Section 1. CONSTITUTIONAL HISTORY AND SOURCES OF LAW

A. TACITUS, *ANNALES* 1.1

in M. Hadas, ed., *The Complete Works of Tacitus* (1942) 3

THE ANNALS

BOOK I

A.D. 14, 15

1. ROME at the beginning was ruled by kings. Freedom and the consulship were established by Lucius Brutus. Dictatorships were held for a temporary crisis. The power of the decemvirs did not last beyond two years, nor was the consular jurisdiction of the military tribunes of long duration. The despotisms of Cinna and Sulla were brief; the rule of Pompeius and of Crassus soon yielded before Caesar; the arms of Lepidus and Antonius before Augustus; who, when the world was wearied by civil strife, subjected it to empire under the title of "Prince." But the successes and reverses of the old Roman people have been recorded by famous historians; and fine intellects were not wanting to describe the times of Augustus, till growing sycophancy scared them away. The histories of Tiberius, Caius, Claudius, and Nero, while they were in power, were falsified through terror, and after their death were written under the irritation of a recent hatred. Hence my purpose is to relate a few facts about Augustus—more particularly his last acts, then the reign of Tiberius, and all which follows, without either bitterness or partiality, from any motives to which I am far removed.

Note

A brief chronology may help to clarify the sweep of this famous opening passage: 753 B.C.—legendary foundation date of Rome; 510 B.C. traditional date of the expulsion of the Kings by Lucius Junius Brutus;451–449 B.C.—constitution suspended in favor of two groups of ten who prepared the Twelve Tables; 444-367 B.C—at irregular intervals tribal commanders given consular power; 87-84 B.C.—Lucius Cornelius Cinna consul four times; 82-79 B.C.—Sulla dictator; 60/59-53 B.C.—"First Triumvirate": Pompey, Crassus, Julius Caesar; 49-44 B.C.—Caesar dictator; 43-32 B.C.—"Second Triumvirate": Antony, Octavian (later Augustus), Lepidus.

B. RES GESTAE DIVI AUGUSTI [THE ACHIEVEMENTS OF THE DIVINE AUGUSTUS]

ed. P. Brunt & T. Moore (1967), 1-14, 34-35 at 19-25, 35-37 (alternate pages)

THE ACHIEVEMENTS OF THE DIVINE AUGUSTUS

A copy is set out below of 'The achievements of the Divine Augustus, by which he brought the world under the empire of the Roman people, and of the expenses which he bore for the state and people of Rome'; the original is engraved on two bronze pillars set up at Rome.

1 At the age of nineteen on my own responsibility and at my own expense I raised an army, with which I successfully championed the liberty of the republic when it was oppressed by the tyranny of a faction. 2 On that account the senate passed decrees in my honour enrolling me in its order in the consulship of Gaius Pansa and Aulus Hirtius, assigning me the right to give my opinion among the consulars and giving me *imperium*. 3 It ordered me as a propraetor to provide in concert with the consuls that the republic should come to no harm. 4 In the same year, when both consuls had fallen in battle, the people appointed me consul and triumvir for the organization of the republic.

BC 44

BC 43

2 I drove into exile the murderers of my father, avenging their crime through tribunals established by law; and afterwards, when they made war on the republic, I twice defeated them in battle.

BC 43

BC 43

3 I undertook many civil and foreign wars by land and sea throughout the world, and as victor I spared the lives of all citizens who asked for mercy. 2 When foreign peoples could safely be pardoned I

preferred to preserve rather than to exterminate them. 3 The Roman citizens who took the soldier's oath of obedience to me numbered about 500,000. I settled rather more than 300,000 of these in colonies or sent them back to their home towns after their period of service; to all these I assigned lands or gave money as reward for their military service. 4 I captured six hundred ships, not counting ships smaller than triremes.

4 I celebrated two ovations and three curule triumphs and I was twenty-one times saluted as *imperator*. The senate decreed still more triumphs to me, all of which I declined. I laid the bay leaves with which my *fasces* were wreathed in the Capitol after fulfilling all the vows which I had made in each war. 2 On fifty-five occasions the senate decreed that thanksgivings should be offered to the immortal gods on account of the successes on land and sea gained by me or by my legates acting under my auspices. The days on which thanksgivings were offered in accordance with decrees of the senate numbered eight hundred and ninety. 3 In my triumphs nine kings or children of kings were led before my chariot. 4 At the time of writing I have been consul thirteen times and am in the thirty-seventh year of tribunician power. AD 14

5 The dictatorship was offered to me by both senate and people in my absence and when I was at Rome in the consulship of Marcus Marcellus and Lucius Arruntius, but I refused it. BC 22 2 I did not decline in the great dearth of corn to undertake the charge of the corn-supply, which I so administered that within a few days I delivered the whole city form apprehension and immediate danger at my own cost and by my own efforts. 3 At that time the consulship was also offered to me, to be held each year for the rest of my life, and I refused it.

6 In the consulship of Marcus Vinicius and Quintus Lucretius, and afterwards in that of Publius and Gnaeus Lentulus, and thirdly in that of Paullus Fabius Maximus and Quintus Tubero, the senate and the people of Rome agreed that I should be appointed supervisor of laws and morals without a colleague and with supreme power, but I would not accept any office inconsistent with the custom of our ancestors. BC 19 BC 18 BC 11 2 The measures that the senate then desired me to take I carried out in virtue of my tribunician power. On five occasions, of my own initiative, I asked for and received from the senate a colleague in that power.

7 I was triumvir for the organization of the republic for ten consecutive years. 2 Up to the day of writing I have been *princeps senatus* for forty years. 3 I am *pontifex maximus*, *augur*, *quindecimvir sacris faciundis*, *septemvir epulonum*,[1] *frater arvalis*, *sodalis Titius*, *fetialis*.

8 In my fifth consulship I increased the number of patricians on the instructions of the people and the senate. BC 29 2 I revised the role of the senate three times. In my sixth consulship with Marcus Agrippa as colleague, I carried out a census of the people, and I performed a *lustrum* after a lapse of forty-two years; at that *lustrum* 4,063,000 Roman citizens were registered. BC 28 3 Then a second time I performed a *lustrum* with consular *imperium* and without a colleague, in the consulship of Gaius Censorinus and Gaius Asinius; at that *lustrum* 4,233,000 citizens were registered. BC 4 4 Thirdly I performed a *lustrum* with consular *imperium*, with Tiberius Caesar, my son, as colleague, in the consulship of Sextus Pompeius and Sextus Appuleius; at that *lustrum* 4,937,000 citizens were registered. AD 14 5 By new laws passed on my proposal I brought back into use many exemplary practices of our ancestors which were disappearing in our time, and in many ways I myself transmitted exemplary practices to posterity for their imitation.

9 The senate decreed that vows should be undertaken every fifth year by the consuls and priests for my health. In fulfillment of these vows games have frequently been celebrated in my lifetime, sometimes by the four most distinguished colleges of priests, sometimes by the consuls. 2 Moreover, all the citizens, individually and on behalf of their towns, have unanimously and continuously offered prayers at all the *pulvinaria* for my health.

10 My name was inserted in the hymn of the Salii by a decree of the senate, and it was enacted by law that my person should be inviolable for ever and that I should hold the tribunician power for the duration of my life. 2 I declined to be made *pontifex maximus* in the place of my colleague who was still alive, when the people offered me this priesthood which my father had held. Some years later, after the death of the man who had taken the opportunity of civil disturbance to seize it for himself, I received this priesthood, in the consulship of Publius Sulpicius and Gaius Valgius, and such a concourse poured in from the whole of Italy to my election as has never been recorded at Rome before that time.

[1] A group of seven who organized feasts in honor of Jupiter. CD.

BC 12

11 The senate consecrated the altar of Fortuna Redux before the temples of Honour and Virtue at the Porta Capena in honour of my return, and it ordered that the *pontifices* and Vestal virgins should make an annual sacrificed there on the anniversary of my return to the city from Syria in the consulship of Quintus Lucretius and Marcus Vinicius, and it named the day the Augustalia from my *cognomen*. 12 Oct., BC 19

12 In accordance with the will of the senate some of the praetors and tribunes of the plebs with the consul Quintus Lucretius and the leading men were sent to Campania to meet me, an honour that up to the present day has been decreed to no one besides myself. 2 On my return from Spain and Gaul in the consulship of Tiberius Nero and Publius Quintilius after successfully arranging affairs in those provinces, the senate resolved that an altar of the Augustan Peace should be consecrated next to the Campus Martius in honour of my return, and ordered that the magistrates and priests and Vestal virgins should perform an annual sacrifice there. BC 13

13 It was the will of our ancestors that the gateway of Janus Quirinus should be shut when victories had secured peace by land and sea throughout the whole empire of the Roman people; from the foundation of the city down to my birth, tradition records that it was only shut twice, but while I was the leading citizen the senate resolved that it should be shut on three occasions.

14 My sons, Gaius and Lucius Caesar, of whom Fortune bereaved me in their youth, were for my honour designated as consuls by the senate and people of Rome when they were fourteen, with the provision that they should enter on that magistracy after the lapse of five years. And the senate decreed that from the day when they were led into the forum they should take part in the councils of state. 2 Furthermore each of them was presented with silver shields and spears by the whole body of *equites Romani* and hailed as *princeps iuventutis*. …

34 In my sixth and seventh consulships, after I had extinguished civil wars, and at a time when with universal consent I was in complete control of affairs, I transferred the republic from my power to the dominion of the senate and people of Rome. 2 For this service of mine I was named Augustus by decree of the senate, and the door-posts of my house were publicly wreathed with bay leaves and a civic crown was fixed over my door and a golden shield was set in the Curia Julia, which, as attested by the inscription thereon, was given me by the senate and people of Rome on account of my courage, clemency, justice and piety. 3 After this time I excelled all in influence (*auctoritas*), although I possessed no more official power than others who were my colleagues in the several magistracies. BC 28–7

35 In my thirteenth consulship the senate, the equestrian order and the whole people of Rome gave me the title of Father of my Country, and resolved that this should be inscribed in the porch of my house and in the Curia Julia and in the Forum Augustum below the chariot which had been set there in my honour by decree of the senate. 2 At the time of the writing I am in my seventy-sixth year. BC 2

C. LEX DE IMPERIO VESPASIANI [THE LAW ON VESPASIAN'S IMPERIUM]

in A. Johnson, *et al*., eds. *Ancient Roman Statutes* No. 183, at 149-50

183. LAW ON VESPASIAN'S IMPERIUM, 70 A.D.

(B 202; G 106; R 154)[†]

It is disputed whether this celebrated document[1] the so-called *Lex de imperio Vespasiani*, which conferred constitutional powers and privileges on Emperor Vespasian, is a decree of the Senate (*senatus consultum*) or a comitial statute (*lex*) or a combination of the two. Although the clauses in it follow the pattern of a senatorial resolution, yet the appended sanction calls the document "this law" (*haece lex*). Probably the measure was framed as a decree of the Senate soon after the death of Vespasian's predecessor in the principate (20 December

[†] *Introductory Note*. For the grammatical construction see introductory note to Doc. 28.

[1] It is interesting to observe that apparently the inscription, as such, was unknown till Cola di Rienzi affixed it, preserved on a bronze tablet found in the structure of a Christian altar (*ca.* 1347) to a wall of the patriarchal basilica of San Giovanni in Laterano the cathedral of Rome, which boasts the proud title of "Mother and Head of All the Churches of the City and of the World" (*Omnium Vrbis et Orbis Ecclesiarum Mater et Caput*). Interpreting it as antipapal propaganda, in that the powers conferred by it came from the people, Rienzi is said to have referred to it in his harangues to the Roman populace, when he orated on the rights which the Senate and the people of Rome had lost to the papal power.

69 A.D.), and then a magistrate, probably one of the consuls, proposed it to the Centuriate Assembly (*comitia centuriata*) for enactment.[2] With allowance for the customary interval, the law should have been promulgated early in January 70 A.D.

Beyond stating the obvious, namely, that the document incorporates legislation which confers the supreme authority of the State on Vespasian as emperor, one enters the field of conjecture, since no consensus of opinion on the following alternatives has been achieved: (1) Was the inscription simply special legislation applicable only to Vespasian or was it an example of a general law by which earlier emperors governed? (2) What provisions were in the initial part, now missing, of the inscription: the award of the tribunician power (*tribunicia potestas*) and/or of the proconsular imperium (*imperium proconsulare*)?[3] (3) Was it conceived as conferring separate prerogatives or as constituting a general empowering enactment? Perhaps these and other questions, while they perplex us, did not trouble Vespasian, who trusted in the loyalty of his legions, for, as Tacitus was later to remark epigrammatically, the secret of imperial power had been divulged, namely, that an emperor could be made elsewhere than in Rome.[4]

1) … or it shall be lawful for him to make a treaty with whom he wishes,[5] just as it was lawful for the deified Augustus, for Tiberius Julius Caesar Augustus, and for Tiberius Claudius Caesar Augustus Germanicus;[6]

2) And that it shall be lawful for him to hold a session of the Senate, to make a motion in it, to refer a matter to it, to propose decrees of the Senate by a motion and by calling for a vote by division, just as it was lawful for the deified Augustus, for Tiberius Julius Caesar Augustus, for Tiberius Claudius Caesar Augustus Germanicus;[7]

3) And that, when a session of the Senate is held in accordance with his pleasure or authority or order or mandate or in his presence, the authority of all proceedings therein shall be maintained and shall be observed, just as if that session of the Senate had been announced and was held in accordance with a statute;[8]

4) And that whatsoever persons seeking a magistracy, power, imperium, or charge of anything he commends to the Roman Senate and people and to whomsoever he gives or promises his electoral support special consideration of them shall be taken in every election;[9]

---

[2] Certainly the jurisconsults of what we may call the Golden Age of Roman Jurisprudence (98-235 A.D.) traced the legislative powers of the emperors to the fact that they had received their sovereign authority from the people by a law (*lex*).

See also H. Last in *CAH* 11, 404-408, for recent support of this suggestion about the character of this document. Aldo dell' Oro sheds additional light on this problem in his article "Rogatio e riforma dei comizi centuriati alla luce della tabula hebana" in *La parola del passato*, 5 (1950) 132-150.

[3] In effect these powers gave their holder complete control over domestic and foreign affairs.

[4] *Hist.* 1, 4. To consider only the successful claimants in the "year of the four emperors" (68-69 A.D.): so Galba had been elevated by his army in Spain (68), Vitellius by his forces in Germany (69), Vespasian by his troops in Judaea (69).

[5] This clause confers the supreme power in affairs of waging war and making peace, a power which had been the constitutional prerogative of the people, who in the late republican period practically shared it with the Senate.

[6] The mention of these three emperors here and at four later places in this law raises the question why the names of Gaius Caesar Augustus Germanicus, Nero Claudius Caesar Drusus Germanicus, Servius Sulpicius Galba Caesar Augustus, Marcus Salvius Otho Caesar Augustus, Aulus Vitellius Germanicus Augustus have been omitted here and later. The fact that the acts of Gaius, better known by his nickname Caligula, were rescinded by Claudius and that the memory of Nero was condemned by the Senate may account for the exclusion of their names. Since neither *rescssio actorum* (rescission of acts) nor *damnatio memoriae* (condemnation of memory) is recorded for either Galba or Otho or Vitellius, it is open to conjecture, which here would be otiose, why mention of these three princes was omitted.

[7] The four distinct rights of the emperor in his dealings with the Senate historically emanate from both the consular authority and the tribunician power, The third right "to refer a matter" (*relationem referre*) is not quite clear: opinion is divided between interpreting it as to withdraw a matter submitted to the Senate or as to submit to the Senate a matter which has come before the emperor, but which in his opinion falls within the Senate's competence. Literary evidence seems to support the latter view, which has been taken in the translation. The entire clause of the emperor's relation to the Senate can be connected with his tribunician power.

[8] This clause concerns, we must suppose, extraordinary sessions of the Senate convoked by the emperor, for otherwise it seems pointless to have inserted it.

[9] This section is important for two reasons: (1) it testifies to the already known transformation from any citizen's ordinary support of a candidate to the emperor's commendation now clothed with legal validity; (2) for the first time, apparently, the consulship is included as a magistracy for which commendation can be made legally, since it is supposed that, while such commendation had been practiced by previous emperors, their commendation in this case was rather an arbitrary arrogation and assertion than a legal right, such as now it seems.

5) And that it shall be lawful for him to advance and to extend the boundaries of the pomerium[10] whenever he considers it to be in accordance with the public interest, just as it was lawful for Tiberius Claudius Caesar Augustus Germanicus;

6) And that whatever he considers to be in accordance with the public advantage and the dignity of divine and human and public and private interests he shall have the right and the power to do and to execute, just as had the deified Augustus and Tiberius Julius Caesar Augustus and Tiberius Claudius Caesar Augustus Germanicus;[11]

7) And that by whatever laws or plebiscites it has been recorded that the deified Augustus or[12] Tiberius Julius Caesar Augustus and[12] Tiberius Claudius Caesar Augustus Germanicus were not bound, from these laws and plebiscites Emperor Caesar Vespasian shall be exempt; and whatsoever things it was proper[12a] for the deified Augustus or Tiberius Julius Caesar Augustus or Tiberius Claudius Caesar Augustus Germanicus to do in accordance with any law or proposed law, it shall be lawful for Emperor Caesar Vespasian Augustus to do all these things;[13]

8) And that whatever before the passage of this law has been done, executed, decreed, ordered by Emperor Caesar Vespasian Augustus or by anyone at his order or mandate, these things shall be legal and valid, just as if they had been done by the order of the people or of the plebs.[14]

Sanction.

9) If anyone[15] has done or does anything in consequence of this law contrary to statutes or bills or plebiscites or decrees of the Senate, or if he does not do in consequence of this law what it is proper[12a] for him to do in accordance with statute or bill or plebiscite or decree of the Senate, this shall not be to his prejudice nor shall he be liable to pay the people anything on this account, nor shall anyone have the right to an action or a judgment concerning this matter, nor shall anyone allow an action concerning this matter to be pleaded before him.

---

[10] Officially the pomerium seems to have been the open space left free from buildings within and without the Roman walls, bounded by stones and limiting the urban auspices to that area. Ordinarily the term is taken to denote only the close suburban region. Romulus is said to have marked its outer limits, when he planned the city.

Extension of the pomerium was admissible only when the State's boundaries had been extended legally. In confirmation of the statement in this clause that Claudius enlarged the pomerium there is the testimony of Tacitus that Claudius in 49 A.D. did this, after he had added to the province of Syria the districts of Ituraea and Judaea (*Ann*. 12, 23, 4). In 74 A.D. Vespasian brought the former province of Achaea, the city of Byzantium, the islands of Rhodes and Samos, the league of cities in Lycia, the kingdoms of Cilicia, Trachia and Commagene into the provincial system (Suetonius, Vesp. 8, 4); this augmentation of the Empire may have led to his expansion of the ideal bounds of the pomerium in 75 A.D., for two of the boundary stones erected by him in that year to signalize this enlargement have been preserved.

[11] This paragraph presents no difficulty. It simply recognizes the validity of all imperial measures. Perhaps its words were reminiscent of such power as had been granted to the second triumvirate after Caesar's assassination (44 B.C.) or even as early in Roman history as the power granted to Sulla, the first Roman dictator (82-79 B.C.) in the modern sense.

[12] The Latin gives ve (or) … que (and), but to suit the sense of the paragraph these enclitics probably should be ve … ve or que … que, preferably the former in view of the combination lower in the paragraph. In incising the inscription the cutter easily could have confused VE with QVE.

[12a] See Doc. 45, n. 36a. Pharr.

[13] Here we have both negative and positive ideas, the one complementing the other rather than each emphasizing a difference between them. The purpose, it seems, is to explain the emperor's personal position in legal procedure.

[14] This clause confirms all of Vespasian's official acts during the interval between his acclamation in the Orient and the enactment of this legislation in Rome. Though there are technical differences among the terms "done" (*acta*) "executed" (*gesta*), "decreed" (*decreta*), "ordered" (*imperata*), it is probable that inclusive authorization merely is intended, for doubtless political necessity demanded formal recognition of what Vespasian or his deputies at his orders had done.

[15] Presumably the sanction shields Vespasian, but it is odd that if so, the emperor is not named. If, however, it is repeated from past legislation of this character the sanction protects any emperor. At any rate, it would require presumption and temerity on the part of a private citizen, in the face of this complete vindication, to indict any emperor for malfeasance in office.

While a *sanctio* (sanction) frequently included penal clauses. here, as often, it adjusts this law to earlier or later legislation on the same subject.

Section 2. PROCEDURE

A. PRIMARY SOURCES

1. Sample Formulae

a) formula certae creditae pecuniae

nominatio Octavius iudex esto—Let Octavius be judge
intentio Si paret Numerium Negidium [N^mN^m] Aulo Agerio [A°A°] HS X milia dare opportere—
If it appears that N.N. ought to give 10,000 sesterces to A.A.,

exceptio pacti Si inter A^mA^m et N^mN^m non convenit ne ea pecunia intra annum peteretur—
If A.A. and N.N. did not agree that the money would not be sought within a year.
replicatio doli Aut si quid dolo malo N^iN^i factum est—Or if anything was done by N.N.'s fraud

condemnatio Iudex N^mN^m A°A° HS X milia condemnato; si non paret absolvito.—
Let the judge condemn N.N. [to pay] A.A. 10,000 sesterces; if it does not appear let him absolve.

b) formula ficticia
Si A^sA^s L. Titio heres esset, tum si paret N^mN^m A°A° HS X milia dare opportere, iudex [etc.]—
If A.A. were heir to L. Titius, then if it appears that N.N. ought to pay A.A. 10,000 sesterces, the judge, etc.

c) rei vindicatio
Si paret mensam de qua agitur A^iA^i ex iure Quiritium esse neque ea mensa A°A° restituetur—
If it appears that the table which is the subject of the litigation belongs to A.A. by Quiritine right and that table is not restored to A.A.
Quanti ea mensa erit, tantam pecuniam iudex N^mN^m A°A° condemnato, si non paret absolvito—Whatever the table shall be worth, let the judge condemn NN [to pay] to AA so much money; if it does not appear let him absolve.

d) formula depositi in factum concepta
Si paret A^mA^m apud N^mN^m mensam argenteam deposuisse eamque dolo malo N^iN^i A°A° redditam non esse, quanti ea res erit, [etc.]—
If it appears that A.A. deposited a silver table with N.N. and it was not returned to A.A. by the fraud of N.N., whatever the thing shall be worth, etc.

e) formula venditi
Quod A^sA^s N°N° fundum Cornelianum, quo de agitur, vendidit—
Whereas A.A. sold N.N. the Cornelian land which is the subject of the litigation
Quidquid paret ob eam rem N^mN^m dare facere opportere ex fide bona—
Whatever it appears N.N. ought to give [or] do in good faith
Eius iudex N^mN^m A°A° condemnato; si non paret absolvito.—
With respect to that let the judge condemn N.N. [to pay] A.A.; if it does not appear, let him absolve.

2.Gaius, *Institutes*, Book IV

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

BOOK IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[CHALLENGE]

[41] That is what I was willing to swear to then, and now too I swear by all the gods and all the goddesses, for your sake, gentlemen of the jury, and the sake of the spectators,[37] that I did suffer at Conon's hands the insults of which I accuse him. I was dealt those blows, and my lip was split so badly that it needed to be stitched, and for this abuse I am suing him. And if I am swearing honestly, may I reap many benefits, and may I never suffer such a thing ever again, but if I am perjuring myself, may I myself be completely ruined, as well as anything I possess or will possess. But I am *nor* perjuring myself, not even if Conon explodes with indignation. [42] So I ask you, gentlemen of the jury, since I have explained all my legitimate claims and have added an oath to them, that just as each of you, if you are injured, would hate your assailant, that you feel the same anger at this man Conon for my sake; and I ask you not to regard any affair of this sort as a private matter, even if it should happen to another man, but no matter who the victim is, to help him and give him justice and hate those men who before they are accused[38] are brash and reckless but at their trial are wicked, have no shame, and give no thought to opinion or custom[39] or anything else, except for escaping punishment. [43] But Conon will beg and wail. Do consider who is more to be pitied, the man who suffers the sort of things I have suffered at his hands if I leave the courtroom with an added insult and do not attain justice, or Conon, if he is punished? Is it to your individual advantage that it be permitted to hit and commit assault or not? I, for my part, think not. Well, if you acquit Conon, there will be many men like that; if you punish him, fewer.

[44] There is much I could say, gentlemen of the jury, about how we have been useful to the city~ ourselves and my father, as long as he was alive, serving as trierarchs[40] and as soldiers and doing what was assigned, and useful as neither Conon nor his sons have been. But there isn't enough time, and the argument isn't about these matters. You know, if it happened that we were, admittedly, *more* useless than these men and *more* evil, we should not on that account be beaten or insulted.

I don't know what more I should tell you, since I think you understand everything that has been said.

[37] Bystanders seem to have been common at Athenian trials and important to the process: see A. Lanni, "Spectator Sport or Serious Politics: *hoi periestēkotes* and the Athenian Lawcourts," *Journal of Hellenic Studies* 117 (1997): 183—189.

[38] The translation here follows a textual emendation ("charges," in place of the manuscripts' "wrongdoings").

[39] Probably a reference to Conon's shockingly unorthodox method of swearing (40), but perhaps instead a reference to his own character.

[40] See the Introduction to 50.

B. SECONDARY MATERIAL

1. The law of procedure at the time of the XII Tables[1]

H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*
(3d ed., Cambridge: University Press, 1972), ch. 12 (pp. 175–190)

In the history of Roman law there are to be found, apart from differences of detail, three systems of procedure—that of the *legis actiones*, the formulary system, and *cognitio extraordinaria*. The periods during which these systems were in use overlapped each other, but broadly it may be said that the *legis actio* system prevailed until the passing of the *lex Aebutia*, probably in the second half of the second century B.C.,[2] that the formulary system was that chiefly used from the last century of the republic until the end of the classical period and that *cognitio extraordinaria* was the system in use in post-classical times. At any rate, for the purposes of the XII Tables we have only to consider the first of these types of procedure—the *legis actiones*.

In any discussion of procedure three main questions have to be asked: (i) How does a man who wants to set the law in motion against another begin; how, that is, does he get the other into court? (ii) How is the trial conducted when the parties are before the court? (iii) Supposing that the judgment is in favour of the plaintiff, how is it enforced against the defendant? We have therefore to consider (i) Summons, (ii) Trial, (iii) Execution.

[1] See generally Kaser, *ZPR*; Pugliese, *Proc.* 1.

[2] Below, 218.

1. SUMMONS (*IN IUS VOCATIO*)

This process was the simplest that can well be imagined; the man who wished to begin legal proceedings summoned his opponent orally,[3] wherever he might find him, to follow him to court (*in ius*—before the magistrate), and it was the duty of the opponent to obey the summons. If he refused, the summoner called the bystanders to witness and then proceeded to use force, for the state as yet, and for a long time afterwards, provided him with no help.[4] If the defendant was sick or infirm with age he had to be provided with a beast to carry him but he could not insist on a cushioned carriage.[5] The only way in which a defendant could escape from the duty of obeying the plaintiff's summons was by finding a *vindex*, i.e. one who would guarantee his appearance before the magistrate when wanted, and, as the plaintiff could not be expected to let a substantial opponent go merely on the guarantee of some impecunious bystander, the XII Tables laid down that where the defendant was a member of the wealthier class (*assiduus*) the *vindex* must be one also.[6]

2. TRIAL

The trial of an action under the *legis actio* procedure (and also later under the formulary system) was characterised by a remarkable division of the proceedings into two stages, the first of which took place before the magistrate (*in iure*), under whose supervision all the preliminaries were arranged, while the second, in which the issue was actually decided, was held before a *iudex*,[7] who was neither a magistrate nor a professional lawyer, but a layman agreed on by the parties and appointed by the magistrate. He was more than a mere private arbitrator, however, because the decision which he subsequently gave was a judgment which was recognised by the state and which gave rise to execution proceedings (though in the last resort, as with *in ius vocatio*, it was the successful plaintiff who had to put these into effect).[8]

This, in outline, is the Roman system as it emerges into the light of history, but if we seek for origins there are a number of points of uncertainty. Was there a time when the magistrate (or the king) conducted the entire proceedings himself? Later tradition said that there was,[9] and certainly if one assumes that there must have been at Rome as in other societies a period in which questions of proof and therefore of the decision of a case were left to irrational or supernatural methods, such as ordeal or the taking of auspices,[10] the division of proceedings would then have had no point.

---

[3] Whether formal words were necessary is not clear; Kaser, *ZPR* 48; Kelly, *Roman Litigation* 6 n 3.

[4] The powerful man, or the man with powerful friends, must therefore, it would seem, have often been able to snap his fingers at a weaker adversary; see discussion by Kelly, *Roman Litigation* 6ff., and Garnsey, *Social Status* 189ff.

[5] Tab. I.1: *Si in ius vocat* [*ito*]. *Ni it antestamino*: *igitur em capito. 2*: *Si calvitur pedemve struit*, *manum endo iacito. 3*: *Si morbus aevitasve vitium escit*, *iumentum dato. Si nolet*, *arceram ne sternito*. We know that these provisions stood at the beginning of the XII Tables, for Cicero (*Leg.* 2.9) refers to the whole code by the initial words *si in ius vocat*. On [*ito*] see Daube, *Forms* 28f. Whether *in ius vocatio* was necessary in a proceeding *in rem* is disputed; Kaser, *ZPR* 48; Lévy-Bruhl, *Recherches* 159.

[6] Tab. I.4: *Assiduo vindex assiduus esto; proletario iam civi quis volet vindex esto*. The exact position of the *vindex*, who also appears in execution by *manus iniectio* (below, 188) is uncertain. In *manus iniectio* he was probably a substitute who took over the whole liability of the defendant, i.e. became the actual party to the action, but it may be that here he was a mere guarantor of the defendant's appearance; see Kaser, *ZPR* 49f. with reff.

[7] The phrase *in iudicio* sometimes used in modern books for the proceedings before the *iudex*, as opposed to those before the magistrate, does not appear to be warranted by the sources, and it is better to say *apud iudicem*. According to Wlassak, *Prozessgesetze* 2.26ff., followed by Wenger 190 n 1, *iudicium* meant the proceedings from *litis contestatio* until judgment, but there are some passages, especially Cic. *Part. Or*. 99, which go to show that it might also have the narrower meaning; Buckland, *Class. Rev.* 40 (1926) 83ff.; Pugliese, *Proc.*2.1.7ff.

[8] Cf. above, 175 n 4.

[9] Dionys. 4.25, 36; 10.1; Cic. *Rep*. 5.3; Pomponius, D. 1.2.2.1. The question has been much debated; see Broggini, *Iudex* 59ff.; Pugliese, *Proc.* 1.77ff., 97ff.; Kaser, *TR* 32 (1964) 336ff., all with reff. The *addictio* by the magistrate in *in iure cessio* (above, 149), if that can be regarded as a reliable reflection of an early action, also supports the hypothesis. So also, on one view, does Tab. I..8, which provides for the non-appearance of one party: *Post meridiem litem praesenti addicito*. But though *addico* is normally appropriate to the praetor (Kaser, *EB* 78n), it may well here be used of the *iudex* (Jolowicz, *Mél. de Visscher* 1.488n). For another explanation see below, 178 n 2. Broggini, *Iudex* 87ff., argues that the division of proceedings did not become obligatory until the introduction of the *legis actio per iudicis arbitrive postulationem* (below, 182).

[10] Lévy-Bruhl, *Recherches* 73ff.; Broggini, *Coniectanea* 133ff. (=*Recueils de la Société Jean Bodin* 16,1965, 223ff.); J. Ph. Lévy, *Mél. Lévy-Bruhl*, 133ff.; cf. Pollock and Maitland 2.598ff.

Again, what was the reason for the division, whenever it originated?[11] The view which for a long time dominated the approach of many writers to this subject was that of Wlassak,[12] who saw Roman proceedings as essentially a voluntary submission by the parties to arbitration, the state merely giving its approval. In support of this view were cited the lack of state intervention in the proceedings, which has already been noticed, the freedom to choose their own *iudex* which the parties certainly enjoyed in classical law, and the supposedly contractual character of the *litis contestatio* which terminated the proceedings *in iure*.[13] The second and third of these arguments are now, however, commonly thought to be ill-founded,[14] and the first need be no more than a reflection of the paucity of means of detailed law enforcement in primitive society. More fundamentally the objection to Wlassak's theory[15] is that it paints too idyllic a picture of that society, for it assumes that voluntary submission to a rational settlement must have preceded any state organisation. It is more likely, as has been said above, that the arbitrament to which primitive man submitted himself was an irrational or supernatural one, and that the function of the king, who was also the chief priest, was to determine the method which should be used (i.e. to deliver a so-called medial judgment).[16] Here perhaps was the origin of the division of the proceedings, and it may well be that the function of the *iudex* when he was first appointed was not to weigh the evidence (such a transition from the irrational to the rational would be too abrupt), but to determine the verdict from his own knowledge, in somewhat the same way as did the early English jury.

We may, moreover, be distorting our view of the primitive proceedings if we think in terms of the single *iudex* who was normal in historical times. On the one hand we hear also of the appointment of one or more *arbitri*.[17] In classical law *iudex* and *arbiter* are not clearly distinguished, but in origin the difference was probably that the *iudex* was appointed when the question was one of liability or not, while an *arbiter* or *arbitri* acted when the matter was more complex[18] (e.g. the determination of boundaries in the *ao finium regundorum* or the division of the common property in the *ao familiae erciscundae*). More radically, on the other hand, we have to reckon with the possibility[19] that important cases were decided, not by a single *iudex* or by *arbitri*, but by a jury court presided over by a magistrate. For it has been conjectured[20] that the centumviral and decemviral courts, which were of this kind, go back at any rate to the early republic.

There remains the question of how the *iudex* or *arbitri* were appointed.[21] Clearly at all times they were normally drawn from an official list (*album iudicum*) of authorised persons.[22] Until the Gracchan reform[23] only senators could serve, and the list was therefore co-extensive with that of the senate. Thereafter the categories of persons qualified changed more than once. In the post-Gracchan period it seems that the parties could, if they wished, choose someone from outside the *album*, but it is hardly likely that this

[11] For discussion see Kaser, *Irish Jurist* 2 (1967) 129ff.; *TR* 32 (1964) 329ff.; Pugliese, *Proc.* 1.77ff. Kaser, while accepting the likelihood of an initial stage in which the king made the decision himself, thinks that the reason for the division was the recognition of the desirability of recourse to an impartial outsider, and the sense that the mere trial of a case was not the function of the bearer of the royal or magisterial powers of command. But this explanation is surely too rational.

[12] In many places, but see especially *Der Judikationsbefehl der röm. Prozesse* in *Sitzungsb. Ak. Wiss. Wien* 197.4 (1921).

[13] See below, 184.

[14] See below, 178f. and 184 n 8.

[15] Kaser, *opp. citt.* (above, n 2).

[16] See Jolowicz, *Atti Bologna* 2.59ff.; cf. *Mél. de Visscher* 1.477ff.

[17] Three are mentioned in Tab. XII.3; cf. Cic. Leg. 1.55. For *recuperatores* see below, 203 n 7.

[18] Broggini, *Iudex*; Pugliese, *Proc.* 1.169ff. the blurring of the distinction perhaps occurred when *bonae fidei iudicia* appeared, posing questions both of liability and of evaluation.

[19] Kaser, *TR*; 32 (1964) 338ff.

[20] By Kunkel; see below, 199. If Kunkel's arguments as to the nature of Roman jury courts can be accepted, it is likely that the presiding magistrate was bound by the verdict of the jury. Kaser, *TR* 32 (1964) 347ff., conjectures that even the relationship of the single *iudex* to the magistrate may have been seen in this way. This, he thinks, would account for Tab. I.8 (above, 176 n 9). The *iudex* is acting as the jury or *consilium* of the magistrate, and therefore if one party does not appear, the matter is taken back to the magistrate, who makes *addictio*. This involves the assumption that, in the normal case, at the end of the hearing before the *iudex* there was originally what would amount to a third stage, in which the magistrate promulgated the decision of the *iudex*. Kaser finds an echo of this in Censorinus on the *lex Plaetoria* (Bruns 1.45), and Servius, *in Aen*. 12. 727.

[21] Kaser, *TR* 32 (1964) 355ff.; Pugliese, *Proc.* 1.100ff.; 2.1.215ff.

[22] Cf. above, 80f.

[23] Below, 315.

freedom existed in the early law,[24] both because it would fit ill with the rigidity of early society and because the storm aroused by the Gracchan proposals would then be difficult to explain. A more important question is whether the person who was to serve was chosen by the parties (as on Wlassak's theory[25] of the consensual origin of Roman procedure he would have to have been) or by the magistrate. On the one hand there is the language of the *legis actio per iudicis arbitrive postulationem*, as it is revealed by the new fragments of Gaius.[26] The plaintiff (and apparently he alone) asks the magistrate to 'give' a *iudex*, which is hardly the language appropriate to a request for approval of a *iudex* already agreed by the parties. But on the other hand Cicero says[27] that 'our ancestors' wished that no-one should be a *iudex* in any case unless he had been agreed to by the parties; and other evidence suggests that the parties had some say.[28] The explanation is probably that the appointment was indeed made by the magistrate, but that he would in practice take account of the wishes of the parties, and more especially would not force any particular *iudex* on an unwilling party.

A. PROCEEDINGS IN IURE. It is in this stage that the highly formal character of the system makes itself evident. Once before the magistrate[29] the plaintiff had to set the proceedings in motion by making his claim in a set form of words appropriate to his cause of action. The defendant then (if he disputed the matter) replied similarly in set words[30] and the magistrate intervened, again in a prescribed form, so that the case might be sent for trial before the *iudex*. It was these forms of spoken words (for the procedure was entirely oral) which constituted the actual *legis actiones*, and the forms laid down had to be followed so exactly that if a plaintiff made the slightest mistake he failed in his action.[31] Thus Gaius records[32] that a man who wished to sue for the destruction of his vines and used the word 'vines' in his claim lost his case because the clause in the XII Tables[33] under which he was suing spoke only of 'trees'. Had he used the word 'trees' all would have been well, for vines are trees, but his failure to use the right word was fatal. From this example we can see that where the claim was based on a statute it had to follow exactly the wording of the statute,[34] but there must also have been forms of claim not directly based on any statute but the product of customary law,[35] and in either case it was presumably the pontiffs, in their capacity as advisers to magistrate or *iudex*, who finally decided whether a form was admissible or not.[36] When Gaius came to describe the *legis actiones* (which were almost completely obsolete in his day)[37] he said that there were five kinds (*modi*) of *legis actio*,[38] but it is clear that these *modi* were only general moulds in which the action might be cast, and that within these moulds each cause of action had its own appropriate form. In any case, so far as the procedure for beginning an action at the time of the XII Tables is concerned, we need only discuss two of the five *modi—sacramentum* and *iudicis arbitrive postulatio*,

[24] *Contra*, Broggini, *Iudex* 18f.

[25] Above, 177.

[26] Below, 182. On *addiccre iudicem* see Kaser, *AJ* 108 n 21.

[27] Clu.120.

[28] Festus, s.v. *Procum* (Bruns 2.28): *... Est enim 'procare' poscere, ut cum dicitur in iudice conlocando 'si alium procas', 'nive eum procas', hoc est 'poscis'. ...*

[29] After the institution of the praetorship the magistrate concerned was normally the praetor, but originally the only magistrates with *imperium* and hence the only ones with jurisdiction were the consuls, or, in the period between the XII Tables and the institution of the praetorship the military tribunes with consular power (above, 14). It must be remembered too that the magistrate could not sit on all days but only on those which were marked *F* (*fasti*) in the calendar or on those marked *C* (*comitiales*) if no *comitia* were in fact held on them. Days on which he might not sit were marked *N* (*nefasti*).

[30] But see below, 182.

[31] Gai. 4.30.

[32] 4.11.

[33] Above, 170.

[34] Gaius also says (4.11) that the forms were called *legis actiones* 'either because they were provided by statute ... or because they were adapted to the words of the statutes themselves and so were adhered to as unchangingly as statutes'. For another explanation see Stein, *Regulae* 11f. Pugliese, *Proc.* 1.11f., suggests that the qualification of *actiones* (as *legis* would only be necessary if there were other actions, and therefore that it may be no older than the first appearance of procedure *per formulas*.

[35] De Zulueta, *Gaius* 231; Magdelain, *Actions Civiles* 8ff., 22ff.; Pugliese, *Proc.* 1.111f.; contra, Kaser, *ZPR* 25 n 6.

[36] Note that in the story about the 'vines' Gaius says' there was a *responsum* that he had lost his case'. He does not say whether the *responsum* was given to the magistrate, or later when the case had reached a *iudex*.

[37] Gai. 4.31.

[38] Gai. 4.12.

for, of the remainder, two (*manus iniectio* and *pignoris capio*) are primarily methods of execution,[39] and one (*condictio*) is of later origin.[40]

(i) *Sacramentum*. The form of proceedings by *sacramentum* differed according as the claim was *in rem* (a *vindicatio* or claim of ownership especially) or *in personam* (a claim to enforce an obligation). As to the former we are well informed, for Gaius' description is fairly full;[41] unfortunately the manuscript is defective where he deals with the latter.[42]

(a) *Legis actio sacramento in rem* (*vindicatio*). Where the thing claimed was movable it had to be present in court and the plaintiff began by grasping the thing and saying (e.g. if it was a slave), 'I assert that this man (? according to a proper title) is mine by Quiritarian right; see, as I have said, I have put my wand upon him' (*Hunc ego hominem ex iure Quiritium meum esse aio secundum suam causam*; *sicut dixi*, *ecce tibi*, *vindictam imposui*).[43] He then laid a wand (*vindicta*)[44] on the slave. The defendant in his turn made a claim in the same words and with the same gestures as the plaintiff, and the praetor then called on both of the parties to loose their hold (*Mittite ambo hominem*). This is normally seen as a formalisation of the self-help which was supposedly the forerunner of litigation,[45]. but it may equally have originated as a ritual assertion with magical properties.[46] After the praetor's intervention the parties take up the dialogue again. The plaintiff[47] says: 'I demand this; will you say on what ground you have made your claim?' (*Postulo anne dicas qua ex causa vindicaveris*), and the defendant answers: 'I have done right and thus I have laid my wand on him' (*Ius feci sicut vindictam imposui*). Plaintiff: 'Seeing that you have claimed unrighteously I challenge you to a *sacramentum* of five hundred *asses*' (*Quando tu iniuria vindicavisti*, *D aeris te sacramento provoco*). Defendant: 'And I you' (*Et ego te*). The *sacramentum* in historical times was a sum of money[48] which had originally to be deposited, later promised with security,[49] as a sort of stake by each of the parties and was forfeited to the public use by the one that eventually lost the case. As however *sacramentum* literally means 'oath' it is supposed that in an earlier form of the proceeding[50] the parties each made an oath as to the justice of their claims, and the issue then was which oath was justified,[51] the loser forfeiting his stake as a penalty for his false oath. If one accepts that a judge or judges originally played no part in the proceeding,[52] the issue would presumably have been settled by some invocation of the supernatural, such as ordeal or the taking of auspices.[53]

Once the 'bet' was made, the magistrate would proceed to assign the interim possession of the thing claimed to one or other of the parties, who had to give security that if he turned out not to be entitled he

[39] Cf. Buckland 609: '*actio* did not necessarily imply litigation; it was a process for the enforcement of a right'.

[40] Below, 193.

[41] Gai. 4.16f.

[42] Gai. 4.I4f.

[43] Noailles, *Fas et Ius* 45ff. (=*RHD*, 1940/1, 1ff.) points out that Probus 4.6 (*FIRA* 2.456) gives among the abbreviations which he expands' S.S.C.S.D.E.T.V.', showing that he took *secundum suam causam* with what follows, not with what precedes. For discussion see de Zulueta, *Gaius* 234; Pugliese, *Proc.* I.276ff.

[44] The meaning of *vindicta* is doubtful. Gaius treats it as the equivalent of *festuca* (wand), but the original meaning may have been different; de Zulueta, *Gaius* 234; Staszkow, *Labeo* 8 (1962) 317ff.; *SZ* 80 (1963) 83ff.

[45] De Zulueta, *Gaius* 233; Kelly, *Roman Litigation* 2; Pugliese, *Proc.* 1.27ff., 46f.

[46] Kaser, *AJ* 321ff.; Lévy-Bruhl, *Recherches* 45ff., 80ff. (but see Pugliese, *TR* 30, 1962, 513); Broggini, *SZ* 76 (1959) 113ff.

[47] Gaius (4.16) says with greater accuracy 'he who had made the first *vindicatio*n I, for strictly, as each has to claim that the thing is his, neither is more of a plaintiff than the other; cf. above, 142. Watson, *RIDA* (1967) 455ff., pointing to the oddity that the question is asked by only one party, argues that it is the defendant, and therefore that the proceedings were begun by the defendant and not (as above) by the plaintiff. But Gaius describes this party as '*qui vindicabat*' and though Gaius later uses *vindicare* of both parties, he must, when he uses it to identify only one of them, mean the plaintiff.

[48] Fifty *asses* if the matter at issue was worth under 1000 *asses*, 500 if it was worth 1000 or more, except that a question of liberty could always be raised for a stake of 50. Originally the amounts were probably *asses*sed in oxen and sheep (Cic. *Rep*. 2.60). The stakes appear to have been deposited at one time with the pontiffs (Varro, *L.L*. 5.180, Bruns 2.54) and the loser's no doubt forfeited to the gods whom his perjury had outraged.

[49] *Praedes*, Gai. 4.16. Cf. below, 187f. and 299f.

[50] According to Kunkel's view (below, 311f.) the oath survived in that form of the *legis actio* which was used for capital proceedings.

[51] Cic. *Caec.* 97; *Dom.* 78.

[52] Above, 176f.

[53] Lévy-Bruhl, *Recherches* 73ff.; Broggini, *Coniectanea* 133ff. (=*Recueils de la Société Jean Bodin* 16, 1965, 223ff.).

would return it together with any fruit that had accrued meanwhile.[54] Where the thing claimed was an immovable it appears that originally the parties went and transacted part of the ceremony at least on the disputed land, and later there was a pretence of doing so.[55] A clod of earth, Gaius says, was used to represent the land and the parties spoke their words and made their gestures over it 'as if it were the whole thing that was present'.[56]

(b) *Legis actio sacramento in personam*. Here we have fewer details as to the form of words used, but the proceedings must clearly have been simpler, as there was no thing of which both parties claimed the ownership, and no need therefore for any touching or wands or interim possession. The plaintiff asserted whatever it was that he claimed as owing to him from the defendant, saying 'I assert that you owe me' (*Aio te mihi dare oportere*),[57] and perhaps also adding the ground for the claim, and the defendant denied the debt (if he wished to dispute the matter). Then no doubt there followed the challenge to the *sacramentum*, as where the action was *in rem*, and the appointment of the *iudex*. If the defendant did not wish to dispute the plaintiff's claim, he must admit it; he could not remain silent, as he could in *sacramentum in rem*, for there was here no thing that the plaintiff could take away with him; the plaintiff wanted the defendant to pay him something or do something for him, and the defendant must therefore either admit the claim or dispute it in such a way that it could be tried. If he admitted it, the effect of such admission before the magistrate was already at the time of the XII Tables[58] equivalent to that of a judgment, so that execution could proceed just as if there had been a trial followed by a judgment for the plaintiff.

(ii) *Iudicis arbitrive postulatio*. Before the new fragments of Gaius were discovered very little was known of this action, and there was no evidence even that it dated back to the XII Tables. Now we learn that, in contradistinction to *sacramentum* (described as 'general'),[59] it could be used only in those cases for which it had been specifically authorised by statute, and that the plaintiff had to state the ground on which he was suing.[60] If, for instance, he were suing on a stipulation he said *Ex sponsione te mihi X milia sestertiorum dare oportere aio*: *id postulo aias an neges* (I affirm that by a *sponsio* you are under a duty to pay me 10,000 sesterces; this I ask whether you affirm or deny). The defendant denied the debt (no formal words being, it seems, needed for his denial), and the plaintiff proceeded to ask the praetor for a *iudex* or *arbiter*. *Quando tu negas*, *te praetor iudicem sive arbitrum postulo uti des*. This means probably that in some cases he said *iudicem*, in others *arbitrum*, i.e. that a *iudex* was asked for when the claim permitted of a simple answer 'yes' or 'no' an *arbiter* when it required the exercise of some discretion,[61] as in the partition actions. For after mentioning these actions Gaius says *itaque nominata causa ex qua agebatur statim arbiter petebatur*, without adding *sive iudex*.[62] It is also likely that the words *quando tu negas* were omitted in these cases, for there would be nothing to deny. Gaius speaks only of actions on a stipulation (authorised by the XII Tables), and of the two partition actions, *familiae erciscundae* (also under the XII Tables), and *communi dividundo*, under a *lex Licinnia*.[63] Even before the new discovery it had been conjectured that the partition actions were among those for which *i.a.ve p.* had been used, for they would not lend themselves to sacramental procedure involving an oath that could be declared true or false; but the inclusion of stipulation was a great surprise, for the question whether A owes B 10,000 sesterces or not is as definite as can be,[64] and it was not even known that stipulation was as old as the XII Tables.

---

[54] The assignment of interim possession, i.e. until the action has been tried, was called *vindicias dicere*, and the sureties *praedes litis et vindiciarum*; Gai. 4.16; Tab. XII.3; Santoro, *APal.* 30 (1967) 5ff.

[55] Festus, s.v. *superstites* and *vindiciae*, Bruns 2.42, 46; Cic. *Mur*. 26; *Cell.* 20.10.7.

[56] Gai. 4.17; cf. Gell. *loc. cit.*

[57] Probus 4.1 (FIR.A 2.456).

[58] This is shown by the treatment of confession and judgment together in Tab. III.1: *Aeris confessi rebusque iure iudicatis xxx dies iusti sunto*; cf. below, 188.

[59] Gai. 4.13.

[60] Gai. 4.17a.

[61] Cf. above, 178.

[62] Arangio-Ruiz, *BIDR* 42 (1934) 614; *contra*, de Zulueta, *JRS* 26 (1936) 182, especially because Probus 4.8 gives *te praetor iudicem arbitrumve postulo uti des* as a set form; cf. de Zulueta, *Gaius* 239f.

[63] Cf. D. 4.7.12. Date unknown; de Zulueta, *JRS* 26 (1936) 178f.

[64] For conjecture as to why stipulation was included see Kaser, *ZPR* 79; Broggini, *Iudex* 169ff.

The cases mentioned appear to be instances only, but we know of no others. It is likely enough that the *ao finium regundorum*, in view of its resemblance to the partition actions, was included,[65] and possibly also the *ao pluviae arcendae* and the *ao damni infecti*.[66]

Though actions could not be brought by *i.a.ve p.* without statutory authorisation, Gaius does not say that authorised actions could be brought in that way only, and we know that in one case at least in the later law a stipulation was enforced by *sacramentum*.[67] Probably this was always an alternative in the case of stipulation, but it is doubtful whether the partition actions could ever have been brought within the sacramental procedure. It is not clear, however, who had the choice where there was an alternative. Prima facie one would imagine that it was for the plaintiff to begin proceedings in whichever way he chose, but it is noticeable that in the only other case in which we know of alternative penal and non-penal proceedings[68] the choice lay with the defendant. In any case the great advantage which *i.a.ve p.* had over *sacramentum* was that it was non-penal, i.e. there was no risk of forfeiture to the state if the action was lost. Gaius stresses this point particularly—*itaque sine poena quisque negabat*—and, though these words refer literally only to the defendant, the position of the plaintiff must have been similar. Furthermore there is a great simplification;[69] all the antiquated preliminaries are gone, there is no trace of an appeal to the supernatural, and the parties come straight to the issue between them. We cannot tell whether this simplified *legis actio* was an innovation made by the XII Tables themselves, but it is not impossible when we consider that the Tables were in part a concession to plebeian pressure, and that the penalties involved in *sacramentum* would press particularly hardly on the poorer classes. In any case *i.a.ve p.* is certainly of later origin than *sacramentum*.

The last proceeding *in iure* in both these *legis actiones* was the appointment of the *iudex*, and the arrangement of the trial before him for the next day but one (*in diem tertium sive perendinum*). Gaius says this expressly for *sacramentum in personam*, but it is no doubt true of *sacramentum in rem* and *i.a.ve p.* also.[70] The critical moment however was that at which the parties 'joined issue' by the interchange of the solemn forms of assertion and counter-assertion or denial, and this was called *litis contestatio*, probably because it was originally preceded by a solemn calling upon the bystanders to witness (*testari*) what took place.[71] The chief reason why this moment was so important was that from then onwards the plaintiff's right was held to have been 'consumed' i.e. even if judgment was not obtained, no fresh action could be brought on the same claim.

It sometimes happened that the proceedings *in iure* could not be terminated on a single day; in this case, in order to avoid the necessity for a fresh *in ius vocatio*, sureties of a special sort (*vades*) had to 'go bail' for the reappearance of the defendant; this sort of suretyship (*vadimonium*) was replaced at a later date by an ordinary stipulation made by the defendant himself and guaranteed by later forms of suretyship, but apparently not until after the *lex Aebutia*, for Gellius[72] mentions *vades* among the antiquities abolished by that statute. For the adjournment at the end of the proceedings *in iure* for the purpose of meeting again before the *iudex* no bail was needed, because, as we shall see, the *iudex* could condemn a defendant who failed to appear even in his absence, and this was considered sufficient guarantee that he would not fail.

---

[65] *Contra*, Buckland, *RHD* (1936) 741ff.

[66] Kaser, *ZPR* 79; Broggini, *Iudex* 168f.

[67] Gai. 4.95; below, 196 n 6.

[68] Gai. 4.163; below, 231; cf. de Zulueta, *JRS* 26 (1936) 184.

[69] Lévy-Bruhl, *Recherches* 95ff.

[70] Originally the appointment was made at once, and from Gaius' newly discovered paragraph 4.17a it appears that this remained the rule in *i.a.ve p*. But for *sacramentum* a *lex Pinaria* (date unknown) prescribed an adjournment of thirty days before the meeting for the appointment (Gai. 4.15), presumably to give the parties time to come to terms. *Vadimonium* would be used to secure the presence of the defendant after the adjournment.

[71] Festus, s.v. *Contestari* (Bruns 2.5): *Contestari litem dicuntur duo aut plures adversarii*, *quod ordinato iudicio utraque pars dicere solet*: *'testes estote'*. There has been immense controversy as to the juridical nature of *litis contestatio*. Wlassak, in accordance with his view of Roman procedure as originally a voluntary submission to arbitration (above, 177), saw it as a contract. As opinion has moved away from Wlassak's general position, the emphasis has shifted to the formal and unilateral character of the parties' declarations. Even for the classical law to see it as a contract is no doubt anachronistic, but the element of agreement is clearly more significant. For discussion and survey of the considerable recent literature see Kaser, *SZ* 84 (1967) 1ff., 521ff.; *Labeo* 15 (1969) 190ff.

[72] 16.10.8; cf. below, 219.

Such, in outline, was the nature of the proceedings *in iure* in the *legis actio* period. There are many points, not only of detail but of substance, on which our information fails us. We do not know, for instance, exactly how proceedings were begun. In the subsequent formulary system the plaintiff had to let the defendant know what the case was about, probably by showing him the draft of the *formula* which he proposed to use (*editio actionis*), and he had to ask the magistrate to allow the action (*postulatio actionis*). Something of the sort must presumably have been necessary under the *legis actio* system as well, but we have no details. The chief point of controversy is the position of the magistrate himself, but this question, being intimately bound up with the formulary procedure, must be left for discussion in connexion with that system.[73]

B. PROCEEDINGS APUD IUDICEM. The proceedings before the *iudex*[74] appear to have been from the earliest times free from restrictions of form. The *iudex* sat in some public place in the city;[75] he could hear cases even on days when no proceedings *in iure* could take place, and, like the magistrate; he was assisted by a *consilium* of advisers. Proceedings began with a brief statement of the case by the parties.[76] Then came the actual trial. At least in the later republic and afterwards this was conducted as a rule by advocates who spoke on behalf of their clients and produced the evidence on which each side relied. This evidence might be either that of witnesses or of documents, though until well into the empire the testimony of witnesses was preferred. No doubt in very early times, as has been said above,[77] the irrational methods of proof commonly found in primitive law were found also in Rome.[78] In the developed law, however, although there were some rules of evidence (for instance, the general principle that the burden of proof rests on the plaintiff) the judge had a very wide freedom in weighing the evidence that the parties put before him.[79] He had, as is already laid down in the XII Tables, to hear both sides,[80] unless one of them did not appear by midday and had no valid excuse, for the law laid down that in that case judgment could be given for the party who was present.[81] Serious disease and an appointment made for a trial of some matter with a foreigner[82] are the only excuses of which we know. The hearing had to come to an end at sunset,[83] but, at any rate in later times when advocates had learnt to make long speeches, adjournments were common in important cases.

When both parties have finished, the *iudex* withdraws to consider his judgment with the help of his *consilium*. If he is unable to come to a decision he can swear that 'the case is not clear to him' (*sibi non liquere*) and the magistrate can then release him from his duty.[84] The parties will have to go back to the magistrate and get another *iudex* appointed.[85] In the ordinary way, when he could make up his mind, he delivered his judgment (*sententia*) orally at once, but he must do so in the presence of all parties, for a party is not bound by a judgment given in his absence. In *sacramentum* the form of judgment appears to have consisted in a declaration that the oath of one of the parties was *iustum*,[86] and if the proceedings had been *in rem*, or *in personam* for a definite sum of money, execution could follow directly, as described in the next paragraph. This would also be possible in proceedings by *i.a.ve p.* where the claim had been for a

[73] Below, 218ff.

[74] Or other person or group to which the decision of the case is remitted; see above, 178.

[75] Tab. I.6, 7: *Rem ubi pacunt, orato. Ni pacunt, in comitio aut in foro ante meridiem caussam coiciunto. Com peroranto ambo praesentes*; Kaser, *TR* 32 (1964) 349ff.

[76] *Causae coniectio*, Gai. 4.15. Under the formulary. system the *formula* itself would inform the *iudex* what the case was about.

[77] 177.

[78] Broggini, *Coniectanea* 133ff. (=*Recueils de la Société Jean Bodin* 16 (1965) 223ff.); J. Ph. Lévy, *Mél. Lévy-Bruhl*, 193ff.; cf. Pollock and Maitland 2.598ff.

[79] On questions of proof in classical law see Pugliese, *Recueils de la Société Jean Bodin* 16 (1965) 277ff.

[80] *Ambo praesentes*; cf. above, n 3.

[81] Tab. I.8: *Post meridiem praesenti litem addicito*; cf. above, 176 n 9, on the question who made the *addictio*. When it was the defendant who was absent the plaintiff had probably to make out a *prima facie* case; cf. Buckland 638.

[82] Tab. I..2: *Morbus sonticus and status dies cum hoste*.

[83] Tab. I..9: *Solis occasus suprema tempestas esto*.

[84] Gell. 14.2.25.

[85] For the difficulties involved in any change of *iudex* see Buckland 715; Broggini, *Coniectanea* 227ff. (= *TR* 27 (1959) 313ff.).

[86] Cic. *Caec.* 97; *Dom*. 78.

liquidated amount. But it is not clear what happened if the claim was for *certa res* or an *incertum*.[87] Under the formulary system we know that judgment could only be for a definite sum of money,[88] and it may be that this rule goes back to the *legis actiones*, but there are difficulties. It can be argued that in *i.a.ve p.* an *arbiter*, at least, could make a valuation in money himself,[89] but even if this is accepted, there is nothing to justify a similar assumption in regard to the *l.a. sacramento*. The explanation may be found in an *arbitrium liti aestimandae*, of which we know little but the name, which is preserved in Valerius Probus' collection of abbreviations.[90] This was perhaps a proceeding for arriving at a valuation in money after judgment had been given in an ordinary action. There is, however, a further difficulty in a defective passage of Gaius[91] dealing with actions *in rem*, in which he appears to say that while judgment in the formulary system had to be for a definite sum, in earlier law it could be *in ipsam rem*. This clearly cannot refer to any enforcement by state action, but it may be that since in the *l.a. sacramento in rem* the verdict of the *iudex* that the oath of one party was *iustum* amounted in effect to a declaration of ownership, this could be regarded as a judgment *in ipsam rem*, the evaluation being left to the *arbitrium liti aestimandae*. But since in an action *in rem* there is no relationship between plaintiff and defendant on which the liability of the defendant could be based, it is probably better to assume that failure to hand over the thing in dispute constituted a delict only.[92]

3. EXECUTION

There remains the question how a judgment is enforced if the defendant against whom it is pronounced does not voluntarily comply with it. In modern law we think of execution as directed towards the fulfilment of the actual judgment; if the defendant will not do himself whatever it is that he is ordered to do—hand over the possession of a thing, pay a sum of money, or whatever it is—then the state will, so far as possible, take steps to secure the desired result itself; it will, for instance, seize the thing in question and hand it over to the successful plaintiff or seize and sell sufficient of the defendant's property to enable it to pay the requisite sum of money to him. This is not the standpoint of early law; execution is there regarded rather as a method of putting pressures on a defendant who is obstinate in order to break his will and make him do whatever it is he ought to do. It is therefore directed almost exclusively against the person of the defendant, for it is thus that he can be made to suffer most effectively; only in exceptional cases is execution against the property employed. It must also be noticed that in this early period it is the business of the plaintiff to carry out the execution proceedings; for this he needs the authorisation of the magistrate but the magistrate does not act for him. For the discussion of details it is again necessary to distinguish between actions *in rem* and *in personam*.

A. ACTIONS IN REM. Here the need for execution can arise only if the judgment goes against the person to whom interim possession has been awarded,[93] for if it is in his favour then there is no more to be done. In most cases, at any rate, where the defeated interim possessor did not give up the thing of his own accord, execution proceedings would be against the *praedes litis et vindiciarum*, who had gone surety for him at the beginning of the trial, for the purpose of their existence was precisely to facilitate execution.[94] The possibility of proceeding against the party himself has already been considered.[95]

---

[87] Below, 193. The problem would arise, for example, in the case of a thief who had to be condemned in n multiple of the value of the thing stolen.

[88] *Condemnatio pecuniaria*; below, 204.

[89] But see Wenger 144 n 19.

[90] 4.10 (*FIRA* 2.456); cf. *Lex Acilia repetundarum* 58 (Bruns 1.68; *FIRA* 1.96).

[91] 4.48. For discussion see de Zulueta, *Gaius* 264. See also Broggini, *Coniectanea* 187ff. (=*St. Betti* 2.119ff.).

[92] This is the interpretation put by Kaser (*Iura* 13, 1962, 22ff.; cf. *BIDR* 65, 1962, S8f., 94ff.) on a provision of the XII Tables (XII.3): *Si vindiciam falsam tulit, si velit is, <prae>tor arbitros tres dato; eorum arbitrio <reus> fructus duplione damnum decidito*. For a full discussion of this provision and of other interpretations see Santoro, *APal.* 30 (1967) 5ff., who himself argues for the more commonly accepted view that the provision relates to the measure of the liability of the *praedes litis et vindiciarum*; see immediately below.

[93] Above, 181.

[94] For the question of the extent of their liability see Santoro, *APal.* 30 (1967) 63ff. with reff. From Varro, L.L. 6.74 and Festus, s.v. *praes* (Bruns 2.26) it appears that they originally undertook their liability by saying *praes sum* in answer to a question put by the magistrate. The extent of their liability must either have been fixed by Tab. XII.3, as Santoro and others hold, or been left to *asses*sment by *arbitri* (Kaser, *Iura* 13, 1962, 31f.).

[95] Above,186f.

B. ACTIONS IN PERSONAM. Under this heading we have to consider in strictness only the *legis actio per manus iniectionem*, which is the only method of execution for judgment debts and goes against the person of the debtor. It will be convenient however to discuss also the *legis actio per pignoris capionem*,[96] which is a method of execution against the property, permissible in exceptional cases for the execution of certain debts without judgment.

(i) *Manus iniectio*.[97] Thirty days of grace must be allowed after admission in court[98] or judgment; if not paid within this period the creditors could take the debtor before the magistrate and make a ceremonial seizure (*manus iniectio*) of him, reciting in a set form of words[99] the fact of the debt and its non-payment. If the debtor still could not or did not pay, and if no *vindex*[100] came forward to dispute the plaintiff's right of seizure, the creditor had the right to take him away to his private prison. It is usually assumed that there was an actual *addictio* of the debtor to the creditor by the magistrate, such as occurred in the case of the manifest thief,[101] and it is clear that there must have been an official authorisation of some sort, for otherwise there would have been no point in requiring the magistrate's presence, but our chief authorities do not mention *addictio* in this connexion.[102] While in captivity the debtor might be bound 'with cord or with fetters of fifteen pounds weight, not less',[103] but he remained a free man, owner of his property and capable of contracting, at least to the extent of coming to some arrangement with his creditor. If he still did not pay and did not manage to come to any arrangement he might be kept thus for sixty days, but he must be produced on three consecutive market-days[104] before the magistrate in the *comitium*, and the amount of the debt must be publicly announced, in case someone should take pity on him and pay on his behalf or perhaps to give other creditors an opportunity of asserting their rights.[105] If nothing was done by the end of the sixty days, the debtor could be killed or sold as a slave abroad; if there were several creditors they could cut the body up into pieces corresponding to the amount of their debt, but the XII Tables added that no responsibility attached to them if they cut too much or too little.[106]

The frightful severity of this process of execution, which is vouched for by the fragments of the Tables,[107] shows clearly that the law of debt was still regarded as part of the law of delict; the creditor who is not paid what is owed him has suffered a wrong; he desires to take vengeance on his debtor and the law permits him to have his way. The only possibility of escape is the appearance of a *vindex*; by this is meant a person who prevents the removal of the debtor into captivity by himself offering to dispute the matter, not only at his own risk, but, almost certainly, as in the parallel case of the *actio iudicati* in the formulary system, at the risk of having to pay double the amount owing if he fails to dispute it

[96] Cf. above, 180.

[97] See de Zulueta, *Gaius* 242ff.

[98] *Confessio in iure*; cf. above, 182 n 4.

[99] Gai. 4.21: *Quod tu mihi iudicatus* (*sive damnatus*) *es sestertium X milia*, *quandoc non solvisti*, *ob eam rem ego tibi sestertium X milium iudicati manum inicio*. The alternative *sive damnatus* was probably used in cases where execution could be taken without judgment (such as *legatum per damnationem* and *confessio in iure*); see de Zulueta, *Gaius* 246.

[100] Below, 189.

[101] Above, 167.

[102] 3 Gai. 4.21 and the *Lex coloniae Genetivae* 61 (Bruns 1.123; *FIRA* 1.179), which follows the Roman rules of *manus iniectio* fairly closely. And it is difficult to see how the dispute about the position of thieves who were *addicti* (above, 167) could have arisen if *iudicati* were also *addicti*. On the other hand, Gellius, 20.1.44, says *Nisi dissolverant ad praetorem vocabantur*: *et ab eo quibus erant iudicati addicebantur*; cf. Kaser, *AJ* 110f.

[103] *Vincito aut nervo aut compedibus xv pondo*, *ne minore*: *aut si volet maiore vincito*. Gell. 20.1.45. Many editors change the text so as to give a maximum, not minimum, weight, but see Wenger, *SZ* 61 (1941) 372ff., with literature.

[104] Probably the last three market days (*nundinae*) of the period of sixty days; Buckland 619 n 10.

[105] Beseler, 4.104.

[106] Gell. 20.1.49. *Tertiis nundinis partis secanto*: *si plus minusve secuerunt se fraude esto*. It has been held that this famous clause is not to be taken literally, but means that the debtor's property was divided. Gellius however takes it literally, though he says (§ 52) that he has never heard of anyone being dissected, and so does Quintilian (*Inst. Or.* 3.6.84). Most modem authorities also regard a literal interpretation as more in accordance with the spirit of primitive law (e.g. Wenger 224f.; Kaser, *ZPR* 102), but Radin (*AJPhil*. 43 (1922) 40ff.) thinks that *secare* refers to a sale of the debtor's goods (cf. *interdictum sectorium*, Gai. 4.146), and da Nobrega (*SZ* 76 (1959) 499ff.) that it refers to the decision to be made as to the sharing of the price if the debtor is sold *trans Tiberim*. Lévy-Bruhl (*QP* 152ff.) sees a reference to magical rites devoting different parts of the debtor's living body to different divinities, but unaccompanied by actual mutilation.

[107] Tab. III.1-6.

successfully.[108] It is almost certain, also, that even the *vindex* could not dispute the merits of a case which had once been decided by judgment, but could only dispute the validity of the judgment itself,[109] or its sufficiency as a basis for *manus iniectio* on the ground, for instance, that the debt had already been paid, or that the debtor had already made some arrangement with the creditor.[110]

The extreme severity of the process was mitigated in some way by the *lex Poetelia* (? 326 B.C.} already referred to in connexion with *nexum*.[111] This law, apparently, made killing and selling into slavery abroad illegal; presumably it also authorised detention beyond the sixty days allowed by the XII Tables in order that the creditor might use the labour of the debtor,[112] for otherwise, if he had had to let him go free, there would have been no effective process for execution at all. Gaius[113] in describing the result of failure to provide a *vindex* says simply that the debtor was 'led home and bound'. How far execution against property accompanied *manus iniectio* we do not know. It is clear that the debtor remained owner of his property during his sixty days' captivity, for the XII Tables[114] say expressly that if he wishes he is 'to live on his own' but whether, after the sixty days, his property Went with his person to the creditor is uncertain. In any case the question would not be of great practical importance, for a man would almost always part with his last shred of property before allowing *manus iniectio* to take place.

(ii) *Pignoris capio*.[115] This 'taking of a pledge' was the seizure of a piece of property belonging to a debtor as a means of putting pressure on him to pay the debt, The seizure had to be accompanied by the speaking of a solemn form of words, but it did not have to be in the presence of a magistrate or of the other party and so some authorities, says Gaius, doubted whether it should be classed as a *legis actio* at all. It does not appear that the pledge could be sold; probably, if the debtor proved obdurate, it was destroyed. In any case *pignoris capio* was never a general method of execution, nor was it used for judgment debts. It was allowed only in a very limited number of cases, in some by custom, in others by the XII Tables themselves. All these cases appear to be such as concern the state or religion, and the probability is, therefore, that it was primarily a state privilege, allowed to individuals only by a kind of delegation when it was recognised that their claims were of peculiar public importance.[116]

---

[108] Cf. below, 197; and for a discussion of the position of the *vindex* see de Zulueta, *Gaius* 243; Kaser, *ZPR* 99. The *Lex col. Gen*. 61 (above, 188 n 3) says definitely that he must pay double.

[109] E.g. on some formal ground, or on the ground that one of the parties had not been present when it was delivered.

[110] Cf. Buckland 619.

[111] Above, 164.

[112] Kaser, *AJ* 24iff., thinks that this must long since have been the practice, and that the *lex* only mitigated the conditions in which debtors could be held (cf. Livy 8.28.8).

[113] 4.21; cf. *Lex col. Gen*. 61 (above, 188 n 3): *Secum ducito. Iure civili vinctum habeto.*

[114] 111.4.

[115] Gai. 4.26-29; de Zulueta, *Gaius* 248ff.

[116] Buckland 624. None of them could have been enforced by an ordinary *legis actio*; Pugliese, *Mél. Meylan* 1.279ff. The two cases concerned with religion, and said to have been introduced by the XII Tables, have already been mentioned incidentally (above, 163 n 8 and n 9). The customary cases mentioned by Gaius are all those where an individual has been placed under a duty to provide a soldier with money, either for his pay (*aes militare*) or, if he were a knight, for the purchase or upkeep of his horse. This last burden (*aes hordearium*) is said (Livy 1.43) to have been placed on unmarried women, presumably because, though they might be possessed of property, they could not be rated in the census (Greenidge 74). Pay is said to have been taken over by the state in 406 B.C. The remaining case of *pignoris capio*, mentioned by Gaius as having been introduced *lege censoria* (i.e. presumably in the terms of a contract laid down by the censors), is that of the tax-farmers (*publicani*) who were allowed to use this method to enforce the payment of taxes. Here the idea of delegation by the state appears most clearly.

2. Private law from the XII Tables to the fall of the Republic: procedure

H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*
(3d ed., Cambridge: University Press, 1972), ch. 13 (pp. 191–232)

It was in this period that the foundations were laid for the great edifice of the classical law. The four centuries which intervene between the compilation of the XII Tables and the beginning of the principate saw the growth of Rome from a small city-state to be the mistress of a great empire, and the increasing complexity of life which this expansion brought about was necessarily accompanied by an increasing complexity of the law. In 450 B.C. the Romans were still a community of peasant-proprietors, organised largely on the basis of the *gens* or clan, whose life could be regulated by a few comparatively simple institutions; in 31 B.C. they were a diversified population, in which the gentile organisation had ceased to

have any importance, and their law, as a result of foreign conquest and the spread of commercialism, was already marked by that individualism which was to become one of its most distinctive features.'.

There is great difficulty in dealing satisfactorily with the law of this period, for the direct sources from which we can obtain any information are very scanty, and such as exist belong mainly to the latest period.[1] In general we have to take the law as we know it to have existed in the time of the great classical jurists, and, since we cannot suppose it to have sprung into existence fully developed, deduce the earlier state of affairs as well as we can from the internal evidence of the institutions themselves, helped out by the little that the Roman jurists themselves tell us of the history of the law, by stray references in non-legal writers, especially the historians, and, to some extent, inscriptions. Even so it is not only details which remain doubtful; there is plenty of room for differences of opinion even on such fundamental matters, for instance, as the development of the contractual system which we find existing in the early empire.

Before proceeding to deal with the substantive law it will be best to begin by continuing the history of procedure at the point where it was left at the end of the last chapter, because the procedural changes were not only of great importance in themselves, but a condition precedent to much of the substantive development. The chief creative instrument was, in the later part of our period, as in the early empire, the praetorian edict, and it was to a great extent through the *formula* that the praetor worked. The system of procedure, under which the question for decision between the parties is put to a *iudex* in a form of words (*formula*) authorised by the praetor, is indeed the system with reference to which the main body of Roman law was worked out. It is thus impossible to understand the development of the law without some knowledge of this procedure.

1. CHANGES IN THE SYSTEM OF *LEGIS ACTIONES*

Even before the introduction of the formulary procedure (and the date and manner of its introduction are much disputed) considerable changes must have been made by way of suiting the old system to altered conditions. In the first place the number of actual forms of words to be cast in one or other of the 'moulds' of *legis actiones* was presumably increasing continuously as new grounds of action came to be recognised, either by legislation or by custom, and we have some evidence of this process in the statement of Pomponius that Sextus Aelius composed a book of actions to supplement that of Flavius 'because, with the growth of the state, some forms of action were lacking'.[2] This can only mean that since Flavius' time new forms had in fact been recognised and that Aelius put them in his 'book of precedents'; he cannot possibly have created them on his own authority.[3] Apart from this gradual development the only changes of which we have any definite knowledge are those introduced by legislation and mentioned by Gaius in his account of the *legis actio* procedure. Though there is great difficulty in dating the individual laws, they appear to belong to the period stretching from about the middle of the third to about the end of the second century B.C., and they tend, not only to a certain simplification of procedure, but more particularly towards ameliorating the position of the poor litigant who had no kin able and willing to help him. The system of *sacramentum* meant that each plaintiff or defendant had to find a considerable sum of

[1] There area few direct extracts from the late republican jurists in the Digest (see below, 482), and a larger number of citations of their opinions by their successors of the classical period. Chief among the lay sources must be reckoned the works of Cicero (10643 B.C.). Many of the speeches were actually delivered before the courts, though mostly in criminal cases, and thus necessarily contain much legal material, but the philosophical writings are also of great importance. The *Republic* and the *Laws*, though professedly descriptive of the ideal state, are to a considerable extent based on idealisations of actual Roman practice and they, as well as the other works, contain many legal anecdotes. Even the letters often refer to legal matters, especially, of course, to Cicero's private affairs. E. Costa, *Cicerone Giureconsulto* (2nd ed., Bologna, 1927) is a useful guide; for discussion see Pugliese, *Raccolta di scritti in onore di A. C. Jemolo* (Milan, 1963) 4.561ff.; on problems in some' speeches, H. J. Roby, *Roman Private Law* (Cambridge, 1902) 2.451ff. Other authors of importance are the elder Cato (above, 92) and Varro (116-27 B.C.), whose *de lingua Latina* contains many explanations of legal technical terms and was the chief source from which was drawn indirectly Festus' work *On the Significance of Words*. The comedies of Plautus (254-184 B.C.) are full of legal allusions, but have to be used with great care, for the plots are taken from Greek originals, and even whore the dramatist uses Roman technical terms we can be by no means sure that he has made the necessary alterations in the facts to make them fit. Terence (185-159 B.C.) is of less value than Plautus as his works are much closer copies of the Greek originals. Watson's series of volumes on the law in the later republic (see Abbreviations, above, XXVI) make considerable use of these lay sources.

[2] D. 1.2.2.7: *Augescente civitate quia deerant quaedam genera agendi*, *non post multum temporis spatium Sextus Aelius alias actiones composuit et librum populo dedit*, *qui appellatur ius Aelianum*; cf. above, 92.

[3] Cf. Lenel, *SZ* 30 (1909) 343. We can compare in a general way the growth in the number of writs in the twelfth and early thirteenth centuries; see Holdsworth, *HEL* 1.398; *id.*, *Sources and Literature of English Law* (Oxford, 1925) 21.

money for the stake, or, in the later period, find friends who would go surety for him in the requisite amount,[4] and in the case of *manus iniectio* the defendant's position was still worse, for he could not defend himself at all, but had to find a *vindex* who would undertake the cause at the risk of having to pay double if he failed in the defence. It is true that these disadvantages did not attach to *iudicis arbitrive postulatio*, but the field of this simplified *legis actio* was restricted. The harsh use of the judicial machine by the rich against the poor was a question of political importance throughout the republic, and it must have become increasingly acute with the breakdown of the old gentile system.[5] The influx of new citizens made it more difficult for a poor man to find the friends whose help he needed in litigation.[6]

A. INTRODUCTION OF LEGIS ACTIO PER CONDICTIONEM. One of the most important changes made in the old system was the creation of a new *legis actio*—that *per condictionem*. Of this Gaius[7] says that it was introduced by a certain *lex Silia* for the recovery of definite sums of money (*certa pecunia*) and by a *lex Calpurnia* for all 'definite things' (*certa res*).[8]

The dates of these laws are unknown, but they are commonly assigned to the third century.[9] The proceedings are described shortly by Gaius in a passage of which the beginning was not known until the recent discoveries.[10] The plaintiff said *Aio te mihi sestertiorum X milia dare oportere*: *id postulo aias an neges*. The defendant denied his liability and the plaintiff proceeded: *Quando tu negas*, *in diem tricesimum tibi iudicis capiendi causa condico* (Since you deny, I summon you to appear on the thirtieth day for the purpose of appointing a *iudex*). The parties appeared again for this purpose on the thirtieth day, the *legis actio* taking its name, as Gaius says, from the summons, 'for *condicere* in the ancient language is equivalent to *denuntiare*'.[11] It will be seen that there are great similarities with *iudicis arbitritve postulatio*;[12] there is in both cases a direct assertion and denial of obligation, free from the troublesome preliminaries and from the danger of forfeiture involved in *sacramentum*. But there are also important differences. In *condictio* the plaintiff does not have to state the ground of his action, as he does in *i.a.ve p.*, and the thirty days' adjournment, introduced for *sacramentum* by the *lex Pinaria*, applies to *condictio* but not to *i.a.ve p*. It may be that there was another difference. *I.a.ve p*. was completely without risk to either party beyond the matter in dispute, but in the *condictio* of the formulary period, which took the place of the *legis actio* of that name,[13] when the action was for a definite sum of money there was a risk, for the loser had to pay one-third of the sum at issue to the winner. This was secured by *sponsio et restipulatio tertiae partis*, i.e. the plaintiff said to the defendant: 'Do you promise to pay me one-third of the amount claimed if judgment goes in my favour?'[14] The defendant promised and then proceeded in his turn to stipulate for a similar payment if judgment went against the plaintiff. There was thus a bet on the result of the trial, and the loser's stake went to the winner, not as in *sacramentum* to the state. The predominant opinion[15] is that this practice goes back to the *legis actio* period. It is at first sight surprising,

[4] Of. above, 181. That 500 *asses* was a large sum is clear from the fact that a penalty of 300 was inflicted for the serious offence of breaking another's bone; above, 171.

[5] Including the protection of 'clients' by the *gens* to which they were attached.

[6] Of. E. Jobbé-Duval, *Etudes sur l'histoire de la procedure civile chez les Romains* (Paris, 1896) 28. In early law the man without family is a man without rights. It is worth noticing that the period of these reforms (slight as they are) seems to correspond with the appearance of democratic tendencies at Rome about the end of the third and beginning of the second centuries B.C. Cf. also the laws relating to suretyship (below, 300f.) which were probably the result of agitation on the part of the popular party.

[7] 4.19.

[8] A claim for *certa res* is a claim for the conveyance either of a specific thing already identified ('the slave Stichus', 'the estate at Tusculum') or of a definite quantity of fungible things of a definite quality ('a thousand sesterces' 'a hundred bushels of the best African corn', 'a hundred jars of the best Campanian wine'). Any other claim is one for an *incertum*, in particular where the claimant alleges that the other party is under an obligation to perform any act other than a conveyance of property (D. 45.1.68; 74; 75). The question is of special importance with respect to stipulations. Under the formulary system the proper action on a stipulation for *certum* was a *condictio*, on one for an *incertum* an *actio ex stipulatu*; Gai. 4.136, 13i; D. 12.1.24. Cf. below, 215 n 6.

[9] Kaser, *ZPR* 81, with reff.

[10] 4.17b.

[11] Cf. Festus, s.vv. *condicere* and *condictio*, Bruns, 2.5.

[12] Above,152f.

[13] Below, 214ff.

[14] The exact form is uncertain, but see Gai. 4.180; Lenel, *EP* 238.

[15] See especially Arangio-Ruiz, *BIDR* 42 (1934) 622ff.

if this is correct, that Gaius makes no mention of it, even though his account is very short, but the explanation may be[16] that the purpose of the thirty days' adjournment was to encourage the parties to come to a compromise, and therefore that the *sponsio et restipulatio* took place only at the second stage of the proceedings, when the *iudex* was appointed; and of this stage Gaius says nothing.

There remains the question of the scope of the new action. Gaius says[17] that he does not know why it was introduced, seeing that actions *de eo quod nobis dari oportet* could be brought by *sacramentum* or *iudicis postulatio*. This shows that he at any rate did not think that *condictio* made any claims actionable which had not been enforceable before by at least one of the older methods. But it is possible that he was mistaken. It may be that reform was needed because there were new grounds of claim pressing for recognition— the literal contract,[18] *mutuum*,[19] and possibly some forms of what was later called quasi-contract.[20] *I.a.ve p*. would not be available for them without statutory authorisation, and perhaps at the time the grounds on which *sacramentum in personam* could be used had become so stereotyped that legal conservatism would not readily permit its extension to others. Subsequently, when they had been made enforceable by *condictio*, it may have been held that *sacramentum* as a 'general action' must have been available also, and this might account for Gaius' mistake.[21] In any case it is notable that the innovation did not take the form of prescribing specific grounds of claim for which the new procedure could be used. Instead it prescribed the object; on whatever ground a man claimed that *certa pecunia* or *certa res* was owing, he could sue by *condictio*, and there can be no doubt that the 'abstract' nature of the new *legis actio* must have facilitated the recognition of fresh grounds of obligation.[22,23]

B. PROCEDURE PER SPONSIONEM. Another simplification of procedure, this time for the decision of questions of property, which also almost certainly., goes back to the time of the *legis actiones*, is the device of trying questions of ownership directly, by means of a stipulation. The plaintiff says to the defendant, 'Do you promise to pay me twenty-five sesterces if the slave (e.g.) in question is mine by Quiritarian right?' and the defendant promises. Action is then brought for the twenty-five sesterces, and the *iudex* in deciding whether these are owed or not has necessarily to decide the question of ownership, which is the object of the proceeding, for the twenty-five sesterces are a purely nominal sum and are not even in fact pa*id.24* The advantage of this process is that even if the trial is by *sacramentum* it is *sacramentum in personam*, where the formalities are simpler than in the case of *sacramentum in rem*, and as the amount formally at issue is only very small, the stake is only 50 *asses*, whereas if the object whose

[16] In any case there was almost certainly no *sponsio et restipulatio* in actions under the *lex Calpurnia*, for even in the formulary period there is no trace of them when *certa res* is in issue.

[17] 4.20.

[18] Below, 282.

[19] Prichard, *Synteleia Arangio-Ruiz* 260ff., argues that it was introduced to fill the gap in the creditor's recourse against the debtor which had resulted from the emasculation of *nexum* by the *lex Poetelia* (but the effect of this *lex* is uncertain; above, 189). Tomulescu, *Irish Jurist* 4 (1969) 180ff., suggests that the new action, by virtue of the *sponsio et restipulatio*, the oath, and the abstract formulation, strengthened the creditor's hand in a time of inflation.

[20] Below, 284.

[21] De Zulueta, *JRS* 26 (1936) 183ff.

[22] Cf. below, 214f.

[23] It is uncertain also whether there might be a *iusiurandum in iure delatum* (*necessarium*). Under the formulary system where there was a *condictio for certa pecunia*, and in some other cases (Buckland 633), the plaintiff might offer the defendant the chance of deciding the matter by his oath. If the defendant accepted the offer and swore that the claim was unfounded the plaintiff lost the action. The defendant might, however, refuse to swear and 'refer' the oath to the plaintiff, and then, if the plaintiff swore that the claim was justified, the result was as if judgment had been given. If the defendant refused either to swear or to 'refer' he was treated as one who would not defend himself properly and liable to have pressure put upon him by *missio in bona*, i.e. by the praetor's putting the plaintiff in possession of his property. If the plaintiff to whom an oath had been 'referred' refused to take it, then the matter was also settled, for the praetor would refuse him his action if he tried to begin again (*denegatio actionis*). It may be that there is a reference to this oath in Plaut. *Pers*. 478, *Curc*. 496, *Rud*. 14.

[24] In Gaius' time when the indirect method *per sponsionem* was used the *summa sponsionis* was usually claimed by an ordinary formulary *condictio*, but that the procedure dated from before the formulary system is made highly probable by the fact that it was claimed by *sacramentum* if the case came before the centumviral court, which used the old procedure (Gai. 4.95). In any case the process could hardly have been invented at a time when the more effective and simpler *formula petitoria* (below, 211) was already in existence.

ownership was disputed was valuable it would have to be 500 *asses* in *sacramentum in rem*.[25] Once *legis actio per condictionem* had been introduced, the nominal amount of the stipulation could be claimed by this form and so no stake forfeited to the state at all. Of course the mere decision on the stipulation in his favour did not secure to the plaintiff the surrender of his thing. In order that he should be able to enforce this the defendant had to make another promise by stipulation by which he undertook, in effect, if the decision on the first stipulation went against him, either to restore the property with interim profits or pay the value.[26]

For this promise he had to find sureties, whose function was consequently similar to that of the *praedes litis et vindiciarum* in the *legis actio sacramento in rem*, and the promise was therefore called *stipulatio pro praede litis et vindiciurum*.[27]

C. INTRODUCTION OF MANUS INIECTIO PURA. The ancient process of *manus iniectio* has been described above as a method of proceeding to execution when judgment had been obtained,[28] and as applicable, very probably, even without judgment in the case of debts contracted by *nexum*.[29] Gaius[30] after describing its nature goes on to explain that its application was extended by a number of statutes which permitted its use also in the case of all other debts; one of the statutes was the *lex Publilia*, which permitted the sponsor (surety) who had paid a debt on behalf of the principal debtor to use *manus iniectio* against the principal debtor if he were not reimbursed within six months;[31] another was the *lex Furia de sponsu*,[32] which gave similar rights to one of several *sponsores* or *fidepromissores* who had been forced, contrary to the provisions of that law, to pay the creditor more than his share of the debt. In both these cases the *manus iniectio* was *pro iudicato*, i.e. the words 'as if on a judgment' were added to the words spoken when the seizure was made, and the position of the defendant was similar to that of a judgment debtor, in particular with regard to the necessity for a *vindex*; if none such appeared he had either to payor be led away to captivity, and the *vindex* could only prevent this result by taking over the defence himself at the risk of having to pay double the amount due if it were found to be really owing. We cannot, however, imagine that in this case the burden of proof was on the *vindex*, for that would mean that anyone by merely alleging e.g. that he had paid as *sponsor* for the defendant could force the defendant to find a *vindex* who would prove the negative.[33]

Other statutes, Gaius then goes on to say, introduced a different kind of *manus iniectio* for various debts, namely *manus iniectio pura*; in these cases there was no need for a *vindex*, the defendant being allowed to 'ward off the hand of the plaintiff himself and himself defend the action'.[34] Finally, by a certain *lex Vallia*, all *manus iniectio* except that on a judgment and that under the *lex Publilia* was made *pura*,[35] and the process therefore became merely a method of beginning an action available in particular cases and characterised by the liability of the defendant to condemnation for double if his defence were unsuccessful. Some writers, it is true, hold that there was no such double liability, and there is in fact no

[25] Kaser (see *ZPR* 17, with reff.) finds support here for his thesis (above, 154f.) of a transition from a relative to an absolute conception of ownership. In the older procedure both parties assert '*meum esse*' whereas here only the claim of the plaintiff is (indirectly) in issue.

[26] Lenel, *EP* 516ff.

[27] Gai. 4.94.

[28] Above, 188.

[29] Above, 164.

[30] 4.22.

[31] Perhaps this was rather a restriction of a previously existing right to proceed to *manus iniectio* immediately (if the payment of the debt had itself been made by *solutio per aes et libram*, above, 161). See Kaser, *RPR* 1.172, with reff.; RPL 217f. The date of the *lex Publilia* is unknown.

[32] Below, 300.

[33] Cf. Buckland 621.

[34] Gai. 4.23. The instances are (a) the *lex Furia testamentaria* giving *manus iniectio* for a fourfold penalty (*Epit. Ulp*. 1.2) against anyone not coming under one of the classes excepted from the provisions of the law, who had received more than 1,000 *asses* by way of legacy or *donatio mortis causa* from the same person; and (b) the *lex Marcia* providing for the recovery of interest illegally exacted. The date of the *lex Furia* appears to lie between 204 and 169 (Girard, *Mélanges* 1.101; contra, Mitteis, *RPR* 52 n 30); that of the *lex Marcia* is unknown (104 B.C. according to Rotondi, *Leges publicae*; 342 B.C., Seckel-Kübler's edn. of Gaius, ad 4.23).

[35] Gai. 4.25. Date unknown.

direct evidence of it, but without it the process would have no advantage over the ordinary form of procedure by *sacramentum* or *condictio*, and it is difficult to see why it should ever have been invented.[36]

D. INSTITUTION OF THE CENTUMVIRAL AND DECEMVIRAL COURTS. Among the changes in the *legis actio* system we can include the setting up of two new courts before which proceedings '*in iudicio*' might take place—the *centumviri* and the *decemviri stlitibus iudicandis*.[37] The *centumviri* were a panel, numbering at least in the later republic 105 persons, from which the actual court (*consilium*) had to be selected for each particular case. We do not know the method of selection, nor the usual number forming a *consilium*, but some indication is given by the fact that under the empire, when the number on the panel was 180, the *centumviri* usually sat in four divisions.[38] From the time of Augustus they sat under the presidency of the *decemviri*, and before then of ex-quaestors.[39] Their jurisdiction plainly covered claims concerning inheritances: *hereditatis petitio*[40] and the related *querela inofficiosi testamenti*[41] (which probably originated at about the end of the republic). It may have extended more widely than this to include assertions by *vindicatio* of ownership of land, of *tutela*, and of liberty, though the evidence of this wider scope is not compelling.[42] Whatever its exact extent, the jurisdiction seems, in the republic at least, to have been exclusive. For the principate a difficulty is presented by the fact that the preliminary proceedings *in iure*[43] were still by *legis actio sacramento*, even after the *leges Iuliae*[44] had otherwise completed the replacement of the *legis actiones* by the formulary system, and yet there plainly also existed a formulary *hereditatis petitio*.[45] The explanation may be that the matter in issue before the *centumviri* had to be of a certain minimum value.[46] Certainly it was a court where *causes celèbres* were heard and the greatest orators appeared;[47] its reputation, at any rate from the orator's point of view, fell in the latest days of the republic,[48] but rose again in the early empire when the absence of openings for political oratory made forensic opportunities of addressing considerable audiences more valuable. An alternative explanation of the concurrence of jurisdiction may be that after the *lex Julia* the *unus iudex* was allowed to try the ordinary *hereditatis petitio*, while the *querela* remained the exclusive province of the *centumviri*.[49]

The earliest known trial before the *centumviri* dates only from c. 145 B.C.,[50] but the court is probably much older.[51] Festus[52] says that the 105 members were made up of three from each tribe, and since the

[36] Buckland 622. Mitteis, *SZ* 22 (1901) 116, held that the doubling was characteristic of *m.i. pro iudicato* only, but see Kaser, *AJ* 121ff.

[37] I.e. literally, ten men for the trial of cases.

[38] Pliny, *Ep*. 6.33.3; Quint. *Inst. Orat*. 12.5.6.

[39] Pomponius, D. 1.2.2.297 gives the need for presidents of the *centumviri* as the reason for the first creation of the *decemviri*, but both Suetonius (Aug. 36) and Dio Cassius (54.26.6) say that this function was given to them by Augustus, and (unless there had been an intervening change from *decemviri* to ex-quaestors) Pomponius is probably mistaken; but see Brassloff, *SZ* 29 (1908) 179.

[40] Below, 252.

[41] Buckland 327.

[42] See Pugliese, *Proc.* 1.202ff.; contra, Kaser, *ZPR* 39, with reff.; Kunkel, *Krim*. 119 n 437. There is no sign of any jurisdiction in actions *in personam*. Gaius (4.16) says that the spear which was set up in the court was the origin of the *festuca* used in the *legis actio sacramento in rem*, and though this explanation is very probably wrong (the spear being an ancient symbol of public authority, quite distinct from the *festuca*; Kunkel, *Krim.* 117, following Alfoldi, *AJA* 63 (1959) 1ff.), it presumably reflects Gaius' view of the court's functions.

[43] Before the *praetor urbanus* or *peregrinus*; Gaius 4.31.

[44] 17 B.C.; below, 218.

[45] See also Quint. *Inst. orat.* 5.10.15.

[46] An obscure text (PS 5.9.1) may show that the minimum was 100,000 sesterces; see Lenel, *EP* 525ff. and Kaser, *ZPR* 39. If the court's jurisdiction was exclusive there must have been a like limitation on the *querela*, and this Kaser, *loc. cit.*, supposes to have been so; but this is conjectural, and the evidence linking the *querela* with the *centumviri* is strong.

[47] Most famous of an cases was the *causa Curiana* in which the great jurist Q. Mucius Scaevola and the great orator L. Licinius Crassus appeared on opposite sides in a question of inheritance, the former arguing for a strict, the latter for a more equitable interpretation of the law; Cic. *de Or*. 1.242ff.; *Brut*. 144f. See Wieacker, *Irish Jurist* 2 (1967) 151ff.

[48] Tac. *Dial.* 38.

[49] Pugliese, *Proc.* 1.205ff.

[50] That of Cn. Hostilius Mancinus, probably shortly after 146 B.C.; Cic. *de Or.* 1.181; see Girard 1038 n 5.

[51] Kunkel, *Krim*. 115ff.

[52] S.v. *centumviralia*, Bruns 2.5.

number of tribes did not reach 35 until 241 B.C., it cannot in the form we know it be older than that, but the name *centumviri* strongly suggests that there must have been an earlier period when the members did in fact number 100.[53] Moreover the court has features (its tribal composition, the use of the old *legis actio* per *sacramentum*, the spear which stood as its symbol)[54] which are more likely to have originated before than after 241 B.C.

Of the *decemviri*[55] even less is known, partly because they ceased to have any separate existence when Augustus made them into presidents of the centumviral courts. Pomponius[56] speaks of them as being instituted after the creation of the *praetor peregrinus*, but, like the *centumviri*, they may be very much older. The earliest certain evidence we have, however, is an inscription[57] referring to a certain M. Cornelius Scipio Hispanus, *praetor peregrinus* in 139 B.C. and *decemvir* a few years earlier. At least at the end of the republic they were elected in the *comitia tributa* and counted as magistrates. Of their jurisdiction we know only that they heard claims that a man held as a slave was free, and vice versa (*vindicatio in libertatem*, *in servitutem*).

2. THE FORMULARY SYSTEM

A. NATURE OF THE SYSTEM. The chief difference between the *legis actiones* and the formulary system is summed up by Gaius when he says[58] that the result of the *lex Aebutia* and the *leges Iuliae*[59] was to introduce litigation *per concepta verba*, i.e. by words adapted in each case to the particular matter in dispute between the parties, the phrase being used in contradistinction to the *certa verba*—the unalterable forms—which had been characteristic of the *legis actiones*.[60] Under the new system the question at issue is submitted to the *iudex* in a form of words making plain to him that if he finds certain assertions of the plaintiff to be true it is his duty to condemn the defendant, and that if he does not find them true he is to absolve him. Thus in a claim for a definite sum of money (to take the simplest *formula* as an example) the form is *L. Titius iudex esto. Si paret Numerium Negidium Aulo Agerio*[61] *sestertium decem milia dare oportere*, *iudex Numerium Negidium Aulo Agerio sestertium decem milia condemnato*[62] *si non paret absolvito* (If it appear that Numerius Negidius ought to pay ten thousand sesterces to Aulus Agerius, the judge is to condemn Numerius Negidius to pay Aulus Agerius ten thousand sesterces, if it does not appear he is to absolve). What is now done *in iure* is to lay down the formula; *apud iudicem*, as before, the actual trial takes place and the *iudex* gives his decision.

The actual stages in the process were as follows. Summons could still take place in the old form of *in ius vocatio*, but this might be replaced by a *vadimonium*,[63] i.e. the defendant instead of accompanying the

---

[53] La Rosa, *Labeo* 4 (1958) 30ff. (who, however, goes much further and identifies the original court with the senate of the regal period, which is supposed to have numbered 100). Festus himself rather weakly says that the *centumviri* were so called for the sake of simplicity.

[54] Above, 198 n 6.

[55] See Franciosi, *Labeo* 9 (1963) 163ff.

[56] D. 1.2.2.29. They are often identified with the otherwise unknown *iudices decemviri*, who, according to Livy (3.55.7), were included with the tribunes and aediles of the *plebs* in the grant of 'sacrosanctity' by one of the *leges Valeriae Horatiae* (449); but these were evidently plebeian officials, whereas both patricians and plebeians could be *xviri stlitibus iudicandis*; so there would have to have been a development (which Franciosi, *op. cit.*, assumed). Against the identification, Pugliese, *Proc.* 1.189ff.

[57] *CIL* 1.38.

[58] 4.30.

[59] Below, 218.

[60] Gai. 4.29.

[61] In the pattern *formulae* (below, 203) the name of the plaintiff (he who brings the action—*agit*) is always given as *Aulus Agerius*, that of the defendant as *Numerius Negidius* (he who pays—*numerat*—and denies—*negat*). The parallel sometimes drawn between these names and the Richard Roe and John Doe of English law is misleading, for these latter persons are actually feigned to exist and act for certain purposes, whereas the Roman names mean no more than the *A.B.*'s and *C.D.*'s of our books of precedents,

[62] There has been much discussion as to whether the *formula* was cast in the third person of the imperative or the second. See G. Jahr, *Litis contestatio* (Cologne/Graz, 1960) 91ff. with reff. The third person would be more in accord with Wlassak's view (above, 178) of the *formula* as the work of the parties and not of the praetor. The usage in the sources, however, is inconsistent. The appointment of the *iudex* is found only in the third person, but the *condemnatio* occurs in both forms (Gai. 4.43, 46f., 50f.).

[63] *Vadimonium* took two forms: (a) if the hearing could not be completed in one day the defendant was required to give (by stipulation) an undertaking to re-appear (Gai. 4.184; Lenel, *EP* 80ff.); this replaced the old *vades* (above, 184); (b) in order to avoid the need for *in ius vocatio* (with its requirement of immediate compliance under threat of *missio in bona*) the parties might

plaintiff immediately into the presence of the magistrate promised (by stipulation) to appear on such and such a day. When summoning his opponent the plaintiff had to make it clear to him what the claim was and this notification was known as *editio actionis*;[64] when, on the appointed day, the parties came before the magistrate, a second *editio actionis* took place, in which the plaintiff placed before his opponent and the magistrate the draft formula, drawn no doubt usually with the help of his legal adviser, on which he proposed that the case should be tried.

At the same time occurred the *postulatio actionis*—the request by the plaintiff to the magistrate that he would grant the action, i.e. order a *iudex* to undertake the trial on the *formula* indicated. The defendant, also no doubt usually acting on professional advice, might declare himself satisfied with the draft or he might demand alterations, in particular the insertion of an *exceptio*, and the magistrate, who also had his legal advisers, would take part in the proceedings by indicating what form of words he would allow.[65] When once the form of words was arranged there remained the question of the *iudex*. It would usually be after he had been chosen[66] and his name inserted in the draft that *litis contestatio*[67] took place and the magistrate made his decree[68] granting a trial. It is this decree which gives the *iudex* his authority, and it is the magistrate's power of refusing it which preserves in the last resort his complete control over litigation. The decree would be made orally, perhaps in formal words (*iudicium do*), and the *formula* was probably in principle oral too,[69] though in practice it must have been reduced to writing.

B. THE EDICT AND THE FORMULA. The new system gave a new importance to the position of the magistrate. As no *formulae* were laid down by law and the particular *formula* to be used in each case needed his authority to make it effective, he could, if so minded, assent to the use of a *formula* even if such *formula* had no basis in the civil law; and, on the other hand, where a party sought to enforce a civil law right he could render such right nugatory by refusing his concurrence to the *formula* proposed. The general principles by which he intended to be guided in this matter were, like his other rules, set out in the *edictum perpetuum*. The praetor however did more than merely announce that in such and such cases he would 'grant an action'.[70] He also set out in his *album* patterns of the *formulae* which he would permit to be used,[71] and this he did, not only where the action itself was one of his own creation, but also where a *formula* was needed for causes of action already existing at civil law. Thus where the cause of action was, for instance, a loan of money, there was no need for the praetor to say that he would grant an action, because such a loan created a civil law obligation, and all that was needed was that the plaintiff should have indicated to him a *formula* for claiming a definite amount of money due at civil law.[72] Where, on the other hand, the plaintiff's cause of action was the fraud of the defendant, a fact which, by itself, gave no claim at civil law, the edict said: 'If it be alleged that fraud has been committed, and there be no other remedy available on the facts, and the cause appear to me to be a just one, I will grant an action, provided that not more than a year has passed since proceedings might have been begun'.[73] Then followed the pattern formula, which was probably much in the following form: 'If it appears that, as a result of fraud on the part of Numerius Negidius, Aulus Agerius[74] mancipated[75] the estate with which this action is

agree on a convenient date, to which the defendant would bind himself by a similar stipulation. The latter is evidenced only in literary sources (e.g. Cic. *Quinct.* 61) and in the tablets found at Herculaneum (Arangio-Ruiz, *BIDR* 62 (1959) 226ff.).

[64] Lenel, *EP* 59ff. It is not clear how precise the notification has to be; see Kaser, *ZPR* 162; Pugliese, *Proc.* 2.1.359ff.

[65] He could threaten a plaintiff who would not accept certain modifications with denial of action, and a defendant who refused to accept a *formula* in a certain form with the use of his powers of coercion.

[66] See above, 178. A further re-appearance *in iure* might be necessary, e.g. if the availability of a particular *iudex* was in doubt, but *litis contestatio* would have to take place immediately; Kaser, *ZPR* 215f.; cf. Lenel, *SZ* 43 (1922) 570.

[67] See above, 184. It was probably now a formless act, requiring an expression by both parties of their willingness to accept the magistrate's decree (but the expressions were probably directed to the magistrate rather than to the other party, and an analysis in terms of contract therefore strictly misplaced); Kaser, *ZPR* 215ff., with reff.

[68] Kaser, *ZPR* 217ff., 237.

[69] Arangio-Ruiz, *Iura* 1 (1950) 15ff.; Kaser, *ZPR* 237 n 10; *contra*, most recently, Biscardi, *St. Biondi* 1.647ff.

[70] And occasionally would not: D. 12.2.9.5; 25.4.1.10 *sub fin.* (Lenel, *EP* 430, 313).

[71] Perhaps originally in an appendix; below, 357.

[72] For the *formula* see below, 214 n 1.

[73] *Quae dolo malo facta esse dicentur*, *si de his rebus alia actio non erit et iusta causa esse videbitur*, *intra annum*, *cum primum experiundi potestas tuerit*, *iudicium dabo*; D. 4.3.1.1; Lenel, *EP* 114ff.

[74] For these names of the plaintiff and defendant respectively see above, 200 n 7.

concerned to Numerius Negidius, and provided that not more than a year has passed since proceedings might have been begun, then, unless restoration be made in accordance with the directions of the *iudex*,[76] the *iudex* is to condemn Numerius Negidius to pay to Aulus Agerius as much money as shall be the value thereof; if it does not appear, he is to absolve.'[77] In addition there are set out the forms of words to be used for the different *exceptiones*[78] which may be introduced, at the instance of the defendant, into the *formula* in particular cases.

It is obvious that the exact formulation of the issue to be tried in these forms of words was a matter of great importance, and that the praetor, who had the last word in the formulation, exercised a vast influence on the growth of the law in this way. It is also obvious that there is a great deal to be learnt as to the substance of the law from the study of the *formula*, because it expresses in precise language exactly what are the powers and duties of the *iudex* in each case. It may even be said that the invention of this instrument of procedure, at once flexible and precise, was not only a sign of the Roman genius for law, but also, to some extent, a cause of the success which the Roman jurists achieved. We must therefore say something here in more detail of the structure of the *formula*—the 'parts' of which it might be made up, and of the different classes of *formulae* which were in use.

C. THE 'PARTS' OF THE FORMULA. (i) *Intentio*. Beyond the appointment of the *iudex* or *recuperatores*[79] (*Titius iudex esto*; *Titius*, *Maevius ... recuperatores sunto*), which appears at the head of each formula, the most important part, appearing in almost[80] all *formulae*, is the *intentio*. It is here, as Gaius says,[81] that the plaintiff formulates what it is that he claims as his right, and so it is here that is crystallised the question at issue between the parties. Thus in the *actio certae creditae pecuniae*,[82] the *intentio* is the clause 'if it appear that the defendant owes the plaintiff ten thousand sesterces' that being precisely what the plaintiff claims, and the question whether he is entitled or not being precisely what the *iudex* has to decide. In this case the claim is for a *certum*[83] and hence the *intentio* is *certa*, i.e., it describes the claim exactly, but there are also many cases where the *intentio* is *incerta*, and there we find not 'if it appear. …', but 'whatever it appear. …'—not *si paret*, but *quidquid paret*. Thus e.g. in an action on a stipulation for an *incertum* the *intentio* reads 'whatever on that account the defendant ought to pay to or do for the plaintiff'.[84]

---

[75] This is merely an example of an act involving loss which might be induced by fraud. In the particular case the particular method by which the fraud had caused the plaintiff loss would be set out.

[76] For explanation of this *clausula arbitraria* see below, 213.

[77] *Si paret dolo malo Numerii Negidii factum esse*, *ut Aulus Agerius Numerio Negidio fundum quo de agitur mancipio daret*, *neque plus quam annus est*, *cum experiundi potestas fuit*, *neque ea res arbitrio iudicis restituetur*, *quanti ea res erit*, *tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato; si non paret absolvito.* It must be noticed how the *formula* is made to fit exactly the conditions for granting the action laid down in the edict.

[78] Below, 206.

[79] A bench of several jurors. They apparently originated in the redress provided for foreigners under early treaties (above, 102) but they appear in certain ordinary actions under the formulary system, including suits for *repetundae* (see below, 308; originally a civil rather than a criminal action), certain suits involving violence (Cic. *Tull*. 7; *Caec.* 23; Gai. 4.141), and others which seem to have as a common feature a marked public interest. Proceedings before them were speedier because *inter alia* they could sit on *dies nefasti* (cf. above, 179 n 2). See further, B. Schmidlin, *Das Rekuperatorenverfahren* (Fribourg, 1963); Pugliese, *Proc.* 2.1.194ff.; Kaser, *ZPR* 142ff.

[80] In some cases (especially *actio iniuriarum*) the *formula* consists of a *demonstratio* followed by *quantum bonum aequum videbitur condemnato* or similar words (below,213) so that there is no *intentio* which can be separated from the *condemnatio*. For the problems connected with these '*formulae* without *intentio*' Buckland 652; Wenger 141 n 3, and literature there quoted, especially Audibert, *Mélanges P. F. Girard. Etudes de droit romain dédies à M. P. F. Girard* (Paris,1912) 1.35ff. De Visscher, *Etudes* 359ff. (=*RHD*, 1925, 193ff.), holds that *intentio* is confined to *formulae in ius* and that the *si paret* clause of *formulae in factum* has a quite different nature. But see Lenel, *SZ* 48 (1928) 1ff.; Buckland, *Jurid. Rev.* 48 (1936) 35iff.

[81] 4.41: *Intentio est ea pars formulae qua actor desiderium suum concludit.* This definition, which really only fits *intentiones in ius*, is probably taken over from the *legis actio* period; Lenel, *SZ* 48 (1928) 13; de Zulueta, *Gaius* 260; cf. Schulz, *Principles* 46.

[82] Cf. below, 215 n 6.

[83] Of. above, 193 n 8.

[84] *Quidquid paret Nm. Nm. Ao. Ao. dare facere oportere*; Gai. 4.41, 131.

In a few cases the *intentio* stands alone, without anything further; this happens in what we should call 'actions for a declaration', i.e. where no remedy is sought, but the court is only asked to decide a certain question, whether e.g. A is the freedman of B or not. These *formulae* are called *praeiudiciales*.[85]

(ii) *Condemnatio*. Much more commonly, of course, the plaintiff wants not only a declaration but a condemnation, and *condemnatio* is the name given to the clause 'in which the *iudex* is given the power of condemning or absolving'.[86] Thus in the *actio certae creditae pecuniae* this clause runs 'condemn the defendant to pay the plaintiff (ten thousand) sesterces; if it does not appear absolve him'.[87] In this case, as there is a definite sum of money mentioned in the *intentio*, so there is the same definite amount mentioned in the *condemnatio*, which is consequently *certa* also. The *iudex* has only the choice of condemning in that sum or absolving. But this is not usually the position. Generally the *iudex* has himself to fix the amount of money for which he will condemn (if he finds for the plaintiff), and the *condemnatio* clause only indicates to him how he is to arrive at the sum. He may e.g. be told to take the value of something,[88] or a multiple of some value,[89] or simply 'whatever amount of money seems right and just to him'.[90] Where the *intentio* is *incerta*, the *condemnatio* simply tells the *iudex* to condemn for 'that amount' i.e. the value of 'whatever it appears that the defendant ought to pay to or do for the plaintiff'.[91] In some cases the judge's discretion is further limited by a clause (*taxatio*) which fixes a maximum above which he cannot go.[92] But in any case it is for a sum of money only that the judge can condemn; he cannot condemn the defendant to hand over a house or a slave to the plaintiff, or to perform any service for him, or do anything else whatsoever except pay him a sum of money.[93] The explanation of this apparently inconvenient rule of *condemnatio pecuniaria* is not known, nor is it certain that it goes back to the *legis actio* period.[94] It remained in force throughout the formulary system, however, and, although, as we shall see,[95] pressure might be put upon an obstinate defendant to fulfil his obligations, in the last resort all that could be done was to order him to pay a sum of money.[96]

(iii) *Adiudicatio*. This name is given to the clause appearing in the formulae of partition actions[97] which entitles the *iudex* to assign the whole or part of the subject matter of the action to one party as his sole property: 'let the *iudex* adjudge what should be adjudged him (? to him to whom it should be adjudged)'.[98]

(iv) *Demonstratio*. In certain cases the *formula* begins (after the nomination of the judge) with a *quod* ('whereas', 'in so far as')[99] clause, the object of which is to define the issue to which the *intentio*

---

[85] 'Pre-judicial', because the decision is generally needed as a preliminary to further litigation. It was e.g. forbidden that a freedman should summon his patron *in ius* without special authorisation from the magistrate, If A wanted to bring an action against B and B alleged that he was A's patron this question would have to be decided before the case could proceed.

[86] Gai. 4.43.

[87] *iudex Nm. Nm. Ao. Ao. sestertium x milia condemnato; si non paret absolvito*.

[88] Either *quanti ea res est* (i.e. at the time of *litis contestatio*) or *quanti ea res erit* (i.e. at the time of *condemnatio*), e.g. in a *condictio* for a *certa res* the whole *formula* reads as follows: *Iudex esto*: *s.p. Nm. Nm. Ao. Ao. tritici Africi optimi modios centum dare oportere*, *quanti ea res est*, *tantam pecuniam condemnato; s.n.p.a*. For *q.e.r. erit* see e.g. below, 214 n 3.

[89] E.g. in *actio furti nec manifesti* '*quanti ea res fuit cum furtum factum est*, *tantae pecuniae duplum iudex Nm. Nm. Ao. Ao. c.s.n.p.a.*' (Lenel, *EP* 328).

[90] See below, 213, on *actiones in bonum et aequum conceptae*.

[91] See e.g. the *formula* of *bonae fidei* actions, below, 205, 211f.

[92] The *taxatio* may mention a specific sum (Gai. 4.51) or the judge may be restricted in Rome other way, e.g. to a certain fund, as in the *actio de peculio et in rem verso*.

[93] Gai. 4.48.

[94] See above, 186. Kaser, *ZPR* 281, conjectures that it is rooted in the need in primitive delictal liability to buy off the wronged party's vengeance and therefore to have a fixed ransom. See also Santoro, *APal.* 30 (1967) 81ff. Kelly, *Roman Litigation* 69ff., links it with a shortage of money in the late republic and sees it as perhaps an instance of the way in which the law was weighted against the poor and weak; but see Garnsey, *Social Status* 198ff.

[95] Below, 213f.

[96] That the English common law courts could also only give damages and not specific performances appears to be not a real parallel but a coincidence, for the rule is due only to the early disappearance of 'real' actions.

[97] Above, 156.

[98] Gai. 4.42 gives *quantum adiudicari oportet*, *iudex Titio adiudicato*, but *Titio* can hardly be right; Lenel, *EP* 208.

[99] See below, n 3.

relates.[100] If e.g. the seller brings an action on the contract of sale (*actio venditi*) the *formula* reads as follows: 'Whereas the plaintiff sold to the defendant the slave who is the object of this action, which sale is the matter involved in this case, whatever on that account the defendant ought in good faith to pay to or do for the plaintiff, that (i.e. the value thereof) the *iudex* is to condemn the defendant to pay to the plaintiff; if it does not appear he is to absolve'.[101] Here the words 'whereas. … case' form the *demonstratio*, 'whatever. … plaintiff,' the *intentio*, and the remainder the *condemnatio*. A *demonstratio* is only found in actions *in personam* where the *intentio* is *incerta*, thus in all *bonae fidei* actions and in the *actio ex stipulatu*, not in *condictiones* or in actions *in rem*.[102]

(v) *Praescriptio*. There were originally two sorts of *praescriptio*: (a) *pro actore* (on behalf of the plaintiff), (b) *pro reo* (on behalf of the defendant).

(a) The *praescriptio* in this case was a clause limiting the scope which the action would otherwise have. Thus if a stipulation had been made for a number of payments at different dates and one or more, but not all, were overdue, the promisee, if he wished to sue on these, inserted a clause 'let only those payments which are due be the object of the action'.[103] If he did not insert this clause, *litis contestatio* would 'consume' his right and he could never bring an action for the remaining instalments when they, in their turn, became payable.

(b) Certain defences, subsequently raised by *exceptio*, were originally raised by *praescriptio*, e.g. in some cases an action might not be brought if its decision would prejudice that of another and more important issue. Originally if the defendant wished to make use of this rule as a defence he inserted a *praescriptio* in which the judge was told to deal with the matter only if it would not prejudice the more important case.[104]

Demonstratio, *intentio*, *adiudicatio* and *condemnatio* are the only 'parts' of the *formula* enumerated as such by Gaius,[105] but, as we have seen, they do not by any means all of them appear in every *formula*. Nor, on the other hand, do they exhaust the possible contents of the *formula*. In any concrete case it might include additions by which the attention of the judge was directed to special defences put forward by the defendant, answers by the plaintiff to these defences, and so on. To these we must now turn.

(vi) *Exceptio*. An *exceptio* is a clause, the effect of which is to direct the judge not to condemn, even though he finds the *intentio* proved, if he also finds a further set of facts to be true. It is thus always a conditional clause with a negative, i.e. beginning 'if not' or 'unless' and it is used where the defence is not a denial of the right asserted by the plaintiff, but an allegation, that even though that right may exist, it is unjust that the defendant should be condemned.[106] If, for instance, in a claim for money lent the defence is that the money was never received, or that it has already been returned, the defendant can allow the simple *formula* 'if it appear that the defendant ought to pay the plaintiff ten thousand sesterces' to stand, because, if the judge believes him, then he must find that the money is not owed; but if the defence is that the plaintiff agreed (informally) not to sue for the money, then, as an informal pact of this sort has no effect on the existence of the obligation at civil law, if the *formula* is left as it is the judge will be bound

[100] Gai. 4.40. For criticism see Schulz, *Principles*, 46.

[101] *Quod As. As. No. No. hominem quo de agitur vendidit*, *qua de re agitur*, *quidquid ob eam rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona*, *eius iudex Nm. Nm. Ao. Ao. c.s.n.p.a.*; Lenel, *EP* 299. All *b.f. iudicia* (cf. below, 211) have exactly parallel formulae.

[102] The difficulty with *formulae* containing a *demonstratio* is that they appear to be illogically constructed. The *quod*-clause apparently states a fact and yet the truth or falsehood of this fact is one of the matters which the *iudex*: has to decide; one would have expected 'whereas the plaintiff alleges that he sold. …' or something of the sort. Koschaker, *SZ* 41 (1920) 339, takes *quod* to mean 'in so far as', as elsewhere in official style (cf. Schulz, *History* 258), but even so there is no *paret* to balance *si non paret* at the end. Arangio-Ruiz, *Rariora* 25ff. (cf. Turpin, *CLJ* 23, 1965, 262f.) suggested that the *demonstratio* originated in cases where the parties were agreed on liability (or else it had been already established in some other way) and were only concerned to obtain an assessment of what was due by the defendant; the illogicality came in when the *formula* was required to embrace the question of liability also. This involves assuming that the *formula* originally ended not with a *condemnatio*, but with an order to make an assessment (e.g. *iudex aestimato*). It may be better, however, simply to accept that the formula does, illogically, state the case from the plaintiff's point of view; see Daube, *Forms* 35; cf. Turpin, *op. cit.* 270. Against Ashton-Cross, *CLJ* 18 (1960) 81ff., see Turpin, *op. cit.* 268ff. And see further, below, 221.

[103] *Ea res agatur cuius rei dies fuit*, Gai. 4.131.

[104] Gai.4.133.

[105] 4.39; Buckland 649. *Praescriptio* has been mentioned together with them above for the sake of convenience.

[106] Gai. 4.116.

to condemn. The defendant can therefore insist on the insertion of an *exceptio pacti*, so that the instruction to the *iudex* reads: 'If it appear that the defendant ought to pay the plaintiff ten thousand sesterces and if there has not been an agreement between the plaintiff and the defendant that that money should not be sued for, the judge is to condemn, etc.'[107] The result of this form is that if the judge finds that such a pact was in fact made he must absolve the defendant.

The power of authorising such *exceptiones*, which, if proved, will result in the plaintiff's losing his case although his right is perfectly good at civil law, is, equally with the power of granting actions, a source of the praetor's influence on the growth of the law, and the rules concerning these *exceptiones* are just as much part of the *ius honorarium* as are those concerning praetorian actions, but it must not be thought that all *exceptiones* are due to praetorian initiative. In a considerable number of cases rules introduced by a *lex* or a *senatus consultum* are made effective by means of an *exceptio*. If, for instance, it was desired to plead in answer to a claim for the repayment of a money loan, that the loan was contrary to the provisions of the *Sc. Macedonianum*, which forbade such loans to sons under power, an *exceptio* had to be inserted, and similarly where the defence was that the transaction on which the plaintiff founded his claim was contrary to the *lex Cincia*.[108] The form of the *exceptio* was usually in these cases 'if in this matter there has been no contravention of any statute or senatus-consult',[109] it being left apparently to the defendant to make clear *apud iudicem*, if necessary, what was the *lex* or *senatus consultum* on which he was relying.[110] The reason why the rules under these statutes were enforced by means of *exceptiones* and not by treating the forbidden transaction as void were not the same in all the cases,[111] but the use of this praetorian method is a good example of the way in which the *ius honorarium* and the civil law worked in together; nothing could be further from the truth than to conceive of them as antagonistic systems working in opposition to each other.[112]

(vii) *Replicatio*. It may happen, as Gaius says, 'that an *exceptio* which *prima facie* appears just, really acts unjustly against the plaintiff, in which case an addition is needed to assist the plaintiff'.[113] This addition is called a *replicatio*, and is in the form of a clause which tells the *iudex* to condemn even though the facts alleged in the *exceptio* are true, if a further set of facts is also true. If, for instance, a pact not to sue has been made and after that another pact whereby the debtor releases the creditor from that pact and permits him to sue again, in order that he may have the advantage of this second pact it is necessary to allow him to put in the *formula*, in answer to the debtor's *exceptio pacti*, a *replicatio pacti*, so that the whole formula reads: 'If it appear that the defendant ought to pay the plaintiff ten thousand sesterces, and there has not been an agreement ... that the money should not be sued for, or if afterwards there was an agreement that it might be sued for, the judge is to condemn, etc.'[114]

The *replicatio* was not necessarily the last word; the *formula* might be extended by a *duplicatio*, a *triplicatio*, or even further.[115,116]

---

[107] *Sp. Nm. Nm. Ao. Ao. sestertium decem milia dare oportere et si inter Am. Am. et Nm. Nm. non convenit ne ea pecunia peteretur*, *iudex Nm. Nm. Ao. Ao. sestertium decem milia c.s.n.p.a.* (see Gai. 4.119).

[108] Forbidding gifts above a certain maximum except between near relatives; see above, 87.

[109] *Si in ea re nihil contra legem senatusve constultum factum est*; Lenel, *EP* 513. The case might e.g. be that of A who is suing on a gratuitous promise which B has made by stipulation to pay him a sum of money larger than that allowed by the *lex Cincia*.

[110] In some cases an *exceptio in factum* specifying the statute was used; Lenel, *loc. cit.*

[111] See Buckland 653, and cf. above, 87.

[112] Cf. Buckland, *Tulane L.R.* 13 (1939) 163ff.

[113] 4.126.

[114] Gai. 4.126.

[115] Gai.4.128f.

[116] The Roman *exceptiones*, *replicationes*, etc. have often been compared with the pleas, replications, rejoinders, etc. of the old English system of pleading, and there is indeed this central point of resemblance, that the object of both systems was the formulation, by the allegations of the parties, of the issues to be tried between them. In the English, as in the Roman procedure agreement is necessary before the case can proceed (Stephen, *Pleading*, 5th ed., 137f., quoted by Holdsworth, *HEL* 3.627f.). But the differences are as great as the resemblance. In form the English pleadings were separate allegations of fact put into the mouths of the parties, whereas the Roman allegations are in the form of clauses conditioning a condemnation. Secondly, in the English system there had always to be a plea in answer to the declaration, even if it were only a direct traverse, whereas, if the Roman defendant's answer is a traverse he need only accept the *formula* as proposed by the plaintiff. Also, although an *exceptio* is often called a 'plea in confession and avoidance' the defendant is not, as in the English system, necessarily taken to admit the

D. CLASSIFICATION OF FORMULAE. (i) *Formulae* of civil and of praetorian actions. All *formulae* fall first of all into two classes according as they are used for civil or praetorian actions, for, as already observed, there are some cases where the praetor merely authorises a *formula* for the enforcement of a right already existing at civil law, and others where the right only exists because the praetor 'gives the action'. But the praetor does not always act in exactly the same way when he allows an action which falls outside the civil law, and we can distinguish three different sorts of *formulae* according to the different types of *actiones honorariae*.

(a) *Formulae* with a fiction. In some cases where one definite requirement for a civil law action is absent and it is desired that an action should nevertheless be permitted, the praetor exercises his powers by authorising a *formula* in which the *iudex* is simply told to assume that that requirement is present and decide accordingly. Thus the *actio furti* proper lies only between citizens, but if the thief is a foreigner an action may nevertheless be brought against him and the *formula* will be similar to that of the civil law action, but contain a fiction; it will say not 'if he ought (i.e. at civil law) to pay damages as a thief' but 'if he ought, were he a Roman citizen, to pay damages as a thief'.[117]

(b) *Formulae* in which a different name appears in the *condemnatio* from that which appears in the *intentio*. This occurs where a right which, at civil law, belongs to A is to enure, at praetorian law, for the benefit of B, or vice versa, a right which, at civil law, avails only against A is, at praetorian law, to be made the ground of an action against B. For instance if A 'has authorised his son B to purchase a thing from C, then, at civil law, B alone is liable on the contract, but this is one of the cases in which the praetor allows an action against the father on the son's contract, and the *formula* will run something like this: 'Whereas B, by authorisation of A, when he was in A's *potestas*, bought such and such a thing from C, which thing is the subject matter of the present action, whatever on that account B ought in good faith to convey to or do for C, thereto the judge is to condemn A, etc.'[118]

(c) *Formulae in factum conceptae*. Where there is no analogy in the civil law sufficiently close for the use of a fiction, and the case cannot be met in the manner described under (b), the *formula* used is one *in factum concepta*, i.e. there is no reference to a civil law conception such as 'owing' (*dare oportere*) or 'owning' (*alicuius esse ex iure Quiritium*), but the judge is simply told to condemn, if he finds certain facts described in greater or less detail in the *intentio* to be true, if not to absolve. Thus, in the example given by Gaius of an action for a penalty against a freedman who has begun proceedings against his patron without special permission, the *formula* is as follows: 'If it appear that such and such a patron has been summoned to a court by such and such a freedman contrary to the edict of such and such a praetor, the *recuperatores* are to condemn that freedman to pay that patron ten thousand sesterces; if it do not appear they are to absolve.'[119]

Opposed to such *formulae in factum conceptae*, are those *in ius conceptae*,[120] i.e. where the *intentio* refers not merely to the existence of certain facts, but to the existence of certain civil law relationships, in particular those of 'owning' and 'owing'. For instance in a *condictio* for a definite sum of money the *intentio* is 'if it appears that the defendant owes ...' (*dare oportere*); in an action on sale it is 'whatever the defendant ought to convey or do in good faith ...' (*quidquid dare facere oportet ex fide bona*); in a *vindicatio* it is 'if it appear that the thing is the property of the plaintiff at Quiritarian law' (*Ai. Ai. esse ex iure Quiritium*). Included among *formulae in ius conceptae* are thus not only those of civil law actions, but also those of praetorian actions with fictions or change of persons, because here too the *intentio* refers to the civil law conceptions of 'owning' and 'owing' the *formula* of the *actio Publiciana* being, for

---

truth of the plaintiff's first statement. In some ways the English system, though infinitely more developed, is more closely comparable with the system of the *legis actiones*, where the issue is also formulated by assertion and counter-assertion of the parties.

[117] *Quam ob rem eum*, *si civis Romanus esset*, *pro fure damnum decidere oporteret*. A fiction was similarly allowed where it was the victim of the theft who was a foreigner; Gai. 4.37. Among the most important 'fictitious' actions is the *actio Publiciana*, *ibid.* 36; cf. below, 263.

[118] Lenel, *EP* 278. The *formulae* of the other *actiones adiecticiae qualitatis* were similar in the respect here considered. Equally important examples of the same device are the *formulae* used by and against representatives (Gai. 4.86), and purchasers of bankrupt estates (*Rutiliana species actionis*, Gai. 4.35). See also below, 257f.

[119] Gai. 4.46: *Recuperatores sunto*. *Si paret illum patronum ab illo liberto contra edictum illius praetoris in ius vocatum esse*, *recuperatores illum libertum illo patrono sestertium decem milia condemnate; si non paret absolvite*. The amount of the penalty is not certain; see Lenel, *EP* 69.

[120] Gai.4.45.

instance, 'if the thing in question would have been the property of the plaintiff at Quiritarian law, had he possessed it for a year' (*si ... anno possedisset tum si eius ex i. Q. esse oporteret ...*).[121,122]

In addition to the main distinction between the *formulae* of civil and praetorian actions and those between different classes of praetorian formulae, there are also a large number of variations in type corresponding to differences in the nature of the right asserted by the plaintiff and the nature of the relief to which he is entitled either by civil or praetorian law. The *formula* is not, of course, a complete instruction to the *iudex* as to the law which he is to apply, but it does indicate briefly what it is that the plaintiff demands, and what the duty of the *iudex* is, and its form therefore varies with the variations in the nature of the claim, and the nature of the relief which it is possible to grant. Among the more important distinctions and categories are the following:

(ii) *Formulae of actions in rem and actions in personam*. Whether an action is *in rem* or *in personam* is immediately clear from the structure of the formula, for when a man is claiming *in rem*, the defendant's name does not (apart from exceptional cases)[123] appear in the *intentio* at all, in a claim *in personam* it necessarily does. Thus in the typical case of a *vindicatio*,[124] because the plaintiff is only asserting a relationship between himself and the thing he claims, the *intentio* runs 'if it appear that the thing belongs at Quiritarian law to Aulus Agerius' whereas if he is claiming *in personam*, i.e. is alleging that some other person is under a duty towards him, then to make the extent of his assertion clear it is necessary that the name of the person from whom he claims, i.e. the defendant, should be mentioned. In an *actio certae creditae pecuniae* therefore the *intentio* reads 'if it appear that Numerius Negidius ought to pay Aulus Agerius ...'

(iii) *Formulae of actiones bonae fidei*[125] *and of actiones not bonae fidei*. In a number of actions *in personam* where the *intentio* is *incerta* (*quidquid dare facere oportet*), there are added the words *ex fide bona*, the judge being thus definitely instructed to take 'good faith' into account, and to condemn for an amount representing what the defendant ought to do in accordance with good faith. Of this nature are for example all the actions on consensual contracts.[126] Thus if A has sold B a slave and wishes to claim the price or enforce any other claim arising out of the contract the *formula* will read as follows: 'Whereas A sold to B the slave in question, which matter is the subject of this action, whatever on that account B ought to convey to or do for A in accordance with good faith, that sum the judge is to condemn B to pay

[121] The difference between *formulae in ius* and *in factum conceptae* cannot be expressed simply by saying that in the one case it is a question of law and in the other one of fact which is submitted to the judge. In either case the judge has to decide all questions whether of law or of fact which arise; whether e.g. A owes B money depends not only on law but on fact, and similarly questions of law might, no doubt, arise in the action against a freedman for beginning proceedings against his patron without leave, whether for instance the act complained of amounted to an *in ius vocatio* or not.

[122] The exact meaning of *actio in factum* (as distinguished from action with a *formula in factum concepta*) is disputed. One view (Lenel, *EP* 203) is that it is simply equivalent to *actio praetoria*, i.e. would include actions with a fiction and actions with change of persons. Wenger (162 n 12, 169 n 26) believes that *actio in factum* can never mean anything but one with *formula in factum concepta*. Such *formulae* might be granted for a special case (so-called decretal action) and then forgotten, but they might also form precedents and result in the inclusion of a new pattern *formula* in the edict; when this happened the action would nevertheless continue to be called *in factum*. Against this it can be argued that some actions which are called *in factum* seem likely to have been formulated with a fiction, rather than *in factum*, e.g. D. 9.2.11.8, 17, where the *actio in factum* on the *lex Aquilia* which is given to the *b.f. possessor* is likely to have been formulated with a fiction of ownership. The expression *actio utilis*, which is also frequently found, apparently covers all praetorian actions which are based on civil law analogies, whether they have *formulae in factum* or with a fiction or of any other sort. The terms *actio in factum* and *actio utilis* thus overlap to some extent. Cf. Wesener, *SZ* 75 (1958) 220ff.

[123] The *intentio* of the *actio negatoria* does mention the defendant's name, but this is necessary to define the extent of the real right that the plaintiff is claiming; Buckland 677. So also with the *actio prohibitoria*; Lenel, *EP* 190.

[124] In the *condemnatio* the name of the defendant necessarily always appears, as it is he who, failing restitution, will be condemned to pay money to the plaintiff.

[125] The classical phrase is *iudicia bonae fidei*.

[126] The list given by Gaius (4.62) comprises the actions on *emptio venditio*, *locatio conductio*, *negotiorum gestio*, *mandatum*, *depositum*, *fiducia*, *pro socio*, *tutela* and the *actio rei uxoriae*, but the last of these seems strictly to have been *in bonum et aequum concepta* (below, 213); see Lenel, *EP* 302ff.; Kaser, *RPR* 1.337. (B. Biondi, *Iudicia bonae fidei* (Palermo, 1920) 178ff., doubts the MS.) On the other hand we must add to Gaius' catalogue the *actio commodati* (Lenel, *EP* 253) and possibly the *actio pigneraticia* (*ibid.* 255, but see Kaser, *RPR* 1.537) .In the case of *depositum* and *commodatum* the existence of an alternative (and earlier) *formula in factum* is proved by Gai. 4.47, and it may also be regarded as certain for *pignus* (Lenel, *EP* 254) and *negotiorum gestio* (*ibid.* 102). For an earlier list see Cic. *Off.* 3.70. In Justinian's time, when the phrase *iudicium bonae fidei* has lost the very definite signification that it had in the formulary period, the list of b.f. actions is considerably enlarged; see J. 4.6.28.

A; if it do not appear he is to absolve.'[127] The practical importance of the insertion of the words *ex fide bona* is considerable. In particular two points should be noticed.[128]

(a) *Inherence of exceptio doli*. If the defence to an *actio venditi*, for example for the price of goods sold, were that the defendant had been induced to enter into the contract by the fraud of the plaintiff, there is no need (as there would be if the contract were one of stipulation) for him to insist on the insertion of an *exceptio doli* in the formula. He can simply, *apud iudicem*, raise the point that it is unfair for him to be condemned in such circumstances, and the judge, if he finds the facts to be as the defendant alleges, will have to absolve him. The same is probably true of the *exceptio pacti*.[129]

(b) *Possibility of set-off* (*compensatio*). In the ordinary way, if A brought an action against B, B could not originally plead in answer that A was under an obligation to him (B); B must, if he wished to enforce that obligation, bring a separate action against A. In the case of *b.f. iudicia* however it was already in Gaius' time possible for the judge to take account of such counterclaims, provided that they arose out of the same transaction. Thus, e.g., if A and B are partners and A is suing B for a share of profit made by B out of partnership business amounting to 10,000 sesterces and B wishes to claim from A 8,000 sesterces, A's share of expenses incurred by B on partnership business, it is open to the judge to take this into account and condemn B only for the difference, 7,000 sesterces.[130]

In the later law it became possible to plead set-off to actions which were not *bonae fidei*, but the subject is too complicated and disputable for discussion here.[131]

In the law of Justinian's time the antithesis to *actio bonae fidei* was *actio stricti iuris* (or *strictum iudicium*),[132] but it is improbable that the classical law had any inclusive expression of this sort;[133] the variety of actions which were not *bonae fidei* was too great for them all to be included under one heading, and it has long been recognised that in any case the classification could not be exhaustive.[134] Instead, therefore, of attempting to formulate a definition of a 'strict action' it will be better to indicate some of the principal classes of action which are not *bonae fidei*.

(i) *Actiones in bonum et aequum conceptae*. Most closely allied to *iudicia bonae fidei* are these actions, where a phrase referring the *iudex* to equitable considerations is also found in the *formula*, but not in the same position. Instead of the words *ex fide bona* in the *intentio* there is here a clause (following a *demonstratio*) referring the *iudex* to his feeling of justice for the amount for which he is to condemn. Thus the *formula* of the *actio iniuriarum* (*aestimatoria*) ran something as follows: 'Whereas ... Aulus Agerius was (e.g.) struck in the face by Numerius Negidius ... whatever amount of money the *recuperatores* think right and fair that N. N. should be condemned to pay A. A. on that account that amount of money ...they are to condemn N. N. to pay A. A. etc.'[135,136]

(ii) *Actiones arbitrariae*. The rule of *condemnatio pecuniaria*[137] is a clumsy one; there are many cases in which damages are an insufficient remedy and the plaintiff should be given, not a sum of money, but that to which he has a right. The formulary system, though it retained the rule that in the last resort the

---

[127] *Quod As. As. No. No. hominem q.d.a. vendidit*, *q.d.r.a.*, *quidquid ob earn rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona eius iudex Nm. Nm. Ao. Ao. condemnato*, *s.n.p.a.*

[128] For other points see Buckland 680; *Manual* 364.

[129] D. 18.5.3. The text is suspect (see e.g. Schulz, *CRL* 53) but is probably in substance genuine. Biondi, *Iudicia bonae fidei* (above) 37ff., argues that the *exceptiones metus* and *rei iudicatae* were also 'inherent'.

[130] Gai.4.61ff.

[131] J. 4.6.30; Buckland 703ff.

[132] J. 4.6.28,30.

[133] Pringsheim, *SZ* 42 (1921) 649ff.; Biondi, *BIDR* 32 (1922) 61ff.

[134] Wenger 165 n 13; Buckland 679. In any case the distinction only fits non-penal actions *in personam* with a *formula in ius*. Thus *condictiones* (below, 214), the *actio ex stipulatu* and the *actio ex testamento* are counted as 'strict' because the *intentio* runs *si paret dare oportere* or *quidquid dare facere oportet*, but the words *ex fide bona* are not inserted.

[135] *Quod. ... Ao. Ao. pugno mala percussa est. ... q.d.r.a.*, *quantam pecuniam recuperatoribus bonum aequum videbitur ob eam rem Nm. Nm. Ao. Ao. condemnari*, *tantam pecuniam ... recuperatores Nm. Nm. Ao. Ao. c.s.n.p.a.* The manner in which the defendant's name appeared in the *demonstratio* is uncertain; Lenel, *EP* 399.

[136] List of actions having similar *formulae*, Buckland 686 n 8. *Formulae* of this kind were perhaps used especially where sentimental as well as pecuniary damage had to be considered; E. Costa, *Profilo storico del processo civile romano* (Rome, 1918) 57. On the whole subject see Pringsheim, *SZ* 52 (1932) 78ff.

[137] Above, 204.

judge could only condemn for a sum of money, knew, in some cases, of a roundabout way in which pressure might be put on the defendant, if unsuccessful, to induce him to fulfil his primary duty instead of waiting to be condemned in damages. This was achieved by the insertion in the *condemnatio* of a clause which had the effect of making the judge's duty to condemn the defendant in damages dependent on the defendant's not fulfilling his original duty. Thus to take the most important case as an example, if A. A. brings a *vindicatio* against N. N. to recover his property, there will appear after the *intentio* ('if it appear that the property in question belongs to A. A. at Quiritarian law') a *condemnatio* in the following form: 'and N. N. do not make restitution to A. A. in accordance with the directions of the *iudex*, the *iudex* is to condemn him in the value thereof, etc.'[138] If therefore the judge finds for the plaintiff he must announce the fact and give the defendant an opportunity of complying with his findings;[139] only if the defendant fails to comply will he proceed to a condemnation; otherwise he must absolve.

The defendant, it must be noticed, is under pressure to comply, because, if he does not do so, the judge will allow the plaintiff to assess the value of what he claims on oath (*iusiurandum in litem*) himself, and the plaintiff is not likely to be too modest in his assessment.[140]

The list of *actiones arbitrariae* (i.e. of actions with the clause referring to the discretion—*arbitrium*—of the judge) includes, in addition to the *rei vindicatio*, also all other actions *in rem*[141] and some actions *in personam*, e.g. the *actio de dolo* and the *actio quod metus causa*.[142]

(iii) *Condictiones*. Under the rubric *si certum petetur* in the edict there were two[143] pattern formulae, one for use when it was a definite sum of money that was claimed, the other for the claim of any other *certa res*.[144] The former (already quoted several times as an example) ran: 'If it appear that N. N. ought to pay A. A. 10,000 sesterces, the judge is to condemn N. N. to pay A. A. 10,000 sesterces; if it do not appear he is to absolve.'

The latter was: 'If it appear that N. N. ought to convey to A. A. 100 bushels of the best African corn the judge is to condemn N. N. to pay A. A. the value thereof; if it do not appear he is to absolve.'[145]

It is characteristic of both these *formulae* that they allege a civil law debt (*dare oportere*) without mentioning in any way the cause of action.[146] They were used, in fact, in some cases where the cause of action was a contract— if A had lent B a sum of money or a sack of corn (*mutuum*), if B had promised A a sum of money or any other *certa res* by stipulation—but they were also used in a number of non-contractual cases. If, for instance, A had paid B 10,000 sesterces in the mistaken belief that he owed B that sum, he could get the money back by an action of this sort as money paid when it was not owed (*indebitum*). Indeed a number of causes of action came to be recognised because these *formulae* were available for cases where it was difficult to assign a definite cause of action for the plaintiff while it was felt to be unjust that the defendant should retain the money (or other thing) that he had got,[147] e.g. if A had given money to B as a dowry because B was going to marry his daughter, and the marriage in fact never took place. The word used for bringing an action of this sort was *condicere*,[148] and hence *condictio*

---

[138] *neque ea res arbitrio iudicis Ao. Ao. restituetur*, *quanti ea res erit tantam pecuniam iudex Nm. Nm. Ao. Ao. c.s.n.p.a.*

[139] The word commonly used for this finding of the judge is *pronuntiare*; see H.-S. s.h.v.

[140] The judge is not bound to accept the plaintiff's figure but, at any rate where the defendant's refusal to restore appeared to be inexcusable, he would presumably do so. This is indeed given as the rule in D. 12.3.2, but other texts conflict; D. Medicus, *Id quod interest* (Cologne/Graz, 1962) 205ff., 248f.

[141] Except probably those whereby praedial servitudes were claimed; Lenel, *EP* 193. But see Broggini, *Iudex* 74 n.

[142] There is considerable doubt as to the list; Buckland 659; Kaser, *ZPR* 257.

[143] Lenel, *EP* 232. Perhaps a third, with a slave instead of the hundred bushels of corn. served as a model for claims of a 'species' as opposed to those of a 'genus'; Lenel, *EP* 240.

[144] Above, 193 n 8.

[145] *S.p. Nm. Nm. Ao. Ao. sestertium decem milia dare oportere iudex Nm. Nm. Ao. Ao. sestertium decem milia c.s.n.p.a. and S.p. Nm. Nm. Ao. Ao. tritici Africi optimi modios centum dare oportere quanti ea res est tantam pecuniam Nm. Nm. Ao. Ao. c.s.n.p.a.* Though the *intentio* is *certa* in both cases the *condemnatio* of the second form is *incerta* because the judge has to arrive at a money value of the corn for himself.

[146] Compare the *legis actio per condictionem*, above, 193.

[147] Cf. below, 284f.

[148] Thus Gaius (3.91), in explaining the possibility of claiming return of *indebitum*, says *proinde ei condici potest 'si paret eum dare oportere' ac si mutuum accepisset*. The word is used presumably because actions with such *formulae* took the place of the old *legis actio per condictionem*.

may be said to be an action alleging a civil law debt, but not mentioning any cause of action.[149] In this sense it is opposed, not only to praetorian actions, but also to civil law actions with a *demonstratio*, whether 'strict' (e.g. *actio ex stipulatu*) or *bonae fidei*.[150,151,152]

E. TRIAL AND EXECUTION. The formulary system appears to have. brought with it no important change in the proceedings *apud iudicem*. All we can say with any certainty is that the brief statement of the case with which the trial had previously opened[153] had now become unnecessary, as the *formula* itself was sufficient to inform the judge what the case was about. Judgment too was delivered as before.[154] We do however find great changes when we come to execution, the most important innovation being the introduction of execution against the property of the judgment debtor. Not that execution against the person was abolished; it remained, on the contrary, normal throughout the classical period,[155] and common even in the late empire, but already in the last century of the republic it was no longer the only possibility.[156] Apart from this change the most important reform is that it is no longer permissible to proceed at once to execution after the days of grace; instead we find the curious system that the judgment creditor must first bring another action, this time an action on the judgment—*actio iudicati*. As in the case of every other action, there must be summons and *editio actionis*, but the cause of action is now the judgment itself. In the normal case, however, there will be no *litis contestatio* and no trial before a *iudex*, because it is usually hopeless for the defendant to dispute the judgment. He will generally either pay if he can, or, if he cannot, will admit his liability and then execution will begin. It may, however, happen that he does wish to dispute the matter. He cannot, of course, dispute the judgment on its merits,[157] but he may wish to plead that it is invalid, e.g. for want of jurisdiction or want of form, or that he has already satisfied it. If he does this there will be *litis contestatio* and trial in the ordinary way, but there are two rules which must have effectively discouraged frivolous defences; first that the defence will not be admitted at all unless the defendant furnishes security,[158] and secondly that if he loses the case he will be condemned in double the amount of the original judgment. The result is thus in effect much the same as it was under the system of *manus iniectio iudicati* where no trial could take place unless the defendant found a *vindex*, and condemnation was similarly for double if the defence was unsuccessful.[159]

If the defendant neither pays nor defends[160] the *actio iudicati* then the magistrate issues his authorisation to the plaintiff to take him away into custody (*duci iubet*), that is to say, his position is the

[149] Originally only claims for a *certum* could be made in this way. The *condictio incerti* is very doubtfully classical; Buckland 683; Lenel, *EP* 156ff; Schulz, *CRL* 614; *contra*, Kaser, *RPR* 1.599.

[150] We cannot say that this usage was at all strict in the classical period, for the following reasons; (i) the name for the action claiming *certa pecunia* was *actio certae creditae pecuniae*, not *condictio* (Lenel, *EP* 234); (ii) Gaius says (4.5) that actions *in personam* with an *intentio* referring to *dari fieri oportere* are called *condictiones* (unless *fierive* is a gloss, de Zulueta, *Gaius* 229; but the contrast in the text is then unbalanced); and again (4.18) that a *condictio* is an action *in personam* with an *intentio* claiming *dari oportere*. The definition would include *actio ex stipulatu* (although that has a *demonstratio*) and even the *actio certi ex testamento* although that certainly contained a reference to the cause of action (Lenel, *EP* 367), This however is a minor matter of terminology—the important thing is to realise in what cases these particularly simple *formulae* were used.

[151] The difficulties in understanding *condictio* come in part from the close connexion here between the substantive law and the law of procedure. If *condictio* is the name of a certain type of action it is also the name under which a very important class of 'quasicontractual' causes of action have always been known to the Roman lawyer; Schulz, *CRL* 610ff.; Kaser, *RPR* 1.592ff.; 2.304ff.

[152] The three categories here given do not by any means exhaust the types of action which are not *b.f.* Actions not *b.f.* include all those *in rem*, all *in factum*, all *condictiones* and a few actions which, though 'strict' state the ground on which they are brought.

[153] Above, 185.

[154] *Ibid.*

[155] The *lex Rubria* (*FIRA* 1.169, Bruns 1.97) allows the local magistrates to order *ductio* (xxr.15), but reserves *missio* for the praetor (XXI 1.47).

[156] *Missio in possessionem* followed by *bonorum venditio* existed in 81 B.C., the date of Cicero's *pro Quinctio*, though judgment is not actually mentioned as one of the grounds on which it might be granted (5.60). How much further back it goes is uncertain; Kaser, *RPR* 301.

[157] Appeal is an innovation of the empire; see below, 400.

[158] Gai. 4.102. This must no doubt sometimes have been a hardship to poor and friendless persons who really had an honest defence.

[159] Above, 189.

[160] The possibilities are payment, defence, admission of liability (*confessio*) and refusal to defend, i.e. failure to concur in the steps necessary for *litis contestatio*. In either of the last two cases the praetor could order *ductio*, for he could always do this on

same as it would have been under the system of *manus iniectio* after the disappearance of the creditor's right to kill or sell his debtor.[161]

But the magistrate may also now authorise execution against the goods of the debtor. In this case he issues a decree putting the judgment creditor in possession of all the debtor's property (*missio in bona*); the creditor then advertises the seizure in order to give other creditors the chance to come in and claim also; at the end of thirty days the creditors meet and elect a *magister* from among their number who is to proceed to the sale. This *magister*, after the lapse of a further period of days, during which he prepares a list of the property and of the debts, then sells the goods to the highest bidder (*bonorum venditio*),[162] that is to say to the person offering the creditors the highest percentage on their debts. If, for instance, the buyer offers a quarter, then he is given a right to the debtor's assets,[163] in return for which he has to pay each creditor a quarter of what the debtor owed that creditor.

The process, it will be seen, is in effect bankruptcy; at this period in Roman law a creditor must make his debtor bankrupt in order to enforce the payment of the smallest sum that the debtor will not pay voluntarily; he cannot just take one piece of property sufficiently valuable to satisfy his debt and sell that. The method is clumsy, for it often means imposing much greater hardship on the debtor than is necessary to secure the creditor his rights. But from the ancient point of view there was no objection to this; the object was not that the state should do for the creditor what the debtor would not do, but that the state should help the creditor to put pressure on the debtor and punish him if he did not pay his debts, a result normally accomplished by locking him up, but one which could also be achieved by taking away all his property; that the creditor was also paid was a secondary, not a primary, consideration.

The relationship between the two forms of execution is to some extent doubtful. We do not know whether *missio in bona* always accompanied the authorisation to imprison the debtor, or whether personal execution was possible without execution against the goods; normally at any rate the two would go together. It seems clear, however, that the creditor could waive his right to imprison and rely on *missio* alone.[164] In any case there existed, probably only from the time of Augustus[165] however, a method by which the debtor could in many cases escape execution against his person. This was by making a voluntary surrender of his property (*cessio bonorum*) to his creditor or creditors. This surrender took the place of the forcible putting in possession by the magistrate and led similarly to a sale of the property, but it had great advantages for the debtor. He escaped the *infamia* which resulted from an enforced sale and he remained for ever free from danger of imprisonment for his debt.[166] Not all persons, however, could avail themselves of this means of escape; it was closed probably not only to those whose insolvency was due to their own fault, but also to those who had no property worth the mention to hand over to their creditors.[167]

F. ORIGIN OF THE FORMULARY SYSTEM; DATE AND EFFECT OF THE LEX AEBUTIA. According to Gaius[168] the abolition of the *legis actiones* (except in cases before the centumviral court[169] and in the

confession or failure to defend in an action for *certa pecunia* (Lenel, *EP* 410), and an action on a judgment is necessarily for *certa pecunia*.

[161] Above, 191ff.

[162] Gai.3.77ff.

[163] He has an interdict to recover property in anyone else's possession (Gai. 4.145) and can bring a 'Rutilian' action against the judgment debtor's debtors, in which the *intentio* will contain the judgment debtor's name, the *condemnatio* his own (Gai. 4.35). Cf. above, 209.

[164] Wenger 232.

[165] It is referred to as *cessio e lege Julia* (e.g. Gai. 3.78), i.e. probably Augustus' law on procedure of 17 B.C., though Mommsen (*Rom. Gesch.* 3.536) refers it to Caesar.

[166] If the creditors were not paid in full and the debtor afterwards acquired enough property to make it worth while (J. 4.6.40; D. 42,3.4; 6; 7), the creditors might bring another action against him and proceed to another sale, but in such action he had the so-called *beneficium competentiae*, i.e. in the *condemnatio* of the *formula* was a clause limiting the condemnation to *id quod facere potest*, i.e. what the defendant had. He could therefore always pay the amount of the judgment and need not suffer personal execution. The debtor whose goods had been forcibly taken had similarly the *beneficium competentiae*, but only for a year, whereas the man who had made *cessio* had it for ever (Lenel, *EP* 432), In the law of Justinian's day the *beneficium* meant that the debtor was allowed to retain the necessaries of life; Buckland 694.

[167] Woess, *SZ* 43 (1922) 485ff. There is very little direct evidence for either of these exceptions but there certainly must have been exceptions, for otherwise all insolvent debtors would have made *cessio*, and yet we know that personal execution survived.

[168] 4.30f.

proceeding for *damnum infectum*)[170] and their supersession by the formulary system was the result of a certain *lex Aebutia* and two *leges Iuliae*. This brief statement leaves us in doubt on two fundamental questions. We do not know the date of the *lex Aebutia*, though the *leges Iuliae* are plainly the Augustan procedural legislation of 17/16 B.C.;[171] and we do not know what the relationship was between the statutes, or to what extent the introduction of the formulary system was due to legislation at all. For although Gaius makes it clear that the abolition of the *legis actiones* was expressly enacted, he says no more of the introduction of the formulary procedure than that its use was a result of the legislation.[172] The only other reference to the *lex Aebutia* is in a passage of the *Noctes Atticae*[173] in which Aulus Gellius recalls that he put to a lawyer friend of his the question of the meaning of *proletarius* in the XII Tables.[174] The friend did not know the answer, and justified his ignorance by the plea that as a lawyer he was concerned only with what was still in force, whereas '*proletarii* and *adsidui* and *sanates* and *vades* and *subvades* and twenty-five *asses* and talions and searches *lance et licio* have vanished, and all those antiquated things from the XII Tables (except for *legis actiones* in centumviral cases) have with the passing of the *lex Aebutia*, fallen asleep'.[175] Here there is no mention of the formulary system at all, and the use of the words 'vanished' and 'fallen asleep' suggest that the effect of the *lex* on the 'antiquated things, was indirect rather than direct. In regard to the *legis actiones* themselves this is indeed obviously true, both because there would otherwise have been nothing left for the *leges Iuliae* to do, and because there is ample evidence that *legis actiones* were still in use in the time of Cicero.[176] It is therefore safe to assume, as a minimum, that the *leges Iuliae* finally abolished the *legis actiones* (subject to the exceptions noted).

There remain the questions of the date and scope of the *lex Aebutia*. The two are obviously inter-related—if we could determine the date we could with greater confidence infer the probable scope, and vice versa—and there is a danger of arguing in a vicious circle[177] from a conjectural answer to one to an even more conjectural answer to the other. It is important therefore to establish the limits beyond which conjecture begins. The date of the *lex Aebutia* must obviously be before the *leges Iuliae*, and probably before the beginning of the first century B.C. For if the *lex* had been passed only shortly before the *leges Iuliae* it could hardly have escaped mention along with them in the later sources; and if it had been passed in the time of Cicero he would surely have referred to it. That much can be said with reasonable confidence, but when one attempts to determine the *terminus post quem* one is dependent on one's sense of historical probability. Granted that the *lex* was in some way concerned with procedural reform, what is the earliest date by which the need for such a reform is likely to have been felt and to have been met by legislation? Inevitably opinions differ, but there is general agreement that it cannot have been earlier than the first part of the second century.[178]

---

[169] Above, 197, Before a case went to the court the formalities of the *legis actio sacramento* were gone through before the *praetor urbanus* or *peregrinus*.

[170] Cf. below, 227. It also remained true that where collusive actions were used for creating or transferring rights (*manumissio vindicta*, *cessio in iure*) the form was always that of the *legis actio*. The explanation of the exceptions is that *litis contestatio* by agreement on a *formula* is intimately bound up with the appointment of the single *iudex*; where this is not needed, either because, as in *in iure cessio*, there is no question to try, or in the case of centumviral matters because the court is already constituted, then the only procedure possible is the old one.

[171] Girard, *SZ* 34 (1913) 295ff.; see further, below, 225,

[172] 4.30: *Per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones*, *effectumque est ut per concepta verba*, *id est per formulas*, *litigaremus*. For a parallel to this use of *effectum est* to indicate the indirect result of an enactment see Gai. 2.254.

[173] 16.10.8.

[174] Tab. I.4; above, 176n G.

[175] *Cum 'proletarii' et 'adsidui' et 'sanates' et 'vades' et 'subvades ' et 'viginti quinque asses' et 'taliones' furtorumque quaestio 'cum lance et licio' evanuerint omniaque illa Duodecim Tabularum antiquitas*, *nisi in legis actionibus centumviralium causarum lege Aebutia lata consopita sit. ...*

[176] For the evidence see Jobbé-Duval, *Mél. Cornil* 1.542ff.; Marrone, *APal.* 24 (1955) 539f. On the question of the *l.a. per condictionem* see below, 223f.

[177] See Pugliese, *Proc.* 2.1.20ff., 58.

[178] Girard, *Mélanges* 1.99f. argued that the *tripertita* of Sextus Aelius (consu1 198; see above, 92) provided a *terminus post quem*, since the three parts of which it was composed were the XII Tables, *interpretatio*, and *legis actiones*, without any mention of the formula; but just as 'XII Tables' must have included what subsequent legislation there was, so also '*legis actiones*' could have included what innovations there had been by formula; see Kaser, *St. Albertario* 2.46ff. Kaser himself inclines on general grounds to a date in the first half of the second century, Pugliese (*Proc.* 2.1.58) to one in the last decades of the century.

That the *lex Aebutia* created the formulary system is very unlikely. Such changes are seldom made at one stroke,[179] least of all in a period as relatively primitive as that with which we are concerned. The *formula* is more likely to have evolved within the jurisdiction of the praetor, and there are two areas in particular in which the need for it would have been felt—that of the consensual contracts and other relationships actionable by *bonae fidei iudicia*, and that of commercial relations with peregrines. The two areas are plainly not mutually exclusive, since the most obvious form that commercial relations with foreigners would take would be that of sale. It is true that if the development is taken to have occurred after 242 B.C. the two areas would have been within the jurisdiction of different praetors, and there has been debate on the question whether the origin of the *formula* should be attributed to the urban or the peregrine praetor.[180] But on the one hand it is unlikely that the need to do justice in relations with peregrines had not arisen before 242 B.C., and on the other hand there is no need to assume that the formulary system sprang from only one root. We may therefore consider the possibility of a praetorian origin of the formulary system in each of the two areas without embarking on this further question (for the resolution of which there is in any case no sufficient evidence).

It has been suggested[181] that the *formula* might have originated within the *legis actio* as a convenient method of recording the issue between the parties at the end of the proceedings *in iure*. Certainly some aide-memoire would have been useful especially in the *l. a. per condictionem* and (after the *lex Pinaria*) the *l. a. sacramento*, since there was a thirty days' delay between the determining of the issue and its presentation to the *iudex*, but it has been objected[182] that the style of the *legis actio* would lead one to expect a formulation in the first person rather than the third. Thus, Gaius[183] says that when the *l. a. per iudicis arbitrive postulationem* was used for the partition of an inheritance (when of course the issue was not one of liability, but of how much each party should have) parties did not use the normal dialogue, in which, as we have seen, there is an assertion of a claim by the plaintiff and its denial by the defendant, but that there was simply a statement of the cause of action (*nominata causa ex qua agebatur*) and a request for an *arbiter*. Since the usual dialogue is cast in the first person,[184] one would expect this statement of the cause (which evidently has some affinities with the supposed aide-memoire) to take the same form. On the other hand, Arangio-Ruiz[185] long ago propounded in this connexion an attractive explanation of the apparently odd wording of the formulary *demonstratio*. As we have seen,[186] the word *quod* (if taken in its most obvious sense of 'whereas') appears to admit the plaintiff's claim and therefore to leave nothing for the *iudex* to settle except the question of how much the defendant shall pay. And this, suggested Arangio-Ruiz, was exactly what in its earliest origin the *demonstratio* did mean. For in the case of a partition action under the *legis actio*, or where the defendant had, admitted liability by *confessio in iure* on other claims, the assess*ment* of the amount payable was remitted to a *iudex* or *arbiter*[187] in a primitive *formula* containing simply a *demonstratio* and an order to make an *adiudicatio* or an *aestimatio*. From this it would be a short step to the use of the same device for settling the *quantum* due on any other agreed claim, even though it were not recognised by the *ius civile* (e.g. an informal sale). And in course of time, as the possibility of litigating such 'extra-legal' relationships became familiar, the *formula* would be extended to allow consideration of the question not only of the quantum but also of liability itself (i.e. whether the sale or other relationship out of which the claim grew had in fact been made). This would have been the origin of the *bonae fidei iudicia*.

---

[179] The great reform of English procedure by the Judicature Act of 1873 was precede(l by piecemeal legislation, the most important of which was included in the Common Law Procedure Acts of 1852-1860.

[180] See Pugliese, *Proc.* 2.1.36ff.

[181] E.g. Luzzatto, *Procedura civile romana* 3 (Bologna, 1950) 150ff,; G. Jahr, *Litis contestatio* (Cologne/Graz, 1960) 24ff., 84ff. For earlier variants of this view see Pugliese, *Proc.* 2.1.23ff.

[182] Pugliese, *Proc.* 2.1.29.

[183] 4.17:1.

[184] Above, 182.

[185] *St. econ.-giur. della Facolta di Giurisprudenza di Cagliari* 4 (1912) 75ff. (=*Rariora* 25ff.); and see Turpin, *CLJ* 23 (1965) 260ff.

[186] Above, 205 n 3.

[187] Or *recuperatores*? One argument adduced in favour of an origin of the formulary system in the jurisdiction over peregrines is that *recuperatores* are not found in the *legis actio* system but do appear in some formulary actions, and that they themselves originate in international dealings; cf. above, 203 n 7.

An apparent difficulty in the way of any attribution to the praetor of the origin of the *bonae fidei iudicia* is that in classical law they plainly belong to the *ius civile* and not to the *ius honorarium*. The *intentio* asserts an *oportere*, and this, at least within the formula, is taken as the mark of the civil law obligation.[188] How then could it be a praetorian creation? The explanation probably lies[189] in the qualification which follows the *oportere* and gives the actions their name. The *intentio* claims *quidquid dare facere oportet ex fide bona*—whatever it is proper on the basis of good faith that the defendant should convey or do.[190] In the ordinary (so-called *stricti iuris*) *intentio*[191] the unqualified *oportet* refers in origin to a basis in *lex* or *interpretatio*, but here the standard is the extra-legal one of good faith. No doubt the practice had grown up of entering into informal transactions outside the civil law in reliance on recognised standards of good faith. As has been said above, we need not inquire whether the practice first grew up in dealings between citizens or in those involving peregrines;[192] what matters is that the praetor would now be directing the *iudex* to determine what the obligations of the parties were in the light of those same recognised but extra-legal standards. This would in the classical law have been categorised as *ius honorarium*, but in early times when the law-making powers of the praetor are relatively undeveloped and systematic thought in its infancy, the lines have not yet been sharply drawn.[193,194] In the classical law, moreover, when the *oportere* is seen as referring to the civil law, the *ex fide bona* clause came to qualify also the *condemnatio* and to give the *iudex* a wide discretion in *asses*sing the extent of liability.[195]

If it be accepted that the formulary system was in existence in some form before the *lex Aebutia*, what was the purpose of the *lex*? The view which held the field until quite recently was that of Wlassak,[196] who maintained that until then there had been no formulary actions within the area of the *ius civile*, i.e. that the praetor had given actions only when no *legis actio* was available. The innovation made by the *lex* was to allow the giving of formulary actions even for civil law claims. In such cases therefore there was a choice between the old and the new. The *leges Iuliae* simply abolished this choice (subject to the exceptions already mentioned). In this way Wlassak could account for the evident fact that in the time of Cicero both formulae and *legis actiones* did exist side by side,[197] and also to give significance to Aulus Gellius' statement that the *legis actiones* 'fell asleep'. For the *leges Iuliae* would have done no more than recognise the accomplished fact that the old had been unable to hold its own in competition with the new. In recent years, however, opinion has moved away from Wlassak in favour of a less sweeping theory

[188] See above, 209f. Cicero, *Off.* 3.61, speaks of the *bonae fidei iudicia* as being *sine lege*.

[189] Kunkel, *Fschr. Koschaker* 2.1ff.; Kaser, *SZ* 59 (1939) 68ff.; 61 (1941) 179ff. Against the variant version proposed by Wieacker, *SZ* 80 (1963) 1ff. see Turpin, *CLJ* 23 (1965) 264ff.; Kaser, *ZPR* 110 n 30.

[190] Daube, *Forms* 16ff.

[191] Above, 203; cf. 211.

[192] We do not know how early the *bonae fidei iudicia* were recognised, but in D. 19.1.38.1 an opinion of Sextus Aelius on an *arbitrium* concerning sale is quoted, and this must refer to something outside the *legis actio* system. The evidence of Plautus is inconclusive (Ferrini, *Opere* 3.49ff.).

[193] Schulz, *History* 83.

[194] Magdelain, *Le consensualisme dans l'édit du préteur* (Paris, 1958) 109ff. (cf. *id.*, *Actions Civiles*), while accepting the broad thesis outlined above, seeks the origin of the *bonae fidei iudicia* in an edict and in particular in the edict *de pactis*, in which the praetor says *pacta conventa servabo*. The contracts would later come to be assimilated into the civil law, and the scope of the edict confined to its classical scope, i.e. to those agreements which are valid only *iure exceptionis*. But this involves the assumption of a degree of forgetfulness which it is difficult to credit. It is easier to believe that the *bonae fidei iudicia* originated before the practice of issuing edicts in such matters had arisen, and therefore that their origin was unrecorded.

[195] Another possible root of the *formula* is provincial practice, but the evidence of Cicero's time (e.g. Cic. *Verr.* II.2.37-42) is too late to be significant. Partsch, *Schriftformel*, cites also inscriptions of the second century (the earliest being from Magnesia, probably c. 190 B.C.; *FIRA* 3.501) in which the senate is shown intervening to settle a dispute between independent cities and following a method which echoes the formulary procedure, but it is more likely that the senate would borrow procedure from Rome itself than from provincial practice; Pugliese, *Proc.* 2.1.30ff.

[196] *Prozessgesetze* 1.104, 128ff., 153f.; 2.17ff., 362ff. He was followed especially by Girard (*Manuel* 1057; *Mélanges* 1.67ff.), who, however, went further and maintained that until the *lex* there were no formulary actions at all between citizens, and that the great powers of the praetor, especially that of refusing actions—*denegatio actionis*—did not exist until that time. He found support for this in what he saw as a sudden multiplication of examples of praetorian activity in the years after c. 127 B.C. But so late an extension of the benefits of formulary actions for claims not recognised by the *legis actiones* is scarcely conceivable, and it is equally difficult to believe that the praetor was transformed overnight from an automaton into a source of rapid changes in the law (see Lenel, *SZ* 30 (1909) 329ff., esp. 331). And the evidence for Girard's date is unconvincing (Mitteis, *RPR* 52 n 30). Kelly, *Irish Jurist* 1 (1966) 344f., conjectures that until the *lex* the praetor had no power to override the civil law.

[197] For *legis actiones* see above, 198 n 2; and Cicero, *Rosc. Com.* 24, says *sunt formulae de omnibus rebus constitutae*.

propounded by Kaser.[198] Kaser's principal criticism of Wlassak is that he sees the *lex Aebutia* through modern eyes as a general reforming statute, whereas everything that we know of the second century and of the style and content of its legislation would lead us to expect something limited and narrow. Moreover, at this time substance cannot be separated from procedure, and a reform of the kind envisaged by Wlassak would therefore have been much more sweeping in its effect than a corresponding reform in a modern system. Kaser himself accordingly suggests a more limited purpose for the *lex*. Starting from the fact that although we hear of all the other *legis actiones* in the time of Cicero, there is no mention of the *l.a. per condictionem*, he suggests that what the *lex Aebutia* did was to allow a formulary action only for claims covered by the *condictio*. In other words, it was only in this area that the choice postulated by Wlassak was made available, and since the formulary action was obviously preferable, it drove out the *l.a. per condictionem*. It is evident, however, as we have seen, that in the late republic there were other formulary actions for civil law claims, and Kaser therefore supposes that the praetor, encouraged by the success of the *condictio*, must in the course of time have allowed other formulary actions as alternatives to *legis actiones*. But these, having no authority in *lex*, would have been only *iudicia imperio continentia* and not, like the *condictio*, *iudicia legitima*.[199] The most important practical consequence of this would have been that bringing the formulary action would not bar a subsequent proceeding on the same cause by *legis actio*,[200] and there would therefore be a reason for the survival of the other *legis actiones*, by contrast with the assumed withering away of the *l.a. per condictionem*, and the *leges Iuliae*.

Kaser's view is now widely accepted, but there is room for doubt. The central supposition that the *l.a. per condictionem* did not survive the *lex Aebutia* rests on an argument from silence, and the references to the other *legis actiones* are not so numerous as to make the argument compelling. Again, it is not obvious why the *lex* should have abolished the most recent and least formal of the *legis actiones*.[201] And it is difficult to account satisfactorily for the width of language used by Aulus Gellius' lawyer friend (even though he does not present the disappearance of the things he mentions as the direct consequence of the *lex*). To these and other reasons for hesitation Birks[202] has added another. Both Wlassak and Kaser assume that where two modes of procedure are in competition, the good will necessarily drive out the bad—that because objectively, from the point of view of doing justice between the parties, the *formula* is better than the *legis actio* (provided both are *iudicia legitima*), the latter will necessarily wither away if the choice is free. But the history of English law and a consideration of human nature shows that this is not so. The parties to an action are not concerned with doing abstract justice by the best method. They want to win the case, and they, or their lawyers, will seize any tactical advantage which procedural devices offer. In the Roman context this will sometimes lead to the disappearance of the *legis actio*, as in the case of Aulus Gellius' twenty-five *asses*; the plaintiff will prefer the *actio aestimatoria iniuriarum*, because it will give him more. But it will not always be so. One advantage of the formulary procedure from the objective point of view is that by means of *exceptiones* etc. it permits a far more exact and equitable definition of the issue than is possible in the rigid forms of the *legis actio*. A plaintiff might therefore see an advantage in proceeding by *legis actio* instead of by the alternative formulary action, if he could thereby deprive the defendant of the ability to plead an *exceptio*. (How far he could in practice do this we cannot, it is true, be sure;[203] Gaius[204] says that there were no *exceptiones* in the *legis actio*, and this is inherently likely, but the praetor could perhaps induce the plaintiff to modify his position by the threat of *denegatio actionis*; but even if this is so, the plaintiff would still be better off than in the formulary action in which the defendant had only to ask for an *exceptio* to be sure of getting it.) More often, no doubt, a plaintiff would find that by suing under the *formula* he could obtain an advantage not

[198] *St. Albertario* 1.27ff., restating a thesis put forward earlier by Eisele and others (citations on p. 29).

[199] For the distinction and its consequences see Gai. 4.103ff.; Buckland 688; cf. Bonifacio, *St. Arangio-Ruiz* 2.207ff.

[200] Except presumably by *denegatio actionis*; cf. text immediately below.

[201] Kaser, *St. Albertario* 1.43ff., holds that the *sponsio et restipulatio tertiae partis* (above, 194) was compulsory in the *l. a.*, but optional in the formulary action. It therefore made possible litigation without penalty for the loser and favoured poorer persons in n time of tight credit. But since the option is in any case the plaintiff's, whereas the poorer party is likely to be the defendant, this does not seem very persuasive.

[202] *Irish Jurist* 4 (1969) 356ff.

[203] See Kaser, *ZPR* 53f. de Zulueta, *Gaius* 231.

[204] 4.108.

available in the *legis actio*, such as the ability to sue by *cognitor*, or to insert a *praescriptio pro actore*,[205] but so long as there were advantages to be derived from the *legis actio* there could be no question of its withering away. Birks therefore returns to a modification of Wlassak's thesis. Before the *lex Aebutia* was passed the praetor had created formulary actions for civil law claims, but these were of course *imperio continentia iudicia*. Litigants would exploit the advantages to be derived from the choice between *formula* and *legis actio* (most obviously the possibility of bringing a *legis actio* after failure in a formulary action), and this would lead to the passing of the *lex Aebutia* to give to the formulary actions the status of *iudicia legitima*. The result would be a growth in the use of formulary actions at the expense of the *legis actio*, but plaintiffs would continue to find sufficient advantage in the latter to ensure its survival—and to call eventually for legislation to ensure that the objectively better system alone should survive. This would have been the reason for the intervention of the *leges Iuliae*.

There remains the question why the reform should have been contained in two *leges Iuliae*. We do indeed hear of two *leges Iuliae de iudiciis*, but only one was concerned with *iudicia privata*, the other dealing on the contrary with *iudicia publica* (i.e. criminal trials). Since there seemed to be no reason why the latter should have anything to say about the abolition of *legis actiones*, Wlassak[206] conjectured that there had been altogether three *leges Iuliae*, one dealing with *iudicia publica* and two with the *iudicia privata*, of which one concerned Rome itself and the other *municipia* and colonies. There is, however, no trace of any such *lex* dealing comprehensively with trials outside Rome, and it is normally assumed[207] that the jurists were in the habit of referring to the two *leges* dealing with *iudicia publica* and *privata* as if they were a single enactment, although here in fact only one was in question. Kunkel[208] has recently proposed another explanation. As we shall see,[209] he argues that for murder and other wrongs there was a proceeding by *legis actio sacramento* leading to the *addictio* of the wrongdoer, and that this private capital proceeding, though it would have been in practice superseded by the growth of the more normal criminal jurisdiction of the *quaestiones* in the later republic, would have been formally abolished only by Augustus. And since it had more affinities with criminal proceedings than with a private action, its abolition would have been enacted in the *lex Iulia de iudiciis publicis*.

G. PRAETORIAN REMEDIES OTHER THAN ACTIONS. The history of procedure during the republic must not be left without some mention of those praetorian remedies which lie outside the system of actions, but contributed hardly less than the actions and *formulae* to the growth of the *ius honorarium*. The activity of the magistrate in the ordinary procedure leading to an action is a result of that part of his function known as *iurisdictio*, but with the remedies we have now to discuss the position is different. Here we have to deal with orders issued by the praetor as a holder of *imperium*.[210] These orders are however issued for the purpose of the administration of justice; the rules which the praetor adopts with respect to their issue, or at least some indications of them, appear in the edict, and, as we shall see, the praetor generally avoids using direct means of enforcing obedience, so that any dispute concerning them will very often lead to an action which has to be tried in the ordinary way.

The remedies which we have to consider under this head are of four kinds: (i) Praetorian stipulations, (ii) *Missiones in possessionem*, (iii) *In integrum restitutiones*, (iv) Interdicts.[211]

---

[205] Cic. *Rosc. Corn*. 32; *de orat.* 168. In the cases in which we know that the *formula* was used there was a particular advantage to be gained; Kaser, *St. Albertario* 2.52f.

[206] *Prozessgesetze* 1.191ff.

[207] Girard, *Manuel* 1059; *SZ* 34 (1913) 341ff.; Pugliese, *Proc*. 1.65!.

[208] *Krim*. 120.

[209] Below, 311,

[210] See above, 47 n 9.

[211] That all four types of remedy existed before the end of the republic is clear, but otherwise their history raises many difficult questions, the answers to which depend in part on the view taken of the magistrate's powers before the *lex Aebutia*. Some interdicts, it is agreed, must have existed before that law, for though the reference to *utrubi* in Plautus' *Stichus* (acted 200 B.C.) 696, 750, is very. doubtful {cf. Watson, *Property* 86f.), we find a form of words obviously based on that of the interdict *uti possidetis* in use for the settlement of a dispute between two Greek cities about the middle of the second century (above, 263 n 4). From the latter example it would also seem likely that the procedure was by this time out of the stage in which the magistrate settled everything himself (below, 232), for the decision is referred to the assembly of a third city just as in a private matter it is referred to a judge. That *missiones* were known to Q. Mucius Scaevola (consul 95 B.C.) is clear from D. 41.2.3.23 and, since he is there quoted as making a distinction between different kinds, they can hardly have been quite new in his time. A stipulation *damni infecti* is reported (Pliny, *HN* 36.2.2) to have been enacted as early as 123 B.C. (cf. Karlowa 2.1241), and the rather

(i) *Praetorian stipulations*. In some cases the praetor[212] supplements what he considers to be the deficiencies of the civil law by ordering one party to make a promise to the other, such promise being in the form of a stipulation, and giving to the promisee a right, or at least a remedy, which he would not otherwise have. Thus if A's house is in a dangerous condition and likely to fall and damage B's land, B can insist on A's promising to pay damages for any harm that may be done (*cautio damni infecti*—i.e. damage threatened—'not done').[213] If without such promise having been exacted the house fell and did damage, B would have no claim against A unless he could show that A had been guilty of some wilful or negligent act such as would make him liable under the *lex Aquilia*, and this would, of course, not always be the case. Again, suppose that A has been left the ownership and B the usufruct (life-interest) in an estate, A must, it is true, already at civil law, refrain from actively injuring the property, as for instance by cutting down all the timber; but he is, at civil law, under no obligation to do any positive acts to keep it in repair; also at civil law he (or his heir) is under no active obligation to hand over the estate to the owner on the cessation of the usufruct, though of course he has no right to remain on the land. The praetor, on the other hand, will insist that the usufructuary promise the owner that he will perform active duties, will look after the property as a careful man should and return it when the usufruct is at an end (*cautio usufructuaria*).[214,215]

The methods by which the praetor enforces these stipulations are not always the same. In the case of usufruct the praetor would simply refuse the usufructuary failing to make the promise the action for claiming the estate from the owner.[216] In the case of *damnum infectum*, if the stipulation was refused, the praetor made an order entitling the person whose land was threatened to enter into possession of the dangerous building (*missio in possessionem*),[217] and if opposition was offered to the entry and the damage was done, there was an *actio ficticia*, i.e. one in which the judge was told to condemn for as much as would have been payable had the stipulation been made.[218] Direct methods of constraint are not evidenced in classical times, though they may have been used.[219]

Whatever the method used it is clear that the praetor's insistence on the making of the stipulation in fact altered and amplified the law, and the rules of this part of the *ius honorarium* were, like the rest of it, to be discovered from the edict. An appendix gave the forms to be used in each case, and scattered among the earlier provisions were to be found individual edicts concerning their application. Whether in any particular case a stipulation had, according to these rules, to be made, was a question which the praetor decided himself, if necessary after hearing argument; there is no place here for reference by means of *formula* to a *iudex*.[220]

(ii) *Missiones in possessionem*. *Missio* is an authorisation by the praetor to enter into possession, either of a particular thing (as with *damnum infectum*), or of the whole of a person's property (as in the case of execution).[221] Sometimes it merely entitled the person authorised to enter and hold the property

---

archaic form given in D. 46.8.18 also points to an early date (Lenel, *EP* 552 n 1). *In integrum restitutio* for *metus* certainly existed in 59 B.C. (Cic. *Flacc*. 49) 1 and other cases are pretty certainly older. The rubric of the edict promising *restitutio* on account of absence (*Ex quibus causis minores xxv annis in integrum restituuntur*) points to a time when this was the only reason for which persons above the age of twenty-five could get *restitutio*, and this is indeed probably the earliest case, except that of minors, which very probably goes back to a date not long after the *lex Plaetoria* (below, 241).

[212] The aediles, although not invested with *imperium*, also used their powers of coercion to insist on the making of stipulations with relation to matters within their jurisdiction. These stipulations were of great importance in the history of sale; see below, 293f.

[213] That there was a liability at civil law is clear from Gaius' statement (4.31) that procedure by *legis actio* was still in principle possible. What the *legis actio* was we do not know (see de Zulueta, Gaius 255; Pugliese, *Proc.* 1.108 n 185). In any case the praetorian law here completely superseded the civil.

[214] *Usurum se boni viri arbitratu et cum usus fructus ad cum pertinere desinet*, *restituturum quod inde exstabit*; D. 7.9.1 pr .

[215] Sometimes a mere promise was enough, sometimes there had to be security as well, e.g. in the case of *damnum infectum* if the occupier was not the owner; D. 39.2.7 pr.; 13.1.

[216] D. 7.1.13 pr. If the usufructuary were ill possession of the thing the owner could claim it (*vindicatio*) and if the usufructuary pleaded his usufruct in an *exceptio* the owner would have a *replicatio* alleging that the stipulation had not been made; D. 7.9.7 pr.

[217] Below, 228.

[218] Lenel, *EP* 372f.

[219] Wenger 242. *Pignora* are mentioned in J. 1.24.3, but this passage is probably not classical.

[220] For technical distinctions between different classes of stipulations see Buckland 437 and 728.

[221] Above, 217. In some cases it might be a *hereditas*, not a single thing nor yet the whole of a person's property.

concurrently with the person to whom it belonged, sometimes it gave full possessory rights, with authority to eject the owner and eventually become owner by usucapion. The primary object of such *missiones* was to put pressure on the person to whom the goods belonged, as in the case of the person who failed to 'defend himself properly' in an action,[222] or failed to carry out a judgment, but, as we have seen, it might have the secondary purpose of enabling the creditor to get paid by having the goods sold if the pressure proved ineffective. It was also used where there was no one on whom pressure could be put, as where the creditors of a deceased person who leaves no heir are put in possession of his property and allowed to proceed to *bonorum venditio*.[223] Or again it might be a purely provisional measure, as where the mother of an unborn child is put in possession of the property which the child will inherit if it is born alive, but which will go to someone else if it is not.[224] The rules differ very considerably in the different cases, but again we can take *damnum infectum* as an example. If the stipulation ordered by the praetor were refused, there was first a *missio in rem* which entitled the complainant to enter into the dangerous building, but not to eject the owner. If this proved of no avail a second decree would issue giving full possession,[225] which, if the other party remained obdurate, would ripen into ownership after the time for usucapion had elapsed.[226] Again here, as with stipulations, the praetor did not as a rule use direct force if his commands were disobeyed. In the particular case of *damnum infectum*, if opposition was offered to the entry of the person authorised to take possession there was, as we have seen,[227] a fictitious action, at which it was assumed that the desired stipulation had been made.[228] In other cases other means were used. Thus where the *missio* was the result of a judgment, and in connected cases,[229] there was an action for damages against anyone who prevented the persons authorised from taking possession of anything forming part of the estate.[230] When *bonorum venditio* had taken place, the *emptor* had an interdict to enable him to recover anything belonging to the, estate which was not voluntarily surrendered to him.[231] An action of course involves reference to a *iudex*, and so, as we shall see, does an interdict, so that, where opposition was offered to the magistrate's order, there would in fact usually be a trial *apud iudicem* before the matter was decided. The importance of *missiones* can hardly be exaggerated; on them depended, in the last resort, the working of a system in which no trial could take place without the concurrence of the defendant, and no judgment be executed except by the sale of the whole of the judgment debtor's estate.

(iii) *In integrum restitutiones*. In some cases the praetor's way of dealing with the possibility that general rules of law may have inequitable results is to annul the result which he considers inequitable by restoring the party injured to his original position (*in integrum*). Thus if a man has been prevented by absence abroad in the public service from taking steps to interrupt another's possession of his land, with the result that that other has been able to complete usucapion, the praetor will restore him to his original position by decreeing that the usucapion is to be held not to have taken place; or if a man has been induced by threats (*metus*) to make a mancipation of his property, the praetor may decree that the conveyance is to be held not to have taken place. Particularly important too is the rule that a minor (i.e. one under twenty-five years of age) may get *in integrum restitutio* if his inexperience has led him to enter into a transaction which turns out to be disadvantageous, even though he cannot show that the other party actually took advantage of his youth.[232] The praetor does not, of course, act arbitrarily in granting this relief, and like his other remedies it is provided for by clauses in the edict. As, however, it is the praetor himself who decides in each case whether *restitutio* is to be granted or not, he does, in some of the edicts, leave himself a considerable liberty; that concerning minors, in particular, reads simply: 'If a transaction

[222] Above, 216f.

[223] Gai. 3.79.

[224] D. 37.9; Lenel, *EP* 347. It was only available where the child would be a *suus heres*.

[225] D. 39.2.7 pr.

[226] D.39.2.5 pr.; 1

[227] Above, 227.

[228] There was also an interdict forbidding interference with the entry of one authorised to take possession; Lenel, *EP* 469.

[229] I.e. those called *rei servandae causa*; see Buckland 724.

[230] Lenel, *EP* 424.

[231] Gai. 4.145.

[232] Cf. below, 241f.

with a person under twenty-five years of age be alleged, I will take such steps as each particular case shall call for.'[233]

The actual grant by the praetor is only a necessary preliminary to which effect is given by other proceedings. These consist most commonly of a *iudicium rescissorium*, i.e. the person benefiting by the *restitutio* is allowed to bring the action which would have been open to him but for the event whose effects have been rescinded by the praetor.[234] Thus, where land has been usucaped owing to absence, the original owner brings a *vindicatio* with the fiction that the usucapion has not taken place, and the *formula* reads something like this: 'If the land in question had not been usucaped by Numerius Negidius, then if that land ought, by Quiritarian law, to be the property of Aulus Agerius, etc.'.[235]

(iv) *Interdicts*. Literally *interdictum* means a prohibition, but the word came to be used for all praetorian orders of a certain class, whether positive or negative in form.[236] These orders are issued by the praetor, not on his own initiative, but on the application of some person who either considers himself aggrieved or thinks that some public interest is in danger:[237] they are in a stereotyped form which is set out for each sort of case in the edict,[238] and lead, where there is any opposition, to a trial before a *iudex* or *recuperatores*. Suppose, for instance, that A has let B occupy a farm *precario*, i.e. on condition that B returns it at any moment that A chooses to ask for it back,[239] and that when A does so ask for it, B refuses to give it up. A goes to the praetor, and the praetor issues an order to B in the following form: 'What you hold *precario* from A, or by your own wilful wrongdoing have ceased so to hold, that you are to return to him. [240] Now this order is carefully framed so as to leave open the question whether B really does hold the farm *precario* from A or not, and is equivalent to an order 'if you hold *precario* ... you are to return'. Of course if B recognises that the praetor's order does apply to him and gives up the farm, the matter is at an end, but if he does not, the question has now to be decided whether, in not returning the farm, B has been guilty of disobeying the praetor's order or not. Only if he does so hold *precario* from A has he been guilty, and this is what, in effect, the *iudex* will have to decide. Two methods of procedure are possible, one, no doubt the older, *per sponsionem*, and the other *per formulam arbitrariam*.

(a) *Per sponsionem*. The parties by means of stipulations (*sponsiones*) make a sort of bet. B promises to pay A so-and-so much[241] if he has disobeyed the interdict, and A promises to pay B a similar amount if B has not disobeyed it. A and B then bring actions against each other in the ordinary way[242] for these sums; the question to be decided in the two actions is of course exactly the same and they are sent to the same *iudex* to try. The *iudex*, in order to decide whether there has been disobedience or not, must go into all the facts of the case, and in particular must find out whether the land claimed was held *precario* by B from A or not, for, if it was, B has disobeyed the interdict, if it was not, although he has disregarded it, he has not disobeyed it.[243] If the *iudex* finds that B has disobeyed, then he must condemn B in the first action, and absolve A in the second; if he finds that B has not disobeyed he must absolve B in the first

---

[233] *Quod cum minore quam viginti quinque annis natu gestum esse dicetur*, *uti quaeque res erit*, *animadvertam*; Lenel, *EP* 116.

[234] For other possibilities see Buckland 723.

[235] The exact form of the fiction is uncertain; see Lenel, *EP* 123. For another case of *iudicium rescissorium* cf. Gai. 3.84.

[236] Gai. 4.140 says that *decretum* was the proper word when something was ordered to be done, *interdictum* when something was forbidden.

[237] Certain interdicts were *popularia*, i.e. could be brought by anyone whether personally affected or not, e.g. *ne quid in loco publico vel itinere fiat* for the prevention of unauthorised building on public land; see D. 43.8.2.2.

[238] In cases where the form set out did not exactly fit, an *interdictum utile* might be granted; cf. *actio utilis*, above, 210 n 5.

[239] *Precarium* is distinguished from loan (*commodatum*) by the intentional absence of any contractual relation between the parties; neither has any action against the other arising out of the relationship. It probably originated in grants at will of land by great land-owners to their 'clients'.

[240] *Quod precario ab illo habes aut dolo malo fecisti ut desineres habere*, *qua de re agitur*, *id illi restituas*; Lenel, *EP* 486.

[241] How great the amount was in classical times is unknown. Originally it was probably the full value of the plaintiff's interest in the matter estimated by him on oath. At a time when the *iudicium secutorium* (see below, n 1) did not yet exist this would have been the only way in which the plaintiff could get full satisfaction. With the invention of the *iudicium secutorium*, this reason no longer applied, and the full value appears to have been merely a maximum beyond which the praetor would not allow the parties to go. Cf. Lenel, *EP* 471; Buckland 739 n 6.

[242] In classical times these would be *actiones certae creditae pecuniae*; under the *legis actio* system *condictio* or *sacramentum* would have been available.

[243] Cf. Buckland 737.

action and condemn A in the second. The loser thus pays a penalty in any event, but, if B is the loser, the mere decision on the stipulations does not give A his land back. There is therefore in this case a third action, also sent to the same *iudex* (but necessitating no further trial because the point at issue has already been decided), in which the *iudex* is instructed to condemn B to pay the value of the land unless he restores it to A (*iudicium secutorium*).[244] Here again, as we have seen with actions *in rem*,[245] there is no specific restitution; in the last resort the *iudex* can only award damages, but the defendant is given the chance of escaping condemnation by making restoration.,

(b) *Per formulam arbitrariam*. In certain classes of interdicts it is possible for the defendant to avoid the risk involved in the *sponsiones* by asking, before he leaves the presence of the praetor, for the appointment of an *arbiter*. A *formula arbitraria*[246] will then issue at once and the case will be tried on that; the result will then be exactly the same as it would be under the other procedure except that the defendant will not, if he loses, have to pay the penalty, and that the plaintiff will similarly be free from penalty if the case is decided in favour of the defendant.

Such, in the barest outline, is the procedure on this very important and common type of praetorian remedy. Interdicts served all manner of purposes. Some were no more than cogs in the procedural wheel,[247] some were devised to safeguard public rights;[248] others were the vehicles of immensely important praetorian innovations and amplifications of the civil law, as in particular the interdict *quorum bonorum*, by means of which the praetor carried through a great part of his reform in the law of succession.[249] Of even greater significance, if we consider not merely Roman law but the history of law in general, were the interdicts by which the praetor protected possession. This was a matter outside the civil law, but, as we shall see,[250] the praetor made it a rule that an existing possession, whether rightful or wrongful, must not be disturbed except by making a proper claim in a court of law. If I am in possession of land belonging to you and you take it from me, the praetor, by means of an interdict, will force you to return it to me quite regardless of your ownership, and you will not be able to get it again by the proper action, the *vindicatio*, which is open to owners who are out of possession of their things. The interdicts are, in fact, the most far-reaching of magisterial remedies and a very considerable appendix to the edict was needed to include all of them; they are also that form of procedure which most clearly shows the magistrate not merely as an intermediary who helps the parties to come to an issue, but as a superior who can command.[251] It is true that this command leads in historical times to a trial, but it is highly probable that there was originally a personal investigation of the facts by the praetor before he issued the command,[252] and that this system only had to be given up because of an intolerable pressure of business on the single judicial magistrate. It should be noticed in this connexion that interdicts have to a certain extent a 'police' character; many are concerned with public ways and rivers; a number, such as those regulating possession, are provisional—the peace must be kept until the question at issue is settled in a lawful way; one protects the tenant who is prevented by his landlord from moving out with his goods,[253] and others regulate disputes between neighbours.[254] All are further characterised by comparative rapidity of procedure; the praetor can issue them on *dies nefasti* and they can be tried outside term time.[255]

---

[244] Gai. 4.165, 167. The exact wording of the *formula* is not known, but at any rate it contained a *clausula arbitraria* (cf. above, 213f.) where the interdict was exhibitory or restitutory. In the case of prohibitory interdict there is more difficulty; see Lenel, *EP* 450f. The *iudicium secutorium* is presumably later than the *sponsiones*, for it could not exist under the *legis actio* system. Cf. above, n 7, and Lenel in *Festgabe für R. Sohm* (Munich/Leipzig, 1914) 207.

[245] Above, 214.

[246] The *formula* is here quite uncertain (see Lenel, *EP* 449; Kaser, *ZPR* 329 n 42), but the effect was that the defendant either had to put matters right or pay damages.

[247] E.g. *interdicta secundaria*, Gai. 4.170.

[248] Above, 230 n 3.

[249] Below, 253.

[250] Below, 259ff.

[251] Gaius begins his account of interdicts (4.139) by saying: 'In certain cases the praetor or proconsul uses his authority directly for the settlement of controversies' (*principaliter auctoritatem suam. … interponit*).

[252] Which would then naturally not be in the hypothetical form subsequently used.

[253] *De migrando*; Lenel, *EP* 490.

[254] E.g. *De glande legenda*; Lenel, *EP* 487.

[255] Cf. Wenger 75, 246, 254.

3. Jurisdiction and procedure in the principate

H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3d ed., Cambridge: University Press, 1972), ch. 23 (pp. 395–404)

1. GENERAL

The history of the courts and of judicial procedure during the principate is closely parallel to that of the government as a whole. Republican institutions were not abolished, but new imperial institutions grew up by their side, with the result that they became atrophied and finally perished. This process however was not complete until the principate had given way to the dominate, and here, as in other departments of public life, it was the provinces that took the lead, while Rome herself retained the relics of republicanism longer than any other part of the empire.

The chief new factor is the all-pervading power of the emperor. This must be taken as a fact in the judicial sphere as elsewhere, though it is difficult to find any definite constitutional foundation for his jurisdiction as it was actually exercised. He had *imperium* and therefore *iurisdictio*, but from the first he occupied a position which was quite different from that of any other magistrate. He might assume jurisdiction in the first instance in any matter, civil or criminal, arising anywhere within the empire, either of his own motion or, more usually, in accordance with the prayer of a party. He might hear appeals, and, as we have seen, he might, without hearing the whole case, decide questions of law by rescript. Though some of the emperors managed to transact. a surprising amount of judicial business in person, it was of course necessary to restrict appeals within narrow limits and to lighten the burden further by delegation. A delegate might be appointed specially for a particular case, and this indeed seems to have been not uncommon, but there were also standing rules concerning the delegation of certain classes of cases. Augustus, for instance, already directed that appeals from Rome should go before the urban praetor, those from the provinces to a man of consular rank appointed for each.[1] The jurisdiction exercised by the great prefects,[2] mainly criminal at first, but civil as well in the later principate, is also, from the constitutional point of view, based solely upon delegation by the emperor of his own powers, and this kind of jurisdiction was destined, under the dominate, to become the most important of all. A rather different type of delegation consisted in entrusting to republican magistrates, consuls and praetors, special functions in connexion with matters which had never given rise to trials of the ordinary sort. Thus Augustus ordered the consuls to see that certain *fideicommissa* were carried out, and this subsequently became a standing instruction applicable to all *fideicommissa*.[3] Trusts of this nature, hitherto unrecognised by the law, consequently became binding though it was never possible to bring an action under the 'ordinary' procedure for their enforcement.[4] Claudius added two special praetors to relieve the consuls of most of this work,[5] but one was subsequently removed by Titus[6] Somewhat similar was the treatment of guardianship matters. The appointment of tutors at Rome lay, under earlier legislation, with the urban praetor and the tribunes,[7] but Claudius added appointment and supervision of guardians to the functions of the consuls[8] and M. Aurelius appointed a special praetor.[9] Normally these functions would not involve litigation *inter partes*, but the matter might assume the complexion of a lawsuit where a person who was appointed sought to shift the burden on to someone else whom he alleged to be better qualified (*potioris nominatio*).[10] In addition the consuls dealt with claims for *alimenta*, which were an innovation of the empire and only recoverable by *cognitio extraordinaria*,[11] and questions of status, though here the

[1] Suet. *Aug*. 33.3; Kaser, *ZPR* 399 n 15.

[2] Schiller, *Mél. de Visscher* 2.319ff., *BIDR* 57/8 (1953) 60ff.

[3] J.2.23.1.

[4] Gai. 2.278. See Genzmer, *RHD* (1962) 319ff.

[5] Jörs, *Festgabe für R. von Ihering* (Leipzig, 1892) 40ff.

[6] D. 1.2.2.32.

[7] Above, 239.

[8] Suet. *Claud.* 23.

[9] H.A. *Marc. Aur.* 10,11.

[10] *FV* 161ff. So also there may be a dispute between a proposed tutor and the person Who proposed him; *ibid.* 156.

[11] D. 34.1.3 *sub fin.*; cf. Jörs, *op. cit.* above (n 5) 25ff. This right of children and parents to claim support from each other in case of indigence is not known to have existed before Pius, who issued constitutions concerning it; D. 25.3.5.5, 7; Sachers, *Fschr. Schulz* 1.310ff.

ordinary procedure was also available.[12] A praetor *de liberalibus causis* also existed, though references to him in the sources are rare.[13] Claims for payment by people who had rendered 'liberal' services were also perhaps dealt with by a praetor.[14,15]

In all these cases, though the magistrates in question bore names belonging to the republican hierarchy, the functions which they exercised were such as they had not had during the republic, and the real basis of their authority was the imperial command.

In these 'extraordinary' matters consequently there is a concurrence of the emperor's judicial and legislative powers, which illustrates at once the extent and the indefinite nature of his authority.

2. INNOVATIONS IN CIVIL PROCEDURE

A. COGNITIO EXTRAORDINARIA. The chief innovation consists in the introduction, side by side with the old procedure, of a new system, commonly known as *cognitio extra ordinem* or *extraordinaria*. Jurisdiction in the Roman scheme of government was never completely separated from administration; *iurisdictio* in the technical sense was itself a derivative from *imperium*, and sometimes even the urban praetor used directly his powers of command for the settlement of what were in fact legal disputes. *Cognitio extraordinaria* is, in its origin, an extension of this method. Though the praetors at Rome continue to use and even to develop the older system, the emperor and his delegates are, from the first, free from its trammels, need wait for no agreement between the parties and need not suffer the old division of the trial into two stages. It is common to speak of *cognitio* as a type of administrative procedure, and this description expresses a considerable part of the truth, for the official uses his powers of investigation and compulsion to decide a suit between private parties as he does in the case of one which arises in the course of his administrative duties. But the process is a judicial one to which many of the rules of the older procedure apply. Judgment must still be delivered in accordance with the law, and the new system of appeal serves to secure uniformity in the judgments of the various courts. The emperor himself, it is true, can travel outside the existing law if he so pleases, but he too is primarily concerned to administer the law as it is.[16] The new procedure does however imply a different attitude on the part of the state towards the process of litigation. The official supervises and controls all stages of the proceedings, which take the character more of an inquiry than the hearing of a dispute between adversaries. This attitude is, of course, that to which we are accustomed in modern European states, and we shall see that it produced two institutions with which we are familiar, but which were unknown to the earlier system—appeal and judgment by default.

The Latin word for investigating a case is *cognoscere* and the terms *cognitio extra ordinem* or *extraordinaria*, which have some support in the sources,[17] are convenient, provided that they are understood to have a purely negative meaning—in contradistinction to the 'ordinary' procedure[18] of the formulary system. And the new system itself, of course, became 'ordinary' when the old system disappeared.[19] This, however, was not until the principate was over; the normal civil procedure at Rome throughout the classical period was that which used the formula, and it is with reference to this procedure that most of the classical literature was written.

B. DIFFERENT FORMS OF COGNITIO. The use of *cognitio* does not necessarily imply that the official whose authority is invoked tries the whole matter himself. Not only the emperor but some of his delegates (other than those appointed for a particular case) can delegate their powers, and in such cases it may still

[12] Jörs, *op. cit.* above (n 5) 11ff.; L. Franciosi, *Il processo di libertà* (Naples, 1961) 126ff.

[13] Jörs, *op. cit.* above (n 5) 43ff.; C. 4.56.1; *CIL* 10.5398.

[14] The services of e.g. advocates, doctors and teachers could not be the object of *locatio*, and hence no action could be brought in the ordinary way for the recovery of remuneration. Most of the relevant texts speak of *cognitio* by a provincial governor. Only one (D. 50.13.1.14) mentions a praetor. This may mean that, at Rome, there was a special praetor appointed for these matters, or that either the urban or the peregrine praetor dealt with them. It is also suggested that the reference was originally to the tribunes, who may have had some connexion with teachers' claims for salaries; cf. above, 330 n 3.

[15] On a possible 'extraordinary' *querela inofficiosi testamenti*, see Kaser, *ZPR* 359f. On the praetor appointed by Nerva for fiscal matters, see above, 337.

[16] Cf. above, 368.

[17] Kaser, *ZPR* 339f. n 4 and n 5.

[18] The convenient expression *ordo iudiciorum privatorum* is not found in the sources.

[19] And yet Justinian can still use the old terminology: J. 3.12 pr.; 4.15.8.

be convenient to use a *formula* in order to define the issue which the delegate is to try. When this happens the procedure does not, externally, look very different from that of the *ordo*. But there remains the difference that the judge is a delegate, appointed by the official without the parties' collaboration, though, no doubt, the official may take their wishes, if they have any, into account in making the appointment. Moreover, while it is convenient to speak of the *cognitio extraordinaria* as a single system, it is important not to attribute to it a uniformity in detail which it did not possess. Three broad areas may be distinguished[20]: the personal jurisdiction of the *princeps*, the jurisdiction of the magistrates entrusted with matters of 'new law' such as *fideicommissa*,[21] and the jurisdiction of provincial governors.[22] In the senatorial provinces the system of the *ordo* was established, and therefore, to begin with, the extraordinary procedure would apply only to matters of 'new law' but in most if not all of the imperial provinces the *ordo* never applied, and the *cognitio extraordinaria* was itself the normal. Moreover we should not exaggerate the differences between the two procedures in the provinces. It is true that in the formulary system the division of proceedings is mandatory, and that the parties have some say in the choice of the *iudex*, but in the *cognitio* the governor would commonly in practice delegate the hearing to a *iudex pedaneus* and would no doubt try to take account of the parties' wishes, and on the other hand, in a formulary proceeding the parties might well hesitate to assert their right to be consulted in the choice of the *iudex*, especially as in the provinces there might well be a lack of qualified persons. Indeed one of the roots of the *cognitio* may lie in a distortion of the formulary system by conditions in the provinces.

C. CHANGES IN THE METHOD OF SUMMONS. PROCEDURE BY DEFAULT. In the *ordo* it was, as we have seen, the business of the plaintiff to get the defendant before the magistrate;[23] in *cognitio*, on the other hand, the state official began to take a part, not only in the trial, but in the summons. It appears that there were three principal forms—*litterae*, *edictum* and *denuntiatio*.[24] *Litterae* were used if the defendant lived at a distance from the place where the tribunal sat.[25] The plaintiff had to obtain a letter of authorisation from the tribunal, which he then took to the local magistrates, who summoned the defendant and returned the letter to him with a note thereon that this had been done.[26] *Edictum*, i.e., a written notice put up in public, was no doubt only used when the defendant could not be found.[27] *Denuntiatio*, which would seem to have been the normal method when the defendant resided within the jurisdiction of the court in which proceedings were begun, presents more difficulty. That it consisted in a notice to the defendant is clear, but what part the plaintiff himself played is uncertain. Some authorities have seen in it a private summons issuing from the plaintiff, either as a mere private act or with the backing in some way of an official (hence *denuntiatio ex auctoritate*), while others hold that it always issued from an official, though, of course, at the request of the plaintiff.[28] If the latter view is correct, then all three types of summons were simply different forms assumed by the magisterial *evocatio*, or right which the higher magistrates had always had of ordering a private individual to appear before them.[29] The development consists in the use of this right at the instance of another private individual as a method of beginning a private action.

This view also makes it clear why *denuntiatio* as well as the other forms of summons, if not obeyed, might lead to judgment by default. This was an impossibility under the procedure of the *ordo* because no trial could take place without the agreement of the defendant. But disobedience to *evocatio* is an offence, and one effective way of dealing with this particular offence (*contumacia*) is to proceed to try the case without the defendant. Three edicts or summonses, with stated intervals, were normally necessary, the last being a 'peremptory' edict, naming a period at the end of which the case would go on, but in special circumstances the procedure might be shortened.[30] The defendant's absence did not necessarily have the

[20] Kaser, *ZPR* 344ff.

[21] Above, 395f.

[22] Kaser, *ZPR* 122ff.; Pugliese, *Proc.* 2.1.100f.

[23] Above, 175, 200.

[24] D. 5.3.20.6d; 40.5.26.9. For a slightly different analysis see Kaser, *ZPR* 371f.

[25] T. Kipp, *Die Litisdenuntiatio*n (Leipzig, 1887) 126.

[26] *FV* 162f. For an instance of the process see *P. Giess*. 1.34 (Mitteis, *Chrest*. no.75).

[27] Kipp, *Die Litisdenuntiation* (above) 124. But judgment by default, being based on *contumacia* (below), could only be obtained if the defendant knew of the edict; Steinwenter, *Versäumnisverfahren* 40.

[28] See Kaser, *ZPR* 372, with reff.

[29] Gell. 13.12; cf. above, 380 n 8.

[30] D. 5.1.70-2.

result that judgment went against him. The judge had still to go into the case, and might find against the plaintiff,[31] but naturally this would not often happen.

D. APPEAL.[32] In the republic appeal, as we understand it, had not existed. A judgment might be called in question by defending the *actio iudicati*,[33] and the veto of a colleague or a tribune might be invoked to quash the decree of the magistrate made in the initial stages of an action or as a preliminary to execution.[34] But the judgment of a *iudex* was not a magisterial act and so not subject to *intercessio*. Nevertheless, in the early empire an appeal to the emperor seems to have been allowed even from such judgments.[35] In *cognitio extraordinaria*, on the other hand, the *iudex* was only the delegate of the official who appointed him, and there could therefore be no objection in principle to an appeal to that official.[36] Certainly it soon became a regular institution, the higher court not only quashing the decision of the lower, but substituting its own. And there might be further appeals, ending finally with one to the emperor. He, as we have seen, frequently delegated the hearing of appeals by a standing order to other officers, but this did not, during the principate, necessarily prevent further appeal to the emperor himself. Thus Paul recounts a case in which *in integrum restitutio* was refused by the praetor and by the *praefectus urbi*, but finally granted by the emperor.[37] In the Dominate, however, judgments of the praetorian prefect were declared unappealable.[38] Notice of appeal had to be given to the court whose judgment was to be called in question, and might be given at once, orally, or within a very few days in writing.[39] In the case of appeals to the emperor the amount at issue had to be above a certain minimum,[40] and an unsuccessful appellant suffered pecuniarily.[41] No appeal from a judgment given by default was allowed.[42]

Relatio and rescript procedure[43] differ from appeal, but they both serve to show the emperor as supreme judicial authority throughout his dominions and to keep the administration of justice consistent.

E. EXECUTION. Execution, like summons, becomes a matter in which the magistrate can use his powers of command and coercion. Judgment is not, as under the *ordo*, necessarily for money, and in some matters dealt with by *cognitio extraordinaria* the magistrate may actually carry out his decision by direct constraint.[44] When the judgment is for money, however, execution is still begun by *actio iudicati*, but this action too may be brought under the new procedure.[45]

---

[31] C. 7.43.1.

[32] Kaser, *ZPR* 39if.; R. Orestano, *L'appello civile in dir. rom.* (2nd ed., Turin, 1953); Litewski, *RIDA* (1965) 347ff.; (1966) 231ff.; (1967) 301ff.; (1968) 143ff.

[33] Not, of course, on its merits; cf. above 216. There was also an obscure proceeding known as *revocatio in duplum* (not a Roman term), perhaps for the case where a defendant who had already satisfied the judgment wishes to dispute its validity; Kaser, *ZPR* 290.

[34] Cicero (*Verr*. 11.1.119) says that during Verres' tenure of the urban praetorship a crowd gathered round the seat of his colleague L. Piso to ask him to intercede against Verres' acts. Jones, *Studies* ii, suggests that the vetoing magistrate might substitute his own decision, but there is no evidence for this.

[35] Wenger 211n; Kaser, *ZPR* 399f.; Augustus seems to have entertained appeals from magisterial decisions *in iure*, but there is no record of an appeal from a *iudex* until Claudius, who gave *restitutio in integrum* to a plaintiff who had lost his case for *plus petitio*; Suet. *Claud.* 14. Jones, *Studies* 81ff., while conceding that the silence of Cicero is good evidence that there was no appeal in his day in Rome, maintains that it may have been different in the provinces, and conjectures that there was an appeal in *iudicia imperio continentia*, but not in *iudicia legitima* (but not all *iudicia* in Rome were *legitima*). On the basis of the emperor's jurisdiction see below, 402 n 7. .

[36] D. 49.3.3; 49.1.21.1.

[37] D. 4.4.38. Possibly an exceptional case.

[38] D. 4.4.17; 1.11.1.1.

[39] D. 49.1.5.

[40] .D. 49.1.10.1.

[41] Tac. *Ann*. 14.28.

[42] D.49.1.23.3.

[43] Above, 369f.

[44] E.g. when he forces an heir to enter upon an inheritance. which is over-burdened with *fideicommissa*, under the provisions of the *Sc. Pegasianum*; D. 36.1.4. In the case of a *fideicommissum* of liberty the person under the duty might be forced to manumit (D. 40.5.26.6); if he failed to appear and judgment went against him the slaves became free without any manumission by him (*ibid.* 7).

[45] D. 5.1.75.

Execution against the person continued possible, but there appeared also a more sensible method of execution against the goods.[46] The judgment creditor need not be put into possession of the whole of the debtor's property. Instead, court officials might be authorised to seize a sufficient part of the property and, after a delay of two months, sell it for the benefit of his creditor.[47] Here again the state does what under the older system was the business of the plaintiff.

3. CRIMINAL JURISDICTION

The last century of the republic had provided the *quaestiones perpetuae* for the trial of serious offences committed by Roman citizens, and these tribunals continued to exist in the earlier principate. Augustus himself regulated their procedure by one of his *leges iudiciariae*, and added to their number by creating a *quaestio de adulteriis* for the sexual offences which he first made punishable. He also introduced, in some provinces at least, an analogous method of trial by jury courts,[48] but these did not have any jurisdiction over Roman citizens.[49] In spite of these innovations, however, the system remained incapable of providing adequately for the needs of the empire. It was clumsy in that the constitution of the tribunal differed according to the offence, and incomplete in that a number of offences which a civilised state must take upon itself to punish were not covered at all. Theft, damage to property and fraud would, for instance, normally give rise only to a civil action. Only in particular cases, as, for instance, if combined with violence, would they come within the ambit of a *quaestio* at all. The severest punishment which could be inflicted was in many cases too light, and the extension of Roman citizenship gradually made it impracticable to send all citizens accused of serious crime to Rome for trial. It was thus necessary to supplement the work of the *quaestiones* by that of other tribunals which dealt *extra ordinem* both with offences which were covered by them and with those which were not. One of these tribunals was the senate, which developed a jurisdiction in what may be called in a broad sense political cases, usually, but not necessarily, involving senators.[50] The constitutional basis of this jurisdiction is disputed,[51] and because of its restricted scope its influence on the development of the criminal law was not of any great consequence. Of much greater importance were the courts of the emperor[52] and his delegates, in particular the prefects, and of the provincial governors. The extent of the powers over citizens which the latter enjoyed is a matter of some difficulty. Mommsen[53] held that the governor's *imperium* did not include the right to try citizens on a capital charge, but that such right, under the name *ius gladii*, was given more and

[46] The earliest known mention occurs in a rescript of Pius, quoted D. 42.1.31.

[47] Movables were to be taken first, then land and then, if necessary, incorporeal assets: D. 42.1.15.2.

[48] See the first Cyrene edict (*FIRA* 1.404); Premerstein, *SZ* 48 (1928) 419ff., especially 442ff.

[49] *Ibid.* 444.

[50] The first clear evidence of a regular jurisdiction is the *Sc. Calvisianum* of 4 B.C. (in the fifth edict of Cyrene, *FIRA* 1.410), which provided for the trial of non-capital *repetundae* cases (i.e. probably those in which extortion was not accompanied by a capital offence) by a court of five senators chosen by lot after a preliminary hearing by the full senate. It is doubtful how far the handful of political cases in the ordinary sense (including that of Julia's lovers) under Augustus constitute a jurisdiction at all. They probably show merely that 'Augustus treated extraordinary political affairs in an extraordinary fashion' (Sherwin-White, *JRS* 53 (1963) 203). But under subsequent emperors the senate became a tribunal for the trial of cases of a public or scandalous character involving important figures. See Garnsey, *Social Status* 17ff.

[51] It cannot be derived from the occasional practice whereby the senate in the republic, after passing a *Sc. ultimum*, declared persons endangering public safety to be *hostes publici*, because in these cases there was no semblance of a trial (Kunkel, *SZ* 81, (1964) 360ff.). F. de Marini Avonzo, *La funzione giurisdizionale del Senato romano* (Milan, 1957), derives it from delegation by the emperor, but the *Sc. Calvisianum* (above) invokes no such idea, but simply proceeds from the authority of the senate itself. Jones, *Studies* 86ff. (=*Historia* 3 (1955) 478ff.) sees the senate as the *consilium* of the emperor, and its jurisdiction as only an aspect of his (see below). It is more probable that the jurisdiction grew out of the senate's imprecise function as interpreter of *leges publica*e (Sherwin-White, *JRS* 53 (1963) 203). See also de Martino 4.1.503ff.

[52] Both the extent of the emperor's jurisdiction and its basis are the subject of debate, and the evidence is too meagre and obscure for more than conjecture. Dio Cassius includes among the honours offered to Augustus in 30 B.C. the power ἔκκλητον δικάζειν Jones, *op. cit.* above, n 6, bases the emperor's criminal jurisdiction on this and on an unattested provision in the *lex Iulia de vi publica*. J. M. Kelly, *Princeps Iudex* (Weimar, 1957), argues that, with the exception of *maiestas*, where Augustus acted without any legal basis, his criminal jurisdiction was within the *quaestiones*, in which the provision quoted by Dio gave him a casting vote. But the only evidence suggesting that Augustus sat in *quaestiones* is Suet. *Aug.* 33 (which may equally refer to an extraordinary jurisdiction), and it is difficult to believe that Augustus would have often sat in a *quaestio*. It is perhaps better to say that the basis was no more precise than the *maius imperium* which Augustus enjoyed by virtue of his unprecedented combination of powers. See also de Martino 4.1.446ff.; Jones, T.R 32 (1964) 107 ff.; Kunkel, *SZ* 81 (1964) 360ff. And for the part played by the emperor's *consilium* see above, 339f.

[53] *StrR* 229ff. For a modification see Jones, *Studies* 58ff.; A. N. Sherwin-White, *Roman Society and Roman Law in the New Testament* (Oxford, 1963) 9ff.

more frequently to individual governors, and in the third century was given to all who held senatorial rank, though sometimes subject to imperial confirmation. It is difficult on this view to account convincingly for all the recorded cases, and it has recently been suggested[54] that governors from the later republic onwards had capital jurisdiction over citizens (as opposed to the right to put them to death by a mere exercise of *coercitio*), though they might in any case choose not to exercise it. The doctrine, which we find in the Digest,[55] that the governor's power is delegated to him by the emperor would have been a creation of the Severan jurists, who were concerned to subordinate all powers to that of the emperor.

From the first punishments were made more severe. Even now, indeed, the death penalty was very seldom actually inflicted as the result of the verdict of a *quaestio*,[56] but *aqua et igni interdictio* was from the time of Tiberius accompanied by loss of citizenship,[57] and generally its place was taken by *exilium*, which in its milder form of *deportatio*[58] meant not only that the convicted person became a *peregrinus*, but that he was confined to an island or an oasis, and lost the whole of his property except for whatever might be left to him as an act of grace. The milder form, *relegatio*, did not affect citizenship or, perhaps, property.[59] The death penalty was reintroduced in the new courts, and history furnishes enough examples of its infliction in political cases. In ordinary cases it was inflicted on the lower classes, but during the first two centuries *honestiores* seem normally to have been exempt, except in the case of the killing of a parent.[60]

In the new courts, though the magistrate could, and frequently did, deal with crime inquisitorially, i.e. by investigating on his own initiative and by any means at his disposal, the accusatory form of procedure which had been introduced for the *quaestiones* did not cease to exist. On the contrary, it remained normal throughout,[61] and accusers were encouraged by rewards, as they were also subject to penalties for vexatious prosecution or collusion with the accused.

It will be seen that the criminal system as a whole was one in which the highest authorities in the state, the emperor and the senate, took it upon themselves to supplement the deficiencies of law and procedure, not by the enactment of new law, but by direct intervention in the interests of order. The judicial and legislative powers were insufficiently separated, and the 'rule of law' towards which the *quaestiones* had been a step forward, was never established. The substantive rules created by the statutes which set up the *quaestiones* were indeed applied also when the same crimes had to be tried *extra ordinem*,[62] and some quasi-legislative help was provided by imperial *decreta* and occasional *senatus consulta*, but it was never enough to exclude arbitrariness.[63] The criminal system thus never passed through a stage of strict law, the stage in which exact differentiation and definition is necessary, and, though the jurists succeeded in elaborating some principles of value, its example was of much less consequence in subsequent history than that of the civil law.[64]

---

[54] Garnsey, *JRS* 58 (1968) 51ff.

[55] D. 1.21.1; 1.16.6 pr. (cf. 50.17.70).

[56] Though this was not impossible; Mommsen, *StrR* 220.

[57] Dio 57.22; Mommsen, *StrR* 957.

[58] D. 48.13.3. Not apparently a technical term until the second century A.D.; Garnsey, *Social Status* 113.

[59] *Ibid.* 116f.

[60] D. 48.19.9.11. See Garnsey, *Social Status* 122ff., and cf. above, 351.

[61] Except for cases before the *praefectus urbi* or the *praefectus vigilum*; Kunkel, *Symb. David* 1.127.

[62] D. 48.1.8.

[63] D. 48.19.13. Cf. Lévy, *BIDR* 45 (1938) 137, 396ff.

[64] On the criminal courts of the principate see now A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Oxford, 1972) 91ff.

4. Procedure and jurisdiction in the Dominate

H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*
(3d ed., Cambridge: University Press, 1972), ch. 26 (pp. 439–50)

As befits the system of absolute monarchy, the courts of the period were wholly dependent upon the imperial power itself, and procedure both civil and criminal lost connexion with the typically republican institutions that had been preserved to a greater or lesser extent during the transitional period of the principate. Since the imperial bureaucracy was supreme throughout, there was even less distinction between the criminal and civil courts than there had been in the principate, and of criminal procedure