

An Outline of Roman Civil Procedure

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Abstract — This is a broad discussion of the key feature of Roman civil procedure, including sources, lawmaking, and rules. It covers the three principal models for procedure; special proceedings; appeals; magistrates; judges; and representation. It takes account of new evidence on procedure discovered in the last century, and introduces some of the newer arguments on familiar but controversial topics. Citations to the literature allow further study.

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Introduction

English readers have not had a single, article-length account of Roman civil procedure since Leopold Wenger's contribution to the *Enzyklopädie der Rechts- und Staatswissenschaft* (1927) appeared

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in the 1930/31 *Tulane Law Review*, translated by A. Arthur Schiller of Columbia University.¹ The present article covers many of the same topics as Wenger had covered, but takes account of the enormous quantity of new evidence discovered in the last century, as well as new solutions to controversial topics. Ample literature is included to allow further study.

Briefly: the Romans resolved civil disputes by recourse to litigation based on law. Litigation was guided by formal procedures which underwent reform by statute, praetorian innovation and imperial enactment. The earlier procedures depended to a high degree on the initiative of the plaintiff and the cooperation of the defendant. The later procedures depended to a greater degree on the power of the courts to compel obedience.²

¹ L. Wenger, "The Roman Law of Civil Procedure," *Tulane L. Rev.*, 5 (1930/31), 353–95. Soon afterwards, an English translation of Wenger's textbook on civil procedure appeared: L. Wenger, *Institutes of the Roman Law of Civil Procedure*, rev. ed., trans. O. H. Fisk (New York 1940). Barry Nicholas once privately commented that this translation was "unreadable."

² The LEADING REFERENCE WORK on civil procedure is M. Kaser, *Das römische Zivilprozessrecht*, 2nd ed. K. Hackl (Munich 1996). OTHER GENERAL REFERENCE WORKS — J. L. Murga, *Derecho romano clasico*. 2 *El proceso* (Zaragoza 1980); G. Pugliese, *Il processo civile romano* [1. *Le legis actiones*. 2. *Il processo formulare*] (Milan 1962/1963). REFERENCE WORKS ON NARROWER TOPICS — B. Albanese, *Il processo privato romano delle "legis actiones"* (Palermo 1987); F. Bertoldi, *La lex Iulia iudiciorum privatorum* (Turin 2003); G. Cervenca, *Il processo privato romano: le fonti* (Bologna 1983); A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford 1901); K. Hackl, "Der Zivilprozeß des frühen Prinzipats in den Provinzen," *ZSS (RA)*, 114 (1997), 141–59; "Il processo civile nelle province," in F. Milazzo, ed., *Gli ordinamenti giudiziari di Roma imperiale. Princeps e procedura dalle leggi Giulie ad Adriano* (Naples 1999), 299–318; M. Indra, *Status Quaestio. Studien zum Freiheitsprozess im klassischen römischen Recht* (Berlin 2011); W. Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii* (Krakow 1999); D. Mantovani, *Le formule del processo privato romano. Per la didattica delle Istituzioni di diritto romano*, 2nd ed. (Padua 1999); K. W. Nörr, *Romanisch-kanonisches Prozessrecht: Erkenntnisverfahren erster Instanz in civilibus* (Heidelberg 2012); N. Palazzolo, *Processo civile e politica giudiziaria nel principato*, 2nd ed. (Turin 1991); G. Provera, *Lezioni sul processo civile Giustiniano* (Turin 1989); D. Simon, *Untersuchungen zum justinianischen Zivilprozess* (Munich 1969); W. Simshäuser, *Iuridici und Municipalgerichtsbarkeit in Italien* (Munich 1973); M. Talamanca, "Il riordinamento Augusteo del processo privato," in F. Milazzo, ed., *Gli ordinamenti giudiziari di Roma imperiale. Princeps e procedura dalle leggi Giulie ad Adriano* (Naples 1999), 63–260; U. Zilletti, *Studi sul processo civile Giustiniano* (Milan 1965). SHORTER OR INTRODUCTORY WORKS — V. Arangio-Ruiz, *Corso di diritto romano. Il processo privato* (Rome 1951); idem, *Cours de droit romain: les actions* [*Antiqua*, 2], ed L. Labruna (Naples 1980); A. Biscardi, *Lezioni sul processo romano antico e classico*

Surviving evidence of civil procedure

Our understanding of Roman procedure relies on diverse sources, none of which is satisfactory on its own, and even taken together are only adequate.³ Physical evidence has been lost with time, but the problem is deeper. The Romans did not reflect on their procedural law in the way they reflected on their private law.⁴ They did not linger over modes of pleading or representation. If a rule of procedure was unfair or inappropriate, it was mended without a view to the system of litigation as a whole. This prevented the Romans from appreciating that their procedural law had a tradition and an evolution, and that there was something to be learned from studying older law. The result is that the Romans treated old rules as if they were old newspapers. Justinian's compilation and the Theodosian Code are sources for the procedure of late antiquity, but for the earlier forms they are inadequate. Justinian was particularly ruthless: rules that had fallen out of use were often either discarded by the compilers or altered to be fit for re-promulgation. Occasionally the compilers performed these tasks clumsily and the shadow of some earlier law makes itself known through an artless interpolation. But what we miss in Justinian, in strong contrast to his treatment of

(Turin 1968); W. W. Buckland, *A Text-Book of Roman Law*, 3rd ed. rev. P. Stein (Cambridge 1963), 604–744; C. A. Cannata, *Profilo istituzionale del processo privato romano* (Turin 1982/1989); J. A. Crook, *Law and Life of Rome, 90 B.C. – A.D. 212* (Ithaca 1967), ch. 3; idem, “The Development of Roman Private Law,” in J. A. Crook, et al., eds., *The Cambridge Ancient History*, 9, 2nd ed. (Cambridge 1994), 544–46 (“The law of actions”); D. Johnston, *Roman Law in Context* (Cambridge 1999), ch. 6; H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge 1972), 175–232, 395–401, 439–50; M. Kaser, “The Changing Face of Roman Jurisdiction,” *IJ* (n.s.), 2 (1967), 129–143; G. I. Luzzatto, *Procedura civile romana* (Bologna 1945/1948); G. Nicosia, *Il processo privato romano: corso di diritto romano* (Turin 1986/2012); E. Seidl, *Römische Rechtsgeschichte und römisches Zivilprozessrecht* (Cologne 1962), 157–84; A. A. Schiller, *Roman Law: Mechanisms of Development* (The Hague 1978), 188–218, 433–41; M. Talamanca, “Processo civile (diritto romano),” in *Enciclopedia del diritto*, 36 (1987), 1–79; idem, *Istituzioni di diritto romano* (Milan 1990), 273–378; O. Tellegen-Couperus, *A Short History of Roman Law* (London 1993), 21–24, 53–59, 89–93, 128–30; J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam 1976), chs. 5–9.

³ Schiller (note 2), 188–218, 433–41, discusses (and translates into English) a handful of sources. More thorough, but now somewhat out of date, is Cervenca (note 2).

⁴ “Rules of procedure could be found in many parts of the Corpus iuris but the Romans had never gathered them systematically or studied procedure as an autonomous subject.” R. Feenstra, “Law,” in R. Jenkyns, ed., *The Legacy of Rome: A New Appraisal* (Oxford 1992), 410.

private law, is even a cursory discussion of old and new rules side by side.

The discovery of Gaius' *Institutes* in the early nineteenth century partly answered the need. Gaius wrote in the middle second century AD, and the surviving portions of book four give us an overview of the *legis actio* and formulary procedures.⁵ His treatment is brief but preserves many details. We are especially indebted to him for his discussion of the *legis actio* procedure, in which his interest was almost wholly historical, and which leaves only the barest traces in other sources. Yet even the formulary procedure was falling out of use when he wrote, so that what he gives us of that procedure is something like a "potted account" of the main features, rather than the description of an observer or the how-to manual of a practitioner.⁶

Among literary authors Cicero (106 – 43 BC) is the principal source. In certain speeches procedure is front and center (*pro Caecina*, *pro Quinctio*), while in others, details of procedure can be extrapolated from single passages or even passing remarks.⁷

⁵ Additional portions of book four were uncovered in the last century, the first ("Oxford fragments") among the Oxyrhynchus papyri, published in 1927, and the second ("Florentine [or Antinoite] fragments") on parchment fragments discovered in Cairo and first published in 1935. The earlier known portions of the *Institutes*, preserved in the *Digest* and in the *Epitome* of Gaius, do not contain any of book four. A full account of the sources for the *Institutes* is given in H. L. W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden 1981), and a full account of the Veronese palimpsest — the main source — is given in F. Briguglio, *Il Codice Veronese in trasparenza. Genesi e formazione del testo delle Istituzioni di Gaio* (Bologna 2012), who reports also on new efforts to read the manuscript. The principal editions in English are W. M. Gordon and O. F. Robinson, eds., *The Institutes of Gaius* (London 1988), and F. de Zulueta, ed., *The Institutes of Gaius* (Oxford 1946/53), 2 vols. A new critical edition, published by Duncker and Humblot, is in preparation; recent volumes are edited by H. L. W. Hein and U. Manthe. A volume treating book four has not yet appeared. How this new critical text might be affected by the work Briguglio, cited above, is unclear.

⁶ Two authors with practical information on procedure are: Marcus Valerius Probus (latter first century AD), who gives a listing of abbreviations used in statutes, edicts, and other sources affecting procedure, and their meanings ("De notis iuris fragmenta," in J. Baviera, ed., *Fontes Iuris Romani Antejustiniani*, 2 (Florence 1968), 451–60), and Sextus Pompeius Festus (latter second century AD), whose abridgment of Marcus Verrius Flaccus' *De verborum significatu* preserves many terms used in litigation (W. M. Lindsay, ed., *Sexti Pompei Festi de verborum significatu* (Leipzig 1913)).

⁷ For the procedure in Cicero, Greenidge (note 2) is old but still valuable. See also A. Lintott, "Legal Procedure in Cicero's Time," in J. Powell, et al., eds., *Cicero the Advocate* (Oxford 2004), 61–78; B. Frier, *The*

Other important authors are Aulus Gellius (AD 125/8 – ca. 180), who saw service as a judge and recorded thoughts and observations on the law, Horace (65 – 8 BC), Pliny the Younger (AD ca. 61 – ca. 112), and Macrobius (fifth century AD). Plautus (third to second century BC)⁸ is rich but requires special care, because the procedure he describes is not always Roman, and because he often uses a rule of procedure for humorous effect, requiring the reader to divine the law and the joke at the same time.

Quintilian (first century AD) needs special mention as a source, because he was long underappreciated. Proceeding from the part truth, part conceit that Justinian's *Corpus iuris* is "legislation," the natural lawyers and their equally enthusiastic systematisers in the nineteenth century gave special place to the legal sources that were, after all, the raw material for their systems. Literary sources were sidelined, and Quintilian's *Institutio oratoria* (and, for that matter, Cicero's rhetorical works) were seen to belong to another discipline altogether. We now appreciate far better that Quintilian is a valuable source for procedure; much of what took place in litigation was unwritten in the law and shaped by the work of advocates.⁹

Statutes and records of private affairs survive in inscriptions: their value to the study of procedure is enormous.¹⁰ Even imperfectly preserved, they come to us free from abbreviation, interpolation, etc. They convey rules and customs that were uninteresting to subsequent generations, and events that were ephemeral

Rise of the Roman Jurists (Princeton 1985) (on the *pro Caecina*); J. Platschek, *Studien zu Ciceros Rede für P. Quinctius* (Munich 2005); J. Harries, *Cicero and the Jurists: From Citizens' Law to the Lawful State* (London 2006), ch. 7; E. Metzger, *Litigation in Roman Law* (Oxford 2005), 19–44, 163–166 (on the *pro Quinctio*).

⁸ See e.g. A. Scafuro, *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy* (Cambridge 1997); L. Pellicchi, *Per una lettura giuridica della "Rudens" di Plauto* (Faenza 2012).

⁹ On the use of Quintilian, see O. Tellegen-Couperus, "Introduction," in O. Tellegen-Couperus, ed., *Quintilian and the Law: The Art of Persuasion and Politics* (Leuven 2003), 12–17. On the role of advocacy and its relation to law, see J. A. Crook, *Legal Advocacy in the Roman World* (London 1995), ch. 1; B. Frier, "Finding a Place for Law in the High Empire," in F. de Angelis, ed., *Spaces of Justice in the Roman World* (Leiden 2010), 67–87. For a study of Roman advocacy using Quintilian generously, see L. Bablitz, *Actors and Audience in the Roman Courtroom* (Abingdon 2007), 141–204.

¹⁰ The standard reference for statutes is M. H. Crawford, ed., *Roman Statutes* (London 1996), 2 vols. Many records of private affairs are collected in *Fontes Iuris Romani Anteiustiniani*, 3 [*Negotia*], 2nd ed. V. Arangio-Ruiz (Florence 1969), though this does not include the great majority of records discovered in the twentieth century, on which see below.

even to contemporaries. As such they can give us a direct view of daily life in the courts and, substance aside, their drafting gives us clues to juristic practice.

Many new and valuable inscriptions were discovered only in the last century. We now possess, for example, many Roman formulae and can compare them to Gaius' description.¹¹ Among the

¹¹ This group of sources divides into "model formulae" (essentially templates that litigants would complete) and "completed formulae" prepared for specific litigation.

Of the former type: (1) the *lex de Gallia Cisalpina* (first century BC), c. 22, a statute prescribing laws for Cisalpine Gaul, and containing two model formulae to be used for trial when a person fails to make the required performance in a proceeding for *damnum infectum*: see *Roman Statutes* (note 10), no. 28; F. J. Bruna, *Lex Rubria: Caesars Regelung für die Richterlichen Kompetenzen der Munizipalmagistrate in Gallia Cisalpina* (Leiden 1972), 28–30, 107–19; (2) the *Tabula Contrebiensis* (87 BC) from Botorrita in Spain, preserving on bronze the judgment in a border dispute: see CIL I² 2951a; B. Díaz Ariño, *Epigrafía Latina Republicana de España* (Barcelona 2008), 95–98; J. S. Richardson, "The *Tabula Contrebiensis*: Roman Law in Spain in the Early First Century BC," *JRS*, 73 (1983), 33–41; P. Birks, A. Rodger, and J. S. Richardson, "Further Aspects of the *Tabula Contrebiensis*," *JRS*, 74 (1984), 45–73; (3) *Lex rivi Hiberiensis* (AD 117–138), an inscription containing a decree governing an irrigation community on the Ebro in Hispania Citerior, and including a formula for a trial on the imposition of a penalty: see M. H. Crawford and F. Beltrán Lloris, "The *Lex rivi Hiberiensis*," *JRS*, 103 (2013), 233; F. Beltrán Lloris, "An Irrigation Decree from Roman Spain: *The Lex Rivi Hiberiensis*," *JRS*, 96 (2006), 147–197; D. Nörr, "Prozessuales (und mehr) in der *Lex Rivi Hiberiensis*," *ZSS (RA)*, 125 (2008), 108–188; (4) a legal fragment from Egypt, PSI VII 743 *recto* fr. e (ca. AD 100), part of an instructional work used for teaching Greek, containing the *condemnatio* for a formula seeking an *incertum*, the formula translated into Greek and then presented in the Roman alphabet: see S. Ciriello and A. Stramaglia, "PSI VII 743 *recto* (Pack² 2100): *Dialogo di Alessandro* con i ginnosofisti e testo giuridico Romano non identificato," *Archiv für Papyrusforschung*, 44 (1998), 219–27; D. Nörr, "PSI VII 743r fr. e: Fragment einer römischen Prozessformel? Bemerkungen zum vorhadrianischen Edikt und zu den Hermeneumata Pseudodositheana," *ZSS (RA)*, 117 (2000), 179–215.

Of the latter type: (5) A formula in an action on a debt from Puteoli (first century AD), preserved on a waxed tablet: TPSulp. 31, in Camodeca, *Tabulae pompeianae Sulpiciorum* (cited below, note 12); (6) three formulae in papyri (P. Yadin. 28, 29, 30) from the province of Arabia (ca. AD 124), partly prepared in anticipation of a suit on guardianship to be tried before a panel of judges in Judaea: N. Lewis, ed., *The Documents from the Bar Kokhba Period in the Cave of Letters: Greek Papyri* (Jerusalem 1989), 118–20; H. Cotton, "The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia," *JRS*, 83 (1993), 94–108; D. Nörr, "The *Xenokritai* in Babatha's Archive (Pap. Yadin 28–30)," *Israel L. Rev.*, 29 (1995), 83–94; idem, "Prozessuales aus dem Babatha-Archiv," in *Mélanges de droit romain et d'histoire ancienne. Hommage à la mémoire de André Magdelain* (Paris 1998), 317–41.

most valuable of the new discoveries are the collections of first-century waxed tablets from Herculaneum and Puteoli, both of which collections include documents prepared for litigation.¹² Another valuable new source is the *lex Irnitana*, a copy of a model “town charter” prepared for *municipia* in Spain. The *lex Irnitana* contains detailed rules on conducting lawsuits, and many of the rules directly reflect the practice in Rome.¹³

The scope of the law

Litigation was governed by law but the law was not comprehensive: litigants supplemented the law with practices that acknowledged but were not determined by the law, and advocates conducted trials based on rules and practices developed outside the operation of the law altogether. The present day owes its comprehensive laws of procedure to its enthusiasm for testing its systems against wider principles such as “hear both sides” and “due process,” and reforming the law to suit. Roman procedure was not deaf to these principles nor resistant to improvement, but there were no means to challenge the validity of questionable law in a way that might have led to wider reflection and a more

¹² The Herculaneum tablets were discovered in the 1930s and texts were published in succeeding decades by Giovanni Pugliese Carratelli and Vincenzo Arangio-Ruiz. In the last two decades Giuseppe Camodeca has re-edited many of these texts, and a new edition is forthcoming. These tablets date to the late first century. The Puteoli tablets were discovered in 1959 near Pompeii, and date to the middle first century. Many of them relate to a family, the Sulpicii, that engaged in banking activities. The critical edition is Giuseppe Camodeca, ed., *Tabulae Pompeianae Sulpiciorum (TPSulp.)*. *Edizione critica dell'archivio puteolano dei Sulpicii* (Rome 1999). The two collections are introduced and discussed in P. Gröschler, *Die tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden* (Berlin 1997). The Puteoli tablets are discussed in their economic context in J. Andreau, *Banking and Business in the Roman World*, trans. J. Lloyd (Cambridge 1999), 71–79, and there is a popular account in D. Jones, *The Bankers of Puteoli: Finance, Trade, and Industry in the Roman World* (Stroud 2006). For a fascinating and provocative treatment of Roman tablets generally, see E. A. Meyer, *Legitimacy and Law in the Roman World* (Cambridge 2004).

¹³ The critical texts are: J. González, “The Lex Irnitana: A New Copy of the Flavian Municipal Law,” *JRS*, 76 (1986), 147–243 (with English translation); F. Lamberti, *Tabulae Irnitanae: municipalità e “ius Romanorum”* (Naples 1993) (with Italian translation). Some new readings and supplements are given in M. H. Crawford, “The Text of the Lex Irnitana,” *JRS*, 98 (2008), 182. A brief description is given in E. Metzger, “Agree to Disagree: Local Jurisdiction in the *lex Irnitana*,” in A. Burrows, et al., eds., *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford 2013), 213–15.

comprehensive body of rules. This is why it is somewhat jarring to see modern scholars do what the Romans never did: assess Roman procedure for its fidelity to certain “principles of procedure.”¹⁴ We know, for example, that the Romans favored publicity in their proceedings, and that at times they avoided making decisions in a defendant’s absence, but to treat these features as conscious aspirations suggests wrongly that the Romans were somehow anticipating a better and more complete system.¹⁵

In fact the law of procedure, until very late, concerned itself with a limited number of issues, the principal ones being summons, joinder of issue or establishing the claims, and the instigation of trial. Execution of judgments was rudimentary until the creation of appropriate devices under the imperial *cognitio* procedure. The limited scope of procedural law reflected the limited authority of the magistrates¹⁶ who enforced it. From at least the time of the Twelve Tables, and through the principate, much of the ordinary civil litigation took place in two distinct stages,¹⁷ and the magistrate presided over the first stage only. This was the so-called *in iure* stage. Generally speaking, this stage was devoted to isolating the issues for trial. In some cases this could be a complex task to perform, requiring special findings of fact, interim remedies, or sanctions for disobedience. At bottom, however, this stage had a modest goal — to produce the trial agenda — and the law of procedure developed to assist the magistrate in that goal. The law extended hardly at all into the second stage of the lawsuit, the trial before the judge (“*apud iudicem*”). This was the stage at which witnesses and evidence were presented and a judgment given. There were no laws to assist the judge comparable to those that assisted the magistrate.

Thus the Roman practice of dividing the lawsuit into two stages left the trial stage relatively unregulated. There were important exceptions: the judge was answerable for certain mistakes and misbehaviour (usually reflected in the form or timing of the judgment), and in some circumstances a litigant could return

¹⁴ See Kaser, *Das römische Zivilprozessrecht* (note 2), 8–11; Seidl (note 2), 162–67.

¹⁵ For more on this subject, with literature, see E. Metzger, “Roman Judges, Case Law, and Principles of Procedure,” *LHR*, 22 (2004), 243–75.

¹⁶ For the sake of exposition this chapter uses “magistrate” as a shorthand for the various office holders with the authority to administer justice. As such it includes, e.g., consuls, praetors, aediles, local *duumviri* or *praefecti iure dicundo*, governors, *praefecti praetorio*, *vicarii*, and of course the emperor.

¹⁷ See the discussion below at notes 19 to 21 and accompanying text.

to the magistrate to have the lawsuit restored to an earlier, pre-trial state of affairs (*restitutio in integrum*, discussed below). But for the most part the trial was conducted according to other rules: the rhetorical conventions cultivated by the orators who spoke on behalf of the litigants. In the republic these were the *patroni*, men of wealth and standing, later named *advocati* as they came to be drawn from less elevated ranks and became more professionalized. They imported Greek rhetoric and nurtured it into a peculiarly Roman discipline.¹⁸

The two stages

The two-stage proceeding is striking and, not surprisingly, has invited scholars to consider and describe its origins and general character.¹⁹ An enduring description (or at least an enduring point of departure) is Moriz Wlassak's from the nineteenth century: a voluntary submission to state-sanctioned arbitration. His description drew of course on the largely unregulated second stage, but also on the relatively "light touch" exercised by the magistrate in the first stage, and on the seemingly contractual nature of the event (*litis contestatio*) by which the second stage was set in motion. But: if litigation was at the outset a species of arbitration, then it could not have been "unitary" in origin, with a single figure (king, then magistrate) exercising full judicial powers. Thus later writers, such as Leopold Wenger, sought to disprove Wlassak by showing that the Roman kings did indeed

¹⁸ See K. Tuori, "A Place for Jurists in the Spaces of Justice?," in F. de Angelis, ed., *Spaces of Justice in the Roman World* (Leiden 2010), 45–48; J. Powell and J. Paterson, "Introduction," in J. Powell, et al., eds., *Cicero the Advocate* (Oxford 2004), 10–18; Crook (note 9); J.-M. David, *Le patronat judiciaire au dernier siècle de la république romaine* (Rome 1992); A. A. Schiller, *Roman Law: Mechanisms of Development* (The Hague 1978), 569–77.

¹⁹ For what is given below, see A. Bürge, "Zum Edikt *de edendo*," ZSS (RA), 112 (1995), 1–50; H. R. Hoetink, "The Origin of the Dual Mode in Roman Procedure," *Seminar*, 5 (1947), 16–30; Jolowicz and Nicholas (note 2), 176–78; Kaser, *Das römische Zivilprozessrecht* (note 2), 29–30, 79; idem, "Novi studi sul processo civile romano," *Labeo*, 15 (1969), 190–98; idem, "Prätor und Judex im römischen Zivilprozess," *TRG*, 32 (1964), 329–62 (modifying the views expressed in "Zum Ursprung des geteilten römischen Zivilprozessverfahrens," in *Ausgewählten Schriften*, 2 (Naples 1976), 385–409); idem, "Römische Gerichtsbarkeit im Wechsel der Zeiten," in *Ausgewählten Schriften*, 2 (Naples 1976), 419–49; J. M. Kelly, *Roman Litigation* (Oxford 1966), ch. 1; idem, *Studies in the Civil Judicature of the Roman Republic* (Oxford 1976), 125–29; H. F. Jolowicz, "The *judex* and the Arbitral Principle," *RIDA*, 2 (1949), 477–92; G. MacCormack, "Roman and African Litigation," *TRG*, 39 (1971), 221–55.

possess full judicial powers, a proposition for which there are a few (though suspect) sources. Others, such as Kaser, have criticised Wlassak's view directly on the argument that even in the earliest period of litigation, that of the *legis actio*, state compulsion was present and the parties were undeniably at odds.

At bottom the answer turns on the (conjectural) origins of the *judge*: where did the impetus come from to create a separate decision-maker? The arbitration theory makes him the creation of the parties; the unitary-in-origin theory makes him a "state concession" to, for example, democratic pressures or the magistrate's burdens of office. A further state-concession explanation, put forward by Kaser, was influential for many years. This was the explanation that all judicial duties may originally have been concentrated in a king, but this would only be the case so long as lawsuits were decided by, for example, magic and ritual. When lawsuits came to be decided by *law*, this effected a division of responsibility: the magistrate (or king) performed acts of will, such as orders to act or refrain from acting, and these are distinct in character from decision-making, which relies on knowledge of the rights that obtain in a particular case. Thus the divided procedure would reflect a new-found desire of two contesting parties to find an impartial decision-maker with knowledge of the relevant rights.²⁰

Yet newer studies, and new evidence, have perhaps revived the arbitration theory somewhat. The judicial selection procedures, now visible in great detail in the *lex Irmitana*, reveal themselves to be strikingly consensual (Birks). A study of *editio*, a form of pretrial notice (Bürge), though revealing *litis contestatio* to be less "contractual" than Wlassak believed, ironically shows it to be more consensual. And a comparison of the procedures of the Twelve Tables with other primitive modes of litigation suggests that early Roman litigation may have been more concerned with keeping the peace among members of a close community than with parsing every grievance into legal claims (MacCormack). The consensual features now appear so prominent that we are perhaps justified in giving the arbitration theory a second look. Jolowicz's view, that early Roman litigation was arbitral even in the face of a hostile party and a measure of state compulsion, seems now quite plausible.²¹

²⁰ This is the view set out in Kaser, "Prätor und Iudex" (note 19) and idem, "Römische Gerichtsbarkeit" (note 19). It was promptly criticised by Jolowicz and Nicholas (note 2), 177 n.2, as "too rational."

²¹ See especially Jolowicz (note 19), 488–91. His views are reflected in his *Historical Introduction* (with Barry Nicholas, cited in note 2), at

Challenges, reviews, appeals

Until the principate and the arrival of the *cognitio* procedure, a disappointed litigant had limited means for challenging a judgment or the decision of a magistrate; none of the available means could be described as “appeal.”²² Before *cognitio*, a lawsuit proceeded in a (to us) back-to-front manner, with the higher authority (the magistrate) making certain final decisions before the matter was passed to the lower authority (the judge). In theory, this ought to clear the stage of appealable issues before trial. In practice, it might be necessary not to “appeal the case” to a higher authority, but to revisit a matter that the magistrate had earlier decided. A litigant might for example seek the *auxilium* of a tribune or the veto of another magistrate.²³ This must have been rare, however. The more usual method for revisiting a magistrate’s decision, and the method addressed at length in the praetor’s edict,²⁴ was to seek *restitutio in integrum* (“restoration to an earlier state of affairs”). This was a special praetorian remedy, often invoked to relieve a litigant from the legal effects of a transaction deemed to be unfair in that instance. The remedy resembled an appeal, however, when a litigant had lost his right to bring an action and equity demanded that that right be restored. This might occur, for example, if a litigant had innocently sued a person who lacked the capacity to be sued, or if a litigant’s action had expired because a magistrate’s own negligence had allowed it to do so. A further means to challenge the legal sufficiency of a judgment, somewhat analogous to *restitutio*, was for a losing defendant to mount a challenge when the prevailing party brought an enforcement action (*actio iudicati*). The need to furnish security, and the risk of a double condemnation in the event the challenge failed, made this a perilous course.

Quite a separate avenue for challenging a judgment was to

176–78. Cf. Kaser/Hackl (note 2), 30: “Das in dieser Unterwerfung, die notfalls vom Staat erzwungen wird, liegende Element der Gemeinsamkeit im Verhalten der Parteien reicht für die Annahme eines Schiedsvertrages nicht aus.”

²² For what is given below, see A. H. M. Jones, “Imperial and Senatorial Jurisdiction in the Early Principate,” in *Studies in Roman Government and Law* (Oxford 1960), 67–98; Jolowicz and Nicholas (note 2), 216, 229–30, 400; Thomas (note 2), 109, 113–14; P. G. Stein, “‘Equitable’ Remedies for the Protection of Property,” in P. Birks, ed., *New Perspectives in the Roman Law of Property* (Oxford 1989), 191–92; Metzger (note 7), 117–20.

²³ See Cic. *Quinct.* 65, 69

²⁴ O. Lenel, *Das Edictum Perpetuum*, 3rd ed. (Leipzig 1927), 109–30.

bring a personal action against the judge.²⁵ Aside from some possible pre-edictal roots, this type of proceeding belonged to the formulary procedure, and specifically to lawsuits that were brought before the lay *unus iudex*. The grounds on which these actions were granted is not perfectly clear: the evidence is patchy, and it is difficult to distinguish the grounds set down in the praetor's edict from the grounds set down later in a *lex Iulia de iudiciis privatis* (17 BC, discussed below). Properly speaking these actions were not a species of appeal or even a substitute for appeal, but a tool of administration: the state machinery lacked the means to manage the trial, and opted to "manage the judge" instead. He was given a single commission and charged with performing it properly at the risk of personal liability. Aside from certain errors of calculation, easily avoided, he was bound (1) to give judgment within the proper time, and (2) not to give judgment in the face of certain unexpected events, e.g., a party's illness. It is unlikely that a judge who crossed these lines would face certain condemnation, at least after the passage of the *lex Iulia*; many of the errors for which a judge was responsible could be easily corrected. (After execution of a defective judgment, perhaps not.)

From the principate onwards, an increasing number of cases were brought under the *cognitio* procedure, and because the authority to adjudicate these cases derived ultimately from the emperor's *imperium*, appeals could now be taken to the emperor himself or to persons or institutions to whom he delegated this

²⁵ The literature on this subject is enormous. The newer literature should be favored, however, because the *lex Irnitana*, discovered only in 1981, has added a great deal to our understanding. See, most recently, E. Metzger, "Remedy of Prohibition against Roman Judges in Civil Trials," in P. Brand and J. Getzler, eds., *Judges and Judging in the History of the Common Law and Civil Law from Antiquity to Modern Times* (Cambridge 2012), 177–91; idem, "Absent Parties and Bloody-Minded Judges," in A. Burrows and A. Rodger, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 455–73; Á. Gómez-Iglesias, "Lex Irnitana cap. 91: *lis iudici damni sit*," *SDHI*, 72 (2006), 465–505; R. Scevola, *La responsabilità dei iudex privatus* (Milan 2004); D. Mantovani, "La 'diei diffissio' nella 'lex Irnitana'," in *Iuris vincula: studi in onore di Mario Talamana*, 5 (Naples 2001), 13–72. Olivia Robinson has written a series of articles discussing the uses of judges' liability in Justinian: "Justinian's Institutional Classification and the Class of Quasi-Delict," *JLH*, 19 (1998), 245–50; "The 'iudex qui litem suam fecerit' explained," *ZSS (RA)*, 116 (1999), 195–99; "Justinian and the Compilers' View of the *iudex qui litem suam fecerit*," in H.-G. Knothe and J. Kohler, eds., *Status Familiae* (Munich 2001), 389–96; "Gaius and the Class of Quasi-Delict," in *Iuris vincula: studi in onore di Mario Talamana*, 7 (Naples 2001), 120–28.

authority.²⁶ The appellate authority, moreover, could reform the judgment, where *restitutio* had only allowed earlier proceedings to be annulled. For the principate the sources are more spare, but it appears that civil appeals were variously permitted to the urban praetor (from Roman litigants), to the senate (from provincial litigants), and in the late principate to the *praefectus praetorio*. We would expect, however, that in the usual case appeals would be taken from the delegated judge to the delegating magistrate or, where relevant, a provincial governor. In the later empire the judicature was much altered, with cases being heard at first instance in local courts and provincial governors' courts, and more rarely before the now multiple *praefecti praetorio* and in the courts of regional *vicarii* (deputies of the *praefecti*). Second or even third appeals might be heard from these courts upwards, though the governors' courts were usually the last resort for local matters.

Principal models and special proceedings

From the monarchy to the dominate, civil procedure evolved through three periods.

Legis actiones. A procedure nominally, if not in fact, determined by statute (*lex*), guided by strict pleading, and marked by certain archaisms. It is older than the Twelve Tables, and had largely disappeared by the second century BC.

Ordo iudiciorum, or formulary procedure. A procedure guided by a brief written statement, assembled from model clauses ultimately founded on the law. The statement constituted the question to be adjudicated. The procedure's origins may lie in the peregrine praetorship (242 BC), and its use declined through the principate.

Cognitio.²⁷ A procedure marked by an official's undertaking to investigate and adjudicate a claim according to the law. Its

²⁶ See S. Randazzo, "Doppio grado di giurisdizione e potere politico nel primo secolo dell'impero," in J. Sondel, et al., eds., *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*, 2 (Krakow 2003), 75–94; L. Fanizza, *L'amministrazione della giustizia nel principato* (Rome 1999), 11–60; Kaser, *Das römische Zivilprozessrecht* (note 2), 501–10; I. Buti, "La 'cognitio extra ordinem': da Augusti a Diocleziano," in H. Temporini and W. Haase, eds., *Aufstieg und Niedergang der römischen Welt*, 2:14 (Berlin 1982), 54–58.

²⁷ Textbooks commonly refer to *cognitio* in various forms: *cognitio extra ordinem*, *cognitio extraordinaria*, *iudicia extraordinaria*. From at

origins are in the power of the emperor, and it became the usual form of procedure from some undetermined time in the principate.

This account is accurate, though incomplete. The three periods describe the different frameworks within which a civil lawsuit passed from summons to execution. Within each of these frameworks, however, narrow and limited proceedings could take place. Such proceedings had a short duration and followed a unique procedure; each was used to resolve one or more type of controversy. For example, a specific proceeding might be necessary to determine the ownership of a slave or its servile status, a litigant's disobedience, or the genuineness of a debt. Such proceedings met certain needs that the main forms of action could not adequately meet. The most important of these was the need to enforce the magistrate's authority. For whatever reason, the power to enforce obedience to magistral orders came slowly to civil litigation, reaching a measure of efficiency only with the contempt procedure of the later principate and dominate. Before that time, magistrates relied on certain special proceedings.

An important example is *missio in possessionem*: a magistrate with *imperium* gives the possession of another's goods and allows their sale.²⁸ Among its more important uses was as a procedural instrument used to enforce judgment debts. It was also used against those who fraudulently concealed themselves from the praetor's authority, and possibly those who were merely absent from process and undefended.²⁹ A current of opinion holds that *missio* was available even against a person who resisted private summons (*in ius vocatio*, discussed below), but there are reasons to doubt this was the case.³⁰

least the middle empire one could refer to this new, and now common, mode of procedure with the words *extraordinaria* or *extra ordinem* (D.3.5.46.1, Paul 1 *sent.*; J.4.15.8). It is widely accepted that the term was coined to distinguish this form of procedure from that of the *ordo iudiciorum* (or *iudiciaria*), that is, the formulary procedure. See Randazzo (note 26), 79 and n.15. Cf. W. Turpin, "Formula, *cognitio*, and Proceedings *extra ordinem*," *RIDA* (3rd), 46 (1999), 544–62.

²⁸ For what is given below, see Kaser, *Das römische Zivilprozessrecht* (note 2), 222–23, 427–29; Thomas (note 2), 112–13; Jolowicz and Nicholas (note 2), 217, 228–29. A thorough account of the steps leading to *missio* in Cicero's *pro Quinctio* is given in Platschek (note 7).

²⁹ See G.3.78; Lenel (note 24), § 206; and especially Platschek (note 7), 193–226 (considering the juristic evidence in detail).

³⁰ Kaser, *Das römische Zivilprozessrecht* (note 2), 222, outlines the common opinion (with literature). This opinion rests substantially on a series of events recounted in Cicero, *pro Quinctio*, where Cicero's client

A second example is the praetorian stipulation.³¹ This belonged to the formulary procedure, though it followed a sequence of events at least partly familiar to the *legis actio* procedure. The praetor, instead of ordering a party to perform at the risk of penalty, would order a party to make a conditional promise to his opponent. The transaction was therefore a compulsory stipulation, creating a conditional debt. Diverse matters were handled in this way, including *operis novi nuntiatio* (a stipulation for assurance from a neighbour who is contemplating hazardous work), *cautio damni infecti* (a stipulation against impending damage), and *vadimonium* (a stipulation to return after proceedings *in iure* have been interrupted). There are interesting examples of the latter in the finds from Herculaneum and Puteoli. Local magistrates sometimes lacked the jurisdiction to hear a case locally, and were charged with deciding whether the case ought to be heard in Rome or by a provincial governor. But this required a special evidentiary proceeding to determine whether the subject matter of the case, or the amount in controversy, did indeed make a local trial impossible. If the case could not be heard locally, the proceeding would conclude with a praetorian stipulation. One party (or perhaps both?) promised the other to appear at the remote tribunal, and to pay a sum if he did not appear.³²

Interdict

The most important of these special proceedings, however, was the interdictal proceeding.³³ Interdicts are attested from the second century BC and were perhaps the earliest form of praetor-

has been subjected to *missio* and where, according to a widely held view, the client's absence took place before any proceedings had been initiated. To the contrary, new evidence from Puteoli and Herculaneum (above, note 12) suggests that Cicero's client was ignoring the praetor's compulsory order to reappear. See Metzger (note 7), 30–38, 163–66.

³¹ A. M. Giomaro, "Ulpiano e le 'stipulationes praetoriae'," in *Studi in onore di Arnaldo Biscardi*, 4 (Milan 1983), 413–40; Metzger (note 7), 37–38, 161–63; idem, "Lawsuits in Context," in J. W. Cairns and P. du Plessis, eds., *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007), 204–205; Kaser, *Das römische Zivilprozessrecht* (note 2), 429–32.

³² See *Tabula Herculanensis* 14 with Indra (note 2), 106–109; TPSulp. 27.

³³ For what is given below, see G.4.138–170; Kaser, *Das römische Zivilprozessrecht* (note 2), 408–21; Buckland (note 2), 729–44; Frier (note 7); A. Watson, *The Law of Property in the Later Roman Republic* (Oxford 1968), 86–89; idem, *Law Making in the Later Roman Republic* (Oxford 1974), 41–42; Jolowicz and Nicholas (note 2), 230–32, 259–63; Stein (note 22), 188–89.

ian intervention. An interdict was a command that issued from a magistrate with *imperium* and was aimed either at bringing order to a disorderly (and perhaps unpeaceful) state of affairs, or at forestalling some undesirable event. The magistrate, on application, ordered a person to do something or to refrain from doing something. An inquiry of the facts was not needed for an order to issue, and there were even instances where it issued *ex parte*. This seems remarkable until we appreciate that the order was not directed against a person *per se*, but against a person who was, in fact, as he was alleged to be. What this means in practice is that a magistrate, considering an interdict, need not decide whether the plaintiff had a valid claim in law, but only whether the plaintiff was in a deserving position relative to the *alleged* position of the defendant. If for example a person had allowed another the use of his property for some indefinite period (a so-called *precarium*), and the grantee refused to return it on demand, it was enough for the magistrate to appreciate that the greater possessory right would lie with the grantor if the grantor's story were true. The magistrate would then order the grantee to restore, not "the property," but "that which he holds *precario*."³⁴ In inserting the proviso, the magistrate is hedging: the grantor may in fact have no such right. A second example: if a person believed that another had done something injurious on his land, such as erecting a structure, and had done so "by force or stealth" (*vi aut clam*), the magistrate would not simply order restoration, as he did not have the facts before him; he would instead order the restoration of "that which was performed *vi aut clam*."³⁵ Again, the magistrate is hedging.

Speed was the principal advantage in the interdictal procedure. Small and uncontested affairs could be disposed of without trial; possession could be quickly secured when ownership was disputed; a "new possession" could be obtained, for the sake of equity, when time was of the essence.³⁶ But the advantage of speed was at the defendant's expense. The unusual construction

³⁴ The form of the interdict is given in D.43.26.2 pr.: *Quod precario ab illo habes aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas.*

³⁵ The form of the interdict, as reconstructed, is: *Quod vi aut clam factum est qua de re agitur id, si non plus quam annus est cum experiundi potestas est, restituas.* See D.43.24.1 pr.; Mantovani (note 2), 88.

³⁶ Obtaining a "new possession" is a more aggressive use of possessory interdicts; examples are interdicts to assist *bonorum possessio* and possession of a tenant's property by a landlord under the *interdictum Salvianum* (see M. Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich 1971), 472–73).

of the interdict did not allow the free incorporation of defenses, and in any event the interdictional proceeding did not allow a defendant to prove his defense as he would at trial. A defendant who believed his side had merit was therefore put in the position of making a later challenge, not to the interdict itself (which was final), but to the assumption on which the interdict issued. This required a trial on the merits, which would proceed under a *legis actio* or, later, under a formula. The groundwork for the trial was usually set by mutual promises, expressed as stipulations: the interdicted person promised to pay a sum if he had disobeyed, e.g., the interdict to restore that which was performed *vi aut clam*. This required him to prove at trial that he had not acted *vi aut clam*, or possibly that some other factor made his conduct lawful. The other party made a corresponding promise to pay a sum if his opponent had not disobeyed the interdict. Under the formulary procedure, a more careful defendant, unsure whether he could show he had acted properly, could instead elect, at the time the interdict issued, to go to trial on a formula permitting him (in the event judgment went against him) to obey the interdict in lieu of condemnation.

Legis actio

The *legis actio* procedure was a strict and formal method for identifying claims that deserved further prosecution.³⁷ By later Roman standards the claims were highly “unparticularized.” The specific grievance was unacknowledged, the litigant receiving instead an off-the-peg statement that he had been aggrieved in one of the limited permissible ways, along with the state’s approval to seek redress, whether by trial or execution. The state expressed its approval in one of five general forms. Certain forms (*legis actio per sacramentum*; *per condictionem*; *per iudicis postulacionem*) allowed the plaintiff to seek redress before a judge or judges at trial, while other forms (*per manus iniunctionem*; *per pignoris capionem*) allowed the plaintiff to seek direct redress against, respectively, a debtor or the debtor’s property. The differences among the forms lay partly in the underlying substantive claim (e.g., a personal claim would usually be brought under *per sacramentum in personam* or *per condictionem*), but mostly in the pro-

³⁷ For what is given below, see G.4.10–31; Albanese (note 2); Jolowicz and Nicholas (note 2), 175–90; Tellegen-Couperus (note 2), 21–24; de Zulueta (note 5), 2:230–50; Crook, “The Development of Roman Private Law” (note 2), 544–46; Kaser, *Das römische Zivilprozessrecht* (note 2), 25–148, esp. 44–60, 64–81; Greenidge (note 2), 49–75.

cedure. The *per conditionem* interposed a delay before trial; the *per iudicis postulationem* required a similar delay, but was used only when a specific statute authorized it; the *per sacramentum* was preceded by an elaborate wager; the *per manus iniunctionem* and *per pignoris capionem* were highly prescribed modes of execution.

Litigation by *legis actiones* had several obvious shortcomings. The off-the-peg claims required the most careful pleading (Gaius, *Institutes* 4.11, 30) and it was not possible to include affirmative defenses. A representative could not appear in a litigant's place. Non-citizens did not participate: the entire process was, at bottom, a means to bring the authority of the civil law to Roman citizens. This last shortcoming is a serious one, and it is widely accepted that alternative methods of expressing claims must have existed when the peregrine praetorship was created in 242 BC. The origins of the formulary procedure (or some close predecessor) is usually dated to about this time. Quite apart from the problem of peregrine litigants, the availability of claims based on either the urban or peregrine praetor's own authority (*ius honorarium*) will have required the use of formulae.

Yet litigation by *legis actiones* continued alongside the use of formulae, and in the late second century BC a *lex Aebutia*³⁸ appears to have adjusted the use of the two forms of procedure in some way. The traditional view, set out by Moriz Wlassak, is that before the *lex Aebutia*, the only way to enforce a claim under the civil law was via the *legis actiones*. The formulary procedure, even if used in the court of the urban praetor, would adjudicate only praetorian, not civil, law. On this explanation the *lex Aebutia* first permitted formulae for civil law actions between Roman citizen. There are, however, other views.³⁹ The *legis actiones*

³⁸ G.4.30; Gell. *NA* 16.10.8.

³⁹ The newest view, and among the most engaging, is that of Talamanca, who follows Wlassak to some degree. Talamanca looks back to the time before the *lex Aebutia* but after the creation of the peregrine praetorship, suggesting the urban praetor founded on his own *imperium* the authority to grant civil actions, as well as developing his own "honorary actions" for use by Roman citizens: these would exist side-by-side with the *legis actiones*. The *lex Aebutia* would then have "legalized" the formulary procedure for civil actions, giving those actions the civil effects they would have lacked when based only on the praetor's *imperium*. Talamanca, "Il riordinamento Augusteo" (note 2), especially 74–76, 199–203. For other views see e.g. M. Kaser, "Die lex Aebutia," in *Studi in memoria di Emilio Albertario* (Milan 1953), 25–59 (the statute permitted formulae for actions formerly brought by *legis actio per conditionem*); P. Birks, "From *Legis Actio* to *Formula*," *IJ* (n.s.), 4 (1969), 356–67 (the statute limited whatever tactical advantages a plaintiff enjoyed in select-

were clearly dealt a more serious blow by a *lex Iulia de iudiciis privatis* (17 BC),⁴⁰ which seems to have abolished their use in most cases. They remained as an alternative form of proceeding in cases of *damnum infectum* (to forestall damage to one's property by a neighboring property), and in cases before the centumviral court (see below).

Course of proceedings

Though the forms of action eventually gave way to formulae, the underlying procedures proved to be more lasting.⁴¹ This is remarkable, given that these procedures are founded on a few terse provisions of the Twelve Tables.⁴² A person who wished to bring a lawsuit was himself responsible for bringing the defendant physically to the magistrate. This summons ("in ius vocatio") was purely private and, moreover, inadequately supported by state enforcement.⁴³ Until the later development of praetorian measures against reluctant litigants, the law simply gave "cover" to a plaintiff who used force against a refusing defendant. The defendant himself had a single alternative: if he did not wish to come at that moment, he could give a person in his place. The role of this person, the *vindex*, is not perfectly known, but it appears that he undertook to produce the defendant at a later time.⁴⁴

Proceedings *in iure* were oral, and the main tasks were to obtain a claim in one of the permissible forms, and to receive a judge or judges. It might not be possible to achieve this on a single occasion and, in any event, certain *legis actiones* interposed

ing between the two forms of procedure); Crook, "The Development of Roman Private Law" (note 2), 146 (similar to Talamanca: the statute ensured that actions sued by formulae could not be sued upon again). Other views are summarized in Bertoldi (note 2), 107–58.

⁴⁰ G.4.30; *lex Irni.*, ch. 91 (note 13).

⁴¹ For what is given below, see Kaser, *Das römische Zivilprozessrecht* (note 2), 64–69; Kelly, *Roman Litigation* (note 19), ch. 1; MacCormack (note 19); Buckland (note 2), 609–30.

⁴² XII Tab. 1.1–4, 6–10; see also D.50.17.103 (Paul 1 ed.).

⁴³ Kelly, *Roman Litigation* (note 19), ch. 1; cf. Kaser, *Das römische Zivilprozessrecht* (note 2), 222. The use of *missio* in this context is doubtful, as noted above, note 30. Paul says that a fine (*multa*) will be imposed against those who do not come when summoned before a municipal magistrate, but that rustics will be spared, and that for others some sort of prejudice must be shown. D.2.5.2.1 (Paul 1 ed.).

⁴⁴ See Kaser, *Das römische Zivilprozessrecht* (note 2), 224, and the literature cited in R. Domingo, *Estudios sobre el primer título del edicto pretorio*, 2 (Santiago de Compostela 1993), 56 n.140. The awkward text is D.2.4.22.1 (Gaius 1 *leg. duo. tab.*), which suggests that the *vindex* undertook to defend his principal.

a period of delay before the judge was selected. This created the problem of how to induce a defendant to return. The earlier law relied on sureties (*vades*).⁴⁵ How the defendant gathered these *vades* on the spot, and how he satisfied the plaintiff that the *vades* were acceptably solvent, were two recurring problems which perhaps led to the later practice of using personal bonds (*vadimonia*).

The final event *in iure* was *litis contestatio* (“joinder of issue”).⁴⁶ At this juncture the parties made declarations (apparently before witnesses), the effect of which was to erase any claims that arose from the matter being litigated, and replace them with the triable issue or issues described in the *legis actio*. It was not possible to relitigate those claims after *litis contestatio*, even if the matter did not reach judgment.

Iudex, arbiter, centumviri

Most lawsuits requiring a trial would pass to a *iudex* or *arbiter*. By the end of the republic the distinction between the two was all but lost, but originally, it appears, an *arbiter* was selected when a matter was essentially uncontested but something remained for decision, possibly requiring a wide power of discretion: for example, the division of an inheritance or the assessment of a sum owing.⁴⁷ The selection of a lay *iudex*, with full power to resolve and decide contested matters, was the more usual practice. A far smaller number of suits under the *legis actiones* passed to the centumviral court, comprising 105 members (often but not always sitting in panels) and led by magistrates, but drawn from elected representatives from each Roman *tribus*. This court, possibly of great antiquity, had a limited subject-matter jurisdiction whose boundaries are not wholly clear from the sources. Certain matters of inheritance certainly belonged to it, and perhaps also questions of status.⁴⁸

⁴⁵ Varro *Ling.* 6.74; Gell. *NA* 16.10.8; Livy 3.13.8; Kaser, *Das römische Zivilprozessrecht* (note 2), 68–69. Gellius speaks of *subvades*; Livy speaks of multiple *vades*, each liable to a specific sum. One hypothesis is that a defendant “cumulated” *vades* until he reached a satisfactory level of assurance.

⁴⁶ Kaser, *Das römische Zivilprozessrecht* (note 2), 75–77, 79–81. Cf. Alan Watson, *International Law in Archaic Rome: War and Religion* (Baltimore 1993), 10–19 (on “testes estote”).

⁴⁷ Kelly, *Studies* (note 19), 117–19; M. Talamanca, *Istituzioni di diritto Romano* (Milan 1990), 289–90.

⁴⁸ On the composition and jurisdiction of the centumviral court, see Kaser, *Das römische Zivilprozessrecht* (note 2), 52–56; Kelly, *Studies* (note 19), ch. 1. On the physical space it may have occupied, see Bablitz (note 9), 61–70.

Formulary procedure

The formulary procedure was marked by an improved system of pleading and the introduction of new, largely praetorian rules of enforcement.⁴⁹

Pleading

Litigants were no longer required to plead the words of the civil law. They were now allowed to plead the event which triggered the assistance of the law, and the law could be either civil or praetorian in origin. This new freedom was possible because the praetor, in his yearly edict, now announced in advance which events would win the right to bring an action. Thus litigants knew that if they described to the praetor how, for example, they had created a contract, they would win the right to bring an action on the contract. The praetor simplified the task by setting out his intentions in plain language, and by providing model clauses — the actions and defenses — from which the agenda for trial would eventually emerge.

The agenda was expressed as a “formula,” a brief statement of perhaps a few dozen words, addressed to the judge or judges, and written down. It was assembled from model clauses (for example: a charging clause, a defense clause, a condemnation clause). It expressed a conditional injunction, informing the judge under what circumstance he should give judgment for the plaintiff or defendant. As such it served simultaneously as a set of instructions, a judicial commission, and a summation of the pleadings. It was also a very concise expression of a legal remedy, and formulae therefore became the objects of juristic study.

A formula awarded only money damages. This was not because the law lacked the imagination to do otherwise; more exotic remedies were available from magistrates in other proceedings. The preference for money damages might conceivably reflect something deep in Roman legal thinking: that injuries created debts, and that legal process should locate and assess those debts.⁵⁰ Remedies such as performance would have been

⁴⁹ Our main source for the details of the formulary procedure is G.4.30–187. See Kaser, *Das römische Zivilprozessrecht* (note 2), 220–382; Johnston (note 2), 112–18; E. Metzger, “Formula,” in *Oxford International Encyclopedia of Legal History* (New York 2009); idem, *A New Outline of the Roman Civil Trial* (Oxford 1997), ch. 5; Jolowicz and Nicholas (note 2), 199–225; Crook, *Law and Life of Rome* (note 2), 73–87; Talamanca (note 47), 298–360.

⁵⁰ See e.g. G.3.180: *Nam tunc obligatio quidem principalis dissolvi-*

difficult to enforce in any event.⁵¹ The judge's commission ended when he gave judgment, and enforcement was left to a second, wholly separate, proceeding. Roman magistrates had, over time, become expert in bringing pressure to bear on reluctant debtors, and a plaintiff seeking enforcement in a second proceeding could hardly do better than have in hand a judgment debt. In short, litigation at this period was particularly suited to the debt model.

Praetorian lawmaking

The praetor now had considerable powers to fashion remedies, and he used these powers to create new rules of procedure. He was in a unique position both to see and to cure procedural abuses, and used a range of "devices" to enforce appropriate behavior: actions, defenses, oaths, and obligations. For example: he discouraged vexatious litigation over simple debts by allowing the creditor to demand an extra penalty if a stubborn debtor insisted on going to trial but then lost.⁵² He developed the old system of oaths (*iusiurandum in iure*), by which two parties could put any fact or legal conclusion out of contention; a system of actions and defenses prevented parties from reopening these matters.⁵³ He developed a range of praetorian stipulations by which defendants could be compelled to return after an interruption *in iure*.⁵⁴ He created a punitive action against a defendant who, when summoned, neither came nor gave a *vindex*.⁵⁵

tur, incipit autem teneri reus litis contestatione: sed, si condemnatus sit, sublata litis contestatione, incipit ex causa iudicati teneri.

⁵¹ Stein (note 22), 187. In certain cases, performance could be encouraged by including a special clause in the formula (*clausula arbitraria*) threatening condemnation if a performance was not tendered.

⁵² G.4.171. On its praetorian origins, see D. Liebs, "The History of the Roman *condictio* up to Justinian," in N. MacCormick and P. Birks, eds., *The Legal Mind: Essays for Tony Honoré* (Oxford 1986), 165 n.9 (with literature).

⁵³ Kaser, *Das römische Zivilprozessrecht* (note 2), 266–69; E. Metzger, "Civil Procedure in Classical Rome: Having an Audience with the Magistrate," in F. de Angelis, ed., *Spaces of Justice in the Roman World* (Leiden 2010), 27–41.

⁵⁴ Described briefly in G.4.184–187. See Metzger (note 7), 8–10, 65–94.

⁵⁵ G.4.46. The remedy is criticized for giving the plaintiff a second action with, perhaps, no greater promise of victory than the first: I. Buti, *Il "praetor" e le formalità introduttive del processo formulare* (Camerino 1984), 296–98. However, the remedy very effectively thwarts a defendant who makes himself scarce until the plaintiff's right of action expires; the clock begins to run anew under the penal action.

Course of proceedings

Aside from the use of formulae and the new procedural rules, the course of proceedings remained much as it was under the *legis actio* procedure. As before, a plaintiff could use summons (*in ius vocatio*) to begin proceedings; he could also now use “editio,” a term which described one of several methods for informing a defendant about the nature of the impending lawsuit.⁵⁶ Summons remained a private affair (now supported by the punitive action just mentioned). Ideally the two litigants would advance quickly to the selection of a formula and judge, and from there to *litis contestatio*, but when a magistrate concluded his business for the day there might well be litigants remaining to be heard. To ensure the return of the several defendants, the magistrate would order the pending matters to resume on the day-after-the-next; this allowed a plaintiff, with the magistrate’s backing, to demand a promise (*vadimonium*) from his opponent that he would return on that day.⁵⁷ The litigants’ ultimate goal was to secure a formula from the magistrate, and in many cases this will have been an uncontroversial event: the plaintiff selected an action, the defendant selected any defenses, and if the magistrate were satisfied that, e.g., the action would not be barred by *res iudicata*, he would proceed to assemble the formula.

Litigants could now appear through representatives, though it was not possible for the acts or statements of the representative to bind the principal.⁵⁸ These representatives were often simply friends of the litigant: making appearances for your friends was among the duties of friendship.⁵⁹ The representative “stood in for” rather than “stood for” the principal. This was particularly true of the more formal class of representative, the *cognitor*, who for the sake of his principal might allow his own name to be inserted in the condemnation clause of the formula. The gravity of the *cognitor*’s undertaking makes sense when we consider that

⁵⁶ Bürge (note 19). A *vadimonium* was not used at this stage of proceedings. See Metzger, “Lawsuits in Context” (note 31); cf. Kaser, *Das römische Zivilprozessrecht* (note 2), 231.

⁵⁷ The postponements to the day-after-the-next are described with the words *intertium dare* in the *lex Irnitana*, our main source for this institution. See Metzger, “Lawsuits in Context” (note 31) and, in more detail, idem, *Litigation in Roman Law* (note 7), chh. 5, 6, and 7. The details are contested; full discussion of all views is given in id., 123–32. The contrary view is set out most thoroughly in J. G. Wolf, “Intertium — und kein Ende?,” *BIDR* (3rd), 39 (2001), 1–36.

⁵⁸ Kaser, *Das römische Zivilprozessrecht* (note 2), 209–17.

⁵⁹ See e.g. D.3.1.1.2 (Ulpian 6 *ed.*).

the case might have to be prosecuted at a remote tribunal, where the principal cannot easily make a personal appearance at *litis contestatio*.⁶⁰ The other class of representative, the *procurator*, was more generally a mouthpiece and negotiator for his principal, and because his actions alone (unlike the *cognitor*'s) could not give any assurance to his principal's opponent that the matter was being disposed of once and for all, he was obliged to furnish security.

Joinder of issue (*litis contestatio*) was, as before, the final event *in iure*, and as before it served to consume the parties' claims while substituting new claims. The formula was now the expression of those new claims. It is a significant step to exchange irrevocably one's present position for a new position with an uncertain outcome, and thus a defendant's participation at *litis contestatio* continued to be voluntary.⁶¹ This is perhaps why the judicial selection procedures were so solicitous of the defendant.⁶² The names of prospective judges were displayed on an annual list (*album iudicum*), divided into a number of rosters (*decuriae*). By a process of alternating rejection (*reiectio*), the plaintiff and defendant would in turn strike out entire *decuriae*, the defendant making the final strike. From the *decuria* remaining, they would strike out the names of their less desired candidates, the defendant again making the final strike. If the parties so agreed, they might forgo *reiectio* and choose a candidate outright, whether from the list or not. The plaintiff would have the unilateral choice of candidate only if the defendant refused to participate in *reiectio*. The consensual nature of these selection procedures has

⁶⁰ As evidenced in a recently uncovered inscription, TPSulp. 27. The evidence is discussed in Metzger, "Lawsuits in Context" (note 31), 190–92, 204–205. Gaius describes the two permissible formulae for appointing a *cognitor* at G.4.83. The second formula omits any mention of the action being brought, which seems curious until we recall that this is precisely the right formula to use when two *cognitores* are being sent off to prosecute the case away from home, as in TPSulp. 27, and where the ultimate form of the action is therefore unknown to the litigants.

⁶¹ Kaser, *Das römische Zivilprozessrecht* (note 2), 289–90.

⁶² Our knowledge of the judicial selection procedures relies a good deal on the *lex Imitana*, chh. 86, 87, 88. There may be subtle discrepancies from the practice at Rome, but the two obvious discrepancies are (1) the number of *decuriae* (three in Irni; five in Rome after Caligula) and (2) the qualifications for selection for the *album* (the property threshold was modest in Irni). For what is given below, see P. Birks, "New Light on the Roman Legal System: The Appointment of Judges," *Cambridge L.J.*, 47 (1988), 36–60; Kelly, *Studies* (note 19), 125–29; Bablitz (note 9), 93–103; Kaser, *Das römische Zivilprozessrecht* (note 2), 192–96; Metzger, *New Outline* (note 49), ch. 5.

many explanations: that it encourages settlement, that it lends decency to the office of the judge, that it helps to assure impartiality. The more cynical view is that with less consensual selection procedures, the defendant would not participate in *litis contestatio*.

Some formulae in civil trials appointed a small panel of judges (usually three or five) called *recuperatores*.⁶³ Their names were drawn from the same *album iudicum*, but the litigants had less freedom to choose. A pool of potential judges was chosen from the *album* either by lot (if they so agreed) or by *reiectio* (and again, a non-participating party would have to accede to his opponent's selection). The panel was then selected from the pool by lot. Unlisted persons could not be selected by agreement, as in ordinary cases. As Nörr points out, the magistrate had comparatively greater power over selection, and this fact (among others Nörr enumerates) perhaps made recuperatorial trials particularly suited to provincial practice. Another inference is that selection was less consensual because a defendant, for some unknown reason, required less persuasion to participate in a recuperatorial trial. This last inference ought to give some clue to the grounds on which recuperatorial trials were granted, but of all questions surrounding *recuperatores*, this is the most difficult. The trials may have their origin in disputes between nations, and may have been granted in private matters where a strong public interest underlay the suit. Judgments appear to have been speedier, but whether this was true of all recuperatorial trials, or whether speed was attendant on the type of case being heard, is unclear. The *lex Irnitana*, while giving many new details on the selection of *recuperatores*, gives up relatively little on their jurisdiction; we now know that at Rome there was a monetary threshold for granting these trials.

The nature of the trial itself was discussed above. It remains to add that trials were very much a public affair, held out-of-doors or in basilicas; private homes might themselves have contained

⁶³ For what is given below, see *lex Irni.*, chh. 88, 89 (note 13); P. Yadin, 28, 29, 30 (note 11); Birks (note 62); Frier (note 7), ch. 5; Kaser, *Das römische Zivilprozessrecht* (note 2), 197–201. The most thorough recent research on *recuperatores* is by Dieter Nörr; see, above all, “Zu den Xenokriten (Rekuperatoren) in der römischen Provinzialgerichtsbarkeit,” in W. Eck, ed., *Lokale Autonomie und römische Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhundert* (Munich 1999), 257–301. See also idem, “The Xenokritai in Babatha’s Archive,” *Israel L. Rev.*, 29 (1995), 83–94. If the “xenokritai” named in (among other sources) the formulae in the Babatha archive (early second century AD) denote *recuperatores*, as Nörr argues, this may suggest the panel was drawn from an *album* at least partly comprising peregrines.

the open space to accommodate trials and attendant crowds.⁶⁴ It was not necessary for both parties to be present at trial, though a judge risked liability if he gave judgment in the absence of a party who had a permissible reason for being absent.⁶⁵ The form in which judgment was given is unknown, but it seems unavoidable that it should be written down.⁶⁶ A plaintiff who prevails would (it seems) need a written judgment if he intended to bring an enforcement action, and a defendant who prevails would be equally eager to defend against any effort to reopen the matter.

Cognitio

The *cognitio* procedure has no single and identifiable origin.⁶⁷ It is strongly identified with the authority of the *princeps*, though the power of republican magistrates to investigate and adjudge controversies was longstanding. The praetor exercised *cognitio*-like powers when, for example, he conducted *interrogatio* or granted interdicts — arguably whenever he paused from the assembly-line granting of routine actions to consider a subsidiary matter with closer attention.⁶⁸ But certain features of *cognitio* were genuinely different, the most profound difference being its (at least nominally) undivided nature: trials were not conducted by a lay judge chosen by the parties, but directly by the holder of *imperium* or his deputy. Accordingly, in the absence of any founding legislation, one looks for the origins of *cognitio* in instances of “direct adjudication.” For example: Augustus committed to the consuls the enforcement of testamentary trusts (*fideicommissa*), leading eventually to a dedicated court; municipalities were permitted special proceedings to enforce public gifts (*pollicitationes*); special proceedings were created for the disposition of property that would otherwise pass to unmarried or childless persons but, under Augustus’ *lex Papia Poppaea*, passed to the *aerarium* or *fiscus*.

It is unclear how quickly *cognitio* became the usual procedure in civil cases. The formulary procedure is evident in first-century epigraphic sources from Italy and the provinces, and apparently

⁶⁴ See Frier (note 7), 204–205; Bablitz (note 9), 51–70. Cf. Kelly, *Studies* (note 19), 121–24.

⁶⁵ Metzger, “Absent Parties” (note 25), 459–68.

⁶⁶ Frier (note 7), 227.

⁶⁷ See Randazzo (note 26); J. M. Rainer, “Zum Ursprung der *extraordinaria cognitio*,” in J. Sondel, et al., eds., *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*, 1 (Krakow 2003), 69–74; Buti (note 26), 34–39.

⁶⁸ Talamanca (note 47), 361.

thriving, and yet there is evidence from Suetonius (on Augustus) and Tacitus (on Nero) describing the management of appeals from the decisions of *iudices* in Italy and the provinces.⁶⁹ It is disputed whether these are *cognitiones* or formulary. Even in Rome itself the picture is cloudy. Frier has pointed to a passage in Tacitus' *Dialogus* (39.1) where Maternus, describing the state of Flavian oratory, states that *ferè plurimae causae* ("nearly all cases") are decided in conditions which, to us, strongly suggest *cognitio*.⁷⁰ The statement is surprising, given that the *lex Iulia* that reformed the formulary procedure was relatively new and very much in force. It is conceivable the *lex Iulia* made the use of lay judges in some way undesirable and thus drove litigants, where possible, to use professional judges, but this is only a guess.

Course of proceedings

Summons under the formulary procedure had been a private act. Under the *cognitio* procedure both the execution and enforcement of summons was supported by the administrative machinery.⁷¹ The forms of summons evolved; of the earlier forms, *litis denuntiatio* was the most usual. The plaintiff (so it appears) prepared and delivered to the defendant a notice to appear which in some way evidenced the authority of the court. A stronger form of written summons (*litterae*⁷²) was prepared by the tribunal and delivered by the plaintiff to a defendant who resided at a distance. Defendants who were otherwise unreachable could be "summoned" by public notice (*edictum*). All of these methods of summons were enforced by means of a contempt procedure (*contumacia*).

The contempt procedure is a hallmark of *cognitio* and needs special mention, because it marks an abrupt change from the formulary procedure.⁷³ Under the formulary procedure, as already noted, the defendant's participation was voluntary. A magistrate had used his edict to bring pressure to bear where he could, but its effect was limited, and the edictal manner of expression, offering remedies against opponents who acted in such-

⁶⁹ Suet. *Aug.* 33.3; Tac. *Ann.* 14.28.

⁷⁰ Frier (note 9).

⁷¹ For what follows, see Buti (note 26), 44–46.

⁷² Also referred to as summons by *evocatio*, a term which encompasses the tribunal's broad power to summon.

⁷³ For what is given below, see A. Steinwenter, *Studien zum römischen Versäumnisverfahren* (Munich 1914); Pauly-Wissowa, *Real-Encyclopädie*, 4 (1901), col. 1165, s.v. Contumacia; Kaser, *Das römische Zivilprozessrecht* (note 2), 477–81.

and-such a way, required the aggrieved party to take the first steps. The contempt procedure was more plainly a means to punish disobedience to the command of a magistrate or judge. Its role in the summons of the defendant is the most striking. A defendant could be summoned, and fail to appear, three times without consequence, but at that point there issued a “peremptory summons,” and if this were ignored the matter could proceed to disposition in the defendant’s absence. If the plaintiff presented proof in support of his claim, he could receive judgment in his favor, and the defendant was closely restricted in his ability to appeal from the judgment.

The proceedings under *cognitio* were much changed.⁷⁴ Litigants did not frame their claims as specific actions and exceptions as in the formulae, but set them out as rights supported by the law. *Litis contestatio* still existed but its principal effects were gone: it was no longer a “novated obligation,” and the event itself did not consume the right to claim. Aspects of a trial that were handled somewhat clumsily under the formulary procedure, such as the summoning of witnesses, adjournments, and examination by *interrogatio*, were handled efficiently by direct order, usually supported by the power of the contempt procedure. Judgments were no longer restricted to money damages.

The procedure developed further in the dominate under aggressive legislation.⁷⁵ From the middle of the fifth century, a lawsuit was begun with a so-called *libellus conventionis*, a written complaint prepared by the plaintiff and delivered to the judge, setting out the facts on which the plaintiff based his claim, along with a request for the defendant to be summoned. The “libellary process” gave the judge an opportunity to scrutinize the claim before issuing the summons. This period also saw changes to the rules of evidence (some rather retrograde), and the closer control of judges to prevent abuses of their office. This period as a whole shows a less thoughtful system of procedure and an imperial bureaucracy more jealous of its power.

⁷⁴ See Buti (note 26), 47–54; Kaser, *Das römische Zivilprozessrecht* (note 2), 485–501.

⁷⁵ Kaser, *Das römische Zivilprozessrecht* (note 2), 570–607; Simon (note 2), esp. 37–63.

Legacy

Legis actiones

The principal legacy of the *legis actiones* is the modern law of unjust enrichment.⁷⁶ Claims of debt were apparently too cumbersome to prosecute under the earliest *legis actiones*, and in the late third century BC two *leges* simplified these claims considerably by introducing the *legis actio per condictionem* — a simple claim that something was owing. When this kind of claim was later prosecuted by formula (the *condictio*), it retained its simple character: the formula alleged the existence of a debt without explaining how the debt was alleged to have come about (“*causa debendi*”). The bare assertion of a debt, without *causa debendi*, proved to be a convenient vehicle for many different claims that happened not to fit under the heads of property, contract, or delict.

Formulary procedure

The principal legacy of the formulary procedure is the institutional scheme as reflected in the modern civil law. The formulary procedure required the differentiation of actions, and each action, in turn, was triggered by a certain event: winning the right to bring a particular action required a litigant to allege the occurrence of the corresponding event.⁷⁷ To the extent the institutional scheme differentiates among persons, delicts, contracts, and property, it is built upon these separate events.

Cognitio

The principal legacy of the *cognitio* procedure is the romano-canonical procedure and the modern systems that derive from it.⁷⁸ Roman procedure was studied, systematized and written upon from the twelfth century onwards as part of the broader revival of interest in Roman law. The procedure that developed in the church courts was to a large degree an original creation, but drew heavily on Roman sources. The romano-canonical procedure spread

⁷⁶ G.4.17b–20; Liebs (note 52); R. Zimmermann, *The Roman Law of Obligations* (Oxford 1996), 835–36.

⁷⁷ See P. Birks, “Definition and Division: A Meditation on Institutes 3.13,” in P. Birks, ed., *The Classification of Obligations* (Oxford 1997), 17–18.

⁷⁸ See R. C. van Caenegem, *History of European Civil Procedure* [International Encyclopedia of Comparative Law, 16.2] (Tübingen 1987), 11–23, 32–43, 45–53; J. A. Brundage, *The Medieval Origins of the Legal Profession* (Chicago 2008), ch. 5.

into the lay courts of Europe, where its systematization was a great attraction.
