CHAPTER—VIII

MAGISTRATES AND JUDGES

1. Judicial system during the Republic.—The power of determining civil causes belonged at first to the kings, and after their expulsion it passed to the consuls. It then devolved on the praetors and in certain cases on the *curule* and plebeian *ediles*, who were charged with the internal police of the city.

Jurisdiction of the praetor.—The praetor a magistrate next in dignity to the consuls, was elected annually by the *comita centuriata*. His chief duty was to act as supreme judge in the civil court, at Rome, and he was assisted by a council of jurisconsults in determining questions of law. At first one praetor, known as *praetor urbanus*, was appointed for the determination of disputes arising between the citizens; afterwards another praetor, known as *praetor peregrinus* was appointed to decide all disputes in which foreigners were concerned. After the conquest of Sicily, Sardinia and Spain. New praetors were chosen to administer justice in these provinces.

Permanent courts, which were usually presided over by a praetor, were established for the trial of certain crimes. It became the practice for these magistrates to remain at Rome during their year of office and after that they proceeded to the provinces where they dispensed justice as pro-praetors. The first among them was always the *praetor urbanus*. He performed the duties of the consuls in their absence and his functions were considered so important that he was not permitted to leave Rome for more than ten days.

The praetor held his court in the *comitium*, wore a robe bordered with purple, set in a curule chair, and was attended by lictors. Ulpian informs us that his assessors at Rome were ten in number—five senators and five equestrians. These

assessors were often called judges, but they did not pronounce the sentence which was drawn up in the praetor's name by their advice.

Proceeding *in jure.*—According to the judicial system long established at Rome, it was the duty of the praetor, or other magistrate exercising civil jurisdiction to inquire into matters of law; and whatever business was transacted before him was said to be done *in jure.* When the magistrate took cognizance both of the law and the fact, and decided the whole cause himself, the judgement was called extraordinary. But in the great majorilty of cases, and particularly where the parties were at issue upon the facts, it was customary for the magistrate merely to fix the question of law upon which the action turned, and then to remit it to a delegate with power to hear the cause, inquire into the facts, and pro-nounce sentence according to the result of the investigation. There were three kinds of delegated judges, viz.,

(1) Judex,

(2) Arbiter, and

(3) Recuperatores.

(1) Judex.—The judex was not a magistrate; he was a private citizen invested by the magistrate with a judicial commission to try a case. Originally he was chosen from the senators, and afterwards from the official list of *judices selecti,* which was made up of persons whose qualification varied at different times. The judex was chosen by the parties from the official list. If they could not agree the praetor proposed a judex, or allowed one to be drawn by lot. Both parties had a right to object to the judex nominated by the magistrate. As the function of the judex was a public one, he could not decline to act without a lawful excuse. After being sworn to do his duty he received from the praetor a formula containing a summary of all the points under litigation, from which he was not allowed to depart. In deciding suits, he admitted the claim or rejected it and he had no power to

modify it. To suppose that the office of judex was limited to simple questions of fact would be a mistake. He required not only to investigate facts but to give sentence, and in doing so, law was more or less mixed up with the case according to the extent of the powers committed to him. For this reason he was allowed to consult one or more jurisconsults to guide him in cases of difficulty.

(2) Arbiter.—There were two sorts of arbiters-those who were named by the parties extra-judicially in a reference or submission, and those who were appointed by the praetor in a law suit. Here we are concerned with the last sort of arbiter. It does not seem to exist much difference between the duties of an arbiter and a judex. The arbiter, like the judex, could hear and determine all ordinary lawsuits and received a formula from the praetor which enabled him to pronounce a sentence. the main difference between an arbiter and judex is said to have consisted in the formula and its consequences, so that the arbiter in substance was a judex with more extensive powers; and like the judex, he was also allowed to take the assistance of assessors. At a later period, the terms judex and arbiter became practically synonymous.

(3) Recuperatores.—Besides the judex and the arbiter there were officers called recuperatores, to whom a certain class of cases was sent by the praetor for decision. Beaufort is of opinion that when the praetor appointed one person to hear and decide a case he was called judex, but when three or more persons were named for the same suit they were called recuperatores. According to Zimmern the recuperatores might be chosen from the whole body of the citizens, and did not require to be taken, from the list of *judices selecti*, and they were only called upon to serve in summary affairs requiring extraordinary despatch. The number of recuperatores appointed for each case was usually three or five, and in the event of difference, the opinion of the majority prevailed.

Centumviral court.—The *centumvirs* constituted a permanent tribunal, composed of members elected annually,

in equal number, from each of the 35 tribes making in all 105 and to this court the *decemvirs* were attached. In later times the number rose to 180. This tribunal was presided over by the praetor. It was divided into four chambers which, during the republic were placed under the ancient quaestors, and after Augustus under the *decemviri.* These sections gave judgment separately; but they were sometimes united, so as to form one tribunal in affairs of great importance.

This court did not possess what the Romans called jurisdiction. All the proceedings *in jure* took place, in the first instance, before the praetor, or other magistrate, who remitted the case to be heard and determined by the *centumvirs,* if it was one falling within their cognizance. The *centumvirs* were competent to decide questions of status, properly, succession etc. The date of the institution of the *centumvirs* is uncertain. It is supposed to have subsisted till near the close of the Western Empire, but it had entirely disappeared before the time of Justinian.

Italy and provinces.—After Italy was subjected to the Roman supremacy, the jurisdiction of each city and its territory was in the hands of the municipal magistrates. Justice was administered as it was at Rome. In the provinces the governors performed the functions of the praetor, holding circuit courts at stated periods at certain places within their territory, when they decided suits, either directly, or by remitting them to a judex, or to recuperatores. The circuit court was called conventus. The governors were accompanied by assessors, and they were assisted by *legati* (deputies) chosen by themselves, or named by the senate.

Defects of the judicial system during the Republican period.—The judicial system at Rome during the Republic, as will appear from the above institutions, was defective. The superior magistrates were changed annually, and their political duties were mixed up with their judicial functions. They were not necessarily lawyers by profession;

and the same objection applied to the subordinate officers who, as judices or *centumvirs* were entrusted with the power of hearing and deciding civil causes. They had also no training as judges. The success of the system, however, was considerably due to the institution of legal assessors who were selected from the most skilful jurisconsults. Though the magistrate was not bound to follow their advices, their opinions exercised the great influence upon his decisions.

2. Judicial system under the Empire.—Under the Empire the consuls preserved some judicial power till the fourth century. The jurisdiction of the praetors continued still longer. Praetors were appointed to decide questions relating to trusts and guardianship, and exchequer cases; and the number of these magistrates varied considerably at different times. Augustus fixed their number at 12; Tiberius raised them to 16; and Pomponius tells us that, in his time, there were 18 praetors, besides 2 consuls, six ediles, and 10 tribunes of the people.

In the time of Augustus several important changes were introduced in the judicial institutions of Rome, and new jurisdictions came into existence under the Imperial government.

Powers of the Emperor.—The Emperor himself became the supreme judge and gave decisions in law-suits by his decrees, sometimes directly and sometimes by appeal. When the Emperor dispensed justice, he was assisted by a council, which, under Augustus, was composed of two consuls, a magistrate of each grade, and fifteen senators.

Praetorian prefects.—Next in dignity were the praetorian prefects. At first their duties were purely military, but they afterwards discharged the most important judicial functions. Their jurisdiction was established in the reign of Alexander Severus. For a time an appeal lay from their decisions to the Emperor, but afterwards they became final, subject only to the

condition that a petition might be made to the prince. The praetorian prefects were chosen at first from the equestrian order, and afterwards from the senators.

Prefect of the city.—The jurisdiction of the Emperor and the praetorian prefects extended over the whole Empire. Under Augustus the prefect of the city became a permanent judicial officer. His jurisdiction was gradually extended till it embraced appeals from decisions of the praetors. There had been 18 praetors in the time of Alexander Severus; there were only 3 in the reign of Valentinian. Finally, all the important judicial functions of these ancient Republican magistrates were withdrawn from them by slow degrees and transferred to the prefect of the city and the praetorian prefect, who had formerly stood nearly on a level with the consuls, were given the duties of directing the public games.

Italy and the provinces.—Beyond Rome, in Italy and the provinces, jurisdiction continued under the Empire to be divided between the municipal magistrates and the governors. but the competency of the municipal magistrates, which was formerly unlimited, was restricted to suits not exceeding the value of fifteen thousand sesterces, equal to about £125, and their criminal jurisdiction was in a great measure absorbed by that of the governors.

Judices pedanei.—*Judices pedanei* (inferior judicial officers) were appointed by the governor of a province to try cases of minor importance. Cases within their competency were brought directly before them as permanent judges; but an appeal lay from their decisions to the governor. The title pedaneus was given to those judges because they were placed at the foot of the judicial ladder.

Changes by Constantine.—Constantine reduced the powers of the praetorian perfects by depriving them of their military prerogatives and limiting them to purely civil and political duties. Their number was increased to four, and they were not kept in office for more than a year. The Empire was divided

into four prefectures—(1) The East, (2) Illyria, (3) Italy, which included Sicily, Sardinia, and Africa, and (4) the Gouls, which comprehended Spain and England. Each of these four departments was administered by a praetorian prefect, who acted as supreme judge in law-suits raised within his prefecture.

Under the prefect, vicarii, invested with judicial powers, were placed at the head of each diocese, which comprehended many provinces. Each of the provinces had a capital or metropolis. In the provinces the governor, called praeses or rector, was judge ordinary, acting sometimes in the first degree, and sometimes deciding appeals from the municipal magistrates and other inferior judges, such as the judices pedanei and the defensores civitatum.

Originally the defensores civitatum had civil jurisdiction in suits not exceeding 50 solidi but augmented by Justinian to 300 solidi; and they also had power to try for petty delinquencies. Dr. Colquhoun stated that Constantine reduced the weight of the aureus and called it solidus. The value of the solidus or aureus of Justinian's age is said to have been about 11s. 6d. (Summary of Roman Civil Law, vol. III, p. 154-155).

CHAPTER—IX

ACTIONS AND PROCEDURE

1. Civil procedure.—Under the Roman law the history of civil procedure is divided into three stages :

(A) *Legis actiones* (actions of law).

(B) *Formulary system.*

(C) *Extraordinary procedure.*

(A) Legis actiones.—*Legis actiones* mean the actions of law. Its main feature consisted in extreme formalities. A process could only be introduced by uttering certain sacramental forms which, were called the actions of law. The party to the litigation had to utter some prescribed formula before the magistrate at the time of presenting the case. They could not depart or vary from them. If they departed or varied, no case would lie. According to Gaius the *legis actiones* were five in number, viz.,

(a) *Actio sacramenti.*

(b) *Judicis postulatio.*

(c) *Condictio.*

(d) *Manus injectio.*

(e) *pignoris capio.*

Strictly speaking, the first three were actions proper and the last two were the modes of execution.

(a) *Actio sacramenti.*— It was the oldest form of procedure. This action was of general application for all matters for which no other form was prescribed by law. Thus it was applicable in claims to property, to recover a wife in *manu* or a *filiusfamilias* from a person who wrongfully detained them, to a servitude, and to personal clamis which resulted in the payment of a definite sum of money or of a particular specific thing. In other words it was employed for all things for which the law had not given special action. It

was necessary that the object in dispute must be brought into the court. If this was impossible (because the object related to land or a house), some part of it was produced such as a clod of earth to represent the field itself. The plaintiff holding a wand in one hand, seized the object with the other and claimed ownership. The defendant also went through exactly the same ceremoney. Then the praetor ordered them to release their hold on the property. The plaintiff next asked for the defendant's title and the defendant in reply asserted his ownership over the object. Whereupon the plaintiff denied the right and challenged the defendant to a bet or stake of a sum of money called *sacramentum* and the defendant made a like challenge. After this ceremony the praetor awarded possession of the object to one of the parties pending the trial and required the person so given possession to give security to his adversary that if he lost the case he would restore the thing and its profits to him. The case was then referred to the judex or other delegated tribunal for trial. Before the judex or other delegated tribunal parties were heard, evidence was adduced and after pleadings in detail, sentence was pronounced. The stake or wager of the losing party was forfeited to the state for the benefit of the public worship. The *actio sacramenti* derived its name from the *sacramentum* or sum of money which the parties deposited with the praetor by way of stake or wager.

Summons.—In the earliest times the action was commenced by the plaintiff summoning the defendant to appear before the praetor or other magistrate. According to the law of the Twelve Tables, if the defendant refused to go quietly, the plaintiff, after calling witnesses to his refusal, could drag him before the court by force. The law did not impose a legal duty upon the defendant to obey; if he did not go, no further proceedings could be taken. All that the Twelve Tables authorised was that, on proof of a refusal, the complainant might use force without incurring any liability.

(b) *Judicis postulatio.*—Of the *legis actio per judicis postulationem* nothing is really known for that part of the miss of Gaius which related to it was lost. This action seems to have applied to petty cases when the sum in dispute was less than 50 assess. It is also conjectured that this action applied also to other personal claims of unliquidated damages which means an unascertained sum, such as compensation and expenses of illness in *injuria.* Where this action was available the plaintiff had the right, after stating the facts of the case, to demand to the magistrate (praetor) to have a judge appointed without going through the preliminary sacramental procedure. In this action it was not necessary for the plaintiff to stake a sum of money.

(c) *Condictio.* The *legis actio per condictionem* was introduced by a *lex Silia* of uncertain date and confined to the prosecution of obligations. It derived its name from the *condictio,* the formal notice given by the plaintiff to the defendant to appear before the praetor on the 30th day from the date of notice for the appointment of a judex. It was the peculiarity of this action that the parties, at the plaintiff's suggestion, mutually agreed that the person whose claim proved unfounded should give the other not merely the sum or thing in dispute, but one-third of its value as well. In other words, there was a wager in this action as in the case of *actio sacramenti,* but here the wager went to the party proved successful and not to the state. The distinction between *sacramentum, postulationem* and *condictio* was, according to Poste, that the *sacramentum* was practically confined to real actions before the *centumviri;* the *judicis postulatio* would be the personal action for unliquidated sums; while *condictio appled* to claims on a *mutuum* to a stipulation for some definite sum or thing and to money due on a literal contract.

(d) *Manus injectio.* *Manus injectio* (seizure of the person of the debtor) was a mode of execution upon the person of the debtor i.e. the creditor tookthe body of the debtor in

satisfaction of his claim, as authorised by the Twelve Tables. It was available only in the case of debtors who had admitted their liablility or against whom a judgment had been obtained. The debtor was given a period of 30 days grace. At the end of that period the creditor might arrest the debtor and take him before the magistrate. If the debtor did not pay the debt in the presence of the magistrate or if nobody offered to guarantee the payment, the creditor took him away, put him in fetters, and provided him with corn daily, unless the debtor preferred to find his own food. The creditor could keep the debtor in prison for 60 days and on three consecutive market days the creditor had to produce the debtor publicly before the praetor and proclaim the amount due. If no payment was forthcoming the creditor was free to kill him or sell him as slave beyond the Tiber. If there were several creditors they could cut him into several pieces which were divided among themselves.

(e) *Pignoris capio.*—*Pignoris capio*** (seizure of the goods) as described by Gaius was a mode or execution upon the property of the debtor. (Literally *pignoris capio* means the taking of a pledge, i.e. security for payment). This, however, did not apply to ordinary private debts but only to a few exceptional claims relating to the public treasury. The *pignoris capio* bears an analogy to the English law of distress.

Defects of legis actio.—Firstly, the *legis actiones* were excessively formal in their nature. A strict adherence to the forms was essential, when relief was sought under them. The litigant and the magistrate had to take part in it. They had to act in a prescribed way and utter some prescribed formulas. Any variation from the exact words and gestures prescribed was ruinous to the cause of action. In one case a person who complained that his vines were cut down, lost his case because he used the word vines instead of 'trees.' The law mentioned only trees in general. Its extreme technicality was its chief defect. Secondly the system of *legis actiones* was incapable of

adequate expansion. In theory no right could be enforced by a *legis action* unless it came within the letter of some existing law. Though the early jurists did something to, remedy this, it was only possible by interpretation to deal with cases that were in some sense analogous. So a new right was not recognised though such recognition was describable having regard to the increasing complexity of affairs. Thirdly, the parties had to appear in person. There was no scope for representation for attorneys and lawyers. Fourthly there were two parts in the legal actions : (i) the proceeding *in jure* (before the magistrate) and (ii) the proceeding *in judicio* (before the Judge or judex). When the prescribed ceremonies necessary for the introduction of actions were over, the case was referred to the judex who was generally a private individual.

(B) The formulary system.—The system of *legis actio* was superseded for its extreme formalities by the formulary procedure. By the *lex Aebutia* (150 B.C) and the *leges Juliae*, the *legis actiones* were wholly abolished. The formulary system was first introduced in the court of the *praetor peregrinus* when he was administering justice in cases where one of the parties was an alien. In administering justice he avoided all the ceremonies. Under the formulary system, the action began with a preliminary hearing before the praetor who heard both the parties. If he was satisfied that a *primafacie* case was made out, he drew up a formula which was remitted to the judex to regulate his decision. The formula was a written instruction to the judex in accordance with which he had to decide the case. The formula always began with the appointment of the judex, who had been agreed upon by the parties, e.g. "Let there be a judex." It also described the cause of action, the allegation of the parties and the points at issue. Here, as *in legis actio*, the process was divided into two parts, one took place before the praetor *(in jure)* and the other before the judex *(in judicio)*. All the formulae generally in use were to be found in the *album praetoris*, and they were added

from time to time to suit the exigencies of particular cases. The formulary procedure was less formal and more suitable for the growing commercial needs of the country.

The formula contained not merely the claim but also the defence *(exceptio)*. When the formula was prepared, it was handed over to the plaintiff in presence of the defendant. Here the proceeding before the praetor ended and the *litis-contestatio* took place. (See section 3 post).

Parts of the formula.—The formula usually contained three distinct parts :

(1) Demonstratio,

(2) Intentio, and

(3) Condemnatio,

(1) Demonstratio—The *'demonstratio'* stated shortly what was the matter in dispute. It was, therefore, a short recital of the material facts of the case out of which the plaintiff's claim arose. It was, therefore, a statement of the facts of the case and not a statement of the claim. It always began with "whereas" *(quod)*.

(2) Intentio—The *'intentio'* set forth the plaintiff's claim, and the question which the judex was called upon to decide, e.g. to find out whether Y is indebted to X. In short, it contained the issues upon which the judex was to decide the case.

(3) Condemnatio—The *'condemnatio'* directed the judge to condemn or acquit the defendant, according to the result of his examination of the affair.

Besides the above three parts, the following might be met with :—

(4) Adjudicatio

(5) Exceptio and

(6) Replicatio.

(4) Adjudicatio—The *'adjudicatio'* only occurred in case of partition suits. This clause enabled the judge to divide the

property among the various parties to the suit. When a process was raised to divide a property held in common between the parties, the term *'adjudicatio'* was used in place of *'condemnatio."*

(5) Exceptio—In certain cases an *exceptio,* raised by the defendant, was inserted in the formula. An *exceptio* was a defence which primarily admitted the claim of the plaintiff, but alleged some other circumstances which nevertheless barred the claim. Thus the defendant might admit a loan and at the same time might state some circumstances (e.g. limitation) which would make the loan unenforceable. Similarly the defendant might admit a contract and at the same time might state that it was induced by fraud *(exceptio doli).* In such cases, the praetor entered in the formula an *exceptio,* i.e. a statement to the effect that the plaintiff should not succeed if the facts alleged in the exceptio were found to be true.

The burden of proving the *exceptio* was upon the defendant. A defendant who relied upon an *exceptio* as a special defence could not raise it before the judex *(in judicio)* unless it had been urged previously before the praetor *(in jure)* and the appropriate *exceptio* had been inferred in the formula.

Exceptiones were dilatory and peremptory. Dilatory *exceptiones* were those whereby an action was legally competent but brought at an improper time or in an improper manner, e.g. before a court having no jurisdiction. These dilatory *exceptiones* were to be raised at the beginning of the suit, otherwise they were held to be waived. Peremptory *exceptiones* were entered into the merits of the case. They not only freed the defendant from the suit but totally destroyed the plaintiff's right of action. Various examples of *exceptiones* are given in the Institutes viz., *res judicata, prescription,* fraud, violence, forgery etc.

The praetor allowed all reasonable defences. It was partly through these *exceptiones* that equitable principles of *jus gentium* found their entrance into Roman law.

(6) Replicatio—A *replicatio* was a clause which might be inserted after he *exceptio* for the plaintiff's benefit, because if it was proved, it destroyed the force of the *exceptio.* Thus a claimed 50 *aurei* from B: an *exceptio* was raised by B that A made an informal release of the debt. A replied to the *exceptio* that although he (A) promised to release B, B subsequently undertook to pay the debt inspite of the release. If this reply'was proved, the value of the *exceptio* was destroyed and if A made out his original claim he succeeded. This answer to the *exceptio* was called *replicatio;* a duplicaton, was the answer to a replication; a triplication to a duplication and so forth. In these pleadings the defendant was always entitled to the last word.

Summons and procedure.—Under the formulary system, which marked the finest period of Roman jurisprudence, the summons to appear in court was given at first verbally and afterwards in writing. If the defendant refused to follow the plaintiff, or to give security to appear on the specified day, he was subjected to a fine; and if he made no appearance the magistrate could put the plaintiff in possession of the defeaulter's goods. When both parties appeard before the magistrate, the plaintiff pointed out the action he wished to use, and his adversary explained the grounds of his defence, and the *exceptio* which he desired to be inserted in the formula. If the praetor considered the claim and *exceptio* relevant, he prepared the formula, and appointed the judex for the trial of the cause. After the delivery of the formula the parties appeared, on a day fixed for the purpose, before the judex; the cause was pleaded, witnesses were examined, the advocates on both sides were heard, and the sentence was pronounced. When the sentence was given by the judex, his office came to an end, and his power ceased. For the purpose of execution it was necessary to resort to the magistrate.

Such was the ordinary course of procedure during the formulary system. But there were cases in which judgment was given by the praetor or other magistrate himself without

remitting the case to a judex, and these were called *judicia extraordinaria.* The formulary system remained in force from near about the close of the Republic till the reign of Diocletian in 294 A.D.

(C) Extraordinary procedure.—The old constitution of Rome ceased to exist at the time when the government became Imperial. The constitutional changes effected corresponding changes in the judicial system and in the form of procedure. The formulary system was superseded in the Imperial period by a new system known as extraordinary procedure. It was the last and the only procedure that existed under Justinian.

As the manners of the people deteriorated, it became very difficult to get suitable men to undertake the irksome office of judicies in civil suits. This difficulty was chiefly experienced in the provinces. By a constitution of Diocletian in 294 A.D. the provincial governors were directed to decide all cases brought before them without remitting them to a judex. This was followed by other ordinances which established the new system throughout the Empire. The formulae were no longer required; after they remained in use for some time by force of habit, they were expressly abolished by Constantine in 342 A.D.

The distinguishing feature of the extraordinary procedure was the separation of the functions of the magistrate from those of the judex. the old distinciton between proceeding before the magistrate *(in jure)* and proceeding before the judex *(in judico)* was abolished. All questions of law and fact were discussed and decided by the same magistrate. Nothing was referred to the judex. The procedure was called extraordinary because even before its institution such a procedure was allowed under exceptional circumstances. What was formerly regarded as an exception became the general rule. Hence the name extraordinary procedure.

The system of extraordinary procedure as developed under Justinian was as follows :—

Summons.—In the first place, it was not necessary for the plaintiff to secure the attendance of the defendant before the magistrate.The magistrste himself summoned the defendant to appear on the plaintiff's written petition *(libellus conventionis)* and the summons was served by an officer of the court who might arrest the defendant if he refused to appear before the court. The written petition had to be signed by the plaintiff or his agent and in addition the plaintiff undertook, by a security *(cautio)*, to duly pursue his action and to pay the costs of the defendant if he lost the case.

Defence.—The defendant was given the opportunity to make his defence in writing. The statement of defence made by the defendant was called the *libellus contradictionis*. The defendant could admit or deny the claim of the plaintiff or while admitting the claim he could adduce some other circumstances to defeat the plaintiff's claim e.g. *res judicata*, limitation, fraud, violence, essential error etc.

Framing of issue.—Then the issues were framed by the court. Trial—The next step was the trial proper. The day was fixed for trial. Witnesses could be adduced by the parties. The parties could be represented by their agents. Finally after hearing the evidence and arguments the magistrate settled the whole matter and gave judgment.

2. Appeals.—An appeal is an application to a superior judge to review the decision of an inferior one on the ground that it is informal or erroneous. The effect of an appeal is usually to suspend the execution of the judgment till it is confirmed by the superior court. The first title of the 49th book of the *Digest* deals with appeals.

During Republic no appeals in civil suits.—During the Republic there was no right of appeal in civil suits against the judgment of a judge, for each judge had power to decide finally within the limits of his jurisdiction, and even the sentence of the judex, as a general rule, was not subject to review by the magistrate who appointed him. In such cases the only mode in

which a person could obtain relief was by the *intercessio* (veto) of certain magistrates of high rank. There were cases in which the praetor interposed to stop the proceedings of his colleague. The veto was purely negative. It stopped the proceedings, but it could not substitute anything in its place. The tribunes could also use their authority to prevent execution of a judicial sentence. Thus when the praetor condemned L. Scipio for embezzlement, the tribune allowed execution to pass against his property instead of sending him to prison. In exceptional cases the praetor annulled the judgment by granting *"restitutio in integrum."*

Appeals competent under Empire.—From the time of Augustus a regular system of appeals was established. At Rome an appeal lay against the judgment of all the magistrates to the prefect of the city, and then from the prefect of the city to the praetorian prefect or the Emperor. M. Aurelius, by a rescript, allowed an appeal from the judgment of a judex to the magistrate who appointed him.

In Italy and in the provinces there was an appeal from the municipal magistrates in the first instance to the governors, and from them to the praetorian prefect or to the Emperor.

Under Justinian all appeals were to be filed within ten days from the date of the judgment. The same Emperor directed the Imperial court *(auditorium principles)* not to entertain any appeal under the value of twenty pounds of gold, and all cases below that standard were remitted to one or more judge, whose decision was declared to be final.

3. Litis contestatio and its effects.—Literally *litis contestatio* means contest in a litigation between the parties on a subject matter. Under the Roman law *litis contestatio* arose when the issues were joined (the joinder of issue). The issues were joined after hearing both the parties. It was the beginning of the action proper. Under the *legis actiones* and the formulary system, *litis contestatio* took place when the proceedings before the magistrate *(in jure) terminated. In* legis

action proceedings *in jure* terminated when the form or the dramatic exhibition was complied with and in formulary system when the formula was complete and delivered for the investigation of the judex. At a later period, under the system of Justinian, when all proceedings took place before the magistrate *litis contestatio* arose when the case was ready for hearing i.e. after the plaintiff had stated his claims and the defendant his answers or defences.

Effects of *litis contestatio.*—*Litis contestatio* had the following effects :—

(i) After *litis contestatio* the subject in dispute became litigous and could not be alienated.

(ii) Thenceforth the action was good against heirs.

(iii) The action became *lis pendens* (pending litigation) and prescription was arrested i.e. the prescription was stopped there. The limitation would no longer run against the plaintiff after *litis contestatio.*

(iv) From this moment the defendant, if he subsequently failed, was bound to account to the plaintif for all profits or fruits arising from the object in dispute, and was liable for *exacta diligentia* in the custody of such object.

(v) Both parties were bound under a quasi-judicial contract to submit to the decision of the judge.

4. Actions.—An action *(actio)* is the right of suing before a judge for what is due. It is also applied for the enforcement of right and in that sense it has been defined as a judicial demand for attaining or recovering a right. He who makes the claim is called the plaintiff (actor), and he who is subject to it, is called the defendant *(reus).*

Different kinds of actions.—The Romans divided actions into various kinds. The principal divisions were the following :—

(1) Real and personal.—A real action *(actio in rem)* was brought in respect of a right which the plaintiff enjoyed against all the world, though only one particular individual had infringed it, e.g. the owner of a thing, or the holder of an inferior right such as servitude, pledge, or the like. A personal action *(actio in personam)* was founded on an obligation undertaken by another and was directed against the person bound or against his heirs or universal successors.

(2) Mixed action.—A mixed action was that which was both real and personal, e.g. an action for the recovery of a thing and the enforcement of a penalty.

(3) Civil and praetorian action.—A civil action was founded on laws, decrees of the senate, and the Imperial ordinances. A praetorian action was one introduced by the edicts of the praetors. Here no action lay under the law, but the praetor granted it in consideration of equity or public utility. By the strict rule of the civil law, no one was bound by the contracts or deeds of another. but this rigour was relaxed by the praetor in many cases where equity or public utility required it. Thus the *actio institoria* was allowed against the principal upon the contracts of those whom he employed as managers or superintendents of a farm or any other particular branch of business; and under the *actio exercitoria* a similar remedy was given against the owners of a ship, upon contracts for necessary repairs or provisions entered into by the shipmaster.

(4) *Rei persecutoriae* and penal action.—By the former the plaintiff simply asked to recover what was his own, including any loss or damage sustained by him. In penal actions, which always arose from delict, something more was demanded by way of penalty.

(5) *Stricti juris* and *bonae-fidei* action.—During the prevalence of the formulary system great importance was given to the distinction between *stricti juris* and *bonae-fidei* action. The first was an action of strict law; here, the formula

issued by the praetor limited the power of the judge to the strict letter of the law and he was not allowed to travel beyond that. The second was an equitable action which embraced actions arising from consensual contracts, such as, sale, hiring, partnership, *mandate* and other contracts. Under the second action the judge would take into consideration what was fair and equitable between the parties. Thus in a *bonae-fidei* action formula never imposed a fixed limit upon the claim by naming a definite sum but was always general in its terms.

(6) *Actio arbitrariae.*—It was an action where the judge was instructed in the formula *(condemnation)* only to condemn in damages if the defendant failed to do some act, e.g. to restore the plaintiff's property. The judge had a discretionary power to compel specific performance of a duty by fixing a heavy penalty on nonperformance, e.g., on failure to return an object deposited.

In Justinian's time the judge had full power to decree specific restitution without giving the defendant an alternative. By this action the plaintiff would get restitution of property.

(7) *Actio utilis* and *directa.—Actio utilis* was an action granted by the praetor by extending the existing form of action to analogous cases for which there was no such provision. The praetor, instead of introducting a new right, retained the formula and modified it to suit the new facts. An action of this kind was called an *utilis actio* because it was utilised to meet new cases. The modification might be made by means of a fiction. The praetor granted in his edict an *actio serviana* to a farmer *(actio directa).* Subsequently, finding it necessary to protect other mortgages, besides farmers, he modified the *intentio* and created a new action *(quasi-serviana)* to meet the new cases.

An *actio directa* was one of the forms of action as provided by law. The judge followed exactly the words of law as found in

the formula in the determination of suits. This action was brought by an injured person against the wrong doer.

5. Limitation of actions.—Originally all actions founded upon the civil law were perpetual *(perpetuae)* and the right to sue was not extinguished by lapse of time. On the other hand, praetorian action lasted for a limited time *(temporales)* and the right was lost if not brought within a year. Conversely, even a civil law claim to specific property in the hands of another might be lost by the operation of *usucapio; the querela inofficiosi testamenti* was expressly limited to five years. But the old distinction between *actiones perpetuae* and *actiones temporales* continued down to the time of Constantine who provided that the right should be lost if not brought within thirty years. At last Theodosius in 424 A.D. extended this thirty years' limit practically to all perpetual actions. Under Justinian the statutory period of limitation was the same.

6. Interdict.—An interdict was an order issued from the praetor or other judge by virtue of his *imperium*, directing an individual to do or not to do some act. It is analogous to injunction. It was granted in case which required the summary interposition of a judge to preserve property or rights in danger or immediate invasion. Interdict was used mainly in disputes about possession. Possession of property was regarded as an evidence of ownership. A person in possession had a right to continue it against everyone who could not show a better title. Where there was any dispute as to the ownership of property, the lawful possessor was entitled to continue his possession till the question of right was finally decided; and if he had lost possession by violence or stealth, the judge would summarily restore it to him.

Different kinds of interdict.—By the Roman law interdicts were of the following kinds :—

(1) Prohibitory.

(2) Restitutory.

(3) Exhibitory.

(1) Prohibitory.—The prohibitory interdict was ordered to prohibit the doing of some act, e.g. disturbing possession.

(2) Restitutory.—The restitutory interdict was ordered 16 restore something wrongfully taken from another's possession.

(3) Exhibitory.—The exhibitory interdict commanded the exhibition or production of some person or property wrongfully detained. Under this interdict was the guarantee of individual liberty; it prevented any free man from being detained by any one whatever. It resembled the writ of *habeas corpus.*

Object of interdict.—Interdicts were granted in order that possession might be (1) acquired, (2) retained, or (3) recovered.

(1) Interdicts for acquiring possession were :—

(a) *Quorum bonorum.*—By this interdict goods belonging to an inheritance were acquired by the *bonorum* possessor i.e. the person who succeeded to a deceased person under the edicts of the praetor. He was the praetorian heir.

(b) *Salvianum.*—This Interdict was granted to enforce the landlord's hypothec for payment of rent. The landlord who had a hypothec over the stock of his tenant as security for rent, could obtain possession of it by this interdict.

(2) Interdicts for retaining possession were :—

(a) *Uti possidetis.*—This interdict was granted in favour of one who was in possession of movables. But to get the benefit of such interdicts, his possession at the date of the litigation must have been lawful, and not obtained from his adversary by violence, clandestinely, or by permission.

(3) Interdicts for recovering possession were :—

(a) *Unde vi.*—By this interdict possession could be recovered by one who was forcibly ejected from lands or buildings. This remedy applied only to immovable property.

(b) As regards movables seized by violence, the possessor could obtain redress either by *utrubi*, or in the form of action *vi bonorum reptorum*, or *vi furti*, or *ad exhibendum*. After the abolition of formulary system, interdicts were superseded by actions.

7. Judgment.—Judgments are interlocutory or final. An interlocutory judgment is a decision on an incidental point which does not exhaust the merit of the case. A final judgement is one which terminates the action by determining the whole matters in dispute.

Under the Empire every judgement required to be reduced to writing and signed by the judge. It was entered in a register, and a copy was delivered to the parties. In the East, after Arcadius, the judgement might be drawn up in Greek, but the use of Latin was retained at Constantinople down to Justinian's time.

8. Modes of execution of judgment in early times.—Under the Twelve Tables, after judgement the debtor was allowed 30 days for payment of the debt. After the expiry of that time he was assigned over to the creditor by the praetor, and was kept in chains for 60 days, during which he was publicly exposed for three market days, and the amount of his debt was proclaimed. If no person released the prisoner by paying the debt, the creditor could sell him as a slave to the foreigners. When there were several creditors, they were allowed to cut the body of the debtor into pieces, and divide those among them in proportion to their debts, but some writers contend that the price was divided among the creditors when the debtor was sold as a slave. There was no doubt that the debtor might be sold as a slave; but according to Aulus Gellius, there was no instance of killing the debtor.

Such was the state of law at the time of the Twelve Tables. The *lex Poetelia*, probably of 326 B.C., brought some relief and mitigated the severity of the form of execution by abolishing the creditor's right to sell or kill his debtor. But still the creditor retained the power of attaching the person of his debtor *(manus injectio)*.

By the time of Gaius, however, a new method of execution against the property of the debtor, was devised by the praetor *(jushonorium)*, and it was known as *'venditio bonorum.'* The praetor, on the petition of the creditors or some of them, granted *'missio in bona,'* i.e. made an order authorising them to take possession of all the debtor's estate. After an interval of 30 days from the time the property had been seized, during which other creditors could join in the possession, the creditors met and elected a manager to conduct the sale of the property of the debtor. The sale took place by public auction at the end of ten days. At the auction the estate of the debtor was sold as a whole to the highest bidder *(emptor bonorum)*. The sale proceeds were rateably divided among the creditors. The auction purchaser thereupon became entitled in quity to the *'universitas juris'* of the debtor. He was regarded as quasi heir; he could sue for debts owing to the estate he purchased by a formula based on such fiction *(actio serviana)*, or if he wished, by the formula *Rutiliana*, where the *iutentio* was in the name of the person whose estate he had purchased and the *condemnatio* was in his own name. Conversely the creditors of the estate could sue him by the like fiction, i.e.of heirship. To get in the corporeal property belonging to the estate the purchaser had the *interdictum possessorium*.

A more merciful method of execution, however, is mentioned by Gaius *(cessio bonorum)* as taking place in his time under the Julian law. This law, passed under Julius Caesor (Augustus), enabled a debtor to make a voluntary surrender *(cessio)* of all this property to his creditors, who sold them in satisfaction of their claims. A debtor adopting

this method avoided infamy and was freed from imprisonment. But he was not released from his debts unless the creditors were fully paid. If the debtor subsequently acquired property his creditors were entitled to attach it, except those that were necessary for his own subsistence.

In the time of Justinian *manus injectio* and *venditio bonorum* were obsolete. The mode of execution in his time was as follow.—In the case of ordinary execution (where the debtor was not insolvent), it was made by seizure and sale of the debtor's property under the order of the court. When the execution was in bankruptcy, the magistrate, on the application of the creditors, appointed a curator, who, after an interval of two years (in case of creditors within the same province or four years, (incase of creditors of different provinces) sold the debtor's property in lots. The proceeds were divided among the creditors. Even under this system the after acquired property of the bankrupt could be seized by the creditors until they obtained payment in full.

CHAPTER—X

CRIMINAL COURTS AND PROCEDURE

1. Criminal courts.—

(a) Criminal jurisdiction of the king and consuls.—The kings were the suprems judges in criminal trials, and they were assisted by a council. After the termination of kingship, the power of trying and punishing capital crimes devolved on the consuls. They had the power of life and death. But this power was of short duration. By the Valerian law of 449 B.C., every citizen had a right to appeal to the people against any criminal sentence pronounced by a magistrate. Subsequently the direct jurisdiction of the *cimitia* was established for the trial and punishment of all serious crimes involving life and right of a citizen. The Twelve Tables also expressly provided that no citizen was to be tried for any offence involving his life or his rights as a citizen, except before the *comitia* of the centuries. The laws of this kind gradually reduced the criminal jurisdiction of the consuls and other magistrates. In times of civil commotion, however, when the liberties of the people were endangered the senate, by a decree, invested a dictator or the consule sith extraordinary powers, by virtue of which they might put any dangerous citizens to death, and execute summary justice upon all offenders, without regard to the ordinary forms of law.

(b) Criminal jurisdiction of the senate.—During the Republic, the senate possessed no regular jurisdiction in criminal cases. It sometimes exercised criminal jurisdiction and decided criminal cases either by itself or by commissioners taken from its body. This power was derived from the express or tacit delegation of the people. On some extraordinary emergencies, the senate, along with the consuls, had the power to punish state criminals summarily. An example of this is found in the proceedings against the

conspirators associated with Catiline and some of whom were strangled in prison without regular trial, under the consulship of Cicero. The people, however, viewed, this measure as dangerous and unconstitutional stretch of power. Although it was generally acknowledged that Rome had been preserved from great peril by the vigorous conduct of Cicero, he was afterwards driven into exile, under the law of Clodius, for having put Roman citizens to death without trial.

Though the senate, during the Republic, had no proper criminal jurisdiction over the city of Rome, they took cognizance of all serious crimes committed in Italy and the provinces.

Under the Empire, the senate was invested by the prince, exercising the powers of dictator, with criminal jurisdiction, particularly in all offences against the state and the person of the Emperor, as well as in crimes of extortion by provincial magistrates and capital charges against senators. Frequently the Emperor attended the deliberations of the senate. The senators held their office during his pleasure and they became a mere instrument in the hands of the Emperor who abolished all its authority. The real authority belonged to the Emperor.

(c) Criminal jurisdiction of the comitia.—There were three popular assemblies at Rome :—(a) *Comitia curiata, (2) Comitia centuriata* and (3) *Comitia tributa.*

At the commencement of the Republic, the assemblies of the people appear to have acted as a court of review in those criminal cases only where an appeal was made from the sentence of a magistrate. But after the power of the magistrate as criminal judges had been restricted by successive laws (Valerian laws and others) the *comitia centuriata* became the regular court for the trial of all the more serious crimes committed by Roman citizens. The Twelve Tables, passed in this assembly, provided that no Roman citizen could be tried for any offence involving his life or privileges, except by the

comitia centuriata. The judicial power so conferred on the popular assembly was regarded as fundamental part of the Roman constitution, and the surest safeguard against injustice and oppression down to the close of the Republic.

The *comitia tributa* like wise acted as a supreme court of criminal judicature, but the limits of its jurisdiction are not very clearly defined. Originally, it claimed the right of giving judgement on those offences which were regarded as infringement of the privileges of the pleberians. But as the power of the tribunes increased, they grew bold and unscrupulous, and occasionally they brought before the *comitia tributa* capital offences which did not fall under their cognizance. Thus Coriolanus was condemned by the assembly of the tribes, but this was considered a flagrant violation of the constitution. Cicero was convicted and driven into exile by the same tribunal; but he complained that it had no power to try him on the charge of *perduellio* (treason), brought against him by Clodius, which could only be tried before the assembly of the centuries. Many writers are of opinion that, although the *comitia tributa* sometimes exceeded their powers, they were prohibited by law and established usage from inflicting any punishment more severe than the imposition of a fine. In criminal trials before the *comitia*, no one could act as an accuser except a magistrate. As a general rule, no one could be brought to trial while holding any of the higher offices of state, though this was sometimes departed from. But all magistrates might be called to account for malversation after their year of office had expired. When threatened with a criminal prosecution by Milo, Clodius avoided it by getting himself elected edile.

In a trial before the *comitia*, the people gave their votes in the same manner as in passing a law.

(d) Criminal jurisdiction of commissioners quaestiones perpetuae).—When the population of Rome increased it was inconvenient to convene the citizens in the

assembly for the trial of offenders. So the jurisdiction of the people was delegated to one or more persons, invested with temporary authority to try particular crimes. These judges were called *quaestors* and the trial was termed *quaestio*. Their authority ceased when the trial was over. The ordinary magistrates were most frequently appointed as commissioners, and sometimes private persons. In matters, falling under their jurisdiction, the senate usually appointed *quaestors* from their own body.

In the early ages of the Republic, a special commission was set up to try each case. But in the beginning of the seventh century, when offences had become numerous and varied, permanent courts were established for the trial of crimes of frequent occurrence. These courts were called *quaestiones perpetuae*. At first Calpurnius Piso, a *tribune* of the people, introduced a law, *de pecuniis repetundis*, whereby a permanent commission was established for the trial of extortion committed by provincial governors. This court was composed of a praetor, who acted as presiding judge, without a deliberative voice, and a certain number of judices, resembling in many respects a modern jury. Chosen from the senators. As the experiment was successful, it was soon extended to other crimes, such as treason, peculation and bribery. When the criminal code was remodelled by Sylla, new courts of similar description were instituted for a great variety of offences, and at last the system was brought into general operation, and the whole ordinary criminal business, with few exceptions, was conducted by the *quaestiones perpetuae* down to the establishment of the Imperial government. Each court took cognizance of one class of offences only.

Mode of trial,—As the *quaestiones perpetuae* were established under different laws, the forms of procedure were not always the same. But some general principles were applied in all of them. Unlike the *comitia* it was not necessary that a

magistrate should act as accuser in these courts. Any citizen might come forward and prefer a charge before the praetor. Every case was tried by a judge and a jury. The duty of the judge was to preside and regulate the proceedings according to law and the duty of the jury, after hearing the pleadings and the evidence, was to decide upon the guilt or innocence of the accused. The number of the jury varied and was considerable; and we find examples of 32, 50, 70, 75 and other numbers. The presiding judge drew out the names of the jurors from the *urn* (ballot-box). Each party had a right to challenge a certain numbers and the verdict was returned by a majority of votes.

How jurors chosen.—During the last century of the Republic, the power possessed by the judices (jury) was very great, and was often abused for party purposes, At first the judices were chosen only from the senators, and so was the rule at the passing of the *lex Calpurnia;* then by the Sempronian law of C. Gracchus, only from the equestrians; afterwards, by the Servilian law, from both orders. Sylla restored the privilege to the senators alone. By the Aurelian law, Cotta, divided it among the senators, equestrians, and tribunes of the treasury. Augustus increased the number of the judices, and extended the qualification to the humbler classes of the community. But the political importance of the office was reduced under the Empire.

(e) Criminal jurisdiction of the Emperor and other magistrates.—Under the Imperial government, the Emperor exercised criminal jurisdiction in concurrence with the senate. Frequently the Emperor presided personally in criminal trials without consulting the senate.

By the side of the Republican courts. Augustus established the Jurisdiction of the senate for a large class of crimes, such as treason, and offences committed by magistrates and public functionaries. During the first century of the Empire, some crimes were tried by the *quaestiones perpetuae,* but their powers were gradually transferred to Imperial magistrates.

The prefect of the city usurped many of the duties which formerly belonged to the praetor and ediles. He punished all ordinary crimes committed in the city of Rome, and within a circuit of one hundred miles around it, having power to banish persons from Italy, and to transport them to an island named by the Emperor.

The *praefectus vigilum* (prefect of police) who commanded the soldiers appointed to watch the city, took cognizance of incendiaries, thieves, vagrants, and the like, but he could only inflict light punishments.

2. Procedure in criminal trials.—Authority to prosecute.—Any Roman citizen could accuse another before the praetor, if he was authorised to do so by that magistrate. Such authority to prosecute was called *postulatio*, and it was published in the forum to allow all concerned an opportunity of objecting. At the same time the accuser gave his oath of calumny that his proceedings were adopted in good faith and in public interest.

Accusation.—After reasonable delay, if the accuser could prove his charge, he made a formal declaration of the name of the person to be impeached, and the crime which lay against the accused. A document called *inscriptio* was then drawn up, stating the name of the accused and the precise nature of the charge. This was signed by the accuser and those who intended to support him in conducting the prosecution.

The accused was summoned to appear before the praetor and to hear the charge preferred against him. If he appeared and denied his guilt, the praetor appointed a day for trial, which was generally fixed after ten days.

Trial.—The parties appeared on the day fixed for trial. The praetor or in his absence the presiding judge, called judex questiones, drew out of the *urn* the proper number of names to constitute the jury. Both the parties could challenge a certain

number of the jury. After the jury was sworn, the prosecution opened the case. The accused defended himself in person or by his counsel, and then the evidence was taken.

Verdict.—When the proof and pleadings were concluded, the jury was called upon by the judge to give their verdict, which was done at first openly, and afterwards by ballot. After examining the verdict, the judge pronounced sentence, according to the opinion of the majority, in ascertain form. If the verdict was guilty, the praetor said. *videtur fecisse;* if it was not guilty, *non videtur fecisse*, and if a majority was unable to decide, he said *amplius*, and the cause was deferred for a new hearing on a future day. When the criminal was condemned, he was punished by law according to the nature of his offence.

Such were the forms of procedure followed in trials before the *questiones perpetuae*. The forms observed before the *comitia* were almost the same, excepting the differences arising from the nature of the tribunal and the mode of giving the vote.

3. Crimes.—Crimes were divided by the Romans into private and public.

Private crimes.—Private crimes could be prosecuted only by the party injured, and were generally punished by fines which were paid to him. Some offences such as theft, assault and violent robbery, were treated as civil wrongs in the same manner as trespass, slander and various other injuries and the penalty for such crimes was money compensation i.e. payment in money.

Ordinary public crimes.—Ordinary public crimes were those expressly declared to be such by some law or ordinance, and which on account of their atrocious or hurtful character, might be prosecuted by any member of the community.

Extraordinary public crimes.—Some crimes were called extraordinary, when the nature of the punishment was not

defined by any specific law, but was left to the discretion of the judge, e.g. violating a tomb, sheltering and abetting thieves, etc.

4. Character of criminal system.—The criminal system of the Romans did not atiain the same degree of maturity and perfection as their civil law.

The classification of crimes was extremely capricious and anomalous. Perjury was classed with cutting, wounding and poisoning. This anomaly was resulted from the want of any fixed principle in regard to the formation of the courts and the laws administered by them. This classification has not only been retained in the statutes of Sylla and Augustus, but has also been partially retained in the *corpus juris* of Justinian. The criminal laws of the Romans was framed with special reference to their religion, their natural institutions, their manners and habits etc. and these laws were convenient to their situation but are wholly unsuitable to modern states.

THE END

QUESTIONS

CHAPTER—I

01. Indicate the importance of Roman law to a student of jurisprudence,

CHAPTER—II

02. Give an account of the different classes of people in early Rome.
03. Trace the history of Roman senate showing the rise and decline of its power under the various eposchs of the Roman legal history.
04. Discuss the functions of Roman senate in different periods of Roman history.
05. Give an account Comitia centuriata.
06. Discuss the main causes of the conflict between patricians and plebeians in Rome.
07. State the circumstances leading to the publication of the Twelve Tables.
08. State some of the important provisions of the twelve Tables.
09. What do you know of the law of Twelve Tables? Explain its importance in the history of Roman law. Is it properly described as a code?
10. What are the agencies by which law is brought into harmony with the requirements of progressive communities? Note the points of resemblance and difference in this respect between Roman and English law.
11. What do you understand by legal fiction? Give instances from Roman law.
12. Define equity. Give a short history of Roman equity.
13. In what manner did equity improve the civil law of Rome?
14. Compare and contrast praetorian and English equity.

15. When, how and under what circumstances was equity introduced into Roman law?
16. How far did Roman equity extend, and at what period did it exhaust itself?
17. What do you know of the Assemblies during the Republic?
18. Who were jurisconsults? In what way did they modify the law?
19. Give an account of the development of Roman law by means of juristic interpretation. Campare responsa prudentium with the English case law.
20. Discuss the importance of jurisconsults under the Roman law.
21. Sketch the history of praetor's edict and describe the way in which it contributed to the development of Roman law.
22. "The praetor stands mid-way between the jurisconsults and the legislature." Discuss.
23. Upon what principles, and with what leading results, did the praetor modify and enlarge the jus civile?
24. "The great bulk of Roman law and all that is most valuable in it, is due to the jurisconsults." Explain.
25. Distinguish jus civile from jus gentium, and explain how the latter came to be identified with the Law of Nature.
26. What were the different ways by which legislation was made by the Roman Emperor?
27. Give a short account of responsa prudentium and their influence on Roman law.
28. Give an account of the different schools under Roman law.
29. Explain the law of Citations.
30. How do you compare responsa prudentium with English case law?
31. Trace the history of Roman jurisprudence.

32. Name some of the earliest attempts at codification in Rome.
33. Give an account of Justinian's legislation and of the sources from which it was derived. How far may it properly be described as a code?
34. What is corpus juris civilis? What were Justinian's service for the cause of Roman law?
35. Give an account of the legal achievements in the reign of Justinian.
36. What do you know of Bluhme's discovery?
37. Describe the character of the principal sources of Roman law.
38. Write short notes on :—

    Curiae, Gentiles, Patrician, Plebeian, Client, Leges regiae, Comitia curiata, Comitia centuriata, Comita tributa, Concilium plebis, Jus civile Papirianum, Edict, Plebiscita, Jus civile. Jus gentium, Jus naturale. Lex, Jus, Fas, Jus Flavianum, Jus Praetorium, Senatusconsulta, Imperial constitutions, Codex, Digest, Pandects, Institutes, Novels, Corpus juris civilis, Bluhme's discovery.

CHAPTER—III

39. Distinguish Roman public law from Roman private law. What were the main divisions of Roman private law?

CHAPTER—IV

40. What are the different ways in which a person would become a slave under Roman law?
41. What was the condition of slaves in the early stages of Roman law? How were their conditions improved?
42. What powers could a Roman master exercise over his slave?
43. State the principal methods of making a slave free.

44. Shortly explain the law of manumission.
45. In what ways could formal manumission be made? Distinguish between the effects of formal and informal manumission.
46. What were the different restrictions on manumission? How and when were they removed?
47. State the effects of (i) Lex Aelia Sentia, (ii) Lex Fufia Caninia, and (iii) Lex Junia Norbana.
48. Indicate the contractual capacity of a slave.
49. Discuss the liability of a slave in delict.
50. Give an account of Latini Juniani and Dediticii.
51. Explain 'patron' and 'freed man' and state their mutual rights and obligations.
52. Enumerate the different classes of people at the beginning of Empire.
53. Who were quasi-slaves?
54. In what sense and to what extent, could a slave enjoy rights of property?
55. How slavery was determined?
56. Write short notes on :—(a) Dominica potestas, (b) Peculium, (c) Postliminium, (d) Libertiny, (e) Latini Juniani, (f) Dediticii.
57. Enumerate the privileges of a Roman citizen. How citizenship could be acquired and lost?
58. What do you understand by status? Distinguish if from caput.
59. What was meant by Capitis deminutio?
60. Briefly describe the constitution of a Roman family as based on patria potestas.
61. What do you understand by agnatic and cognatic relationship in Roman law? What is the utility of the distinction?
62. What powers had a Roman father over his children? How were they curtailed by legislation?

63. What do you understand by patria potestas? How was it acquired and lost?
64. The paterfamilias had some authority over all the members of the family, but it was exercised under different names. Explain and elucidate.
65. "Patria potestas did not extend to the Jus publicum." Explain.
66. Sketch the growth of the proprietary capacity of a son in the power of his father.
67. Discuss the liability of a son in delict.
68. Discuss the points of difference between the status of a son and that of a slave in Roman law.
69. Write short notes on Civitas, Peregrini, Paterfamilias, Peculium, Concubinatus and Contubernium, DOS, Restitution in integram.
70. Describe briefly the several modes of contracting marriage under Roman law.
71. Give a short history of the Roman law of marriage.
72. "Usus is to coemptio what usucapio is to mancipatio." Explain.
73. What do you understand by (a) Justiae nuptiae, (b) Matrimonium non justum? Explain the legal difference of these institutions.
74. What were the essentials of a valid marriage in Roman law?
75. Describe the legal effects of marriage with manus and without manus on the properties of the wife and of the husband.
76. Explain DOS. Is it essential for the validity of marriage?

    How was DOS constituted and managed?
77. Describe the status of a wife in manu.
78. Distinguish between a wife in manu, and one not in manu.

    What were the practical consequences of these distinction?

79. What do you understand by DOS, and Donatio proper nuptias?
80. How was marriage terminated under Roman law?
81. How far was divorce sanctioned in Roman law? What provisions were made for the custody of the children of divorced parents?
82. Give a short history of the Roman law of legitimation.
83. Describe the different modes of adoption in Roman law.
84. Describe shortly the ceremony of adoption and arrogation in Roman law.
85. What rights were conferred on the adoptee bsy adoption?
86. What changes did Justinian introduce in the law of adoption?
87. What was the difference between adoption and arrogation?
88. Compare the Roman with the Hindu law of adoption.
89. Write a short note on the law of emancipation.
90. Write an essay on the law of guardianship under Roman law.
91. Explain the difference between tutela mulierum and tutela impuberum.
92. What were the different kinds of tutors recognised in Roman Law?
93. What were the functions of a tutor? Who could be a tutor?

    Who were exempted from tutela/ How was a pupil protected against improper conduct of his tutor?
94. In what different ways could tutelage be dissolved under Roman Law.
95. Who were curators? In what cases were they appointed?

    What were their duties?

96. Distinguish between a tutor and a curator.
97. Compare the office of a Roman tutor with that of an English trustee or guardian?
98. What were the rights and liabilities of a minor in Roman Law?

CHAPTER—V

99. What were the principal divisions of the different kinds of res in Roman Law?
100. Distinguish between res mancipi and res nec mancipi. What is mancipatio?
101. What are the rights enjoyed by an owner of a property under Roman Law? Distinguish quiritary from bonitary ownership.
102. Give an account of the Roman law of possession.
103. Under what conditions could a Roman become owner of property by occupatio?
104. What is treasure trove? How could it be acquired under Roman Law?
105. What things were res nullius? How could the ownership of them be acquired?
106. Discuss the rights of a riparian owner in Roman Law.
107. Describe the different ways by which property might be acquired by accessio.
108. Upon what principle was the ownership settled of an island formed in a river by accretion in mid-stream, and by a change in the course of the river?
109. What were the rights of the parties : (i) If A builds with B's materials on A's land? (ii) If A builds with A's materials on B's land?
110. Did the doctrine of principal and accessory apply in the case of books and pictures?
111. Explain confusio and commixtio.
112. Give an account of specificatio, and distinguish it from confusio and commixtio.

113. In what warious ways could traditio be effected?
114. Distinguish between usucapio and prescriptio.
115. What were the necessary conditions for the acquisition of ownership by usucapio? What changes in the law were made by Justinian?
116. Distinguish between positive and negative prescription?

    What was the practical importance of the distinction?
117. Give an account of donatio.
118. What is a servitude? How are servitude classified in Roman law?
119. Give an account of the principal jura in re aliena.
120. What is meant by saying that servitudes must be perpetual, that they are indivisible and that there cannot be a servitude of the servitude?
121. Distinguish between (i) positive and negative, and (ii) rural and urban servitudes.
122. Define praedial servitude, and explain praedium dominans and praedium serviens.
123. Distinguish between praedial and personal servitudes. To what extent do they correspond in English law?
124. What were the principal praedial servitudes? How were such rights created and extinguished?
125. Explain usufruct and distinguish it from quasi-usufruct.
126. Distinguish usufruct from usus and emphytensis.
127. Explain usufruct, usus, habitatio and operae servorum.
128. How usufruct was created and extinguished?
129. What were the rights and duties of a usufructuary.
130. How were servitudes created and extinguished?

131. Explain emphyteusis. What do you know of the development of the tenure called emphyteusis? What controversy as to its juridical place existed and how was it removed?
132. What were the mutual rights and duties of the emphyteuta?
133. How could emphyteusis be created and extinguished?
134. What were the earliest forms of mortages in Roman law and what were its defects?
135. Distinguish between pignus, and hypotheca. How were they introduced, and in what way did they improve the Roman law of mortgages?
136. What was the power of sale exercised by the mortgagee?
137. By what rules was the right of priority determined when the same thing was mortgaged to more than one person?
138. In what cases was a mortgage implied without special agreement?
139. Write short notes on : Res mancipi, Res extra patrimonium, Res nullius, Occupatio, Accessio, Specificatio, Fructum perceptio, Traditio, Confusio and Commixtio, Mancipatio, in jure cessio, Usucapio, Prescriptio, Donatio, Donatio mortis causa, Adjudicatio, Usufruct, Quasi-usufruct, Usus, Praedial servitude, Emphyteusis, Superficies, Fiducia, Pignus, Hypotheca, Tacita hypotheca.

CHAPTER—VI

140. Explain universal succession and damnosa hereditas. What improvement was brought about in heir's position by Justinian?
141. Distinguish Roman heir from an English executor.
142. What were the different kinds of heirs? What means were open to an heir to escape from the burden of an unprofitable inheritance?

143. "The horror of intestacy led the Romans to dispose of property by means of testament." Explain.
144. What were the essential elements in a Roman will? Give short description of each of them.
145. Give a short history of the "pedigree of wills" in Roman law.
146. Describe the nature of a mancipatory testament, and note the points in which it differed from a modern will.
147. Explain the importance in the Roman law of wills of the institution of an heir. What was the consequence of failing to institute or disinherit descendents?
148. Explain and distinguish the different kinds of substitutio.
149. Explain the meaning of Testamenti factio.
150. What were the limitations of testamentary power of a Roman testator? Explain.
151. Explain and distinguish between the following : Legitim, Falcidian fourth, Pegasian fourth.
152. What do you know of lex Falcidia? Give the rules for its application.
153. How a will becomes invalid under the Roman law?
154. Explain the circumstances in which a will originally valid might fail to take effect.
155. In what different ways could a Roman will be revoked and annulled?
156. Explain the nature and effect of querela inofficiosi testament. In Justinian's law to whom was this remedy available and in what circumstances?
157. Explain the nature of codicil.
158. What were "the snares and pitfalls of the testamentum"?
    How and when were they avoided?
159. Give a short history of the Roman law of legacies.

160. How were legacies classified in the time of Gaius? What changes did Justinian make in the law of legacies?
161. How a legacy could be given?
162. What could be given as a legacy?
163. Is there any restriction upon the amount of legacy? How a legacy could be lapsed?
164. Explain the nature of a fidei-commissa and its practical application.
165. State shortly the effect of senatusconsultum Trebellianum and senatusconsultum Pegasianum.
166. Summarise the difference between legacies and fideicommissa of particular things. Did any difference between them exist in the time of Justinian?
167. Write short note on : (a) Universal succession, (b) Sui heredes, (c) Extranei heredes, (d) Testamenti factio, (e) Falcidian portion or quarta Falcidia, (f) Legitim or Legitima portio, (g) Querela inofficiosi testamenti, (h) Condicil and (i) Legacy.
168. Give a short sketch of the rules of intestate succession.
169. What were the rules of intestate succession as fixed by the Twelve Tables? Point out its defects.
170. State briefly the changes introduced by Justinian into the law of Intestate succession.
171. What is meant by Bonorum possessio? To what classes of persons was it given?
172. Give the provisions of Sc. Tertullianum and, Sc. Orfitianum.

CHAPTER—VII

173. Define obligation. Discuss the different sources of obligation under Roman Law.
174. What are the essentials of a valid contract in Roman law?

175. Classify the different varieties of contract.
176. Classify 'Contract.'
177. Explain the nature of the Roman contract of stipulatio, What was its peculiar importance?
178. Give a short account of literal contract in Roman law.
179. Estimate the importance of the Roman consensual contracts in the history of the law of contract.
180. Describe the contract of mutuum.
181. Define commodatum. Under what circumstances was the borrower bound to make good the loss of the thing borrowed?
182. Distinguish between mutuum and commodatum.
183. What is depositum? When was a deposit said to be miserabile? What was the liability of depositee for misconduct or negligence?
184. Indicate as briefly as you can the essential features of the Roman contract of emptio venditio.
185. What are the essential elements of sale? How was a verbal contract of sale affected by giving earnest money?
186. State the duties of the vendor and the vendee in Roman law.
187. Explain the nature of the contract "locatio conductio" indicating briefly the different purposes for which this contract was used.
188. Describe the rights and liabilities of a tenant in the case of ordinary letting on hire.
189. Shortly discuss the nature and the principles of the Roman contract of Societas.
190. Enumerate and distinguish the several kinds of partnership.
191. How partnership was dissolved?
192. distinguish between the Roman law of partnership and modern law. What were the rights and duties of a partner?

193. Enumerate the principal classes of mandatum.
194. State the powers and duties of a mandatarius. How did mandate terminate?
195. What is a quasi-contract? Shortly explain the principal quasi-contracts in Roman law.
196. How were obligations determined in Roman law?
197. What are the different kinds of delict in Roman law?
198. Define theft. Who could bring action for theft? Distinguish between furtum manifestum and furtum nec manifestum.
199. Distinguish injuria from damnum injuria datum.
200. State the provisions of Chapters I & III of the lex Aquilia. Show how the original scope of lex Aquilia was extended by the jurists and the praetors?
201. What is a quasi-delict? Give examples.
202. What causes of liability are included under the head of quasi-delict? How delicts are discharged under Roman law?
203. Write short notes on : Nexum, Mutuum, Sc. Macidonianum, Commodatum, Depositum, Pignus, Stipulatio, Fidejussio, Emptio venditio, Locatio conductio, Societas, Mandatum, Arra, Periculum rei, Quasi-contract, Negotiorum gestio, Jettison, Acceptilatio, Novation, Merger, Delict, Furtum, Rapina, Damnum injuria datum.

CHAPTER—VIII

204. Give an account of the judicial system during the Republic pointing out its defects.
205. Summarise the judicial system under the Empire.
206. Explain the functions of the Judex, Arbiter, Centumviri, Recuperatores.

CHAPTER—IX

207. Describe briefly the character of the three systems of procedure known to the Romans.

208. What were legis actiones? What were their defects?
209. give a brief sketch of the history of summons under Roman law.
210. Give an account of Actio Sacramenti.
211. How was the formulary system introduced?
212. Write a note on equitable defence in Roman law.
213. Describe the nature of changes effected in the Roman law of procedure by the introduction of the formulary and the extraordinary system.
214. Was appeal allowed in civil cases (i) under the Republic, and (ii) under the Empire?
215. Explain litis contestatio and its effects.
216. Give a short account of interdict.
217. Give historical sketch of the law of execution in Roman law.
218. Write short notes on :

Actio sacramenti, Judicts postulatio, Condictio, Manus injectio, Pignoris capio, Demonstatio, Intentio, Condemnatio, Adjudicatio, Exceptio, Replicatio, Litis contestatio, Interdict.

CHAPTER—X

219. Give an account of the criminal jurisdiction of the (a) Kings (b) Consuls, (c) Senate, (d) Comitia, (e) Commissioners, (f) Emperors and (g) Magistrates.
220. Summarise the procedure in criminal trials.

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