

CHAPTER III

THE MACHINERY OF THE LAW

The most formal aspect of this subject, with which it will be best to begin, is the structure of the civil and criminal courts. After this initial exposition everything else relating to criminal justice will be left aside for a later chapter. The establishment of the Principate by Augustus resulted in important changes in the organization of Roman jurisdiction, so we must deal with the courts in two stages, first those of the late Republic and then those of the Principate.

In the time of Cicero the main civil jurisdiction for all Italy reposed in the two courts, in the city of Rome, of the urban praetor (the 'praetor who gives justice between citizens') and the peregrine praetor (the 'praetor who gives justice between peregrines'). There is controversy about how their functions were divided as to the middle ground: who gave justice between a citizen and a peregrine?¹ Whatever the original division may have been, it has been shown to be probable that by Cicero's time the court of the peregrine praetor was not confined to suits between peregrines;² and in the time of Gaius (and very likely long before) you could even have that most solemnly 'civil' of all suits, the *legis actio*, before either praetor,³ although particular statutes might lay down that suits based on them must be brought in the court of a specific praetor. Constitutionally speaking the consuls, who had the highest *imperium*, were always entitled to exercise jurisdiction or to quash that of the praetors, but they had a great deal else to do, and so seldom appear in this role in the late Republic.⁴ Magistrates with equal *imperium* could quash one another's acts; a famous case is that of the colleague of Verres, when Verres was urban praetor, to whom (according to Cicero) litigants flocked to rectify the arbitrary rulings of Verres.⁵ In

addition the tribunes of the plebs were available to aid citizens in trouble who appealed to them, and this aid was sometimes exercised against the proceedings in the praetor's court.⁶ But all this fell short of being a regular system of appeal against civil judgments, for reasons which will appear.

In the municipalities of Italy, all of whose citizens, south of the River Po, were also Roman citizens after the Social War of 91–90 BC (and the 'Transpadanes' north of the Po were enfranchised in 49) there was a civil jurisdiction of the local magistrates; but it was limited, probably uniformly, to suits where not more than the small sum of fifteen thousand sesterces was in issue—or even ten thousand in the case of suits involving 'infamy' on conviction;⁷ and even then it seems to have been possible for litigants to demand transfer of the action to Rome.⁸

The ancient criminal jurisdiction of the assembly of the Roman people was certainly not defunct in the late Republic, but it was not often called into play.⁹ Essentially the criminal courts of Cicero's day were the 'standing jury courts', *quaestiones perpetuae*. Their scope will be treated less summarily in a later chapter; here, it is enough to say that each court dealt with a particular statutory offence and had a large jury and a majority verdict from which there was no appeal. The penalties were also standard and not at the discretion of the jury or the president of the court. The juries were drawn from an annual list; they were upper-class, and the offences dealt with by the *quaestiones* were mostly of the kind committed by the upper-class. As to how the great bulk of ordinary crime amongst the humble folk and slaves in the cosmopolitan alleyways of the city of Rome was dealt with we are exceedingly ill informed. There was probably little real jurisdiction, only summary punishment. There existed a very junior magistracy, that of the *tresviri capitales*, who certainly had the job of imprisoning malefactors and seeing to the carrying out of executions. The scholiast on Cicero says they punished 'thieves and evil slaves',¹⁰ and from this and other references it has recently been deduced that they had a wide criminal jurisdiction amongst the lower orders;¹¹ it is doubtful, however, whether they could have sentenced anyone to death.

In the provinces the governor was the sole independent jurisdictional authority, and although he could delegate his power it is clear that one of his principal duties was to tour the province holding assizes. From Cicero's self-congratulation it sounds as if he was unusual in following Scaevola's edict and leaving civil suits between peregrines in the hands of their local and traditional courts; certainly the governor was not obliged to do so unless (as in Sicily) the charter of the province imposed this rule on him, and, contrariwise, he might be urged by the provincials themselves to hear their suits. All suits involving a Roman citizen in principle came to him, though some inscriptions recording grants of citizenship to individual provincials (a rare thing in Republican times) give them choice of jurisdictions.¹² It was apparently possible for a citizen to request transfer of his suit to Rome, but pretty uncertain whether he would get it unless he had powerful patrons.¹³ In criminal jurisdiction the governor had sole authority, and over peregrines it was exercised without limit. In the case of Roman citizens there was a limit, set by their famous right of appeal to the people, *provocatio ad populum*. In Cicero's day all Roman citizens everywhere possessed it, and it meant that they could not be executed, flogged, tortured or put in chains by a governor if they appealed—in effect, that for capital crimes he must remit them to Rome for trial by the appropriate jury court. Apart from this he had a very free hand, for he was not bound by the list of statutory offences or penalties but could try and punish in any form anything he thought contrary to the good order of his province.¹⁴

The Principate brought substantial changes, initiated by Augustus (by what constitutional authority we shall not here discuss)¹⁵ and brought to completion by a long development over the whole of our period. Julius Caesar had thought of codifying the civil law;¹⁶ it would have been a huge task already. But in two big statutes, the loss of all but a few references to which is one of the most serious gaps in our knowledge, the *leges Iuliae iudiciorum publicorum et privatorum*,¹⁷ Augustus seems to have produced at least a code of procedure for the existing structure of courts, civil and criminal, settling such matters as the qualifications

of jurors and witnesses, judicial vacations, bail, and the form of criminal indictments, and (incidentally) reaffirming the right of *provocatio*. In fact, the great praetorian civil courts and the standing jury courts went on as before; the novelty was the growth alongside them (in a wholly characteristic Roman way) of more and more jurisdiction by the emperor himself and his delegates and by the senate (that is, technically, the consuls reviving their dormant powers with the senate as their *consilium*). The emperors probably never did much civil jurisdiction at first instance; they were mostly busied with settling points of law by rescript and with civil appeal, which now became freely available. The only other new civil jurisdictions were certain specialized tribunals introduced at one time or another: that of the 'fiscal praetor' and the 'praetor for trusts'; except that in the latter part of our period steps were taken to provide more accessible justice in Italy by the appointment of four *iuridici*.^{17a}

In the criminal law the obvious differences were much greater. The senate became the regular court for the two principal 'upper-class' crimes, treason and extortion by provincial magistrates, and we find it sometimes trying other cases that would normally have gone to the standing jury courts, which the senate had always hated when non-senators were included on the panel of jurors, since it took the view that senators had a right to be tried by their peers. From Augustus onwards the panel for the jury courts consisted largely of non-senators,^{17b} so as a *quid pro quo* the senate got the privilege of this concurrent jurisdiction (which, in the case of treason, it came to regret). We hear a lot in the pages of Tacitus and Suetonius about criminal jurisdiction by the emperors themselves 'within the bedchamber', and where opposition to the regime was involved or suspected this sinister procedure was used without scruple; but in the broader context of crime generally appeal was again probably the main field for the emperor's intervention, for 'appeal to the people' became 'appeal to Caesar' as a kind of universal Ombudsman.¹⁸

'Ordinary' crime in the city of Rome badly needed new measures, and this became the principal sphere of the urban prefect, *praefectus urbi* (who, though appointed by the emperor,

was a magistrate in his own right). The first reference to his criminal jurisdiction, of the time of Nero, shows the way in which the new concurrent tribunals gradually overwhelmed the old:¹⁹

‘Valerius Ponticus was also disgraced, for laying indictments against people before the praetor [*i.e.* so as to take them before a standing jury court] in order to prevent them being tried in the prefect’s court, and so secure their acquittal first by apparent legal scrupulousness and secondly by collusion.’

It was, then, still technically correct in AD 61 to be given a jury, but it was already normal to be hailed before the prefect, whose methods were quicker and less at the mercy of gerrymandering. By the end of our period the principal authorities for criminal jurisdiction had come to be the urban prefect for Rome and a hundred miles radius and the praetorian prefect for the rest. This latter, who was not a magistrate at all but the commander of the guards, began with no more in the legal field than the custody of people sent to Rome for trial. The steps by which, by the end of our period, he had become—besides much else—a kind of ‘principal law officer of the crown’ are strangely untraceable; the earliest evidence for his having a jurisdiction is Hadrianic.²⁰ The prefect of the night watch, *praefectus vigilum*, is found executing a slave burglar;²¹ he probably came to have powers concurrent with those of the old *tresviri*,²² and ultimately supplanting them.

From Augustus onwards the provinces fall into two categories: ‘provinces of the Roman people’, governed as hitherto by men each with his own individual *imperium*, subject only to the overriding *maius imperium* of the emperor, and ‘provinces of Caesar’, really just parts of the ‘province of Caesar’ and so governed by men who were technically *legati*, delegates of the emperor. Civil appeal was automatically possible from the latter to their delegator; it was allowed also to citizens in the ‘provinces of the Roman people’, by some constitutional formula the nature of which remains uncertain. As for criminal appeal from capital sentences, *provocatio ad populum* turned into ‘appeal to Caesar’, and a strong case has been made for thinking that in spite of

its reaffirmation in the *leges Iuliae* it was subjected to new restrictions and that at least for the statutory crimes (which in Rome fell to the inappellable jury courts) governors of the 'provinces of the Roman people', where the bulk of Roman citizens were, could now inflict the death penalty without appeal.²³ In other respects provincial jurisdiction remained as it had been in Republican times, except that in Treasury matters the fiscal procurators came to possess an authority; Ulpian gives a warning hint:²⁴

'Note, however, that if the case is pecuniary and concerns the Treasury, which is the business of the emperor's procurator, he (the governor) will do best to keep out.'

Governors had always been entitled to delegate non-capital jurisdiction to their *legati* and others if there was more than they could manage themselves; but governors of 'provinces of Caesar' were already delegates, could not delegate further, and had no *legati*. Under the Principate inscriptions record a number of men with the formal title *legatus iuridicus* (or just *iuridicus*), who seem to have been appointed specifically to take the legal burden of a 'province of Caesar' or part of one off the shoulders of the governor.²⁵ Apart, however, from the regular *iuridicus* of Egypt they are only found in one or two provinces, and in the rest there must have been a huge burden of litigation for the governor to get through—or fail to get through.^{25a}

Much the most important innovation in the machinery of justice made by the Principate was appeal.^{25b} The volume of civil appeals was very great, and from Augustus onwards the emperors took various means to delegate them, but during the whole of our period the emperor himself remained the final instance.^{25c} Besides contributing to the correction of justice, appeal must have worked as a unifying and integrating force upon the law, providing a source of ultimate legal decision which the Republic had lacked.

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Civil suits at Rome, then, began in the court of the praetor. They did not normally end in it; an important fact about Roman civil procedure is that the praetor did not try anybody. His business

was not to try cases but to settle between the parties, in a way analogous to the 'pleadings' of the old English common law, the exact nature of the dispute between them and of their claims and counter-claims, to appoint someone to try the action, and to issue to him a 'formula' containing a precise and unequivocal statement of the question he had to try.²⁶ These proceedings might involve counsel for the parties, and argument as to law and fact,²⁷ but they were not the trial of the action; they were the proceedings *in iure*, 'in presence of the law officer', and when they were completed the praetor's function was over. He was not a professional lawyer, and his praetorship was part of a political career; he was one of eight men (in Cicero's day; later twelve and then sixteen) elected annually to praetorships, who drew lots for their respective spheres of action, two of whom would draw the two great jurisdictions. He was a magistrate, and his job was seeing that the law was carried out. He also had, as a magistrate, many functions that were relevant to the law but not jurisdictional at all, as can be seen by looking at the rubrics of the praetor's edict in its codified form:²⁸ slaves were manumitted before him; he was the recipient of legal declarations such as *professiones* of birth; he issued orders putting people into possession of property and heirs into inheritances; he gave injunctions requiring actions such as production of documents or persons or restraining actions such as building; he appointed guardians and caretakers.

Who was entitled to bring someone into court? In the civil (as opposed to the criminal) law it must be some specific person or group of people claiming under an interest such as ownership or possession or contract or damage. If there were several valid claimants to be plaintiff the praetor would choose. Certain people could legitimately sue on behalf of others: guardians for their wards, *adsertores libertatis* for persons in slavery, agents for their principals; and in such cases the praetor would usually require security that judgment would be accepted by the person on whose behalf the action was brought. There were, however, a few 'popular actions', *actiones populares*, civil actions which any member of the public might bring—and receive the damages if he secured a conviction. They were based, it has been suggested,

on the idea that though these things were not crimes it was in the general interest to secure their repression; characteristic examples were the 'action for misuse of a tomb' and the 'action for things poured or dropped' (*i.e.* from upper stories).²⁹

Where must suit be brought? The *Digest* titles on this are interesting.³⁰ Though there were complications, in general the Roman principle was that suit must be brought in the *forum* of the defendant, that is to say his domicile (the place absence from which would lead people to say 'he is abroad'), or where his shop was, if he was a travelling merchant.³¹ Cicero mentions this as a privilege the peregrine Sicilians were given by Republican Rome:³²

'that no man can be obliged to give bail for appearance elsewhere than in his own *forum*.'

However, agreement between parties to litigation as to a jurisdiction is allowed by Ulpian to be good,³³ and if a clause in a contract stated where it was to be fulfilled, that was also where it would have to be sued upon.³⁴ A letter of Cicero refers to a man who owed money to a friend of his 'in Gaul', the praetor at Rome would not accept the suit:³⁵

'the case has been handed on to Gaul by Volcatius who has jurisdiction in Rome.'

Cicero therefore writes to the governor of Gaul asking him to 'expedite' the collection of the debt by the freedman whom his friend has sent to Gaul for the purpose.

How did a plaintiff get his man into court? Originally by 'calling to law', *in ius vocatio*. In early Roman law you could seize a recalcitrant defendant (if you had the power), and this was never repealed; but the normal process in our period is well illustrated by documents from Herculaneum: the parties took bail, *vadium*, that is to say mutual promises on pain of a money penalty for appearance in court on a due day:³⁶

'Bail taken with Calatoria Themis for 3 December next at Rome in the Forum of Augustus before the tribunal of the urban praetor at the second hour: promise of one thousand sesterces called for by Petronia Iusta of unknown father (as she

styles herself), promise duly given by Calatoria Themis with authorization of her guardian C. Petronius Telesphorus.’

Cicero in his speech *pro Quinctio* also deals at length with an (alleged) bail of this kind.³⁷ Alternatively, the parties might offer persons instead of money promises as security for appearance, a procedure referred to by Horace, especially in his encounter with the Bore.³⁸ If your opponent simply could not be got into court and would not appoint a representative, no action and hence no judgment against him was possible; but he counted as *indefensus*, and the praetor would grant you entry into his property, which it would then be up to him to contest.

Let us, however, suppose that both parties are before the praetor. At this point the whole action may come to an end—not merely by the possible veto of another magistrate or of a tribune. First, the praetor might simply refuse the plaintiff an action if he thought the claim misconceived; *denegatio actionis* was a most important praetorian right.³⁹ The plaintiff naturally need not despair; he could go to the other praetor, or wait till next year when there would be two fresh ones, or appeal to the tribunes or (under the Principate) to the emperor. Secondly, the defendant might confess the plaintiff’s right, and this counted as judgment against him.⁴⁰ Thirdly, one of the parties might invite the other to swear an oath as to the justice of his case; if the oath was sworn the swearer won the case without more ado, and it was over. The *Digest* has a title on these judicial oaths (12. 2) which unfortunately conflates certain complex differences; but the broad pattern is important—the oath offered and sworn to had sanctity, and is throughout our period a factor to be reckoned with in the judicial process. Even the cynical Juvenal thought that perjurers met the fate at least of a nagging conscience.⁴¹

Supposing that none of these things has happened and the suit is to continue, it is now the praetor’s business to get the parties to accept a *formula* or statement of the issue to be tried. The subtle structure of these *formulae* is a fascinating study, and Gaius tells us a lot about them,⁴² but there is not space to develop it here; the simplest possible one is given as an example:

'Let Titius be judge. If it appears that the defendant ought to give ten thousand sesterces to the plaintiff, let the judge condemn the defendant to the plaintiff in that sum; if it does not so appear, let him acquit.'

The basic types of *formula*, it is commonly held, were set out as an appendix to the praetor's edict,^{42a} but flexibility was the whole purpose; probably the plaintiff, with expert advice, chose the one most appropriate and if necessary asked for modifications to it that would more precisely meet his contentions, and the defendant could make objections and ask for other modifications. For the defendant there were *exceptiones*, clauses that could be added to the *formula* to permit account to be taken of reasons (other than simply denying the charge) why the action should not succeed, such as fraud or coercion or agreement not to sue or case already tried before, thus:

'If it appears that the defendant ought to give ten thousand sesterces to the plaintiff, *unless it was agreed between them that suit should not be brought for this sum within a year*, let the judge condemn the defendant to the plaintiff in that sum . . .'

To the *exceptiones* the plaintiff could append *replicationes*, and so on.

The final business *in iure* was for the parties to accept from the praetor a person or persons to try the action (of whom more in a moment). Though the parties might be allowed much latitude to argue about what issue should be tried and who should try it, the praetor was not a mere referee; he was a magistrate, and could in the long run coerce a recalcitrant litigant into accepting *formula* or judge, on pain of being treated as *indefensus*. This is made sufficiently clear by what Cicero says about Verres (though the context is actually provincial governorship);⁴³ no one can get his rights if

'a bad praetor, with no one to veto him, appoints anyone he likes as judge.'

With the appointment of one or more persons to judge the action the stage of *litis contestatio* is reached, proceedings *in iure* are over, and the case must go on to judgment, *iudicium*.

Who are these persons who judge? The figure most commonly spoken of in the law-books is *iudex unus*, the 'single judge'. He is not necessarily a professional lawyer, any more than the praetor. If the parties were agreed, he could be anyone at all, even a peregrine (there were some exceptions, particularly women).⁴⁴ Eminent jurists, or eminent orators like Pliny,⁴⁵ were naturally often asked to perform this service, but we hear sometimes of humble *iudices*, chosen no doubt by humble litigants.⁴⁶ If the parties did not have anyone in particular in mind, or could not agree, the praetor would propose names from the annual list of 'select jurors' who were also used to man the criminal jury courts, with certain rights of rejection by the parties.⁴⁷ An alternative system of drawing by lot names from the annual list (with rights of rejection) is widely attested, especially for *recuperatores*—to whom we shall come—and in the provinces.^{47a} Sometimes the single judge is called *arbiter*; it has recently been argued that he originally dealt with different categories of case from the *iudex*,⁴⁸ but in our period no significant difference is apparent. One characteristic sphere of the *arbiter*, however, was actions for division of land or inheritances, where all parties were equally anxious for an answer, and where he might be (or bring in) an expert such as a surveyor.

Here in parenthesis must be mentioned the practically not much different figure of the 'arbiter by agreement', *arbiter ex compromisso*. Technically he differs because he is extra-judicial, a good neighbour or an expert called upon without resort to the courts, particularly to settle boundary disputes.⁴⁹ The law made some rules, however, particularly that the arbiter who accepted such a commission must carry it through. A decision by an arbiter between a private citizen and a municipality survives on a stone inscription,⁵⁰ but better still, the Herculaneum Tablets have recently given us (rather fragmentarily) the whole process of such an arbitration in AD 69:⁵¹

'Concerning the dispute between L. Cominius Primus and L. Appuleius Proculus over the bounds of the estate called "Numidianus", property of L. Cominius Primus, and that

called "Stratanicianus", property of L. Appuleius Proculus, . . . Ti. Crassius Firmus is to be arbiter by agreement between L. Cominius Primus or his heir and L. Appuleius Proculus or his heir; and is to give a decision, formal or informal, or order a decision to be given, openly in the presence of both parties; and provided that he gives the decision or orders it to be given before 1 Feb. next or postpones the day of agreement or orders it to be postponed, then if anything is done or not done contrary to the agreement one thousand sesterces are to be paid. It is agreed that no fraud exists or shall exist with respect to this matter and arbitration.'

Then we have the acceptance by the arbiter, pieces of notes of the proceedings 'in the house of M. Nonius P . . .', and pieces of the arbiter's decision, 'having brought in the surveyor L. Opsius Herma'.⁵²

Civil suits by no means always went to a single *iudex* or *arbiter*; there were juries, of two sorts. First, instead of a single *iudex* the praetor might appoint 'recoverers', *recuperatores*, a small jury of three or five *iudices*. The institution had an old history, connected with the early legal relations of Rome with foreign states, as a kind of international civil jury; but by Cicero's day it appears as a standard alternative to the single judge—whether the parties had a choice we do not know.^{52a} Two of Cicero's private law speeches were delivered before *recuperatores*, *pro Caecina* and *pro Tullio*, and those two cases concerned forcible ejection from property; but a speech of the emperor Claudius in the senate implies that in his day the main sphere of *recuperatores* was suits for freedom:⁵³

'Do at least lay this down, that no one of only 24 years of age be appointed to recoverers. For it is not unreasonable, I think, that only those persons should judge issues of slavery and freedom who cannot plead the privileges of the Laetorian law in their own affairs.'

Many civil actions went before a much bigger jury, the Court of One Hundred, *centumviri*. This was the home of *causes célèbres*;

Cicero furnishes a resounding list of suits that could come before it,⁵⁴ but its main business was with the inheritances and fortunes of the noble and rich—petitions of heirs, suits against unreasonable wills and so on. The famous *causa Curiana* which Cicero remembered as a ‘classic’ was heard before it,⁵⁵ and it was the stamping-ground (*harena*) of Pliny, who gives most information about it. It did not actually consist of one hundred; the full court, for very big suits, on an occasion when Pliny pleaded before it, was one hundred and eighty,⁵⁶ but it usually sat in four divisions. The *centumviri* had no exclusive competence in any particular field; inheritances, for example, could equally well go before a single *iudex*. The intention of the parties was decisive here, for if they wanted to go to the *centumviri* they had to open their suit with the archaic ceremony of the *legis actio*.

The judge (for we shall speak of *unus iudex* in what follows, for simplicity’s sake) had to try the action and acquit or condemn (on the basis of the *formula*)—not the praetor:⁵⁷

‘What if the defendant denies? What if he is not liable at all?
Is it the praetor’s business to pronounce on his liability?’

To serve as judge if called upon was not only a social duty but a public office, from which you must be officially excused. It could be an extremely arduous and complex task, and the judge who performed it with prejudice or partiality was liable to legal action against him.⁵⁸ ‘When I was first put on the panel’, says Gellius, ‘I read all the manuals, but it didn’t help. I had an allegation of debt—no evidence at all, but the plaintiff a known man of honour and the defendant a known twister.’ He consulted his friend Favorinus the philosopher but in the end had to pronounce a *non liquet* and retire.⁵⁹ The judge appointed time and place; before him counsel for the parties orated (‘I give them all the time in the world; truth must come before convenience’, said Pliny),⁶⁰ and testimonies, oral and otherwise, were produced. There were singularly few rules, either to bind or to assist him; such as there were appear mostly in a few titles of Book 22 of the *Digest*. The plaintiff was required to produce *in iure* documents on which he was going to rely before the judge—a wholly one-way

arrangement in the interest of the defendant, who could not be made to produce anything in advance.⁶¹ The jurists developed some rules of interpretation of documents, which could help a judge—for example, on legacies:⁶²

‘the significance of words must not be departed from unless it is manifest that the testator meant something different.’

There was a principle similar to our own, that ignorance of the law was no defence though ignorance of facts might be, and Labeo at the end of the Republic was already giving thought to the question what degree of knowledge or ignorance was appropriate to the ‘man in the street’.⁶³ One title concerns ‘burden of proof’ and one concerns witnesses.⁶⁴ On the latter it looks as though Augustan legislation laid down some rules; a great deal was made to depend on the status and reputation of those who gave testimony, at least as time went on and the distinction between *honestiores* and *humiliores* grew more and more marked.⁶⁵ Written testimonies could be put in; we have seen the sworn statements in Petronia Iusta’s dossier. A rule is given, based on a *senatusconsultum*, that the census and public documents must prevail against oral testimony.⁶⁶ As for private documents—receipts, contracts and so on—their force was purely evidentiary, not necessarily clinching as against other evidence (though they might, of course, be the best or only evidence of a transaction). The only exception, apart from the ‘contract *litteris*’ which will be explained later, was that the tablets of a will *were* the will; and Suetonius records that under Nero a formal requirement was made that the tablets must be secured with thread through holes at their edges in a special way, and then sealed.⁶⁷ A *senatusconsultum* of unknown date (but perhaps itself Neronian) generalized this formality for all documents on tablets; documents which fail to conform to these specifications were of no effect.⁶⁸

To reach a decision on his *formula* the judge might well have to decide matters of law as well as fact, though it was recognized that the latter were peculiarly his province:⁶⁹

‘When judges enquire about the law governors usually give a

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reply, but about matters of fact they ought not to offer guidance, but tell the judge to decide according to his conscience; for this is something that sometimes mars reputations and opens the way for graft and unscrupulousness.'

One has only to read a Ciceronian speech to see how difficult it must have been, with limited rules of procedure and opposing counsel using every rhetorical trick known to man—especially irrelevance—for a judge to reach a true verdict (though it is fair to say that the very rigid modern English rules of admissibility which we tend to use as a criterion are under critical fire, and would be regarded in some other modern systems as deleteriously limiting). Moreover, he might have to do far more than just condemn or acquit. Many suits were *bonae fidei iudicia*, 'actions of good faith', in which the judge must decide 'what in all fairness the defendant ought to pay or do'; all contracts, partnerships and guardianships were of this kind.⁷⁰ And there were the divisory actions for the *arbiter*, involving elaborate financial calculations, valuations, set-offs and collations. All this done, judgment must be delivered in the presence of the parties. Judgment (*condemnatio*) was always in a sum of money; that is, even if what the plaintiff wanted was his slave or his land back, the judge could not directly order this 'specific performance' to be done. The common law of England had the same rule when the Chancellor stepped in with Equity; it 'aimed, not at making a party carry out his contract, but at making him pay for not doing so'.⁷¹ In practice, however, Roman law also got out of this, though by a different route, the *formula arbitraria*, a clause instructing a judge to convict 'unless the thing be restored'; if it was not restored the plaintiff might make his own assessment, under oath, of the value of his thing.⁷² This was sufficient; the *Digest* title on suing for one's property as owner (6. 1) seems to assume all through that one can in fact get it back.

Judgment given, the duty of the judge was over. If the convicted party did not obey the judgment it was up to the plaintiff to take further steps. He was not given physical help by the authorities, but the legal consequences for the recalcitrant

defendant were severe. First, after thirty days the plaintiff could bring an 'action on the judgment'.^{72a} This apparently time-wasting formality may have been primarily to ensure that he did not take the next steps he was entitled to without the backing of an unquestionable judgment. For the next steps were first 'personal execution', that is, the plaintiff could seize the judgment debtor and keep him in private imprisonment until the debt was discharged,⁷³ and secondly authorized entry into the whole of the debtor's property to sell it up. The 'action on the judgment' was not a procedure of appeal; and it is usually said that while there were various methods of contesting proceedings *in iure*, against a *iudicium* there was in Republican times no appeal. It has recently been argued on the basis of a distinction made by Gaius⁷⁴ that appeal was possible from all except *iudicia legitima* (judgments given in Rome or within the first milestone by a single *iudex*, he and the parties all being Roman citizens) in the Republican period as well as under the empire.⁷⁵ In the absence of clear evidence either way one cannot be sure of this. At any rate, the defendant could contest the 'action on the judgment' on the ground that there had been no proper judgment because of coercion or fraud,⁷⁶ or he could have an action against the *iudex* for corrupt judgment.

One consequence of conviction in certain civil suits and (probably) all criminal trials was 'infamy', *infamia* or *ignominia*. Infamy could indeed arise in other ways, and it could have other consequences besides legal ones; the subject is complicated and much has been written about it.⁷⁷ The concept enshrines very characteristic Roman attitudes. The small aristocratic society of early Rome, valuing above all overt esteem (*existimatio*, *dignitas*), dreaded its loss exceedingly. The disapproval of a man's peers was channelled through the censors, the customary guardians of public morality, who provided a sharp extra-legal sanction against behaviour that offended accepted canons by their 'censorial mark', the *nota censoria* entered against a man's name in the census-lists,⁷⁸ which was both an expression and at the same time a cause of his being held 'infamous'.⁷⁹ The censors, part of whose function was

to revise and control the lists of members of the senate and equestrian order, could also deprive a man of his place,⁸⁰ and this deprivation and the *nota censoria* would naturally (though not inevitably) be connected. Independently, the praetor in his edict deprived persons judged guilty of certain civil law offences of the right of appointing representatives in litigation or acting as representatives of others. Gaius tells us this,⁸¹ and gives a list—perhaps not meant to be exhaustive—of actions condemnation in which resulted in this ‘ignominy’, carefully pointing out that the praetor did not use the word but that ‘ignominy’ was a consequence of the deprivation. Theft, violent seizure of goods and *iniuria* (principally defamation) appear in the list, and actions on partnership, pledge by *fiducia*, guardianship, mandate and safekeeping. Another list is given in the *Digest*;⁸² they fail in curious ways to coincide, and neither mentions loan or the actions for intimidation or the corruption of slaves. It is in fact very difficult to get a general theory out of them; on the one hand not all the *bonae fidei iudicia* were infaming (e.g. not sale or hire); on the other not every condemnation even in a *bonae fidei iudicium* such as partnership could have justified ‘infamy’ on the ground which otherwise one might have seized on as its essential basis, namely fraud. It has recently been argued that this infamy resulting from condemnation in private law actions ceased to be a reality in the late Republic because it only arose if you yourself were condemned ‘in your own name’—but you could appoint a representative to defend the suit, and if he was condemned *he* would be condemned in your name.⁸³ The logic is unassailable, but does not allow for the difficulty that a man might have in finding a representative; and while the fact that the lawyers went on talking about civil *infamia* might be put down to obsession with dead theory it is harder to explain why imperial constitutions went on dealing with it (surely as a practical issue) with reference to the praetor’s edict.⁸⁴ (They dealt, it is true, with the cases of theft and rapine and *iniuria*, where a man might indeed find it hardest to get a representative.) This sort of *infamia* was also a practical issue in the municipalities, as will be seen in a moment. Conviction in the standing criminal courts also pro-

duced effects of infamy (not necessarily the same effects as the edict), and so did being sold up as a bankrupt. The consequences of all these patterns of disesteem put together can be seen in that long list of persons in the *Table of Heraclea*, quoted in Chapter II, who are not allowed to present themselves for municipal office.⁸⁵ It includes persons criminally convicted, bankrupts, persons convicted in the civil actions, including theft, persons discharged from the army with ignominy and persons exercising certain despised professions. This is a very mixed bag, and it is now usual to hold that there was no general 'law of infamy'. Nevertheless there can be no doubt that 'stigma' remained an element of legal and social sanction all through our period, and in the criminal law it was extended from the *quaestiones publicae* into the penalties of the *cognitio extra ordinem*.⁸⁶

Jurisdiction other than that before the praetors at Rome was on an entirely different footing. The governor of a province, as fount of all procedural law, was entitled simply to *cognoscere*, try a case, which (as opposed to the *ius dicere* of the praetors) meant to try it completely before himself with any procedure he thought fit—summon the parties, determine the issue, hear the evidence, pronounce the judgment, and see to its execution. This right he had with respect to the Roman citizens in his sphere no less than the peregrines, and sometimes he exercised it:⁸⁷

'Verres put in the plaintiff, Verres ordered appearance, Verres heard the case, Verres gave the judgment.'

But if there was more work than he wished to cope with directly he was equally entitled to 'give a judge'.⁸⁸ In theory this was very different from the formulary system; there was no question of choice of judge by the parties nor of *formula*—the instructions to the judge could be in any form.⁸⁹ But if we escape from excessive fixation on the technical mysteries and theoretically voluntary nature of the formulary system we must admit that the practical effects were probably much the same. Normally, as between peregrines in the Republican age, in so far as the local courts were not left to their own procedures, the 'charter of the province'

might lay down rules (as, for example, about choice of juries in Sicily),⁹⁰ and the ordinary formulary system would prevail; we hear from Cicero of recuperatorial actions between peregrines in the provinces of Asia and Sicily,⁹¹ of *formulae* and choice of *iudices*;^{91a} and, *a fortiori*, Roman citizens will have had no less privilege. The distinction between the two procedures open to a governor is well brought out in a Verrine passage:⁹²

‘Having got a rich source of profit from the cases which he had decided to try himself with his advisers, which simply meant the personnel of his suite, Verres then discovered another endless vein to tap. You must all realise well enough the extent to which everybody’s goods depend on the power of those who grant *iudices* and those who deliver judgment . . .’

There is no reason to suppose that things were different under the Principate. In Cyrene, a ‘province of the Roman people’, under Augustus, *iudices* were normal for all civil suits and even in criminal trials except capital cases.⁹³ The only evidence we have for ‘provinces of Caesar’ comes from Egypt, but there too *iudices* were given,⁹⁴ and some of their judgments survive. Here is one of the Julio-Claudian period:⁹⁵

‘Suit between discharged trooper Dionysius son of Manlius (defended in absence by M. Trebius Heraclides son of aforesaid Dionysius, trooper of the Aprian squadron, troop of Acamas) and M. Apronius and M. Manlius, troopers of the Vocontian squadron, troop of Domesticus, concerning degree of relationship, which of them was the nearer relative, so as to be granted the estate, of Dionysius son of Manlius, trooper of the Aprian squadron, alleged deceased intestate: L. Silius Laetus camp prefect having given as judge P. Matius, centurion of legion III Cyrenaica, and ordered him to pronounce:

P. Matius, centurion of legion III Cyrenaica, with an advisory panel, namely M. Marcus Optatus son of Publius, tribe Falerna, corporal of the Choitan squadron; L. Herennius Valens, corporal of the Aprian squadron; and Octavius

Domesticus, corporal of the Vocontian squadron: each party having pleaded its case and the affidavits having been read out, announced his verdict as follows:

That he held that Dionysius son of Manlius was the brother of his brother Dionysius alleged deceased, and Apronius and Manlius sons of the said Dionysius, according to their own affidavits of relationship; that therefore the property of Dionysius, object of suit, belongs to the said Dionysius son of Manlius, discharged trooper, and should be adjudged to him.' (Place and date follow.)

No formalities bound the emperor; his decisions were pure *cognitiones* arrived at in any way he chose. So were those of the new courts under his officials, the urban and praetorian prefects, and of the specialized tribunals of the *fiscus*,^{95a} the praetor for trusts and so on. Thus the formulary system and its element, however slight, of voluntary arbitration by the parties gradually slipped into the background and civil jurisdiction became a part of the administrative machine.

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The praetor was not necessarily a legal expert, neither were the judges. There was therefore in Rome no Bench. As to barristers, their training was in the schools of rhetoric—simply, indeed, a more protracted and purposeful immersion in the secondary education that everybody had.⁹⁶ There was plenty of law in it, and in so far as the rhetoric was forensic, which it came to be more exclusively under the Principate when political oratory ceased to be a reality, it dealt with legal situations, however fantastic. But the barrister's job was to make a case; he was not *amicus curiae*, as Cicero did not scruple to confess:⁹⁷

'Anyone who supposes that in my forensic speeches he has got my personal views under seal is making a great mistake . . . We orators are brought in to say not what we personally think but what is required by the situation and the case in hand.'

Cicero's friend Aquilius Gallus, who was a jurist, used to say, if consulted about matters of fact (Cicero records the remark himself):⁹⁸

‘Nothing to do with the law; go to Cicero.’

And Horace, to flatter a friend, says there are three (not two) fields in which he could easily make himself a master:⁹⁹

‘whether you sharpen your tongue for litigation or prepare to give opinions on Roman law or write charming poetry . . .’

In this situation one might wonder how the law ever got done, or at least how it became so precise, detailed and technical. Who could tell the praetor, the governor, the judge and the advocate what the law was?

The people who did so were the ‘learned in the law’, *iuris prudentes* or *iuris consulti*. First, the praetor or other jurisdictional magistrate sat with an advisory panel, a *consilium* of *assessores*; though the decisions were his responsibility he might well take them on a vote.¹⁰⁰ Pliny refers to an occasion when he was assessor to the urban prefect,¹⁰¹ and Ulpian records a case when he was assessor to a praetor.¹⁰² Most illuminating is Aulus Gellius:¹⁰³

‘I remember being an assessor on the tribunal of a praetor [a learned man]; and a barrister, quite well known, was pleading altogether off the point, not coming to the matter in hand at all. The praetor told the defendant that he was not being represented by counsel, and when the barrister exclaimed “but I am over the defendant, m’lud”, the praetor replied (quite amusingly) “You’re over him all right; and you’re over the rest of us too”.’

Provincial governors also sat with a *consilium*. Cicero is always going on about how Verres packed his with his minions,¹⁰⁴ but Verres was quite entitled to choose whom he wished, though normally some eminent men of the province would be brought in. And a *iudex* would have his panel also. Gellius tells us how once, being a delegated *iudex*, told by the consuls to hold a *cognitio* and pronounce judgment ‘within the Kalends’, he asked

an erudite philologist whether this empowered him to pronounce *on* the Kalends. His friend replied:¹⁰⁵

‘Why do you ask me rather than one of the learned practitioners of the law whom you fellows usually get on to your *consilium* when you have to act as judges?’

(to which Gellius’ answer was that his question was about Latin, not law. ‘Very well,’ said his friend, ‘I’ll tell you about Latin; but for what terms mean in law you must look to the usages of the law’). Furthermore, all these people (unless they happened to be jurists themselves), and also private people thinking of litigation, went to the jurists for legal opinions, *responsa*. *Publice respondere*, to give opinions on the law to all comers, was their ancient and honourable function—Labeo’s for example,¹⁰⁶ and we hear of specialists in particular branches:¹⁰⁷

‘Quintus Scaevola, the most celebrated and reliable prophet of the laws, used to refer those who consulted him to Furius and Cascellius when the matter concerned land law, because they had devoted themselves to that particular subject.’

In Republican times even the eminent jurists helped with ‘cautelary’ jurisprudence, *i.e.* the drawing up of proper processes and documents,¹⁰⁸ but later this was mostly left to lesser fry.

It would be wrong to think of jurisprudence in the Republican age as a profession. Its practitioners were members of the Roman upper class, for whom even public and political office were only incidents in lives of leisure, and it was therefore an amateur activity just as much as being a historian or an agricultural expert. In the late Republic, however, we find Aquilius Gallus giving up the ladder of public office after the praetorship to devote himself to the law, and Labeo likewise; and men begin to come into jurisprudence from less exalted backgrounds.¹⁰⁹ Under the Principate it takes on more of the character of a profession. The career of an expert in the law might now often lead him to one of the offices under the emperor that had big jurisdictional functions, and the emperor himself needed jurists to call on to his *consilium*, as he himself became the main source of legal

advice through his rescripts.¹¹⁰ We hear, in Gaius mostly, of two 'schools' of jurists, the Proculians and the Sabinians, who took opposite sides about numerous legal problems. Every book on Roman law discusses them—but inconclusively, owing to paucity of evidence. The tendency nowadays is to hold that they were actual colleges,¹¹¹ but the case is not convincing. There is no doubt that eminent jurists taught law, but another passage from Gellius suggests rather that it remained an informal activity:¹¹²

'When I first came out of the retired corner of books and schoolmasters into the world of life and the light of the forum, I remember that a question was going round several of the haunts in Rome of those who gave public lessons in the law or jurists' opinions (*stationes ius publice docentium aut respondentium*), whether a quaestor of the Roman people could be summoned to court by a praetor. . . .'

At any rate, by the end of our period the science of the law, like much else in Roman society, had become very much more bureaucratized and linked to the imperial administration than at the beginning.

The bar, in our period, was not organized in the elaborate and rigid way that characterizes the later empire.¹¹³ It covered an enormous range of talents and standards, from the star performers in Rome to the humble *causidici* who pleaded in the provincial assizes.^{113a} The main rule, going back to a law of 204 BC, was that barristers were not allowed to take fees. Of course, the great advocates of the Republic had no need to do so directly; if Cicero did a client proud the client's purse, friends and influence would be available to Cicero later at call. Nevertheless, the rule was constantly being infringed and as constantly reiterated. Augustus re-enacted it;¹¹⁴ there was a terrible fuss about its evasion in Claudius' time, when a maximum fee was set at ten thousand sesterces;¹¹⁵ and another terrible fuss raised by a conscientious urban praetor in Pliny's day, from which it appears that even the allowed sum of up to ten thousand sesterces must be a present, and nothing could be bargained for in advance.¹¹⁶ One might bear in mind that the English barrister today cannot

bargain or sue for fees, but 'it is believed that the services of barristers are not in fact wholly gratuitous'.¹¹⁷ Ten thousand sesterces was not a very large sum in the upper brackets of Roman society, and Juvenal thought the bar a poorly rewarded profession:¹¹⁸

'There's no money in it. Argue yourself hoarse before some bumpkin of a judge—what do you get? A couple of bottles of *vin rouge*; and you've got your clerks to pay. The only way to get a name is to live like a lord; that's how clients pick their counsel. And Rome soon eats up your capital that way. If you're thinking of making a living by speeches you'd better get off to Gaul or Africa.'

This is more impressive than the complaints, common to every age, of the wealth and avarice of advocates.¹¹⁹ At any rate, it does not look as if at any level the litigant often pleaded his suit in person unaided.

The voice of the provincial barrister is sometimes audible through the documents, such as the testamentary probate action of AD 184 from Egypt, in which four counsel argue:¹²⁰

'Action brought by Cassius, also called Hegoumenos, of Antinoopolis, present also Isidore son of Tiberinus, a minor, assisted by Longinus Chaeremonianus his half-brother and advocate:

Philotas, counsel for Cassius, said: "My client's relative, being a Roman citizen, on point of death, wrote his will and sent for my client and begged him to accept its custody, . . . etc.";

Longus, counsel, said in reply: "Our opponent, fearing the penalty for opening the will, comes and says he received this will from his relative and wishes to produce it. That the testator is no relative of his I herewith assert, . . . etc."'

A considerable bulk of the surviving prose literature of Rome consists of treatises on the art of oratory, and some of the technique seeped down to the humble bar, as is exemplified by a delicious epigram of Martial:¹²¹

'My suit is not about assault or murder or poison but about three she-goats that I say my neighbour has stolen; and that's what the *iudex* expects you to prove to him. But you go on about Cannae and the Mithridatic War and the treacherous behaviour of the wicked Carthaginians and your Sullas and Mariuses and Muciuses—all in a voice of doom and waving your arms about. I say, Postumus, get on to my three she-goats!'

Traces also survive of the 'cautelary' activities of the town and village notaries and scribes who wrote legal documents for people,¹²² and not merely in those numerous cases in which it is said 'I, so-and-so, have written this on behalf of so-and-so, who declares that he is illiterate'. There is, for example, a papyrus containing specimen forms for testamentary clauses,¹²³ and a bronze tablet (evidently hung on the wall of some notary's office in Spain) with similar specimens for 'fiduciary mancipation'.¹²⁴ The scribes clung fast to the magic words of their formulas, even when they understood them little or not at all, and even when the institutions to which the phrases referred had been modified or abolished.¹²⁵

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A celebrated nineteenth-century essay set out the reasons for believing that in the antique age of Roman law, the age of the *legis actiones*, legal procedure weighted the scales of litigation heavily in favour of the rich against the poor.¹²⁶ Both parties must begin a suit by putting cash down; defendant in a suit for debt must find a representative (liable for double if the case was lost). How could the humble litigate at all under these conditions? The money element was a disincentive, a penalty for litigation. The powerful man could seize the humble man and drag him into court; what chance did the humble have of seizing the powerful? Judgment meant that you were haled off in chains and could be sold into slavery abroad. And so on. The argument went on to show that already in the *legis actio* period some democratic reforms were made, and that the formulary system marked a great revolution—the notion of free litigation as

opposed to penalized litigation. We here meet the fundamental question, how the machinery of law worked in practice, how far men could really obtain their rights through the law; and we must ask it for our period, the classical age of Roman law.

‘One law for all, whether rich or poor’ sounds splendid, but in all ages it has put the poor at a disadvantage against the rich, if only because they cannot keep litigation up for so long against the rich man (or corporation). Only by having one law for the rich and another (more favourable) law for the poor can this be remedied, and the recentness of the English introduction of ‘legal aid’, designed to achieve this deliberate unbalance, should be a warning against exaggerated criticism of the Romans. Medicine is a parallel; but then medicine was often given free in the ancient world, and there was one immensely important side to Roman law and society to which, even for archaic Rome, the essay described above gave insufficient weight. The wheels of Roman society were oiled—even driven, perhaps—by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help in mine) and patronage of higher status to lower. In the early Republic each noble family had many ‘clients’, and the relation of client to patron was akin to serfdom (akin, indeed, to the freedman’s relation to *his* patron); and it could be entered into voluntarily.¹²⁷ The fact that the word *patronus* came also regularly to mean an advocate helps to stress that the relationship was not one-sided. It was the patron who came to the legal rescue of his client, paid his money down for litigation, paid his debt to prevent him being haled off, stood as his representative; you might hesitate to ‘lay the hand’ on a humble plebeian with his patron standing by. In the old scale of ‘duties’ clients came below none but parents and wards.¹²⁸ Clientship of this ancient formal pattern did not survive into our period (except for the relation of patron and freedman), but its philosophy did, in public law as well as private. Nor must the informal clientship of the late Republic be thought of merely in terms of the humble ‘hanger-on’ waiting for his meal or present, with whom we are familiar from the satirists. Wealthy families were clients of wealthier families—that is how they got

their sons into politics. Clientship was what might enable a provincial (Roman citizen or not) to get help and protection against a governor; Verres picked on one wealthy victim because:¹²⁹

‘he had no patrons except the Marcelli whom he could appeal to personally.’

Fides, ‘faith’, it has recently been argued, was originally an aspect of clientship.¹³⁰ As to the complementary concept, *officium* or mutual serviceableness between status-equals, the origins at least of many legal institutions which will be studied later are unintelligible unless it is borne in mind—such things as ‘personal security’:¹³¹

‘If our friends hold to their duty (*officium*) there’ll be plenty of funds;’

or *negotiorum gestio*, looking after your friend’s legal position in his absence:¹³²

‘I’ll make sure you’re not down as absent on the census; I’ll see placards are posted about everywhere.’

And then, finally, there was the patron *par excellence*, the emperor, the universal Ombudsman. This was not just an amiable fiction. Evidence can be found of the freedom of speech of the humble before the emperor:¹³³

‘He was a cobbler, and of course people who are no bodies can say things with more freedom before emperors than the great ever could,’

and the humble did find their way to him at times, as the *sententiae Hadriani* show,¹³⁴ and felt that there would be justice there if only they could get his ear:¹³⁵

‘. . . which has compelled us humble men once more to petition your divine forethought, and so we ask you to come to our aid, most sacred emperor.’

The imperial *responsa* have a significant feature; the highest legal

department in the empire is often found patiently explaining elementary legal points to unsophisticated petitioners, for example:¹³⁶

‘To (name missing) daughter of Ambrelus, petitioning by the hand of Abdomanchus, her son; women are not forbidden to borrow money or to pay on behalf of others.’

Nevertheless, many of the criticisms made of the law of the later Roman empire¹³⁷ can be made of our period with equal justification, so long as one remembers that not only Roman law is open to social criticism, and that law is in all ages a focus of social argument because it is a social regulator and an expression, at any moment, of the *status quo*. After all, only since Tolpuddle has it ceased to be the case in Britain that ‘freedom of contract is the freedom of the powerful to impose terms’, and until yet more recently justified pursuit of legal claims was impossible to those who could not afford it.¹³⁸ The costs of the law at Rome were not confined to what you might have to pay a barrister (as to which it may be worth noting that ten thousand sesterces was made the maximum honorarium at a time when a private soldier’s pay was nine hundred sesterces a year, a centurion’s perhaps fourteen thousand, and that of an equestrian procurator of the lowest grade sixty thousand). For many processes legal security had to be given in the form of promise of a fine or introduction of a substantial friend as surety: bail for appearance in court, for example, where we have seen the Herculaneum figure of one thousand sesterces, or security of an agent for ratification by his principal. And not only for litigation; there was security for right use of a usufruct, security of guardians for the property of their wards and of heirs for due payment to legatees. Legal appeals also cost money; in order to stem frivolous appeals a sum had to be paid down, to be forfeit if the appeal was lost.¹³⁹ Characteristically, however, ‘maintenance’ (financially supporting someone else’s litigation) was not an offence in Roman law, unless it was done for profit.¹⁴⁰

It has been pointed out that when we say things like ‘the praetor gave an action to repress this abuse’ we are assuming the

standards of regularity and impartiality of justice that Western European states have attained to in modern times.¹⁴¹ There was, to begin with, no professional control of the standards of Bench and Bar in Rome, because there were no Bench and Bar of a kind that would have made such standards possible. And secondly, *clientela*, *amicitia* and *officium* worked for ill as well as for good, since the praetor and the provincial governor and the *iudex* were enmeshed in their network as much as the litigants—under pressure to give weight to the pleas of personal friends, the letters of the great and so on. (These facts in any case ruin our chance of estimating how good or bad the system was in practice, because where improper influence is known to be a possible factor every disappointed litigant will tend to allege it.)

Then there were—what people in all ages have grumbled about—the law's delays:¹⁴²

‘a thousand vexations, a thousand hold-ups’;

even worse, perhaps, its hastes—thirty days to pay up or be sold up and haled off (for private imprisonment for debt was a reality, quite calmly referred to by Ulpian, who includes in a list of those who can get a conviction in absence annulled ‘a man put into public or private chains’;¹⁴³ the great, as will be seen, had a different procedure applied to them, and the great could get lawsuits delayed, for themselves and others).¹⁴⁴ Or consider distances: the principle of ‘*forum* of the defendant’ was all very well if the plaintiff was well-off, but even apart from that, litigation meant getting to Rome or to the provincial assize and waiting about in hired rooms; a man must be given time to ‘find a hotel, lay out his luggage, and contact a barrister’, says Ulpian.¹⁴⁵ The extreme centralization of jurisdiction upon Rome and a few provincial assize towns must have been a very real disincentive. Also, except in the cities, the aid of the law might be too remote to prevent violent self-help by the powerful; Apuleius has a horrid tale (pure fiction, but significant none the less) of the local magnate who set savage dogs on a neighbour's sons when they disputed his boundaries.¹⁴⁶ More or less at the beginning of our period two remedies were invented, the ‘action for intimidation’, *actio metus*

causa, and the 'action for cunning', *actio doli*—and there were *exceptiones* for a defendant on the same grounds.¹⁴⁷ But it seems that already in Labeo's time the praetor would refuse an *actio doli* of a humble man against a noble: ¹⁴⁸

'it must not be given to a humble person against one prominent in dignity, to a plebeian, for example, against a consular of accepted stature.'

In a rather late text of the *Digest* we are told that the *bona fides* of humble witnesses will be scrutinized¹⁴⁹ (though only in a very late one is it said that the poor may not bring criminal actions except on their own behalf); ¹⁵⁰ and this leads to one last point. By the time that virtually all free men in the empire were finally given Roman citizenship (by the *constitutio Antoniniana*) the Gilbertian situation had been reached, that 'when ev'rybody's somebody, nobody's anybody'. The 'humble' in the *Digest* texts quoted above are a status category, not the poor as against the rich—the *humiliores* as opposed to the *honestiores* or 'distinguished'. Even in Labeo's time the dichotomy was recognized and the *humiliores* were under some disadvantages; there was one law for the distinguished and another (but worse) law for the humble. But in the second century AD it appears much more rigidly and explicitly, and in the criminal law there arose a double scale of penalties for the same offence, less severe for the *honestiores* and more severe for the *humiliores*.¹⁵¹ Nowhere in the legal sources is there an exhaustive official definition of who belonged in each of the two status groups. The upper group included the decurions—the town councillors of the municipalities, whom (presumably with all above them) Hadrian had already exempted from the death penalty.¹⁵² All below, however wealthy, were *humiliores*. The consequences of this sharpened distinction, along with the decline of *provocatio*, as more governors besides the proconsuls came to be empowered to exercise death sentences on Roman citizens without appeal, were that '*honestiores* retained the privileges which had once belonged to all Roman citizens, and *humiliores* were degraded to a status slightly if at all superior to that which *peregrini* had held'.¹⁵³

G