APPENDIX A.

Procedure.

I shall give but an outline, in some instances pointing out information lacking in the Code. In any event, we learn many things in this connection only from that book. The formulary procedure had disappeared. A rescript of 342 A.D. states that "legal formulas, with the snares of their syllables laying a trap for the acts of all, shall be completely abolished."(229) Even previous to that time, Diocletian had provided that there should be no division in the proceedings of a case -- one to make up the issues and one for the actual trial, but that the same court should be competent throughout, with the proviso that the proper judges might appoint referees to hear cases, if they themselves were unable to do so on account of pressure of business.(230) Hence the first step in a suit in Justinian's time was, we may infer,

229) C.2,57,2.
230) C.3,3,2.

the libellus, the petition, filed in the proper court.(231) That was true also in the case of interdicts, which had now become ordinary actions.(232) Many provisions relate to what the proper court was -- the competency of judges and the venue of actions. I shall not go into details, except to say that the ordinary personal and civil action was triable where the defendant lived,(233) a criminal action where the crime was committed,(234) and a real action where the property was situated.(235) The exact requirements of the petition are not shown. But it is certain that while in some cases, perhaps, the pleader set out the details in a manner similar to the pleadings of today, the law made no such requirement, and we are reasonably certain that the system of pleadings was crude as compared with that of today. The main thing necessary was that the defendant should receive general information of plaintiff's claim. And the requirement as to that was not great. We may infer, for instance, that when a creditor had debts due him from a debtor on account of different and various matters,

(231) C.2,2,4.
(232) C.8,1,4.
(233) C.3,13,2.
(234) C.3,15,1.
(235) C.3,19.

he was not required to state the nature of the cause of action, but it was sufficient if he merely stated that there was a certain sum due him from the defendant.(236) The law, however, frowned upon a demand for too large a sum, or to bring an action too soon. The emperor Zeno provided(237) that if a man brought an action before his claim was due, he should lose his suit, and could not bring another until the demand was due and the length of time had thereafter elapsed equivalent to the length of time between the first suit and the time when the debt was due; that in the meantime he should lose his interest, and he should pay the debtor the expenses of the first suit. He added the significant statement that "if anyone sues for less than is due him, the judge shall, without regard to that fact, give judgment for the true amount." If anyone, however, claimed a greater amount in the petition than was due him, he was, by a provision of Justinian,(238) required to pay the defendant three times the damages which were caused him thereby. That emperor also provided that if any one had fraudulently

(236) C.7,40,3; See Collinet, Proc par libelle, 38.
(237) C.3,10,1.
(238) C.3,10,2.

obtained a due bill for a larger amount than was actually due, he could, without penalty, repent of his cheating, claiming only the true amount; but if he persisted in his fraud, he should lose his suit.

The defendant was called into court.(239) We are told that he received a copy of the petition.(240) We may also gather that a citation was issued.(241) But the Code is devoid of information as to the contents thereof. And, strange to say, that is true also of the Digest and the Institutes.(242) Later laws furnished much more information. The petition, and presumably the citation, was served by a process-server of the court, who received certain fees fixed by law.(243) We learn that the defendant was required to answer, in a personal action, but the information in the Code in that respect is scant.(244) We also learn that each defendant in a personal action in a civil case -- I pass over the subject of real actions -- was required to give a bond for his appearance in the court. A defendant who was a real estate owner was not required to give a surety.

(239) C.2,2.
(240) C.2,2,4.
(241) C.7,17,1,3.
(242) Collinet, Proc. par Libelle, 103.
(243) C.3,2.
(244) C.2,14,1,3.

He was merely required to take his oath to appear.(245) The same or similar privilege was extended to persons of illustrious rank,(246) and to bishops.(247) Others were required to give a surety.(248) If they did not do so, they were thrown into prison. That is clear from a provision of Justinian, in which he directed the bishops to visit prisons regularly, and he provided that if a person was detained for a debt and could not give a surety, his case should be tried within thirty days and that he should then be released.(249) It is apparent that a great number, and probably the greatest number of debtors, would not be able to find a surety, and that prisons, accordingly, were probably overcrowded with defaulting debtors.(250) The parties might not want to try the case before the regular or special judge assigned to the case. It seems that they had the absolute right, without giving any reasons, to reject a special judge assigned to the case, and have another appointed.(251) When the objection lay against the regular judge -- ordinarily the governor of the province -- the party might appeal to the emperor.

(245) C.3,2,4,3; See C.10,11,8,7.
(246) C.12,1,17.
(247) C.1,3,32.
(248) C.3,2,4,3.
(249) C.8,4,6. A mater familias could not be dragged into public places. C.1,48,1.
(250) See Woess in 43 S.S.S. 513-514.
(251) C.3,1,16 and 18.

But reasons had to be assigned. If reasons existed, the emperor either appointed some one else to hear the case, or an additional judge was assigned to hear the case along with the regular judge.(252) All objections to the judge or judges, special or regular, were required to be made before the parties joined issue in this case.(253)

Such joinder of issue was the next step in the procedure of a civil action, when the defendant denied liability, or wanted to resist the claim. The defendant might be, and probably generally was, represented by an agent or attorney, and while the Code gives us much information on that subject, I shall not stop to consider the details.(254) Joinder of issue no longer consisted, as formerly, of the acceptance of the formula, handed by the praetor to the parties litigant, but of an oral statement of the respective parties litigant.(255) Then for the first time the parties ordinarily learned the details of the claims of the opponent. The defendant could merely deny the

(252) C.3,1,12.
(253) C.7,45,16.
(254) See C.2,12; C.2,56.
(255) C.3,9,1; C.3,1,14,4.

plaintiff's claim, or he might set up an affirmative defense if he had one. The rules in regard to that seem to have been similar to those of the present day. A rescript of Diocletian[256] told a defendant: "If you are confident that the claim of plaintiff will lack proof, you have no need to set up an affirmative defense. But if you acknowledge the claim, and allege that you are protected by an affirmative defense (exceptio), it is only necessary to try this defense. If you do not acknowledge the claim and at the same time also set up an affirmative defense, it is not necessary to prove the latter, till the plaintiff has proven his claim, according to his allegation." I might here mention the fact that the last vestige of the extinctive effect of joinder of issue in an action involving a joint and several obligation (correal) disappeared with a law of Justinian, enacted in 531, and from that time on only payment released all of the various obligors.[257]

After hearing the detailed claims of the

(256) C.8,35,9.
(257) C.8,40,28.

opponent, one or both of the parties might find that they could not safely proceed with the trial of the case without taking evidence of persons who were not present in court, or to obtain documentary evidence not at hand. They might, accordingly, ask for postponement.(258) And it is readily seen that in those days greater time might be required than would be necessary today. A law of Diocletian provided that if the evidence were to be taken in the province where the case was pending a postponement of three months might be granted. As long as nine months could be granted to obtain evidence from across the sea.(259)

The Code gives us much information on the subjects of limitation of actions,(260) burden of proof and evidence.(261) I shall mention but a few of the matters. The burden of proof was on the claimant.(262) Self-serving declarations were no proof of the truth thereof.(263) Oral testimony could not be introduced to contradict a writing.(264) Nor did oral testimony suffice to prove that a man was a free born citizen.(265)

(258) C.3,11.
(259) C.3,11,1.
(260) C.7,26-39.
(261) C.4,19-20.
(262) C.4,19,1,23; C.2,1,1,4.
(263) C.4,19,5-7.
(264) C.4,20,1. The importance of this seems to have been overlooked.
(265) C.4,20,2.

The testimony of persons under the control of a party to a suit was not considered credible.(266) It was provided that "parents and children cannot testify against each other even voluntarily."(267) Again, it is stated that "we deprive every one of the right to give testimony in his own cause."(268) That rule of the Roman law was carried down the ages, and was not abolished until recent times. So we find the further rule that "we make it plain that the testimony of only one witness shall not be considered at all, although such witness glories in the splendor of senatorship of a curia."(269)

The trial was required to be held in the usual place in presence of the officers of the court.(270) And it was provided that advice of superior officials need not be followed. "For if a wrong decision has been given," wrote Justinian, "the vice of that should not be made greater by other judges. Judgments should not be given by following examples, but in accordance with law. All our judges must follow in the footsteps of truth, law and justice."(271) The decision was required

(266) C.4,20,3. See Cujas 9, 252.
(267) C.4,20,6.
(268) C.4,20,10.
(269) C.4,20,9.
(270) C.7,45,6.
(271) C.7,45,13.

to be in writing. In 371 A.D. the emperors wrote: "We believe it best to provide that judges must first frame their decisions, not hurriedly, but with deliberation, after the trial, duly consider them, correct them, and then immediately and with fidelity inscribe them in a protocol, and from that read them to the parties as written."(272) And three years later it was provided that "a decision not written is not entitled to the name of a decision, and the formality of an appeal is not necessary to vacate such faulty judgment."(273)

Many of the cases were doubtless tried and disposed of quickly. Some of the cases seem to have taken a long time, just as some of the cases take a long time today. Justinian complained that "lawsuits extend almost into infinite time and exceed the measure of the life of man." He accordingly fixed the period of three years in which a civil suit should be ended.(274) Criminal cases were directed to be disposed of in two years.(275) But judgment in the trial court might not end the suit. An elaborate system of appeals was provided. The

(272) C.7,44,2.
(273) C.7,44,3.
(274) C.3,1,13.
(275) C.9,44; C.3,1,13 pr.

provisions in connection therewith are extensive. I pass over the details, and merely refer in that connection to the provision, which we should deem peculiar, that new allegations might be made, and new testimony might be introduced, in the appellate courts.(276) When a judgment had been obtained, it could, of course, be enforced. The judgment debtor had, under Justinian, four months time in which to pay it. No execution issued until after that time.(277) An order for seizure of property was issued upon the demand of the judgment creditor.(278) Certain property was exempt; for instance, a soldier's salary.(279) Implements and means of agriculture, including oxen and slaves, could not be seized.(280) A levy was made on other property of a debtor. This might include a debt due to the debtor; in other words, garnishment was known to the Romans.(281) The judgment debtor could not take the law into his own hands. The levy was required to be made by officers of the court.(282) If there was no satisfactory purchaser, the judgment creditor could buy.(283) And if no buyer

(276) C.7,62,6,1; C.7,63,4.
(277) C.7,54,2.
(278) C.7,53,2; C.8,22,1.
(279) C.7,53,3.
(280) C.8,16,7-8.
(281) C.4,15,2; C.7,53,5.
(282) C.7,53,18.
(283) C.8,22,2.

at all could be found, it might, by the emperor, be assigned in absolute ownership to the judgment creditor.(284) If the purchaser at the sale was evicted -- when his title proved worthless, he had an action over against the debtor, so that the rule of caveat emptor did not apply in its full force in any event.(285) But that rule was often, doubtless, of little value.

(284) C.8,22,3; C.7,53,3.
(285) C.8,44,13.