Book II.
Title LVII (LVIII).

The abolition of formulas and the granting of rights of action.

2.57.1. Emperors Constantinus and Constans to Marcellinus.

Legal formulas, with the snares of their syllables laying a trap for the acts of all shall be completely abolished.

Given January 23 (342).

Note.

It was one of the peculiar characteristics of the Roman law, commencing with an early time and lasting through part of the empire, to dispose of the ordinary civil case in two separate and distinct stages. The issues were joined before the praetor or other proper magistrate; the facts were tried before a trior or triors of facts, generally one called a judex or arbitrator—translated, frequently, as referee. The Aebutian law, enacted soon after the middle of the second century B.C., supplemented by the Julian laws under Augustus, directed the issuance of the legal formulas above mentioned. These were succinct instructions issued, after oral disputations as to what they should contain, by the magistrate to the trior of facts, the latter being bound thereby. Various actions, for instance those in rem, those for the recovery of loans, those on equitable contracts, received, from time to time, a definite mold, and forms of these formulas were kept in the magistrate's office, just as writs of various kinds were kept in our common law times in the chancellor's office. These forms were changed to suit the case, and if none was present, one was made up and molded according to the facts. The subject is treated at length in 4 Gaius 30 ff. This system gradually passed out of use, and in fact was never used in some of the provinces. Its place was taken by the so-called extraordinary procedure, already substantially in use at all times in some matters—e.g., in restitution of rights. Under it, the magistrate, then generally called judex—judge—disposed of the whole case, without referring it to a trior of facts. Only minor cases were referred, and in such case the referee disposed of the whole case. A general law, directing magistrate to try cases themselves, was enacted in 294 A.D. C. 3.3.2. That was the deathblow to the formula. The instant rescript shows, however, that nothwithstanding that law, formulas continued to be issued. They were abolished thereby, and the system of commencing actions by the filing of written complaints (C. 2.1 headnote), probably developed gradually, took the place of the old procedure. See further, C. 2.1, headnote; C. 3.3.2, note; C. 3.9.1 and note. For general authorities see those cited at C. 2.1 headnote, and see also Cuq, Manuel des Inst. 837 ff; Kipp, Litisdenuntiation; Asverus, Denuncation; Wieding, Libellprocess, 129 ff; Partsch, Schriftformel; Wlassak, Processgesetze.

2.57.2. Emperors Theodosius and Valentinian to Hierius, Praetorian Prefect.

The defense that no action (formula) was granted shall not be set against one suing in any court, high or low, if it appears that the action is suited to the subject matter and proper in the matter at hand.

Given at Constantinople February 20 (428).

C. Th. 2.3.1.

Note.

It is apparent that despite law 1 h.t., something of the old procedure still remained. It seems that either the issuance of the formula continued, and that this law but repeated law 1 h.t., or it was thought necessary for the judge to allow an action to be brought, just as the formula was formerly issued by him. Authorities are not agreed. See Bethmann-Hollweg, 3 Civilprocess 248; Wenger, Actio iudicati, 151-153; Wieding, Libelprocess, 141 ff; Eisele, Cog. und Proc. 241. In any event, the instant rescript abolished the last remnants of the old procedure.