THE DEVELOPMENT OF THE PRAETOR'S EDICT *

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So much has been written on even the most minute problems of Roman Law that it is surprising to find topics of fundamental importance which have been generally neglected. But such a one is the course of development of the praetorian Edict—perhaps the most important source of Roman law—despite the broad studies of Dernburg [1] and Kelly.[2]

Two primary difficulties face any attempt to reconstruct the course of development of the Edict. The first is the extreme rarity of positive or virtually positive dates for the introduction of individual edicts. In fact there are only four. The *edictum de hominibus armatis coactisve et vi bonorum raptorum* was introduced by M. Lucullus [3] who was *praetor peregrinus*—not *praetor urbanus*—in 76 B.C.[4] The *edictum de dolo* was the work of Aquilius Gallus [5] who was a praetor in 66 B.C.[6] An edict on *metus* was issued almost certainly by the Octavius[7] who was consul in 75 B.C. and hence praetor not later than 78. It is noteworthy that all positive dating for these three edicts comes from Cicero. An edict to restrict the right of patrons was issued by a praetor Rutilius who is in all probability P. Rutilius Rufus who was praetor in 118 B.C. or just before. The identification here would be far less sure if we were without the information about Rutilius which is given by Cicero.[8] These are the only dates which can be asserted with a strong degree of probability.[9] There have been many attempts to attach individual parts of the Edict to individual praetors because of the names involved. Thus, for instance, Kelly links the *interdictum Salvianum* with a Salvius who was *praetor urbanus* in or about 74 B.C.; [10] the *actio Publiciana* with the Q. Publicius who was praetor about 67; the *actio Serviana* with the jurist Servius Sulpicius Rufus who was praetor in 65; the *actio Calvisiana* with a Calvisius who was praetor in 46; the *iudicium Cascellianum* with Cascellius who was praetor in 44 or 43; and so on.[11] Sometimes the correlation will be valid. But the flimsiness of the basis of the argument becomes apparent when one notices that an action which is at least very similar to the *actio Serviana* was known to Cato the Elder who died in 149 B.C.; [12] and that there is no evidence of the existence of the important *actio Publiciana* before the time of Neratius who was active in the closing decades of the first century A.D.[13] The underlying danger of too readily attaching edicts etc. to particular praetors must be stressed. So few actual dates are known—and they all come fundamentally from Cicero—that if a number of possible, but conjectural, dates is added, a picture of a development will emerge which owes its existence mainly to an *a priori* conception of the pattern.[14]

The second major difficulty is, if anything, even more serious. We have for the Republic direct evidence of the actual wording or a substantial part of the actual wording of

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[1] ' Untersuchungen über das Alter der Satzungen des prätorischen Edikts ', *Festgaben Heffter* (Berlin, 1873), 91 ff.

[2] ' The Growth Pattern of the Praetor's Edict ', *Irish Jurist* I (1966), 341 ff.

[3] Cicero, *pro Tullio* 4, 8.

[4] Asconius, 75. It is not intended to enter here into the vexed problem of the relationship of the peregrine Edict or the peregrine praetor to the urban Edict. For a detailed account of the problem, see Serrao, *La ' iurisdictio ' del pretore peregrino* (Milan, 1954). Even if Lucullus' edict was not in the urban Edict from the start, it certainly was by 69 B.C.: Cic., *pro Tullio* 3, 7.

[5] Cic., *de nat. deor.* 3, 30, 74; *de off.* 3, 14, 60.

[6] The wording of two passages of Cicero, who was *praetor de repetundis* also in 66 B.C., indicates strongly that it was as praetor that Aquilius Gallus was responsible for the edict: *de off.* 3, 14, 60 ' . . . nondum enim C. Aquilius, collega et familiaris meus, protulerat de dolo malo formulas . . . '; *de nat. deor.* 3, 30, 74 ' . . . inde everriculum malitiarum omnium iudicium de dolo malo, quod C. Aquilius familiaris noster protulit . . . ' But Aquilius Gallus' sphere of praetorian jurisdiction seems to have been the *quaestio de ambitu* (Cic., *pro Cluentio* 53, 147), and the *edictum de dolo* could not have been issued for that court. The problem will not be dealt with here, but see, e.g., von Lübtow, ' Die Ursprungsgeschichte der *exceptio doli* und der *actio de dolo malo* ', *Eranion für Maridakis* I (Athens, 1963), at pp. 185 ff. and the literature he cites. In whatsoever way Aquilius Gallus is responsible for the *edictum*, it must be dated in the urban Edict relatively close to 66.

[7] Cic., *ad Quintum fratrem* 1, 1, 21; cf. *in Verrem* II, 3, 65, 152.

[8] Cf. infra, 117.

[9] Cf. Dernburg, *Festgaben Heffter* 100 f.

[10] So Kelly, but Verres was urban praetor in 74.

[11] art. cit. (above, n. 2) 346 f. It must be emphasized at this stage that in general Kelly's view of the development of the Edict and my own are similar, though I disagree with much that he says.

[12] Cf. infra, 115 ff. It might be worth observing that the jurisdiction of Ser. Sulpicius Rufus as praetor was the *quaestio de peculatu*: Cic., *pro Murena* 17, 35; 20, 42.

[13] Cf. infra, 117.

[14] A danger perhaps not entirely avoided by Kelly, o.c.

extremely few edicts, interdicts or *formulae*. And the majority of these have undergone alteration in the wording by the time of Hadrian's Edict.[15] An extreme example—but perhaps extreme only because our sources here are more informative—is the *interdictum de vi armata*. In 73 or 72 B.C. it began: *Unde dolo malo tuo, M. Tulli, M. Claudius aut familia aut procurator eius detrusus est*.[16] In 69 B.C. it ran: *Unde tu aut familia aut procurator tuus illum vi hominibus coactis armatisve deiecisti, eo restituas*.[17] In Julian's Edict it read: *Unde tu illum vi hominibus coactis armatisve deiecisti aut familia tua deiecit, eo illum quaeque ille tunc ibi habuit restituas*.[18] So the wording of the parts of the Edict was commonly subject to change. In no case where the date of an edict is unknown can we say, even with a fair degree of probability, that we have substantial knowledge of its original wording. The consequence is that we cannot use the form of an edict or its phraseology to help in dating the introduction of the edict.[19] Thus, observations of the type produced first by Dernburg[20] that the latest and most mature stage of development of the Edict links the promise of the action not to a state of facts but to the allegation of a state of facts (that is, for instance, to *si quis . . . fecisse dicetur, iudicium dabo*, not to *si quis fecerit . . . iudicium dabo*) will not greatly help in dating the introduction of an edict, but at the most in dating the known and surviving form of the edict.[21] Moreover, even if the edicts which contain an allegation of facts represent a mature state of development, the choice of formulation, as Daube[22] has shown, is basically dependent upon factors other than the date. In fact, to maintain his theory Dernburg has to postulate—without any evidence—that the general edict on *metus* is very old, though that of Octavius, of which we know, introduced the *actio quod metus causa*.[23]

In these circumstances, any attempt to trace the Edict's development must be based on more or less indirect arguments. Plausibility can be maintained only if a distinct pattern emerges. Conversely, the degree of plausibility should not be measured in terms of any one particular piece of evidence. A number of minor evidentiary points all tending in the same direction can have as much force as one very strong item of positive evidence. But the accuracy of each point must be established or again we run the risk of establishing a pattern by *a priori* reasoning.

A pattern of development is, in fact, visible, and it is proposed to (A) outline the pattern, (B) list the facts which illuminate the pattern, (C) where necessary examine separately the strength and accuracy of these facts, and finally (D) call attention to further aspects of the problem.

A

As early as the end of the third century B.C. the praetor could issue edicts, but the development of the Edict proper had scarcely begun. What edicts there were touching private law were restricted to making alterations in the measure of damages (and probably in procedure). Changes in substantive private law were not yet made by the Edict. As late as 140 B.C. major changes in the substantive law, which later would have been introduced by the Edict, still could not be so made, but were instituted by the introduction of new actions

[15] The *edictum* giving *bonorum possessio secundum tabulas*, cf. Lenel, *Das Edictum perpetuum* (3rd ed.) (Leipzig, 1927), 349; that giving *bonorum possessio* to *legitimi*, cf. Kaser, 'Zum Ediktsstil', *Festschrift Schulz* II (Weimar, 1951), 21 ff. at 25 f.; the *edictum* on *metus*, cf. Kaser, o.c. 32: the *interdictum de vi*, cf. Lenel, o.c. 462; the *interdictum de vi armata*, cf. Lenel, o.c. 467; the *interdictum qui fraudationis causa latitabit*, cf. Lenel, o.c. 415; the *interdictum uti possidetis*, no direct evidence of wording for Republic but there is for earlier and later versions in the Empire, cf. Kaser, o.c. 30; probably the *interdictum ne quid in loco publico*, no direct evidence of wording but see Watson, *The Law of Property in the Later Roman Republic* (Oxford, 1968), 10 f.; perhaps the *edictum* on *commodatum*, cf. now Watson, *The Law of Obligations in the Later Roman Republic* (Oxford, 1965), 168 f.; weighty doubts are expressed by Kaser on a *formula* for *fiducia*, o.c. 29; Rutilius' *edictum* on *bonorum possessio liberti* was replaced by another, *D.* 38, 2, 1, 1 (Ulpian *42 ad ed.*); from Cic., *pro Quinctio* 27, 84 we know the wording of an edict 'qui ex edicto meo in possessionem venerint', but we have no precise indication of its wording in classical law, cf. Lenel, o.c. 423; Kaser, o.c. 28.

[16] Cic., *pro Tullio* 12, 29; cf. Watson, *Property* 88.

[17] Cic., *pro Caecina* 14, 41–17, 48; 19, 55; 21, 60 f., 30, 88; *ad fam.* 15, 16, 3: cf. Lenel, *Edictum* 467; Watson, loc. cit.

[18] Cf. Lenel, loc. cit.

[19] Cf. Kaser, o.c. (above, n. 15) 24 f., who reaches the same conclusions primarily for other reasons.

[20] art. cit. (n. 1) 103, 109 ff.; cf. Kaser, o.c. 33; Burillo, 'Las formulas de la *actio depositi*', *SDHI* XXVII (1962), 233 ff. at 246. Dernburg thinks three historical levels of development of the Edict can be traced from different forms of edicts. He assigns no dates to these.

[21] This remains true despite the power of survival of ancient forms. On which see Daube, *Forms of Roman Legislation* (Oxford, 1956).

[22] *Forms* 30 ff.

[23] art. cit. 101.

with what were later regarded as civil law *formulae*, though they were due to the praetor. But even before this the praetor was changing the law by means of a praetorian action *in factum* though no edict was issued. By the second-last decade of the second century B.C., edicts were being promulgated which profoundly modified the *ius civile*, but it is quite probable that the force of these was limited to restricting the rights of a plaintiff in a civil law action. Apparently only around 100 B.C. was the Edict so developed that individual edicts giving totally new actions on substantive law could be issued. The main period of expansion of the Edict was the following decades, but the development was not complete by the end of the Republic. Interdicts—concerned with the peace-keeping duty of the praetor—could be issued before 160 B.C., decretal remedies before 70 B.C.; and both civil law and edictal actions could be refused by the praetor by this latter date.

B

The facts which illuminate the pattern are as follows:

(i) *Bonae fidei* actions existed as *iudicia* with *formulae* which were not *in factum conceptae*. The development of this small group of actions for *tutela*, the four consensual contracts, *commodatum* and *depositum*, presents many problems, one of the greatest of which is to explain how they arose as actions *de novo* without a statute or edict.[24] This cannot have been easy or straightforward and the fact is of significance for the history of the Edict. Law tends to develop in the simplest manner. Yet generally, development by the Edict seems extremely straightforward. If it did not occur in this case—as it did not—it must have been impossible, and this can only have been because the introduction of the *bonae fidei iudicia* took place before the Edict could introduce new provisions of substantive law. The most important of the *bonae fidei iudicia* for us are the *actio mandati* and the *actio commodati*. The former was the last to become a *bonae fidei iudicium* without first passing through an edictal phase.[25] The latter was the first certainly to begin with an edictal phase, the *formula in ius concepta* being much later. Hence the major change in the power of the praetor to issue edicts which actually modified the substantive law came between the dates of introduction of these two actions.

The *actio mandati* was in existence by 123 B.C. but it is unlikely to be much earlier. In all probability a date around 140 B.C. can be set as the extreme terminus. The edictal *actio commodati* was known to Quintus Mucius Scaevola, so it was probably in existence by 100 B.C. Therefore the fundamental change is somewhere in the region of 140–100 B.C. Other evidence will tend to support a date nearer the later end of this period.

(ii) The evidence of the Edict in Plautus is very limited. The playwright Plautus was interested in law and his plays are studded with legal jokes and legal scenes. But virtually nothing is said about the Praetor's Edict. The argument here, though *e silentio*, is nonetheless strong. It becomes even stronger when one takes into account the nature of the one praetorian provision of which we seem to have evidence. This is the *edictum generale* of *iniuria*, which originally changed the measure of damages but not the substantive law. The conclusions to be drawn are that in the time of Plautus the Edict was in its infancy; and, perhaps, that the praetor could make changes in the civil law penalties but not in the substantive law.

(iii) There are no traces of the Edict in the texts relating to the jurists before Publius Rutilius Rufus and Quintus Mucius. We have in the sources a reasonable amount of information on the opinions and attitudes of the jurists of the second century B.C., and there is no sign of any praetorian edictal provision in any of the discussions before Rutilius.[26] The point is of importance in a negative sense. More than that, if the Edict had been extensively developed we would have expected some trace of it.

(iv) The earliest known praetorian action with a formulation *in factum* which changed

[24] The extent of the difficulty is fully seen in the account in Kaser, *Das römische Zivilprozessrecht* (Munich, 1966), 109 f. See also, e.g., Wieacker, 'Zum Ursprung der *bonae fidei iudicia*', *ZSS* LXXX (1963), 1 ff.

[25] There was both a *bonae fidei formula* and a *formula in factum* (and an edict) for the *actio negotiorum gestorum*, but the early history of these is most obscure. The *bonae fidei formula*, however, was known to Cicero, *top.* 10, 42; 17, 66. Cf. now Watson, *Obligations* 193 ff. esp. 201 ff.

[26] Cf. infra, 115.

the substantive law existed before 160 B.C., but it was not introduced by an edict. The action in question was either the *actio Serviana* or an action akin to the *actio Serviana*, and it appears in Cato's *de agri cultura* which was written around 160 B.C. It should not be thought to be merely a quirk of fate that this, the earliest known *actio in factum* which changed the substantive law, should have been introduced by the praetor without an edict. Such actions are extremely rare: the only other probable examples which seem to have been introduced by the praetor of his own initiative are the *actio in factum adversus nautas, caupones, stabularios*,[27] and the *actio si mensor falsum modum dixerit*.[28] It would be very odd if it was nothing but chance that the earliest known praetorian innovation in substantive law belonged to this tiny group.

It thus seems that, before the praetor began issuing edicts which modified the substantive law, he was already introducing a new action which was not formulated *in ius* and which did greatly change the law.

(v) Between the time of Plautus and the praetorship of P. Rutilius Rufus, in or shortly before 118 B.C., we have no evidence of the introduction of any new edict. A Rutilius who is probably this one introduced a clause in his Edict that he would not give to the patron more than an *actio operarum et societatis*. The purpose of this was to restrict the burden which a master could impose on his slave in return for the gift of liberty. Now in a very real sense this does alter the substantive law, but it is at the most a restriction on a plaintiff's rights at civil law, and can still be seen as primarily procedural. What it does not do is create a new right of action or a new legal concept. Perhaps it is not possible to estimate the full significance of our knowledge of such an edict before any edict introducing a new right of action. There are many edicts which do nothing but modify existing civil law rights; and there is no corpus of background—as there is in the plays of Plautus—against which the fragment of our knowledge can be judged.

(vi) The *edictum* on *commodatum* was certainly known to Quintus Mucius Scaevola [29] whose death was in 82 B.C.[30] So it probably was in existence around 100 B.C. This makes it the earliest known edict which created an action unknown previously in the civil law. It is possible—though by no means certain—that Quintus Mucius also knew the *edictum* on *depositum*,[31] but in the surviving evidence concerning him there is no sign of any other edict.

(vii) In the following few decades the Edict was well-developed. The *edictum de convicio* was probably in existence by the second decade of the first century B.C.[32] Edictal clauses giving *bonorum possessio* on several accounts, *qui fraudationis causa latitarit, cui heres non existabit, qui exilii causa solum verterit*, were available by 81 B.C.; [33] an edict on *metus* was in all probability issued by L. Octavius in 78 or just before; [34] the *edictum de hominibus armatis coactisve et vi bonorum raptorum* was issued by M. Lucullus in 76; [35] and

[27] Cf. Lenel, *Edictum* 205 f.

[28] Cf. Lenel, 219.

[29] *D.* 13, 6, 5, 3 (Ulpian *28 ad ed.*); against suggestions of interpolation see Watson, *Obligations* 169 f.

[30] Cf. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd ed. (1967), 18.

[31] *D.* 46, 3, 81, 1 (Pomponius *6 ad Quintum Mucium*) as far as *teneri* is in indirect speech and so goes back to Mucius. But it is possible he was concerned with the XII Tables' provision on *depositum*.

[32] *Rhet. ad Herenn.* 4, 25, 35. But the matter is not so simple as would appear from Watson, *Obligations* 250 f. In *Rhet. ad Herenn.* 2, 13, 19, ' C. Caelius iudex absolvit iniuriarum ' a defendant who insulted Lucilius on the stage, yet in a similar case Publius Mucius (consul in 133 B.C.) as *iudex* found against the defendant. For the story to have much point the *actio* in question must have been the same in both cases and it cannot have been under the *edictum ne quid infamandi causa fiat* or the *edictum de convicio* (despite Pugliese, *Il processo civile romano*, II *Il processo formulare* I (Milan, 1963), 198, n. 109), or Caelius, one would think, would also have awarded the decision to the plaintiff. But an action under at least the *edictum de convicio* would have been more sensible if that edict was in existence. Hence, first, that edict was not known when Publius Mucius acted as *iudex*, and secondly, the *edictum generale* had been extended by the jurists to cases where there was no physical assault. *Rhet. ad Herenn.* 4, 25, 35 then lists as one form of *iniuriae* those caused *convicio*. This need not mean, as was there argued, that *convicium* was subsumed under the *edictum generale*. The wording of the text is perfectly consistent with *convicium* being regarded as a form of *iniuria* under its own edict. It would not be strange if the work of the jurists was legitimised by issuing an edict giving an action for *convicium* (and if at a later stage of development *convicium* was again engulfed by the *edictum generale*). Actually the wording of the text would be appropriate even if the *edictum de convicio* had not yet been issued.

[33] Cic., *pro Quinctio* 19, 60.

[34] Cic., *ad Quintum fratrem* I, I, 7, 21; cf. *in Verrem* II, 3, 65, 152.

[35] Cic., *pro Tullio* 4, 8.

the *edictum de dolo* was the work of Aquilius Gallus, almost certainly in 66 B.C.[36] An edict giving *bonorum possessio secundum tabulas* was already *tralaticium* in 74 B.C.,[37] and so was at least *unde legitimi* for *bonorum possessio contra tabulas*.[38] An *edictum de bonis libertorum* had been issued before that date [39] and the *edictum de pactis* existed in 54 B.C.[40] *Qui nisi pro certis personis ne postulent* existed by 44 B.C.[41] Servius Sulpicius Rufus died in 43 B.C.[42] and he knew of the *edictum ne quid infamandi causa*,[43] the *edictum de ventre*,[44] *the edictum de suggrundis* [45] (and hence of *de effusis vel deiectis* [46]) and of that which introduced the *actio institoria*.[47] Since that last action must be later than the *actio exercitoria*, which in turn is apparently later than the *receptum nautarum cauponum stabulariorum*, the two edicts for these actions must also have existed. Alfenus dealt with aspects of the *actio servi corrupti* [48] and the *actio de peculio et de in rem verso* ; [49] so considering the dependence of that jurist on his teacher, Servius, it is most probable that the relevant edicts had already been discussed by Servius. Trebatius discussed aspects of the *edictum de sumptibus funerum*,[50] and apparently *si quis mortuum in locum alterius*,[51] and the clause *unde cognati* for *bonorum possessio contra tabulas*.[52] Ofilius commented on *ne quis eum qui in ius vocabitur vi eximat*,[53] on the clause *de eo per quem factum erit, quo minus quis vadimonium sistat*,[54] and on the edict *de minoribus viginti quinque annis*.[55] The edict on *damnum infectum*, at least of the peregrine praetor, existed by 49 B.C.[56]

It might be suggested that this evidence shows that the Edict was well-developed in the first century B.C., and even in the first half of that century, but does not indicate that the great development took place in this time.[57] The more extensive sources for this period, as compared with those for the last half of the second century B.C., present us, it might be argued, with an unbalanced picture. There is point to the argument but it should equally be observed that to a considerable extent the survival of Republican juristic discussion in later legal sources is dependent upon the continuing relevance of that discussion. The relative paucity of information in the Digest on jurists up to and including the time of Quintus Mucius must be due in part to the fact that the law shortly afterwards underwent such changes that their discussions were largely irrelevant.

(viii) A few edicts were issued in the Empire before Julian's redaction ; one of minor importance—which did not become permanently enshrined in the Edict—by Cassius on *restitutio in integrum* ; one on *bonorum possessio* ; and probably some others. There were also adjustments in wording, and a few actions and *exceptiones* were added or subtracted. But the great days of the Edict had passed with the Republic.

(ix) Interdicts developed early. Though there is no sign of them in Plautus [58] we know that at least one existed in 161 B.C., the date of production of Terence's *Eunuchus*. Lines 319 f. have : 'ipsam hanc tu mihi vel vi vel clam vel precario fac tradas'. The combination *vi, clam, precario* is frequent in interdicts but occurs nowhere else. The *interdictum Servianum* is older than the *actio Serviana* which seems to have been available by 160 B.C.[59]

[36] Cic., *de nat. deor.* 3, 30, 74 ; *de off.* 3, 14, 60.
[37] Cic., *in Verrem* II, 1, 45, 117.
[38] Cicero, *in Verrem* II, 1, 44, 114.
[39] *D.* 38, 2, 1, 1–2 (Ulpian *42 ad ed.*) ; Cicero, *in Verrem*, II, 1, 48, 125–6.
[40] Cic., *ad Att.* 2, 9, 1.
[41] *Lex Iulia Municipalis*, lines 108 ff.
[42] Cf. Kunkel, *Herkunft* 25.
[43] *D.* 47, 10, 15, 32 (Ulpian *57 ad ed.*) ; cf. Watson, *Obligations* 252.
[44] *D.* 37, 9, 1, 24–25 (Ulpian 41 *ad ed.*).
[45] *D.* 9, 3, 5, 12 (Ulpian *23 ad ed.*).
[46] Cf., e.g., Daube, *Forms* 26 and n. 3 ; Watson, *Obligations* 267.
[47] *D.* 14, 3, 5, 1 (Ulpian *28 ad ed.*).
[48] *D.* 11, 3, 16 (Alfenus Varus *2 dig.*).
[49] *D.* 15, 3, 16 (Alfenus *2 dig.*).
[50] *D.* 11, 7, 14, 11 (Ulpian *25 ad ed.*).
[51] *D.* 10, 3, 6, 6 ; cf. Watson, *Property* 6.
[52] *D.* 38, 10, 10, 15 and 18 (Paul *sing. de gradibus*) ; cf. Watson, *The Law of Succession in the Later Roman Republic* (Oxford, 1970).
[53] *D.* 2, 7, 1, 2 (Ulpian *5 ad ed.*).
[54] *D.* 2, 10, 2 (Paul *6 ad ed.*).
[55] *D.* 4, 4, 16, 1 (Ulpian *11 ad ed.*).
[56] *Lex Rubria de Gallia Cisalpina* xx. On the complicated history of the early law on *damnum infectum* see Watson, *Property* 125 ff. Elsewhere I have suggested that the grants of *datio deminutio* to Faecenia Hispala in 186 B.C. (Livy 39, 19, 5) shows either that the *edicta Fabianum* and *Calvisianum* existed or that similar provisions did: *The Law of Persons in the Later Roman Republic* (Oxford, 1967) 234. But the point of the grant is probably simply to allow Faecenia Hispala, though in *tutela mulierum*, to alienate her property despite the tutor's opposition, and nothing more need be read into it.
[57] Cicero, *de inventione* 2, 22, 67 cannot be used as evidence that substantive changes had been effected by the Edict for more than a few decades.
[58] Against the idea of the *interdictum utrubi* in Plautus' *Stichus* 696 and 750, see now Watson, *Property* 86 f.
[59] In Hadrian's Edict the formula of the *actio Serviana* appears, surprisingly, in the section on interdicts where it is appended to the *interdictum*

Unless Cicero is being anachronistic *uti possidetis* existed in 129 B.C. the year in which his *de re publica* is set.[60] A Rutilius, who is almost certainly the consul of 105 B.C.[61] (and praetor of around 118) commented on the interdict *quae arbor ex aedibus tuis*,[62] and Quintus Mucius discussed *quod vi aut clam*.[63] The interdict *de vi armata*[64] existed in 73 or 72 B.C.[65] and so did that *de vi*.[66] *Quam hereditatem* was established by 74 B.C.[67] and *quorum bonorum* is at least as old as 44 B.C.[68] Servius knew the *interdictum de rivis*,[69] Alfenus a version of *ne quid in loco publico*.[70] Trebatius discussed *de fonte*,[71] *de cloacis*,[72] and *quem liberum dolo malo retines*.[73] Ofilius disagreed with another Republican jurist on a point concerning *de aqua cottidiana et aestiva*[74] and we have an opinion of his on *quod in itinere publico*.[75] The two interdicts *de itinere actuque* also existed in the Republic.[76]

Of praetorian edictal stipulations we have for the Republic evidence only for *de damno infecto* which existed in 58 B.C.[77] and *legatorum servandorum causa* which was known to Ofilius.[78]

(x) Though not a matter of the Edict, it is significant for the praetor's legal activity that as early as the time of Servius he was granting decretal remedies,[79] and this was not a rare practice.

By 70 B.C., too, we know that the praetor might refuse an action on a valid civil law claim which he regarded as inequitable[80] and he was refusing *bonorum possessio* under his own Edict by 74 at the latest.[81]

C

(i) As yet, no convincing explanation of the mechanics of introduction—without statute or edict—of the *iudicia* with *dare facere oportet ex fide bona* has, I think, been produced. But there have been many attempts. The nature and effect of *oportet ex fide bona* are also much disputed.[82] In Gaius' time these actions may have been regarded *par excellence* as the civil law *iudicia*, but it has been argued that originally they were not civil law actions at all.[83] Whether they were or were not does not here concern us. It is enough to emphasize first that the difficulties of modern scholars to account for their existence can have been excelled only by the difficulties experienced by the ancients in creating them. And secondly that though the praetor must have been responsible for the mechanics of the actions,[84] he did not establish them by edicts and they were not formulated *in factum*.

The order of development of each of the actions and the date of introduction are also much disputed. But it is very widely accepted that the *bonae fidei actiones of tutelae*, *empti*, *venditi*, *locati*, *conducti*, *pro socio* and *mandati*—for which institutions there was no edict—were in existence in the second half of the second century B.C. The majority, in fact, are probably considerably older.[85] In any event it is very likely that the *actio mandati* was the last to develop and it existed in 123 B.C., as we know from *Rhet. ad Herennium* 2, 13, 19:

Salvianum. This must mean: (i) that the action is later than the *interdictum* which has attracted it to that position; (ii) that both the *interdictum* and the *actio* go back to a time when the Edict was in its infancy and arrangement of it was lax. On the general view the *interdictum* dates from the 1st half of the first century B.C.: cf. e.g. Kaser, *Das römische Privatrecht* I (Munich, 1955), 395; Kelly, *Irish Jurist* cit. 347.

[60] It is parodied in *de re pub.* 1, 13, 20.

[61] Cf. infra, 117.

[62] *D.* 43, 27, 1, 2 (Ulpian *71 ad ed.*).

[63] *D.* 50, 17, 73, 2 (Quintus Mucius *sing.* ὅρων); 43, 24, 1, 5 (Ulpian *71 ad ed.*).

[64] An early form of it.

[65] Cic., *pro Tullio* 12, 29.

[66] Cic., *pro Tullio* 19, 44 f.

[67] Cic., *in Verrem* II, 1, 45, 116.

[68] Cic., *ad fam.* 7, 21.

[69] *D.* 43, 23, 3 pr., 1 (Ulpian *70 ad ed.*).

[70] *D.* 8, 5, 17, 2 (Alfenus *2 dig.*); cf. Watson, *Property* 10 f.

[71] *D.* 43, 20, 1, 8 (Ulpian *70 ad ed.*); cf. Watson, *Property* 197.

[72] *D.* 43, 23, 2 (Venuleius *1 interd.*). So did Ofilius.

[73] *D.* 43, 29, 4, 1 (Venuleius *4 interd.*).

[74] *D.* 43, 20, 1, 17 (Ulpian *70 ad ed.*).

[75] *D.* 43, 8, 2, 39 (Ulpian *68 ad ed.*).

[76] *D.* 43, 19, 4 pr. (Venuleius *1 interd.*).

[77] Cf. Watson, *Property* 140.

[78] *D.* 36, 3, 1, 15 (Ulpian *79 ad ed.*).

[79] *D.* 9, 3, 5, 12 (Ulpian *23 ad ed.*) (Servius); 3, 5, 20 (21) pr. (Paul 9 *ad ed.*) (Servius); 19, 5, 23 (Alfenus *3 dig. a Paulo epit.*) (Alfenus); 6, 1, 5, 3 (Ulpian *16 ad ed.*) (?Alfenus—see now Watson, *Property* 75); 39, 2, 9, 2 (Ulpian *53 ad ed.*) (Alfenus—see now Watson, *Property* 148); 44, 1, 14 (Alfenus Varus *2 dig.*) (Alfenus, *exceptio in factum*); 9, 2, 9, 3 (Ulpian *18 ad ed.*) (Ofilius).

[80] Valerius Maximus, 7, 7, 5.

[81] Valerius Maximus, 7, 7, 7; Cicero, *in Verrem*, II, 1, 47, 123–4; cf. also Valerius Maximus, 7, 7, 6: on all see Watson, *Succession* ch. 6.

[82] Cf., e.g., Wieacker, art. cit. (above, n. 24), 2 ff.

[83] See the account in Wieacker, 9.

[84] Whether *praetor urbanus* or *praetor peregrinus* can be here ignored.

[85] So is the unique *actio rei uxoriae*, which dates from around 200 B.C. If, as is generally believed (cf. Kaser, 'Die Rechtsgrundlage der *actio rei uxoriae*',

'. . . M. Drusus pr. urbanus, quod cum herede mandati ageretur, iudicium reddidit, Sex. Iulius non reddidit. . . .'

Sextus Iulius Caesar was *praetor urbanus* in 123 B.C.[86] But *mandatum* as a contract can scarcely be much older. It can have developed only in what was already a mature legal system and few scholars, if any, would suggest a date before 140 B.C.

Commodatum, on the other hand, gave rise to a *bonae fidei iudicium* in the Empire only.[87] Before that the action was *in factum concepta* and was established by an edict.[88] *Commodatum* was known to Quintus Mucius Scaevola who died in 82 B.C.:

D. 13, 6, 5, 3 (Ulpian 28 *ad ed.*). Commodatum autem plerumque solam utilitatem continet eius cui commodatur, et ideo verior est Quinti Mucii sententia existimantis et culpam praestandam et diligentiam et, si forte res aestimata data sit, omne periculum praestandum ab eo, qui aestimationem se praestaturum recepit.[89]

So it is likely that the *edictum* on *commodatum* was issued by, say, 100 B.C. The significance of this information cannot be over-emphasized. In the first place, so far as our knowledge goes, this is the earliest edict which introduced a new action. Secondly, since eventually an *actio in ius concepta* developed to take its place side by side with the *actio in factum*, one cannot argue that the edict was needed because the power to introduce actions with an *oportet ex fide bona* clause had been lost. Rather, the kind of development which occurred here must be attributed to a growth of power in the Edict, a power which did not exist when *mandatum* became actionable.

It might be suggested that the Edict already had the power to change the substantive law when *mandatum* arose, and that that contract had a *bonae fidei iudicium* because of the power of attraction of the older *bonae fidei iudicia*. The force of the argument cannot be denied, but it affects the problem only marginally. One would then have to say that the power of counter-attraction of the Edict was not strong enough to cause the issue of an edict on *mandatum*, but a few years later it was enough for an edict to be issued for *commodatum*. So, on this view, the praetor in, say, 140 B.C. was still only beginning to develop his power to issue edicts changing the substance of the law.[90]

The rather different objection might be raised that the advent of a new way of making legal changes does not necessarily mean the disappearance of old and successful ones, and therefore that edicts changing substantive law could have been issued for some considerable time before the introduction of the *actio mandati*. But it must not be forgotten that issuing a new *bonae fidei iudicium* had never been a common method of law reform—the last case having probably occurred more than half a century previously—and the practice would not have been in the forefront of a praetor's mind if he had been accustomed to making changes by edict. Moreover, an edict clearly putting the innovation before the public would have had its advantages and a satisfactory *actio mandati in factum* could easily have been formed.

(ii) From earliest times, it seems, Roman magistrates had the right *edicere*.[91] In all probability, the *praetor urbanus* and the *praetor peregrinus* had this right from the date of creation of their offices. This, of course, is in itself no guide to the date of introduction of an annual Edict nor of the date of the first individual edicts altering the substantive private law.

The earliest known praetorian edict is from the year 213 B.C.[92]

Livy, 25, 1, 12: Is [i.e., M. Aemilius, *praetor urbanus*] et in contione senatus consultum recitavit et edixit ut quicumque libros vaticinos precationesve aut artem

RIDA II (1949), 511 ff. at 542 ff., and the references he gives), the *actio* is praetorian, it fits into the pattern described here since there was no edict. If its civil law character (in Hadrian's Edict) derives from the censors' control over family morals (cf., e.g., Monier, *Manuel élémentaire de droit romain* I, 6th ed. (Paris, 1949) 291 ff.), it is irrelevant to us.

[86] Cf. Broughton, *The Magistrates of the Roman Republic* I (New York 1951), 513.

[87] Cf., e.g., Watson, *Obligations* 167 and 160.

[88] Cf. Lenel, *Edictum* 252.

[89] On the text see now Watson, *Obligations* 169 ff.

[90] It is possible that the *edictum* on *depositum* was as early, but the early history of *depositum* is too complicated for any help to be obtained from the possibility.

[91] See, e.g., the *SC de Bacchanalibus* (Bruns *FIR*[7] no. 36: 186 B.C.). In Livy the right is ascribed to kings (e.g. I, 29, 6; I, 52, 6), consuls (2, II, 5; 2, 24, 6, etc.), dictators (2, 30, 6; 3, 27, 5, etc.), the *decemviri* (3, 38, 13, etc.), the *tribuni militum* (6, 10, 5). See further the *Thes. Ling. Lat.*, s.v. edicere I, B; Mommsen, *Staatsrecht* I[3] 202 f.

[92] Cf. Weissenborn-Mueller, *Titi Livi ab urbe condita libri* II, 2nd ed., 237; Broughton, *Magistrates* I, 263. But Dernburg gives the date as 215 B.C., and names the praetor as M. Atilius: *Festgaben Heffter* 95 and n. 2.

sacrificandi conscriptam haberet eos libros omnes litterasque ad se ante calendas Apriles deferret neu quis in publico sacrove loco novo aut externo ritu sacrificaret.

It is doubtful how significant the episode is for the general development of the Edict. In the first place, the edict was issued when the senate expressly gave the task of freeing the people from these superstitions to the *praetor urbanus*.[93] In the second place, the edict was not concerned with private law but is in the nature of a police measure. And in the third place, the edict was apparently issued by itself and was not part of a general, annual, Edict.

The information in Plautus on the provisions of the praetor's Edict is minute. It is likely, though not certain, that the *edictum generale* on *iniuria* is referred to in *Asinaria* 371, where the slave, Leonida, says: 'pugno malam si tibi percussero.' Lenel observes that this has the ring of a comic citation of the formula [94] for *iniuria* which began: *Quod . . . Ao Ao pugno mala percussa est. . . .* The argument, however, can only be from the similarity of words since nothing else in the Plautine context indicates a legal joke, and this similarity may perhaps not result from imitating the wording of the *formula*.[95] Nothing like absolute certainty is possible. Some support for an early date for the *edictum generale* may be found in Aulus Gellius, *NA* 20, 1, 13. He tells us that the jurist Labeo in his work on the XII Tables recorded the story of L. Veratius who amused himself by striking passers-by in the face while a slave followed him with a purse full of *asses* and counted out twenty-five to each victim, according to the law of the XII Tables. It was precisely the fall in the value of money which led to the replacement of the fixed sums of the XII Tables by the flexible assessment of the *edictum generale*, and it is unlikely that the fixed penalty would long survive the behaviour of a Veratius. Indeed, the praetor's edict is said in the story to be the consequence of Veratius' conduct. Now the word used for purse or money-bag in Labeo's story is *crumena*, and *crumena* (or *crumina*) with this its fundamental meaning is rare outside Plautus.[96] In fact, the grammarians Festus[97] and Nonius [98] indicate that in their time the word was obsolete for all practical purposes. And Gellius in his account uses the verb *depalmare* which occurs nowhere else. Might one not suspect that this, too, is an archaism? So the story of L. Veratius—and hence the introduction of the *edictum generale*—is old. The account is circumstantial, with its otherwise unknown L. Veratius, and is likely to have some foundation in reality.[99] But so long as each *as* weighed approximately 10-ounces, one slave with a bagful of *asses* would not have sufficed to give Veratius the pleasure of striking quite a few people, as the story suggests he did. Moreover, the story demands that Veratius be exhibitionist, a self-confident, suave young man.[100] As such he would not walk through the streets followed by an overburdened slave who had such an important rôle to play in his insolence. One might feel, therefore, that a date at least after the halving of the weight of the *as* has greater plausibility. The date of this reduction—and of the subsequent ones—is

[93] Livy, 25, 1, 11: Ubi potentius iam esse id malum apparuit quam ut minores per magistratus sedaretur, M. Aemilio praetori [urbano] negotium ab senatu datum est ut eis religionibus populum liberaret.

[94] *Edictum* 398, n. 7, followed by, e.g., Watson, *Obligations* 248; Simon, 'Begriff und Tatbestand der *iniuria* im altrömischen Recht', *ZSS* LXXXII (1965), 132 ff. at 181.

[95] Cf. Girard, *ZSS* XIV (1893), 24 '. . . et il y a en effet une concordance de termes très frappante. Elle cesse d'être bien étonnante si l'on réfléchit que longtemps avant l'édit il y eu des poings qui sont tombés sur des visages et qui y sont même tombés contrairement à la loi des XII tables, et que la formule concrète d'action soumise comme modèle aux plaideurs a dû précisément être choisie parmi les variétés d'injures les plus usuelles.'

[96] Cf. *TLL* IV, 124. With this meaning it occurs 15 times in the extant plays of Plautus: *As.* 590; 653; 657; 661; *Epid.* 360; 632; *Per.* 265; 317; 685; *Ps.* 170; *Ru.* 1318; *Tru.* 652; 654; 655; 956; (plus once as a corruption of the text: *Per.* 687). Apart from the two grammarians and the text of Gellius, it appears elsewhere before the fourth century A.D. with this meaning only in Apuleius, whose exoticisms, as is well-known, include archaisms: *Met.* 2, 13; *Ap.* 42. Horace uses it once ('deficiente crumina') with the transferred sense of money, *Ep.* 1, 4, 11; and in this he is followed once ('deficiente crumina') by Juvenal, 11, 38.

[97] s.v. Crumina, sacculi genus. Plautus 'Di bene vertant, tene cruminam, inerunt triginta minae'.

[98] 78 s.v. Bulga, et folliculus omnis, quam et cruminam veteres appellarunt et est sacculus ad bracchium pendens.

[99] Contra, Dernburg, o.c. (above n. 1), 106 n. 4. An argument of Dernburg's (p. 101) for the existence of the *actio iniuriarum aestimatoria* in 170 B.C. is based on a now abandoned reconstruction of the *SC de Thisbensibus*: cf. Dittenberger, *Syll.*[3] 205; Bruns, *FIR*[7], 169 f.; Riccobono, *FIRA* I,246. Most recently, Birks also rejects the historicity of the episode ('The Early History of *Iniuria*', *T.v.R.* XXXVII (1969), at 174 ff.), but he dates the edict to the third century B.C. (195). Von Lübtow leaves the question open: 'Zum römischen Injurienrecht', *Labeo* XV (1969), 134.

[100] Not a bitter middle-aged man of moderate means. He obviously did not fear being struck in return so he must have come from an upper-class background: cf. Kelly, *Roman Litigation* (Oxford, 1966).

disputed. But Hersh shows that Sydenham's suggested 208 B.C.[101] is too late, and proposes a date round 227.[102] And Mattingly gives 217 as the date of the reduction of the 10-ounce *as* to 6 ounces, and suggests 209 as the year of reduction to 3 ounces.[103] The recent work of Crawford indicates that coins of semi-libral standard (or just below), but no others, were in circulation in 216, and that coins of sextantal standard were introduced in 211 or just before.[103a] The *Asinaria* is one of Plautus' early plays and should be dated before 200 B.C.[104] Thus, a date for the *edictum generale* in the last quarter of the third century B.C. seems indicated.[105] If this is accurate then in all probability the *edictum generale* is the work of the urban praetor, since between 215 and 198 B.C. (with the sole exception of 210) a peregrine praetor was either not appointed or was employed outside Rome.[106]

Kelly produces an argument for a much later date for the *actio iniuriarum aestimatoria*.[107] He observes that the Lex Fannia, of as late as 160 B.C.,[108] ' set 10 *as* as the maximum expenditure for a normal day's dinner : it seems scarcely likely that the 25 *as* penalty (in other words 2½ good dinners) was so derisory by the mid-second century as to require supersession. ' But the position is not quite so straightforward. The Lex Fannia seems [109] to have permitted as maximum expenditure on food on the days of the *ludi Romani*, *ludi plebei*, *Saturnalia* and certain other days 100 *asses* ; on 10 other days in each month 30 *asses* ; and on every other day 10 *asses*. When one takes the nature of sumptuary laws into account, 30 *asses* will represent a good dinner [110] and 10 *asses* a frugal day's eating. Moreover, Roman accounting was so weak at this time [111] that it is likely that the cost of preparing the meal (labour and wood for cooking) would not be taken into account and the 30 *asses* would represent the cost of raw materials only. So 25 *asses* was not such a great sum. And the fact remains that it was worth much less than the 25 *asses* of the XII Tables, mainly because of the reduction in weight of the *as* but also because copper was not so scarce.

The *edictum generale* was confined to cases of physical assault and did not in any way change the substantive law.[112] This latter point, indeed, emerges even from the unusual wording of the edict : the praetor does not promise an action, but gives instructions on how to proceed in one.[113] The widening of the scope of the edict to include cases where no blow had been struck was the work of jurists.[114] So on this score there is no evidence that the Edict was yet used to introduce reforms of substantive private law. But the survival of this edict indicates that already the praetor was issuing an Edict, the more satisfactory of whose provisions would be repeated in the Edicts of subsequent praetors.

Something more must be said about the nature of the action given under the *edictum generale*. This—to judge from later sources—was *in factum* and it is unlikely that this characteristic of the action was due to subsequent development.[115] Thus it seems that as early as Plautus, when the damages under the civil law were changed by an edict, the action itself would become an *actio in factum*.[116]

[101] *The Coinage of the Roman Republic*, revised with indexes by Haines, edited by Forrer and Hersh, (London, 1952), p. xxii.

[102] In Sydenham, *Coinage* 220.

[103] ' The first Age of Roman Coinage ', *JRS* XXXV (1945), 73.

[103a] ' War and Finance' *JRS* LIV (1964), 29 ff. ; *Roman Republican Coin Hoards* (London 1969), 4 f.

[104] Cf., e.g., Duckworth, *The Nature of Roman Comedy* (Princeton, 1952), 55.

[105] For further texts in Plautus which may concern *iniuria* though they throw no light on our problem see Simon, ' Begriff ' (above, n. 94), 181 ff.

[106] Cf. Mommsen, *Römisches Staatsrecht*³ II, i, 210, n. 5.

[107] *Irish Jurist* cit. (above, n. 2), 347.

[108] 161 is perhaps better : cf. Rotondi, *Leges publicae populi romani* 287 f.

[109] The provisions of the *lex* are not absolutely clear. The main source is Aulus Gellius, *NA* 2, 24, 2–7, but see also *NA* 20, 1, 23 ; Macrobius, *Sat.* 3, 17, 3 ; Pliny the Elder, *NH* 10, 50, 139 ; Athenaeus, *Deipnos.* 247C.

[110] Breakfast was a frugal meal, cf. Marquardt, *Das Privatleben der Römer* I² 265. And so usually was lunch, cf. Warde Fowler, *Social Life at Rome in the Age of Cicero* (repr. London, 1965), 273 f. ; also Marquardt, 267.

[111] Cf. de Ste Croix, ' Greek and Roman Accounting ', *Studies in the History of Accounting* (London, 1950), at 33 ff., esp. 37 ff.

[112] Cf., e.g., Watson, *Obligations* 248 ff. In general the sole dispute is whether all kinds of physical assault were covered, or only the less serious. Birks, who takes a different view from other scholars of the early history of *iniuria*, agrees that the praetor was not creating a new form of action : ' Early History ' (above, n. 99) 196.

[113] Cf. *Collatio* 2, 6, 1 (Paul *sing. de iniuriis*); *D.* 47, 10, 7 pr. (Ulpian 57 *ad ed.*); Lenel, *Edictum* 397 f.

[114] By the later part of the second century B.C. : P. Mucius in *Rhet. ad Herenn.* 2, 13, 19 ; cf. Watson, *Obligations* 250 f. Pugliese (o.c. (above, n. 32) 198, n. 109) suggests that the text was concerned with *convicium*, but the argument of Watson against *ne quid infamandi causa fiat* is also valid against the idea of *convicium* : cf. above, n. 32.

[115] Cf. Lenel, *Edictum* 399.

[116] It is possible that a further instance of praetorian intervention is to be found in Plautus, *Poenulus* 711–85. The pimp, Lycus, who is described as a ' fur

A parody of a praetorian edict appears in the prologue to Plautus' *Poenulus*, lines 16–45:

16 'bonum factum esse, edicta ut servetis mea.
scortum exoletum ne quis in proscaenio
sedeat, neu lictor verbum aut virgae muttiant, . . . '

and so on. At one time it was thought that the prologue was post-Plautine but the basis for that opinion is now thought to be wrong.[117] The date of the play is by no means certain[118] and it is not known when and on what occasion the play was first produced. Nonetheless, Plautus is representing the production as being under the auspices of the praetor, not of the curule aediles, as is shown by the reference to *lictor* in line 18. The praetors—as magistrates with *imperium*—but not the aediles were accompanied by lictors. But the passage takes us little further forward. All the provisions named are, as one would expect, directly concerned with the smooth running of the performance. They are evidence that, just as the curule aediles early issued regulations for the streets and markets for which they were responsible,[119] so the praetor issued an edict of several clauses governing behaviour at festivals for which he was responsible.[120] But no wider conclusions for the development of the Edict can be drawn from the passage.

This paucity of information in Plautus on the praetor's Edict is all the more striking when one recalls the large number of legal jokes, legal scenes and comic use of legal terminology which occurs in his plays. Thus, to choose a few instances, he jokes about *furtum manifestum*,[121] *fiducia*,[122] the *exceptio legis Laetoriae*,[123] *in diem addictio* (a standard term in sale) [124] makes puns on the forms of real security,[125] has an elaborate legal scene to enable a rogue to sell a free woman as a slave without becoming liable to reimburse the buyer,[126] and another to make a brothel-keeper a *fur manifestus*,[127] and tells us something about the rôle of *arra* in sale,[128] the forms of words used for divorce,[129] capacity to marry,[130] and *manumissio vindicta*.[131, 132]

(iii) The jurists of the second century B.C. before P. Rutilius Rufus and Quintus Mucius of whose opinions on private law matters something of importance has survived are Sex. Aelius Paetus Catus, M. Porcius Cato,[133] M. Iunius Brutus, M'. Manilius and P. Mucius Scaevola.

We know a little of Sextus Aelius' views on liability for late delivery in sale,[134] on the extent of a legacy of *penus*,[135] on old restrictions on mourning,[136] on the heir's action in *furtum*.[137] From Cato we have information on the adoption of slaves,[138] the complications

manifestus ' is under threat of *addictio*. It is most reasonable to treat this *addictio* as being due to the XII Tables' provision for manifest theft, but it is conceivable that, if the praetor had already introduced the fourfold penalty for manifest theft where the thief was a free man, the *addictio* would be due to Lycus' inability to pay the condemnation : cf. his reaction to the accusation of *furtum nec manifestum* in lines 1343–1354. In this event, the praetor would again have intervened to change a penalty (but not by an edict) though not the substantive law. It must be emphasized, however, that nothing positively indicates that here the threat of *addictio* is not the direct consequence of *furtum manifestum*.

[117] Cf., e.g., Duckworth, *Roman Comedy* 80 f.

[118] Cf., e.g., Duckworth 55.

[119] There is considerable early evidence in Plautus and elsewhere for the development of the Edict of the curule aediles. A parody of aedilician edictal clauses appears in Plautus, *Capt.* 803 ff. Cato discussed the edict on the sale of slaves : *D.* 21, 1, 10, 1 (Ulpian *1 ad ed. aed. cur.*). Aulus Gellius, *NA* 4, 2, 1 gives the wording of an early form of that edict. But the argument from the aedilician Edict to the praetorian Edict is not straightforward.

[120] So would the aediles for their games and festivals.

[121] *Aul.* 465 ff.

[122] *Most.* 37 ; cf., e.g., *Trin.* 116 ff. ; Watson, *Obligations* 173.

[123] *Rud.* 1376 ff.

[124] *Capt.* 179 ff. ; Watson, *Obligations* 98.

[125] *Epid.* 697 ff.

[126] *Per.* 524 ff., 665, 714 f.

[127] *Poen.* 711 ff.

[128] E.g. *Most.* 637, 643 ff., 915 ff. ; *Rud.* 554 ff., 859 ff. ; cf. Watson, *Obligations* 47 ff.

[129] *Am.* 928 ; *Trin.* 266 ; *Cas.* 210.

[130] *Cas.* 67 ff.

[131] *Mil.* 961.

[132] None of this is to be taken to imply that Plautus always accurately represents the legal institutions which he mentions.

Nothing can be deduced from Varro's words ' quod tum et praetorium ius ad legem et censorium iudicium ad aequum existimabatur ' (*de ling. lat.* 6, 71), though *tum* refers to the time of an unrecognized *fabula palliata*, a line of which he has just quoted : cf. Ribbeck, *Scaenicae Romanorum Poesis Fragmenta* II, 114. ' Praetorium ius ad legem ' must mean praetorian enforcement of the clause of the XII Tables on *sponsio*.

[133] Whether this is the Cato who was consul in 195 B.C. or his son who died when *praetor designatus* in 152 B.C. is uncertain but is not of vital importance at the moment.

[134] *D.* 19, 1, 38, 1 (Celsus *8 dig.*).

[135] *D.* 33, 9, 3, 9 (Ulpian *22 ad Sab.*).

[136] Cic., *de leg.* 2, 23, 59.

[137] Cic., *ad fam.* 7, 22.

[138] *J.* 1, 11, 12.

of stipulations with penalty clauses,[139] what counted as *morbosus* under the aedilician Edict,[140] the *actio ex empto* against a seller who fraudulently concealed a legal defect [141] and perhaps on the *actio rei uxoriae* and the institution of an heir.[142] Traces remain of Brutus' discussion of usufruct,[143] the *actio legis Aquiliae*,[144] *usucapio*,[145] *postliminium*,[146] *in diem addictio* in sale,[147] *furtum*,[148] the Lex Atinia,[149] and the same problem of the heir's action on *furtum*. The same disputes on usufruct, *usucapio*, the Lex Atinia and the heir's action on *furtum* involved Manilius, who also wrote extensively on the stipulations to be taken on a sale,[150] and described *nexum*.[151] Views of Publius Mucius survive on the *actio rei uxoriae*,[152] *ambitus*,[153] inheritance and *legatum partitionis*,[154] loss of citizenship,[155] and the problem of the heir's action on *furtum*.[156]

It cannot be claimed that our information on juristic attitudes in the second century B.C. is very extensive. On the other hand, it is not minute. What is totally lacking is evidence of the praetor's Edict. This would surely be surprising if the Edict was well-developed in their time. It would be no sufficient counter-argument to suggest that the Edict might have been well-developed, but since, as we have seen, edictal provisions were subject to change the views expressed by these jurists quickly became obsolete and would not be recorded. Certainly, obsolete views have a diminished survival rate, but it should be emphasized, first, that those opinions of the jurists which have survived were in many (and perhaps most) cases already overruled by the time they were recorded in the writing which we have ; and secondly that many of the edictal alterations known to us [157] concern relatively minor matters, and that juristic opinions expressed in connection with the earlier form would not necessarily lose their interest when the wording of the edict was changed.

Sextus Aelius wrote a work on the XII Tables,[158] Cato a commentary in at least 15 books on the civil law,[159] Brutus a commentary of either 3 or 7 books on the civil law,[160] Manilius a collection of forms and 3 books probably of *responsa*,[161] and Publius Mucius 10 books also probably of *responsa*.[161] It might be thought that the emphasis on the civil law, at least in the writings of the first three jurists, explains the absence of information on the Edict. But it is not so simple. Accounts of the *ius civile* and collections of *responsa* cannot neglect the important modifications of the Edict. More than that, if these jurists concentrated on writing books on the *ius civile* to the exclusion of the Edict the most natural explanation is that edictal law hardly existed. It is undoubtedly significant that the first commentary on the Edict was as late as Servius' short work in two books and that the first full treatment was not until Ofilius.[162]

> (iv) Cato, *de agri cultura* 146, 2 . . . donicum solutum erit aut ita satis datum erit, quae in fundo inlata erunt, pigneri sunto: nequid eorum de fundo deportato: siquid deportaverit, domini esto.
>
> 149, 2 . . . donicum pecuniam (solverit aut) satisfecerit aut delegarit, pecus et familia quae illic erit, pigneri sunto. si quid de iis rebus controversiae erit, Romae iudicium fiat.
>
> 150, 2 . . . conductor duos menses pastorem praebeat. donec dominum satisfecerit aut solverit, pigneri esto.

The texts are certainly concerned with a legal, not just a moral right : ' si quid de iis rebus controversiae erit, Romae iudicium fiat.' What is involved is a real right, not a personal

[139] *D.* 45, 1, 4, 1 (Paul *12 ad Sab.*).
[140] *D.* 21, 1, 10, 1 (Ulpian *1 ad ed. aed. cur.*).
[141] Cic., *de off.* 3, 16, 66. This time we are certainly concerned with Cato the Censor.
[142] *D.* 24, 3, 44 pr. (Paul *5 quaest.*). But the *Cato* of the text is probably a scribal error for *Capito*.
[143] *D.* 7, 1, 68 (Ulpian *17 ad Sab.*) ; Cic., *de fin.* 1, 4, 12.
[144] *D.* 9, 2, 27, 22–23 (Ulpian *18 ad ed.*).
[145] *D.* 41, 2, 3, 3 (Paul *54 ad ed.*).
[146] *D.* 49, 15, 4 (Modestinus *3 reg.*).
[147] *D.* 18, 2, 11, 1 (Ulpian *28 ad Sab.*) ; h.t. 13 pr (*Idem*).
[148] Aulus Gellius, *NA* 6, 15, 1.
[149] Aulus Gellius, *NA* 17, 7, 3.
[150] Varro, *de re rust.* 2, 3, 5 ; 2, 4, 5 ; 2, 5, 11 ; 2, 7, 6.
[151] Varro, *de ling. lat.* 7, 5, 105.
[152] *D.* 24, 3, 66 pr (Iavolenus *6 post. Labeonis*).
[153] Cic., *top.* 4, 24.
[154] Cic. *de leg.* 2, 20, 50; 2, 21, 53.
[155] *D.* 50, 7, 18 (17) (Pomponius *37 ad Quintum Mucium*).
[156] For Rutilius who is slightly older than Quintus Mucius, see infra, 117.
[157] Cf. supra, n. 15.
[158] *D.* 1, 2, 2, 38 (Pomponius *sing. enchiridii*).
[159] *D.* 45, 1, 4, 1 (Paul 12 *ad Sab.*).
[160] Cic., *de orat.* 2, 55, 224 ; *D.* 1, 2, 2, 39 : cf. Lenel, *Palingenesia Iuris Civilis* 1, 77 n. 2 ; Schulz, *History of Roman Legal Science* 92.
[161] *D.* 1, 2, 2, 39.
[162] *D.* 1, 2, 2, 44.

right, since the purpose of the provisions is to bolster existing personal rights with the same party. The contracts which are being supplemented are contracts of sale, not of hire, hence the real remedy envisaged cannot be the *interdictum Salvianum*. The conclusion to be drawn from these facts is that the real right involved is the *actio Serviana* (or *actio hypothecaria*) of a forerunner of this.[163] There is no evidence of a forerunner to the *actio Serviana*, far less of a civil law forerunner,[164] so it seems that we have to do with a praetorian action which innovated and gave a new real right. Since the *de agri cultura* was written about 160 B.C.[165] this action will be the earliest praetorian action known to us which introduced a change in the substantive law.

The *formula* of the *actio Serviana*, as reconstructed from evidence for a later period by Lenel,[166] was as follows: *Si paret inter Am Am et L. Titium convenisse, ut ea res qua de agitur Ao Ao pignori esset propter pecuniam debitam, eamque rem tunc, cum conveniebat, in bonis Lucii Titii fuisse eamque pecuniam neque solutam neque eo nomine satisfactum esse neque per Am Am stare quo minus solvatur, nisi ea res arbitrio iudicis restituetur, quanti ea res erit, tantam pecuniam iudex Nm Nm Ao Ao condemna si non paret absolve*. The formulation was thus *in factum*, not *in ius*. Lenel points out that we have not the slightest trace of an edict for this action and that without doubt there was not one; [167] rather, the *formula* was given at the end of the clause on the *interdictum Salvianum*.

It would be extraordinary if it were nothing but chance that the earliest information we have concerning a praetorian action which changed the substance of the law relates to one which was introduced without an edict. Such actions—introduced at the praetor's initiative [168]—are extremely uncommon, the only other probable cases being the *actio in factum adversus nautas, caupones, stabularios* and the *actio si mensor falsum modum dixerit*. The implication is that, for one reason or another, when the praetor began to make significant modifications to the substance of private law he gave the action without issuing an edict. This is reminiscent of his behaviour in introducing the *bonae fidei iudicia*.[169]

Incidentally, Kaser explains the absence of an edict here by saying that the requirements for the *actio Serviana* were covered by the requirements for the *interdictum Salvianum* which also functioned as an edict for the *formula*.[170] But apart from any other difficulties this explanation works only if at this time the scope of the *interdictum Salvianum* was much wider than it later became—the *interdictum* lay only in the case of a lease of land—which is very unlikely, or if the *actio Serviana* had originally a narrower scope than it had in the time of Cato.

> (v) *D.* 38, 2, 1 (Ulpian *42 ad ed.*). Hoc edictum a praetore propositum est honoris, quem liberti patronis habere debent, moderandi gratia. namque ut Servius scribit, antea soliti fuerunt a libertis durissimas res exigere, scilicet ad remunerandum tam grande beneficium, quod in libertos confertur, cum ex servitute ad civitatem Romanam perducuntur. 1. Et quidem primus praetor Rutilius edixit se amplius non daturum patrono quam operarum et societatis actionem, videlicet si hoc pepigisset, ut,

[163] On all this see now Watson, *Obligations* 180 ff.

[164] Though Kaser, following out his theory of divided ownership, thinks that originally the pledge creditor would have the *vindicatio*: see, e.g., *Eigentum und Besitz im älteren römischen Recht*, 2nd edit. (Cologne, Graz, 1956), 21 ff.; 'The Concept of Roman Ownership' *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1964), 8. Whatever the general attractiveness of Kaser's concept of early ownership (and against it, see Watson, *Property* 91 ff.), the fact that the *actio Serviana*, which is not based on an edict, is formulated so totally in a praetorian fashion is very much against the idea of a civil law forerunner. The *actio Serviana* in this respect contrasts very markedly with the actions for servitudes and usufruct, which began *si paret ius Ao Ao esse . .* ; and servitudes especially are thought by Kaser to be illustrative of the concept.

[165] To accept the traditional dating: but Daube postulates a much earlier date *Forms* 96 f.

[166] *Edictum* 493.

[167] Loc. cit.

[168] The *actio si ager vectigalis petatur* has no edict but this is probably because it was introduced at imperial instigation: cf. Lenel, *Edictum* 186 f. And similarly there is no evidence of an edict for the actions *ad senatusconsultum Velleianum*: Lenel, *Edictum* 287.

[169] The *actio in factum adversus nautas, caupones, stabularios* is not significant here. It belongs to the group of *actiones in factum* clustered round the Lex Aquilia—hence its position in the Edict—though it alone of these has an edictal *formula*, presumably because it went beyond a straightforward extension of the *lex*: cf. Lenel, *Edictum* 205. It is thus essentially a decretal action which has come to be provided with an edictal *formula*. Of the early history of the *actio si mensor falsum modum dixerit* little is known though it is certainly Republican—*D.* 11, 6, 1 pr. (Ulpian *24 ad ed.*)—and is presumably earlier than the *edictum de dolo*: cf. Rudorff, in Blume, Lachmann and Rudorff, *Die Schriften der römischen Feldmesser* II (Berlin, 1852), 320, n. 235.

[170] *Privatrecht* I, 395 and n. 21.

nisi ei obsequium praestaret libertus, in societatem admitteretur patronus. 2. Posteriores praetores certae partis bonorum possessionem pollicebantur : videlicet enim imago societatis induxit eiusdem partis praestationem, ut, quod vivus solebat societatis nomine praestare, id post mortem praestaret.

It is usually,[171] though not always[172] held that this *praetor Rutilius* is P. Rutilius Rufus, who was consul in 105 B.C. and praetor not later than 118 B.C. The identification cannot be regarded as certain but it is at least very probable considering his general importance, his reputation as a jurist,[173] and his friendship with Publius Mucius and Quintus Mucius.[174]

Nothing more need be said about (vi) or (vii).

(viii) The Edict did not play a strong part in shaping the new law of the Empire.

Only two new edicts were certainly introduced in the great praetorian Edict during the Empire, apart from that of Julian, *de coniungendis cum emancipato liberis eius*; [175] Julian, of course, as redactor of Hadrian's Edict, is in a special position and one cannot argue from him to the behaviour of earlier praetors. Indeed, the fact that almost a century later this edict of his is described by Ulpian as *edictum novum* and by Marcellus as *nova clausula* indicates that even before his time the issuing of a new edict was, at the very least, a great rarity.[176] It is perhaps more than a coincidence that the other two edicts from the Empire known to us both come from the first half of the first century A.D.

One of them was issued by C. Cassius Longinus who was urban praetor around A.D. 27, and this promised *restitutio in integrum* if the magistrate could not *ius dicere* because of the proclamation of an extraordinary holiday. But this clause did not find a permanent place in the Edict.[177] The other edict declared : *Uti me quaque lege senatus(ve) consulto bonorum possessionem dare oportebit, ita dabo.*[178] We know of no statute or *senatusconsultum* which gave someone the right to *bonorum possessio* earlier than the Lex Papia of A.D. 9.[179] And when one considers how few statutes or *senatusconsulta* touched upon private law in the later Republic, it seems safe to assume that none was issued on this point. Hence, this edict too dates from the Empire, and presumably from a time shortly after the passing of the Lex Papia.

The 'breve edictum' of the praetor Nepos, enforcing a *senatusconsultum*, which is mentioned by Pliny the Younger [180] can scarcely be directly relevant. Licinius Nepos, who is known to us only from four letters of Pliny,[181] was a praetor in A.D. 105 [182] but it seems that his sphere was the presidency of one or more criminal court.[183] At the most, therefore, one might argue that if this praetor could issue a new edict, then it is very likely that the urban praetor could still do so also.

At least some of the edicts which are not directly evidenced for the Republic will have been in existence then, so that there are rather few edicts remaining which could have originated in the Empire. Still, it must be emphasized that some of them could have done, and probably did. For instance, the very important *actio Publiciana*, which is usually thought to have been issued in 67 B.C., is not evidenced until the time of Neratius who was active around the end of the first century A.D. and the beginning of the second. A Publicius Certus was praetor in A.D. 93.[184] Again, the Digest title *D.* 26, 7, *de administratione et periculo*

[171] Cf., e.g. Bremer, *Iurisprudentiae Antehadrianae* I, 43 ff. ; Münzer, *RE* I A, 1269 ff. ; Kaser, *Privatrecht* I, 257.

[172] Thus Kelly also suggests as possibilities the praetors of 93 and 49 : *Irish Jurist* (cit. n. 2), 347. But 49 B.C. is impossibly late since *D.* 38, 2, 1, 2 tells us that it was later praetors who promised *certae partis bonorum possessio*, and this *bonorum possessio* was in existence when Verres was urban praetor in 74 B.C. : Cicero, *in Verrem* II, 1, 48, 125–26. On the other hand, P. Rutilius Calvus, praetor in 166 B.C. is perhaps a possibility.

[173] Cf. Cicero, *Brutus* 30, 113–14 ; *de off.* 2, 13, 47. He is also likely to be the Rutilius whose opinions have survived on the extent of a legacy of *penus* (Aulus Gellius, *NA* 4, 1, 2 ; *D.* 33, 9, 39 (Ulpian *22 ad Sab.*)), on the duration of *habitatio* (*D.* 7, 8, 10, 3 (Ulpian *17 ad Sab.*)) and on the interdict *quae arbor ex aedibus* (*D.* 43, 27, 1, 2 (Ulpian *71 ad ed.*)) : and to be the inventor of the *formula Rutiliana* (Gaius 4.35 ; *Vat. Fr.* 1 (Paul *8 ad Sab.*)) cf. Bremer, l.c.

[174] Cicero, *de off.* 2, 13, 47 ; Livy, *epit.* LXX ; Diod. Sic. 37, 5, 1.

[175] Cf. *D.* 37, 9, 1, 13 (Ulpian *41 ad ed.*) ; 37, 8, 3 (Marcellus *9 dig.*).

[176] Cf. Dernburg, art. cit. (above, n. 1), 99.

[177] *D.* 4, 6, 26, 7 (Ulpian *12 ad ed.*) : cf. Lenel, *Edictum* 120 ff. ; Daube, 'Extraordinary Holidays', *Festschrift Leibholz* (Tübingen, 1966), 311 ff. at 315 ff.

[178] Cf. Lenel, *Edictum* 360 f.

[179] Gaius 3, 46, 49–50.

[180] *Epist.* 5, 9, 3.

[181] 4, 29 ; 5, 4 ; 5, 9 ; 5, 13.

[182] Cf. Sherwin-White, *The Letters of Pliny* (Oxford, 1966), 305.

[183] Cf. Sherwin-White, 336.

[184] On all this see now Watson, *Property* 104 ff.

tutorum etc., is one of the longest in the Digest, but not one of the texts in it refers to the Republic and there is not the slightest indication elsewhere either that the edict *de administratione tutorum* existed before the Empire.[185] It should be stressed, too, that the absence of positive proof of more edicts being issued in the Empire is not necessarily significant. We have so very few firm dates that the main argument for dating is normally from the lifespan of the first jurist to mention the edict. And we may easily underrate the time-lapse between the introduction of an edict and the earliest surviving mention of it.

It is clear that other changes, apart from issuing new edicts, also occurred before the time of Julian. Thus, Cassius cut out the *exceptio metus*, considering the *exceptio doli* sufficient.[186] Later praetors reinserted it.[187, 188] Aulus Gellius tells of an edict no longer in the Edict.[189] Again, actions were given in the Edict under the *senatusconsultum Velleianum* of about A.D. 46 [190] and the *senatusconsultum Trebellianum* of A.D. 56 [191] and the *senatusconsultum Macedonianum* of the time of Claudius or Vespasian [192] gave rise to an edictal *exceptio*.[193] And not all the alterations in the wording of edicts which have already been noticed [194] can reasonably be ascribed to praetors before the end of the Republic or to Julian. Julian himself, in his redaction of the Edict was responsible for modifications.[195]

The main reason for the decline of the Edict as a source of new law is, it is agreed, the changed political climate of the Principate, though the theoretical powers of the praetors in this regard remained unaltered.

Nothing more need be said about (ix) or (x).

D

It remains to call attention to two aspects of the problem of the development of the Edict, neither of which need here be given detailed treatment.

(*a*) First, a brilliant conjecture of Kelly should be noted. He suggests that the first edicts would be designed to assist the enforcement of the civil law, such as threatening some evil against someone who did not obey a summons, and that ' the history of the praetorian edict reveals itself as a progress from *adjective* to *substantive* law '.[196] In view of the sources this can be nothing but an informed conjecture—hence excluded from discussion in the main part of the article—but it is extremely plausible.

(*b*) A famous problem is the relationship of *lex* and *edictum*. *Leges* in private law were always rare, but what determined whether a reform be introduced by *lex* or *edictum*? The matter will not, in general, be discussed here but it is part of Kelly's case that there never was any conflict or concurrence between *lex* and *edictum* in substantive reform because the periods of their respective activity in this sphere simply did not coincide or overlap.[197] There are, he says, no known statutes in private law in the Republic after 125 B.C. and it is unlikely that there were any. After 125 B.C., he claims, the instrument of private law reform was the Edict.

But Kelly's view of the cessation of statutes changing private law does not seem accurate. Thus, the Lex Iulia et Titia (either one or two statutes) which gave provincial

[185] On all this see now Watson, *Persons* 131 ff.

[186] *D.* 44, 4, 4, 33 (Ulpian *76 ad ed.*).

[187] Cf. now Watson, *Obligations* 257 f. The alternative is to say that the *exceptio metus* is post-Cassius.

[188] On Cassius' activity see also *D.* 42, 8, 11 (Venuleius Saturninus *6 interdic.*). Lenel suggests that here Cassius was the jurist who formulated the action, not the praetor who proposed it, *Edictum* 500, n. 2. Against suggestions of interpolation in the text see now Impallomeni, *Studi sui mezzi di revoca degli atti fraudolenti nel diritto romano classico* (Padua, 1958), 112 ff.

D. 29, 2, 99 (Pomponius *1 senatus consult.*) does not seem relevant to the present discussion.

[189] *NA* 11, 17, 2: *Qui flumina retanda publice redempta habent, si quis eorum ad me eductus fuerit, qui dicatur, quod eum ex lege locationis facere oportuerit, non fecisse.* On this, most recently, Viganò ' Sull' *edictum de fluminibus retandis,*' *Labeo* XV (1969) 168 ff.

[190] Cf. Lenel, *Edictum* 287 f.: and it seems that the action *si ager vectigalis petatur* which is in the Edict—but has no edict—is also from the Empire: Lenel, *Edictum* 186 ff.

[191] Cf. Lenel, *Edictum* 183 f.

[192] For the view that it is likely the *SC* dates from Claudius, see Daube, ' Did Macedo kill his father? ' *ZSS* LXV (1947), 308 ff.; *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh, 1969), 90, n. 4.

[193] *D.* 14, 6, 11 (Ulpian *29 ad ed.*).

[194] Above, n. 15.

[195] This is really outside the scope of the present enquiry, but see, e.g., Jolowicz, *Historical Introduction to the Study of Roman Law*, 2nd ed. (Cambridge, 1954), 366 f.

[196] art. cit. (above, n. 2), 348 f.

[197] art. cit. 344 ff.

magistrates the power to appoint tutors almost certainly dates from between 125 B.C. and the end of the Republic ;[198] and so probably does the Lex Minicia which enacted that the offspring of a Roman and a peregrine, where there was no *conubium*, was a peregrine.[199] The Lex Cornelia de sponsu, which forbade anyone to act as guarantor for the same debtor to the same creditor in the same year for a sum greater than 20,000 sesterces, is probably the work of Sulla,[200] as is the Lex Cornelia de captivis, which ordered the execution of a will left by a citizen who died a captive.[201] The Lex Scribonia which excluded the usucapion of servitudes seems to date from 50 B.C.[202] The Lex Falcidia, which enacted that testamentary heirs were to take at least one quarter of the *hereditas*, is a plebiscite of 40 B.C.[203]

It is, of course, true that a political motivation can be traced for at least some of these statutes,[204] but this is of little consequence in this connection ; first, because the same also applies to particular edicts—a great deal of private law reform always has political overtones—and secondly, because Kelly's argument is there were probably no statutes which changed private law in the last century of the Republic, and this should exclude any enacted for political reasons.[205]

The problem of the relationship of *lex* and *edictum* in the Republic is thus still unresolved.[206]

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[198] Cf. the authors cited by Kaser, *Privatrecht* 1, 303, n. 24.

[199] For the difficulties in dating the Lex Minicia see Watson, *Persons* 27, n. 4.

[200] Cf. Rotondi, *Leges* 362 f.

[201] Cf., e.g., Watson, *Persons* 253.

[202] Cf., e.g., Watson, *Property* 22 f.

[203] Cf. Rotondi, *Leges* 438.

[204] Especially the Lex Falcidia : cf. now Watson, *Succession* ch. 12.

[205] Cf., art. cit. (n. 2) especially 344 f.

[206] I am grateful to a number of friends, Professor Reuven Yaron, Mr. John Barton, Mr. Robin Seager and Mr. Alan Rodger whose criticism has much improved this paper.