

# 'IMPERIAL' RESCRIPTS A.D. 193-305: AUTHORSHIP AND AUTHENTICITY

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This article summarizes some of the results of an inquiry into third-century rescripts which has been proceeding for the last seven years but of which nothing has so far been published.<sup>1</sup> The main source, the *Codex Justinianus*, contains some 2491 items dated between A.D. 193, when we first have a substantial number of texts, and 305, which are certainly or probably private rescripts, as I shall call them, i.e. *subscriptiones*.<sup>2</sup> These were written answers given by the emperor to petitions by private individuals on points of law. If these written answers, which were in some sense the concern of the imperial office *a libellis*, are reassembled from the titles under which they are grouped in the *Codex*, and are read in complete chronological order, the reader is struck by the fact that their style is consistent over a period which varies from a few months to several years. The periods of consistent style, however, do not coincide with the reign of a particular Augustus or Augusti. Some twenty such periods and hence some twenty third-century composers of rescripts, who are clearly not emperors, can be distinguished in this way.<sup>3</sup> In half a dozen cases there is evidence, again drawn from the style of composition, that the composer is one of the jurists known to us independently from the pages of Justinian's *Digest*; for example, Papinian, Ulpian, Menander, Modestinus or Hermogenianus.<sup>4</sup> In two cases the evidence for the identification is set out in some detail below. It seems, therefore, that the composition of rescripts of any importance was the responsibility of professional lawyers, acting in their capacity of imperial secretaries *a libellis*, an office which Papinian at least is known to have held.<sup>5</sup>

If this thesis is accepted, it becomes possible to challenge or modify certain widely held views. Although the civil administration of the empire was highly centralized, and quite trivial acts required the emperor's assent,<sup>6</sup> in this branch of government at least the empire was far from a one-man band. The emperor depended on the specialist advice and draftsmanship of the lawyers who held the *libelli*. He needed them if he was to be seen to provide a reasonable legal service to his subjects, just as they needed him. The composition of rescripts can indeed be looked on as a branch of professional legal activity carried on, it is true, in the name of the emperor, but otherwise closely similar to the giving of *responsa* by private jurists, of which the imperial system was a copy. The importance of the rescript system to lawyers was that it was one factor which helped to make the imperial government dependent on professional collaboration.

Another widely held view is sceptical of the authenticity of the texts of imperial constitutions of the principate preserved in the *Cj*.<sup>7</sup> This view can be challenged head-on. So far from being unreliable, the received texts preserve the style of the originals down to the most minor and trivial details. It is only because this is so that it is possible to divide the corpus of rescripts into periods of consistent style. It is true that the inscriptions giving the names of the Augustus or Augusti are not always to be relied on, since certain reigns have been antedated. Occasionally the consular year given in the subscription to the text, or the day and month, can be doubted.<sup>8</sup> But the body of the texts, though often drastically shortened, with the omission of preliminary matter and superfluous detail, has been treated with reverence both by copyists and by the editors of the Gregorian, Hermogenian and

<sup>1</sup> A fuller version will appear in *Emperors and Lawyers* (1980). The basic research was carried out in 1972-3.

<sup>2</sup> The term *scriptio* is evidenced only for the second century: Gaius, *Inst.* 1. 94; *Cj* 7.43.1; *D.* 4.8.32.14; U. Wilcken, *Hermes* 55 (1920), 1; A. v. Premerstein, *RE* IV. 739; F. Millar, *The Emperor in the Roman World* (1977), 243-52.

<sup>3</sup> Table below, p. 56.

<sup>4</sup> Below, p. 56, and Appendix, p. 63.

<sup>5</sup> *D.* 20.5.12 pr. (Tryphoninus, VIII *disputatio*).

<sup>6</sup> Emphasized by Millar, *op. cit.* (n. 2), esp. 240-52.

<sup>7</sup> E. Volterra, 'Sulle *inscripciones* di alcuni

costituzioni di Diocleziano', *BIDR* 76 (1973), 245; 'Il Problema del testo delle costituzioni imperiali', *Atti del II cong. int. della soc. ital. di stor. del diritto* (1971), 821.

<sup>8</sup> Despite the scepticism of A. Birley, *Septimius Severus* (1971), 14 and C. E. van Sickle, 'The Headings of the Rescripts of the Severi in the Justinian Code', *Class. Phil.* 23 (1928), 270, only *Cj* 7.12.1 (*Sev. et Ant.*, 16 June 161) has a clearly wrong date and should probably be attributed to 213 ('Antonino et Balbino cons.' for 'Antonino et Vero').

Justinianic codes. Even when, as with Justinian's compilers,<sup>9</sup> they were authorized to change the texts, they have generally preferred to respect them. So much is this the case that rescripts of unknown date can often be assigned to the appropriate year or years simply because they contain some expression typical of the lawyer composing them at that period.

#### I. THE RESCRIPT SYSTEM

From the time of Augustus political authority was concentrated in the hands of one man, who was consequently subjected to requests and petitions of all sorts. Some of these were for favours, privileges and other benefits. Others were for rulings on points of law. In the Republic such requests had been addressed orally or in writing to jurists, who acquired prestige by displaying learning and wisdom in the answers, *responsa*, which they gave. It is not clear that Augustus himself undertook to provide a similar service to petitioners.<sup>10</sup> The grants which he is said to have made of *ius respondendi ex auctoritate principis*<sup>11</sup> could be interpreted as a device for evading this responsibility by delegating to lawyers in whom he had confidence the task of answering such petitions. But at least from Tiberius onwards<sup>12</sup> the emperor granted what came to be called rescripts on points of law and so, in effect, set up a free legal advice service as part of the imperial administration. In time a secretary *a libellis* was charged with processing these petitions, and in the second century the post came to be held by a knight,<sup>13</sup> supported by a clerical staff, and its tenure was the object of ambition to aspiring lawyers.

Rescripts on points of law counted as imperial constitutions and, according to Gaius<sup>14</sup> and Ulpian,<sup>15</sup> had the force of statute (*legis vicem optinet, legem esse constat*). But the use of *lex* can mislead. Rescripts were not legislative. Though very occasionally they purport to derogate from existing law by granting an indulgence,<sup>16</sup> they never purport to change it. They simply declare what the law is. Nor do they have the force of a judgment, or any other executive force.<sup>17</sup> They are rather authoritative opinions which a petitioner can use in any way he pleases, for example as an argument in court. But if the rescript which he solicited does not arrive in time for the trial or appeal, or the petitioner fails to note an appeal, the rescript, though favourable to his cause, is of no effect.<sup>18</sup> Even supposing that it arrives in time for the trial, it helps the petitioner only if the provincial governor or other judge finds the facts in the sense he alleges when in his petition he states them *ex parte*.<sup>19</sup> Hence a rescript often runs 'si, ut proponis . . .' etc. The point of the system is to provide a service to petitioners similar to that afforded by private jurists to those who consult them, not to interfere with the course of justice, whether in ordinary or extraordinary proceedings. Hence a judge must not postpone a trial until a rescript arrives.<sup>20</sup> Right into the third century the rescript system coexisted with the giving of *responsa*, only slightly less authoritative, by private jurists. This coexistence was possible only because jurists took account of the trend of rescript law, while emperors respected juristic opinion and entrusted the composition of rescripts to jurists.

The composition of rescripts is best understood if the material is read chronologically, beginning with the *Cj*, in which the dating is more reliable than in other sources. Where the consular date conflicts with the inscription to a particular Augustus the consular date is generally to be preferred. Thus, the inscriptions antedate the reign of Caracalla to the beginning of 197<sup>21</sup> and that of Gordian III to the beginning of 238.<sup>22</sup> If, then, one reads

<sup>9</sup> *C. Haec* (13 Feb. 528) 2; *C. Summa* (7 Apr. 529)

1, 3.

<sup>10</sup> The 'Caesar' referred to by Atilicinus (*D.* 8.3.35; Millar, *ERW*, 465) is more likely to be Claudius or Nero than Augustus, given that Atilicinus was *Proculi aequalis*: Lenel, *Pal.* 1. 71.

<sup>11</sup> *D.* 1.2.2.49.

<sup>12</sup> *D.* 48.5.39.10 (Pap. 36 qu.: 'et hoc ita Tiberius Caesar rescripsit').

<sup>13</sup> L. Volusius Maecianus (*CIL* xiv. 5347; Lenel, *Pal.* 1. 575-88) is the first attested equestrian jurist to hold the office, to Pius under Hadrian in A.D. 138; Pflaum, *Carrières procuratoriennes*, no. 141; Millar, *op. cit.* (n. 2), 103.

<sup>14</sup> *Inst.* 1.5.

<sup>15</sup> *D.* 1.4.1 *pr.*, 1 (1 *institutionum*).

<sup>16</sup> *Cj* 9.23.1 (212); 1.18.1 (25 April 212); 5.41.1.1 (25 July 213); *D.* 48. 22. 16 (Antoninus). All stem from Caracalla, and seem to belong to the tenure of Arrius Menander. Below, p. 55.

<sup>17</sup> *Cj* 7.62.2 (Alexander); 1.21.1 (232). Pace J. A. Crook, *Law and Life of Rome* (1967), 21, they are not appeals.

<sup>18</sup> *Cj* 1.21.1 (232).

<sup>19</sup> *D.* 42.1.32 (Callistratus, *lib.* III *cognitionum*).

<sup>20</sup> *D.* 49.5.4 (Macer, *lib.* I *appellationum*).

<sup>21</sup> *Corp. Iur.*<sup>11</sup> II (ed. P. Krueger), 489.

<sup>22</sup> *CjC* II, 492.

according to the dating in Krueger's edition of *CJ*, leaving the texts without a consular date to be fitted in later, one is struck by the fact that very minor linguistic habits have been preserved in their chronological niches.

For instance *modo si* and *si modo* can both be used to mean 'provided that'—a standard lawyer's term for qualifying a statement of the law. But whilst *modo si* is found only from 194 to February 213,<sup>23</sup> *si modo* is found only from July 213 to 270.<sup>24</sup> So a change of expression between February and late July 213 has survived three editors and many copyists without a single inversion of the original word order. This encourages us to respect the authenticity of the texts of rescripts in more substantial matters.

There are many similar examples. All four uses of *in fatum concedere* for 'to die' are in the period 238 to mid-241,<sup>25</sup> four of five dated texts with *fati munus implere* in 242-4.<sup>26</sup> Three of four mentions of *pertimescere*<sup>27</sup> are in 238 to June 241. The dated *nequaquam*s are divided between seven in mid-241 to 246 and two in the first half of 290.<sup>28</sup> All the instances of *quin immo*<sup>29</sup> and *quin etiam* belong to 238 to mid-241.<sup>30</sup> All three texts with (*iudex* etc.) *non negabit* come from 246 or (undated) Philip.<sup>31</sup> All six with *iure poscere/posci* belong to 244-6 or Philip.<sup>32</sup> The five dated texts with the imperative *consiste* are from 213-18.<sup>33</sup> Four of five dated texts with *ulcisci* belong to mid-290<sup>34</sup> to 291, six of seven with *solicitudinem gerere* to 293-4.<sup>35</sup> These two years also have forty-six of fifty-two dated rescripts with *convenit*,<sup>36</sup> all eight with *certissimi iuris est*<sup>37</sup> and all nine with *incerti iuris non est*.<sup>38</sup> Of nineteen dated texts with *explorati iuris est* twelve come in 242-6 and four in 293-4.<sup>39</sup> In this way it is possible to plot dates, for example mid-241, at which changes of style, involving a number of different expressions, occur.

The criteria of style are not of course confined to the use of particular expressions such as those mentioned. Many points are taken into account. Despite shortening by the editors, length of rescript is a good indication of a change of composer. Thus the rescripts of 254 to March 259 are longer than those of March 259-260 (average of 9.7 lines against 7.8) and those of 238 to mid 241 are longer than those of mid-241 to 246 (average of 8.0 lines against 6.7). The logical structure of a rescript can be important. The texts of 209-11 follow the syllogistic form:<sup>40</sup> motivation, facts, advice. An example would be: 'priority of mortgage depends on priority in time. Hence, if your mortgage was earlier, you prevail'. The texts of 212 to mid-213 favour the counter-syllogistic form:<sup>41</sup> facts, advice, motivation, as in 'If your mortgage was earlier, you prevail, since priority of mortgage depends on priority in time'. The beginnings and endings of rescripts are worth close

<sup>23</sup> *CJ* 2.23.1 (194); 4.28.4 (201); 5.53.1 (205); 3.34.1 (211); 5.43.1; 6.3.4; 6.21.1 (all 212); 10.40.1 (Antoninus); 9.12.2 (15 Feb. 213).

<sup>24</sup> *CJ* 2.3.7. (30 July 213); 4.21.1 (9 Sept. 213); 8.40.4 (17 Sept. 213); 6.37.7; 6.31.2; 6.54.4 (all 215); 4.57.1 (222); 5.55.1 (223); 6.26.4 (225); 4.31.4; 5.5.1; 7.4.6; 9.47.7 (all Alex.); 2.19.3 (238); 1.50.1 (240); 5.37.12, 8.40.16 (241); 10.39.3 (Philip); 1.23.2 (270). The earliest text, if correctly dated, is *App. leg. Rom. Wis.* 1.3 (26 July 213). *CJ* 5.16.3 (4 March 213) is not a real exception, since *si modo* there qualifies the facts of the case, not the statement of the law.

<sup>25</sup> *CJ* 7.66.4; 8.42.4; 7.66.5 (all 238); 6.30.3 *pr.* (18 Aug. 241); cf. 2.52.2 (238, 'in fata concessit').

<sup>26</sup> *CJ* 4.10.1 (242); 6.22.1 *pr.* (243); 6.20.6 (244, Gordian); 6.42.12 (244, Philip); 8.50.4.1 (290).

<sup>27</sup> *CJ* 2.11.14 (238); 5.64.1.1 (239); 8.50.2.1 (12 June 241); 2.19.7 (293).

<sup>28</sup> *CJ* 6.40.1 (20 July 241); 6.42.11 (31 Dec. 241); 2.11.17 (242); 5.43.8 (244); 2.26.3; 4.28.6 *pr.* (245); 6.21.10 *pr.* (246); 6.23.7 (16 Jan. 290); 7.43.7 (30 March 290); cf. 11.34.2 (Gordian); 7.57.6; 7.53.6 (both Philip); 9.51.9 (*Diocl. et Max. AA.*); 7.35.4 (*Diocl. et Max. AA. epistula.*)

<sup>29</sup> *CJ* 10.11.2 *pr.* (238); 9.35.3 (239); 9.19.1 (240).

<sup>30</sup> *CJ* 6.50.9 (238); 3.35.2; 5.62.14.1 (both 239).

<sup>31</sup> *CJ* 3.32.8; 4.2.4.1 (both 246); 9.49.5 (Philip).

<sup>32</sup> *CJ* 2.43.3; 8.40.18 (both 244); 5.37.14 (245); 6.42.13 (246); 7.2.8, 9.49.5 (Philip).

<sup>33</sup> *CJ* 3.37.1 *pr.*; 4.50.1; 5.54.3 (all 213); 4.49.1 (215); 2.18.8 (218); 8.35.3 (Antoninus). *CJ* 2.18.8 of 27 July 218 may indicate that Elagabal reappointed Caracalla's secretary a *libellis*.

<sup>34</sup> *CJ* 2.40.1 (229); 9.9.20 (5 Oct. 290); 9.9.23 (1 Nov. 290); 7.13.1 (7 Dec. 290); 6.35.9 (291); cf. 10.33.1 (*Diocl. et Max. AA.*).

<sup>35</sup> *CJ* 6.49.4; 8.53.15.1; 8.53.18 (all 293); 5.18.8; 6.35.10.1; 6.36.6; 8.41.5 (all 294).

<sup>36</sup> Too many to set out here: see von Mayr, *Vocab. Cod. Iust.* 1, 731.

<sup>37</sup> *CJ* 4.5.4; 4.15.4; 5.34.5; 2.21.5.1; 8.4.2 (all 293); 5.62.18 *pr.*; 6.50.17; 6.36.5 (all 294).

<sup>38</sup> *CJ* 6.26.8.1; 5.51.7; 4.5.5; 8.53.11 *pr.*; 8.13.14; 9.20.9; 3.36.19; 8.1.3 (all 293); 2.56.1 *pr.* (294).

<sup>39</sup> *CJ* 6.50.2 (197); 6.29.1 (213); 6.11.2.1; 9.33.1; 9.9.14; 8.40.17; 7.55.2 (all 242); 3.33.7 (243); 4.29.11; 6.42.12 (both 244); 3.28.15; 3.32.7 (both 245); 6.20.7; 6.21.12 (both 246); 6.58.3 *pr.* (250); 2.5.1; 5.14.6, 4.5.7 (all 293); 4.26.9 (294); cf. 7.50.1 (Gordian); 3.36.11; 10.39.3 (both Philip). *CJ* 4.2.1 (204) has 'cum sit explorati iuris.

<sup>40</sup> *CJ* 8.18.1 (209); 3.32.1; 8.53.1 (210); 7.59.1; 6.45.1 (211); 8.43.1 (11 Feb. 212).

<sup>41</sup> *CJ* 2.53.1; 8.17.2; 6.24.2; 8.44.4; 5.43.1; 5.37.3; 6.21.1 (all 212); 9.12.2; 8.35.3; 5.54.2 *pr.*; 3.31.5; 2.3.5; 6.29.1 (all 213, before 30 July).

attention. In the texts of 223–6 initial *qui* is common,<sup>42</sup> in those of 293–5 various initial prepositions.<sup>43</sup> Those of 194–202 favour endings in *est*,<sup>44</sup> those of 230–4 final conditional clauses with the future perfect (e.g. *si ostenderitis*),<sup>45</sup> those of 238 to mid-241 noun endings, those of mid-241 to 246 final *explorati iuris est*.<sup>46</sup> The composers of March 202 to 209 and July 213 to 217, reversing the practice of their predecessors, often invert the normal Latin word order and write, for example, *es consecutus* for *consecutus es*, or *habes actionem* for *actionem habes*.<sup>47</sup> Between 226 and 229 we find one negative heaped on another: ‘neither X nor Y since Z is impossible and so you may not do A’.<sup>48</sup>

Another point worth attention is the relatively plain or rhetorical manner of different composers. Between 238 and mid-241, 254 and March 259, and mid-290 and 291 the texts are longer than usual, variants are sought for technical terms, and some outlandish expressions are introduced. These might rouse suspicions of post-classical alteration or interpolation were it not that the rhetorical periods are followed by plainer periods in mid-241 to 246, March 259 to 260 and 293–5. Technicality is another criterion. In 194–202 the composer seems to be writing for professional lawyers,<sup>49</sup> while in 202–09 and 213–17 a pedagogic effort is made to convince the petitioner of the truth of the reply. The facts alleged by the petitioner are introduced in varying ways. In October 222 to October 223 *adlegare* is frequently used,<sup>50</sup> in 293–5 *commemorare*.<sup>51</sup> In 212 and 213 *nam* is favoured for drawing a conclusion,<sup>52</sup> in 293–5 *idcirco*<sup>53</sup> and *quapropter*.<sup>54</sup> In certain periods the petitioner is addressed in an intimate tone, with a free use of the second person (e.g. ‘potes tu, frustra times’),<sup>55</sup> notably in 202–9 and 230–4. The rescripts of 254 to March 259 are somewhat censorious, those of 209–11 restrained and colourless.

With the help of these and other criteria it is not difficult to divide the third century into stylistically coherent periods, though there are naturally gaps for years in which we have no or few rescripts. The periods resulting, which are interpreted as periods of office of secretaries *a libellis*, are set out in the Appendix below.<sup>56</sup> It will be seen that there are three periods during Caracalla’s sole rule, six for Alexander and three for Diocletian. Conversely, the same style may persist from one reign to the next. Thus, the style of the last years of Severus continues for a year after his death. That of the later years of Gordian III continues under Philip, and recurs under Decius, possibly also under Gallus and Volusianus.<sup>57</sup> Most strikingly of all, in 238 the same style persists under Maximinus, the senatorial emperors Maximus and Balbinus, and Gordian III ruling alone.

This is enough to dispose of the idea, if anyone entertained it, that emperors composed their own rescripts. Certainly the emperor had to write *scripsi* or *rescripsi* at the end of a petition. He could make arbitrary decisions on points of law, in the sense that he had the legal power to do so. But if any emperor was actually so minded, his decisions were consigned to oblivion; the legal sources do not report them. Either for this reason or because he was lazy, few rescripts of Commodus are recorded.<sup>58</sup> Under an emperor who was docile,

<sup>42</sup> *CJ* 7.71.1 (22 Nov. 223); 5.55.2; 6.54.5 (both 224); 4.55.5; 9.23.4; 3.18.1; 4.24.6 (*quae*); 6.42.8; 9.22.5 (*quod*—all 225).

<sup>43</sup> Below, nn. 140–8.

<sup>44</sup> Seventeen such endings in sixty-five rescripts: *CJ* 9.41.1; 3.15.1; 4.26.2; 3.38.2; 7.32.1 (all 196); 2.11.2; 5.54.1; 2.50.1; 6.46.1; 6.50.2; 2.18.2; 8.16.1 (all 197); 4.28.3; 4.28.2 (both 198); 5.4.1; 6.47.1; 6.25.9 (all 199).

<sup>45</sup> *CJ* 8.19.1 (230); 9.34.1; 7.30.2; 4.19.3 (all 231); cf. 2.41.1 (232, ‘quod prospexerit’).

<sup>46</sup> Above, n. 39.

<sup>47</sup> e.g. *habere actionem*, *CJ* 5.12.2 (30 July 213); 7.73.3 (30 Dec. 213); 6.54.4; 6.2.3 (215); 2.18.7 (216); 8.37.2 (24 Feb. 217).

<sup>48</sup> e.g. *CJ* 2.4.4 (226, ‘nullam . . . nisi . . . non ambigitur . . . nisi’). Of forty-eight rescripts in 226–8 only eight are expressed positively.

<sup>49</sup> Below, n. 77–84.

<sup>50</sup> *CJ* 8.44.9 (22 Dec. 222); 6.30.2; 7.19.1; 4.48.2.1; 8.35.4; 6.33.2; 3.41.1; 4.56.2 (all 223). The earliest text is *CJ* 2.18.2 (197) and the next after 223 is *CJ* 9.22.4 (227).

<sup>51</sup> Below, n. 132.

<sup>52</sup> Above, n. 41.

<sup>53</sup> *CJ* 2.3.12 (230); 4.13.1.1 (238); 10.3.2 (239); 4.10.5; 4.26.7.1; 7.60.2; 4.49.8; 6.2.12.1; 7.16.22 (all 293); 8.13.20; 4.6.8; 6.57.2.1; 5.62.18.1; 3.37.5; 7.33.8.1; 5.42.4 (all 294); cf. 7.4.11.1; 7.45.7.1 (both *Diocl. et Max. AA et CC*).

<sup>54</sup> *CJ* 2.3.1 (200); 6.35.2 *pr.* (208); 2.53.2. (215); 6.22.1 (243); 7.16.12; 1.22.1; 6.23.11; 7.16.23; 4.38.6 (all 293); 4.38.9; 2.4.25; 2.18.20.2; 5.12.2.1; 3.33.24; 6.36.4; 7.16.35; 1.18.9; 4.21.12; 7.16.38 (all 294); cf. 9.51.8 (Val. et Gall.), 4.38.12 *pr.*; 4.38.13; 4.44.12 (*Diocl. et Max. AA et CC*).

<sup>55</sup> *CJ* 9.9.16.1 (256, ‘erras tu marite’); 6.25.5 (257, ‘reprehendenda es’); 9.22.7 (‘ipse significas’).

<sup>56</sup> p. 63.

<sup>57</sup> Appendix, p. 63f.

<sup>58</sup> Only three rescripts of Commodus as sole ruler are clearly attested: *D.* 12.3.10 (Callistratus, *lib. I quaestionum*), 35.3.6 (idem, *lib. IV cognitioinum*), 49.14.31 (Marcianus, *lib. IV institutionum*).

like Alexander, or vigorous and conscientious, like Severus, there was a large output of rescripts, but they record or choose between standard legal opinions. Out of 2491 rescripts only Caracalla is reported, on two or three occasions, to have granted indulgence contrary to strict law.<sup>59</sup>

Who then were the real authors of 'imperial' rescripts? They can only be the secretaries *a libellis*, whose styles are reflected in the successive periods of composition. It may be that in very simple cases, such as the *Apokrimata* of Severus record,<sup>60</sup> the emperor dictated a short answer. For any problem that was not straightforward, and for many that were, the composition fell neither to the emperor nor to a clerk in the office but to the secretary himself. When the Severan jurist Tryphoninus records<sup>61</sup> that 'rescriptum est ab imperatore libellos agente Papiniano creditorem a debitore pignus emere posse', the significance of this information must be that the holder of the office *a libellis* influenced the content of the rescript. He was in all the better position to do so because there is nothing to indicate a general practice that the emperor consults a *consilium* before answering these petitions. Naturally the emperor might consult his legal friends if he was perplexed.<sup>62</sup> But petitions were many and, unlike the conduct of trials, the answering of them was not a public performance. On the other hand few emperors are credited with legal expertise. Only Galba<sup>63</sup> and Macrinus<sup>64</sup> (and presumably the equestrian Philip) seem to have had legal training. It was natural for an emperor to rely on the advice of his secretary *a libellis* in the great majority of cases, and so not surprising to find evidence that that official drafted a reply to the petition before the emperor decided how to answer it. The evidence is the fact that on ten different occasions in the third century, when there is a change in the style of composition of rescripts (212, 213, 222, 223, 226, 229, 230, 241, 259 and 290) there is a period of overlapping style which runs from three weeks to four or five months. During these overlaps the rescripts display a mixture of the styles of the outgoing and incoming secretaries, or sometimes an alternation between the two.

An example may be taken from the change of office which took place on or about 30 July 213, and which involved the substitution of *si modo* for *modo si*.<sup>65</sup> Though in general inversion of the conditional was typical of the outgoing secretary, who uses it in twenty one of his eighty rescripts,<sup>66</sup> and absent from the rescripts of the new office holder,<sup>67</sup> a rescript of 9 September<sup>68</sup> provides an instance of a mixture of the two styles:

Imp. Antoninus A. Septimiae Marciae. Debitores tuos quibuscumque rationibus debere tibi pecuniam si probaveris, ad solutionem compellet aditus praeses provinciae: nec oberit tibi amissio instrumentorum [si modo manifestis probationibus eos debitores esse apparuerit].

The first sentence contains an inverted conditional characteristic of the outgoer (*debitores debere tibi pecuniam si probaveris*) but the last clause makes use of the *si modo* construction which the incomer has introduced into rescript composition, and of *si apparuerit*, which his predecessor does not use. The explanation is clearly that the qualification *si modo . . . apparuerit* has been added to a draft which originally stopped at *amissio instrumentorum*. Hence the outgoing secretary must have left a draft reply for the

<sup>59</sup> Above, n. 16. Since these rescripts all fall in the tenure of secretary no. 4—Arrius Menander, below n. 66—it is debatable how far these derogations reflect the emperor's personal intervention.

<sup>60</sup> *P. Col.* 123; W. L. Westermann, A. A. Schiller, *Apokrimata* (1954); H. C. Youtie, A. A. Schiller, 'Second Thoughts on the Columbia Apokrimata', *Chron. d'Egypte* 30 (1955) 327 = *SB* 9526.

<sup>61</sup> *D.* 20.5.12 pr. (*lib. VIII disputationum*). *Frag. Vat.* 9 shows that this was indeed Papinian's opinion.

<sup>62</sup> *D.* 37. 14. 17 pr. (Ulpian, *lib. XI leg. Iul. et Pap.*). Marcus here after consultation decided to depart from one of his own previous rescripts. Millar op. cit. (n. 2), 249 takes 'cuius sententiam nos quoque secuti sumus, cum rescriberemus.' to mean that Marcus and Verus had themselves composed the previous rescript. But since, formally speaking,

rescripts were imperial acts, the emperor could hardly express himself otherwise.

<sup>63</sup> Suetonius, *Galba* 5.1: 'inter liberales disciplinas attendit et iuri.'

<sup>64</sup> Herodian 4.12.1.

<sup>65</sup> Above, nn. 23-4.

<sup>66</sup> *Cy* 5.75.1.2; 5.16.1; 2.12.5; 6.24.2; 5.43.1; 5.37.3; 8.44.5; 4.29.1; 9.50.1 (all 212); 10.3.1; 9.12.2; 6.21.2; 5.54.2.1; 3.37.1 pr.; 5.16.3; 6.25.2; 5.14.2; 4.30.2; 5.51.2; 2.3.5 (all 213, before 31 July), cf. 7.26.1 (13 Aug. 213, overlap). This habit makes it possible to identify the composer as Arrius Menander, who wrote *de re militari* (Lenel, *Pal.* 1 695-700).

<sup>67</sup> Only three instances in 105 rescripts: *Cy* 6.31.2 (214); 4.26.3; 5.50.1 (both 215).

<sup>68</sup> *Cy* 4.21.1.

incomer to make use of when the emperor heard the petition. This text affords excellent evidence of the non-interpolation of *Cŷ* texts. A concluding clause with *apparuerit* would readily be regarded as interpolated, were it not that three of four texts with final *apparuerit* occur between September 213 and June 215.<sup>69</sup>

When overlap is present it is necessary to define a tenure of the *libelli* by three dates : (i) the first date at which clear signs of the new composer's style appear, (ii) the last date at which traces of the outgoing secretary's style are to be observed and (iii) the last date of a rescript in the new style before the date at which clear signs appear of a further change in style. The following table is compiled according to the criteria explained, the reference to the relevant *Cŷ* constitution being given in brackets.

Beginning of tenure	End of overlap	End of tenure
1. 26 Sept. 194 (2.23.1)		12 Feb. 202 (2.3.2)
2. 25 March 202 (2.3.3)		1 May 209 (7.74.1)
3. 15 July 209 (8.18.1)		28 Dec. 211 (6.45.1)
4. 5 Jan. 212 (5.75.1)	11 Feb. 212 (4.32.6)	28 July 213 (8.22.1)
5. 30 July 213 (2.3.7)	13 Dec. 213 (9.23.2)	22 Feb. 217 (2.18.9)
6. 19 Feb. 222 (4.44.1)		1 Oct. 222 (9.1.5)
7. 15 Oct. 222 (6.50.3)	6 Dec. 222 (8.44.8)	27 Oct. 223 (6.33.2)
8. 28 Oct. 223 (8.15.4)	1 Dec. 223 (4.56.2)	24 Jan. 226 (5.38.1)
9. 6 March 226 (2.4.4)	26 March 226 (7.30.1)	13 Aug. 229 (5.62.10)
10. 9 Sept. 229 (5.43.4)	5 Nov. 229 (5.17.1)	18 Dec. 229 (6.34.1)
11. 6 Jan. 230 (2.4.6)	27 Feb. 230 (2.3.12)	7 Sept. 234 (4.65.9)
12. 1 Jan. 238 (5.70.2)		12 June 241 (8.50.2)
13. 20 July 241 (6.40.1)	8 Sept. 241 (8.25.5)	2 July 246 (6.21.12)
14. 4 July 254 (6.23.5)		8 March 259 (4.65.13)
15. 15 March 259 (4.49.2)	16 June 259 (8.46.4)	24 Sept. 260 (2.30.3)
16. 13 Jan. 283 (7.04.5)		30 Aug. 284 (10.11.4)
17. 24 Nov. 284 (4.20.4)		15 Nov. 287 (8.46.6)
18. 19 Nov. 289 (4.19.8)		16 June 290 (6.50.12)
19. 18 June 290 (7.20.1)	1 July 290 (4.27.1)	4 Dec. 291 (8.47.5)
20. 1 Jan. 293 (3.34.8)		13 Apr. 295 (3.36.25)

The average tenure works out at 2.81 years, but as 17 and 18 are tenures of the same man, the average per secretary is nearly three years. This is long by Roman standards, and may be explained by the fact that legal expertise was needed in the holder, so that emperors would be glad to keep a competent man in office for a substantial period.

Some of the changes of office appear to reflect political events. The change from 1 to 2 coincides with the return of Severus to Rome from the east,<sup>70</sup> that from 2 to 3 (probably) with the occasion when, embarking on his campaign in Britain, Severus left Geta behind in charge of the civil administration,<sup>71</sup> that from 3 to 4 the fall of Geta.<sup>72</sup> The succession of 7 to 6 and 8 to 7 may be connected with advent of Ulpian to the praetorian prefecture<sup>73</sup> and his murder<sup>74</sup> respectively, and that of 13 to 12 with the rise of Timesitheus to the same office.<sup>75</sup> Equally striking, however, are political changes, like those of 238, which left no mark on the office *a libellis*.

## II. TWO EXAMPLES : PAPINIAN AND HERMOGENIANUS

To illustrate how in practice the chronological reading of rescripts can lead to the definition of stylistically coherent periods of composition and in some instances to the identification of the composer with a jurist known to us from other sources I take two examples, the first and last of the identifiable secretaries *a libellis* for the period.

<sup>69</sup> *Apparuerit* texts are *Cŷ* 4.28.4 (201); 7.8.1 (205); 4.21.1 (9 Sept. 213, final); 6.37.5 (same, final); 4.26.4 (215, final); 5.18.3 (215); 6.50.3 (222); 5.63.1 (223); 2.4.3 (223); 8.29.4 (240); cf. 4.61.3 (Sev. et Ant.), 4.32.9 (Ant.), 11.39.1 (Alex.).

<sup>70</sup> Herodian 3.10.2; Hist. Aug., *Severus* 16.8.

<sup>71</sup> Herodian 3.14.9.

<sup>72</sup> Probably on 26 December 211. T. D. Barnes, 'Pre-Decian Acta Martyrum', *JTS* 19 (1968), 552.

<sup>73</sup> Advent before 1 Dec. 222: *Cŷ* 4.65.4.1.

<sup>74</sup> Murder some considerable time before May/June 224: *Pap. Oxy.* xxxxi, no. 2565.

<sup>75</sup> *RE* vii. 364, 366; Hist. Aug., *Gord.* 23.5.6.

It should be noted that when the *Cy* texts in which the relevant expression is found are set out in the footnotes, these run in the first example from 193 to 282, and in the second from 193 to 305.

(a) No. 1 = 26 Sept. 194 (*Cy* 2.23.1) to 12 Feb. 202 (*Cy* 2.3.2). *Papinian*

No. 1 is a brisk, business-like lawyer's lawyer who spares us no technicality. Thus : <sup>76</sup>

Cum filius familias tutor aut curator datur, pater tutelae vel negotiorum gestorum iudicio de peculio et de in rem verso conveniendus est. Quod si voluntate eius filius decurio sit creatus et a magistratibus tutor constitutus, pater in solidum satisfacere cogitur.

To him it is self-evident that the law must be stated in terms of the actions,<sup>77</sup> exceptions,<sup>78</sup> interdicts,<sup>79</sup> claims,<sup>80</sup> forms of execution<sup>81</sup> and the like<sup>82</sup> with which the law books familiarize us. All his successors will make at least some concession to the predicament of the man who has not attended a law school. In the sixty seven rescripts from September 194 till early 202 inclusive there are no less than twenty nine mentions of forms or types of action,<sup>83</sup> exception or interdict. This level of technicality will not return.<sup>84</sup> Our secretary also envisages his petitioner's problems from the standpoint of proof. Hence he tends to tell the inquirer what his position is if he can prove (*si probaveris*)<sup>85</sup> certain facts, rather than if the facts are, as the petitioner states, so-and-so. He is used to advising on litigation; visibly a lawyer with a substantial *responsum* practice. Structurally, the most striking feature of his drafting is his tendency to end a sentence or rescript with *est*,<sup>86</sup> for example *manifestum est* (a favourite),<sup>87</sup> *notum est*,<sup>88</sup> *declaratum est*,<sup>89</sup> *incivile est*,<sup>90</sup> *receptum est*,<sup>91</sup> *certi et explorati iuris est*,<sup>92</sup> *rationis est*,<sup>93</sup> *necessarium est*.<sup>94</sup> *Cogi* is favoured to express being liable.<sup>95</sup> With the help of these criteria we can mark out a tenure beginning on 26 September 194 (*non cogaris, mandati iudicio*)<sup>96</sup> until 12 February 202 (*si probare potueris, exceptione taciti pacti*).<sup>97</sup>

One of the distinctive phrases of the period is *rationis est*, which occurs on 21 March 197 and 25 February 198,<sup>98</sup> thereafter only in an undated rescript of Gordian.<sup>99</sup> The slightly different *non est rationis* comes in an undated constitution of 'Antoninus'.<sup>100</sup>

This is an important clue to the identity of the secretary. *Rationis est* occurs in six *Digest* texts, four in Papinian and one each from Marcianus and Macer.<sup>101</sup> But the latter are simply citations from constitutions of Severus and Antoninus. So all the *Digest* texts come from Papinian or the emperors reigning in 197-202. This turn of phrase, 'it stands to reason', is Papinian's. We know the great lawyer was secretary *a libellis* to Severus.<sup>102</sup> We did not know exactly when.

<sup>76</sup> *Cy* 4.26.1 (196).

<sup>77</sup> Below, n. 83.

<sup>78</sup> *Cy* 2.3.2 (12 Feb. 202).

<sup>79</sup> *Cy* 8.2.1 (197).

<sup>80</sup> *Cy* 4.30.1 = 8.32.1 (197).

<sup>81</sup> *Cy* 4.15.1 (197, *pignoris capio*), 4.55.1; 4.55.2 (both 200, *manus iniectio*).

<sup>82</sup> *Cy* 6.54.3 (196, *ius praetorium*).

<sup>83</sup> *Cy* 2.23.1 (194); 6.39.1; 2.18.1; 4.26.1 *bis*; 3.28.2 (all 196); 2.11.2 *ter*; 5.18.1; 3.28.3; 2.30.1; 4.30.1; 3.36.1 (all 197); 2.18.3 *bis* (199); 6.2.1 *ter*; 4.55.2 (all 200); 5.58.1; 5.12.1 *quinq.*, 2.18.4 (all 201).

<sup>84</sup> The rate of such citations is about double that for any subsequent tenure.

<sup>85</sup> *Cy* 5.47.1; 8.2.1 (both 197); 2.11.4; 6.53.1 (both 198); cf. 6.39.1 (196, 'probatura es'); 7.4.1.1. (197, 'si docueris'); 2.3.2 (12 Feb. 202, 'si probare potueris'); 4.30.1 (197, 'probaturus es'); 3.31.2 (200, 'si liquido probaretur').

<sup>86</sup> Seventeen rescripts out of sixty-five: below, nn. 87-94 and *Cy* 2.11.2; 5.54.1; 2.50.1 (all 197); 4.283. (198).

<sup>87</sup> *Cy* 9.41.1 (196); 6.46.1 (197); 6.47.1; 6.25.1 (both 199). In view of this trait the last clause in 6.46.1 is clearly interpolated.

<sup>88</sup> *Cy* 3.15.1 (196).

<sup>89</sup> *Cy* 4.26.2 (196).

<sup>90</sup> *Cy* 3.28.2 (196).

<sup>91</sup> *Cy* 7.32.1 (196); 2.18.2 (197).

<sup>92</sup> *Cy* 6.50.2 (197).

<sup>93</sup> *Cy* 8.16.1 (197); 4.28.2 (198).

<sup>94</sup> *Cy* 5.4.1 (199).

<sup>95</sup> *Cy* 2.23.1 (194); 4.19.1; 6.39.1 (both 196); 4.26.1 (197); 3.31.2 (200).

<sup>96</sup> *Cy* 2.23.1

<sup>97</sup> *Cy* 2.3.2.

<sup>98</sup> *Cy* 8.16.1; 4.28.2.

<sup>99</sup> *Cy* 4.52.2.

<sup>100</sup> *Cy* 11.36.1.2.

<sup>101</sup> *D.* 23.2.34 *pr.* (Papinian, *lib. IV responsorum*), 23.3.69.1 (*idem, IV resp.*), 29.5.21.1 (*idem, VI resp.*); 31.66.4 (*idem, XVII quaestionum*); 28.5.49.2 (Marcianus, *IV institutionum*); 48.21.2 *pr.* (Macer, *II publicorum*).

<sup>102</sup> *D.* 20.5.12 *pr.*, cf. *Frag. Vat.* 9. On Papinian, Lenel, *Pal.* 1 803-946; W. Kunkel, *Herkunft und Soziale Stellung der römischen Juristen* (1967), 224; H. G. Pfau, *Les carrières procuratoriennes équestres sous le haut-empire romain* (1960-1), no. 220.

The identification helps to set the limits of his tenure. *Neque enim aequitas patitur* (21 April 200)<sup>103</sup> is a *hapax* in *Cj*, and *non enim aequitas hoc probare patitur*<sup>104</sup> in the *Digest*. 'Equity does not allow . . .'. *Faenebris pecunia*, is another Papinian *hapax* in the *Digest*.<sup>105</sup> In the *Cj* it occurs only in a constitution of 27 September 200.<sup>106</sup> Papinian is not the most elegant or lucid of writers, 'cum fides veritatis verborum adminicula non desideret',<sup>107</sup> he says. What is one to say of *intentio dati pignoris*, found only in a rescript of 197,<sup>108</sup> or of another *Cj hapax*, (*pecuniam numeratam implere*),<sup>109</sup> to prove payment, which parallels a *Digest hapax* also of Papinian?<sup>110</sup> A *Cj* text of September 194 has another unique expression, *sed ea res fideiussores excusare non potest*,<sup>111</sup> which again echoes a *Digest hapax*, *ea res filium non excusat*.<sup>112</sup> In the *Digest vita decedere* (twenty nine texts) is found only in Papinian: <sup>113</sup> two of three dated *Cj* texts belong to this period.<sup>114</sup> *Coniectura pietatis* is *hapax* both in the *Digest* and in a *Cj* text of 197.<sup>115</sup>

As to the limits of No. 1's tenure, one might fix the starting point at 26 September 194.<sup>116</sup> As to the end of the tenure we have evidence that Papinian was in office on 25 November 200,<sup>117</sup> when we find the phrase *condicionis incertum* which is a *hapax* in both *Cj* and *Digest*.<sup>118</sup> The rescript already cited of 12 February 202 also bears his imprint,<sup>119</sup> since *non inutiliter* with the future passive (here *defenderis*) is paralleled in the *Digest* only by four texts of Papinian.<sup>120</sup> The dates suggested by internal *Cj* evidence therefore coincide with those drawn from a comparison with Papinian's writing outside it. The change of tenure in February-March 202 seems to be connected with the return of Severus to Rome from the east, when he occupied himself with problems of civil administration.<sup>121</sup> Papinian's tenure is the longest of which we have record.<sup>122</sup> He is known to have attained the praetorian prefecture in 205 on the fall of Plautianus. Hence there is a gap of three years in his career.

(b) No. 20 = 1 Jan. 293 (3.34.8) to 13 April 295 (3.36.25). *Hermogenianus*

This secretary must count as one of the leading Roman lawyers. Not only is the surviving bulk of his work comparable with that of any other legal writer apart from Ulpian and Paul,<sup>123</sup> but its quality is outstanding. His rescripts are short, concise, doctrinally consistent and polished. They constitute a legal education in themselves.

The rescripts of the first two years of this tenure, 293-4, unlike the previous ones, were incorporated in the *Codex Hermogenianus*.<sup>124</sup> This must have been planned from the start. The code and the tenure of the office *a libellis* begin at the same time as the tetrarchy. It is true that Constantius and Maximian (often called Galerius to distinguish him from the Augustus Maximian) were proclaimed Caesars on 1 March 293 in Milan and Nicomedia respectively.<sup>125</sup> But from a legal point of view the tetrarchy began on 1 January 293, and all constitutions from this date on are attributed to 'Diocletianus et Maximianus Augusti et

<sup>103</sup> *Cj* 6.2.1 (200).

<sup>104</sup> *D.* 31.70.1 (Papinian, xx *quaestionum*).

<sup>105</sup> *D.* 22.1.9 pr. (Papinian, xi *responsorum*).

<sup>106</sup> *Cj* 4.32.3 (200).

<sup>107</sup> *Cj* 2.38.1 (198, referring of course to evidence, not style).

<sup>108</sup> *Cj* 4.30.1 (197).

<sup>109</sup> *Cj* 4.19.1 (196).

<sup>110</sup> *D.* 20. 4. 1 pr. (Papinian VIII *quaestionum*: 'numeratio impleta est').

<sup>111</sup> *Cj* 2.23.1 (194).

<sup>112</sup> *D.* 50.7.8 (Papinian I *responsorum*).

<sup>113</sup> *Voc. Iur. Rom.* II 98, 11-15; W. Kalb, *Bekannte Federn in Reskripten römischer Kaiser. Commentationes Woelfftianae* (1891), 329.

<sup>114</sup> *Cj* 2.50.1 (197); 2.3.1 (200); 7.21.2 (205); cf. 7.21.1 (Sev. et Ant.). *Vita cessisse*, *Cj* 3.28.3 (197) only.

<sup>115</sup> *D.* 35.1.102 (Papinian, IX *responsorum*), *Cj* 3.28.31 (197).

<sup>116</sup> *Cj* 2.23.1, above n. 111.

<sup>117</sup> *Cj* 2.3.1.

<sup>118</sup> *D.* 37.11.11 pr. (Pap. 13 *qu*: 'propter incertum condicionis').

<sup>119</sup> *Cj* 2.3.2; above, n. 116.

<sup>120</sup> *D.* 21.2.66.2 (Papinian, xxviii *quaestionum*: 'agetur'), 22.1.9.1 (Pap., xi *responsorum*: 'opponetur'), 26.7.37.1 (Pap., xi *quaestionum*: 'convenietur'), 39.6.42 (Pap., xiii *responsorum*: 'opponetur'), cf. *Cj* 3.1.2. (210, 'uteris'), perhaps evidence of a connection (historically plausible: they were associates of Geta: nn. 71, 72) between secretary no. 3 and Papinian. *Cj* 8.15.1 (22 Oct. 194) has 'non inutilis erit exceptio'.

<sup>121</sup> Herodian 3.10.2; *Hist. Aug., Severus* 16.8; Dio 76.1.1.

<sup>122</sup> Seven years, 140 days: no. 2 held office for seven years, 38 days.

<sup>123</sup> We have less of his compositions than of Gaius, more than of Modestinus.

<sup>124</sup> Krueger-Mommsen-Studemund, *Collectio librorum iuris anteiustiniiani* III (1890); A. Cenderelli, *Ricerche sul Codex Hermogenianus* (1965); G. Rotondi, *Scritti giuridici* I (1922), 111.

<sup>125</sup> E. Stein, *Geschichte des spätromischen Reichs* I (1928), 98.



Constantius et Maximianus nobilissimi Caesares'.<sup>126</sup> The beginning of the present tenure therefore coincides with the introduction of a new constitutional order.

The total number of lines in the dated rescripts of this tenure comes to 36.5 per cent of all dated rescripts between 193 and 305. As a rule of thumb I have not cited as marks of no. 20's style any expression unless at least sixty per cent of the citations of the word or phrase in question come from 293-5.

Our secretary likes to set out the law first, then apply it to the facts. To make the transition he favours *unde*,<sup>127</sup> *quapropter*<sup>128</sup> and *idcirco*.<sup>129</sup> He is fond of the form of argument that something is not legally sufficient by itself to produce a given result, in particular (*propter*) *hoc solum . . . non (oportet etc.)*.<sup>130</sup> Forty-eight of fifty-four dated texts with *convenit*,<sup>131</sup> meaning 'it is settled', come from this tenure. Characteristic ways of stating the facts as seen by the petitioner include the relative (*quem etc.*) with *commemorans*,<sup>132</sup> *quoniam proponis*<sup>133</sup> or *cum significes*<sup>134</sup>/*significas*.<sup>135</sup>

Our secretary favours initial *nec . . . nec*,<sup>136</sup> *nihil*<sup>137</sup> and *quominus*.<sup>138</sup> He also likes to begin with certain prepositions: *in* with the accusative,<sup>139</sup> *ad*<sup>140</sup> (as in *ad probationem*) *sub*<sup>141</sup> (*praetextu*), *ab hostibus captus*,<sup>142</sup> *de his quae*,<sup>143</sup> *contra eos qui*,<sup>144</sup> *ante*,<sup>146</sup> *inter*.<sup>147</sup> *per*.<sup>148</sup> No. 20 likes to state the legal position emphatically. Thus he resorts to *absoluti*<sup>149</sup> /*absolutissimi*,<sup>150</sup> *certissimi*,<sup>151</sup> *evidentis*<sup>152</sup>/*evidentissimi*,<sup>153</sup> *manifestissimi*<sup>154</sup> and *notissimi*<sup>155</sup> *iuris est*, *ambigui iuris non est*,<sup>156</sup> *incerti iuris non est*,<sup>157</sup> and to related expressions such as *evidenter*,<sup>158</sup> *evidentissime*,<sup>159</sup> *evidens est*<sup>160</sup> and *certissimum est*.<sup>161</sup>

Our secretary's use of *respuere*,<sup>162</sup> to reject, *velamentum*,<sup>163</sup> a pretence, and *velare*,<sup>164</sup> to pretend, is untypical metaphorical. He is insistent that the absence of documentary evidence cannot 'alter the truth' i.e. prevent oral and other non-documentary evidence

- <sup>126</sup> *Corp. Iur. Civ.* II. 495 n.1.  
<sup>127</sup> Thirty-two of forty-one dated texts. *Voc. Cod. Iust.* I 2457.  
<sup>128</sup> *Cy* 2.3.12 (230); 4.13.1.1 (238); 10.3.2 (239); 4.10.5; 4.26.7.1; 7.60.2; 4.49.8.1; 6.2.12.1; 7.16.22 (all 293); 8.13.20; 4.6.8; 6.57.2.1; 5.62.18.1; 3.37.5; 7.33.8.1; 5.42.4 (all 294); cf. 7.4.11.1; 7.45.7.1 (*Diocl. et Max. AA et CC*).  
<sup>129</sup> *Cy* 2.3.1 (200); 6.35.2 *pr.* (200); 2.53.2 (215); 6.22.1 (243); 7.16.12; 1.22.1; 6.23.11; 7.16.23 (all 293); 4.38.6; 4.38.9; 2.4.25; 2.18.20.2; 5.12.2.1; 3.32.24; 6.36.4; 7.16.35; 1.18.9; 4.21.12; 7.16.38 (all 294); cf. 9.51.8 (Val. et Gall.), 4.38.12 *pr.*; 4.38.13.4.44.12 (*Diocl. et Max. AA et CC*).  
<sup>130</sup> *Cy* 2.41.1.1 (232); 4.44.4; 7.33.3; 7.16.18; 7.22.1; 4.65.21; 4.44.8 (all 293); 4.44.11.1; 4.44.13 (294); cf. 7.34.1 (*Diocl. et Max. AA*), 10.48.6 (*Diocl. et Max. AA et CC*).  
<sup>131</sup> Too numerous to set out here. *Voc. Cod. Iust.* I, 731.  
<sup>132</sup> *Cy* 4.44.4; 4.19.10; 5.12.11; 5.16.17; 7.16.13; 8.44.21.1 (all 293); 8.40.22 (294); cf. 10.43.1 (Car., Car. and Num.).  
<sup>133</sup> *Cy* 6.30.7 (293); 2.4.28.1 (294); cf. 4.31.10 (*Diocl. et Max. AA et CC*).  
<sup>134</sup> *Cy* 5.70.4 (293).  
<sup>135</sup> *Cy* 8.13.13; 8.42.11 (both 293).  
<sup>136</sup> *Cy* 8.53.10; 7.16.15; 4.24.10; 4.1.7 (all 293); cf. 7.1.3, 8.48.4 (*Diocl. et Max. AA et CC*).  
<sup>137</sup> *Cy* 8.42.4 (238); 7.29.2; 7.1.2 (both 293); 2.12.20; 4.50.9 (294).  
<sup>138</sup> *Cy* 8.19.3; 4.24.12 (both 294).  
<sup>139</sup> *Cy* 5.31.3 (215); 4.31.2 (223); 5.75.2 (224); 5.42.3 *pr.* (287); 3.19.1 (293); 4.15.5; 8.47.7; 8.47.8; 3.37.5; 2.26.5; 6.56.2; 9.12.5; 7.72.8; 6.2.18 (294); cf. 7.2.5 (Alex.), 9.49.4; 9.51.6 (both Gord.); 4.38.13 (*Diocl. et Max. AA et CC*).  
<sup>140</sup> *Cy* 2.11.6 (293); 3.37.3 (224); 5.38.2 (226); 3.42.5 (239); 6.49.2 (244); 5.44.3 (265); 5.44.4 (267); 5.30.1 (290); 5.30.2; 4.44.4; 7.16.18; 6.58.5; 4.65.23 (all 293); 7.52.5; 2.19.6; 4.19.21 *pr.*; 4.35.16; 2.39.2; 7.14.12; 2.17.4; 4.19.22 (all 294); cf. 10.61.2 (Gord.); 7.14.10 (*Diocl. et Max. AA et CC*).  
<sup>141</sup> *Cy* 2.4.19; 4.16.4 (both 293); 2.4.29 (294).  
<sup>142</sup> *Cy* 8.50.12; 7.35.6; 8.50.18 (all 293).  
<sup>143</sup> *Cy* 5.37.12 (241); 5.12.11; 5.16.17; 9.33.4; 6.2.11 (all 293); 3.35.6 (294).  
<sup>144</sup> *Cy* 2.35.1, 11.31.2 (both 294).  
<sup>145</sup> *Cy* 4.49.15 (294); cf. 10.43.4 (*Diocl. et Max. AA et CC*).  
<sup>146</sup> *Cy* 4.8.2; 5.12.16 (both 294).  
<sup>147</sup> *Cy* 7.60.1; 7.60.2 (both 293); 5.71.17 (294); cf. 3.36.11 (Phil.).  
<sup>148</sup> *Cy* 7.32.1 (196); 7.32.8; 3.34.11; 5.39.5 (all 294); cf. 4.32.4 (Sev. and Ant.).  
<sup>149</sup> *Cy* 6.20.12.2 (294).  
<sup>150</sup> *Cy* 4.17.1 (294); cf. 9.49.6 (*Diocl. et Max. AA et CC*).  
<sup>151</sup> *Cy* 4.5.4; 4.15.4; 5.34.5; 2.21.5.1; 8.4.2 (all 293); 5.62.18 *pr.*; 6.50.17; 6.36.5 (all 294).  
<sup>152</sup> *Cy* 7.23.1 (294); cf. 7.14.9 (*Diocl. et Max. AA et CC*).  
<sup>153</sup> *Cy* 7.33.5; 7.14.6 (both 293); 6.29.2 (294).  
<sup>154</sup> *Cy* 5.12.20 (294); 8.53.24 (299): 'Manifestissimi iuris'; *Cy* 4.13.3 (294).  
<sup>155</sup> *Cy* 7.60.2; 7.75.4 (both 293); 2.4.26 (294).  
<sup>156</sup> *Cy* 5.57.2 (225); 9.22.6 (249); 4.9.2; 7.27.2; 4.26.7 *pr.*; 6.20.11 (all 293); 3.22.4; 5.34.10 (both 294); cf. 7.3.3 (*Diocl. et Max. AA et CC*).  
<sup>157</sup> *Cy* 6.26.8.1; 5.51.7; 4.5.5; 8.53.11 *pr.*; 8.13.14; 9.20.9; 3.36.19; 8.1.3 (all 293); 2.56.1 *pr.* (294).  
<sup>158</sup> *Cy* 6.46.1 (197); 7.4.10.1 (260); 6.55.3; 8.15.6; 2.42.3.3; 8.30.3; 6.55.4 (all 293); 9.35.8; 4.2.15; 6.23.14 (all 294).  
<sup>159</sup> *Cy* 4.16.7 (294).  
<sup>160</sup> *Cy* 6.30.7; 4.16.4 (both 293).  
<sup>161</sup> *Cy* 4.12.3; 3.36.17 (both 293); 4.8.2 (294).  
<sup>162</sup> *Cy* 3.32.19 (293); 6.31.3 (294); 3.36.25 (295).  
<sup>163</sup> *Cy* 5.6.1 (215); 7.20.1 (290); 2.4.23; 2.4.27; 1.18.7; 7.16.30; 2.4.35; 6.19.1; 9.9.26; 7.50.2.1; 2.6.4 (all 294).  
<sup>164</sup> *Cy* 9.20.14 (294).

being given : it cannot *veritatem* (or *substantiam veritatis*) *mutare*,<sup>165</sup> *convellere*,<sup>166</sup> *minuere*.<sup>167</sup>

A small selection of rescripts will serve to illustrate the style and outlook of this important legal writer. The first characteristically emphasizes the sanctity of agreements :<sup>168</sup>

De contractu venditionis et emptionis iure perfecto alterutro invito nullo recedi tempore bona fides patitur, nec ex rescripto nostro, quo iure fiscum nostrum uti saepe constitutum est.

*Pacta sunt servanda*. The emperor obeys the rule of law. Precedents are to be respected. Three cardinal principles in as many lines. Again :<sup>169</sup>

Non nudo consensu patria liberi potestate, sed actu sollemni vel casu liberantur, nec causae, quibus motus pater mancipavit filium, sed actus sollemnitatis quaeritur.

First grasp the distinction between acts for which informal consent is sufficient and those, such as emancipation, for which formality is needed. Then apply the principle that for formal acts motive is irrelevant. Though the doctrines are not made explicit, we are moving in an academic and systematic environment.

The rescript cited<sup>170</sup> displays magisterial pedantry. A father's power over his son may be extinguished *casu*, by death or loss of status, which, except in a law school, hardly needs saying. The professorial tone goes further. Petitioners are rapped over the knuckles for not expressing themselves clearly.<sup>171</sup> The vice no. 20 reproves is intellectual : *nimia credulitas*.<sup>172</sup>

The law values personal freedom, at any rate between social equals :<sup>173</sup>

In communionem vel societatem nemo compellitur invitus detineri: quapropter aditus praeses provinciae ea, quae communia tibi cum sorore perspexerit, dividi providebit.

The rescript breathes respect for the will of the owner. The legal universe proceeds according to fixed rules, not arbitrary upsets :<sup>174</sup>

Parentes natales non confessio adsignat. Quapropter si ex ancilla nata post ad libertatem manumissa pervenisti, te velut ex altera natam ancilla servam professa quaesitam manumissione libertatem huiusmodi simulatione vel errore amittere minime potuisti, cum servi nascantur ratione certa, non confessione constituentur.

Your status is fixed by law, not at the mercy of what people or records may state.

The rescripts cited give some impression of the ideas dominant in the work of secretary no. 20. The law is now a systematic discipline, *disciplina iuris*,<sup>175</sup> in which general principles, once grasped, yield a maximum of solutions to individual problems. It is a discipline which, with the aid of application and natural reason, is within the reach of all. Once the fundamentals are learned, syllogistic reasoning will carry one through to the end. The form of the secretary's rescripts, in which premise is so often linked to conclusion with *unde*, *idcirco* or *quapropter*,<sup>176</sup> vividly demonstrates this standpoint. The emperor, through his secretary, is educating the petitioner to accept a legal proposition which in a sense he already knows, a truth which encapsulates the principles of social dealing appropriate to a civilized society. The material is Roman but the intellectual force is now Greek. A philosophically minded people restates the law. There have indeed been academic forerunners, like Gordian's secretary (no. 11) of 238-41.<sup>177</sup> But now time has left its mark, and Roman law has become Romano-Greek law, a marriage of casuistry, sharp outlines and system-building. The

<sup>165</sup> C<sup>y</sup> 4.49.8 *pr.*; 1.18.5 (both 293); 4.39.10; 4.22.2; 7.16.27.1 (all 294).

<sup>166</sup> C<sup>y</sup> 4.21.11 (294).

<sup>167</sup> C<sup>y</sup> 7.16.15 (293).

<sup>168</sup> C<sup>y</sup> 4.44.3 (293).

<sup>169</sup> C<sup>y</sup> 8.48.3 (293).

<sup>170</sup> C<sup>y</sup> 8.48.3 (293).

<sup>171</sup> C<sup>y</sup> 6.26.8 (293, 'precibus tuis manifestius exprimere debueras'), 8.39.2 (293, 'exprimere debueras precibus tuis').

<sup>172</sup> C<sup>y</sup> 4.10.11 (294).

<sup>173</sup> C<sup>y</sup> 3.37.5 (294).

<sup>174</sup> C<sup>y</sup> 7.16.22 (293).

<sup>175</sup> C<sup>y</sup> 4.6.8 (294), 4.32.22 (*Diocl. et Max. AA et CC*).

<sup>176</sup> Above, nn. 127-9.

<sup>177</sup> See Table on p. 56.

culmination builds on a long tradition of receptiveness to Greek influence, which runs from Quintus Mucius Scaevola in the Republic to Labeo, Gaius and Ulpian. All of these tried by definition, classification and the search for principle to reduce Roman law to order and harmony. But it owes much also to Diocletian's third secretary *a libellis*, a man who, notably out of sympathy with the *nimia credulitas* of the age, deserves to be called the last classical lawyer and the first legal theorist.

His tenure may be taken to begin from 1 January 293, since a rescript of that date<sup>178</sup> has *minime prohibetur*.<sup>179</sup> Up to the end of 294 there is no difficulty. On 30 December 294 we find *edicti forma perpetua declaret*<sup>180</sup> and *probationis onus*.<sup>181</sup> Thereafter difficulties abound. There are no more than twelve private rescripts in *Cj* for 295-305.<sup>182</sup> The *Codex Hermogenianus* was intended to, and did, bring about a transformation of the rescript system. Texts of 13 April 295,<sup>183</sup> 19 August 299,<sup>184</sup> and 23 August 301<sup>185</sup> have marks of no. 20's style, and rescripts of 5 February 299<sup>186</sup> and 6 January 303<sup>187</sup> arguably do so. Others of the twelve scattered constitutions seem to be by another hand.<sup>188</sup> Slender evidence from sources outside *Cj* suggests that no. 20 twice held the western *libelli*, in 291<sup>189</sup> and again in 295-8.<sup>190</sup> A rather teasing text of late 284,<sup>191</sup> important for the history of Diocletian's accession, can be read as indicating that he held the eastern *libelli* briefly at that time, before Diocletian, after the death of Carinus, took over the latter's officials.<sup>192</sup> If so, our secretary was one of the earliest collaborators in the reforming regime. The eastern tenure here under review, however, can be extended only from the beginning of 293 to 13 April 295.

It seems to me nearly certain that secretary no. 20 is the Hermogenianus who gave his name to the *Codex Hermogenianus*. In a thorough study of the question, Liebs<sup>193</sup> concluded that the compiler of the codex was the same man as the author of *Iuris Epitomae* from which there are excerpts in the *Digest*. The matter can be taken a stage further, since an epitomizing style is common to the author of *Iuris Epitomae* and the private rescripts of 293-4. The secretary *a libellis* of 293-4 was the person best placed to collect the relevant material for the *Codex Hermogenianus* and the person most likely to be charged by Diocletian with such a task. What is more, the rescripts of 293-4 differ from those of the *Codex Gregorianus* in that most of them are subscribed D (*data*) or S (*subscripta*), not PP (*proposita*). This is an indication that the compiler did not have to await publication of the rescripts before making copies for his own work.

The question remains whether a detailed study of the style of *IE* in comparison with *CH* bears out the suggested identification. We have 612 lines, as printed in Lenel's *Palingenesia*, from *IE* and the equivalent of 3898 lines in the form of rescripts from *CH* in *Cj*, between six and seven times as much material. There are a number of parallels: the use of *idcirco*,<sup>194</sup> of initial *ad*,<sup>195</sup> *sub*<sup>196</sup> and *per*,<sup>197</sup> of *convenit*,<sup>198</sup> *praetextu*<sup>199</sup> (or *praetexto*),

<sup>178</sup> *Cj* 3.34.8.

<sup>179</sup> *Cj* 4.29.6.1 (228); 3.34.8 (293); 8.47.9 (294).

<sup>180</sup> *Cj* 6.2.18. Twenty of thirty-one dated texts with impersonal *declaret* fall in 293-4.

<sup>181</sup> *Cj* 8.42.25. *Probationis onus* is found only in *Cj* 4.19.15 *bis* (293); 4.19.20; 8.42.25 (294); cf. 7.16.5.2 (Alex.); 4.30.10 (*Diocl. et Max. AA et CC*).

<sup>182</sup> *Cj* 5.72.3 (18 March 295); 3.36.25 (13 Apr. 295); 8.53.24 (5 Feb. 299); 9.45.6 (29 June 299); 3.21.1 - 4.50.7 - 7.72.9 (19 Aug. 299); 7.21.8 (22 Nov. 299); 9.21.1 (12 Feb. 300); 7.22.2 (26 March 300); 3.28.25 (4 July 301); 4.12.4 (23 Aug. 301); 2.30.4 (6 Jan. 303); 9.1.18 (28 Feb. 304).

<sup>183</sup> *Cj* 3.36.25 (*respuere*, above, n. 162).

<sup>184</sup> *Cj* 3.21.1 - 4.50.7 - 7.72.9 (*eum contra quem supplicas*: eleven of fourteen texts with this expression, or the plural *supplicastis*, come from 293-4).

<sup>185</sup> *Cj* 4.12.4 (*minime prohiberis*); 6.2.4 (222); 9.25.1 (293); 4.38.6; 5.18.7; 2.4.24; 3.35.6 (all 294); 4.12.4 (301), *urgueri* (twenty-four of twenty-seven dated texts from 293-4).

<sup>186</sup> *Cj* 8.53.24 (*manifestissimi iuris est*, above, n. 154).

<sup>187</sup> *Cj* 2.30.4 (highly condensed construction).

<sup>188</sup> *Cj* 7.22.2 (26 March 300, *salubris iam pridem ratio*), 3.28.25 (7 July 301, *inofficiosi eo modo*

*actionem*) have a separation of noun from adjective or noun object which are contrary to no. 20's habit.

<sup>189</sup> *Frag. Vat.* 315 (18 Feb. 291, Dorocortorum, *convenit* above, n. 131).

<sup>190</sup> *Frag. Vat.* 292 (21 Dec. 295, Mediolanum, *ratio dictaverit* cf. only *Cj* 6.23.10, 293, *dictat iuris ratio*); 313 (31 March 296, Aquileia, *quam commemoras*, above n. 132); 41 (10 March 298, Carthago); *commemores* only in *Cj* 7.19.5; 8.53.11; 7.16.16 (all 293); 4.12.3 (301).

<sup>191</sup> *Cj* 3.7.1 (15 Oct. 284, *invitus agere vel accusare nemo cogitur*) points to no. 20 (below nn. 216-18) and is ascribed to Diocletian.

<sup>192</sup> E. Stein, op. cit. I, 94.

<sup>193</sup> D. Liebs, *Hermogenians Iuris Epitomae* (1964).

<sup>194</sup> *D.* 4.4.17 (I *iur. epit.*); 47.19.5 (II *iur. epit.*); 40.15.3 (VI *iur. epit.*); cf. above, n. 129.

<sup>195</sup> *D.* 49.1.26 (II *iur. epit.*); 25.2.16 (II *iur. epit.*); 35.2.40 (IV *iur. epit.*); cf. n. 140 above.

<sup>196</sup> *D.* 37.4.18 (III *iur. epit.*); cf. n. 141 above.

<sup>197</sup> *D.* 41.2.50 (V *iur. epit.*); cf. n. 148 above.

<sup>198</sup> *D.* 36.4.11.1 (IV *iur. epit.*); cf. n. 131 above.

<sup>199</sup> *D.* 19.2.33 (II *iur. epit.*); 24.1.60 (II *iur. epit.*); 40.16.5 (V *iur. epit.*). Eleven of seventeen dated *Cj* texts with *praetextu* come from 293-4.

*pellere*,<sup>200</sup> *sumere*,<sup>201</sup> *nocere*,<sup>202</sup> *prodesse*<sup>203</sup> and *superior*<sup>204</sup> in the sense of 'former'. *Translatio domini*,<sup>205</sup> first found in *Cj* in this tenure, is also in *IE*. *Pro donato sive alio quolibet titulo*<sup>206</sup> in *IE* runs close to *donationis titulo aut quolibet alio modo*<sup>207</sup> in a *Cj* text of 294. *IE* is strongly marked by a fondness for third person present passive constructions, whether personal or impersonal, the point of which is perhaps to make the law appear more objective. Some of these are also marks of no. 20's style (*compellitur/-untur*,<sup>208</sup> *desideratur*,<sup>209</sup> *excluditur/-untur*)<sup>210</sup> and others (*coercetur/-entur*)<sup>211</sup> are at least common to both. *Magna est differentia*<sup>212</sup> in *IE* matches *cum magna sit differentia*<sup>213</sup> in *Cj*; *quod servatur*<sup>214</sup> in *IE* the same expression in *Cj*.<sup>215</sup> *Non est prohibitum*<sup>216</sup> is common to both.

These convergences provide some evidence for the identification of secretary no.20 with Hermogenianus. More important in my estimation is the epitomizing style which is common to *IE* and *CH*, and which generates a profusion of legal maxims. Compare, for example, *IE*'s *invitus non efficitur heres*<sup>217</sup> with *CH*'s *nec ignorans nec invitus quisque donat*<sup>218</sup> or *in communionem vel societatem nemo compellitur invitus detineri*.<sup>219</sup> The same ideas are of course to be found in other jurists and other tenures of the *libelli*, but not with the same phrasing or repeated emphasis on freedom of contract and property. It should, after all, be no surprise if the author of the bulk of the constitutions in the *Codex Hermogenianus* turns out to be Hermogenianus himself.

### III. THE ROLE OF THE LEGAL PROFESSION IN THE LATER PRINCIPATE

The simple device of reading rescripts chronologically instead of by subject-matter clears up a number of misconceptions. Throughout the third century, in times good and bad, the rescript office, under professional guidance, upheld the integrity of Roman law against Greek and provincial practices<sup>220</sup>—the Lincoln's Inn of the Roman world. Its output changed little during this period, either in substance or style, though some holders of the *libelli* tended to adopt a more rhetorical manner than had previously been customary. The scientific-didactical, as opposed to the practical-casuistic, lawyer becomes more prominent.<sup>221</sup> Roman law has become infused with the spirit of Greek philosophy and culture: the influence is intellectual, not sociological. The new trends are, however, gradual, and there are counter-examples. Nothing in the record of the rescript office justifies us in placing much emphasis on what Roman lawyers like to call the 'end of the classical period', in A.D. 230 or 240.<sup>222</sup> Though private legal writing dried up at that time, juristic contributions to the development of the law did not. They continued, but took the

<sup>200</sup> *D.* 39.4.10.1 (v *iur. epit.*); cf. *Cj* 8.4.2 (293), a *hapax*.

<sup>201</sup> *D.* 2.14.45 (II *iur. epit.*). Ten of fourteen dated *Cj* texts are from 293-4. *Voc. Cod. Iust.* I, 1799-1800.

<sup>202</sup> *D.* 29.2.96 (III *iur. epit.*); 21.3.3.1 (VI *iur. epit.*). Nineteen of twenty-three dated texts in *Cj* are from 293-4. *Voc. Cod. Iust.* I, 1634.

<sup>203</sup> *D.* 40.9.27.1 (I *iur. epit. bis*); 2.4.15 (II *iur. epit.*); 37.10.15 (III *iur. epit.*); 21.3.3 *pr.* (VI *iur. epit.*). Nineteen of twenty-eight dated *Cj* texts are from 293-4. *Voc. Cod. Iust.* I, 1951.

<sup>204</sup> *D.* 26.7.48 (I *iur. epit.*), cf. *Cj* 7.18.1 *pr.* (239); 8.17.8 (30 Apr. 293); 2.18.20 *pr.* (24 Apr. 294); 7.23.1; 6.44.5 (18 Nov. 294).

<sup>205</sup> *D.* 39.5.33.1 (VI *iur. epit.*), cf. *Cj* 2.4.35 (294), a *hapax*. *Cj* 5.38.6 (294) has *tutela translatio*.

<sup>206</sup> *D.* 29.4.30 (III *iur. epit.*).

<sup>207</sup> *Cj* 4.43.1 (294).

<sup>208</sup> *D.* 50.4.17 (I *iur. epit.*). Six of eight dated *Cj* texts are from 293-4. *Voc. Cod. Iust.* I, 652.

<sup>209</sup> *D.* 41.1.61 *pr.* (VI *iur. epit.*); cf. *Cj* 8.44.20.1 (293), a *hapax*.

<sup>210</sup> *D.* 37.14.21.1, 4 (III *iur. epit.*); cf. *Cj* 9.22.12 (293); 7.34.3 (294); 4.30.10 (*Diocl. et Max. AA et CC*).

<sup>211</sup> *D.* 42.1.53 *pr.* (I *iur. epit.*); 47.10.45 (v *iur. epit.*), 48.15.7 (VI *iur. epit.*), cf. *Cj* 3.15.1 (196); 9.16.6 (294).

<sup>212</sup> *D.* 26.7.48 (I *iur. epit.*).

<sup>213</sup> *Cj* 4.30.10 (*Diocl. et Max. AA et CC*), *hapax*.

<sup>214</sup> *D.* 37.14.21 *pr.* (III *iur. epit.*); cf. 1.3.35 (I *iur. epit.*, *iura servantur*).

<sup>215</sup> *Cj* 7.27.3 (*Diocl. et Max. AA et CC*).

<sup>216</sup> *D.* 42.1.46 (II *iur. epit.*); cf. *Cj* 8.46.8 (294), a *hapax*, but contrast *prohibitum non est*, *Cj* 7.41.1 (239); *non prohibitum est*, *Cj* 2.4.18 (293).

<sup>217</sup> *D.* 28.7.12 (III *iur. epit.*).

<sup>218</sup> *Cj* 8.53.10 (293).

<sup>219</sup> *Cj* 3.37.5. Five of seven dated *Cj* texts with *invitus* and a negative maxim come from 293-4: *Cj* 5.53.2 *pr.* (212); 3.7.1 (15 Oct. 284, above n. 191); 8.53.10; 4.44.6 (both 293); 3.37.5; 8.41.6; 5.62.20 (all 294); cf. 4.39.2 (Ant.), 4.38.13 (*Diocl. et Max. AA et CC*).

<sup>220</sup> *Cj* 5.5.2; 6.24.7 (both 285); 8.46.6 (287). The patriotic edict on incest of 1 May 295 (*Mos. et rom. leg. collatio* 6.4.1) is by the same hand.

<sup>221</sup> F. Wieacker, 'Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie', *Iura* 20 (1969), 476.

<sup>222</sup> R. Orestano, *Introduzione allo studio storico del diritto romano*<sup>2</sup> (1961), 119; F. de Marini Avonzo, *Critica testuale e studio del diritto*<sup>2</sup> (1973), 45.

form of rescripts rather than treatises or private collections of *responsa*. But for lawyers to shape the law through the rescript office was nothing new. Several of the Severans—Papinian, Ulpian, Menander, Modestinus—had held the *libelli*.<sup>223</sup> Only a failure of vision prevents our seeing their rescripts as part of the corpus of their work.

Diocletian brought a change. Concerned to preserve and revive traditional ways, including traditional laws, he thought it essential to improve the efficiency of the institutions concerned to uphold them, including the system of rescripts. The encouragement to Gregorius and Hermogenianus to make their collections of imperial constitutions is to be seen as part of this effort. Its object, which no codification ever quite achieves, was to make the giving of rescripts a largely automatic process. The effect of the compilation of the codes was to reduce the standing of the rescript office, and to lend countenance to the idea that rescripts outside the codes, not being general laws, were henceforth at best a necessary evil. Thus the imperial government reduced its dependence on lawyers.

No less important is the confidence which, to an impartial scholar, the chronological reading of rescripts imparts in the authenticity of the transmitted texts. There is no way of explaining the concentration of certain forms and expressions in particular years or months, other than that no copyist or editor felt free to rewrite the received texts. This in turn has implications for the authenticity of the *Digest*. For it implies that Justinian's compilers and the intermediate editors, if any, were imbued with a deep respect for the precise wording of the legal texts. What is more, the parallels that we find in detail between phrases in the *Codex* and *Digest* could not exist unless a comparable respect had been extended to both sorts of legal text, imperial and private. When due allowance is made for condensation, what we read in the pages of Justinian's codification is largely what the lawyers of the principate, composing in the emperor's name or in their own, actually wrote.

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<sup>223</sup> See Appendix.

#### APPENDIX

Proposed *fasti* for the office of secretary *a libellis* to the senior Augustus A.D. 193-305.

1. Aemilius Papinianus, 26 Sept. 194 to 12 Feb. 202.  
*PIR*<sup>2</sup> A 388. Kunkel, *Herkunft*, 224. Later praetorian prefect 205 to 211 or 212. Killed late 211 or 212 as a supporter of Geta. Writings in Lenel, *Pal.* I. 803-946. Above p. 57.
2. Domitius Ulpianus, 25 March 202 to 1 May 209.  
*PIR*<sup>2</sup> D 169. Kunkel, 245. Later *praefectus annonae* 31 March 222, praetorian prefect 1 Dec. 222. Killed in 223. Writings (mainly 213-7) in Lenel, *Pal.* II. 379-1200.
3. Unknown, 15 July 209 to 28 Dec. 211.  
Possibly an associate of Papinian (no. 1 above) who remained with Geta (Herodian 3.14.9) while Severus and Caracalla campaigned in Britain and who fell with Geta.
4. Arrius Menander, 5 Jan. 212 to 28 July 213.  
*PIR*<sup>2</sup> A 1100. Kunkel, 233. Writings in Lenel, *Pal.* I. 695-700.
5. Unknown, 30 July 213 to 22 Feb. 217.  
Perhaps held the office also on 27 July 218 under Elagabal.
6. Unknown, 19 Feb. 222 to 1 Oct. 222.  
An associate of Ulpian (above no. 2) and author of 'Ulpiani' *liber singularis pandectarum* (Lenel, *Pal.* II. 1013) ? Perhaps also held the office on 30 Dec. 218 under Elagabal.
7. Unknown, 15 Oct. 222 to 27 Oct. 223.  
Another associate of Ulpian (no. 2 above) and author of 'Ulpiani' *opinionum libri vi* (Lenel, *Pal.* II. 1001-13) ?
8. Herennius Modestinus, 28 Oct. 223 to 24 Jan. 226.  
*PIR*<sup>2</sup> H 112. Kunkel, 259. Later *praefectus vigilum* before 244. Writings in Lenel, *Pal.* I. 701-56.
9. Unknown, 6 March 226 to 13 Aug. 229.

10. Unknown, 9 Sept. 229 to 18 Dec. 229.  
An associate of Modestinus (no. 8 above) ?
11. Unknown, 6 Jan. 230 to 7 Sept. 234.  
Perhaps held the office also on 13 Aug. 235.
12. Unknown, 1 Jan. 238 to 12 June 241.  
Held the office under Maximinus; Maximus, Balbinus and Gordian III; and under Gordian III alone. Another associate of Modestinus ?
13. Unknown, 20 July 241 to 2 July 246.  
Also held the office from 20 Feb. 250 to 4 Dec. 250 and perhaps in October 249 and March-April 252. He therefore served as secretary to Gordian III, Philip and Decius, possibly also to Gallus and Volusianus.
14. Unknown, 4 July 254 to 8 March 259.
15. Unknown, 15 March 259 to 24 Sept. 260.
16. Unknown, 13 Jan. 283 to 30 Aug. 284.
17. Unknown, 24 Nov. 284 to 15 Nov. 287.  
See also no. 18 below. Possibly Gregorius, author of the *Codex Gregorianus*. Held office under Carinus and Diocletian.
18. Unknown, 19 Nov. 289 to 16 June 290.  
The same as no. 17. Perhaps later *ab epistulis Latinis* to Diocletian, 26 Feb. 292 and 1 May 295. On Gregorius see *PLRE* Gregorius 1.
19. Unknown, 18 June 290 to 4 Dec. 291.  
Perhaps previously *a libellis* to Maximian 21 June 286, then to Diocletian 17 Nov. and 30 Nov. 287. Later *ab epistulis Latinis* to Diocletian 6 April 292 to 25 March 294, and again on 27 Feb. 304 and to Constantius I 305 (3.12.1).
20. Hermogenianus, 1 Jan. 293 to 13 April 295.  
*PLRE* Hermogenianus 2; D. Liebs, *Hermogenians Iuris Epitomae* (1964). Author of the *Codex Hermogenianus* and of *Iuris Epitomae* (Lenel, *Pal.* 1. 266-78). He probably held the *libelli* twice before and two or three times after the above tenure: to Diocletian on 15 Oct. (?) 284, to Maximian 18 Feb. 291, then the above tenure with Diocletian, then with Maximian from 21 Dec. 295 to 10 March 298, again with Diocletian from 5 Feb. to 19 Aug. 299 and perhaps again with Diocletian between 23 Aug. 301 and 6 Jan. 303. Someone else was Diocletian's secretary between 26 March 300 and 7 July 301.

This leaves unaccounted for two persons who are attested from historical sources as holders or possible holders of the *libelli* at this period:

Aelius Coeranus.

*PIR*<sup>2</sup> A 161. According to a letter of Caracalla written in *c.* 200-5 (*Forschungen in Ephesos* II, 125, no. 26) he then held the *libelli*, if this is the implication of ἐξήγησις τῶν ἐξιωματικῶν. If he is also the Coeranus mentioned by Dio 77(76) 5.5, a quasi-supporter of Plautianus, his career fits none of the three tenures under Severus and Caracalla above (nos. 1-3). He must therefore have been secretary to the junior Augustus, Caracalla. Exiled after the fall of Plautianus (205), he was recalled by Caracalla to the suffect consulship seven years later.

Aurelius Arcadius Charisius.

*Digest* 1.11.1 calls him *magister libellorum*. Writings in Lenel, *Pal.* 1. 57-60. Since in *Dig.* 1. 11.1.2 *publice sententia principali lecta* need not refer to *CTh* 11.30.16 (331), Charisius may have held office under Diocletian or Constantine. His style shows traces of the influence of no. 17/18 and no. 19 above but not of no. 20. His outlook seems closest to that of no. 17/18. There are gaps in both eastern and western *libelli* in the last decade of Diocletian (see above, nos. 19 and 20) but there is no proof that Charisius filled one of them. In particular he is not the secretary of 26 March 300 and 7 July 301 (above, no. 20).