CHAPTER I

THE SOURCES OF THE LAW IN THE EMPIRE

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I. Though the history of the modes of formation of Law[1] in earlier Rome is outside the scope of this book, it is convenient to have an outline of the facts before us in order the better to understand the material with which Augustus had to deal in his reconstruction. The story may be said to begin with the XII Tables. There are indeed traditions of legislation by more or less legendary kings[2], of a collection of these *leges regiae* issued by one Papirius about the time of the foundation of the Republic[3] and of a commentary on the *Ius Papirianum* by Granius Flaccus[4], near the end of the Republic, and there are what purport to be citations from these *leges regiae* by later writers, mostly non-legal[5]. It is probable that the *leges regiae* are merely declarations of ancient custom: they are largely sacral, and play no important part in later law. The XII Tables are of vastly greater importance. They were a comprehensive collection of rules framed by officers called *Decemviri*, specially appointed for the purpose, perhaps in two successive years, and superseding for the time being the ordinary magistrates of the Republic. They were enacted about 450 B.C.[6] by the *Comitia Centuriata*, perhaps the first express legislation, in the Roman State, affecting Private Law. They consisted mainly of ancient Latin custom, but there was some

1 Krueger, *Röm. Rechtsquell.* 3–82; Kipp, §§ 5–10; Clark, R. P. L., *Regal Period*; Hirschfeld, *Kleine Schriften*, 239, 264; Cornil, *A.D.R. Liv.* 1. 2 Krueger, *op. cit.* 3 *sqq.* 3 1. 2. 2. 36. *Praenomen* variously stated. 4 50. 16. 144. 5 Girard, *Textes*, 3 *sqq.*; Bruns, 1. 1 *sqq.* Most are attributed to the earlier and certainly mythical kings. 6 On the sceptical views sometimes expressed as to the story of the *Decemviri* generally, Girard, *Mélanges*, 1 *sqq.*; Greenidge, *Engl. Hist. Rev.* 1905, 1; de Francisci (*Storia*, 1. 193 *sqq.*), who accepts the main story, though not all the attributions to the XII Tables.

innovation and apparently some incorporation of rules of Greek Law[1]. They have not survived in their original form, but have been partially reconstructed from the numerous references to them in later legal and lay writings, some of which purport to give the actual wording of particular rules, though in all cases this is in a much modernised form[2]. Though they were in great part superseded by later legislation long before the end of the Republic, they continued to be held in great reverence. Livy describes them as the "*fons omnis publici privatique iuris*[3]," and citations and allusions are found even in Justinian's compilations. But the XII Tables did not contain the whole law. They stated general rules: the countless details, especially of form, were left to be elucidated by officials. In early Rome, as in other nascent civilisations, there was no great difference between religious and legal rules and thus those to whom it fell to expound the laws and advise thereon, and this not merely informally, but by virtue of their official position, were priestly officers, the Pontiffs[4]. In this age it does not appear that any authority was thought of as capable of altering the provisions of the XII Tables: these were a fundamental law. But while civilisation is advancing, the law cannot stand still, and the power of *interpretatio* and formulation placed in the hands of the Pontiffs[5] was in effect a power to alter the law, by ingenious and useful, though not very logical, interpretations, some of which we shall meet with later on[6].

Of express legislation there was, to the middle of the Republic, but little, and what did occur was mainly on constitutional matters[7]. Of the various popular assemblies the oldest was the *Comitia Curiata*. This was an assembly of the whole people, or perhaps of all heads of families, grouped in 30 *curiae*, the *curia* being the voting unit. Each *curia* consisted of a number of *gentes*, or clans, the members of which were connected by a real or assumed relationship[8]. This body probably never exercised legislative power in the ordinary sense. Important as its functions[9] were, they belong, in the main, to an age before legislation was thought of as an ordinary method of law reform. The *Comitia Centuriata* was, in historical times, a much more important body. The centuriate organisation, existing, at the latest, soon after the foundation of the Republic,

1 Bonfante, *Scr. Giur.* 1. 337, rejects any close relation between early Roman and Greek Law. 2 For the most usually accepted reconstruction, see Girard, *Textes*, 9 *sqq.*, who states the evidence on which the somewhat speculative attribution of individual provisions to their proper *Tabula* is based. 3 Livy, 3. 34. 4 Krueger, *cit.* 27; Mommsen, *Staatsr.* 2. 18 *sqq.*; *D.P.R.* 3. 19 *sqq.* 5 See D. 1. 2. 2. 6 as to the relation of the pontiffs to the public. 6 E.g. *post*, §§ XLIV, LXXXVII. 7 See Karlowa, *Röm. Rg.* 1. 116 *sqq.*; Rotondi, *Scr. Giur.* 1. 1 *sqq.* 8 See Mommsen, *Staatsr.* 3. 9, 30, 90; *D.P.R.* 6. 1. 8, 32, 98, as to the conception of a *Gens*, the introduction and position of *minores gentes*, the extension of the notion to plebeians and the vote of these in the *Comitia Curiata*. But see also de Francisci, *Storia cit.* 1. 106 *sqq.* 9 Willems, *D.P.* 36.

was a grouping of the whole people, patrician and plebeian[1], as a military force, on a plan attributed to Servius Tullius. The grouping was into *classes*, subdivided into *centuriae*, and, when the body acted as a political assembly, the voting unit was the *centuria*. The *classes* consisted of one *classis* of *Equites* and five *classes* of *Pedites*[2]. The *centuriae* within each class were divided into an equal number of Senior and Junior, but the number of *centuriae* assigned to the *Equites* and the *prima classis* amounted to more than half of the total number[3]. As the Senior centuries were chiefly employed in home defence, this arrangement put the practical voting power, in this assembly, into the hands of the older and the well-to-do, a result not seriously affected by the fact that the very poor, not subject to regular military service at all, were constituted into one *centuria* for voting purposes[4]. As the total number was 193, this gave them no power, but it served to secure an odd number of voters. Such a body was necessarily conservative, and it must be remembered that it could vote only on propositions submitted by the presiding magistrate, in the earlier part of the Republic always a patrician, that it was usual, if not legally necessary, to submit the proposal for the previous approval of the Senate[5], and that a *lex* of the *centuriae* also required *auctoritas patrum*, commonly supposed to mean approval of the patrician members of the Senate[6]. This approval, which had followed enactment by the *Comitia*, was made to precede the vote by a *lex Publilia Philonis*[7], traditionally dated 339 B.C., and soon became unimportant. A considerable amount of legislation seems to have been effected by the *Comitia Centuriata*, the *Comitia Maxima*[8]. A third assembly of the whole people was the *Comitia Tributa*. Its voting unit was the *tribus*, a subdivision, essentially local, of the whole territory of the State. Tradition assigns the establishment of these local tribes to Servius Tullius, the number increasing as the State grew, till it reached the maximum, 35, about 240 B.C.[9] This body seems to have had the power of legislation soon after the enactment of the XII Tables[10], but there were few *leges tributae* in

1 Nature of the *plebs*, de Francisci, *Storia cit.* 1. 172; Rose, *Journal of Rom. Studies*, 1922, 106 *sqq.*, denies any racial distinction. 2 Originally only the highest group was a *classis*, the others were *infra classem*, but in historic times the organisation was as stated. Mommsen, *Staatsr.* 3. 262; *D.P.R.* 6. 1. 297. 3 Mommsen, *Staatsr.* 3. 254, 267; *D.P.R.* 6. 1. 288, 302. 4 *Proletarii*, *capite censi*. Chief authorities, Livy, 1. 43, and Dion. Halic. 4. 20 *sqq.* The accounts do not agree in detail, and historical evolution is obscured. The provision for an odd number of votes seems to have been observed in the gradual extensions of the Tributal system (below). 5 Mommsen, *op. cit.* 3. 1037; *D.P.R.* 7. 236. 6 *Ibid.* 7 Livy, 8. 12. 8 Cic. *de legg.* 3. 4. 12; Girard, *Textes*, 20; Kuebler, 69. All clearly "private" laws seem to be plebiscites, Rotondi, *Scr. Giur.* 1. 1 *sqq.* 9 Mommsen, *op. cit.* 3. 161 *sqq.*; *D.P.R.* 6. 1. 180 *sqq.* 10 As to the confused story of the validation of *leges tributae* and plebiscites by the *l. Valeria Horatia* (449 B.C.), *l. Publilia Philonis* (339 B.C.) and *l. Hortensia* (about 287 B.C.), Mommsen, *Staatsr.* 3. 1037 *sqq.*; *D.P.R.* 7. 236 *sqq.*; Kipp, § 6; Brini, *Mem. Acc. Bologna*, 1930 (*Sc.M.*), 67.

the earlier part of the Republic. As in the *Comitia Centuriata*, the proposal by the presiding magistrate was usually submitted for previous approval of the Senate, and *auctoritas patrum* was required[1].

II. In the later Republic the law had become secularised. The Pontificate having been thrown open to plebeians[2], the control of the Pontiffs over law lost its old value to the patricians as a weapon against plebeian aggression, and with the gradual passing of power into the hands of the plebeians the pontiffs disappeared as factors in the development of the ordinary law. Their place as advisers and expounders was taken by professed jurists who were quite unofficial, but, as advisers to magistrates, as well as to private persons, exercised great influence and became very prominent in the later centuries of the Republic[3]. Little of the writings of these *veteres* remains[4], but it was the beginning of a rich literature to which we owe most of our knowledge of the law.

Legislation by the *Comitia* now covered a wider field but still remained a relatively unimportant source of private law. The *Comitia Centuriata* legislated little[5]: its chief influence on law was exercised by its appointment of the higher magistrates. Legislation was carried on to some extent by the *Comitia Tributa* and in an increasing degree by the assembly of the *plebs* alone, *concilium plebis*[6], which, in historical times, was also based on the tributal organisation. This assembly, presided over by a tribune of the *plebs*, was active from early times and there was early legislation on constitutional questions, enacted by that body and approved by the Senate, which was regarded as binding on the whole community[7]. Its enactments, *plebiscita*, were often called, as binding the whole community, *leges*, though in strictness this name does not cover any *rogationes* except those in a *Comitia*, i.e. of the *populus*. They never needed *auctoritas patrum*, but they did not bind any but plebeians unless previously approved by the Senate. This requirement seems[8], however, to have been abolished by the *l. Hortensia*, itself a plebiscite, about 287 B.C.[9] It is probable that most of the later legislation was by this body, though the recorded story does not clearly distinguish its acts from those of the *Comitia Tributa*.

1 Mommsen, *op. cit.* 3. 1040; *D.P.R.* 7. 240. 2 According to Livy, 10. 6, by a *l. Ogulnia*, 300 B.C. Tiberius Coruncanius, the first plebeian *Pontifex Maximus*, was also the first public teacher of law, D. 1. 2. 2. 38. 3 Jörs, *Röm. Rechtsw. der Rep.*, 1. ch. 2. §§ 18–25, especially 24. 4 Bremer, *Jurisprudentia Antehadriana*, vol. 1. 5 Thus difficulties from concurrent powers were avoided. In any case they would be lessened by the reference to the Senate, and by the reorganisation of the *C. Centuriata* which to an extent not fully known assimilated it to the *Com. Tributa*, Mommsen, *op. cit.* 3. 270; *D.P.R.* 6. 1. 305 *sqq.*; Rotondi, *Leges publicae populi Romani*, a history of comitial legislation and a chronological account of all known *leges*, with reff. to literature. *Addenda, Scr. Giur.* 1. 411 *sqq.* 6 Mommsen, *op. cit.* 3. 150 *sqq.*; *D.P.R.* 6. 1. 166 *sqq.* 7 E.g., *lex Icilia*, 492 B.C.; *lex Canuleia*, 445 B.C. 8 Mommsen, *op. cit.* 3. 159; *D.P.R.* 6. 1. 178. 9 Further details on influence of Senate on legislation, *post*, § v.

The chief new factor in the late Republic remains to be stated. Roman magistrates had the right to issue Edicts, *ius edicendi*[1], but while the Edicts of the Curule Aediles were of importance in some branches of law[2], those of the Urban and Peregrine Praetors and the Provincial Governors, who administered justice respectively between *cives* in Italy, in cases in Italy[3] in which those without *commercium* were concerned (*peregrini*[4]) and in the Provinces, were far more significant in legal history. The Edict of the *Praetor Urbanus* was much the most potent instrument of law reform in the last century of the Republic[5].

The control of litigation, *iurisdictio*, was transferred from the Consuls to the newly created Praetor by one of the Licinian Rogations in 367 B.C.[6] So long as litigation was conducted by the *legis actio*, this may have meant little but formal and almost ministerial co-operation[7]. But the *l. Aebutia* of about 140 B.C., authorising the use, instead of *legis actio*, of the more elastic *formulae* framed by the Praetor himself and variable as need arose, resulted in a great change in the position of the magistrate. He was now found refusing actions where civil law gave them, giving them where it did not, creating new defences and so forth. By these means he introduced, side by side with civil law rights and duties, another system, technically, and in some cases practically, less effective than civil law rights and duties, but in the end completely transforming the working of the law[8]. How far this change resulted directly from the *lex*, the exact provisions of which are not recorded[9], is not clear. But as the Praetor's Edict remained in force only for his year of office, and could be changed by his successor, so that a rule which worked badly could be stopped and one which worked well carried on[10], it is likely that it was in great part an aggression accepted by Senate and people as being a convenient form of experimental legislation: the *Comitia*, nominally an assembly of the whole people, could not adequately represent a population scattered

1 Not Quaestors, except in praetorian provinces, Mommsen, *op. cit.* 1. 203; *D.P.R.* 1. 234. Account of the magistracies, their significance, collegiality, etc., Kuebler, 70 *sqq.* 2 *Post*, §§ CLXXII, CCV. 3 Both Praetors sat at Rome, but both had jurisdiction over all cases except so far as local jurisdictions were created or recognised. Of these the most prominent was that of the provincial governors. But in the cities of various kinds in Italy there were many local jurisdictions which more or less excluded the Court at Rome. As to these, Girard, *Org. Jud.* 1. 272 *sqq.* 4 *Post*, § XXXVI. 5 The Praetor is not necessarily a lawyer. What we call praetorian law is often the Praetor's only in form. The ideas come from the lawyers, both as his *consilium*, and as advising suitors before him. De Francisci, *Storia*, 2. 1. 190. 6 Livy, 6. 42; Mommsen, *op. cit.* 2. 193; *D.P.R.* 3. 221. 7 His powers under this régime are much disputed, *post*, §§ CCVII, CCXIV. 8 Jörs, *op. cit.* 158 *sqq.* A *l. Cornelia* (67 B.C.) required the Praetors to abide by their own Edict, Krueger, *R.Rq.* 34. Buckland, *Tulane L.R.* 1939, 163 *sqq.* 9 *Post*, § CCXIV. 10 His Edict for his year is *E. perpetuum*; special Edicts for temporary purposes are *E. repentina* (Cicero, *Verr.* 2. 3. 14. 36, not official). A provision carried on from the last Praetor is *E. praelatum* as opposed to *E. novum*. That part habitually carried on is *E. tralatitium*.

over all Western Europe, and was in fact little more than the Roman mob.

When, after a long period of exhausting civil war, Augustus became undisputed master of Rome it was clear to him that the first need of the State was reorganisation and good administration. It was clear also that the old republican methods, already in decay, could not really be revived. The State had outgrown them, and their inefficiency under existing conditions had rendered possible the domination of one man after another, which culminated in the Dictatorship of Caesar. But though the institutions could not be restored, the pious reverence for them which still existed made them convenient instruments in his reconstruction. The history of the previous 150 years had shewn that avowed despotism, however well meant, gave no promise of stability. Thus his course was marked out. He was a conservative wherever conservatism was possible[1]. One of his earliest acts was one of the most significant. The Triumvirate (of which he had been a member), whose régime had ended in civil war, had received full legislative power. This Augustus renounced and restored to the popular assembly in which it was traditionally vested[2]. On the other hand he claimed and received the fullest magisterial authority. He had *tribunicia potestas*[3] in Rome and proconsular power through the Empire. And, since power for a year only was of little use to the founder of a new political system, and had shewn its unsuitability to existing conditions, he had these powers conferred on him for life, though this was hardly more consistent with republican notions than supreme legislative power would have been.

III. We have now to consider the different Sources of Law in the Empire, beginning with those which survived from the Republic.

Leges. Enactments of the popular assembly[4]. Surviving records tell us of many *leges*, but these, spread over 500 years, are too few to suggest that they were ever a main source of private law[5]. This view is confirmed

1 Heitland, *Short Hist. of the Rom. Repub.* 508. For a study of the policy of Augustus, see id., *Hist. of Rom. Repub.* 3. 509 *sqq.*, and de Francisci, *La Costituzione Augustea*, and *Storia*, 2. 1. 233. 2 See on all these matters, Mommsen, *op. cit.* 2. 745; *D.P.R.* 5. 1; Wenger, *Hausgewalt und Staatsgewalt*, 46. 3 He is not Tribune, though he has the powers. The ordinary tribunes continue with dwindling powers. 4 *Ll. latae*, as opposed to *ll. datae*, imposed by a magistrate duly authorised on a community under his charge, and *ll. dictae*, a name applied to laws laid down for private domains of the Emperor. 5 As to mode of promulgation of *ll.* and *scc.*, Mommsen, *Ges. Schrift.* (*Jur.*) 3. 290. The *liber singularis regularum*, 1, classifies *ll.* under three heads: A *l. perfecta* annuls the act; most of the later *leges* are of this type. A *l. minus quam perfecta* inflicts a penalty but leaves the act valid, e.g. the *l. Furia Testamentaria* (G. 4. 23; *post*, § CXIX) and the *l. Marcia* (G. *ib.*). A *l. imperfecta* merely forbids the act, e.g. *l. Cincia* (*Fr. Vat.* 260 *sqq.*; *post*, § XCI), the prohibition in this case being made effective by an *exceptio*. It is suggested that earlier legislation takes this form because it is by way of plebiscite, and thus cannot alter the civil law, the fact that it is later than the *l. Hortensia* being explained as meaning only

by a study of their subject-matter. Apart from the XII Tables the earlier republican *leges* are constitutional[1], and though in the later Republic their field is wider, still most of them deal with matters closely connected with public order[2], and the same is true of those enacted after the accession of Augustus[3]. There are many in his reign, several under Tiberius, one or two under Claudius and there is one under Nerva[4]. After this we hear only of the *lex de imperio*, conferring various powers on a new emperor; the part of the *Comitia* being merely formal[5].

The legislation of this period was in no real sense legislation by a popular legislative body. The Emperor restored the legislative power not because he wished the people to make their own laws, but because he desired to use what reverence existed for the ancient institution in order to give effect to his own wishes, along the line of least resistance. No one knew better than Augustus that the *Comitia* were unfit to exercise legislative power. It must however be remembered that these bodies had never at any time had a right to initiate legislation. They voted only on a proposal submitted by the presiding magistrate, on whom therefore all depended. By virtue of his permanent *tribunicia potestas* the Emperor could convoke the plebeian assembly and submit proposals to them, and there is no doubt that all important *leges* of this time were so voted. When, as was sometimes the case, he held the Consulship, he could do the same with the centuries, but the people in their centurial organisation do not seem to have legislated in this age. When he restored legislative power to the *Comitia*, he restored also the power of choosing the magistrates, which, also, had been conferred on the Triumvirate. This was not a question of submitting a nominee to the vote, so that the worst that could happen would be his rejection: the *Comitia* could choose whom they would. That would not have suited Augustus, and accordingly, in his

that an old form has survived its purpose. This would be more weighty if we had *ll. centuriatae perfectae* on private law between the XII Tables and the *l. Hortensia*. Another view suggested by a text of Ulpian (24. 2. 11. pr.) is that legislation could not directly affect an act formally valid in the civil law, to which Mitteis objects (*R.Pr.* 1. 248) that it is little more than giving the rule as a reason for itself. Rotondi, *Scr. Giur.* 1. 36 *sqq.*; Senn, *Ll. perfectae, minus quam perfectae et imperfectae*; Baviera, *St. Fadda*, 2. 205 *sqq.* All these defective laws seem to run counter to provisions of the XII Tables, and are evasions of it. *S.M.W.* 54. The *l. Canuleia*, however, is an early direct contradiction of the XII Tables (11. 1). But it is really constitutional.

1 Even *l. Canuleia* (445 B.C., *post*, § XLI). 2 E.g. the numerous statutes establishing procedure in criminal law (Mommsen, *Strafr.* 202 *sqq.*), those regulating remedies against debtors, the old order having caused grave public danger, those regulating civil procedure (*post*, § CCXIV), in effect a successful revolt against the old patrician order of things. The few which deal with private law are plebiscites. 3 E.g. laws on manumission (*post*, § XXVIII), and laws dealing with the encouragement of marriage (*post*, §§ CIII, CXI, CXXXIV). 4 A *l. agraria* (47. 21. 3. 1). 5 Bruns, 1. 202; Girard, *Textes*, 107. It may have been a senatusconsult confirmed by a *lex*. Mommsen, *Staatsrecht*, 2. 878 *sqq.*; *D.P.R.* 5. 154.

reconstruction, when he abandoned the power of election, he provided that he should have the right of deciding whether a candidate was eligible and of commending particular candidates, which was equivalent to a direction to choose them, and was so understood. Thus he controlled the magistracy and thereby the submission of proposals of law to the Assembly[1]. The security was soon carried further. Tiberius transferred the selection of magistrates to the Senate[2], which by this time consisted entirely of the Emperor's nominees. Unreal as was the positive part of the people in legislation, if they could not choose what they would consider, they could at least choose what they would refuse, and this power they exercised. We know that they refused, for many successive years[3], to pass the comprehensive legislation on marriage which ultimately took effect in the *l. Iulia de maritandis ordinibus* and the *l. Papia Poppaea*[4].

These *leges* seem to have all been Tributal[5] and to have been submitted by or for the Emperor by virtue of his *tribunicia potestas*: there is no trace of legislative proposals by the actual *Tribuni plebis*. Though the centuries still met in the *Comitia Centuriata* their power was confined to the election of magistrates, and even this, as we have seen, they lost under Tiberius. They still continued to issue a formal *renuntiatio* of the name of the person elected till the third century, when the *Comitia* disappeared altogether[6].

IV. *EDICTA* of the Magistrates[7]. Among the attributes of the Emperor was of course a *ius edicendi*, to be considered later: we are now concerned with the Edicts of the republican magistrates.

The re-establishment, in form, of republican institutions, which was, as we have seen, part of the scheme of Augustus, meant that the *ius edicendi* of magistrates continued unaltered: the Edicts of the Urban and of the Peregrine Praetor, that of the Aediles and the Provincial Edicts continued to appear for some centuries[8]. As to the Provincial Edicts it is to be remembered that Augustus divided the provinces into

1 Mommsen, *Staatsr.* 2. 916; *D.P.R.* 5. 198. 2 Tacitus, *Ann.* 1. 15. 3 Karlowa, *R.Rg.* 1. 617. 4 *Post*, §§ CIII, CXI, CXXXIV. 5 Machinery of voting, Mommsen, *Staatsr.* 3. 380 *sqq.*; *D.P.R.* 6. 1. 437 *sqq.* 6 *Ib.* p. 348; *D.P.R.* 6. 1. 397. In other matters the power of the *Comitia* was much cut down by Augustus. He took into his own hands foreign relations, the making of war and treaties (Willems, *D.P.* 429 *sqq.*, and the *lex curiata de imperio Vespasiani*, Girard, *Textes*, 107; Bruns, 1. 202). He removed the little that was left of criminal jurisdiction in the *Comitia* and transferred it to *Quaestiones perpetuae*, though the Senatorial jurisdiction which soon came into existence overshadowed this. Mommsen, *Staatsr.* 2. 958; *D.P.R.* 5. 246. 7 Gai. 1. 6. 8 Wilcken, *Z.S.S.* 1921, 137, holds that in Egypt and possibly in the provinces generally, the Edict of the *praeses* was of permanent validity. On the view that the Edict of the Emperor was permanent (*post*, 18) this might well be true of those of his officials in the Imperial appanage of Egypt but is hardly proved by citation in later years under the name of their introducer. In Rome the name of the introducer clings to the Edict. If in the provinces generally the Edict was so much more durable, the *amplissimum ius* of G. 1. 6 is misleading.

two groups. One group, the Senatorial provinces, were governed by republican magistrates and ex-magistrates in the old way, but all provinces of military importance, and all those newly acquired[1], were kept under the direct control of the *Princeps*, and put in charge of new imperial officers called *Legati Caesaris*, with the powers of Praetor (*pro praetore*), who held office at the will of the Emperor and often for many years, being regarded as representatives of the Emperor rather than as independent magistrates[2]. They issued Edicts in the ordinary way, except that it appears that in these provinces the Edict of the Aediles was not issued; it is not clear that its principles were not applied[3].

But the Edicts were now of less importance as sources of new law. Already in the Republic the pace of reform by this method had begun to slacken. The new Praetor tended simply to carry on the old Edict. New clauses were few, so that the Edict tended to be wholly *praelatum*, carried on from the former Praetor, and indeed, as many clauses had long been, *tralatitium*, traditional, regularly carried forward[4]. This tendency is accentuated under the new régime. Such changes as occur seem to be of three types. First, obsolete clauses drop out. Secondly, existing clauses are modified as occasion requires. We can trace this process, e.g., in the case of the interdict *unde vi*[5], and in the Edict of the Aediles as to defects in things sold[6]. Thirdly, new clauses are added. It is in relation to these that the change in legislative method is most obvious; there is little sign of any new clause added on the initiative of the Praetor himself.[7] The change made is normally merely provision in the Edict of machinery for giving effect to changes in the law made by other agencies[8]. Thus the *lex Papia Poppaea*, regulating the law of succession for the encouragement of marriage, gave in certain cases *bonorum possessio*[9], the praetorian right of succession, instead of the civil law *hereditas*. Whatever the reason for this, it resulted in a new clause in the Edict, promising *bonorum possessio* where a statute required it[10]. When *fideicommissa*, bequests in trust, were recognised, the ordinary Praetor did not deal with them: they were administered by a new officer, the *Praetor fideicommissarius*[11]. But when the *sc. Trebellianum* enacted that where a *hereditas* had been handed over under a trust, all actions that lay at civil law to and against the *heres* should lie to and against the *fideicommissarius*, this brought the matter into the Praetor's

1 As to areas governed by *Procurator* and *Praefectus* (Egypt), Marquardt, *Staatsverw.* 1. 90 *sqq.* esp. p. 337. 2 Mommsen, *Staatsr.* 2. 1087 *sqq.*; *D.P.R.* 5. 395 *sqq.* See, however, *post*, § XIX. 3 Gai. *ib.* The Quaestors issued Edicts there. 4 The Edict does not lose its importance: the latest jurists speak of the *ius honorarium* as the "*viva vox iuris civilis*," 1. 1. 8. 5 See Lenel, *E.P.* 462 and *post*, § CCXLIX. 6 Lenel, *op. cit.* 555. 7 See, however, as to Cassius, 4. 6. 26. 7; 29. 2. 99; 42. 8. 11; 44. 4. 4. 33. 8 Karlowa, *R.Rg.* 1. 629. 9 E.g., Gai. 3. 50. 10 D. 38. 14. 11 Inst. 2. 23. 1.

sphere: *formulae* were provided, in the Edict, of *actiones fictitiae* for this case[1], but there was no Edict about them. The *sc. Macedonianum* forbidding loans to *filiifamilias*, and the *sc. Velleianum*, forbidding surety by women, were made effective by suitable provisions in the Edict[2].

It should be added that new magistrates with special functions created by the Emperor for various purposes, with the name of Praetor, e.g., *Praetor fideicommissarius* just mentioned, *tutelaris*[3] and *de liberalibus causis*[4], never acquired the right of issuing Edicts: it was no part of the imperial scheme to extend praetorian institutions.

The next step in the history of the Edict is Julian's revision. Soon after A.D. 125 Hadrian ordered him to put the Edict into permanent form, a death-blow, as was intended, to all further praetorian initiative. All we know of his instructions is what Justinian tells us 400 years later[5], for Pomponius' account stops short of this event. The new Edict was confirmed by Senatusconsult[6], and that Julian's work on the Edict was traditionally regarded as of great importance appears from the fact that he is repeatedly spoken of as *compositor*, *conditor*, *ordinator* of the Edict[7]. We have now to consider what is known as to what he actually did.

(*a*) *The Urban Edict.* He seems to have added little. Only one new clause is known and it is called *nova clausula* of Julian[8]. This need not necessarily be "the" new clause, but the language suggests that Julian was not active in this direction. It has been made clear, further, by Lenel, that he did not alter materially the general order of the Edict[9]. There was a good deal of restating of individual rules, but that leaves little trace. It is in relation to the *formulae* of actions that Julian seems to have done most. In the Edict before his time all the various *formulae* may have been in an appendix at the end. There were other appendixes, i.e. the interdicts, the *exceptiones* and the *stipulationes praetoriae*, which he left where they were. But he dealt differently with the *formulae*. Under each edict, or group of edicts, he put the appropriate *formulae*, and, following these, usually, the *formulae* for civil actions connected with the same matter. Thus the Publician Edict was followed by the

1 Gai. 2. 253. The various ancillary protections which the Edict provided for legatees were gradually extended to *fideicommissa*, but it is likely (Lenel, *op. cit.* 372) that this was done by juristic practice and not by Edict. 2 14. 6. 11; 16. 1. 6; Karlowa, *loc. cit.*, thinks that when the *l. Aelia Sentia* prevented slaves freed under 30 from being citizens, there must have been an alteration in the Edict bringing them under the clause protecting those informally freed (*post*, § XXVII). But we do not know the form of that clause, and it may well have been wide enough to cover them. The date of the *l. Iunia*, which gave such persons the legal status of Latins, is not certain (*post*, § XXVIII), so that the clause in the Edict may have been already obsolete. 3 Vat. Fr. 232, *post*, § LIII. 4 C. 4. 56. 1. 5 *Const.* "*Tanta*," 18. 6 *Ibid.* 7 See reff. in Krueger, *R.Rq.* 94; Girard, *Mélanges*, 1. 200. 8 37. 8. 3. 9 Lenel, *E.P.* 18; Girard, *Mélanges*, 1. 177 *sqq.*