A NOTE ON A. CASCELLIUS

WE know very little about the life of the jurist, A. Cascellius, but in his famous potted history of Roman legal science, parts of which are preserved in the *Digest*, Pomponius does tell us that Cascellius never rose beyond the rank of quaestor and that he rejected the consulship when Augustus offered it to him (D. 1. 2. 2. 45, Pomponius *libro singulari enchiridii*).[1] Such are the ways of scholars, however, that several modern writers are intent on posthumously awarding him a praetorship under the Triumvirate.[2] The purpose of this note is to raise an objection to this tendency, which shows signs of causing trouble in the field of Roman law also.

> Valerius Maximus 6. 2. 12. age, Cascellius vir iuris civilis scientia clarus quam periculose contumax! nullius enim aut gratia aut auctoritate conpelli potuit ut de aliqua earum rerum, quas triumviri dederant, formulam conponeret, hoc animi iudicio universa eorum beneficia extra omnem ordinem legum ponens.

Valerius Maximus mentions that Cascellius refused to draft a formula on provisions of the *triumviri*. In his *Institutes* 4. 169, Gaius talks of an action which he calls the *iudicium Cascellianum*. The name suggests that it was devised by someone called Cascellius. Since actions were introduced by a praetor, it is deduced from these two pieces of information that Cascellius was a praetor under the Triumvirate and introduced the *iudicium Cascellianum* then.

Important objections to this conclusion have been raised by Wlassak and Kunkel,[3] who both point out that there is no reason to assume that Cascellius was a praetor when he refused to *conponere formulam*, since it was one of the functions of a jurist in private practice to advise on the drafting of formulae. It was to this function that Cicero alluded when making fun of lawyers in the *de legibus*: 'Quam ob rem quo me vocas aut quid hortaris? ut libellos conficiam de stillicidiorum ac de parietum iure? an ut stipulationum et iudiciorum formulas conponam?'[4] Equally, Cascellius could have devised the *iudicium Cascellianum* either when advising a client or more probably when advising a praetor. These objections tend to be swept aside, but one can go further and show that it is most unlikely indeed that Cascellius introduced the *iudicium Cascellianum* under the Triumvirate.

According to Gaius, the *iudicium Cascellianum* operated in the sphere of procedure under the double interdicts, *uti possidetis* and *utrubi*, both of which

[1] On the offer see W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*,[2] 26. n. 55.

[2] See for instance P. Jörs in *RE* iii. 1634 ff. Cascellius obtained his praetorship (a little hesitantly) in the Supplement, though not in the body, of T. R. S. Broughton, *The Magistrates of the Roman Republic*. Cf. ii. 115 with Supplement, p. 14. Professor Kunkel is strongly opposed to a praetorship: *Herkunft*, 26.

[3] M. Wlassak, 'Die klassische Prozessformel', *Sitzungsberichte der Akademie der Wissenschaften in Wien, Phil.-hist. Klasse*, ccii (1924), 3. Abhandlung, 28 ff.; Kunkel, *Herkunft*, 26 n. 55; F. Wieacker, 'Augustus und die Juristen seiner Zeit', *Tijdschrift voor Rechtsgeschiedenis*, xxxvii (1969), 331 at 344 ff. It is not clear at what date the incident is supposed to have occurred.

[4] 1. 4. 14.

concerned questions of possession. During the trial of the interdict itself, one of the parties had to have possession. To decide who was to have possession during the trial the parties were invited to bid for it and possession was given to the highest bidder. If he was successful in the trial, he simply retained possession of the object. If the other party, the one to whom interim possession was not awarded, won, then he had to obtain possession of the object. For this purpose, at the start of the interdict proceedings he was given a *iudicium Cascellianum* by which he could claim his possession if he won under the interdict.[1] Usually the unsuccessful party would simply hand over possession, but if he did not he would suffer *condemnatio* under the *iudicium Cascellianum*. D. 43. 17. 3. 11, Ulpian 69 *ad edictum* refers to the problem of the measure of damages in this action.[2]

> in hoc interdicto condemnationis summa refertur ad rei ipsius aestimationem. 'quanti res est' sic accipimus 'quanti uniuscuiusque interest possessionem retinere.' Servii autem sententia est existimantis tanti possessionem aestimandam, quanti ipsa res est: sed hoc nequaquam opinandum est: longe enim aliud est rei pretium, aliud possessionis.

For some reason which I cannot understand Siber[3] takes the text as referring to the *iudicium fructuarium*, but there seems no reason to do so and no one explicitly follows him in this.

The passage has suffered considerably from interpolation.[4] Beseler[5] pointed to the difficulties in 'in hoc interdicto . . . aestimationem' and 'sed hoc . . . possessionis', but even after these excisions a reference of some sort to the views of Servius is left. Probably Beseler was correct in thinking that all we have is the rump of a much more extensive discussion of the measure of damages, since the question at issue is extremely difficult,[6] viz. how, if at all, one can assess in money terms the value of possession and how, if at all, this is to be distinguished from the value of ownership. Servius was of the opinion that the plaintiff should be awarded the value of the object—Beseler would substitute *litem* for *possessionem* in the report of Servius' opinion, but, although this might in some respects be an improvement, it does not seem necessary and the text is best left as it stands. The difficulty of awarding much less than the value of the object is that the defendant who retains it will enjoy the role of defendant in any *vindicatio* and that may give him such an advantage that the plaintiff will feel disinclined even to attempt the *vindicatio*. Hence the defendant will have the benefit of the object. In effect, this gives the interdict proceedings very much the status of a decision on title. It may be that Servius' opinion that the value of the object should be paid did not prevail; still the violent rejection which we find in the text can scarcely be anything but compilatorial.[7]

Siber thinks it conceivable that Servius expressed his view about 'quanti ea res erit' in the context of a *rei vindicatio*, and that Ulpian merely adduced it in

[1] Cf. W. W. Buckland, *A Textbook of Roman Law*[3], 741.

[2] O. Lenel, *Das Edictum Perpetuum*[3], 472; *Palingenesia Iuris Civilis*, ii. 822 and cf. ii. 331 with n. 1. Lenel follows K. A. Schmidt, *Das Interdiktenverfahren der Römer*, 256 ff.

[3] H. Siber, *Die Passivlegitimation bei der Rei Vindicatio*, 166 ff.

[4] For literature, see E. Levy, *Nachträge zur Konkurrenz der Aktionen und Personen*, 58 n. 233.

[5] *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, xliii (1922), 425.

[6] See above all the discussion in Levy, *Nachträge zur Konkurrenz*, 57 ff. For Beseler the dispute was about the subjective or objective valuation of the object.

[7] I do not altogether understand why Professor Watson regards Servius' view as 'punitive': *The Law of Property in the Later Roman Republic*, 88.

argument on the other action. Siber argues that if Servius could not yet distinguish between the value of an object and *interesse* in the case of an interdict action, then he would not be any more capable of doing this for a *rei vindicatio* and so his opinion could come from discussion of that action. However, as has been seen and as Siber himself recognizes, the problem in the interdict was very far from straightforward. Hence to suggest that Servius' solution shows any lack of sophistication on his part would be rash, and any further deduction that he could have been talking about the *vindicatio* would be unjustified. Siber's conjecture has not found any support.

It would be possible, but implausible, to argue that Servius was discussing not the *iudicium Cascellianum* itself but a predecessor of that action. For one thing, there is no evidence for such a predecessor.[1] For another, even if such an action did exist, Servius' opinion on its wording would not be very persuasive in interpreting the meaning of the new action and so would be unlikely to merit citation by Ulpian.

What we have then in D. 43. 17. 3. 11 is a comment by Servius on the *iudicium Cascellianum*. This jurist Servius is known to a wider public by his full name Servius Sulpicius Rufus[2] and it was he who proposed in the Senate on 4 January 43 B.C. that an embassy should be sent to Antony encamped near Mutina. The proposal was accepted and despite his indifferent health Servius set out with two companions, but died when approaching Antony's camp.[3] The date of Servius' death is accordingly firmly fixed in January 43 B.C., and this also gives a firm *terminus ante quem* for the *iudicium Cascellianum* upon which he had commented. It need only now be recalled that the Triumvirate was not constituted until 27 November 43 B.C. for us to see that the *iudicium Cascellianum* cannot have been introduced by Cascellius while holding a praetorship under the *triumviri*.

Of course, the bare possibility remains that Valerius Maximus 6. 2. 12 is referring to a praetorship of Cascellius; but stripped of support from the *iudicium Cascellianum* such an assertion becomes even less plausible and should probably yield to Pomponius' explicit statement to the contrary. Cascellius should therefore be withdrawn once more from the list of praetors.

A further negative result follows for Roman lawyers. The *iudicium Cascellianum* cannot be dated to the Triumviral period. We thus lose one of Professor Kelly's fixed points for dating the growth of the Edict.[4] Once that specific date is abandoned, then if it is accepted that this Cascellius was the originator of the action, we are simply left with a possible period for its introduction covering Cascellius' active working life down to, say, late 44 B.C. Since Cascellius is unlikely to have achieved sufficient eminence to be responsible for a significant innovation until he was perhaps thirty at least, the possible period could be narrowed to roughly the thirty years between 74 B.C. and 44 B.C.[5] Indeed the *terminus ante quem* could probably be moved back a little to, say, 47 B.C., because most of Servius' juristic activity doubtless stems from the period before he became so deeply involved in politics.

[1] See, however, below, p. 138.

[2] *RE* IVA. 1. 851 ff. (B. Kübler).

[3] Cicero, *Philippics* 9. 15.

[4] 'The Growth Pattern of the Praetor's Edict', *Irish Jurist*, i (1966), 341 at 347. Watson is rightly reluctant to accept the date in 'The Development of the Praetor's Edict', *JRS* lx (1970), 105.

[5] For the arguments for placing Cascellius' probable date of birth around 104 B.C., see Kunkel, *Herkunft*, 25 ff.

Much of this is highly speculative, and indeed a further note of warning must be sounded. Although it is extremely tempting to say that the Cascellius of the *iudicium* and the jurist Cascellius are one and the same,[1] this need not be so. They could be different. In which case all that can be said is that the action is earlier than 44 B.C. One reason which might weigh in favour of such a negative conclusion is that the *iudicium Cascellianum* looks like a very important part of the machinery of the interdicts *utrubi* and *uti possidetis*. Both of these interdicts are old, probably going back to the early second or even to the third century B.C. One must therefore wonder whether this action would not have emerged before the first century B.C. It could, of course, be a replacement for or a refinement of some previously existing remedy. Professor Kaser says that before the *iudicium Cascellianum* developed, the remedy would simply be self-help.[2] It is perhaps almost a question of taste whether one sees that as acceptable in the legal system as late as the first century B.C.[3]

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PROPERTIUS 1. 16. 1–2

Quae fueram magnis olim patefacta triumphis,
ianua Tarpeiae nota pudicitiae . . .

LINE 2 has puzzled editors: 'The significance of the name is beyond knowledge' (Shackleton-Bailey);[4] 'Hic versus inter difficillimos Properti est' (Enk).[5] It should mean, 'a door known to the chastity of Tarpeia', i.e. 'known to Tarpeia when she was still chaste', i.e. 'known to Tarpeia as a girl'; and I suggest it means just that.

Propertius is saying that the door has not only an illustrious history (*magnis . . . patefacta triumphis*), but a long one, coeval with the city itself (Tarpeius, father of Tarpeia, was commander of the Capitol under Romulus), and he establishes its antiquity, not by a general assertion, but by this precise, if unexpected, reference to the childhood innocence of the legendary traitress.

The notoriety of her guilty love makes the association of ideas paradoxical, but the paradox is in Propertius' manner.

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[1] The name is not common: see L. R. Taylor, *The Voting Districts of the Roman Republic*, 202.

[2] *Das römische Zivilprozessrecht*, 327 n. 16.

[3] I am grateful to Mrs. Griffin and Professor Daube for their comments on a draft of this article.

[4] *Propertiana* (Cambridge, 1956), 46.

[5] *Sex. Propertii Elegiarum, Liber I, pars altera* (Luguduni Batavorum, 1946), 136.