

THE ORIGIN AND HISTORY OF THE PEREGRINE PRAETORSHIP, 242—166 B.C.¹

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The traditional account of the reason for the appointment at Rome of a second praetor in the year 242 B.C., an account repeated in almost all the books on Roman Law and History, is that the appointment was due to the increasing numbers of *peregrini* in the city; while its object was to provide a magistrate specially charged with the duty of administering the law in cases involving *peregrini*.

This view however has not been unchallenged. Professor E. C. Clark, in his *Practical Jurisprudence*, 1883, appears to have been the first to throw doubt upon it. His arguments find an echo in Cuq's *Manuel des Institutions Juridiques des Romains* (2nd Ed., 1928, p. 806), where the author, after giving in the body of his text the traditional view of the appointment of the second praetor, adds in a footnote:—

“ . . . Il est douteux que le second préteur ait eu, dès l'origine, pour mission principale, de dire le droit. On l'a utilisé suivant les besoins de l'Etat, quelquefois à Rome, plus souvent au dehors. L'acquisition de la Sicile en 513² et de la Sardaigne en 526² exigea la présence d'un magistrat du peuple romain: à diverses reprises on y envoya le préteur pérégrin. Même après la création de deux nouveaux préteurs en 527² les attributions du préteur pérégrin furent souvent réunies à celles du préteur urbain . . . ”

The source of the traditional theory may be found in a passage of the *Encheiridion* of Pomponius, preserved in the *Digest* of Justinian. The account given by Pomponius³ of the development of the office of praetor at Rome is as follows:—

“Cumque consules avocarentur bellis finitimis neque esset qui in civitate ius reddere posset, factum est ut praetor quoque crearetur qui urbanus appellatus est quod in urbe ius redderet. Post aliquot deinde annos non sufficiente eo praetore quod multa turba etiam peregrinorum in civitatem veniret, creatus est et alius praetor, qui peregrinus appellatus est, ab eo quod plerumque inter peregrinos ius dicebat . . . ”

In his observations on the account of Pomponius, Clarke⁴ remarks upon that author's general laxity and carelessness in his statements. And in the passage dealing with the praetors this reputation is certainly borne out. Even in the portion set out above it seems a little odd to find a period of 125 years referred to as “aliquot annos;” apart altogether from any examination of other authorities.

But there are grounds much stronger than possible verbal inaccuracies for doubting the statements of Pomponius in this matter.

In the first place, in the year 242 B.C., Rome had been engaged for twenty-two years in a desperate struggle with her Mediterranean rival, Carthage; a struggle into which she had been drawn when the

1. This article contains the substance, though in a somewhat expanded form, of a paper recently delivered to the Classical Association of Victoria.

2. Continental scholars usually employ the chronology *ab urbe condita*.

3. *Dig.* 1. 2. 2. 27-28.

4. *Practical Jurisprudence*, pp. 345-6.

conquest of Italy itself was scarcely completed. It seems, on the face of it at least, unlikely that in the circumstances of the time there would have been any crying need for a new judicial officer to concern himself with cases involving litigants who were not Roman citizens, while the *praetor urbanus* confined his activities to litigation between citizens only.

But there is a further reason, as Clarke points out, and a reason to be found in the circumstances of the time for challenging the account given by Pomponius of the appointment of the new *praetor*. In the year 242 B.C. Rome had staked her fortune on a naval engagement with the Carthaginian fleet. The battle took place off the Aegates Insulae, and the Romans were victorious. They were commanded in this engagement by Q. Valerius Falto, who was the *praetor urbanus* of the year, and who had been put in command of the expedition along with C. Lutatius Catulus, one of the consuls for the year. (Catulus, however, appears to have been disabled by a wound before the main engagement, and not to have taken any part in it).⁵

Zonaras (in a portion of his work which is generally agreed to be an epitome of Dion Cassius) says:⁶

Λουτάτιος Κάτυλος ἕπατος ἡρέθη καὶ τοῦτω ξυνεπέμφθη Κύντος Οὐαλέριος Φάλλκος⁷ ἀστυνομῶν.⁸

The reason for the despatch of the *praetor* with the *consul* is to be found in the Roman custom of entrusting any enterprise, as serious and vital to the state as was the last throw with Carthage, to two magistrates, normally the consuls; and in the passage in the *Epitome of Livy*⁹ by Florus dealing with the occasion:¹⁰ "Duo praetores tum creati sunt. Caecilius Metellus pontifex maximus A. Postumium consulem, quoniam idem et flamen Martialis erat, cum is ad bellum gerendum proficisci vellet, in urbe tenuit, nec passus est a sacris recedere."¹¹

The consul, then, being prevented from taking his place in the expedition, it became necessary to send another magistrate in his place; and a magistrate possessed of *imperium*. This the *praetor* had; and so the judicial magistrate was sent away from the city. During his absence, the other consul could not take his place, for the consuls were excluded from the administration of justice. It thus became necessary to have a magistrate charged with the power and duty previously attaching to the *praetor urbanus*. And so another *praetor* was appointed. This view of the matter seems the more reasonable, in the light of the circumstances of the time. And as Clarke says, it has the merit of being suggested by the extract from Florus.

Clarke may, however, be going a little further than is necessary, in suggesting that the action of the *pontifex maximus* was a pious political fraud to enable the supplanting of a nonentity by the more able

5. Vol. Max. 11. 8. 2; Eutrop. 2. 27.

6. Z on 8. 17.

7. A natural mistake, as Clark points out, for Φάλλων

8. The word used by Zonaxas for "praetor."

9. The original books do not survive for this period.

10. Epit. Livy, XIX.

11. See for the same account and this event: Val. Max. 1. 1. 2; Tac. Ann. 111. 71.

praetor. The *flamines* were apparently forbidden to spend a night away from the city; and the Romans had not yet begun to be contemptuous of the old religious scruples; nor is it likely that the head of the state religion would lend his countenance to any neglect of them. Besides, the moral of Claudius and the chickens was no doubt too painfully fresh in Roman ears to allow any further unnecessary attraction of the wrath of heaven by contempt of religious observances.

Other instances of similar action on the part of the *pontifex maximus* may be found. In the year 189 B.C.,¹² in the allotment of the praetorian *provinciae*, Sp. Postumius Albinus took that "*Urbanam et inter peregrinos*," while Sardinia fell to Q. Fabius Pictor, who was also *flamen Quirinalis*; the *pontifex maximus* of the day forbade Fabius to go out to his province; and after some dispute the Senate decreed: "*ut ius inter peregrinos diceret*."

Livy quotes the incident as a parallel with the events of 242 B.C. A few years later, in 183 B.C., one of the praetors elected was also *flamen Dialis*, and to avoid any difficulty: "*Praetores ita sortiri iussi; uti flamini Diali utique altera iuris dicendi Romae provincia esset. Peregrinam est sortitus*."¹³ And coming down to a much later time, during the war with Andronicus, in 131 B.C.: "*Rogatus est populus quem ad id bellum gerere placeret. Crassus consul et pontifex maximus Flacco collegae flamini Martiali multam dixit si a sacris discessisset. Quam multam populus remisit: pontifici tamen flaminem parere iussit*."¹⁴

The view maintained by Clark, which he suggests may be derived from the passage in Florus, may be supported by other considerations.

Following upon the victory of the Romans in 242 B.C., the island of Sicily was organised as a Roman "province," the first extension of the empire outside Italy. Appian,¹⁴ writing about the same time as both Pomponius and Florus (in the first half of the second century, A.D.), describes the process thus: *φόρους τε αὐτοῖς ἐπέθεσαν καὶ τέλη τὰ θαλάσσια ταῖς πόλεσι μερισάμενοι στρατηγὸν*¹⁵ *ἐτήσιον ἐπεμπον ἐς Σικελίαν*.

In the *στρατηγὸν ἐτήσιον* of this passage may be found a hint of how the services of the second praetor were used when normal conditions were restored at Rome. The Roman imperial "province" required a magistrate with *imperium*, which only the consuls and praetors possessed, as its governor; and in the period from 241 B.C. to 227 B.C., when the number of praetors was raised to four, apparently for the purpose of having two available for Sicily and the new province of Sardinia,¹⁶ the two consuls were every year occupied with wars in other directions. And the second praetor may well have been employed in the manner that Appian's words suggest. Unless the device of sending out some former magistrate with *imperium proconsule* or *propraetore* was used, it is difficult to see how else the government of the province could have been provided for. The authorities for this period are very scanty, but in 234 B.C., at least, one of the praetors was on foreign service:

12. Livy XXXVII. 50-51—Livy XXXIX. 45.

13. Cic. Phil. XI.—8.

14. V. 2. 2.

15. The word used by Appian to express "praetor."

16. Livy Suppl. XX. 33 (in edit. Delphin).

τῷ δ' ἐπιγενομένῳ ἔτει τριχῆ τὰς δυνάμεις διελόμενοι οἱ Ῥωμαῖοι ἴν' ἅμα πολεμούμενοι πάντες μὴ συμβοηθοῖεν ἀλλήλοις Πιστούμιον μὲν Ἀλβῖνον εἰς τὴν Λιγυστικήν, Σπούριον δὲ Καρονίλιον ἐπὶ τοὺς Κυρνίους ἐς δὲ τὴν Σαρδῶ τὸν ἀστυνόμον Πούπλιον Κορνήλιον ἔπεμψαν.¹⁷

The fact, of course, that in 227 B.C. the number of praetors was raised from two to four (there then being only two territorial provinces outside Rome, namely, Sicily and Sardinia) does suggest that by that time—or at any rate, after that time—duties had been found for the praetor, whose office originated in the appointment in 242 B.C. to perform within the city. That those duties were solely, or even necessarily, concerned with litigation involving *peregrini*, cannot be stated with any real certainty. In 225 B.C. Polybius¹⁸ says that the Romans: Δεύκιον μὲν Αἰμίλιον ὑπάτον . . . ἐξαπέστειλαν ὡς ἐπ' Ἀρμίον (against the Gauls) . . . ἕνα δὲ τῶν ἐξαπελέκων¹⁹ εἰς Τυρρηνίαν. ὁ μὲν γὰρ ἕτερος τῶν ὑπάτων Γάιος Ἀτίλιος προεξεληλυθὼς ἔτυχεν εἰς Σαρδόνα.²⁰

It is not until the year 216 B.C. that Livy gives a full statement of the election of, and allotment of provinces to, the praetors for the year; and he continues these records down to the year 166 B.C.²¹ with only occasional lacunae. For the years 218 B.C., and 217 B.C.,²² it is, however, possible to discover in Livy the following facts:—

In 218 B.C., the praetors were Lucius Manlius, who had Gallia (i.e., Cisalpina, North Italy) as his *provincia*,²³ M. Aemilius, "cuius Sicilia erat provincia,"²⁴ C. Atilius Serranus, apparently *praetor urbanus*, who is sent from the city by the Senate to assist the praetor in Gallia Cisalpina,²⁵ and who is found attending to governmental business in the city at various times; the fourth praetor was C. Terentius Varro,²⁶ of whose *provincia* no record exists. He may, however, have been *peregrinus*, or possibly *urbanus* and Atilius, who seems to have been absent from the city a great part of the time, *praetor peregrinus*.

In 217 B.C. the praetors were M. Aemilius, apparently *praetor urbanus*,²⁷ T. Otacilius, in Sicily;²⁸ A. Cornelius Mammula, in Sardinia;²⁸ and M. Pomponius, of whose *provincia* no account is given, but who is found in the city after the news of Trasimene arrived, and who may have been *peregrinus*.²⁹

Livy gives his first full account of the praetors, for the year 216 B.C., thus:³⁰ "Inde praetorum comitia habita: creati M. Pomponius Matho et P. Furius Philus. Philo Romae iuri dicendo urbana sors, Pomponio inter

17. Zonaxas 8. 18.

18. Polybius 2. 23-24.

19. The word Polybius uses for "praetor."

20. However, the consul did not have much trouble in dealing with the unrest in Sardinia, and was soon back in Italy; leaving, it is not unreasonable to assume, the province to its praetor.

21. I.e., to the end of book XLV., which is the last of those that have come down to us.

22. I.e., from the beginning of book XXI. (books XI.-XX. being lost in their original form).

23. Livy XXI. 17, 25.

24. XXI. 49.

25. XXI. 26, 39, 62-63.

26. XXII. 25.

27. Livy XXII. 9, 33.

28. XXII. 10, 31.

29. XXII. 25, XXIII. 21, 32.

29. XXII. 7.

30. XXII. 35.

civis Romanos et peregrinos evenit. Additi duo praetores M. Claudius Marcellus in Siciliam, L. Postumius Albinus in Galliam."

In the lists Livy gives for this and subsequent years it is not unreasonable to suppose that he was referring to original records, and using the phraseology used there; year by year he groups together the results of the magisterial elections and allotment of offices, employing much the same mode of arrangement and expression throughout. In this connection the words used to describe the *provincia* of the *praetor peregrinus* for 216 B.C., may be noted: "Romae iuri dicundo . . . sors . . . *inter civis Romanos et peregrinos*." It is not until the year 189 B.C., in a passage³¹ already quoted, that Livy seems to use the phrase "*ius inter peregrinos dicere*" to describe the jurisdiction of a praetor. Thereafter occasional instances of the phrase, or some equivalent expression, may be found down to 166 B.C.³²

Now, the frequent descriptions of the functions of the *praetor peregrinus* as being the *sors*, or *provincia*, or *iurisdictio peregrina*, indicate no further than does the name *praetor peregrinus* the scope of this magistrate's duties; that is, that he had something to do with the *peregrini*, all those, in other words, who were not Roman citizens. But that the duties concerned principally, or at all, at first, the administration of justice *inter peregrinos* is exceedingly doubtful.

Clark refers to the accounts Livy gives of the allotment of the praetorian provinces down to 199 B.C. It is better, however, to carry the examination of these accounts down to 198 B.C. at least as a first step; for in the following year the number of praetors was increased to six. (The reason being the organisation of Spain into two provinces, Ulterior and Citerior, to which, for the future, praetors were generally sent).³³ Summarising the result of such an examination as that suggested, in the nineteen years covered there is no mention of the allotment of any *provincia peregrina* in ten³⁴ of those nineteen years (including six years in succession from 203-198 B.C.); in two years, namely. 212 B.C. and 207 B.C., for the first, "P. Cornelius Sulla urbanam et peregrinam, quae duorum³⁵ ante sors fuerat;"³⁶ and for the second, "C. Hostilio iurisdictio urbana evenit; addita et peregrina ut tres in provincias exire possent."³⁷ Thus there was a union of the two *provinciae* in one magistrate. The same position arose, though in a different manner, in 213 B.C., and 206 B.C. In those years one of the praetors had drawn the *peregrina sors*, but, presumably as a result of the war then raging, in one case is described as taking another province, "iurisdictione M. Atilio collegae praetori urbano

31. Livy XXXVII. 50-51.

32. XL. 1, for 182 B.C.; XLI. 15, for 176 B.C.; and XLI. 21, XLII. 10, 31, XLIV. 21, XLV. 16, for the years 174, 172, 171, 168, 167 B.C. For the year 168 B.C., Livy describes the jurisdiction also "*inter cives et peregrinos ius dicere*"; though in doing so he is referring to a re-allotment of the praetorian provinces. However, before this he has described the same praetor as having his province variously "*inter peregrinos*" and "*inter cives et peregrinos*."

33. Livy XXXII. 27-28.

34. Namely: 214, 211, 210, 205, 203-198 B.C.; Livy XXIV. 10-12, 20; XXV. 41; XXVI. 23, 28, XXVII. 4, 7; XXVIII. —38; XXX. 1, XXX. 27, XXX. 40, XXXI. 6, XXXII. 1, XXXII. 7-8.

35. Not, it would seem, a strictly accurate comment by Livy.

36. Livy XXV. 3.

37. XXVII. 36.

mandata,"³⁸ and in the other similarly, "collegae iurisdictione tradita."³⁹ In three years, 209 B.C., 208 B.C., and 204 B.C., the *provincia peregrina* was joined, in the first and third years with "Gallia," and in the second year with "et quo senatus censuisset."⁴⁰ It is only,⁴¹ then, in two years, namely, 216 B.C. and 215 B.C., that there was a distinct allotment of a *sors*, "Romae iuri dicundo . . . inter cives Romanos et peregrinos,"⁴² or "peregrina . . . in iurisdictione."⁴³ But in 216 B.C., the *praetor urbanus*, P. Furius Philus, is found taking over the command of the fleet at Ostia, and later the same year returning with the fleet from Africa to Lilybaeum, seriously wounded; while M. Pomponius Matho, who had the *sors inter civis Romanos et peregrinos*, remained in the city.⁴⁴ And indeed in the year 215 B.C., that very desperate year for the Roman State, Livy says: "Ne praetoribus quidem qui ad ius dicendum creati erant, vacatio ab belli administratione data est." But the *praetor urbanus* was charged "ad suburbana litora tutanda,"⁴⁵ and so was probably never far from the city, nor absent from it for very long. The other praetor, however, was sent to Apulia and charged with guarding the coast between Brundisium and Tarentum.⁴⁶

Another passage of Livy, dealing with the discharge by the praetors in the city of their functions, in this same year, 215 B.C., is not without interest: "Praetores quorum iurisdictione erat tribunalia ad Piscinam publicam posuerunt: eo vadimonia fieri iusserunt; ibique eo anno ius dictum est."⁴⁸

But this examination of Livy's accounts of the praetorian *provinciae* may usefully be carried down to the year 166 B.C.⁴⁶ In the period from 197 B.C. to 166 B.C. there was generally a separate allotment of a *provincia* or *iurisdictione peregrina*, or *inter cives et peregrina*, or *inter peregrinos*. In several years, however, there occurred a union of jurisdictions in one individual. In 191 B.C. it was decreed "prima ut sors duae urbanae et inter cives ac peregrinos iurisdictione esset," and that "M. Junio Bruto iurisdictione utraque evenit."⁴⁷ The events of 189 B.C.,⁴⁸ when there was at first a union, and subsequently a separation of the *provinciae* have already been dealt with. In 184 B.C. the *praetor urbanus* died during the year; thereafter, Livy goes on:⁴⁹ "Ingens certamen tribunis et inter se ipsos et cum consule fuit; donec senatus a consule est habitus, decretumque: 'quoniam praetoris surrogandi comitia ne legibus fierent pertinacia Q. Flacci et prava studia hominum impedirent, senatum censere satis praetorum esse: P. Cornelius utramque in urbe iurisdictionem haberet.'"

38. Livy XXIV. 44.

39. XXVII. 10.

40. XXVII. 7, XXVII. 22, XXIX. 13.

41. Pomponius even, it should be observed, said "plerumque inter peregrinos ius dicebat."

42. XXII. 35.

43. XXIII. 30.

44. XXII. 57, XXIII. 20, 21, 22, 24.

45. Livy XXIII. 32.

46. Complete records are missing, in Livy, for the years 185 B.C., 175 B.C., 170 B.C. and 166 B.C. but there would appear to have been a "peregrina iurisdictione" in 170 B.C.; XLIII. 11.

47. Livy XXXV. 41, XXXVI. 2.

48. XXXVII. 51.

49. XXXIX. 39.

P. Cornelius Cethegus had obtained the *provincia* "inter cives et peregrinos."⁵⁰ Some instances may also be found of the *praetor peregrinus* taking another *provincia* outside the city. Thus in 178 B.C. Ti Claudius Nero, the *praetor peregrinus*, was directed by the Senate: "militibus legionis quartae . . . Pisas ut conveniret ediceret eamque provinciam dum consul inde abesset tutaretur."⁵¹ In 172 B.C. the *praetor* "cuius inter cives et peregrinos iurisdictio erat" was directed by the Senate to enrol soldiers to be taken over to Apollonia to secure the sea-board there for the campaign against Macedonia. But as he was still being given special tasks later the same year, it is doubtful whether he was absent from the city to any extent.⁵² In 168 B.C., the allotment had been "peregrina et si quo senatus censuisset;"⁵³ the sequel was as follows: "Senatus decrevit . . . 'ut L. Aemilius consul Cn. Octavius praetor cui classis obtigisset in provinciam proficiscantur.' Additus est his tertius L. Anicius praetor cuius inter peregrinos iurisdictio erat. Eum in provinciam Illyricum . . . succedere placuit"⁵⁴ . . . "Et praetores praetor C. Papirium Carbonem, cui Sardinia evenerat, in provincias iere. Eum ius dicere Romae (nam eam quoque sortem habebat) inter cives et peregrinos Patres censuerant."⁵⁵

Before concluding this survey of the terminology applied to the *provincia* of the *praetor peregrinus*, there are one or two other matters that should be mentioned.

With respect to the name given to the holder of the second praetorship, Clark points out that the earliest contemporary reference discoverable is that in s. 12 of the Lex Acilia Repetundarum, an enactment of either 123 or 122 B.C.,⁵⁶ which imposes a duty on "Praetor quei inter peregrinos ius deicit;" it has already been said that Livy does not, apparently, employ this phrase until the year 189 B.C., more than half a century after the original appointment of a second praetor. Girard⁵⁷ remarks upon a further peculiarity in the inscriptions: those of the Republic apparently mention only a *praetor qui inter peregrinos ius dicit*, and those of the Empire only a *praetor qui inter cives et peregrinos ius dicit*; the diversity of expression has not been explained satisfactorily, but it certainly seems reasonable to reject, with Girard, the explanation that it was not until the Empire that the *praetor peregrinus* dealt with cases between citizens and non-citizens. Even if it is put against Livy, writing, as he was, at the time that the Republic became the Empire, that he is reading the forms of his own day into the records of a much earlier period, there is still pretty clear evidence of a *praetor qui inter cives et peregrinos ius dicit* under the Republic. And in any event it seems likely⁵⁸ that in his lists of magistrates and their "provinces" Livy was referring to official records of some sort. Indeed, the jurisdiction "inter cives et

50. Livy XXXIX. 38.

51. XLI. 5.

52. Livy XLII. 18, 19, 22, 27.

53. XLIV. 17.

54. XLIV. 21.

55. XLV. 21.

56. See, Girard, Textes de droit romain.

57. Melanges I. 396.

58. v. supra.

peregrinos" was probably the first judicial function taken by the second praetor, at the same time giving rise to the title he bore.

It is worthy of note also that Livy seems never to speak of a *provincia* "inter cives" in referring to the office of the first praetor; it is always *sors*, or *provincia*, or *iurisdictio urbana*, or *Romae iuri dicundo* (or *iuris dicendi*) or *in iurisdictione urbana*, or similar phrases. And the man is always *praetor urbanus*, a name, as Clark points out, going back to the origin and reason of his appointment: the need of a magistrate in the city to carry on the judicial and administrative work of the State while the consuls were absent at wars in Italy. The name is derived from the area where the *imperium* is exercised, not from the subjects of the jurisdiction.⁵⁹

Clark also refers to a *Lex Papiria*⁶⁰ of uncertain date, but which he puts at a time shortly after 180 B.C., while Mommsen, and Girard following him, do not go beyond putting it between 242 B.C. and 122 B.C.⁶¹ The *Lex* regulates the sacramental procedure and mentions a "*praetor qui inter cives ius dicet.*" All three writers apparently accept the view that from such a phrase may be inferred existence of another praetor with a *provincia iuris dicendi*. The inference cannot, however, be very certain, for a *Lex Plaetoria*, which almost certainly goes back to the time of the appointment of the first praetor at Rome, apparently read "*Praetor urbanus qui nunc est quique posthac fuat duo lictores apud se habeto iusque ad supremam inter cives dicito.*"⁶² This indeed would suggest the complete neglect of *peregrini* by Roman Law.

It would appear from Livy, too, that the two praetors, *urbanus* and *peregrinus*, were regarded as having very much a common sphere of duty in the City, the division of judicial function being a matter of administrative convenience rather than legal constitutional necessity, even after 197 B.C. A passage from Livy,⁶³ relating to the year 215 B.C., and illustrating this joint possession of the judicial power, has already been quoted. From the year 186 B.C., there is another instance: "*Ceterum tanta fuga ex urbe facta erat ut quia multis actiones et res peribant cogerentur praetores . . . per senatum res in diem trigesimum differe donec quaestiones a consulibus perficerentur.*"⁶⁴

Livy also employs such phrases as "*praetoribus . . . quibus ut ius dicerent Romae provincia erat;*" "*duae Romae iuri dicundo (or iuris dicendi causa)*" sc. "*provinciae,*" "*utraque in urbe iurisdictio,*" "*duae urbanae iurisditiones (or provinciae);*" or *provinciae* "*ius dicere in urbe.*"⁶⁵

On the administrative side as well, although the *praetor urbanus* was the senior, his colleague, either alone or in association with him, is to be found constantly being charged with particular administrative duties or special inquiries of a judicial nature. And on the occasions when the *praetor urbanus* was away from the city his colleague is there to carry on the business of government.

59. And cf. Livy VI. 42: *Concessumque ab nobilitate plebi de consule plebeio: a plebe nobilitati de praetore uno qui ius in urbe diceret ex patribus creando.*

60. Festus, s. v. sacramentum.

61. Girard, *Textes de droit romain*, p. 26.

62. Censorinus de die Nat. 24.

63. XXIII. 32.

64. Livy XXXIX. 18.

65. See also Aulus Gellius, XX. 10, 3-4.

In considering the question of the nature of the judicial work first performed by the *praetor peregrinus* it is well to bear in mind also the essential, and intense, nationalist and personal character of Roman Law.⁶⁶ This was reflected in two ways; in the first place, *peregrini* could not employ the peculiarly Roman Law of procedure, save by way of treaty rights or fictitious actions,⁶⁷ and similarly did not enjoy the *ius provocacionis* or other privileges of the citizen under the criminal law; secondly, it was the policy of Rome in extending her Empire to leave the conquered peoples to be governed by their own laws. And when Caracalla extended the *civitas* to the whole Empire in 212 A.D., the struggle that arose was to apply Roman law universally to all the new *cives* throughout the Empire.

This peculiarly nationalist view served to emphasise the probability that a long time elapsed before the Roman Law concerned itself with disputes simply "inter peregrinos" at all. But Roman Law would, from the very first contact with *peregrini*, be concerned with litigation between them and Roman citizens; and hence the treaties relating to *ius commercium* that were made. But apart from such treaties, disputes might well arise between *cives* and *peregrini* not covered by them. And there can be no doubt that the *praetor urbanus* eventually had to concern himself with such disputes. When a second praetor became available for duty in the city it probably seemed a natural division of functions to attribute to him judicial work involving *peregrini*. But the evidence that has been adduced seems to indicate that such work was not the reason for the first appointment of a second praetor; while it also goes some way towards showing that a considerable period elapsed even then before disputes "inter peregrinos" simply became a concern of the Roman judicial magistrates.

The part played by the *praetor peregrinus* in the development of the formulary system and of the *ius gentium* has been the subject of much dispute; and on these two points the matters discussed in the preceding pages may also be regarded as being of some importance, apart altogether from any question of historical accuracy. At least the traditional account of the peregrine praetorship may be considered not well founded.

66. Schulz, Principles of Roman Law, pp. 118 sqq., 213-214.

67. Buckland, Text Book of Roman Law, p. 98.