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“The Historical Development of Roman
Maritime Law during the Late Republic and
Early Principate”



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ABSTRACT

In the period between the end of the Second Punic War and the early Principate, several sources of evidence combine to indicate that the Roman economy experienced some measure of (probably real) growth. At the same time, this was also the period during which Rome's legal institutions were most radically developed. The question that arises is, what part (if any) did the development of Roman law play in the city's economic history during this period? This is a big question, which it is outside of the scope of this thesis to answer. Rather, the aim of this study is to take a first step in this direction, by providing an evidential foundation upon which to base hypotheses about the relationship between changes in the intensity of transactional activity and legal development in the context of the Roman world.

One of the pillars for the case for growth is the observation that the evidence for the chronological distribution of shipwrecks located in the Mediterranean Basin indicates that there was a steep increase in maritime traffic in the second and first centuries BCE. In the first place, by studying the chronological development of Roman legal institutions relevant to the conduct of long-distance trade, this investigation shows that these developed in parallel with the increase in the intensity of maritime commercial activity. In the second, by constructing a model of the process by which long-distance trade was typically conducted, I demonstrate that the legal remedies that arose were specific to the relationships typically entered into by merchants in the course of transporting goods to their intended market. In this way, the pattern of legal change that emerges from the evidence is best understood as the development of Roman 'merchant law', even if the Romans themselves did not conceive of it as such.

LAY SUMMARY

The late Roman Republic and early Principate was a period of tumultuous change. Besides the dramatic military and political events that led to the expansion of Rome's empire and the transition of the state from a Republic to the Principate, Rome's economy and society were also transforming. New evidence from archaeological and natural science research has shown that certain kinds of economic activity – such as long-distance trade – intensified greatly during this period. At the same time, the textual evidence for the development of Roman law demonstrates that this was also the period during which Rome's legal institutions were most radically developed.

The circumstances surrounding these two parallel processes gives rise to a number of exciting questions: To what extent were they connected? Did changes in patterns of economic activity stimulate legal change? And conversely, did legal change stimulate economic activity? Finally, how does the relation between legal and economic change in this period compare to the relation observed in others? This thesis takes a first step towards answering these questions. By focussing on the conduct of maritime trade, I show that not only did Roman legal institutions develop in parallel with the economy, but that they emerged as a coherent cluster of remedies best characterised as a body of 'merchant law'.

AUTHOR'S DECLARATION

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

Signed: 

Date: 11/07/2019

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LIST OF ABBREVIATIONS

<i>Annali del Seminario Giuridico della Università di Palermo</i>	AUPA
<i>Bullettino dell'Istituto di diritto romano</i>	BIDR
<i>Dike: rivista di storia del diritto greco ed ellenistico</i>	Dike
<i>Historia: Zeitschrift für Alte Geschichte</i>	Historia
<i>Index: quaderni camerti di studi romanistici</i>	Index
<i>IURA: rivista internazionale di diritto romano e antico</i>	IURA
<i>Journal of Roman Archaeology</i>	JRA
<i>The Journal of Roman Studies</i>	JRS
<i>Labeo: rassegna di diritto romano</i>	Labeo
<i>Memoirs of the American Academy in Rome</i>	MAAR
<i>Rivista di diritto della navigazione</i>	RDN
<i>Revue historique de droit français et étranger</i>	RHD
<i>Revue internationale des droits de l'Antiquité</i>	RIDA
<i>Studia et documenta historiae et iuris</i>	SDHI
<i>Tijdschrift voor Rechtsgeschiedenis</i>	TvR
<i>Tyche: Beiträge zur alten Geschichte, Papyrologie und Epigraphik</i>	Tyche
<i>Zeitschrift für Papyrologie und Epigraphik</i>	ZPE
<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung</i>	ZSS

CHAPTER 1

INTRODUCTION

The immediate context of this study is that, in the period between the end of the Second Punic War and the early Principate, several sources of evidence combine to indicate that the Roman economy experienced some measure of (probably real) growth. At the same time, this was also the period during which Rome's legal institutions were most radically developed. The question that arises is, what part (if any) did the development of Roman law play in the city's economic history during this period? This is a big question, which it is outside of the scope of this thesis to answer. Rather, the aim of this study is to take a first step in this direction, by providing an evidential foundation upon which to base hypotheses about the relationship between changes in the intensity of transactional activity and legal development in the context of the Roman world.

The case for the growth of the Roman economy is founded on two complementary approaches. One approach has been to construct an 'argument from convergence', which proceeds from the observation that several archaeological data sets – including, for example, shipwrecks located in the Mediterranean basin, deposits of domestic animal bones at Italian sites, and samples of lead and copper pollution derived from Arctic ice cores and lake sediments – all show an increase in their chronological distribution during the late Republic and early Principate.¹ If these data sets are taken as proxies for the volume and intensity of exchange, consumption, and production respectively, then, as Scheidel has argued, 'we may reasonably assume that they indicate at least the general direction of economic development'.² Wilson is right, however, to acknowledge that uncertainty about the value of these proxies means that although they are consistent with the idea that the Roman economy experienced both extensive and intensive growth during this period,

¹ Walter Scheidel, 'In Search of Roman Economic Growth', *JRA* 22 (2009): 47.

² Walter Scheidel, 'Approaching the Roman Economy', in *The Cambridge Companion to the Roman Economy*, ed. Walter Scheidel (Cambridge and New York: Cambridge University Press, 2012), 3.

they cannot be relied upon to argue for either of these eventualities in their own right.³

A second approach has been to attempt to quantify the GDP of the Roman economy. Again, the limitations of the evidence mean that the exercise is necessarily conjectural. Nevertheless, where such estimates are possible they provide an insight into the trajectory of economic development, if only by giving a rough indication of the rate at which the economy was likely to have grown or contracted over a given period.⁴ The most significant study from our perspective is Kay's 'probabilistic quantification' of the GDP of Roman Italy for the second and early first centuries BCE.⁵ In brief, Kay concludes that the economy experienced nominal growth, and probably also real growth, not least because the rate of inflation remained at a relatively low level throughout the period.⁶ Kay's estimate that prices rose by 95% between 150 – 50 BCE. (i.e., at an annual compound rate of 0.67% *per annum*) accords with the broadly similar conclusions reached by, among others, Rathbone, Hollander, Scheidel, and Temin.⁷ Although, as Kay warns, 'the estimates we have produced are assumptions, not facts', the results are both plausible and credible from a comparative perspective.⁸

The conclusion that the Roman economy experienced some measure of (real) growth over the course of the last few centuries BCE has given rise to a profusion of alleged causes.⁹ These range variously from environmental and climatic change, to technological developments, the rapid increase in the supply of coinage, military conquest, the suppression of piracy, and the political transformation of the Roman state. In addition, several scholars have sought to locate Roman economic development within the context of the

³ Andrew I. Wilson, 'Quantifying Roman Economic Performance by Means of Proxies: Pitfalls and Potential', in *Quantifying the Greco-Roman Economy and Beyond*, ed. François de Callataÿ (Bari: Edipuglia, 2014), 155.

⁴ Scheidel, 'Approaching the Roman Economy', 4.

⁵ Philip Kay, *Rome's Economic Revolution* (Oxford: Oxford University Press, 2014), 278.

⁶ Kay, 324.

⁷ Kay, 284. For a summary of the literature on this point, Peter Temin, 'Price Behaviour in the Roman Empire', in *Quantifying the Greco-Roman Economy and Beyond*, ed. François de Callataÿ (Bari: Edipuglia, 2014), 191–92.

⁸ Kay, *Revolution*, 325.

⁹ Scheidel, 'Approaching the Roman Economy', 13.

longue durée, sometimes with an emphasis on institutional change.¹⁰ From time to time, the development of Roman law has been touted as a potential contributor to Roman economic development, though sometimes with the qualification that it ought not to be considered a ‘prime mover’.¹¹

While the increased attention paid to the historical significance of Roman law by ancient historians is heartening, it has also given rise to cross-disciplinary tensions. In a recent contribution made to the *Oxford Handbook of European Legal History*, James Whitman wrote that ‘European legal historians ought to overcome their reticence... and engage frankly with claims about the world historical significance of their subject’.¹² He continued:

It is a great loss if the grand theories about European legal history are debated by outsiders, and not by specialists who know the sources and understand how to think about law. It goes without saying that the sorts of grand claims about European legal history that non-specialists make may turn out to be foolish on close inspection. Nevertheless they deserve informed responses; and there is good reason to hope that the field will profit intellectually from debating them seriously.

In the past two decades, an increasing number of Roman legal scholars have engaged with economic historians to this effect.¹³ The approach has been pioneered by, among others, Dennis Kehoe, who has applied the framework provided by the New Institutional Economics (NIE) to the study of Roman

¹⁰ E.g., Taco T. Terpstra, *Trade in the Ancient Mediterranean: Private Order and Public Institutions* (Princeton, N.J.: Princeton University Press, 2019); also, Joseph G. Manning, *The Open Sea: The Economic Life of the Ancient Mediterranean World from the Iron Age to the Rise of Rome* (Princeton, N.J.: Princeton University Press, 2018); and *The Economy of the Ancient Mediterranean World* (Princeton, N.J.: Princeton University Press, Forthcoming).

¹¹ E.g., by William V. Harris, ‘Roman Governments and Commerce, 300 B.C. - A.D. 300’, in *Mercanti e politica nel mondo antico*, ed. Carlo Zaccagnini (Rome: L’Erma di Bretschneider, 2003), 285; Koenraad Verboven, ‘The Knights Who Say NIE. Can Neo-Institutional Economics Live up to Its Expectation in Ancient History Research?’, in *Structure and Performance in the Roman Economy: Models, Methods and Case Studies*, ed. Paul Erdkamp and Koenraad Verboven (Brussels: Éditions Latomus, 2015), 53; and Luuk de Ligt, ‘Law-Making and Economic Change during the Republic and Early Empire’, in *Roman Law and Economics*, ed. Giuseppe Dari-Mattiacci and Dennis P. Kehoe (Oxford: Oxford University Press, Forthcoming).

¹² James Q. Whitman, ‘The World Historical Significance of European Legal History: An Interim Report’, in *The Oxford Handbook of European Legal History*, ed. Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey, 2018, 5.

¹³ For a survey of the literature, Lauretta Manganzani, ‘“Law and Economics” e diritto romano’, in *Antologia giuridica romanistica ed antiquaria*, ed. Lorenzo Gagliardi, vol. 2 (Milan: Giuffrè Francis Lefebvre, 2018), 407–53.

property rights and aspects of the law of agency.¹⁴ However, significant gaps in coverage remain, and Lo Cascio was right to point out just over a decade ago that:¹⁵

...there is still ample room for studying in more detail, and through an analysis specifically oriented by the conceptualizations of the New Institutionalism, both the emergence and diffusion of what we may call Roman commercial law: the sheer richness of the documentary basis provided by the jurists but also by such epigraphic evidence as the Murecine tablets or more generally the Campanian archives can allow the drawing of a fairly detailed and concrete picture of the working of the Roman economy in a crucial sector of it.

The gap that this thesis will address is the historical development of Roman maritime law. An immediate caveat, however, is necessary: when I say, ‘the historical development of Roman maritime law’, what I really mean is the historical development of a subset of Roman legal institutions relevant to the conduct of long-distance trade. The expression ‘Roman maritime law’ is therefore used as a convenient way of referring to a set of institutions relevant to carriage by sea, which was just one aspect of the broader process by which overseas trade was conducted. As I shall argue at the conclusion of this study, those institutions that I have grouped together under the heading of Roman maritime law are better understood as part of a wider body of institutions

¹⁴ See, generally, Bruce W. Frier and Dennis P. Kehoe, ‘Law and Economic Institutions’, in *The Cambridge Economic History of the Greco-Roman World*, ed. Walter Scheidel, Ian Morris, and Richard P. Saller (Cambridge: Cambridge University Press, 2007), 113–43. On property rights, most significantly: Dennis P. Kehoe, *Investment, Profit, and Tenancy: The Jurists and the Roman Agrarian Economy* (Ann Arbor: University of Michigan Press, 1997); and *Law and the Rural Economy in the Roman Empire* (Ann Arbor: University of Michigan Press, 2007). Recent contributions on the law of agency include: ‘Roman Economic Policy and the Law of Contracts’, in *Obligations in Roman Law: Past, Present, and Future*, ed. Thomas A. J. McGinn (Ann Arbor: University of Michigan Press, 2012), 189–214; ‘Law, Agency and Growth in the Roman Economy’, in *New Frontiers: Law and Society in the Roman World*, ed. Paul J. du Plessis (Edinburgh: Edinburgh University Press, 2013), 177–91; ‘Contracts, Agency, and Transaction Costs in the Roman Economy’, in *Law and Transaction Costs in the Ancient Economy*, ed. Dennis P. Kehoe, David M. Ratzan, and Uri Yiftach (Ann Arbor: University of Michigan Press, 2015), 231–52; and ‘Agency, Roman Law, and Roman Social Values’, in *Ancient Law, Ancient Society*, ed. Dennis P. Kehoe and Thomas A. J. McGinn (Ann Arbor: University of Michigan Press, 2017), 105–32.

¹⁵ Elio Lo Cascio, ‘The Role of the State in the Roman Economy: Making Use of the New Institutional Economics’, in *Ancient Economies, Modern Methodologies: Archaeology, Comparative History, Models and Institutions*, ed. Peter F. Bang, Mamoru Ikeguchi, and Harmut G. Ziche (Bari: Edipuglia, 2006), 223.

comprising Roman ‘merchant law’, even if the Romans themselves did not conceive of it as such.

The reader may fairly point out that several studies of Roman maritime law have already been conducted.¹⁶ Moreover, there is a strong tradition in Roman legal scholarship of examining the conduct of long-distance trade from an interdisciplinary perspective.¹⁷ The novel contribution of this thesis, however, will be to produce an interpretation of the evidence upon which future studies informed by NIE can be based. To be useful for this purpose, the study must bring together the evidence for changes in the intensity of transactional activity and legal development with a view to establishing: first, the chronology of legal institutional change; and second, the substantive content of the changes that took place. In short, the specific focus must be on the interpretation of the evidence from the dual perspectives of chronology and change.

This will be achieved by means of a two-pronged approach. First, in chapter 2, I shall isolate one of the archaeological proxies identified above – the shipwreck data – with a view to establishing the period during which Roman maritime trading activity intensified at its greatest rate. In the second part of that chapter, I will situate this change within the context of the broader economic history of the period. In the third and final part, I will use a case study to construct a model of the process by which Roman long-distance trade was

¹⁶ Comprehensive treatments include (at century intervals): Jean-Marie Pardessus, *Collection de lois maritimes antérieures au XVIII siècle*, vol. 1 (Paris: Imprimerie Royale, 1828); Paul Huvelin, *Études d'histoire du droit commercial romain (histoire externe-droit maritime)* (Paris: Recueil Sirey, 1929); and Dominique Gaurier, *Le droit maritime romain* (Rennes: Presses Universitaires de Rennes, 2004). See, also, Pietro Cerami and Aldo Petrucci, *Diritto commerciale romano: profilo storico*, 3rd ed. (Turin: G. Giappichelli, 2010), 247–94.

¹⁷ See, e.g., Christoph H. Brecht, *Zur Haftung der Schiffer im antiken Recht* (Munich: C.H. Beck, 1962); Apollonia J. M. Meyer-Termeer, *Die Haftung der Schiffer im griechischen und römischen Recht* (Zutphen: Terra, 1978); Arnaldo Biscardi, ‘Introduction à l’étude des pratiques commerciales dans l’histoire des droits de l’Antiquité’, *RIDA* 29 (1982): 21–44; Alfons Bürge, ‘Der Witz im antiken Seefrachtvertrag: Beobachtungen zur Vertragspraxis im antiken Mittelmeerraum’, *Index* 22 (1994): 389–407; Gianfranco Purpura, *Studi romanistici in tema di diritto commerciale marittimo* (Soveria Mannelli: Rubbettino, 1996); Éva Jakab, ‘Risikomanagement bei den naukleroi’, in *Antike - Recht - Geschichte. Symposium zu Ehren von Peter E. Pieler*, ed. Nikolaus Benke and Franz-Stefan Meissel, vol. 4 (Frankfurt am Main: Lang, 2009), 73–88; and Roberto Fiori, ‘L’allocazione del rischio nei contratti relativi al trasporto’, in *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell’Impero)*, ed. Elio Lo Cascio and Dario Mantovani (Pavia: Pavia University Press, 2018), 507–67.

typically conducted. The second prong (chapters 3 and 4) will consist of an analysis of the legal evidence from the dual perspectives of chronology and change. In chapter 3, the relationship between merchants and financiers will be considered, with a particular focus on the practice of lending *pecunia traiectica*. In chapter 4, the attention will turn to the remedies that governed the relationship between merchants and *exercitores*: sc., the *actio exercitoria*; the *actiones locati* and *conducti* (including the *lex Rhodia*); the decretal *actio oneris aversi*; and the *actiones in factum* (*de recepto*; *furti* and *damni adversus nautas*). In the final chapter, I draw some conclusions about the chronological and substantive relationship between the conduct of long-distance trade and the development of legal institutions at Rome.

Before proceeding, however, it is important to say a few words about method. With respect to chapter 2, the approach has been to set out the evidence with the support of secondary literature in order to construct a model of a typical overseas trading enterprise. I have not offered any new interpretations of the evidence, archaeological or otherwise, except insofar as I have interpreted it to demonstrate that long-distance enterprises tended towards a typical socio-economic structure. In addition, since the study concerns the development of institutions of private law, the focus has been on the evidence for the conduct of private enterprise. This has necessarily led to certain omissions (such as a thorough treatment of the *annona*), principally in the interests of clarity and concision.¹⁸

Turning to the legal evidence, an historical question demands an historical method. In the context of the study of Roman law, the approach I have taken may be broadly understood as ‘contextual’ and ‘neo-humanist’ in character.¹⁹ In brief, this means that I have sought to treat each text first and foremost as *evidence*. In the first place, this involves considerations about the transmission

¹⁸ On which, e.g., Adriaan J. B. Sirks, *Food for Rome: The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople* (Amsterdam: Gieben, 1991).

¹⁹ Laurens C. Winkel, ‘Roman Law and Its Intellectual Context’, in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 11–12.

of the text (e.g., its manuscript tradition) and possible alterations made to its substance by the compilers and their postclassical forbears. With respect to interpolations, my approach is aligned with that of Kaser and Johnston, who have both advocated a rigorous and critical exegetical technique.²⁰ In those cases where questions concerning the form of the text arise, these have been indicated and, where appropriate, addressed. Where a text does not appear to have been substantially altered, or good arguments have already been made against allegations of interpolation, I have indicated this as well.

Once the text has been established, the next aim is to interpret its intended meaning. In this pursuit I follow Skinner, who has argued that:²¹

The essential question which we... confront in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance. It follows that the essential aim, in any attempt to understand the utterances themselves, must be to recover this complex intention on the part of the author.

This raises the question as to how we are to recover the author's intention. In this connection, I follow Collingwood's thesis that the historian's basic method is 'the re-enactment of past thought in the historian's own mind'.²² Thus, to give an example:²³

...suppose he is reading a passage of an ancient philosopher. Once more, he must know the language in a philological sense and be able to construe; but by doing that he has not yet understood the passage as an historian of philosophy must understand it. In order to see that, he must see what the philosophical problem was, of which his author is here stating his solution. He must think that problem out for himself, see what possible solutions of it might be offered, and see why this particular philosopher chose that solution instead of another. This means re-thinking for himself

²⁰ Generally, Max Kaser, *Zur Methodologie der römischen Rechtsquellenforschung* (Cologne, Graz, and Vienna: Böhlau, 1972); also, David Johnston, 'Justinian's Digest: The Interpretation of Interpolation', *Oxford Journal of Legal Studies* 9, no. 2 (1989): 149–66.

²¹ Quentin Skinner, 'Meaning and Understanding in the History of Ideas', *History and Theory* 8 (1969): 48–49.

²² Robin G. Collingwood, *The Idea of History* (Oxford: Clarendon Press, 1946), 215. Despite the criticisms that have been levelled against the doctrine, I agree with Dray that 'the idea itself is basically sound': *History as Re-Enactment: R. G. Collingwood's Idea of History* (Oxford: Oxford University Press, 1999), 32.

²³ Collingwood, *Idea of History*, 283.

the thought of his author, and nothing short of that will make him the historian of that author's philosophy.

It is not difficult to see that, for the legal historian, one only has to substitute the word 'philosophical' for the word 'legal' to be confronted with a viable method for the interpretation of juristic texts.

All this brings us back to the importance of context. In the first instance, if recovering the intention of an author means the re-enactment of their thought, this necessarily requires an awareness and knowledge on the part of the historian of their subject's way of thinking (i.e., their intellectual context). In addition, Skinner was also right to argue that the wider socio-economic context within which a certain text was produced can bear on its interpretation. In this way, context becomes the 'ultimate framework' that delimits the range of possible meanings that someone who belonged to a society of the kind in question can have intended to communicate.²⁴

In Roman legal scholarship, the acknowledgment that contextualisation can yield important insights into the meaning of juristic texts can be traced through two complementary lines of inquiry. On the one hand, studies conducted into the intellectual context of juristic thought has led to an increasing recognition of the influence of ancient philosophy and rhetoric on Roman legal thinking.²⁵ On the other hand, the location of juristic activity in its political and socio-economic context has led to a deeper understanding of the assumptions that formed the background to legal interpretation.²⁶ In both respects, however, the relationship between Roman legal thought and the context of its expression

²⁴ Skinner, 'Meaning and Understanding', 49.

²⁵ See, e.g., the scholars cited by Winkel: 'Roman Law', 11–12; and the recent doctoral thesis by Graeme Cunningham: 'Law, Rhetoric and Science: Historical Narratives in Roman Law' (University of Glasgow, 2018).

²⁶ The tradition can be traced (at least in its present form) to Crook's seminal work, *Law and Life of Rome* (Ithaca, NY: Cornell University Press, 1967); and through David Johnston, *Roman Law in Context* (Cambridge and New York: Cambridge University Press, 1999). For a survey and discussion of the literature since the late 1960s, John W. Cairns and Paul J. du Plessis, eds., 'Introduction: Themes and Literature', in *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2007), 3–8; Paul J. du Plessis, ed., 'Introduction', in *New Frontiers: Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2013), 1–5; and Paul J. du Plessis, Clifford Ando, and Kaius Tuori, eds., 'A Word from the Editors', in *The Oxford Handbook of Roman Law and Society* (Oxford: Oxford University Press, 2016), 3–7.

remains controversial. As Winkel has pointed out, addressing these problems requires 'intensive interdisciplinary collaboration', and it is against the backdrop of this tradition that the present contribution may be assessed.²⁷

²⁷ Winkel, 'Roman Law', 17.

CHAPTER 2

THE CONDUCT OF LONG-DISTANCE TRADE

The development of Roman legal institutions relevant to the conduct of long-distance cannot be understood without an appreciation of the socio-economic context within which that development took place. To this end, the aim will be to construct a model of a typical Roman maritime trading enterprise from the period in question. The chapter will be divided into three sections. In the first, the quantitative evidence for changes in the intensity of Mediterranean long-distance trade will be introduced. In the second, the context within which these changes took place will be considered in more detail, including the location of points of supply and demand, and the trade networks that connected them. Third, and finally, a specific trade route between the Italian peninsula and southern Gaul will be analysed with a view to constructing a model of a typical maritime trading enterprise.

Section 2.1: The Shipwreck Evidence.

The evidence for the distribution of ancient shipwrecks provides an unparalleled insight into changes in the intensity of Mediterranean long-distance trade over time. The shipwreck data for the Mediterranean basin was originally brought together by Anthony Parker in 1992 and has subsequently been updated and refined by Andrew Wilson and Julia Strauss as part of the Oxford Roman Economy Project (OXREP).¹ The current database, which was last updated in 2013, contains a record of all the known shipwrecks within the Mediterranean basin that can be dated to before 1500 CE. The graph reproduced in Fig. 1 (see Appendix) represents the chronological distribution of the whole dataset.

¹ Anthony J. Parker, *Ancient Shipwrecks of the Mediterranean and the Roman Provinces* (Oxford: Tempus Reparatum, 1992). For the OXREP database, Julia Strauss, *Shipwrecks Database*, version 1, 2013, oxrep.classics.ox.ac.uk/databases/shipwrecks_database/. Many shipwrecks have been discovered since the release of the database. The effect that these have on the overall distribution has yet to be seen.

The interpretation of the data must be handled with some care. First, it is important to acknowledge the geographical biases concealed by the chronological representation of the data. These come out strongly when the locations of the shipwreck sites are charted cartographically (Appendix: Fig. 2). The map clearly shows that the majority of known wrecks are located along the French Riviera and the Tyrrhenian and Adriatic coasts. This is due, at least in part, to the greater intensity of archaeological work that has been undertaken along the western seaboard. Consequently, the eastern and North African Mediterranean littoral, as well as areas of deep water out to sea, are underrepresented in the present sample. While the data, therefore, may be broadly indicative of changes in the volume of maritime traffic along coastal routes in the north-western quarter of the basin, it is less securely representative of conditions elsewhere.

With this in mind, the changes in the volume of maritime traffic in the western Mediterranean during our period can be more accurately represented by isolating a subset of the data that only includes wrecks located in the West Mediterranean, Tyrrhenian, and Adriatic Seas (Appendix: Fig. 3).² Within this subset, it is notable that of approximately 600 wrecks, almost 400 are located in the West Mediterranean Sea, of which more than three-quarters sank off the French and Italian coastline. In contrast, the Tyrrhenian and Adriatic coastlines are each home to just over 100 wrecks each.³ This suggests that the observable increase in the volume of maritime traffic that occurred during the late Republic was driven to a large extent by long-distance trade between the Italian peninsula and Gaul: a conclusion that is corroborated by the scale of terrestrial amphora deposits in Gaul from the same period. The intensity of the trade conducted along this route is indicated by the number of findspots of

² Long-dated wrecks – that is, wrecks with long date ranges – have been left in the data set because, as Wilson suggests, their removal does not have any significant impact on the shape of the graph: 'Developments in Mediterranean Shipping and Maritime Trade from the Hellenistic Period to AD 1000', in *Maritime Archaeology and Ancient Trade in the Mediterranean*, ed. Damian Robinson and Andrew I. Wilson (Oxford: Oxford Centre for Maritime Archaeology, 2011), 35.

³ The OXREP database records the remains of 606 wrecks in these three sea areas: 392 in the West Mediterranean Sea, 101 in the Tyrrhenian, and 113 in the Adriatic.

Republican amphorae recorded in France, which stood at 1,975 in 2003,⁴ amounting to a total quantity of c. 70 million containers.⁵ Drawing upon the shipwrecks known in the 1980s, Tchernia attempted to quantify the volume of Italian wine exports to Gaul during the period for which Dressel 1 amphorae were in use and came to an estimate of 6 million litres per annum.⁶ Separately, Rosenstein reached the conclusion that exports amounted to between 6 and 15 million litres per year.⁷ Whatever the true figure, there is little doubt that the volume of trade conducted was substantial. All this is consistent with the shape of the graph presented in Fig. 3, which indicates a sharp increase in traffic in the last quarter of the second and first quarter of the first centuries BCE, followed by a decrease in the quarter century during which the demand from Gaul is thought to have abated (i.e., 75 – 50 BCE).⁸

In addition, before we can argue that the graph is representative of changes in the volume of maritime traffic that traversed the Mediterranean during any given period, we must be prepared to recognise that the pattern contained within it is underpinned by two fundamental assumptions.⁹ First, it is assumed that the probability of a ship becoming wrecked was the same in all periods. This, however, is a factor that depends on a number of variables, such as, among other things, changes in climate, sailing routes, the propensity for winter sailing, and, perhaps above all, shipping technology. It is probable, for example, that the introduction of a new design of bilge pump around 100 BCE made ships equipped with this technology less likely to sink, and also facilitated the construction of larger ships which were more capable of withstanding

⁴ Matthew E. Loughton, 'The Distribution of Republican Amphorae in France', *Oxford Journal of Archaeology* 22, no. 2 (2003): 177.

⁵ André Tchernia, 'The Economic Crisis in Imperial Italy and Competition from the Provinces', in *The Romans and Trade*, trans. James Grieve and Elizabeth Minchin (Oxford: Oxford University Press, 2016), 302; Fabienne Olmer, 'Amphores en Gaule aux I^{er} et II^{es} siècles avant notre ère. Aspects épigraphiques, quantitatifs et économiques', *Bollettino di Archaeologia On Line* 1 (2010): 67–68.

⁶ André Tchernia, *Le vin de l'Italie romaine. Essai d'histoire économique d'après les amphores* (Paris and Rome: École française de Rome, 1986).

⁷ Nathan Rosenstein, 'Aristocrats and Agriculture in the Middle and Late Republic', *JRS* 98 (2008): 17.

⁸ André Tchernia, 'Wine Exporting and the Exception of Gaul', in *The Romans and Trade*, trans. James Grieve and Elizabeth Minchin (Oxford: Oxford University Press, 2016), 292.

⁹ Wilson, 'Developments', 36.

adverse sailing conditions.¹⁰ It is hard to assess the extent that this causes us to underestimate the increase in the volume of traffic following the introduction of the pump, however, since the effect of better technology may have been offset by, for example, a greater willingness to sail in inclement weather and along more dangerous routes.

Second, it is assumed that the archaeological remains of wrecks are equally visible across all periods. Clearly this is not the case, and it is vital to acknowledge that the majority of known wrecks have only remained visible because their cargoes consisted of durable materials, such as clay (for amphorae) or stone.¹¹ In contrast, any soft commodities that were freely transported, or contained in sacks or wooden barrels, have perished and are therefore not traceable in the archaeological record.¹² The interpretation of the data becomes especially problematic once the transition in container preference from amphorae to barrels, which began in earnest from the first century CE, is factored in.¹³ It is likely, therefore, that the apparent decline in the number of shipwrecks attributable to the second century CE and beyond is, in part, a reflection of changes in the use of containers.¹⁴ On the other hand, because this change in preference appears to have only become significant by the first century CE at the earliest, it does not affect our assessment of the

¹⁰ Wilson, 42–44.

¹¹ For research into stone cargoes, Ben Russell, 'Lapis Transmarinus: Stone-Carrying Ships and the Maritime Distribution of Stone in the Roman Empire', in *Maritime Archaeology and Ancient Trade in the Mediterranean*, ed. Damian Robinson and Andrew I. Wilson (Oxford: Oxford Centre for Maritime Archaeology, 2011), 139–55; Ben Russell, 'Roman and Late-Antique Shipwrecks with Stone Cargoes: A New Inventory', *JRA* 26 (2013): 331–61.

¹² Tchernia has remarked that, had slaves been transported in amphorae, we would detect a peak in their export from both Gaul and Delos to the Italian peninsula in the second and first centuries BCE: 'Wine Exporting', 295; also, Michele Stefanile, 'The Development of Roman Maritime Trade after the Second Punic War', in *The Sea in History - The Ancient World*, ed. Pascal Arnaud and Philip de Souza (Woodbridge, UK: Boydell & Brewer, 2017), 261–62.

¹³ For the use of barrels as containers, Élise Marlière, 'Le tonneau en Gaule romaine', *Gallia: Archéologie de la France antique* 58 (2001): 181–201; also, *L'outré et le tonneau dans l'Occident romain* (Montagnac: Éditions monique mergoil, 2002).

¹⁴ Andrew I. Wilson, 'Approaches to Quantifying Roman Trade', in *Quantifying the Roman Economy: Methods and Problems*, ed. Alan K. Bowman and Andrew I. Wilson (Oxford: Oxford University Press, 2009), 219–21.

rate of increase in the intensity of maritime traffic that occurred before this time (e.g., during the late Republic).¹⁵

One final issue concerning the interpretation of the shipwreck evidence requires to be addressed. So far, we have only taken the evidence to be representative of the volume of maritime traffic within a given period, subject to the two assumptions outlined above. If, however, we are prepared to interpret the data as an indicator of the *number of transactions* taking place in connection with long-distance trade within a given timeframe, then we must acknowledge the additional assumption that the average size of vessels was the same in all periods. It should be kept in mind that smaller ships of less than 75 tons capacity (approximately 1,500 amphorae) were common throughout the Roman period, and probably made up the great majority of vessels in the merchant fleet at any given time.¹⁶ However, the period between 100 BCE and 300 CE is exceptional for the increase in the number of wrecks of vessels with a capacity of over 100 tons, some of which exceeded 350 tons.¹⁷ Consequently, we are likely to underestimate the increase in the volume of trade which can be attributed to the use of larger vessels within this timeframe, particularly between the end of the second and the beginning of the first centuries BCE. Kay, for example, suggests that this factor alone can be assumed to account for an uplift in the volume of trade of somewhere in the order of 20% between the latter half of the second and the first half of the first centuries BCE.¹⁸ Altogether, we may conclude that there was a steep increase in traffic in the last quarter of the second and first quarter of the first centuries BCE, followed by a period of stagnation (or even slight decline) in the latter half of that century, before there was a final uplift in the first half of the first century CE.

¹⁵ Wilson, 'Developments', 221.

¹⁶ Wilson, 39.

¹⁷ Wilson, 39.

¹⁸ Philip Kay, *Rome's Economic Revolution* (Oxford: Oxford University Press, 2014), 281.

Section 2.2: Context: Traders, Supply, and Demand.

The shipwreck evidence alone indicates that long-distance trading activity intensified in the Mediterranean basin between the end of the Second Punic War (218 – 210 BCE) and early Principate, particularly in its western part. The questions that arise concern the identity of the persons conducting that trade and the points of supply and demand between which products were transported.

2.2.1 The Spread of Italian Trading Networks.

Both literary and epigraphic sources indicate that the size, number, and geographical spread of communities of Roman *negotiatores* resident abroad rose markedly following the conclusion of the Second Punic War.¹⁹ In the East, the most well documented community of Italian traders were resident on the island of Delos, which rapidly became a thriving commercial centre following the decision of the Roman Senate to grant it the status of a duty-free port in 167.²⁰ This, among other measures, contributed to the decline of the hegemony of Rhodes in the region, and, if Strabo is reliable, the position of the island was strengthened still further by the relocation of merchants from Corinth following the city's conquest and destruction in 146.²¹ Delos functioned principally as an entrepôt, at which goods imported from the Eastern littoral could be brought together and sold to Italian merchants for re-export to markets further west. Two of the most significant kinds of merchandise to pass through the port in this respect were slaves and luxury items, both of which were increasingly in demand on the Italian peninsula.²²

Beyond Delos, Roman traders also appear in Macedonia following the establishment of Roman rule there in 146, as well as in Athenian inscriptions from about 150. Elsewhere in Greece, Italian traders are attested to have been active in Argos, as well as on this islands of Chios, Cos, and Crete. In Asia,

¹⁹ Kay, 206–10.

²⁰ Véronique Chankowski, 'Delos', in *The Encyclopedia of Ancient History* (Chichester, West Sussex: Wiley Blackwell, 2012); also, Kay, *Revolution*, 197–202.

²¹ Strab. *Geog.* 10.5.4.

²² Kay, *Revolution*, 202–6.

too, the conversion of the region into a Roman province in 133 encouraged the activities of Roman traders who, if reports of their massacre in the Mithridatic revolt of 88 are to be trusted, were a significant presence in places such as Ephesus, Pergamum, and Caunos.²³ The effects of the revolt, however, appear only to have been temporary, such that by c. 60 BCE a group of '*Italicei qui Ephesi negotiantur*' are attested erecting a statue in honour of a certain L. Agrius Publeianus.²⁴

In the West, communities of Italian traders are known to have been established in Sicily and North Africa, where Sallust reported the presence of Roman merchants in Utica, Vaga, and Cirta during the Jugurthine War (112 – 106 BCE).²⁵ Although the literary and epigraphic evidence for Spain is sparse, Kay notes that the extent of the Roman mining operations on the peninsula and the archaeological evidence for the export of wine and olive oil to the Iberian provinces suggests an ongoing Roman presence.²⁶ Lastly, Gaul increasingly became a hotbed of Roman trading activity, especially following the completion of the Via Domitia to Spain and the establishment of the colony at Narbo in 118. By the first half of the first century BCE Cicero could state that Gaul was packed with Roman *negotiatores* and that not a coin could change hands there without the transaction being recorded in their account books.²⁷ Although the scope of the word *negotiator* during the Republic has been debated,²⁸ it is likely, as Tchernia suggests, that a number of these businessmen were involved in the wine and slave trade.²⁹

²³ Appian reported the murder of thousands of Romans at Tralles, Ephesus, Pergamum, Adramyttium, and Caunos: *Mith.* 22-3. For further references, Kay, 209.

²⁴ *IvE* 6 2058: on which, Candace Rice, 'Mercantile Specialization and Trading Communities: Economic Strategies in Roman Maritime Trade', in *Urban Craftsmen and Traders in the Roman World*, ed. Andrew I. Wilson and Miko Flohr (Oxford and New York: Oxford University Press, 2016), 106.

²⁵ Sall. *Iug.* 64.5, 47.1, and 26.3 respectively: on which, Kay, *Revolution*, 209–10.

²⁶ Kay, 210.

²⁷ Cic. *Font.* 11.

²⁸ See, e.g., Koenraad Verboven, 'Ce que negotiari et ses dérivés veulent dire', in *Vocabulaire et expression de l'économie dans le monde antique*, ed. Jean Andreau and Véronique Chankowski (Bordeaux: Ausonius, 2007), 102.

²⁹ Tchernia, 'Wine Exporting', 289 and 295.

2.2.2 Supply: Production on the Italian Peninsula.

Turning to the second question, one of the defining features of Rome's economic transformation following the conclusion of the Second Punic War was the development of the villa estate as a mode of production. These were plots of land organised around a villa, which characteristically made use of slave and free labour to exploit the estate's natural resources with a view to profit.³⁰ In the second century BCE, villa estates – like the kind described in Cato's *de agri cultura* – were predominantly of a small-to-medium size and tended to be located in the central-western part of the Italian peninsula, particularly along the Tiber and the Tyrrhenian coast.³¹ In the succeeding centuries the number of new occupations in Latium, Tuscany, and Umbria reached a peak in the first century BCE, while the total number of occupied villas reached a maximum in the early first century CE.³²

In addition to greater frequency, villas also began to furnish a dual purpose for their owners, with an increasing number exhibiting both a *pars rustica*, for the exploitation of the estate's natural resources, and a *pars urbana*, intended for recreational use.³³ Estates also grew in size, and the literary sources leave little doubt that some properties grew to be extremely large, particularly over the course of the first century BCE.³⁴ Whether these properties were continuous or fragmented into smaller landholdings, however, is not always clear, and the evidence suggests that there remained a considerable class of absentee landlords who owned multiple small-to-medium size estates dispersed across several locations.³⁵ In addition, as Harper notes, the model of the progressive accumulation of land into ever-larger estates was not

³⁰ Neville Morley, *Metropolis and Hinterland: The City of Rome and the Italian Economy 200 B.C. - A.D. 200* (Cambridge: Cambridge University Press, 1996), 142.

³¹ Annalisa Marzano, *Roman Villas in Central Italy: A Social and Economic History* (Leiden and Boston: Brill, 2007), 125.

³² Marzano, 9.

³³ Marzano, 125.

³⁴ E.g., Pliny the Elder's claim that *latifundia* had ruined Italy: *HN*. 18.35. Further, Marzano, 127.

³⁵ Kay, *Revolution*, 135.

unidirectional: there was, however imperfect, a market for land, and villa estates were not immune from diseconomies of scale.³⁶

The methods by which a landowner could extract a profitable yield from his estate were discussed by the Roman agronomists, who emphasised the intensive exploitation of the land's natural resources.³⁷ The most common way to exploit the productive potential of the land was to engage in agriculture. One strategy was to practise 'polyculture', which is the name given to the combined cultivation of the so-called 'Mediterranean triad' – olive trees (for olive oil), vines (for wine), and cereals (mostly grain) – each element of which required different soil conditions and harvesting at different times of the year.³⁸ Besides cultivating the soil, landowners also engaged in livestock rearing, the operation of clay-pits, mines, and quarries, and, for those estates benefiting from a coastal location, reaping the fruits of the sea.³⁹ In the *suburbium* of Italian cities market gardening was also a viable enterprise,⁴⁰ and for estates adjacent to busy roads *tabernae deversoriae* (that is, inns, which sometimes doubled up as brothels) were a potential source of profit.⁴¹

The productivity of all these forms of exploitation – and of agriculture in particular – was gradually enhanced by technological innovations. These included, for example, the development of techniques to harness water

³⁶ Kyle Harper, 'Landed Wealth in the Long Term: Patterns, Possibilities, and Evidence', in *Ownership and Exploitation of Land and Natural Resources in the Roman World*, ed. Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (Oxford: Oxford University Press, 2015), 60.

³⁷ The seminal treatises in this respect are Cato's *De agri cultura*, Varro's *Rerum rusticarum*, and Columella's *De re rustica* (also, by the same author, *De arboribus*, which concentrated in part on the cultivation of olive trees and vines): on which, Kenneth D. White, 'Roman Agricultural Writers I: Varro and His Predecessors', in *Aufstieg und Niedergang der römischen Welt*, ed. Hildegard Temporini, vol. I:4 (Berlin: De Gruyter, 1973), 439–97.

³⁸ Kevin Greene, *The Archaeology of the Roman Economy* (London: Batsford, 1986), 72–73; also, Kay, *Revolution*, 148.

³⁹ Annalisa Marzano, *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (Oxford and New York: Oxford University Press, 2013); also, 'The Variety of Villa Production: From Agriculture to Aquaculture', in *Ownership and Exploitation of Land and Natural Resources in the Roman World*, ed. Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (Oxford: Oxford University Press, 2015), 187–206.

⁴⁰ Kay, *Revolution*, 148.

⁴¹ For Varro's observations on inns, *Rust.* 1.2.22-3. Ulpian mentioned the proceeds of brothels as a common source of income for 'many respectable men' (D.5.3.27.1 (Ulp. 15 *ad ed.*)), which Tchernia suggests was also the case in the time of Varro: *The Romans and Trade*, trans. James Grieve and Elizabeth Minchin (Oxford: Oxford University Press, 2016), 11.

resources to power lifting machines and provide irrigation, as well as the design of presses for the more efficient processing of olives and grapes.⁴² Perhaps the most significant development, however, was the systematic exploitation of slave labour as a mode of production.⁴³ Over the course of the last two centuries BCE, Scheidel has estimated that the slave population of Italy rose from between 130,000 and 270,000 in 200, to between 850,000 and 1.86 million in 1 BCE.⁴⁴ Extrapolating from these figures, Kay suggests that between 1.7 and 4.4 million slaves were imported during this time.⁴⁵ Not all of these slaves worked in agriculture, and the figures cover all ages and genders.⁴⁶ Nevertheless, the scale and pace of the import of forced labour was integral to the development of the villa economy, which thrived on the exploitation a servile workforce. This is not to say that villa estates only relied on slave labour: the seasonal nature of agriculture had the potential to leave an enslaved workforce underemployed at some times of the year and overstretched at others. Consequently, villa estates also resorted to the employment of external (waged) labour to augment the slave workforce where required.⁴⁷

2.2.3 Demand: Growing Urban Centres and Gaul.

The growth in the number and size of villa estates in Latium, Campania, and Etruria in the second and first centuries BCE coincided with growing sources

⁴² Dennis P. Kehoe, 'The Early Roman Empire: Production', in *The Cambridge Economic History of the Greco-Roman World*, ed. Walter Scheidel, Ian Morris, and Richard P. Saller (Cambridge: Cambridge University Press, 2007), 552–53; also, the table of innovations displayed in William V. Harris, 'The Late Republic', in *The Cambridge Economic History of the Greco-Roman World*, ed. Walter Scheidel, Ian Morris, and Richard P. Saller (Cambridge: Cambridge University Press, 2007), 536; and Kay, *Revolution*, 155–60.

⁴³ Morley, *Metropolis and Hinterland*, 123–24.

⁴⁴ Walter Scheidel, 'Human Mobility in Roman Italy, II: The Slave Population', *JRS* 95 (2005): 77, table 2.

⁴⁵ Kay, *Revolution*, 181.

⁴⁶ Scheidel's schedule suggests that some 60% of these slaves were urban: 'Slave Population', 77, table 2.

⁴⁷ Alessandro Launaro, 'The Nature of the Villa Economy', in *Ownership and Exploitation of Land and Natural Resources in the Roman World*, ed. Paul Erdkamp, Koenraad Verboven, and Arjan Zuiderhoek (Oxford: Oxford University Press, 2015), 177–78; Kehoe, 'Production', 554. Max Weber suggested that, following the Carthaginian writer Mago, the Roman agronomists took it for granted that free labourers would only be employed during the harvest: *The Agrarian Sociology of Ancient Civilizations*, trans. R. I. Frank (London and New York: Verso, 2013), 318.

of demand. These largely consisted of the urbanising population centres of the Italian peninsula and markets overseas. Turning first to Italian urban populations, Rome was by far the most significant settlement on the peninsula, and whereas the population of the metropolis had been somewhere in the region of 500,000 in 130 BCE, it had reached between 850,000 and one million by the time of Augustus, and had stabilised at one million by the middle of the first century CE.⁴⁸ In addition to offering high prices, the conurbation was also accessible by means of river transport along the Tiber, which opened onto the Tyrrhenian Sea through the river port of Ostia.⁴⁹ Although necessarily speculative, Morley has estimated that the volume of wine consumed at Rome in c. 100 BCE outstripped the volume exported to Gaul – Italy’s largest overseas market at the time – by at least four times.⁵⁰ Panella and Tchernia, for example, show that in c. 50 BCE almost half the amphorae imported through Ostia to Rome were carrying Italian wine, of which approximately three in every five containers came from villas with access to the Tyrrhenian coast.⁵¹ City-dwellers also needed to be fed, and for the duration of the second century at least, Campania, northern Etruria, and Latium all contributed heavily to the Roman grain supply.⁵² In fact, no agricultural products appear to have been imported from beyond the Italian peninsula on a regular basis before the 120s.⁵³ By the time of the high empire, Virlouvet has estimated that between one-fifth and one-quarter of the Italian population resided in cities, and that the inhabitants of Rome consumed c. 420,000 tonnes of cereals, 150,000

⁴⁸ Morley, *Metropolis and Hinterland*, 38–39.

⁴⁹ Generally, Steven L. Tuck, ‘The Tiber and River Transport’, in *The Cambridge Companion to Ancient Rome*, ed. Paul Erdkamp (Cambridge: Cambridge University Press, 2013), 229–45.

⁵⁰ Morley, *Metropolis and Hinterland*, 113.

⁵¹ Clementina Panella and André Tchernia, ‘Produits agricoles transportés en amphores: l’huile et surtout le vin’, in *L’Italie d’Auguste à Dioclétien. Actes du colloque de Rome (25-28 mars 1992)* (Rome: École française de Rome, 1994), 154–56, graphs 2 and 3.

⁵² Morley, *Metropolis and Hinterland*, 114.

⁵³ Paul Erdkamp, *The Grain Market in the Roman Empire: A Social, Political and Economic Study* (Cambridge and New York: Cambridge University Press, 2005), 112–13.

hectolitres of oil, and between 1.5 and 2.2 million hectolitres of wine each year.⁵⁴

The increasing demands of the growing Italian urban population coincided with an expanding export demand for certain commodities and products overseas. The terrestrial distribution of Italian amphorae shows that wine produced in central Italy was already being transported to Mediterranean coastal regions during the third century BCE.⁵⁵ This scattered distribution, from Carthage and the Iberian Peninsula to the southern coast of Gaul, transformed in the first half of the second century BCE, when large numbers of Greco-Italic amphorae began to be exported from Tyrrhenian Italy to the innermost regions of Gaul.⁵⁶ By 130 BCE, the Greco-Italic style had been replaced by Dressel 1s,⁵⁷ which begin to be found in vast numbers from the last decades of the second century, until the demand finally abated at or around the time of Caesar's conquest (58 – 51 BCE).⁵⁸

A plausible explanation for this 'revolution in demand' has been offered by Poux, who argues that the vast shipments of wine that were transported to inland Gaul were intended for mass consumption at ritual banquets.⁵⁹ To this end, Tchernia has suggested that these feasts, which could involve a gathering of several thousand people and the consumption of thousands of litres of

⁵⁴ Catherine Virlouvet, 'La mer et l'approvisionnement de la ville de Rome', in *The Sea in History - The Ancient World*, ed. Pascal Arnaud and Philip de Souza (Woodbridge, UK: Boydell & Brewer, 2017), 269–70.

⁵⁵ Tchernia, 'Wine Exporting', 277–79.

⁵⁶ Tchernia, 279.

⁵⁷ For 130 BCE as the likely transition date from Greco-Italic amphorae to Dressel 1s, André Tchernia, 'Italian Wine in Gaul at the End of the Republic', in *Trade in the Ancient Economy*, ed. Peter Garnsey, Keith Hopkins, and Charles R. Whittaker (London: Chatto & Windus, 1983), 87–104. Identifying the period during which Dressel 1s (particularly, Dressel 1As) ceased to be produced has proved controversial, although a date around the middle part of the first century BCE seems likely: Loughton, 'Republican Amphorae', 180–82.

⁵⁸ Tchernia, 'Wine Exporting', 292.

⁵⁹ This is indicated by observation that, at a number of sites, the amphorae were distributed in such a way as to suggest purposeful ritual deposition: Matthieu Poux, *L'âge du vin. Rites de boisson, festins et libations en Gaule indépendante* (Montagnac: M. Mergoïl, 2004), 211; 'De Midas à Luern: le vin des banquets', in *Le Vin, nectar des Dieux, génie des hommes*, ed. Jean-Pierre Brun, Matthieu Poux, and André Tchernia (Gollion: Infolio, 2004), 68–95. For a review of the literature, Fanette Laubenheimer, 'Amphoras and Shipwrecks', in *A Companion to the Archaeology of the Roman Republic*, ed. Jane DeRose Evans (Oxford: Wiley-Blackwell, 2013), 104–6.

wine,⁶⁰ were planned ahead of time and supplied by purchasing consignments from Italian traders, who were well placed to organise its delivery.⁶¹ The archaeological evidence suggests that the wine, once delivered, was not exchanged for coin, but rather for slaves and precious metals, which were then exported back to Italy.⁶² Finally, the abatement of the demand for wine in Gaul around the middle part of the first century BCE probably reflects, among other things, the disruption to this process caused by the reduction of the remainder of Gaul to a province, which likely restricted the ability of chieftains to enslave populations for the purpose of exchange as well as to convene the potentially seditious gatherings for which the wine was intended in the first place.⁶³

Section 2.3: A Case Study: Cosa – Narbo – Ostia – Rome.

The aim of this section is to build as full a picture as possible of the infrastructure and human processes that shaped the conduct of Roman long-distance trade. The most complete chain of evidence for the process by which long-distance trade was conducted in the late Republic exists in connection with the trade route between Italy and Gaul. Again, notwithstanding the biases inherent in the shipwreck data, it is also clear that this route was among the most active in the Mediterranean during this period, perhaps only to be compared in magnitude with the route connecting Delos with the Italian peninsula. It therefore serves to focus attention on the evidence yielded by this route in order to construct a model for the process by which goods were produced and distributed overseas. This is further made possible by the thorough excavations that have taken place at the ports of Cosa (in southern

⁶⁰ Poux, *L'âge du vin*, 393.

⁶¹ Tchernia, 'Wine Exporting', 286.

⁶² The discovery of superimposable slave fetters, suitable for creating chain gangs, on the bed of the Saône, indicates that these were being mass produced in the area: Tchernia, 290–92; also, 'Italian Wine in Gaul'. This is consistent with Nash's conclusion that coinage was not normally used in Central Gaul in the second and early first centuries BCE: *Settlement and Coinage in Central Gaul c.200-50 B.C.* (Oxford: British Archaeological Reports, 1978), 6. For barter in Roman law, Jean-Jacques Aubert, 'For Swap or Sale? The Roman Law of Barter', in *Les affaires de Monsieur Andreau: Économie et société du monde romain*, ed. Catherine Apicella, Marie-Laurence Haack, and François Lerouxel (Bordeaux and Paris: De Boccard, 2014), 109–22.

⁶³ Tchernia, 'Wine Exporting', 292.

Etruria), Narbo (modern Narbonne), Ostia, and Rome. All these sites thrived on late Republican overseas trade and can therefore serve as a template from which the distribution process can be reconstructed. To this end, we can illustrate this process by tracing the route along which merchandise produced in the *ager Cosanus* was typically transported to the south coast of Gaul (e.g., Narbo); as well as the route along which those goods acquired in Gaul were carried to Rome via Ostia.

2.3.1 Production in the *ager Cosanus*.

The *ager Cosanus* broadly refers to the area now known as Maremma in modern Tuscany, which fronts onto the Tyrrhenian Sea and was connected to Rome 140 km to the south-east by the Via Aurelia. The town of Cosa and its hinterland were served by the *portus Cosanus*, which thrived off the growth of the villa economy in the region in the late second and first centuries BCE.⁶⁴ Besides the town and port, which were the object of excavations carried out by the American Academy in Rome in the 1960s and 1970s, a number of villa estates in the *ager Cosanus* have also been examined. Chief among these are the villas at Settefinestre and Le Colonne, both of which lie just a short distance from Cosa in the fertile Valle d'Oro.⁶⁵ Both villas were first occupied in the late second century BCE,⁶⁶ and their occupation history appears to reflect the fortunes of Cosa more broadly: namely, phases of more intense activity in the

⁶⁴ The harbour area at Cosa was 2.5 ha. To put this in perspective, the enormous harbour at Portus constructed in the first century CE covered 234 ha and had a wharfage length of c. 13,890 m: Katia Schörle, 'Constructing Port Hierarchies: Harbours of the Central Tyrrhenian Coast', in *Maritime Archaeology and Ancient Trade in the Mediterranean*, ed. Damian Robinson and Andrew I. Wilson (Oxford: Oxford Centre for Maritime Archaeology, 2011), 96; also, Stephen L. Dyson, 'Cosa', in *A Companion to the Archaeology of the Roman Republic*, ed. Jane DeRose Evans (Oxford: Wiley-Blackwell, 2013), 480.

⁶⁵ The estate at Settefinestre was excavated by an Anglo-Italian team under the direction of Andrea Carandini up to 1984: 'Il vigneto e la villa del fondo di Settefinestre nel Cosano: un caso di produzione Agricola per il mercato transmarino', *MAAR* 36 (1980): 1–10; also, *Settefinestre: una villa schiavistica nell'Etruria romana* (Modena: Panini, 1985). The excavations at Le Colonne were conducted by, *inter alios*, Stephen L. Dyson: 'The Excavations at Le Colonne and the Villa Culture of the Ager Cosanus', *MAAR* 47 (2002): 209–28.

⁶⁶ Dyson, 'Le Colonne', 224–25; also, Marzano, *Roman Villas*, 138.

late second and first half of the first centuries BCE, the early Principate, and the Antonine period, interspersed by quieter spells.⁶⁷

The best known of these two villas is the one located at Settefinestre, which has been held up as a model of the kind of villa estate described and theorised by the Roman agronomists.⁶⁸ In its earliest configuration, the villa consisted of a modest *pars urbana* and a *pars rustica*, the latter part of which contained a series of processing rooms equipped with olive and grape presses, and a mill for cereals. Beneath the villa was a cryptoportico, used partly for storage and partly as a *lacus vinarium* into which grape juice could drain from the wine presses. A kitchen was located in the adjacent service courtyard, opposite which stood two rows of six *cellae*, capable of being used for storage or as housing units for approximately 45 slaves.⁶⁹ The whole setup demonstrates that the villa was intended as a centre for the cultivation and production of the three staples of the Mediterranean triad; sc., wine, olive oil, and grain.⁷⁰

2.3.2 The Separation of Production and Distribution.

Owing to stamps imprinted on the amphorae in which many agricultural products such as wine, olive oil, and garum were transported, it is sometimes possible to trace both the provenance and distribution of containers originating from particular kilns.⁷¹ This is of special interest for Cosa, because 86% of the amphorae bearing stamps discovered in the town's port had been marked with the letters SES (99 of 115), of which all but one belonged to styles produced

⁶⁷ Marzano, *Roman Villas*, 217; cf. Anna M. McCann, 'Chapter I. The History and Topography', in *The Roman Port and Fishery of Cosa: A Center of Ancient Trade*, ed. Anna M. McCann (Princeton, N.J.: Princeton University Press, 1987), 28.

⁶⁸ For a description of the layout of Settefinestre during its various phases, Marzano, *Roman Villas*, 655–57.

⁶⁹ The original excavators of the site interpreted the *cellae* in the service courtyard as slaves' quarters (*ergastula*). This, however, has been doubted by Marzano: 129–53.

⁷⁰ Daniele Manacorda, 'Produzione agricola, produzione ceramica e proprietari nell'ager Cosanus nel I secolo a.C.', in *Società romana e produzione schiavistica. Merci, mercato e scambi nel Mediterraneo*, ed. Andrea Giardina and Aldo Schiavone, vol. 2 (Bari and Rome: Laterza, 1981), 3–54 and 263–73; also, Greene, *The Archaeology of the Roman Economy*, 91.

⁷¹ David P. S. Peacock and David F. Williams, *Amphorae and the Roman Economy: An Introductory Guide* (London and New York: Longman, 1986), 9–10; Jonathan Edmondson, 'Economic Life in the Roman Empire', in *The Oxford Handbook of Roman Epigraphy*, ed. Christer Bruun and Jonathan Edmondson (Oxford: Oxford University Press, 2014), 683–84.

in the late second and first centuries BCE (variants of Dressel 1s).⁷² In addition, amphorae bearing the same stamp have been found in large quantities at some fifty sites stretching along the Italian and Gallic coasts, as well as at inland locations in Gaul and northern Spain.⁷³ An amphora bearing an SES stamp has been found, for example, at the site of the ‘Titan’ wreck at the *Île du Levant*. At the site of the Grand Congloué B wreck, which sank near Marseilles between 110 – 80 BCE, as many as 1,200 amphorae have been found, of which the great majority bore the same stamp.⁷⁴

The SES stamp has been linked to the Sestii, a senatorial family of whom three members have been connected prosopographically: L. Sestius, tribune of the plebs between 100 – 90 BCE; his son Publius, who was defended by Cicero in 56 and had occupied the praetorship by 54; and his son L. Sestius Albanianus Quirilianus (‘Albanianus’), suffect consul in 23 BCE.⁷⁵ The connection of the Sestii with Cosa is attested by Cicero, who referred to Publius Sestius as ‘Cosianus’ and mentioned his association with the colony.⁷⁶ Although the earliest of the amphorae marked SES at Cosa date to the first half of the second century BCE, the discovery of a stamp bearing the initials JES at Pech-Maho (near to Narbonne), which was destroyed at the end of that century, suggests that production may have started earlier.⁷⁷ Since, however,

⁷² Will type 4s (= Dressel 1As): Elizabeth L. Will, ‘Chapter IX. The Roman Amphoras’, in *The Roman Port and Fishery of Cosa: A Center of Ancient Trade*, ed. Anna M. McCann (Princeton, N.J.: Princeton University Press, 1987), 174.

⁷³ For a listing, Fabienne Olmer, *Les amphores de Bibracte, 2. Le Commerce du vin chez les Éduens d’après les timbres d’amphores* (Glux-en-Glenne: Centre archéologique du Mont Beuvray, 2003), 310–13. For older literature and the publication record of the earliest stamps, John H. D’Arms, *Commerce and Social Standing in Ancient Rome* (London: Harvard University Press, 1981), 56–57, notes 32–34.

⁷⁴ Luc Long, ‘Appendix 1. The Grand Congloué Site: A Reassessment’, in *The Roman Port and Fishery of Cosa: A Center of Ancient Trade*, ed. Anna M. McCann (Princeton, N.J.: Princeton University Press, 1987), 165; also, ‘Les épaves du Grand Congloué. Étude du journal de fouille de Fernand Benoit’, *Archaeonautica* 7 (1987): 9–36; and Fabienne Olmer et al., ‘Histoire d’épave. Origine, destin et fonction de la cargaison d’amphores du Grand Congloué 2’, in *Les Gaulois au fil de l’eau. Actes du 37e colloque international de l’Association Française pour l’Étude de l’Âge du Fer (Montpellier, 8-11 mai 2013)*, ed. Fabienne Olmer and Réjane Roure, vol. 1-Communications (Bordeaux: Ausonius, 2015), 175–216.

⁷⁵ Clementina Panella, ‘Roma, il suburbio e l’Italia in età medio- e tardo-repubblicana: cultura materiale, territori, economie’, *Facta: A Journal of Roman Material Culture Studies*, 2010, 51.

⁷⁶ Cic. *Att.* 15.27.1; 29.1: D’Arms, *Commerce*, 55–56.

⁷⁷ Will, ‘The Roman Amphoras’, 172–73.

70% of the amphora material at the port belongs to Will type 4 (= variants of Dressel 1s), it is clear that the most prolific period of production was the late second and first centuries BCE.⁷⁸ This suggests the agency of L. Sestius,⁷⁹ although stamped amphorae likely continued to be produced by both his son and grandson (in the manner of a family business carried on through generations). The connection of the Sestii with Cosa in the literary sources and the density of SES stamps in the port has led scholars to believe that the family owned a number of villas in the *ager Cosanus*, not least the site at Settefinestre, where brick tiles bearing the initials of Albanianus have been found.⁸⁰

Two aspects of the distribution of amphorae bearing the SES stamp inform our understanding of the conduct of long-distance trade. First, it is notable that only a handful of the amphorae are found on routes south of Cosa (exceptionally, a few have been found at Athens and on the island of Delos), suggesting that the produce of the estates owned by the Sestii in the area was intended for markets in the western Mediterranean.⁸¹ Second, the wide distribution of amphorae bearing SES stamps suggests their dispersal among numerous traders exploiting different routes, rather than distribution by the Sestii themselves.⁸² This latter observation is strengthened by the additional marks that are sometimes found on amphorae stoppers. Several of the amphorae that made up the cargo of the Grand Congloué B wreck, for example, bear two marks: that of the Sestii on the body of the amphora itself (of which there are over 1,000 examples in this wreck alone), and that of a trader identified as Lucius Titius C.f. on the amphora's stopper ('L TITI C.F').⁸³ This situation is repeated elsewhere, for example on amphorae recovered from the Dramont A wreck (near to modern Fréjus, 75 – 25 BCE), which bear the marks of both a

⁷⁸ Will, 174.

⁷⁹ D'Arms, *Commerce*, 59–61.

⁸⁰ Greene, *The Archaeology of the Roman Economy*, 91–92.

⁸¹ Olmer, 'Amphores en Gaule', 76.

⁸² Peacock and Williams, *Amphorae*, 63.

⁸³ Fernand Benoît, *Fouilles sous marine. L'Épave du Grand Congloué à Marseille* (Paris: CNRS, 1961), 52–56; Antoinette Hesnard and Piero A. Gianfrotta, 'Les bouchons d'amphore en pouzzolane', *Publications de l'École française de Rome* 114 (1989): 427, no. B 36; Tchernia, *Trade*, 17.

producer, 'L LENTV P [F]' (most likely L. Cornelius Lentulus Crus, consul in 49 BCE and a major landowner near Minturnae) and a trader called Sextus Arrius.⁸⁴ Since the name Sex. Arrius was also inscribed on the ship's anchor, it is very likely that he, and therefore not Lentulus, was also the owner of the vessel.

The dual marking of these amphorae suggests that it was traders, rather than the producers themselves, who were engaged in long-distance distribution. This observation is corroborated by the literary sources. Varro, for instance, spoke of 'the merchants who transport on pack asses from the region of Brundisium or Apulia to the sea oil or wine, and grain or other products',⁸⁵ while Columella recommends 'properly cleaning the *dolia* as soon as they have been emptied by traders'.⁸⁶ The many *Digest* texts dealing with the sale of wine also concentrate on purchase by traders to the exclusion of direct sales to consumers.⁸⁷

The point at which traders took over the process, however, could vary. So far as wine was concerned, the evidence suggests that one possibility was for the landowner to both produce and store the vintage, which was then sold to traders at the estate after the *vinalia* in April (sometimes by auction), either in bulk or in amphorae.⁸⁸ A second option, which was alluded to by Cato and Pliny the Younger and also discussed in the *Digest*, was for the landowner to sell the standing crop and pass over the responsibility for making the wine to the trader, who could either make use of the equipment at the estate or,

⁸⁴ Tchernia, *Le vin de l'Italie romaine*, 118–19; also, *Trade*, 16.

⁸⁵ Varro, *Rust.* 2.6.5.

⁸⁶ Columella, *Rust.* 12.52.14.

⁸⁷ Jeremy Paterson, "'Salvation from the Sea': Amphorae and Trade in the Roman West", *JRS* 72 (1982): 155; also, 'Trade and Traders in the Roman World: Scale, Structure and Organization', in *Trade, Traders and the Ancient City*, ed. Helen M. Parkins and Christopher J. Smith (London: Routledge, 1998), 159–60. On the juridical aspects of the sale of wine, Bruce W. Frier, 'Roman Law and the Wine Trade: The Problem of "Vinegar Sold as Wine"', *ZSS* 100 (1983): 257–95; Éva Jakab, 'Periculum und Praxis: Vertragliche Abreden beim Verkauf von Wein', *ZSS* 121 (2004): 189–232; and *Risikomanagement beim Weinkauf: Periculum und Praxis im Imperium Romanum* (Munich: C.H. Beck, 2009).

⁸⁸ André Tchernia, 'La vente du vin', in *Mercati permanenti e mercati periodici nel mondo romano: atti degli Incontri capresi di storia dell'economia antica (Capri, 13-15 ottobre 1997)*, ed. Elio Lo Cascio (Bari: Edipuglia, 2000), 201–2.

possibly, facilities located elsewhere.⁸⁹ Third, and finally, the producer could transport his own wine, though this was usually undertaken with a view to supplying the landowner's townhouse or nearby settlements, and not with the intention of engaging in long-distance trade.⁹⁰ Altogether, Tchernia concludes that 'the screen that trading interposed between producers and consumers was pretty solid and diverse, and that the producing activity was as a rule quite separate from any level of trade that went beyond local sales'.⁹¹

A number of reasons for this separation have been proposed, not least by D'Arms, who argued that the evidence for social and legal sanctions directed against elite involvement in long-distance trade indicates the disapproval with which it was viewed.⁹² The 'legal sanction' to which D'Arms principally referred was the *lex Claudia*, which prohibited senators and their sons from possessing seagoing ships with a capacity of more than 300 amphorae (approximately 12.5 tons).⁹³ The plebiscite, according to Townshend, was most likely enacted between the censorship and second consulship of the law's promoter – C. Flaminius – and so most plausibly in 218 BCE.⁹⁴ The same prohibition was re-enacted in the *lex Iulia de repetundis* (59 BCE), though the size limit was replaced by a clause that prohibited senators from owning a ship for the purpose of making money (*navem in quaestum habere*).⁹⁵ By creating a legal restriction on the senatorial ownership of seagoing vessels, the plebiscite theoretically impeded members of the order from directly engaging in maritime trade. Even so, it did not circumscribe indirect involvement, and various sources indicate that senators did seek to profit from long-distance commerce, often by using their sons-in-power, slaves, and freedmen as agents.⁹⁶ Since, however, landowners were not averse to transporting their produce locally,

⁸⁹ Tchernia, 143–46.

⁹⁰ Tchernia, 146–47; also, Luuk de Ligt, *Fairs and Markets in the Roman Empire: Economic and Social Aspects of Periodic Trade in a Pre-Industrial Society* (Amsterdam: J. C. Gieben, 1993), 163–65.

⁹¹ Tchernia, 'La vente du vin', 147.

⁹² Generally, D'Arms, *Commerce*, 20–47.

⁹³ D'Arms, 5.

⁹⁴ James R. Townshend, 'Lex Claudia', in *Oxford Classical Dictionary*, ed. Sander M. Goldberg (Oxford: Oxford University Press, 2016).

⁹⁵ Paul., *sent.* Leiden fr. 3.5-6.

⁹⁶ E.g., Plut., *Cat. mai.* 21.6.

Tchernia's argument that the separation of production and distribution in the context long-distance trade 'was not about ideology, but about an economic arrangement' remains compelling.⁹⁷

2.3.3 Traders and Networks.

Despite the routine separation of the production of goods at villa estates from the process of their distribution to distant markets, landowners continued to be involved in their capacity as fathers, slave owners, and patrons. As Tchernia has shown, landowners frequently used their dependants (often freedmen) as 'seedbeds for businesses to which advances of start-up capital were made'.⁹⁸ The relative abundance of evidence for the involvement of freedmen in business during the first two centuries CE can give the impression that the socio-economic environment of the Principate was more dynamic than that of the late Republic. In the tablets of the Sulpicii archive (first century CE), for example, just over half of the recorded *cognomina* are Greek (a good indicator of freed status), and a significant number of the Latin remainder of servile origin (e.g., Fortunatus, Felix, etc.).⁹⁹ In the tablets discovered in the Lucundus archive, 42% of the 370 individuals possessed Greek names,¹⁰⁰ and Jongman has suggested that 77% of the witnesses named in the tablets may have been freed.¹⁰¹ The *collegia* inscriptions at Ostia are also revealing, since they list hundreds of members of (mostly) professional associations, of which 26 – 30% had Greek names.¹⁰²

Despite the scarcity of earlier sources, however, Mouritsen has argued that the evidence shows no sign of structural change in the use of freedmen by their patrons between the late Republic and the Principate.¹⁰³ On Delos, for example, estimates based on the nomenclature recorded in inscriptions

⁹⁷ Tchernia, *Trade*, 26; also, Kay, *Revolution*, 134.

⁹⁸ Tchernia, *Trade*, 37.

⁹⁹ Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge: Cambridge University Press, 2011), 207; also, Taco T. Terpstra, *Trading Communities in the Roman World: A Micro-Economic and Institutional Perspective* (Leiden and Boston: Brill, 2013), 17.

¹⁰⁰ Mouritsen, *Freedman*, 207.

¹⁰¹ Willem M. Jongman, *The Economy and Society of Pompeii* (Amsterdam: J. C. Gieben, 1988), 271.

¹⁰² Mouritsen, *Freedman*, 129.

¹⁰³ Mouritsen, 246–47.

indicate that the majority of *Romaioi* resident on the island were slaves or freedmen working for Roman-Italian patrons.¹⁰⁴ The impression of a 'freedman milieu' also emerges from the literary evidence, where a number of ex-slaves are recorded acting as agents and managers on behalf of their patrons. Plutarch, for instance, recorded that Cato the Elder despatched his freedman Quinctio to safeguard his business interests in relation to a maritime enterprise.¹⁰⁵ Cicero, too, mentioned three freedmen who were tasked with overseeing the interests of Cn. Otacilius Naso in Sicily, as well as a freedman of L. Titius Strabo, who had been sent to settle a business and collect money overseas.¹⁰⁶ Cicero also reports that he called P. Granius, from Puteoli, as a witness against Verres, because the latter had allegedly taken possession of Granius' boat and executed the freedmen that were stationed on board (which suggests they were acting as his agents).¹⁰⁷

Where these patrons had multiple dependants performing trading activities in different locations, the result could be a commercial network with far-reaching interests. Here, the archaeological evidence provides an insight. An amphora stopper recovered at Carthage, for instance, records a partnership (*societas*) between two freedmen (*liberti*), Titus and Lucius, who were both dependants of the *gens* Luceii.¹⁰⁸ The Luceii were also active in the Gallic wine trade, where the name of the freeborn M. Luc(c)i M. f(ili) has been found imprinted on a stopper found in the Grand Ribaud A wreck (off the southern coast of France, 120 – 110 BCE), which consisted only of Dressel 1A and 1C amphorae.¹⁰⁹ In addition, a stopper sealing a Lamboglia 2 oil amphora recovered from the Punta de Algas wreck off the Spanish coast (100 – 50 BCE) identifies a freedman, previously held as a *servus communis* by a L. Lucceius

¹⁰⁴ Nicholas K. Rauh, *The Sacred Bonds of Commerce: Religion, Economy, and Trade Society at Hellenistic Roman Delos, 166–87 B.C.* (Amsterdam: Gieben, 1993), 33, note 70; also, Kay, *Revolution*, 201.

¹⁰⁵ Plut. *Cat. mai.* 21.5-6.

¹⁰⁶ Cic. *Fam.* 13.14.2: on which, Mouritsen, *Freedman*, 215.

¹⁰⁷ Cic. 2 *Verr.* 5.154: on which, Tchernia, *Trade*, 31.

¹⁰⁸ Hesnard and Gianfrotta, 'Les bouchons', 418, no. B 17; Wim Broekaert, *Navicularii et Negotiantes: A Prosopographical Study of Roman Merchants and Shippers* (Rahden/Westf.: Verlag Marie Leidorf, 2013), 443–44, nos. 1160 and 1162.

¹⁰⁹ Hesnard and Gianfrotta, 'Les bouchons', 418, no. B 18; Broekaert, *Navicularii et Negotiantes*, 444, no. 1161.

and L. Vibius, who appears to have continued trading under the auspices of his patrons.¹¹⁰ Epigraphic evidence also indicates that the Lucceii had commercial interests on the island of Delos, where a certain Nicephoros, the slave of a Roman *legatus*, L. Lucceius M. f., who was present in Samothrace in 92, is named on a dedicatory inscription at the agora of the Compitaliastes.¹¹¹ The senator L. Lucceius Q. f. owned a villa near Puteoli in the late Republic;¹¹² a Q. Lucceius L. f. is known through Cicero to have acted as an *argentarius* in Rhegium in 72 BCE;¹¹³ and the family kept warehouses and other buildings on the banks of the Tiber near to the *forum boarium* in Rome.¹¹⁴ In addition to all this, the network could extend yet further, insofar as each dependant might have his own agents, who were no doubt required to operate trade routes between different locations effectively.¹¹⁵

The familial networks described above intersected with the networks formed by traders, both as members of diaspora communities and commercial or religious associations (e.g., *collegia*). The communities of Italians that established themselves at, among other places, Delos, Ephesus, and Narbo, became long-standing groups that facilitated trade by bringing together individuals with similar ethnic and cultural backgrounds. Moreover, the traders belonging to these communities frequently organised themselves into commercial and religious associations according to their specialisations and beliefs. At Delos, for instance, inscriptions record the existence of associations of Italian bankers, olive oil merchants, and wine traders.¹¹⁶ Meanwhile, Roman-Italians also formed religious *collegia* with followers known as, for example, the *Poseidoniastai*, *Apolloniastai*, and *Compitaliastai*.¹¹⁷ To this end, successful repeat dealing between members of the same, or connected,

¹¹⁰ Hesnard and Gianfrotta, 'Les bouchons', 419, no. B 19; Broekaert, *Navicularii et Negotiantes*, 450, no. 1188.

¹¹¹ *ID* 94 and 1763: on which, D'Arms, *Commerce*, 64.

¹¹² D'Arms, 78.

¹¹³ *Cic. 2 Verr.* 5.165: on which, D'Arms, 64.

¹¹⁴ Robert E. A. Palmer, 'The Vici Luccei in the Forum Boarium and some Lucceii in Rome', *Bullettino della Commissione archeologica comunale di Roma* 85 (1976–1977): 135–61.

¹¹⁵ Tchernia, *Trade*, 31; Jean-Jacques Aubert, 'Les institores et le commerce maritime dans l'empire romain', *Topoi: Orient-Occident* 9 (1999): 149.

¹¹⁶ Kay, *Revolution*, 201.

¹¹⁷ Kay, 201.

communities, could cultivate trust and ongoing relationships founded on reputation and shared values.¹¹⁸

2.3.4 Distribution.

Once a product had been acquired by a trader, the next stage was to transport it to its intended market. The distribution networks that developed in the Roman period were an integrated system that combined complementary forms of land, fluvial, and seaborne transport.¹¹⁹ Within this system, ports acted as nodal points, through which both overland and waterborne routes were connected.¹²⁰ As Rickman has suggested, ports may be thought of as ‘great clusters of facilities’, connecting the terrestrial areas they served (their ‘hinterland’) with the maritime distribution network (their ‘foreland’).¹²¹ For the purpose of this subsection, it therefore serves to treat the hinterland and foreland in turn. In addition, it is useful to distinguish between the infrastructure and technology that served the purposes of distribution and the human processes by which long-distance trade was carried out. Within each stage (hinterland/ foreland), I will therefore treat each of these categories separately.

2.3.4.1 Ports and their Hinterland.

2.3.4.1.1 Infrastructure.

2.3.4.1.1.1 Roads.

In most cases, goods intended for a distant market would begin their journey by land, unless the villa in question had a private riverine or coastal frontage.¹²² By the early to mid-second century BCE the road system of Roman Italy had

¹¹⁸ Reputation was important among traders at Puteoli in the first century CE: Terpstra, *Trading Communities*, 23–26.

¹¹⁹ Colin E. P. Adams, ‘Transport’, in *The Cambridge Companion to the Roman Economy*, ed. Walter Scheidel (Cambridge: Cambridge University Press, 2012), 231–32.

¹²⁰ Adams, 228.

¹²¹ Geoffrey Rickman, ‘Ports, Ships, and Power in the Roman World’, in *The Maritime World of Ancient Rome. Proceedings of the “Maritime World of Ancient Rome” Conference Held at the American Academy of Rome 27–29 March 2003*, ed. Robert L. Hohlfelder (Ann Arbor: University of Michigan Press, 2008), 7. For the distinction between a port’s hinterland and foreland, Yehuda Karmon, ‘Geographical Components in the Study of Ancient Mediterranean Ports’, in *Harbour Archaeology. Proceedings the First International Workshop on Ancient Mediterranean Harbours, Caesarea Maritima 24-28.6.83*, ed. Avner Raban (Oxford: British Archaeological Reports, 1985), 105–14.

¹²² On which, e.g., Schörle, ‘Constructing Port Hierarchies’, 100–103.

been established from the River Po to the southern end of the peninsula, and had likely become, as Laurence has observed, the principal means by which goods were moved from place to place.¹²³ In the view of the agronomists, the strategic location of a villa on, or near to, a point of access to the distribution network was a primary consideration. Columella, for instance, reported Cato's view that access to a good road facilitated the import of goods and resources into a property and the transport of produce away from it.¹²⁴ Varro, too, was adamant that access to a good road was essential, for 'farms which have suitable means of transporting their products to market nearby and convenient means of bringing in those things needed on the farm are profitable for that reason'.¹²⁵ From this perspective, the villa at Settefinestre appears to have been ideally located. The villa itself was situated less than 2.5 km from the Via Aurelia and connected to it by means of a side-road (*diverticulum*). In addition, it was under 5 km from the colony at Cosa and its port, and less than a day's journey by land from a number of other settlements.¹²⁶ Varro's depiction of merchants who used mules to carry produce to the coast indicates that pack animals were a popular mode of transport for this purpose.¹²⁷

2.3.4.1.1.2 Waterways and Ports.

The success of a port as a transport hub depended upon two main factors: first, its geographical location; and second, its natural harbour facilities. The first of these factors was by far the most significant, since the second could be improved upon by adapting the port to the natural environment and constructing facilities as required.¹²⁸ For this reason, it makes sense to treat ports and waterways together, for many ports acted as gateways to important fluvial networks extending deep into their hinterland.

¹²³ Ray Laurence, 'Land Transport in Roman Italy: Costs, Practice and the Economy', in *Trade, Traders and the Ancient City*, ed. Helen M. Parkins and Christopher J. Smith (London: Routledge, 1998), 143–44. On the development of the road network in Roman Italy during the second century BCE, Kay, *Revolution*, 218.

¹²⁴ Columella, *Rust.* 1.3.

¹²⁵ Varro, *Rust.* 1.16.2-3.

¹²⁶ Laurence, 'Land Transport in Roman Italy', 142–43.

¹²⁷ Varro, *Rust.* 2.6.5.

¹²⁸ Schörle, 'Constructing Port Hierarchies', 93.

The *portus Cosanus*:

The *portus Cosanus* was situated below the eponymous fortified hilltop town, which had been established as a Latin maritime colony in 273 BCE.¹²⁹ The port was a day's sail from Rome and had the protection of a promontory that acted as an important reference point for vessels sailing westward along the coast from the Italian peninsula to Gaul and Spain.¹³⁰ Besides providing the best anchorage between Portus Lunae to the north and Portus Gaeta to the south, the attractiveness of the site was enhanced by the wealth of natural resources possessed by its hinterland, which included minerals from volcanic mountain ranges, timber, fertile agricultural land, and fishing both along the coast and in coastal lagoons.¹³¹

The expansion of the harbour facilities at Cosa accelerated greatly in the final quarter of the second century BCE.¹³² The concrete remains of the port, which include the harbour piers, a wall, bridge, and platform, the fish tanks in the lagoon, the foundations of the Spring House, and an aqueduct, likely date to this period.¹³³ The construction of the piers inside the port provided an anchorage for vessels within the harbour basin, as well as the foundation for a lighthouse. In addition, if McCann's dating is correct, the use of hydraulic concrete for some of these structures would make the *portus Cosanus* one of the earliest known sites for the use of this technology.¹³⁴ It is also notable that

¹²⁹ Elizabeth Fentress and Phil Perkins, 'Cosa and the Ager Cosanus', in *A Companion to Roman Italy*, ed. Alison E. Cooley (Oxford and Malden, MA: Wiley Blackwell, 2016), 378.

¹³⁰ McCann, 'History and Topography', 15–18.

¹³¹ For the probable location of salt-works near Cosa during the Republican period and the exploitation of marine resources along the coast, Marzano, *Harvesting the Sea*, 134 and 220–22 respectively. According to Strabo, Cosa was one of only three locations along the Tyrrhenian coastline with dedicated tuna watches (*Geog.* 5.2.8): on which, McCann, 'History and Topography', 16–17.

¹³² Steven L. Tuck, 'Ports', in *A Companion to the Archaeology of the Roman Republic*, ed. Jane DeRose Evans (Oxford: Wiley-Blackwell, 2013), 330–31.

¹³³ Anna M. McCann, *The Roman Port and Fishery of Cosa: A Short Guide* (Rome: American Academy in Rome, 2002), 22.

¹³⁴ Anna M. McCann, 'Chapter XVIII. The Chronology of the Port and Fishery', in *The Roman Port and Fishery of Cosa: A Center of Ancient Trade*, ed. Anna M. McCann (Princeton, N.J.: Princeton University Press, 1987), 327; though cf. Elaine K. Gazda, 'Cosa's Hydraulic Concrete: Towards a Revised Chronology', *MAAR Supplementary Volumes* 6 (2008): 265–90. For the history of the use of hydraulic concrete, see the results of the ROMACONS project recorded in Christopher J. Brandon et al., eds., *Building for Eternity: The History and Technology of Roman Concrete Engineering in the Sea* (Oxford: Oxbow Books, 2014).

a warehouse (*horreum*), constructed in the mid-third century BCE, was situated near to the north-west gate of the town itself.¹³⁵

The development of the port facilities at Cosa coincided with a sharp increase in the volume of goods being shipped overseas, as shown by the proportion of Dressel 1 amphorae found in the harbour. These goods consisted mainly of products that had been produced in the *ager Cosanus*, including wine, olive oil, and garum (the latter from the fishery at the port itself). The geographical distribution of amphorae bearing SES stamps demonstrates that many of these goods were transported to the Gallic interior and northern Spain by means of the dual Aude/ Garonne and Rhône/ Saône river axes, which were accessed through the ports of Narbo and Massalia (modern Marseilles) respectively. Indeed, the SES stamp has been found at Narbo, and Publius Sestius is known to have visited Massalia – which was only ten miles distant from the site of the Grand Congloué B wreck – on two separate occasions.¹³⁶ All this indicates that the facilities at the *portus Cosanus* were developed at a time when the volume of maritime traffic travelling along sea lanes between the Tyrrhenian coast and southern Gaul was increasing.

Narbo:

Turning to the Gallic ports, it has frequently been observed that the take-off in Italian imports in the last quarter of the second century BCE coincided with the establishment of the Roman colony at Narbo in the penultimate decade of the second century BCE. Narbo's centrality as a trading post was recognised by Diodorus Siculus, who described the colony as 'the finest market' (μέγιστον ἔμπόριον) in the region, and by Strabo, who stated that it was the busiest centre of trade in the whole of Celtica.¹³⁷ These observations are corroborated by the concentration of Italian amphorae dating to the late Republic found at

¹³⁵ McCann, 'History and Topography', 25.

¹³⁶ Elizabeth L. Will, 'Les amphores de Sestius', *Revue archéologique de l'est et du centre-est* 7 (1956): 243.

¹³⁷ Diod. Sic. 5.38.5; Strab. *Geog.* 4.1.12: on which, Virginie Ropiot, 'Narbonne et ses ports dans les sources antiques', in *Espaces littoraux et zones portuaires de Narbonne et sa région dans l'Antiquité*, ed. Corinne Sanchez and Marie-Pierre Jézégou (Monographie d'Archéologie Méditerranéenne, 2011), 21–24.

the port.¹³⁸ The dominance of Italian imports during this period is indicated by deposits at La Lagaste, an *oppidum* upstream from Narbonne on the Aude, where 85% of the amphorae dating to the first half of the first century BCE are of Italian origin.¹³⁹

A number of reasons for the centrality of Narbo as a commercial port have been proposed. Its propitious location at the mouth of the River Aude provided access to a system of navigable rivers that provided natural highways along which goods could be transported to and from the territory's interior at relatively little expense.¹⁴⁰ Strabo, commenting upon the arterial rivers of Gaul, observed that 'the cargoes are transported only a short distance by land, with an easy transit through plains, but most of the way they are carried on the rivers – on some into the interior, on the others to the sea'.¹⁴¹ The distribution of the archaeological deposits bears this out, as amphorae appear to have been transported along two main riverine axes.¹⁴² The first, which could be accessed through Narbo, followed the channels of the Aude and the Garonne. The second followed the paths of the Rhône and the Saône (and their tributaries), which enabled the transport of large numbers of amphorae into central and northern Gaul.

The colony also lay at the junction of the *Via Domitia*, which connected Gaul with northern Spain along the Mediterranean Riviera, and the *Via Aquitania*, which ran across the Gallic Isthmus to the Atlantic coast.¹⁴³ Two other more minor roads also passed through the colony: the *Via Corbaniensis* and the *Via*

¹³⁸ Corinne Sanchez, *Narbonne à l'époque tardo-républicaine: Chronologies, commerce et artisanat céramique* (Montpellier: Éditions de l'Association de la Revue archéologique de Narbonnaise, 2009), 323.

¹³⁹ Generally, Yves Roman and Guy Rancoule, 'Les amphores de Sestius de La Lagaste (Aude) et de sa région', *Revue archéologique de Narbonnaise* 10 (1977): 247–61; and Guy Rancoule, 'L'agglomération gauloise de La Lagaste (communes de Pomas et Roufiac d'Aude). Apports, échanges et transit dans la vallée de l'Aude à l'époque républicaine', *Pallas* 50 (1999): 63–74.

¹⁴⁰ Sanchez, *Narbonne à l'époque tardo-républicaine*, 20.

¹⁴¹ Strab. *Geog.* 4.1.2.

¹⁴² Laubenheimer, 'Amphoras and Shipwrecks', 107.

¹⁴³ Sanchez, *Narbonne à l'époque tardo-républicaine*, 17–18. According to Syme, 'the Romans thought in terms of roads', which in turn explains the location of, among other places, Narbonensis (as the high road to Spain): *The Roman Revolution* (Oxford: Clarendon Press, 1939), 413.

Mercaderia.¹⁴⁴ Narbo's hinterland was connected to the wider maritime network by means of its harbour facilities. Although the Republican port system remains obscure on account of environmental change, it seems very probable that the colony had an urban port from the time of its foundation.¹⁴⁵ Whether this could be reached from deep water, however, is far from certain, and various hypotheses have been advanced about the location of harbours further out in the lagoon, at which goods could be transferred into flat-bottomed boats for transshipment to the settlement itself.¹⁴⁶ The first attested outer harbour at Narbo was situated 4 km south of the settlement at La Port Nautique, where archaeological remains suggest that the facilities there were used in connection with the specialised trade of goods shipped in bulk, such as wine and ceramics, between c. 40 BCE and 70 CE. In the colony itself a cryptoportico has been discovered, but there is some doubt as to whether it was used as a *horreum* or for some other purpose.¹⁴⁷

The development of the transport infrastructure both at Narbo and throughout its hinterland undoubtedly helped to reduce costs for traders seeking to exploit the potential of the region. On the other hand, it is important to recognise that this infrastructure was not created *ex nihilo*. Near to the site of Narbo, for example, there is firm archaeological evidence for the existence of a settlement at Montlaurès which continued to be occupied throughout the second half of the second century.¹⁴⁸ Moreover, the construction of the *Via Domitia* at around the same time as the foundation of the colony likely traced the path of a pre-existing route.¹⁴⁹

Besides Narbo's propitious location, its success was likely enhanced by its status as a Roman colony. The political circumstances surrounding the

¹⁴⁴ Sanchez, 19–20.

¹⁴⁵ Corinne Sanchez and Marie-Pierre Jézégou, 'Les Ports Antiques de Narbonne' (Les carnets du Parc, 2014), 30.

¹⁴⁶ Sanchez, *Narbonne à l'époque tardo-républicaine*, 265.

¹⁴⁷ Geoffrey Rickman doubts the use of the cryptoportico for storage, citing, *inter alia*, the 'minute' size of the rooms flanking the galleries and the inconsistency of their layout in comparison to the *horrea* at Ostia: *Roman Granaries and Store Buildings* (Cambridge: Cambridge University Press, 1971), 144–47. Cf. Sanchez, *Narbonne à l'époque tardo-républicaine*, 264–66.

¹⁴⁸ Sanchez, *Narbonne à l'époque tardo-républicaine*, 22–23.

¹⁴⁹ Sanchez, 18.

settlement's colonisation shed some light on the issue. Having responded to a request made by their Massiliote allies for military assistance, the Roman Senate despatched a string of consular commanders in the latter half of the 120s to defend their interests east of the Rhône. The discovery of a milestone bearing the name of one of these commanders – Cn. Domitius Ahenobarbus – at Treilles indicates that the construction of the *Via Domitia* began under his stewardship,¹⁵⁰ and it is almost certain that he fortified the site at Narbo before his return to Italy.¹⁵¹ A few years later, a combination of literary and numismatic evidence indicates that L. Licinius Crassus was sent in or shortly after 118 to establish a colony at Narbo Martius,¹⁵² despite the opposition of the Senate.¹⁵³ As Badian has argued, the transformation of Gallia Transalpina into a regular *provincia* took place after the Cimbric Wars, but no later than the mid-90s.¹⁵⁴

The foundation of the colony and the organisation of the region into a *provincia* was institutionally significant for several reasons. No doubt the colony, which Cicero described as 'a watch-tower and bulwark of the Roman people', fulfilled an important military function.¹⁵⁵ As Ebel has argued, the Romans also had commercial interests in the region, which were enhanced by Narbo's status as a '*colonia nostrorum civium*'.¹⁵⁶ Once the *provincia* had been established, the availability of the governor in his capacity as a magistrate with jurisdictional competence would also have been significant. Caesar, for example, held

¹⁵⁰ *ILLRP* 460a: on which, Charles Ebel, *Transalpine Gaul: The Emergence of a Roman Province* (Leiden: Brill, 1976), 84.

¹⁵¹ T. Corey Brennan, *The Praetorship in the Roman Republic*, vol. 2 (Oxford: Oxford University Press, 2000), 361.

¹⁵² Vell. Pat. 2.7.8; Jer. *Chron.* 165.1. For the numismatic arguments, Ebel, *Transalpine Gaul*, 90–92. For a discussion of the dating of the foundation of the colony, T. Robert S. Broughton, *The Magistrates of the Roman Republic*, ed. Susan Treggiari, vol. 3 (Atlanta, GA.: Scholars Press, 1986), 118.

¹⁵³ Cic. *Brut.* 43.160: on which, Umberto Laffi, *Colonie e municipie nello stato romano* (Rome: Edizioni di storia e letteratura, 2007), 30.

¹⁵⁴ Ernst Badian, *Foreign Clientelae, 264-70 B.C.* (Oxford: Clarendon Press, 1958), 203–12; also, 'Notes on Provincia Gallia in the Late Republic', in *Mélanges d'archéologie et d'histoire offerts à André Piganiol*, ed. Raymond Chevallier, vol. 2 (Paris: S.E.V.P.E.N., 1966), 901–18; followed by Brennan, *Praetorship*, 2:363. Cf. Ebel, who attributes the organisation to Pompey in 77/76: *Transalpine Gaul*, 75–105.

¹⁵⁵ Cic. *Font.* 5.13.

¹⁵⁶ Ebel, *Transalpine Gaul*, 36; also, Edward T. Salmon, *Roman Colonization under the Republic* (London: Thames & Hudson, 1969), 121–23; though cf. Badian, 'Notes', 909.

assizes in the campaigning off-season during the Gallic Wars.¹⁵⁷ By as early as the late 90s, Cicero provides evidence that Roman citizens were forming partnerships for the management of grazing farms (*pecuaria*) in Gaul, and that Narbo was considered the appropriate place to conduct sales of land.¹⁵⁸ Judging by the archaeological record, the colony certainly flourished during the first half of the first century BCE.

Rome and Ostia:

Rome was connected to the Tyrrhenian Sea by means of the Tiber. Cicero was effusive about the river's role in connecting Rome to the Mediterranean,¹⁵⁹ and for Pliny the Elder it was both accessible to vessels of all sizes and 'a most calm conveyor (*mercator placidissimus*) in the produce of all the earth, with perhaps more villas on its banks and overlooking it than all the other rivers in the whole world'.¹⁶⁰ Until the construction of the massive harbour at Portus by the emperor Claudius in the first century CE, however, the port of Ostia, which was located at the mouth of the Tiber, was the nearest coastal facility to Rome.¹⁶¹ As Rickman has observed, the rebuilding of much of the settlement during the Principate has meant that the town plan is largely a reflection of its organisation from the first century CE onwards.¹⁶² Nonetheless, both Rickman and Meiggs supported the view that facilities must have been developed during the Republic, particularly in relation to the provision of storage.¹⁶³ According to Coarelli, the Horrea di Hortensius can be traced to the first century BCE; and it is possible that the close association of the Forum Vinarium with the Republican

¹⁵⁷ Caes. *B Gall.* 1.54: on which, John S. Richardson, 'The Administration of the Empire', in *The Cambridge Ancient History*, ed. John A. Crook, Andrew W. Lintott, and Elizabeth Rawson, 2nd ed., vol. 9: The Last Age of the Roman Republic, 146–43 BC (Cambridge: Cambridge University Press, 1994), 590–91.

¹⁵⁸ Cic. *Quinct.* 3.12–4.15: on which, Ebel, *Transalpine Gaul*, 92.

¹⁵⁹ Cic. *Rep.* 2.

¹⁶⁰ Plin. *HN.* 3.54: on which, Brian Campbell, 'Watery Perspectives: A Roman View on Rivers', in *Fluvial Landscapes in the Roman World*, ed. Tyler V. Franconi (Portsmouth, R.I.: Journal of Roman Archaeology, 2017), 26–27. Cf. Verg. *Aen.* 7.31, who depicted the Tiber as more turbulent.

¹⁶¹ For a survey of the settlement's early history, Fausto Zevi, 'Ostie sous la République', in *Ostia: port et porte de la Rome antique*, ed. Jean-Paul Descoeudres (Geneva: Georg, 2001), 10–18.

¹⁶² Rickman, *Roman Granaries*, 84.

¹⁶³ Rickman, 84; Russell Meiggs, *Roman Ostia*, 2nd ed. (Oxford: Clarendon Press, 1973), 124.

sanctuary on the Via della Foce indicates that there may have been facilities in this area as well.¹⁶⁴ On the other hand, Coarelli's view that the Grandi Horrea also had Republican origins has been doubted, not least by Rickman and Boetto.¹⁶⁵

Turning to the docking facilities, geoarchaeological analysis has shown that Ostia originally possessed a harbour basin with an area of roughly 2 ha and a depth of 6 m.¹⁶⁶ Despite its small size, the basin was deep enough to accommodate even the largest vessels, which seldom had a draft of more than 3.5 m at full load. At some point between c. 160 BCE and 25 CE, however, the basin was abandoned due to widespread silting.¹⁶⁷ By the time of Dionysius of Halicarnassus, only vessels with a capacity of less than 3,000 amphorae/20,000 *modii* had a sufficiently shallow draft (2.2 – 2.3 m) to enter the river; and by the early Principate Strabo reported that the settlement was 'harbourless' and that only light merchant vessels could run inland as far as the metropolis.¹⁶⁸ As Tuck has pointed out, the situation can only have been exacerbated by the explosion in bridge-building along the river during the second half of the first century BCE, which probably made it necessary to resort to transshipment on a more frequent basis.¹⁶⁹

Between the abandonment of the basin and the commencement of construction at Portus by Claudius in 40 CE, ships arriving at Ostia were only served by a

¹⁶⁴ Filippo Coarelli, 'Saturnino, Ostia e l'annona. Il controllo e l'organizzazione del commercio del grano tra II e I secolo a.C.', in *Le ravitaillement en blé de Rome et des centres urbains des débuts de la République jusqu'au Haut Empire. Actes du colloque international organisé par le Centre Jean Bérard et l'URA 994 du CNRS. Naples, 14–16 février 1991* (Naples and Rome: Centre Jean Bérard/École française de Rome, 1994), 40–42; also, Filippo Coarelli, 'Il Forum Vinarium di Ostia', in *'Roman Ostia' Revisited. Archaeological and Historical Papers in Memory of Russell Meiggs*, ed. Anna Gallina Zevi and Amanda Claridge (London: British School at Rome, 1996), 105–13.

¹⁶⁵ Geoffrey Rickman, 'Rome, Ostia and Portus: The Problem of Storage', *Mélanges de l'École française de Rome* 114 (2002): 355; also, Giulia Boetto et al., 'Les Grandi Horrea d'Ostie', in *Entrepôts et trafics annonaires en Méditerranée: Antiquité-Temps modernes*, ed. Marin Brigitte and Catherine Virlovet (Rome: École française de Rome, 2016), 186–88.

¹⁶⁶ By comparison, Cosa's harbour basin measured c. 2.5 ha: Michael Heinzelmann and Archer Martin, 'River Port, Navalía and Harbour Temple at Ostia', *JRA* 15 (2002): 5–19. For the depth of the Ostian basin, Jean-Philippe Goiran et al., 'Geoarchaeology Confirms Location of the Ancient Harbour Basin of Ostia (Italy)', *Journal of Archaeological Science* 41 (2014): 396.

¹⁶⁷ Goiran et al., 'Geoarchaeology', 397.

¹⁶⁸ Dion. Hal. *Ant. Rom.* 3.44.3; Strab. *Geog.* 5.3.5.

¹⁶⁹ Tuck, 'The Tiber', 237–38.

linear fluvial harbour. Those merchantmen that were either too large to navigate the shallows at the river's mouth or solely dependent on the wind for propulsion therefore had to make alternative arrangements. One option was to put in at the port of Puteoli, in the bay of Naples, with a view to transshipping the cargo to lighter coastal craft that could then make the three-day journey north to Ostia before travelling up-river to Rome.¹⁷⁰ Alternatively, both Dionysius and Strabo state that some merchantmen chose to anchor at the mouth of the river with the intention of transferring their cargo to lighters, which could either unload merchandise at Ostia or be towed upstream directly to Rome.¹⁷¹ These lighters were supplemented by *naves caudicariae*, which were specialised river barges designed for towing upstream by teams of men and oxen along paths on the river's banks.¹⁷² Tugs, too, helped larger ships to manoeuvre in the shallows of the river's mouth and the narrow confines of the harbour.¹⁷³

The earliest commercial port facilities at Rome were located at the Portus Tiberinus, which occupied a low-lying area of approximately 8,000 m² between the Tiber and the hills nearest to the river (Capitoline, Palatine, and Aventine).¹⁷⁴ The situation of the port at the heart of the city meant that, besides the river frontage to the west, it was hemmed in on all sides by buildings. Despite the lack of space in which to expand, there is some evidence that the port's facilities continued to be developed. As censor in 179 BCE, L. Aemilius Lepidus, with his colleague M. Fulvius Nobilior, completed construction of the Pons Aemilius across to the opposite bank, the arches of which were added by the censors L. Mummius and Scipio Aemilianus in 142.¹⁷⁵ The road that ran through the Porta Flumentana to the bridge's western end

¹⁷⁰ Lionel Casson, 'Harbour and River Boats of Ancient Rome', *JRS* 55 (1965): 32; Simon J. Keay, 'The Port System of Imperial Rome', in *Rome, Portus and the Mediterranean*, ed. Simon J. Keay (London: The British School at Rome, 2012), 41.

¹⁷¹ Dion. Hal. *Ant. Rom.* 3.44.3; Strab. *Geog.* 5.3.5.

¹⁷² On which, Giulia Boetto, 'Tra il fiume e il mare: le caudicariae di Fiumicino', in *Maritime Technology in the Ancient Economy: Ship-design and Navigation*, ed. William V. Harris and Kristine Iara (Portsmouth, R.I.: Journal of Roman Archaeology, 2011), 103–12.

¹⁷³ Casson, 'Harbour and River Boats', 32–33; Meiggs, *Roman Ostia*, 293–96; though cf. Tuck, 'The Tiber', 238–39.

¹⁷⁴ Filippo Coarelli, *Rome and Environs: An Archaeological Guide*, trans. James J. Clauss and Daniel P. Harmon (Berkeley, Los Angeles, and London: University of California Press, 2007), 307 and 315; also, Keay, 'Port System', 36.

¹⁷⁵ Coarelli, *Rome and Environs*, 309.

was the Vicus Lucceius, which was paved at the expense of the *gens* Lucceii, whose business interests have already been discussed above.¹⁷⁶ A Trajanic complex of warehouses has also been discovered on the site, though they were likely an imperial reconstruction of the Horrea Aemiliana, a grain storehouse thought to have been erected by Scipio Aemilianus in 142 BCE.¹⁷⁷

After the Second Punic War, however, the demand for more facilities led to the development of the plain further downstream to the south-west of the Aventine. According to Livy, the aediles of 193, L. Aemilius Lepidus and L. Aemilius Paullus, built a new port in the area (the Emporium) in addition to two new porticoes.¹⁷⁸ One of these porticoes appears to have been the so-called Porticus Aemilia, which flanked the wharf of the Emporium and was divided into a series of rooms, arranged seven rows deep along fifty separate aisles.¹⁷⁹ Although it has been suggested that the building functioned as a *navalia*,¹⁸⁰ Coarelli has argued that it functioned as a depot for incoming merchandise.¹⁸¹ Later, Livy reports that the censors of 174, Q. Fulvius Flaccus and A. Postumius Albinus, made repairs to the Porticus Aemilia, paved the 500 m length of the Emporium in stone, and installed staircases along the banks of the river.¹⁸²

More warehouses were added in the latter half of the second and first centuries BCE. Festus and Plutarch both attest that the subsidised distribution of grain instituted during the tribunate of C. Gracchus was accompanied by the construction of storage facilities known as the Horrea Sempronia.¹⁸³ The Severan Marble Plan shows that the Horrea Galbana (known as the Horrea Sulpicia before the emperor Galba's restoration of the buildings) were constructed immediately behind the Porticus Aemilia, where they covered an area of c. 24,000 m², with 140 storerooms located on the ground floor alone.¹⁸⁴

¹⁷⁶ Coarelli, 316. For the Lucceii, *supra*, 30 *et seq.*

¹⁷⁷ Coarelli, 315–16.

¹⁷⁸ Livy, 35.10.12.

¹⁷⁹ Coarelli, *Rome and Environs*, 345.

¹⁸⁰ Steven L. Tuck, 'A New Identification for the "Porticus Aemilia"', *JRA* 13 (2000): 175–82; also, Pier Luigi Tucci, 'Navalia', *Archeologia Classica* 57 (2006): 175–202.

¹⁸¹ Coarelli, *Rome and Environs*, 345.

¹⁸² Livy, 41.27.8: on which, Coarelli, 345.

¹⁸³ Festus, 370L; Plut. *C. Gracch.* 6.3.

¹⁸⁴ Rickman, *Roman Granaries*, 101; Catherine Virlouvet, 'Les entrepôts dans le monde romain Antique, formes et fonctions: première pistes pour un essai de typologie', in '*Horrea*'

Their Republican origins are indicated by the facing of the concrete walls with *opus reticulatum*,¹⁸⁵ and the siting of the tomb of Ser. Sulpicius Galba, most likely the consul of 108, dates the warehouses to c. 100 BCE.¹⁸⁶ A number of other storage facilities are likely to have been constructed during the first century. The Horrea Seiana, supposedly connected with the *gens* Seia, may have been founded by M. Seius, a friend of Cicero's.¹⁸⁷ The Marble Plan also indicates the existence of the Horrea Lolliana: a warehouse of at least 80 storage rooms (2,500 m²) situated on the banks of the Tiber to the south-west of the Horrea Galbana,¹⁸⁸ which may have been constructed by M. Lollius Palicanus (*tr. pl.* 71 BCE).¹⁸⁹ It is also possible that the Horrea Volusiana were founded at around the same time by Q. Volusius (Saturninus), whose involvement in financial dealings were described in detail by Cicero.¹⁹⁰ As Rickman suggests, the ground plans for the commercial quarters on the opposite bank of the Tiber also indicate that these, like a number of other warehouses located in the Emporium, were probably developed during the latter years of the Republic.¹⁹¹

2.3.4.1.2 Human Processes: Port Administration.

Although the evidence for the civil administration of ports during the late Republic is scarce, the extant sources provide some limited insights. Cicero mentions that a quaestorship existed for Ostia, the allotment of which was often

d'Hispanie et de la Méditerranée romaine, ed. Javier Arce and Bertrand Goffaux (Madrid: Casa de Velázquez, 2011), 20; also, José Ubaldo Bernardos Sanz and Catherine Virlouvet, 'Formes et fonctions: essai de typologie', in *Entrepôts et trafics annonaires en Méditerranée: Antiquité-Temps modernes*, ed. Marin Brigitte and Catherine Virlouvet (Rome: École française de Rome, 2016), 82.

¹⁸⁵ Rickman, *Roman Granaries*, 103–4.

¹⁸⁶ Coarelli, *Rome and Environs*, 346.

¹⁸⁷ Rickman, *Roman Granaries*, 168.

¹⁸⁸ *FUR* pl. 25: on which, Rickman, 111; also, Sanz and Virlouvet, 'Formes et fonctions', 82.

¹⁸⁹ Rickman, *Roman Granaries*, 164; also, D'Arms, *Commerce*, 66. The suggestion that the *horrea* were constructed by M. – Pob. Pallacinus (cos. 21) founders on Badian's identification of this character with M. Quin(c)tius Plancinus: review of *Supplement to the Magistrates of the Roman Republic*, by T. Robert S. Broughton, *Gnomon* 33, no. 5 (1961): 496; also, 'Notes on Roman Senators of the Republic', *Historia* 12, no. 2 (1963): 137; and Timothy P. Wiseman, *New Men in the Roman Senate* (Oxford: Oxford University Press, 1971), 282, no. 546.

¹⁹⁰ Cic. *Fam.* 5.20.3: on which, D'Arms, *Commerce*, 69–70; cf. Rickman, *Roman Granaries*, 169.

¹⁹¹ Rickman, *Roman Granaries*, 121–22.

greeted with uproar because it was a *provincia* that promised 'more trouble and anxiety than fame and popularity'.¹⁹² Rougé suggested that, among other duties, this quaestor would have been tasked with the administration of the *annona* and the oversight of the port.¹⁹³ It is possible, too, that a quaestorship existed for Puteoli as well, since a certain Vatinius was sent there in 63 BCE to oversee the trade in gold and silver.¹⁹⁴ For the early Principate, Houston concluded that 'the ordinary administration of Italian ports outside of Ostia and Puteoli was left in the hands of local officials, and that there was, so far as we can tell, almost no interest in such ports on the part of the central administration'.¹⁹⁵ There is no evidence to suggest that the position was any different during the late Republic.

The major practical operation undertaken at ports was the loading and unloading of cargoes. If the merchandise was fungible (i.e., of a kind that could be stored in bulk), then it was usual to measure the quantity taken on and off the ship to ensure that the process of loading and unloading had been executed correctly.¹⁹⁶ The standard Roman dry measure for this purpose was the *modius* (c. 9 litres), though the measuring vessels used as standards could vary in capacity from anywhere between 8.5 and 13 litres.¹⁹⁷ The physical task of transferring goods was usually achieved manually by stevedores and longshoremen. The epigraphic evidence from Ostia indicates that, at least from the time of the Principate, a number of guilds dedicated to specialised tasks formed at the port. Besides *saccarii*, or stevedores, these included groups of 'ballast-men' (*saburrarii*), divers (*urinatores*), and even crane operators

¹⁹² Cic. *Mur.* 18; also, Vell. Pat. 2.94.

¹⁹³ Jean Rougé, *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire romain* (Paris: S.E.V.P.E.N., 1966), 202.

¹⁹⁴ George W. Houston, 'The Administration of Italian Seaports during the First Three Centuries of the Roman Empire', *MAAR* 36 (1980): 162.

¹⁹⁵ Houston, 166.

¹⁹⁶ For an iconographic representation of this process, see the depiction of the *Isis Geminiana* (*infra*, 194).

¹⁹⁷ Richard Duncan-Jones, 'The Choenix, the Artaba and the Modius', *ZPE* 21 (1976): 43–52; also, 'The Size of the Modius Castrensis', *ZPE* 21 (1976): 53–62; and Andrew M. Riggsby, *Mosaics of Knowledge: Representing Information in the Roman World* (Oxford: Oxford University Press, 2019), 92. According to Wallinga, the Romans used amphorae as the unit by which to quantify the capacity of ships during the Republic, and the *modius* only later: 'Nautika (I): The Unit of Capacity for Ancient Ships', *Mnemosyne* 17 (1964): 6–7.

(*professionarii de ciconiis*).¹⁹⁸ The use of pulley systems and cranes during the late Republic is attested by Vitruvius, who described their use for drawing ships ashore and loading and unloading cargo.¹⁹⁹ Although there is only fragmentary evidence for the formation of guilds such as these during the Republic, the organisation of the process at Ostia gives a good indication of the kinds of activities that were taking place in Roman ports.

Goods being transported over long distances were subject to a whole slew of duties bearing on mobility, usually connected with the use harbour infrastructure.²⁰⁰ Chief among these were *portoria*, or customs duties, levied on the movement of goods. These were either collected by the state or, if the settlement was a free city or had been granted special privileges, by the city itself.²⁰¹ During the Republican period, the right to collect taxes on behalf of the state was usually contracted out to tax farmers (*publicani*), who collected the dues at *stationes*.²⁰² From the time of the Principate, the trend was away from the collection of duties by individual cities and toward external customs levied on goods moving in and out of the empire and between provinces.²⁰³ The rate for goods crossing into the empire from outside was relatively high: often 12.5% or even 25%. For those goods moving between provinces the rate was lower: usually between 1% and 5%, and frequently 2% or 2.5%. Duties were

¹⁹⁸ Lionel Casson, *Ships and Seamanship in the Ancient World* (Baltimore: Johns Hopkins University Press, 1995), 370.

¹⁹⁹ Vitr. *De arch.* 10.2.10.

²⁰⁰ Nicholas Purcell, 'Taxing the Sea', in *The Sea in History - The Ancient World*, ed. Pascal Arnaud and Philip de Souza (Woodbridge, UK: Boydell & Brewer, 2017), 324; also, generally, 'The Ancient Mediterranean: The View from the Customs House', in *Rethinking the Mediterranean: Papers from a Conference Organized by the Columbia University Center for the Ancient Mediterranean, September 21-22, 2001*, ed. William V. Harris (Oxford and New York: Oxford University Press, 2005), 200–232; and Alan K. Bowman, 'The State and the Economy: Fiscality and Taxation', in *Trade, Commerce, and the State in the Roman World*, ed. Andrew I. Wilson and Alan K. Bowman (Oxford: Oxford University Press, 2018), 37–40.

²⁰¹ Purcell, 'Taxing the Sea', 325; also, Pascal Arnaud, 'Ancient Sailing-Routes and Trade Patterns: The Impact of Human Factors', in *Maritime Archaeology and Ancient Trade in the Mediterranean*, ed. Damian Robinson and Andrew I. Wilson (Oxford: Oxford Centre for Maritime Archaeology, Institute of Archaeology, 2011), 66.

²⁰² The right to collect taxes was leased by the censors for five-year periods (i.e., a *lustrum*): on which, generally, Ernst Badian, *Publicans and Sinners: Private Enterprise in the Service of the Roman Republic* (Oxford: Blackwell, 1972).

²⁰³ Pascal Arnaud, 'Les infrastructures portuaires antiques', in *The Sea in History - The Ancient World*, ed. Pascal Arnaud and Philip de Souza (Woodbridge, UK: Boydell & Brewer, 2017), 241–42.

normally payable immediately in coin, either on the value of the merchandise or else at a fixed rate.²⁰⁴

Both literary and epigraphic sources show that the collection of *portoria* was widespread by the late Republic. Putting aside the belief of the Roman historians that customs duties were levied in archaic Rome, the first evidence for the collection of *portoria* is provided by Livy, who states that the taxes were introduced after the appropriation of the Bay of Naples in the wake of the Second Punic War.²⁰⁵ Cicero refers to port duties being collected in Italy, Asia, Macedonia, and Sicily, where Verres was accused of evading the 5% harbour duty on exports from Syracuse.²⁰⁶ At Ephesus, the *lex portorii Asiae* (probably first promulgated in during the 120s BCE), set out the rules for the collection of *portoria* on both imports and exports to and from the province of Asia by both land and sea.²⁰⁷ Indeed, Cicero considered Asian customs dues as among the most significant of Rome's sources of revenue.²⁰⁸ *Stationes* are also attested in Gaul, where they are known through epigraphic sources to have been established at Narbonne, Arles, and (later) Marseilles.²⁰⁹ Equally, Cicero accused one provincial governor, L. Calpurnius Piso, of setting up a private customs-house in Dyrrachium (Macedonia);²¹⁰ and defended another, M. Fonteius, governor of Transalpine Gaul in the late 70s, from allegations that he had raised extortionate taxes on the import of Italian wine into the province.²¹¹

²⁰⁴ If only because traders had access to coin: David B. Hollander, *Money in the Late Roman Republic* (Leiden and Boston: Brill, 2007), 92. Duncan-Jones is probably right to observe that the Romans levied taxes from people according to whatever kind of money was available to them: *Structure and Scale in the Roman Economy* (Cambridge: Cambridge University Press, 1990), 198.

²⁰⁵ Livy, 32.7: on which, Purcell, 'Taxing the Sea', 330.

²⁰⁶ Cic. 2 *Verr.* 2.176 and 185. For Asia, Cic. *Att.* 2.16; *Leg. Man.* 15; for Macedonia, Cic. *Pis.* 87; for Italy, Cic. *QFr.* 1.1.33; also, Suet. *Iul.* 43; Vell. *Pat.* 2.6.3. For a list of literary references to late Republican sources of revenue, Hollander, *Money*, 90, Table 5.1.

²⁰⁷ The inscription itself was set up in Ephesus in 62 CE. For the disputes concerning its internal chronology, Michel Cottier and Mireille Corbier, eds., *The Customs Law of Asia* (Oxford: Oxford University Press, 2008), 8–10.

²⁰⁸ Cic. *Leg. agr.* 2.80.

²⁰⁹ Jérôme France and Antoinette Hesnard, 'Une statio du quarantième des Gaules et les opérations commerciales dans le port romain de Marseille (place Jules-Verne)', *JRA* 8 (1995): 84–85.

²¹⁰ Cic. *Prov. cons.* 5.

²¹¹ Cic. *Font.* 19–20.

The valuation of goods for the purpose of taxation appears to have been intimately connected to the process by which cargoes were bought and sold. According to Bresson, the Greek procedure known as the *deigma* involved the seller unloading his goods, declaring the price at which he intended to sell, and the payment of duties in relation to their declared value and quantity.²¹² As Arnaud has pointed out, this interpretation is consistent with a passage from Cicero, which indicates that the procedure of unloading, exposition, and herald proclamation was also followed in Puteoli in the first century BCE.²¹³ Again, a customs law set up at Caunos during the first century CE indicates that the normal practice was to unload the vessel, pay the import tax *ad valorem*, and then to reload any unsold merchandise after paying the export duty.²¹⁴ *Deigmata*, or samples, may have played a role in this process, though they might equally have been used for other purposes.²¹⁵

Goods that had been unloaded and taxed were often stored in warehouses awaiting the next stage of their distribution. Warehouses fulfilled multiple functions: they could be used to conserve products, to store goods in anticipation of transport to another location, or as storage units for merchandise intended for sale, loan, or use as security.²¹⁶ The slender evidence that we have for the late Republic suggests that warehouses during this period – and even those connected with the grain supply – were privately operated.²¹⁷ Cicero, for example, implies that the *horrea* at Puteoli were owned by private individuals

²¹² Alain Bresson, *L'économie de la Grèce des cités (fin VIe-1er siècle a. C.)*, vol. 2 (Paris: A. Colin, 2008), 101–5.

²¹³ Cic. *Rab. Post.* 14.40: on which, Arnaud, 'Ancient Sailing-Routes', 67.

²¹⁴ For the tax regulation at Caunos, George E. Bean, 'Notes and Inscriptions from Caunos (Continued)', *The Journal of Hellenic Studies* 74 (1954): 97–99, no. 38; also, Julia Vélissaropoulos-Karakostas, *Les nauclères grecs: recherches sur les institutions maritimes en Grèce et dans l'Orient hellénisé* (Geneva and Paris: Droz, Minard, 1980), 224; and Christian Marek, *Die Inschriften von Kaunos* (Munich: C.H. Beck, 2006), 171–221, no. 34, C, ll. 8-10.

²¹⁵ For a recent discussion of CIL IV 9591, which consists of an inscription recorded on a 'little amphora' that was sent in advance of a shipment from Ostia to Puteoli, Jean Andreau, Lucia Rossi, and André Tchernia, 'CIL IV, 9591: un transport de blé entre Ostie et Pompéi', *Mélanges de l'École française de Rome - Antiquité [Online]* 129, no. 1 (2017), <https://doi.org/10.4000/mefra.4646>.

²¹⁶ Virlovet, 'Les entrepôts dans le monde romain antique', 11–12; also, Sanz and Virlovet, 'Formes et fonctions', 72.

²¹⁷ Rickman, *Roman Granaries*, 171–72.

and of considerable rental value.²¹⁸ With respect to their layout, they generally involved the construction of buildings divided into rectangular units surrounding either a central courtyard or corridor. The epigraphic evidence from the early Principate indicates that they tended to be operated by the freedmen and slaves of wealthy individuals, who could then let individual storage units for profit.²¹⁹

So far as they were lucrative, the agreements entered into by warehousemen and the owners of goods were contracts of letting and hiring. The epigraphic evidence suggests that, at least from the time of the early Principate, the terms of these agreements were spread across several different documents. In the archive of the Sulpicii, for example, a number of *chirographa* record private arrangements between *horrearii* and *conductores*.²²⁰ These, however, only contained information about those aspects of the arrangement that were essential to the formation of the contract: the more detailed terms and conditions which the warehouseman intended to apply to all the agreements he concluded appear to have been set out in 'charters' (*leges horreorum*), two of which have survived as inscriptions dating to the second century CE.²²¹ Together, these comprised the *lex contractus* governing the agreement between the parties.²²²

2.3.4.2 Traversing the Foreland: Shipping.

2.3.4.2.1 Infrastructure: Technology, Routes, and Hazards.

Besides the insights gained from the shipwreck evidence concerning changes in the volume of maritime traffic over time, archaeological remains have also

²¹⁸ Cic. *Fin.* 2.84-5.

²¹⁹ Claude Alzon, *Problèmes relatifs à la location des entrepôts en droit romain* (Paris: Éditions Cujas, 1966), 26–32.

²²⁰ *TPSulp.* 45 and 46 are good examples: on which, Giuseppe Camodeca, *Tabulae Pompeianae Sulpiciorum (TPSulp.)*. Edizione critica dell'archivio puteolano dei Sulpicii, vol. 2 (Rome: Quasar, 1999), 122 and 125. On *chirographa* generally, Éva Jakab, 'Chirographum in Theorie und Praxis', in *Römische Jurisprudenz - Dogmatik, Überlieferung, Rezeption. Festschrift für Detlef Liebs zum 75. Geburtstag*, ed. Karlheinz Muscheler (Berlin: Duncker & Humblot, 2011), 275–92.

²²¹ CIL VI 33747: on which, Salvatore Riccobono, Vincenzo Arangio-Ruiz, and Giovanni Baviera, eds., *Fontes Iuris Romani Anteiustiniani*, vol. 3 (Florence: Barbèra, 1943), 455–56 and 457; and most recently, Roberta Marini, 'La custodia di merci dell'horrearius: a proposito di CIL VI 33747', *ZSS* 132 (2015): 154–80.

²²² Paul J. du Plessis, 'The Roman Concept of Lex Contractus', *Roman Legal Tradition* 3 (2006): 90–92; also, generally, Jean-Jacques Aubert, 'Law, Business Ventures and Trade', in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 621–34.

made it possible to reconstruct its technological aspects. The shipwreck data indicates that the average size of vessels between the fifth century BCE and the twelfth century CE remained broadly constant, and that ships with a capacity of less than 75 tons (c. 1,500 amphorae) were the most common in all periods. The dataset also reveals, however, that ships with a capacity of between 75 and 200 tons (1,500 – 3,000 amphorae) were used frequently between the first century BCE and the third century CE. Excepting the heavy stone cargoes traversing the Mediterranean during the Principate, the wrecks of carriers exceeding 250 tons belong almost exclusively to the late Republic.²²³ Two of these larger wrecks are particularly noteworthy, since they were both involved in the export trade from Italy to Gaul. The Albenga wreck, for example, sank in c. 100 – 80 BCE with a total cargo of between 500 – 600 tons, comprised of c. 11,500 – 13,000 Dressel 1B wine amphorae together with sacks of hazelnuts and grain. At the Madrague de Giens, off the southern coast of Gaul, a ship of 375 – 400 tons sank in c. 75 – 60 BCE laden with between 6,000 – 7,000 Dressel 1 amphorae, apparently stowed underneath crates of black gloss wares, as well as coarse and cooking pottery.²²⁴ It is possible, if not likely, that even larger ships were involved in the grain run between Alexandria and Rome during the Principate, but no wrecks have yet been found, probably on account of the perishable nature of their cargoes.²²⁵

Shipbuilders in the ancient Mediterranean predominantly followed the shell-based method of construction.²²⁶ A typical Roman merchant vessel was equipped with a square sail and could achieve speeds of between 4 – 6 knots with a calm sea and favourable winds, and at best 1.5 – 2 knots in the intended direction if it was tacking or gybing into the wind.²²⁷ In terms of equipment, a

²²³ Anthony J. Parker, 'Cargoes, Containers and Stowage: The Ancient Mediterranean', *International Journal of Nautical Archaeology* 21, no. 2 (1992): 89 and 90, fig. 1.

²²⁴ Wilson, 'Developments', 39–40.

²²⁵ Wilson, 40.

²²⁶ Julian Whitewright, 'Mediterranean Ship Technology in Antiquity', in *The Sea in History - The Ancient World*, ed. Pascal Arnaud and Philip de Souza (Woodbridge, UK: Boydell & Brewer, 2017), 201–2.

²²⁷ Casson, *Ships and Seamanship*, 282–91; Julian Whitewright, 'The Potential Performance of Ancient Mediterranean Sailing Rigs', *International Journal of Nautical Archaeology* 40 (2011): 9–10; also, Justin Leidwanger, 'Modeling Distance with Time in Ancient

papyrus dated to 212 CE records the long-term lease of a ship with a capacity of c. 400 *artabas* together with: ‘mast, yard, linen sail, ropes, jars, rings, blocks, two steering oars with tiller bars and brackets, four oars, five boat poles tipped with iron, companionway ladder, landing plank, winch, two iron anchors with iron stocks, one one-armed anchor, ropes of palm fibre, tow rope, mooring lines, three grain chutes, one measure, one balance yard, Cilician cloth, cup-shaped two-oared skiff fitted with all appropriate gear and an iron spike’.²²⁸ It is likely that this inventory was fairly typical.

Although the assembly of a cargo was primarily influenced by economic concerns, its safety in transit was partly dependent upon how carefully it had been stowed.²²⁹ Usually, heavy materials were loaded first (such as metal ingots), amphorae next, and the lightest goods last of all. Amphorae were stowed in intercalated layers which, at the Albenga wreck, could have numbered as many as nine.²³⁰ In general, amphorae do not appear to have been padded or wedged in place, except for the bottom layer, where the pointed tips of the containers were sometimes set in sand or pebbles, which doubled up as ballast at the bottom of the hold.²³¹ Residues recovered from the interior of amphorae show that they were commonly used to transport liquids, such as wine, olive oil, and garum.²³² Cereals and other foodstuffs could be loaded into sacks or crates, or, as in the case of Saufeius’ ship, shot loose into the hold.²³³ Slaves, too, must have been held below deck.

Mediterranean Seafaring: A GIS Application for the Interpretation of Maritime Connectivity’, *Journal of Archaeological Science* 40, no. 8 (2013): 3305.

²²⁸ P. Lond. 3 1164 (h): on which, Casson, *Ships and Seamanship*, 257; also, Naphtali Lewis, *Life in Egypt under Roman Rule* (Oakville, CT.: American Society of Papyrologists, 1999), 143.

²²⁹ Generally, Sean McGrail, ‘The Shipment of Traded Goods and of Ballast in Antiquity’, *Oxford Journal of Archaeology* 8, no. 3 (1989): 353–58.

²³⁰ Parker, ‘Cargoes, Containers and Stowage’, 90; Xavier Nieto, ‘Le commerce de cabotage et de redistribution’, in *La Navigation dans l’Antiquité*, ed. Patrice Pomey (Aix-en Provence: Édisud, 1997), 149.

²³¹ Parker, ‘Cargoes, Containers and Stowage’, 90.

²³² Parker, 92–93.

²³³ D.19.2.31 (Alf. 5 *dig. a Paolo epit.*): on which, *infra*, 190 *et seq.*

Virtually all the maritime traffic traversing the Mediterranean during the Roman period carried cargoes and only provided passenger transport incidentally.²³⁴ The evidence for increasingly larger ships carrying low-value cargo in bulk points towards a trade-pattern characterised by direct pendular movements between predetermined destinations.²³⁵ Even if, as Beresford has argued, sailing continued through the winter months, the majority of enterprises operated during the traditional sailing season between April and September.²³⁶ While larger vessels could brave longer distances over open seas, the majority of vessels, which were of a small-to-medium size, are more likely to have preferred coastal routes. Even so, this does not mean that they were reduced to tramping from port to port in search of uncertain profits. Rather, these smaller vessels may have still been engaged in direct, purposeful, long-distance ventures.²³⁷ The epitaph of Flavius Zeuxis, dated most recently to c. 100 CE, provides a good example of this tendency:²³⁸ he recorded that in his career as a trader he had rounded the Cape of Malea on his way to and from Hierapolis in Phrygia seventy-two times.²³⁹

Looking specifically at the trade between Italy and Gaul, Warnking has identified the three likely routes taken by traders based on a journey between Ostia and Forum Iulii (modern Fréjus): the first, through the Strait of Bonifacio; the second, around the Corsican Cape; and the third, through the Gulf of

²³⁴ Lionel Casson, *Travel in the Ancient World* (London: Allen and Unwin, 1974), 152–53. Cf. Ulpian's statement that some vessels designed to ferry passengers from Brindisi to Cassiopa or Dyrrachium were unfit for carrying cargo: D.14.1.1.12 (Ulp. 28 *ad ed.*): on which, *infra*, 136 *et seq.*

²³⁵ Arnaud, 'Ancient Sailing-Routes', 75; also, Nieto, 'Le commerce de cabotage et de redistribution'; and Tchernia, *Trade*, 69–70; cf. Peter F. Bang, *The Roman Bazaar: A Comparative Study of Trade and Markets in a Tributary Empire*, Cambridge Classical Studies (Cambridge and New York: Cambridge University Press, 2008), 141–42.

²³⁶ Generally, James Beresford, *The Ancient Sailing Season* (Leiden: Brill, 2013).

²³⁷ Arnaud, 'Ancient Sailing-Routes', 73.

²³⁸ SIG 1229 (= IGRR IV 841): on which, Tchernia, *Trade*, 69. For a first century date, Tullia Ritti, 'Iura sepulcrorum a Hierapolis di Frigia nel quadro dell'epigrafia sepolcrale microasiatica', in *Libitina e dintorni Libitina e i luci sepolcrali. Le leges libitinariae campane. Iura sepulcrorum: vecchie e nuove iscrizioni. Atti dell'XI Rencontre franco-italienne sur l'épigraphie* (Rome: Quasar, 2004), 573–74. Cf. Henning, who dates the inscription to the fourth century CE: 'Die antike Seehandelsroute um Kap Malea', *Münstersche Beiträge zur antiken Handelsgeschichte* 20 (2001): 23–37.

²³⁹ According to Strabo, the cape was so notorious that it had its own proverb – 'But when you double Maleae, forget your home': *Geog.* 8.6.20.

Genoa.²⁴⁰ The Elder Pliny stated that the trip could be completed in three days.²⁴¹ Although this may have been ambitious, it was not outside the realms of possibility if the ship was sailing with the Mistral. More commonly, as Warnking has shown, the voyage passing through the Strait of Bonifacio or north of the Corsican Cape probably took about five days, while the journey along the Gulf of Genoa could take about one week.²⁴²

Navigating ships safely, both at sea and in the tight confines of a river or harbour, required specialist knowledge and experience. Without the benefit of navigation by chart and compass, or indeed the barometer, ancient sailors were heavily dependent upon their ability to interpret the natural environment.²⁴³ The direction and strength of winds and swells, the perception of features on the visible coastline, and – when there was a clear night – the stars, were all useful guides for the experienced seaman. Manmade navigational aids, such as lighthouses and poles protruding from submerged rocks and shallows, created additional features that helped to steer vessels to safety.²⁴⁴ Despite the lack of practical charts, navigators may also have had *periploi* at their disposal: that is, written sailing directions containing information about sailing routes, landmarks, hazards, harbours, and stop-ins where supplies could be taken on board.²⁴⁵ In addition, vessels could be

²⁴⁰ Pascal Warnking, *Der römische Seehandel in seiner Blütezeit. Rahmenbedingungen, Seerouten, Wirtschaftlichkeit* (Rahden/ Westf.: Leidorf, 2015), 231–32.

²⁴¹ Plin. *HN*. 19.1.3–4.

²⁴² Warnking, *Seehandel*, 232.

²⁴³ Generally, Patrice Pomey, 'L'art de la navigation dans l'Antiquité', in *Regards sur la Méditerranée. Actes du 7ème colloque de la Villa Kérylos à Beaulieu-sur-Mer les 4 & 5 octobre 1996* (Paris: Académie des Inscriptions et Belles-Lettres, 1997), 89–101; also, Beresford, *Sailing Season*, 173–212.

²⁴⁴ For a catalogue of ancient lighthouses, Ken Trethewey, *Ancient Lighthouses: And Other Lighted Aids to Navigation* (Torpoint, Cornwall: Jazz-Fusion Books, 2018); also, generally, Baldassare Giardina, *Navigare Necesse Est. Lighthouses from Antiquity to the Middle Ages: History, Architecture, Iconography and Archaeological Remains* (Oxford: Archaeopress, 2010). For issues surrounding their funding and construction, Pascal Arnaud, 'Maritime Infrastructure. Between Public and Private Initiative', in *Infrastruktur und Herrschaftsorganisation im Imperium Romanum: Herrschaftsstrukturen und Herrschspraxis III. Akten der Tagung in Zürich 19.-20.10.2012*, ed. Anne Kolb (Berlin: De Gruyter, 2014), 161–79.

²⁴⁵ For maps and *periploi* in general, Pietro Janni, *La mappa e il periplo. Cartografia antica e spazio odologico* (Rome: Giorgio Bretschneider, 1984); and Oswald A. W. Dilke, *Greek and Roman Maps* (London: Thames and Hudson, 1985), 130–44. The earliest *periplous* is believed to have been composed by Scylax of Caryanda during the fourth century BCE: on which, Aurelio Peretti, *Il Periplo di Scilace: studio sul primo portolano del Mediterraneo*

equipped with sounding rods and, more exceptionally, sounding weights, with which to gauge depths and avoid becoming stranded.²⁴⁶

Even the most experienced sailors could not avoid some of the perils associated with travel by sea, the most serious of which were piracy and shipwreck. The threat posed by Cilician pirates, who famously took Caesar captive in the mid-70s, is well known.²⁴⁷ Over the course of the first century BCE, however, a series of campaigns, the last of which was conducted by Pompeius Magnus in the mid-60s, led to the almost complete suppression of the problem across the Mediterranean.²⁴⁸ As Ferrary has suggested, a decisive factor in pursuing this policy was the protection of Roman and Italian commercial interests in the eastern half of the basin.²⁴⁹ Although piracy continued to disrupt maritime trade after this time, Roman naval dominance ensured that it persisted at a much lower level than before.²⁵⁰

One threat that could not be avoided was the danger of adverse weather. Besides factors such as size and technical equipment, the fate of a vessel depended heavily upon the skill of its pilot (*gubernator*). Not only could the

(Pisa: Giardini, 1979). For the first-century CE *Periplus maris Erythraei*, which provided information on sailing routes between the Red Sea to India, Lionel Casson, *The Periplus Maris Erythraei: Text with Introduction, Translation, and Commentary* (Princeton, NJ: Princeton University Press, 1989); also, George W. B. Huntingford, *The Periplus of the Erythraean Sea* (London: Hakluyt Society, 1980).

²⁴⁶ According to Oleson, 83.8% (62 of 74) of the datable sounding weights recovered from the Mediterranean date to between the second century BCE and the second century CE: 'Testing the Waters: The Role of Sounding Weights in Ancient Mediterranean Navigation', in *The Maritime World of Ancient Rome. Proceedings of the 'Maritime World of Ancient Rome' Conference Held at the American Academy in Rome 27-29 March 2003*, ed. Robert L. Hohlfelder (Ann Arbor, MI.: University of Michigan Press, 2008), 139; also, generally, John P. Oleson, 'Ancient Sounding-Weights: A Contribution to the History of Mediterranean Navigation', *JRA* 13 (2000): 293–310.

²⁴⁷ For a discussion of the evidence for Caesar's capture, Allen M. Ward, 'Caesar and the Pirates', *Classical Philology* 70, no. 4 (1975): 267–68. On the Cilician pirates, Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge: Cambridge University Press, 1999), 97–148.

²⁴⁸ de Souza, *Piracy in the Graeco-Roman World*, 149–78.

²⁴⁹ Jean-Louis Ferrary, 'La création de la province d'Asie et la présence italienne en Asie Mineure', in *Les Italiens dans le monde grec, IIe siècle av. J.-C. - Ier siècle ap. J.-C. Circulation, activités, intégration (actes de la table ronde, École normale supérieure, Paris, 14-16 Mai 1998)*, ed. Christel Müller and Claire Hasenohr (Athens and Paris: De Boccard, 2002), 135; also, Kay, *Revolution*, 202–3.

²⁵⁰ David C. Braund, 'Piracy under the Principate and the Ideology of Imperial Eradication', in *War and Society in the Roman World*, ed. John Rich and Graham Shipley (New York: Routledge, 1993), 204–7.

pilot's expertise keep the ship afloat in stormy weather, but the experience of the crew could also count when making decisions about which goods and equipment to jettison at the appropriate moment.²⁵¹ The famous story of the apostle Paul's shipwreck *en route* from Caesarea to Rome includes a description of the crew's efforts to save the ship by throwing the cargo, and then the ship's tackle, overboard.²⁵² Sallust, too, indicated that the extra cargo (*supervacuanea onera*) on a large ship was usually the first to be jettisoned because it was of the least value.²⁵³ Nor were living creatures spared the horror of being cast out of an imperilled boat: in a military setting, Tacitus included pack-horses among the items jettisoned from a sinking ship,²⁵⁴ and Cicero posed the dilemma between sacrificing an expensive horse or an inexpensive slave.²⁵⁵

2.3.4.2.2 Human Processes: Crews and Commerce.

Crews

The composition of a ship's crew depended upon its navigational requirements and commercial purposes.²⁵⁶ The most senior officer responsible for the vessel's navigation was the *gubernator* (pilot), who had a team of *nautae* (sailors) at his command. Specific roles were also taken up by carpenters, who were responsible for the ship's repairs, as well as rowers for the ship's boat and lookouts. The commercial exploitation of the ship was in the hands of its *exercitor*, who was the person entitled to all the revenue generated by the asset.²⁵⁷ Frequently *exercitores* were either the owner of the vessel or a person

²⁵¹ Generally, Jean Rougé, 'Droit romain et navigation: autour des problèmes du jet', in *L'exploitation de la mer de l'Antiquité, II: La mer comme lieu d'échanges et de communication. VI^e Rencontres internationales d'archéologie et d'histoire d'Antibes, 24, 25, 26 Octobre 1985* (Valbonne: APDCA, 1986), 31–45.

²⁵² Acts, 27.14-20: on which, Patrice Pomey, 'Le voyage de saint Paul', in *La navigation dans l'Antiquité*, ed. Patrice Pomey (Aix-en-Provence: Édisud, 1997), 10–17.

²⁵³ Sall. *Ad Caes. sen.* 2.9.4.

²⁵⁴ Tac. *Ann.* 2.23.

²⁵⁵ Cic. *Off.* 3.23.89. The famous case of the *Zong*, a slave ship from which 133 African slaves were jettisoned in 1781, resulted in a case before the King's Bench decided by Lord Mansfield according to the principles of insurance law. The case inspired the famous painting, *The Slave Ship*, by William Turner.

²⁵⁶ For the composition of ship's crews, Rougé, *Recherches*, 213–27; also, Casson, *Ships and Seamanship*, 314–28.

²⁵⁷ D.14.1.1.15 (Ulp. 28 *ad ed.*). C.4.25.4 (Diocl./Maxim. AA. et CC. Antigonae) demonstrates that female *exercitores* were a reality by the late third century CE. Suetonius' account of

engaged in a recognised legal relationship with the owner, such as a contract of letting and hiring.²⁵⁸ Equally, the *exercitor* could be *sui iuris* or a dependant, in which case the ship would be held as part of a *peculium*. If the *exercitor* chose, he or she could appoint a *magister navis* (shipmaster) to oversee the commercial management of the ship on a day-to-day basis.²⁵⁹ To assist with the administration of the vessel, the shipmaster might also delegate the responsibility for its maintenance to a *proreus* and the care of the cargo and passengers to a *toicharchos*. This latter officer might have several assistants, among them a *perineos* for administering the cargo, as well as *naustologoi* for the supervision of the passengers. Ship's guards (*nauphylakes*) and valets (*diaetarii*) are also attested.

Carriers and Merchants:

Turning to the commercial organisation of shipping enterprises, again the shipwreck evidence provides an insight. We have already seen that consistent differences between the names stamped on amphorae and those imprinted on their mortar stoppers lends support to the view that there was a separation between production and distribution in long-distance trade. Likewise,

an edict issued in 51 CE by the emperor Claudius is evidence for the same proposition with respect to the early Principate. The edict granted, *inter alia*, the privilege of the *ius quattuor liberorum* to women who were responsible for the construction of vessels of a capacity of not less than 10,000 *modii* (about 70 metric tons) once the ship (or its replacement) had been put at the service of the *annona* for a duration of six years: Suet. *Claud.* 18-9; also, G.1.32c; and Epit. Ulp. 3.6. The date of the edict can be discovered from Tac. *Ann.* 12.43, in which the author describes the same food shortage: Patrice Pomey and André Tchernia, 'Le tonnage maximum des navires de commerce romains', *Archaeonautica* 2 (1978): 238. On these texts as evidence for female participation in maritime trade, Verena Halbwegs, 'Women as Legal Actors', in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 450–51.

²⁵⁸ There are three examples of long-term *misthoprasiarum* (literally 'lease-sales') in the papyri from Roman Egypt: on which, Rougé, *Recherches*, 332 and 334-35; Gianfranco Purpura, 'Misthoprasiarum ed exercitores', *AUPA* 40 (1988): 37–61; Dominic Rathbone, 'Misthoprasia: The Lease-Sale of Ships', in *Akten des 23. Internationalen Papyrologenkongresses (Wien, 22.-28. Juli 2001)*, ed. Bernhard Palme (Vienna: Verlag der österreichischen Akademie der Wissenschaften, 2007), 587–93; Éva Jakab, 'Risikomanagement bei den naukleroi', in *Antike - Recht - Geschichte. Symposium zu Ehren von Peter E. Pieler*, ed. Nikolaus Benke and Franz-Stefan Meissel, vol. 4 (Frankfurt am Main: Lang, 2009), 73–88.

²⁵⁹ Priamus, a servile *magister*, is attested in an undated inscription from Vettona (CIL XI 5183): on which, Aubert, 'Les Institores', 157; also, Broekaert, *Navicularii et Negotiantes*, 500 no. 1308. See, also, Hor. *Carm.* 3.6.13-6 and the depiction of the *magister* Farnaces in the image of the *Isis Geminiana* (*infra*, 194).

comparing the names on those same stoppers with the name, if any, inscribed on the ship's anchor can shed light on the relationship between the person in control of the ship and the cargo on board.²⁶⁰ In most cases the anchors bear no inscription whatsoever, which Broekaert takes to indicate that the shipowner was also the person using the ship.²⁶¹ In this situation, it is possible that the shipowner was only transporting his own goods, in which case we would not expect to find any marks on the amphora stoppers either. This appears to have been the case in the Mahon wreck, which sank in the first century CE off the island of Menorca, where neither the amphorae nor the anchor had been inscribed.²⁶² Alternatively, a shipowner could elect to transport other merchants' goods, either exclusively or alongside his own merchandise. At the site of the Dramont A wreck, which sank in the mid-first century BCE, for example, both an anchor and amphorae stoppers inscribed with the name of a Sex. Arrius have been recovered, along with amphora stoppers bearing the names of other traders.²⁶³ This indicates that Arrius was both the owner of the ship and a trader, besides transporting the goods of other merchants.

Marking anchors appears to have been a way of identifying who held property in the ship where the vessel was likely to be placed in the hands of someone who was not the owner. The name of L. Ferranius Celer, for example, has been found on no fewer than three anchors at different late Republican sites, which indicates that he was either extremely unlucky or the owner of a considerable fleet of ships (or, indeed, both).²⁶⁴ The discovery of a stopper belonging to a Ti. Claudius Ti. f. at the Foce Verde wreck, which sank in the

²⁶⁰ Usually, the name of the anchor's manufacturer is given in the nominative case, the name of the owner in the genitive: Piero A. Gianfrotta, 'Note di epigrafia "marittima." Aggiornamento su tappi d'anfora, ceppi d'ancora e altro', in *Epigrafia della produzione e della distribuzione. Actes de la VIIe Rencontre franco-italienne sur l'épigraphie du monde romain (Rome, 5-6 juin 1992)* (Rome: École française de Rome, 1994), 599–600.

²⁶¹ Broekaert, *Navicularii et Negotiantes*, 438.

²⁶² Broekaert, 438; Hesnard and Gianfrotta, 'Les bouchons', 431.

²⁶³ Hesnard and Gianfrotta, 'Les bouchons', 411, no. B.6 and 434, no. A.8; Broekaert, *Navicularii et Negotiantes*, 440, no. 1145 and 454, no. 1198.

²⁶⁴ The discovery of the wrecks at Populonia, Latina, and Valencia suggest that Celer was exploiting the route between Italy and the Iberian Peninsula: Hesnard and Gianfrotta, 'Les bouchons', 435, no. A.15; Broekaert, *Navicularii et Negotiantes*, 455, no. 1206.

mid-first century BCE off the coast of Latium, suggests that Celer was making his vessel available to traders.²⁶⁵ The names of senatorial families, such as the Ahenobarbi, also appear on anchors, in which case the ship in question would almost certainly have been administered by agents or leased to other traders and carriers.²⁶⁶ Alternatively, the name of the agent could be inscribed on the anchor, as in the case of the slave Nicia ('Nicia Villi L. s[ervus]'), whose name appears on two anchors retrieved at Palermo (Sicily) and Sassari (Sardinia) respectively.²⁶⁷ Again, it is possible to distinguish between cargoes belonging to a single merchant and those belonging to several traders. At the La Chrétienne C wreck (175 – 150 BCE), for example, six stoppers belonging to a solitary freedman-trader have been found, suggesting that the merchandise belonged to him alone.²⁶⁸ In contrast, amphora stoppers marked with the names of different merchants have been recovered from the Planier 3 wreck, indicating that consignments belonging to multiple traders were on board.²⁶⁹

The evidence for the contents of chartering contracts demonstrates that these matched the potential complexity of maritime enterprises. As Fiori has argued, the papyrological and juristic evidence suggests that there were four preferred

²⁶⁵ Piero A. Gianfrotta, 'Nuovi rinvenimenti subacquei per lo studio del commercio marittimo del vino (I sec. a.C.-I sec. d.C.)', in *El Vi a l'antiguitat: economia, producció i comerç al Mediterrani occidental. II colloqui internacional d'arqueologia romana (Barcelona 6-9 de maig de 1998)* (Barcelona: Museu de Badalona, 1998), 106; Broekaert, *Navicularii et Negotiantes*, 441–42, no. 1151.

²⁶⁶ Hesnard and Gianfrotta, 'Les bouchons', 433, no. A.6; Broekaert, *Navicularii et Negotiantes*, 457, no. 1217. It is also notable that the name of a Sex. Domitius has also been recorded as a stamp on amphorae dating to the late first century BCE recovered at Cosa: Will, 'The Roman Amphoras', 214–15. On the shipping interests of the Ahenobarbi, Piero A. Gianfrotta, 'Ancore "romane." Nuovi materiali per lo studio dei traffici marittimi', *MAAR* 36 (1980): 111; also, Olmer, 'Amphores en Gaule', 76.

²⁶⁷ Hesnard and Gianfrotta, 'Les bouchons', 437, no. A.24; Broekaert, *Navicularii et Negotiantes*, 458, no. 1222; Piero A. Gianfrotta, 'Il commercio marittimo in età tardo-republicana: merci, mercanti, infrastrutture', in *Comercio, redistribución y fondeadores: la navegación a vela en el Mediterráneo. Actas V Jornadas de Arqueología Subacuática*, ed. José Pérez Ballester and Guillermo Pascual Berlanga (Valencia: Jornadas Internacionales de Arqueología Subacuática, 2007), 65–66.

²⁶⁸ C. Teren(t) M(arci) I(iberti): Hesnard and Gianfrotta, 'Les bouchons', 426, no. B.35; Broekaert, *Navicularii et Negotiantes*, 438 and 449, no. 1182.

²⁶⁹ M. Alfi. M. f. Ung[uentarius] and M. Enni C. f.: Hesnard and Gianfrotta, 'Les bouchons', 409, no. B.3 and 415, B.12; Broekaert, *Navicularii et Negotiantes*, 439–40, no. 1142 and 442, no. 1153. The same is true of, *inter alia*, the wrecks at San Andrea A and La Jaumegarde Amay: Broekaert, 438.

contractual configurations, corresponding broadly with modern bareboat charters, time charters, voyage charters, and contracts of carriage.²⁷⁰ Since bareboat charters are most likely to have been entered into by shipowners and *exercitores*, the latter three configurations are those which formed the basis of relationships between merchants and *exercitores* (or the persons they appointed). In general, chartering contracts tended to include the same standard information: namely, the name of the ship and the *nauclerus*; the ship's port of departure; the port of loading; the port of destination; and the sailing itinerary, with the possible identification of sailing routes.²⁷¹ As Arnaud has pointed out, voyage charters in which the destination and route were specified in advance would have been important where multiple independent charterers were engaged on the same vessel.²⁷²

Financiers:

The Planier 3 wreck, which was discovered near to Marseille and has been dated to between 55 – 45 BCE, is also instructive for the insight it provides into the broader structure of the entire enterprise. Besides the marks on the amphora stoppers, some of the amphorae themselves bore the stamp of a certain M. Tuccius L. f. Tro. Galeo, whose name also appears stamped on the necks of amphorae found in Brundisium.²⁷³ These amphorae were predominantly of the Lamboglia 2 type, carrying oil and wine.²⁷⁴ In addition, traces of realgar (*sandacara*), litharge (*molybditis*), and *caeruleum* indicate that colouring dyes were also among the merchandise on board.²⁷⁵ This was the part of the cargo that was presumably in the charge of the trader identified

²⁷⁰ Roberto Fiori, 'L'allocatione del rischio nei contratti relativi al trasporto', in *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero)*, ed. Elio Lo Cascio and Dario Mantovani (Pavia: Pavia University Press, 2018), 560–61. For the distinction between time charters and voyage charters in the ancient evidence, Vélissaropoulos, *Les nauclères grecs*, 279–82. Also, *infra*, 158.

²⁷¹ Arnaud, 'Ancient Sailing-Routes', 68.

²⁷² Arnaud, 68–69.

²⁷³ André Tchernia, 'Les fouilles sous-marines de Planier (Bouches-du-Rhône)', *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 2 (1969): 299; also, 'Premiers résultats des fouilles de juin 1968 sur l'épave 3 de Planier', *Études classiques* 3 (1969): 51–82. For the amphora discovered at Brundisium, CIL I² 2654: on which, Tchernia, 'Les fouilles sous-marines de Planier', 299, note 3.

²⁷⁴ Tchernia, 'Les fouilles sous-marines de Planier', 299.

²⁷⁵ Tchernia, 300–303.

by an amphora stopper as M. Alfi. M. f. Ung[uentarius]. These substances are known to have been available in Puteoli during this period, and it is possible that the producer was a certain C. Vestorius, who is attested by Vitruvius to have manufactured dyes in the port town using Alexandrian methods.²⁷⁶ The same Vestorius, who was a *vir municipalis* and friend of both Cicero and Atticus, was described by the former as a man ignorant of philosophy but shrewd in accounting.²⁷⁷ Cicero also records that Vestorius helped him to resolve the details of a legacy in 44, which included some *tabernae* for which the latter appears to have made efforts to find a suitable lessee.²⁷⁸ Altogether, it appears that the cargo of the wreck at Planier 3 was being shipped from Campania to southern Gaul, had been produced by at least two manufacturers, and was split into consignments belonging to at least two traders.²⁷⁹

The literary sources provide several other tantalising hints at the structure of the arrangement. A letter composed by Cicero to Atticus places Vestorius in Apulia in late 54; and if, as D'Arms suggests, the M. Tuccius attested in the literary sources is the same M. Tuccius Galeo whose name appears on the amphorae, then it is possible that Vestorius was visiting the producer at Brundisium.²⁸⁰ In May 51, Cicero wrote to Atticus that he had guests at his villa in Cumae, including Vestorius and a certain C. Sempronius Rufus, over whom the former was keeping a watchful eye.²⁸¹ Later in the same letter, Cicero reveals that Rufus was often to be seen in the *emporium* at Puteoli, and Shackleton-Bailey has conjectured that, all things considered, Sempronius

²⁷⁶ Vitr. *De arch.* 7.11.1. The elder Pliny also reports that Vestorius pioneered a 'Vestorian blue', composed of the finest elements of Egyptian blue: *HN.* 33.57.162.

²⁷⁷ Cic. *Att.* 14.2.3: '*in arithmetiis satis exercitatum*'.

²⁷⁸ Cic. *Att.* 14.9.1, 10.3, 11.2, etc.: on which, Bruce W. Frier, 'Cicero's Management of His Urban Properties', *The Classical Journal* 74, no. 1 (1978): 2; also, D'Arms, *Commerce*, 49–50.

²⁷⁹ For a proposed itinerary, beginning in Apulia, before stopping at Puteoli and then on to Gaul, Tchernia, 'Les fouilles sous-marines de Planier', 303.

²⁸⁰ Cic. *Att.* 4.19.1: on which, D'Arms, *Commerce*, 54.

²⁸¹ Cic. *Att.* 5.2.2: '*cum interim Rufio noster, quod se a Vestorio observari videbat, στρατηγηματίῳ hominem percussit; nam ad me non accessit*'. The use of 'στρατηγηματί' ('little ruse') to describe Rufus' evasion of Vestorius suggests that the two were in conflict. For the gathering, Wiseman, *New Men*, 48.

owed Vestorius money.²⁸² By October the matter appears to have come to a head: in a letter received by Cicero from M. Caelius Rufus, the latter explained how M. Tuccius had brought charges against C. Sempronius Rufus, to which he responded by launching a counter-indictment against his accuser under the *lex Plotia de vi*.²⁸³ Caelius goes on to report that he successfully defended Tuccius, in part by ‘bringing in the matter of Vestorius’, and that Sempronius was subsequently convicted for *calumnia* and exiled.²⁸⁴ In the following year, while *en route* to Cilicia, Cicero remarked in a letter to Atticus that Sempronius’ conduct had been naïve, and that he was jealous of Vestorius’ *potentia*.²⁸⁵

The common business interests of both men and their united opposition to C. Sempronius Rufus has led D’Arms to suppose that the latter had at one time provided finance for their shipping operations.²⁸⁶ It may even have been the case, as D’Arms conjectured, that the lawsuit launched by Tuccius against Sempronius was part of a strategy to provoke the latter into paying money owed in lieu of a shipwreck, which may plausibly have been the one located at Planier 3.²⁸⁷ Whatever the case, it is reasonable to suppose, in line with D’Arms, that ‘these men (and possibly others) had entered into an agreement to combine their capital, merchandise, maritime expertise, and knowledge of foreign markets, in order to pursue profits over a long term’.²⁸⁸

The provision of finance by wealthy individuals is attested elsewhere in the literary sources. In Petronius’ *Satyricon* (first century CE), the fictional Trimalchio used the profits earned from a successful long-distance enterprise as loan capital to fund entrepreneurial freedmen.²⁸⁹ Plutarch also described how Cato the Elder, nearer to the end of his life, lent money to, and entered into a partnership with, fifty shipowners, taking their vessels as security and

²⁸² Cic. *Att.* 5.2.2: on which, David R. Shackleton-Bailey, *Cicero: Letters to Atticus*, vol. 3 (Cambridge: Cambridge University Press, 1968), 192.

²⁸³ Cic. *Fam.* 8.8.1.

²⁸⁴ Gordon P. Kelly, *A History of Exile in the Roman Republic* (Cambridge: Cambridge University Press, 2006), 202–3.

²⁸⁵ Cic. *Att.* 6.2.10.

²⁸⁶ D’Arms, *Commerce*, 54–55.

²⁸⁷ D’Arms, 55. The more recent dating of the wreck to between 55 and 45 only increases this likelihood.

²⁸⁸ D’Arms, 55.

²⁸⁹ Petron. *Sat.* 75-6.

sending his freedman Quintio to oversee the affair.²⁹⁰ The practice of sending a representative (χερμαχόλουθος) to safeguard the lender's interests is attested elsewhere, not least in the terms of a maritime loan agreement reported by the jurist Q. Cervidius Scaevola (second century CE).²⁹¹

Besides wealthy individuals, professional bankers and moneylenders – who were typically of lower status – were instrumental in facilitating transactions. As Andraeu has shown, bankers, moneychangers, and cashiers performed a wide range of activities, including the assaying of coins; foreign exchange; the advancing of credit and the collection of money at auctions; the receipt of deposits and the facilitation of payments; and the advancing of loans.²⁹² In the papyri, several Italian bankers are attested acting as creditors or intermediaries in transactions concerning maritime enterprises.²⁹³ The most complete set of evidence for the activities of bankers and moneylenders operating in a maritime trading environment is contained in the archive of the Sulpicii, which consists of over one hundred *tabulae* recovered near to the site of Pompeii in 1959.²⁹⁴ The tablets, which were kept by a business operating in the port town of Puteoli, date to the period 26 – 61 CE, with almost 90% from between 35 – 55 CE. The main protagonists were three successive generations of freedmen (the C. Sulpicii) who, amongst other things, looked after documents, kept debt-claims safe in a strongbox, and acted as

²⁹⁰ Plut. *Cat. mai.* 21.6: on which, Ulrich von Lübtow, 'Catos Seedarlehen', in *Festschrift für Erwin Seidl zum 70. Geburtstag*, ed. Heinz Hübner, Ernst Klingmüller, and Andreas Wacke (Cologne: Hanstein, 1975), 103–17; also, Vittoria Silvestre and Mario Valentino, 'L'affare di Catone e la sua funzione obiettiva', *Labeo* 48 (2002): 189–207.

²⁹¹ D.45.1.122.1 (Scaev. 28 *dig.*); also, D.22.2.4.1 (Pap. 3 *resp.*) and D.44.7.23 (Afr. 7 *quaest.*). For discussion, Ivano Pontoriero, *Il prestito marittimo in diritto romano* (Bologna: Bononia University Press, 2011), 43, note 12.

²⁹² Jean Andraeu, *Banking and Business in the Roman World*, trans. Janet Lloyd (Cambridge and New York: Cambridge University Press, 1999), 36.

²⁹³ E.g., SB VI 9571 (the Fayyum, second century CE) and SB III 7169 (Ptolemaic Alexandria, second century BCE): on which, *infra*, 71 *et seq.* and 85 *et seq.* respectively.

²⁹⁴ Andraeu, *Banking and Business*, 71–79; Koenraad Verboven, 'The Sulpicii from Puteoli, Argentarii or Faeneratores?', in *Hommages à Carl Deroux*, ed. Pol Defosse (Brussels: Latomus, 2003), 442–43.

creditors.²⁹⁵ There is little doubt that many of their clients were either directly or indirectly engaged in long-distance trade.²⁹⁶

Section 2.4: Modelling Long-Distance Trade.

The aim of this chapter was to construct a model of a typical late Republican long-distance enterprise. From the survey of the evidence provided above, a typical enterprise could involve as many as seven (groups of) actors: 1) Producers; 2) Merchants; 3) Warehousemen; 4) *exercitores*; 5) Financiers; 6) Bankers/ Moneylenders; and 7) Consumers (taken broadly to include businesses). Their relation to one another can be roughly sketched by placing them along the path that an amphora of wine exported from the *ager Cosanus* may have taken:

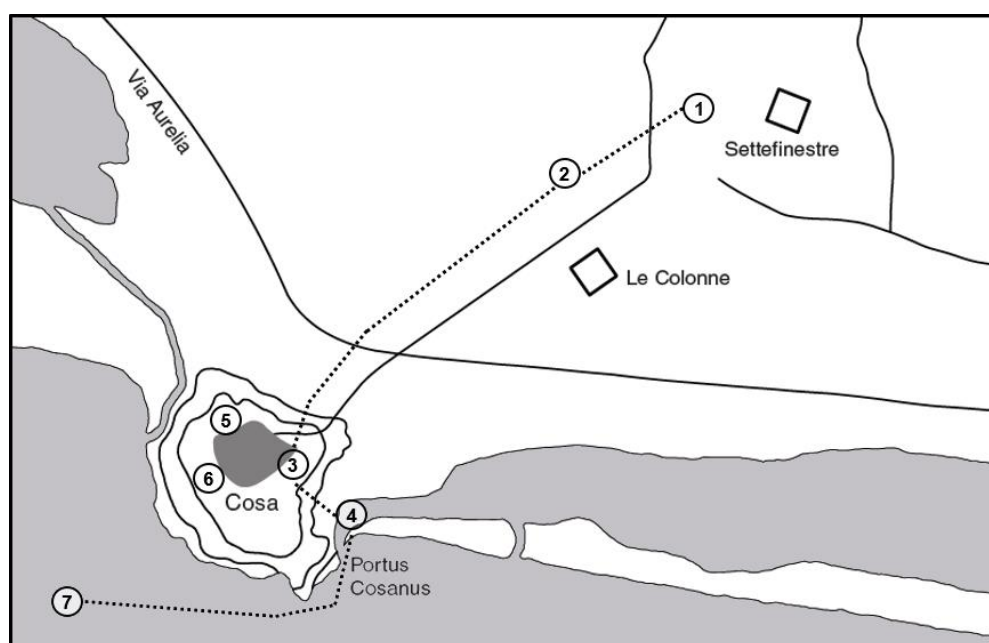


Fig. 4: Plan showing the site of Cosa, Le Colonne, and Settefinestre, overlaid with the hypothetical route taken by goods from their production to their distribution overseas. Source: Illustration by Amy Yandek as reproduced in Dyson (2013, 482).

²⁹⁵ Andreau, *Banking and Business*, 73–74. For the role of women in the transactions documented in the archive, Éva Jakab, ‘Financial Transactions by Women in Puteoli’, in *New Frontiers: Law and Society in the Roman World*, ed. Paul J. du Plessis (Edinburgh: Edinburgh University Press, 2013), 124–50.

²⁹⁶ Andreau, *Banking and Business*, 74; also, Koenraad Verboven, ‘Faeneratores, Negotiatores and Financial Intermediation in the Roman World (Late Republic and Early Empire)’, in *Pistoi dia tèn technèn: Bankers, Loans, and Archives in the Ancient World. Studies in Honour of Raymond Bogaert*, ed. Koenraad Verboven, Katelijin Vandorpe, and Véronique Chankowski (Leuven: Peeters, 2008), 221–22.

In brief, the evidence suggests that the production of the wine and the amphorae in which it was contained took place at villa estates such as those excavated at Settefinestre and Le Colonne. The product was then sold to a merchant, who may have borrowed money from a financier (possibly themselves a producer) for the purpose of raising the capital needed to purchase the merchandise. Once the goods had been acquired, the merchant transported them overland (or by river) to a nearby port, where he could engage an *exercitor* for their carriage overseas. If the product required storage awaiting distribution, the merchant could come to an arrangement with a warehouseman for the intervening period. All of these relationships could be documented and/ or facilitated by professional bankers and moneylenders. Once the ship had reached its port of destination the whole process was, in effect, conducted in reverse, insofar as the goods had to be unloaded, taxed, stored, taken inland, and finally sold to businesses and consumers.

From this perspective, the character at the heart of the process was the merchant, whose ultimate goal was to generate a profit by connecting producers with consumers. The relationships that he entered into along the way – principally with financiers, warehousemen, and *exercitores* – were all subservient to this objective. In the remaining chapters of this thesis, the legal institutions that developed in the context of two of these relationships – namely those that merchants entertained with financiers and *exercitores* – will be explored in depth.

CHAPTER 3

MERCHANT AND FINANCIER

The main legal institution directly concerned with the financing of maritime trade was the maritime loan. As Rathbone has observed, the value of cargoes often far exceeded that of the vessels that carried them, which makes it likely that merchants often required a source of credit.¹ The sources for the Roman period are thinly spread, both geographically and chronologically. So far as contractual practice is concerned, the evidence consists of three papyri, a juristic text authored by Q. Cervidius Scaevola, and (possibly) a tablet belonging to the archive of the Sulpicii.² However, the evidence for the terms of these contracts is somewhat limited, since two of the papyri only refer to the existence of a maritime loan, the details of which were recorded in separate documents which have not survived.

Turning to the legal sources, these consist chiefly of the texts collected in D.22.2 (*de nautico faenore*) and those scattered elsewhere in the compilation; a handful of fragments in the *Pauli Sententiae*; four imperial constitutions attributed to Diocletian; two Justinianic Novels; and a single text in the *Basilica*. The interpretation of these materials poses a particular challenge because, unlike juristic interpretations of *leges* or *edicta*, the opinions contained within them refer directly to contractual practice through the lens of basic institutions such as *mutuum* and *stipulatio*. Before attempting to interpret these sources, it is therefore necessary to understand the content and structure of contracts that typically formed the basis of maritime trading enterprises. Despite the fragmentary state of the evidence, it is my submission that it is possible to gain an insight into the way in which these arrangements were structured from both a commercial and legal perspective. To this end, the chapter will be divided

¹ Dominic Rathbone, 'The Financing of Maritime Commerce in the Roman Empire I-II AD', in *Credito e moneta nel mondo romano: atti degli Incontri capresi di storia dell'economia antica (Capri 12-14 ottobre 2000)*, ed. Elio Lo Cascio (Bari: Edipuglia, 2003), 211–12.

² The papyri are: SB III 7169 (second century BCE); SB VI 9571 (second century CE); and SB XVIII 13167 (second century CE). The tablet is *TPSulp. 78*. The juristic text that refers to contractual practice most directly is D.45.1.122.1 (Scaev. 28 *dig.*).

into two sections: the first, setting out the legal and financial structure of maritime loan contracts during the Roman period; and the second, focussing on two particular issues of legal interpretation.

Section 3.1: The Legal and Financial Structure of Maritime Loans from the Second Century BCE to Justinian.

In this section, I will argue that the evidence from the Roman period shows that there were two main ways in which the yield was typically demanded on a maritime loan. The argument proceeds in three parts. First, I will examine a Novel issued by Justinian in which a gathering of shippers testified to the two customary methods for giving maritime loans. Then, in the second and third parts, I will show that all the evidence for contractual practice during the Roman period is consistent with the lending techniques described in the Novel. I conclude that the two methods spoken to by the shippers complemented one another and demonstrate a high level of integration between the provision of finance and other relationships essential to the conduct of maritime trade.

3.1.1 The Two Types of Yield on a Maritime Loan.

Nov. 106:

In the year 540 CE two moneylenders – Petros and Eulogetos – submitted a petition to Justinian's praetorian prefect, Iohannes (John the Cappadocian). The moneylenders claimed that they were fearful because disputes had arisen in connection with the customs surrounding maritime loans, which they were accustomed to give to merchants (*emporoi*) and carriers (*nauklero*) as a source of income.³ Consequently, they asked the praetorian prefect for clarification concerning the customs governing loans of this kind and for the law to be settled by imperial decree. Justinian, who received John's report, therefore instructed his subordinate to inquire into the matter, prompting John

³ On this text and the connected Nov. 110, Ivano Pontoriero, *Il prestito marittimo in diritto romano* (Bologna: Bononia University Press, 2011), 164–78, with literature.

to convene a conference of *naukleroi* so that they could testify to the *antiqua consuetudo* under oath. Their response was as follows:

...οἷς δὴ τὰ τοιαῦτα τῶν δανεισμάτων μέλει, καὶ πυθέσθαι ποῖόν ποτε τὸ ἀρχαῖον ἔθος ἦν τοὺς δὲ καὶ ὄρχον προσεπιπιθέντας μαρτυρεῖν τρόφους εἶναι ποιχίλους τῶν τοιούτων δανεισμάτων, καὶ εἰ μὲν δόξειε τοῖς δανεισταῖς, ἐφ' ἐχάστῳ νομίσματι τῶν χρημάτων ἄπερ ἂν δοῖεν ἓνα σίτου μόδιον ἢ χριφῆς ἐμβαλεῖν τῇ νητ, καὶ μηδὲ μίσθωμα τοῖς δεμοσίοις παρέχειν ὑπὲρ αὐτοῦ τελώναις, ἀλλὰ τό γε ἐπ' αὐτοῖς ἀτελώνητα πλέειν τὰ σχάφη, καὶ τοῦτον χατὰ δέχα χρυσοῦς ἓνα χομίζεσθαι μόνον ὑπὲρ τόχων [χαθ' ἐνάστην δεχάδα χρυσοῦ], αὐτοὺς δὲ τοὺς δανειστὰς ὄραν τὸν ἐχ τῶν ἀποβησομένων χίνδυνον. εἰ δὲ οὐχ ἔλοιντο τὴν ὁδὸν ταύτην οἱ δανειζοντες, τὴν ὁδὸν μοῖραν λαμβάναι ὑπὲρ ἐχάστου νομίσματος ὄνοματι τόχων οὐχ εἰς χρόνον τινὰ ῥητὸν ἀριθμουμένων, ἀλλ' ἕως ἂν ἡ ναῦς ἐπανέλθοι σεσωσμένη χατὰ τοῦτο δὲ τὸ σχῆμα συμβαίνειν ἴσως καὶ εἰς ἐναιυτὸν ἐχταθῆναι τὸν χρόνον, εἴπερ τοσοῦτον ἕξω διατρίφειεν ἡ ναῦς ὡς καὶ τὸν ἐπιαυτὸν ἢ πέρασ λαβεῖν ἢ καὶ ὑπερβῆναι, θᾶπτόν γε μὴν ἐπανιούσας αὐτῆς τὸν χρόνον εἰς ἓνα μόνον ἢ δύο παρελχυσθῆναι μῆνας, καὶ ἐχ τῶν τριῶν χερατίων ὠφέλειαν ἔχειν, χᾶν οὕτως βραχὺς διαγένηται χρόνος χᾶν εἰ περαιτέρω παρὰ τῷ δανεισαμένῳ μένοι τὸ χρέος. ταῦτο δὲ τοῦτο χρατεῖν ἐτέραν πάλιν τῶν ἐμπορευομένων ἀποδεμῖαν αἰρουμένων, ὥστε χαθ' ἕχαστον πόρτον ὀριζεσθαι τὸ σχῆμα χαθ' ὃ προσήχει τὸ δάνεισμα ἢ μένειν ἢ ἐναλλάττεσθαι χατὰ τὸ περὶ τούτου συνδοχοῦν τοῖς μέρεσι σύμφωνον. εἰ μέντοι μετὰ τὴν ἐπάνοδον τῆς νηὸς σωθείσης καὶ μηχέτι πλεῖν διὰ τὸν χαιρὸν δυναμέσης ἐπανέλθοιεν, εἴχοσι καὶ μόνων ἡμερῶν προθεσμίαν δίδοσθαι παρὰ τῶν δανεισάντων τοῖς δανεισαμένοις, καὶ μηδὲν ὑπὲρ τῶν ὀφλημάτων τόχου ἐνεχεν ἀπαιτεῖν, ἕως πραθῆναι συμβαίν τὸν φόρτον. εἰ δὲ μένοι περαιτέρω τὸ χρέος οὐχ ἀποδιδόμενον, τὸν ἐχ διμοίρου τῆς ἐχαστοστῆς τοῖς χυρίοις τῶν χρεμάτων δίδοναι τόχον, καὶ μεταβάλλειν εὐφὺς τὸ δάνεισμα καὶ εἰς τὸν τῶν ἐγγείων μεταχωρεῖν τρόπον, οὐχέτι τῶν θαλλαπτίων χινδύνων τὸν δανειστὴν ἐνοχλοῦντων...

The carriers began by explaining that there were a variety of ways in which maritime loans could be made. On the one hand, the creditor, having assumed the risk, could require the borrower to carry and pay duties on one *modius* of grain or barley per *solidus* lent, in addition to paying one *aureus* for each ten *modii* received. On the other hand, the creditor could simply demand a yield equivalent to an eighth part of the amount given, not calculated with reference to a definite due date, but owing instead on the ship's safe return. The uncertain due date meant that the yield demanded on the loan bore no relation to the time taken to complete the enterprise; rather, the creditor was entitled to a fixed sum notwithstanding the duration of the voyage. The parties could also

agree to repeat the transaction multiple times during a sailing season, thereby building up a debt which became due when no more shipments could be made. Once the final journey of the season had been completed it was customary – so the carriers claimed – for the borrower to be allowed a twenty-day grace period to sell the last freight and repay what was owed, after which time the loan would be placed on a landed (ἔγγεια) footing and accrue interest at the maximum rate for business loans of two-thirds of a one hundredth part per month (i.e., 8.33% *per annum*).⁴

The text provides several insights into the customary structure of maritime finance. Most straightforwardly, the *naukleroï* were clear from the outset that there was no uniform way of making maritime loans. This has an influence on our treatment of the evidence in two respects: first, so far as the few surviving documents that either contain or refer to the details of a maritime loan agreement are concerned, we should not expect their financial and legal structures to be entirely uniform; and second, with respect to literature written about such agreements, whether juristic or otherwise, we must be sensitive to the possibility that an opinion may turn depending upon the author's underlying assumptions about the way in which the loan was structured.

⁴ This interest rate limit had been established by a constitution of Justinian in 528: C.4.32.26.2 (*Iust.*, 528). The unusual fraction arose as a result of the currency reforms of Constantine, after which the *centesima usurae* of classical Roman law, which had amounted to 1% per month or 12% *per annum*, ceased to be an absolute rate and was set at one-eighth of a *nomisma* (aureus/ solidus), or 12.5% per annum: Demetrios Gofas, 'The Byzantine Law of Interest', in *The Economic History of Byzantium from the Seventh through to the Fifteenth Century*, ed. Angeliki E. Laiou (Washington, D.C.: Dumbarton Oaks, 2002), 1095–97; cf. Geoffrey E. M. De Ste. Croix, 'Ancient Greek and Roman Maritime Loans', in *Debits, Credits, Finance and Profits*, ed. Harold C. Edey and Basil S. Yamey (London: Sweet & Maxwell, 1974), 56. This explains why, in Nov. 106.1, Justinian felt able to exclaim that his ruling 'was not in conflict with already enacted laws', since the rates set in each of the constitutions were the same. It is therefore not true, as Cosentino has stated, that Nov. 106 elevated the rate of legal interest that could be demanded on these contracts to 12.5%, impliedly *per annum*: 'Banking in Early Byzantine Ravenna', *Cahiers de Recherches Médiévales et Humanistes* 28 (2014): 252; also, David J. D. Miller and Peter Sarris, eds., *The Novels of Justinian: A Complete Annotated English Translation*, vol. 2 (Cambridge: Cambridge University Press, 2018), 697, note 1; and Mariagrazia Bianchini, 'La disciplina degli interessi convenzionali nella legislazione giustiniana', in *Studi in onore di Arnaldo Biscardi*, ed. Franco Pastori, vol. 2 (Milan: Istituto Editoriale Cisalpino, La Goliardica, 1982), 418–22. This interpretation misses both the impact of Constantine's currency reforms and the fundamental distinction between yields calculated by time and as a fixed proportion of the sum lent.

Diversity of practice notwithstanding, the *naukleroï* were content to single out two methods by which maritime finance was customarily provided: in the first, the creditor assumed the risk that the ship did not return for a reward that involved a combination of a financial yield and a *quid pro quo*; and in the second, the loan was extended on the same terms, except that the *quid pro quo* was foregone in favour of a more generous financial yield. In both instances the yield was figured as a fixed proportion of the sum lent that became due on the safe return of the vessel, irrespective of the voyage's duration.

The question that arises is the extent to which the loan structures described by the carriers in Nov. 106 were as deeply rooted in custom as they made out. On the one hand, as Humfress has illustrated, the late Roman emperors frequently showcased their power and authority by 'confirming' the established customs of institutions and individuals alike. Consequently, petitioners seeking to enhance their likelihood of success were incentivised to make rhetorical claims about the customary origins of the rules they sought to rely upon.⁵ What is telling here, however, is that John's inquiry did not take evidence from the petitioners themselves, but rather from a group of *naukleroï*; that is, the people to whom the petitioners claimed to be lending. They therefore did not have the same direct incentive to appeal to the legislator as the petitioners themselves.

The text also contains several indications that the customs spoken to by the carriers were every bit as ancient as they claimed. In the first place, the feature of a yield that was calculated as a fixed proportion of the sum lent reveals the persistence, even by the time of Justinian, of a categorical distinction that was fundamental to Hellenic commercial usage and thought: namely, between 'maritime' (ναυτικά) arrangements on the one hand and 'landed' (ἔγγεια) arrangements on the other. More specifically, as Cohen has shown with respect to the evidence from fourth-century BCE Athens (almost a millennium before Justinian), the antithesis between maritime and landed loans turned on

⁵ Caroline Humfress, 'Law and Custom under Rome', in *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages: Proceedings of the 2008 Byzantine Colloquium*, ed. Alice Rio (London: Centre for Hellenic Studies, 2011), 32 and 46-7.

the method by which the financial returns of each kind were calculated.⁶ Thus, in classical Athens, a loan was considered ‘maritime’ if the calculation of its yield (τόχος) bore no relation to time-denominated interest; and conversely ‘landed’ if the yield was figured on the basis of the passage of time. Exactly the same distinction is drawn in Nov. 106, in which the maritime loan – described as τοῖς θαλαπτίοις... δανείσματα and understood as subject to the governance of the ‘νόμος *traiecticia*’ – was conceived as one for which the yield was calculated as a proportion of the sum lent, in juxtaposition to a loan given on a landed footing (δανείσματα ἔγγεια), to which a maritime loan would convert once the grace period for its repayment had expired. Again, the same distinction emerges from a text in the *Basilica*, which concerns the legal position of a creditor who had given a maritime loan (δανεῖον ναυτικὸν) secured using a hypothec over ‘landed’ property (ἐγγείων πραγμάτων).⁷

It is also worth drawing attention to two more specific details. First, the *naukleroι* testified that in the absence of any agreement to provide a *quid pro quo*, creditors were accustomed to demand a yield equivalent to one-eighth of the principal. This, as it happens, was also the yield reported by (Ps.-) Demosthenes in relation to a maritime loan given for a short one-way journey between Sestos and Athens in the fourth century BCE, and by Athenaeus (second century CE) in the context of a story about a loan given for a two-day voyage from the Hellespont to Athens.⁸ To these may be added a fragment contained in the *philogelos* (literally, the ‘the laughter-lover’), which was a collection of jokes compiled in the fourth or fifth centuries CE:

⁶ Edward E. Cohen, ‘Athenian Finance: Maritime and Landed Yields’, *Classical Antiquity* 8, no. 2 (1989): 208.

⁷ Bas. 53.5.16: on which, Pontoriero, *Il prestito marittimo*, 53–55.

⁸ Dem. Or. 50.17: on which, Cohen, ‘Athenian Finance’, 215 and 219–20. Also, Ath. 7.292b: on which, Karl G. Billeter, *Geschichte des Zinsfusses im griechisch-römischen Altertum bis auf Justinian* (Leipzig: Teubner, 1898), 35.

Philogelos 50:

Σχολαστικὸς δανειστὴς ναυκλήρω χρεώστη ἐνετέλλετο σοφὸν αὐτῷ κομίσει καὶ δύο παιδικὰς τοῖς ὀκταέτεσι παιδίοις αὐτοῦ, δικαίου μέτρου ὡς εἰς αὔξησιν.

A *scholastikos* (smart alec) who had lent money to a *naukleros* demanded in return a cinerary urn for himself and one for each of his two eight-year-old children in proportion to the size of the yield on the debt. As Tarwacka has pointed out, the use of the past tense indicates that the debt had become due and the urns were demanded in lieu of a financial return.⁹ In this connection, the adult-sized urn represented the principal, and the childrens' urns the yield. The ages of the children cannot be a coincidence: their smaller urns were intended to represent the customary yield of one-eighth on a maritime loan.¹⁰ The urns were a clever substitute for repayment of the loan because even though the children might grow in the future, their ashes would still fit in the containers, which remained fixed in proportion to the adult-sized principal. The joke therefore consists in a play on the idea of growth: just as the yield in a maritime loans was conceived as growing out of the principal (i.e., *faenus*), but fixed in proportion to the sum lent, so too the children were their father's offspring, but would fit into the urns provided for them even if they grew in the future. In any case, the ages of the children add to the evidence that a yield of one-eighth was customary in maritime loans.¹¹

Second, as De Romanis has recognised, allowing the borrower a grace period after the ship's return to sell the cargo and repay the loan appears to have been standard practice long before the time of Justinian. Thus, not only does a maritime loan contract from second-century BCE Ptolemaic Egypt show that, under certain circumstances, the borrowers were entitled to a grace period to make repayment (either 50, 70, 80 or 90 days, thereby taking account of the time required to tranship the goods from the Red Sea coast to Alexandria), but a *syngraphe* recording the details of a maritime loan in the Demosthenic

⁹ Anna Tarwacka, *European Legal Culture through the Prism of Jokes. The Example of the Philogelos* (Wrocław: Europe of Nations and Freedom, 2018), 99–100.

¹⁰ Cf. Jean Rougé, 'Le Philogélôs et la navigation', *Journal des Savants*, no. 1–2 (1987): 11–12.

¹¹ One hopes, for evidentiary purposes, that the joke was funny because it was true.

corpus also records that the grace period was, as reported in Nov. 106, twenty days.¹² Altogether, there are several indications that the customs attested by the Constantinopolitan *naukleroι* were deeply embedded in Hellenic and Roman commercial practice.

3.1.1.1 'Financial' Maritime Loans.

SB VI 9571:¹³

recto

ἀπὸ τῆς Μάρκου Κλαυδίου Σαβεῖνου [δημοσ]ί[ας τραπέζης]
 Ζωίλῳ Ζωιγ[ᾶ]τος καὶ Καλλιμῆ[δε]ῖ Διογ[έν]ου[ς] [Ἀσκα]λωνε(ίταις)
 (ἔτους(;)) .ιβ Ἀύτοκ(ράτορος) Καίσαρο(ς) Τίτο(υ) Αἰλί(ο)υ Ἀδριανο(ῦ)
 Ἄντων[ε(ίνου)] Σεβ(αστοῦ) Εὐσεβοῦς Μεχειρ
 [ι]θ. Γάιος Λονγεῖνος Κέλερ καὶ Τιβέριος Κλαύδιος Χάρης ἃς ἐπέστειλαν
 5 ὑμῖν(*) σὺν Σωστράτῳ καὶ Σώσῳ ἀμφοτέροις Διοπείθου[ς] Ἀσκαλωνε(ίταις)
 συνναυκλήροις ὑμῶν πλοίου ἀκάτο(υ) ὧ ἐπιγραφῆ/ Ἀντίνοο(ς) Φιλοσάραπ(ις)
 Σώζων ἀλ-
 ληλεγγύοις εἰς ἔκτεισιν δάνιον(*) ναυτικὸ(ν) κατὰ ναυτικὴν συγγραφὴν ἧς ἡ ἔν-
 γειος παρ' ἐμοὶ τῷ τραπ(εζίτῃ) ἐπι. ()ω[. .]κη. ()ω προγεγραμμένῳ πλοίῳ
 καὶ τοῖς τούτο(υ)
 σκεύεσι ἐσχάτῳ ναύ[λ]ῳ ὥστε ἔχε(ιν) ὑμᾶς τοὺς τέσσαρας ἀργυρί(ο)υ
 (τάλαντα) ζ (δραχμὰς) Ερξ
 10 σὺν οἷς ἔχε[ι]ε] διὰ χειρὸς (τάλαντα) ζ (δραχμὰς) [.]ρξ τὰς λοιπὰς μὴ
 ἐλαττουμένου τοῦ ἐνὸς αὐτῶν
 Γάιου Λονγεῖνο[υ] Κέλερος περὶ ὧν ἄλλων ὀφείλε[ι] αὐτῷ Καλλιμῆδης(;)]
 Διογένους . . . [. . .] . . [.] . . . κατ' ἐγγ[ρα]φον ἀσφάλειαν (;) -κα. ; -]
 τοκ[-κα. ; -]
 (ταλαντ) [-κα. ; -]
 15 . [-κα. ; -]

verso

(hand 2) ἔχι(*) Γάιος Λ[ονγεῖ]νος πιπτάκιον
 προανα() . . κλ. στ()ο των π. . . . ωγ

SB VI 9571, though not itself a maritime loan contract, contains a reference to such an agreement and reproduces some of its clauses.¹⁴ The document,

¹² SB III 7169 and Dem. Or. 35.11: on both of which, Federico De Romanis, 'Time to Repay a Maritime Loan: A Note on SB III 7169 and SB XVIII 13167 Recto', *Sileno: Rivista semestrale di studi classici e cristiani fondata da quintino cataudella* 40 (2014): 73–78.

¹³ = SB XIV 11850; P. Vindob. G. 19792.

¹⁴ First published by Lionel Casson in: 'New Light on Maritime Loans', in *Symbolae Raphaeli Taubenschlag dedicatae*, ed. Isabella Biezuńska-Małowist and Henryk Kupiszewski, vol. 2 (Warsaw: Ossolineum, 1956), 89–93. A reproduction of the original can be seen in Arnaldo Biscardi, *Actio pecuniae traiecticiae: contributo alla dottrina delle clausole penali* (Turin:

which comes from the Fayyum (probably the village of Karanis), is dated to 13 February 149 CE and belonged to the archive of a bank run by a certain M. Claudius Sabinus.¹⁵ In the document, two creditors – C. Longinus Celer and Ti. Claudius Chares – are described as having ordered a payment of the balance on a maritime loan to four borrowers from Ascalon in Palestine. The four borrowers – Zoilos, Callimedes, and the brothers Sostratos and Sozon – were co-owners of a light merchant vessel (*akatos*) bearing the name ‘Antinoos Philosarapis Sozon’.¹⁶ Zoilos and Callimedes received the funds (probably from Sabinus’ bank in Alexandria) and the two brothers stood as surety for repayment.¹⁷

The document states that the money paid over by the bank was advanced as a ‘maritime loan, in accordance with a maritime agreement’. A copy of the agreement was left on land with the bank, and security taken over the ship, its gear, and the ‘last freight’.¹⁸ The total amount of the loan is given as 7 talents and 5,160 drachmas (i.e., 47,160 drachmas, which Rathbone says was enough to buy c. 150 tonnes of wheat in the province at the time).¹⁹ 7 talents is recorded as already having been paid out in cash. A figure –]60 or]160 – is then given below, and it is reasonable to assume that it records the receipt by the borrowers of the remaining 5,160 dr.²⁰ The document ends with a

Giappichelli, 1974), 212. Seidl argued that the loan recorded in the papyrus was one for which two shipmasters had made their *exercitores* liable on the basis of the *actio exercitoria*: ‘Review of Symbolae Raphaeli Taubenschlag dedicatae, 2 (=Eos, 48/2 (1956)), Ossolineum, Vratislaviae-Varsaviae’, *SDHI* 23 (1957): 360; ‘Juristische Papyrskunde’, *Studia et documenta historiae et iuris* 24 (1958): 439.

¹⁵ For Karanis, Rathbone, ‘Financing’, 217.

¹⁶ On *akatos*-type vessels and the ship’s name, Lionel Casson, ‘New Light on Maritime Loans: P. Vindob. G 19792’, in *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and William V. Harris (Leiden: Brill, 1986), 13; also, *Ships and Seamanship in the Ancient World* (Baltimore: Johns Hopkins University Press, 1995), 159–60.

¹⁷ According to Rathbone, SB III 6291 (= P.Freib. II 8) shows that Sabinus’ bank was located in Alexandria: ‘Financing’, 218.

¹⁸ This is the only piece of evidence from the Roman period to attest to security being taken over the vessel itself: Casson, ‘New Light (1986)’, 16. The ‘last freight’ likely refers to the lender’s right in security over the merchandise possessed by the borrowers at any given moment, somewhat in the character of a floating charge. In this connection, Julia Vélissaropoulos-Karakostas, *Les naulères grecs: recherches sur les institutions maritimes en Grèce et dans l’Orient hellénisé* (Geneva and Paris: Droz, Minard, 1980), 311.

¹⁹ Rathbone, ‘Financing’, 218.

²⁰ Biscardi, *Actio pecuniae traiecticiae*, 205.

statement that the rights of one of the lenders, Celer, were not to be prejudiced in relation to other debts owed to him by one of the borrowers, Callimedes. There is, in line 13, an unmistakable reference to a 'yield' (τοκ[ι]), though I agree with Casson that whatever was said here was likely connected to the arrangement between Celer and Callimedes discussed immediately above.²¹

Rathbone's prosopographical research into the background of the actors designed in the papyrus has shed light upon the context of the loan.²² The *tria nomina* of both the banker (Sabinus) and lenders (Celer and Chares) indicate that they were Roman citizens, and possibly (in the case of the lenders) Romanised Greeks. Sabinus looks to have run a bank that served the Romanised Egyptian elite, and Celer (and probably also Chares) appears to have been involved variously in landowning, tax-collecting, state supply contracts, and lending.²³ As Thür has suggested, the lenders likely anticipated that any dispute would ultimately end up in front of the Prefect of the province, which is precisely what happened in 142 when the adjudication of a lawsuit in which Celer was involved in some capacity was delegated by the magistrate to the Prefect of the (Alexandrian) Fleet.²⁴ Roman law was therefore a relevant consideration.

The papyrus provides important insights into the legal and financial structure of maritime loans during the Roman period. Some scholars have taken the document at face value and supposed that the 5,160 dr. was the second instalment payable on a loan totalling 47,160 dr.²⁵ Certainly, as Youtie has shown, the language used is similar to that in other loan documents in which the money was paid in instalments.²⁶ The unusual sum has drawn attention in this connection: as Jones has suggested, for example, the original loan may

²¹ Casson, 'New Light (1986)', 14.

²² Rathbone, 'Financing', 218–20.

²³ Rathbone, 219.

²⁴ Gerhard Thür, 'Arnaldo Biscardi e il diritto greco: (riflessioni sul prestito marittimo SB VI 9571)', *Dike* 3 (2000): 185. For the case in 142, P. Stras. IV 281: on which, Rathbone, 'Financing', 219.

²⁵ E.g., Casson, 'New Light (1986)', 14; Rathbone, 'Financing', 218; David F. Jones, *The Bankers of Puteoli: Finance, Trade and Industry in the Roman World* (Stroud: Tempus, 2006), 183.

²⁶ Herbert C. Youtie, 'Notes on Papyri', *Transactions and Proceedings of the American Philological Association* 91 (1960): 260–63.

have amounted to 8 t., the 7 t. and 5,160 representing this sum less a handling fee charged by the bank.²⁷

A better explanation, however, has been provided by Thür, who has contended that the actual sum of the loan was 7 t. (i.e., 42,000 dr.), and the 5,160 dr. – roughly 12% of the principal – was the amount to be owed by the borrowers as the yield.²⁸ This interpretation is consistent with the second loan structure reported in Nov. 106:

However, should the lenders not choose that method, they would receive interest at one-eighth on each coin. This would not be counted as due on any definite date, but only on the ship's safe return; and under that arrangement, it might happen that the time extended up to even a year, should the ship have spent so long away that the year had actually come to an end, or even been exceeded – whereas, if she had returned sooner, and the time only lasted a month or two, they still had the benefit of the three carats [i.e., one-eighth of a 24-carat *solidus*] whether the elapsed time was as short as that, or whether the loan had remained with the borrower for longer (trans. Miller and Sarris 2018, 2:698-9).

First, as Cohen has pointed out, the same antithesis between 'maritime' and 'landed' arrangements that comes out so strongly in the evidence from fourth-century BCE Athens is also evident here: the maritime loan (δῶνιον ναυτικὸν) was given in accordance with a maritime agreement (ναυτικὴν συγγραφὴν), a copy of which was left on land (ἔνγειος).²⁹ If, as Cohen argued, the appellation of an agreement as 'maritime' signalled that the yield would be due as a fixed proportion of the sum lent and therefore not calculated by time, then the language used here indicates that the 5,160 dr. could well represent the yield. More striking is the fact that the sum given in the document – which Thür reckoned at 12% of the principal – is actually closer to 12.5%, or one-eighth, which is exactly the proportion that the *naukleroi* in Nov. 106 testified was the customary yield demanded on a maritime loan.³⁰ If, as is possible, the loan

²⁷ Jones, *The Bankers of Puteoli*, 183.

²⁸ Thür conjectures that a bank charge of 120 dr. would explain the difference between the lower amount of 12% of the principal (i.e., 5,040 dr.) and the higher sum of 5,160 documented here: 'Arnaldo Biscardi', 283; also, Éva Jakab and Ulrich Manthe, 'Recht in der römischen Antike', in *Rechtskulturen der Antike*, ed. Ulrich Manthe (Munich: C.H. Beck, 2003), 280.

²⁹ Cohen, 'Athenian Finance', 212.

³⁰ 12.5% of 42,000 is 5,250; i.e., 90 dr. more than the sum of 5,160 attested here.

given here was for the short three-day trip (without stops) from Alexandria to Ascalon, then a yield of one-eighth would be consistent with the other short voyages attested in the evidence for which a similar yield was demanded. It is therefore my submission, with Thür, that the 5,160 dr. recorded in SB VI 9571 was intended to represent the yield demanded by the lender and was calculated as a fixed proportion of the sum lent.

The problem, which Thür has recognised, is as follows: why does the document appear to show the borrowers receiving the yield from the lenders? Thür has rightly suggested that by recording the receipt by the borrowers of a sum equivalent to the negotiated yield, the document was good evidence of an obligation *ex re* that could be sued upon by the lender using a *condictio*.³¹ On the other hand, if the sum lent had not in fact been paid over, the borrowers would be able to defend a claim by raising the *exceptio doli*. In my view, the solution to this problem resides jointly in the archive of the Sulpicii and the juristic literature, to which we now turn.

The loans in the archive of the Sulpicii and SB VI 9571:

The Sulpicii archive, which was discovered near the site of Pompeii in 1959, consists of wax tablets encased in wood (*tabulae*), which were kept by a money-lending business operating in the port town of Puteoli.³² Verboven has calculated that the documents preserved in the archive record 61 payments or acknowledgments of debt amounting to a total value of HS 1,022,000.³³ One of the mysteries surrounding the tablets, however, is that very few of the loan documents contain due dates for repayments and none make any mention of interest. It is, of course, hardly plausible that the Sulpicii and their clients, who were operating at the heart of a thriving business community, lent their money

³¹ Thür, 'Arnaldo Biscardi', 185–86.

³² Jean Andreau, *Banking and Business in the Roman World*, trans. Janet Lloyd (Cambridge and New York: Cambridge University Press, 1999), 71–79; Koenraad Verboven, 'The Sulpicii from Puteoli, Argentarii or Faeneratores?', in *Hommages à Carl Deroux*, ed. Pol Defosse (Brussels: Latomus, 2003), 442–43.

³³ Koenraad Verboven, 'Currency and Credit in the Bay of Naples in the First Century AD', in *The Economy of Pompeii*, ed. Miko Flohr and Andrew I. Wilson (Oxford and New York: Oxford University Press, 2016), 372.

gratuitously. Several explanations for these absences have therefore been put forward.

According to Purpura and Andreau, who have been followed by Wolf, stipulations for interest were recorded in the loan dossiers for each transaction, but in *cautiones* that have not survived.³⁴ In my view, the reason for the absence of these documents in the archive can be explained as a matter of practice. In the Greek world, transactional documents were of such strong probative value that they were sometimes perceived as having a dispositive effect.³⁵ Consequently, the evidence of the agreement was sometimes destroyed on its completion, an act that was at once symbolic and tantamount to extinguishing the obligation permanently.³⁶ The same perception appears to have persisted in the Roman period, except that rather than destroying the document, the practice was for the creditor to hand over the *cautio* to the debtor.³⁷ Ulpian, in a discussion of the theft of financial documents, noted that debtors frequently sought to recover *tabulae* on completion of the transaction so that they could rebut any allegation that they had failed to repay.³⁸ Equally, it was Paul's view that the return of the *cautio* was evidence of the creditor's tacit agreement not to sue, which could be relied upon in the debtor's defence.³⁹ It is therefore no surprise that none of the surviving *tabulae* in the Sulpician archive were *cautiones* of this kind: the clients of moneylenders would have expected the return of the document once repayment had been made.

³⁴ Gianfranco Purpura, 'Tabulae pompeianae 13 e 34; duo documenti relativi al prestito marittimo', in *Atti del xvii congresso internazionale di papirologia (Napoli, 19-26 maggio 1983)* (Naples: Centro internazionale per lo studio dei papiri ercolanesi, 1984), 1245–66; Andreau, *Banking and Business*, 98–99; also, Joseph G. Wolf, 'Documents in Roman Practice', in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 78.

³⁵ Elizabeth A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge: Cambridge University Press, 2004), 19; Hans Julius Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats Bd. 2: Organisation und Kontrolle des privaten Rechtsverkehrs (Handbuch der Altertumswissenschaft 10.5.2)* (Munich: C.H. Beck, 1978), 144, note 9.

³⁶ Walter Ashburner, *NOMOΣ ΠΟΔΙΩΝ ΝΑΥΤΙΚΟΣ. The Rhodian Sea-Law* (Oxford: Clarendon Press, 1909), 216.

³⁷ Meyer, *Legitimacy and Law*, 119–20.

³⁸ D.47.2.27 pr. (Ulp. 41 *ad Sab.*).

³⁹ D.2.14.2.1 (Paul. 3 *ad ed.*).

To return to the apparent absence of interest clauses, Guarino and Gröschler have proposed that it was paid monthly on the basis of pacts.⁴⁰ Bove and Camodeca, on the other hand, have cited a passage in Plutarch in support of the position that creditors deducted interest in advance from the sum paid out to the debtor, so that the amount of the principal was effectively overstated.⁴¹ Finally, Verboven has argued that the lenders in the Sulpician archive made a practice of paying out the principal to the borrower, a portion of which was immediately and voluntarily paid back in the name of ‘future interest’.⁴² On this account, while the handing over of the money to the borrower obliged him to repay, for example, 100, in fact he only took away 80 with him, having agreed to pay back 20 immediately as the yield. To satisfy the obligation to repay the debt he would therefore need to find a further 20 (that is, the difference between that which he owed and that which he had taken away) before it became due. As Verboven has explained, the technique was legally secure because once the future interest was handed over the debtor could not reclaim the sum as *indebitum*, while the *mutuum cum stipulatione* recorded in the *chirographum* remained valid and enforceable.⁴³

Verboven’s account has much to commend it, and for the reasons I shall set out below I believe that it may have been the method used by the lenders Celer and Chares in SB VI 9571. The starting point here is that, as Pestman has

⁴⁰ Antonio Guarino, *Giusromanistica elementare*, 2nd ed. (Naples: Jovene, 1989), 205. Gröschler has argued that although the method proposed by Verboven is possible for those loans for which there was a specified date for repayment, interest was likely demanded on a monthly basis in those loans without a certain due date: ‘Darlehensvalutierung und Darlehenszins in den Urkunden aus dem Archiv der Sulpizier’, in *Festschrift für Rolf Knütel zum 70. Geburtstag*, ed. Holger Altmeyden, Ingo Reichard, and Martin J. Schermaier (Heidelberg: C.F. Müller, 2009), 398–99; also, *Die Tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden* (Berlin: Duncker und Humblot, 1997), 165–77. This hypothesis assumes that the interest in all these loans was calculated by time, and not as a fixed proportion of the sum lent.

⁴¹ Plut. *De vitando*. 5; also, Ps.-Asc. *in Cic. Verr. II* 1.36.91: on which, Lucio Bove, *Documenti di operazioni finanziarie dall’archivio dei Sulpici: Tabulae Pompeianae di Murécine* (Naples: Liguori, 1984), 41–42 and 47–48; Giuseppe Camodeca, *L’archivio puteolano dei Sulpicii* (Naples: Università Napoli Federico II, 1992), 174–77; also, *Tabulae Pompeianae Sulpiciorum (TPSulp.)*. *Edizione critica dell’archivio puteolano dei Sulpicii*, vol. 2 (Rome: Quasar, 1999), 134; and now, Peter Gröschler, ‘Die Konzeption des Mutuum cum Stipulatione’, *TvR* 74 (2006): 267–69.

⁴² Koenraad Verboven, ‘The Sulpicii from Puteoli and Usury in the Early Roman Empire’, *TvR* 71 (2003): 17–19.

⁴³ Verboven, 18.

shown, it is common in the papyrological evidence from Ptolemaic and Roman Egypt to find loan documents in which the stated sum was intended to represent the total amount that the debtor was obliged to repay.⁴⁴ From here, as Pestman says, it may be that the debtor had either: i) simply received a gratuitous loan; ii) received the sum stated, but owed interest in some other form (e.g., as a *quid pro quo*); or iii) received less than the sum stated since the interest was already included in the amount represented as the principal.⁴⁵ If, as I have argued, the 5,160 drachmas in SB VI 9571 represents the yield of c. one-eighth on a loan of 7 talents, then this acknowledgment appears to be an example of Pestman's third type.

SB VI 9571 is similar to the *mutua cum stipulatione* in the Sulpician archive for the reason that all were intended as acknowledgments of debt. It is, however, also different in two important respects: first, no stipulations were concluded; and second, the sum to be owed as interest was stated separately from the amount of the principal.⁴⁶ This latter feature allows us to rule out the possibility that there was a clause in the *syngraphe* responsible for the addition of interest, since the obligation to pay the yield was already established alongside the principal. The Guarino–Gröschler thesis can also be discounted, because the yield on maritime loans was calculated as a proportion of the sum lent, and not by time. This leaves the structures proposed by Bove–Camodeca and Verboven: either the four borrowers never received the 5,160 dr. as stated, or they did in fact receive it, only to hand it (or an equivalent sum) back to the lender as 'future interest'. It is not possible on the evidence presented thus far to say which technique was used here. It is my submission, however, that the juristic literature cited by Verboven provides guidance on this point.

⁴⁴ Pieter W. Pestman, 'Loans Bearing No Interest?', *Journal of Juristic Papyrology* 16–17 (1971): 24.

⁴⁵ Pestman, 24–26.

⁴⁶ Thür has pointed out the lack of verbal formalities: 'Arnaldo Biscardi', 185.

The payment of future interest, Q. Cervidius Scaevola, and the Callimachus Loan:

In support of the argument that the lenders in the Sulpician archive demanded payment of interest up front when the loan was given, Verboven has pointed to the awareness of the practice on the part of the Roman jurists. In this connection, Florentinus opined that a person who accepted ‘future interest’ (*qui in futurum usuras a debitore acceperat*) appeared to have tacitly agreed that he would not seek the capital until the period for which he had accepted the interest had elapsed.⁴⁷ Ulpian confirmed this view, adding that the *exceptio doli* would lie if a creditor brought forward a claim during the interval.⁴⁸ The reasoning behind these opinions appears to have been that, since *usura* was conceived as the creditor’s reward for furnishing the borrower with the use (*usus*) of the money, it would only be due once the latter had had the use of the funds for a period of time commensurate to the amount of interest paid.⁴⁹

The structure was also known to Q. Cervidius Scaevola (second century CE), who depicted its operation in D.45.1.122 pr. (Scaev. 28 *dig.*):

[pr.] Qui Romae mutuum pecuniam acceperat solvendam in longinqua provincia per menses tres eamque ibi dari stipulanti spondisset, post paucos dies Romae testato creditori dixit paratum se esse Romae eam numerare detracta ea summa, quam creditori suo usurarum nomine dederat. quaesitum est, cum in integrum summam, qua stipulatione obligatus est, optulerit, an eo loco, in quo solvenda promissa est, sua die integra peti posset. respondit posse stipulatorem sua die ibi, ubi solvendam stipulatus est, petere.

In this text, Scaevola began by describing a situation in which a borrower had received money in Rome having promised to repay an equivalent sum in a distant province three months later (*in longinqua provincia*; hereafter, the ‘Distant Province loan’). Having changed his mind, however, the borrower attempted to tender repayment in Rome just a few days later, ‘after deducting

⁴⁷ D.2.14.57 pr. (Flor. 8 *inst.*).

⁴⁸ D.44.4.2.6 (Ulp. 76 *ad ed.*): ‘...si creditor usuras in futurum acceperit...’ The possibility that interest could be paid in advance was also countenanced by Justinian: C.4.32.28.1 (*l.ust.*, 529).

⁴⁹ E.g., D.36.1.60(58).6 (Pap. 9 *resp.*); also, D.22.1.16.1 (Paul. 1 *decr.*). Ambrose put the issue in *de Tobia*, 5 with chiastic brevity: ‘*usum requirit, ut adquirat usuram*’.

the sum he had given to his creditor in the name of interest' (*deducta ea summa, quam creditori suo usurarum nomine dederat*).⁵⁰ Scaevola decided that the lender was entitled to refuse the borrower's offer and could still sue for repayment at the agreed place and time.⁵¹

Samter, following Mitteis, supposed that this was a case in which the interest had been deducted in advance, so that the principal had in effect been overstated.⁵² However, as Cherchi's exegesis has made clear, it is more likely that this was a loan in which the borrower had paid interest upfront.⁵³ This interpretation is strengthened by another reply given by Scaevola, in which the jurist held that interest that was owed every thirty days was due from the moment the stipulation for the loan was concluded, and not from the time at which it was due.⁵⁴

⁵⁰ Mommsen (*nec integram*) and Cohn (*non integram*) both suggested emending *in integrum summam* to resolve the fact that the borrower appeared to be offering less in Rome than he would have owed in the distant province: Max Cohn, *Die sogenannte actio de eo quod certo loco: Eine Untersuchung aus dem römischen Recht* (Leipzig, 1877), 98. Cf. Alice Cherchi, *Ricerche sulle 'usurae' convenzionali nel diritto romano classico* (Naples: Jovene, 2012), 31–32.

⁵¹ This is consistent with Ulpian's decision in D.13.4.9 (Ulp. 47 *ad Sab.*), that a person who had stipulated performance in a certain place was entitled to refuse it elsewhere. If the person who owed the money failed to perform in the agreed place, the pursuer could rely upon the praetorian *actio de eo quod certo loco*, which empowered the judge to increase the sum due to reflect the pursuer's *interesse* in performance at that place. This would be relevant if, for example, the pursuer had lent *pecunia traiecticia* to the borrower on terms that it be repaid at Ephesus. If the borrower failed to repay at Ephesus, so that the pursuer incurred a loss (e.g., because he was forced to default on a debt, so that a penalty became due, or his goods were sold as security), he would have the action to increase the obligation of the borrower in order to recover: D.13.4.2.8 (Ulp. 27 *ad ed.*).

⁵² Richard Samter, 'Das Verhältnis zwischen Scaevolas Digesten und Responsen', *ZSS* 27 (1906): 163.

⁵³ Cherchi, *Ricerche*, 29–34; also, Camodeca, *L'archivio puteolano*, 175–76; *Tabulae Pompeianae Sulpiciorum*, 2:133–34; 'La prassi giuridica municipale: il problema dell'effettività del diritto romano', in *Gli statuti municipali*, ed. Luigi Capogrossi Colognesi and Emilio Gabba (Pavia: IUSS Press, 2006), 541; cf. Gröschler, *Die Tabellae-Urkunden*, 158–59; 'Darlehensvalutierung', 392–94; 'Il "mutuum cum stipulatione" e il problema degli interessi', in *Quaderni lupiensi di storia e diritto*, ed. Francesca Lamberti (Lecce: Edizioni del Grifo, 2009), 120–22.

⁵⁴ D.45.1.135 pr. (Scaev. 28 *dig.*): on which, Cherchi, *Ricerche*, 35–37.

We now turn to the text immediately following the Distant Province loan, D.45.1.122.1 (Scaev. 28 *dig.*):⁵⁵

[1] Callimachus mutuam pecuniam nauticam accepit a Sticho servo Seii in provincia Syria civitate Beryto usque Brentesium: idque creditum esse in omnes navigii dies ducentos, sub pignoribus et hypothecis mercibus a Beryto comparatis et Brentesium preferendis et quas Brentesio empturus esset et per navem Beryto invecturus: convenitque inter eos, uti, cum Callimachus Brentesium pervenisset, inde intra idus Septembres, quae tunc proximae futurae essent, aliis mercibus emptis et in navem mercis ipse in Syriam per navigium proficiscatur, aut, si intra diem supra scriptam non reparasset merces nec enavigasset de ea civitate, redderet universam continuo pecuniam quasi perfecto navigio et praestaret sumptus omnes prosequentibus eam pecuniam, ut in urbem Romam eam deportarent: eaque sic recte dari fieri fide roganti Sticho servo Lucii Titii promisit Callimachus. et cum ante idus supra scriptas secundum conventionem mercibus in navem impositis cum Erote conservo Stichi quasi in provinciam Syriam perventurus enavigavit: quaesitum est nave submersa, cum secundum cautionem Callimachus merces debito preferendas in nave mansisset eo tempore, quo iam pecuniam Brentesio reddere Romae preferendam deberet, an nihil prosit Erotis consensus, qui cum eo missus erat, cuique nihil amplius de pecunia supra scripta post diem conventionis permissum vel mandatum erat, quam ut eam receptam Romam perferret, et nihilo minus actione ex stipulatu Callimachus de pecunia domino Stichi teneatur. respondit secundum ea quae proponerentur teneri. item quaero, si Callimacho post diem supra scriptam naviganti Eros supra scriptus servus consenserit, an actionem domino suo semel adquisitam adimere potuerit. respondit non potuisse, sed fore exceptioni locum, si servo arbitrium datum esset eam pecuniam quocumque tempore in quemvis locum reddi.

In the so-called ‘Callimachus loan’, Stichus, the slave of Seius (later referred to as Lucius Titius), agreed to lend ‘maritime money’ (*pecunia nautica*) to a merchant called Callimachus for a maximum term of two hundred days.⁵⁶

⁵⁵ I have given Mommsen’s edition of the text, notwithstanding the emendations suggested by both von Lübtow and Biscardi, as these do not bear upon the interpretation of the text offered here: Ulrich von Lübtow, ‘Das Seedarlehen des Callimachus’, in *Festschrift für Max Kaser zum 70. Geburtstag*, ed. Dieter Medicus and Hans H. Seiler (Munich: Beck, 1976), 329; Arnaldo Biscardi, ‘Pecunia traiectica e stipulatio poenae’, *Labeo* 24 (1978): 298–300.

⁵⁶ The time limit reflected the lender’s unwillingness to bear the risk beyond the end of the sailing season: Adriaan J. B. Sirks, ‘Sailing in the Off-Season with Reduced Financial Risk’, in *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity*, ed. Jean-Jacques Aubert and Adriaan J. B. Sirks (Ann Arbor: The University of Michigan Press, 2002), 142–43. Cf. the view that this was the time required for the completion of the enterprise: Richard Duncan-Jones, *Structure and Scale in the Roman Economy* (Cambridge: Cambridge University Press, 1990), 21; Christoph Krampe, ‘Der Seedarlehensstreit des Callimachus - D. 45,1,122,1 Scaevola 28 digestorum’, in *Collatio*

Under the terms of the agreement Callimachus was bound to purchase goods at Berytus (modern Beirut), his port of departure, and to transport them to Brentesium, where he would sell them. Eros, a fellow slave of Stichus, was to accompany him on the journey, and the revenue from the sale of the original cargo would be used to acquire new merchandise. Callimachus would then ship the goods back to Berytus where, once sold, he could repay the sum he had borrowed out of the proceeds. If, however, Callimachus failed to depart Brentesium with a fresh cargo before 13 September, he would be obliged to make repayment to Eros, who would take the money to Rome. Security was taken over both the outward and return cargoes by means of pledge and hypothec.⁵⁷ Once the terms had been agreed, they were made binding by way of stipulation and recorded in a *cautio*.

Some scholars have described the case as hypothetical, and it is true that the jurist uses stock names (Stichus, Eros, Seius, and Lucius Titius) which he employs elsewhere in his writing.⁵⁸ However, the specific details included by Scaevola suggest that the scenario had a firm basis in reality.⁵⁹ In particular, the timeframes explicitly take account of the sailing season and the increased hazards associated with seafaring in winter, while the spelling of Brentesium (for Brundisium, modern Brindisi) lends credence to the view that the text was

iuris Romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire, ed. Robert Feenstra et al. (Amsterdam: Gieben, 1995), 221–22. Sirks calculates that the trip ought not to have taken more than three weeks sailing time each way: 'Sailing in the Off-Season', 148. This accords with the sailing times over coastal and open waters calculated using the Orbis modelling software (orbis.stanford.edu): the trip from Berytus to Brentesium (approximately 2400 km) is estimated to have taken 17 days in April, or 21 in July; and from Brentesium to Berytus 13 days in July, or 14 in September.

⁵⁷ The reference to both types of security raises suspicions of interpolation: cf., e.g., Ludwig Mitteis, Ernst Levy, and Ernst Rabel, eds., *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, vol. 3 (Weimar: Böhlau, 1929), 392.

⁵⁸ Jean Rougé, *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire romain* (Paris: S.E.V.P.E.N., 1966), 350; De Ste. Croix, 'Ancient Greek and Roman Maritime Loans', 55; Pascal Arnaud, 'Ancient Sailing-Routes and Trade Patterns: The Impact of Human Factors', in *Maritime Archaeology and Ancient Trade in the Mediterranean*, ed. Damian Robinson and Andrew I. Wilson (Oxford: Oxford Centre for Maritime Archaeology, Institute of Archaeology, 2011), 69.

⁵⁹ Fritz Pringsheim, *Der Kauf mit fremdem Geld: Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischem und römischem Recht* (Leipzig: Veit, 1916), 147; Biscardi, *Actio pecuniae trajecticiae*, 200; Gianfranco Purpura, 'Ricerche in tema di prestito marittimo', *AUPA* 39 (1987): 213; Krampe, 'Der Seedarlehensstreit des Callimachus', 214.

based upon a set of documents written in Greek.⁶⁰ This possibility is made all the more likely by the fact that Scaevola frequently reproduced Greek documents elsewhere in his work.⁶¹

The jurist's account of the agreement itself is even more telling. The opening phrase, '*Callimachus mutuum pecuniam nauticam accepit*', echoes the language used in *chirographa* to describe the act giving rise to the principal obligation to repay a certain sum (e.g., *scripsi me accipisse mutua et debere*, or the like). He then proceeds to enumerate the terms of the agreement: first an expiry date, then provisions for the taking of security, and finally a stipulation for the services of the lender's representative, which included a (crypto-)penalty for delayed repayment. These, we are told later, were recorded in a *cautio* (*secundum cautionem*). The account finishes with the conclusion of the whole agreement as a stipulation, and again the author replicates the technical language found in typical *mutua cum stipulatione*: '*eaque sic recte dari fieri fide roganti Stichus servo Lucii Titii promisit Callimachus*'.

Scaevola's account of the agreement between Stichus and Callimachus was very likely based upon a real loan dossier similar to those in the Sulpician archive which included a *nautika syngraphe* of the kind referred to in SB VI 9571. In my view, several features indicate that Callimachus had paid the yield up front according to the method suggested by Verboven. In the first place, the jurist's detailed description of the terms of the loan – most of which form no part in his juridical reasoning at the end of the text – leaves little doubt that the absence of an explicit interest clause was a deliberate omission. It is therefore probable, as in the case of the Sulpician loans and SB VI 9571, that the chirograph accompanying the *syngraphe* was an acknowledgment of the whole debt including both principal and yield.

⁶⁰ Jones, *The Bankers of Puteoli*, 181; also, Paul Huvelin, *Études d'histoire du droit commercial romain (histoire externe-droit maritime)* (Paris: Recueil Sirey, 1929), 203.

⁶¹ Especially, D.44.7.61 pr. (Scaev. 28 *dig.*); also, D.17.1.60.4 (Scaev. 1 *resp.*); D.20.1.34.1 (Scaev. 27 *dig.*); D.26.7.47 pr. (Scaev. 2 *resp.*); D.31.88.15 (Scaev. 3 *resp.*); D.32.37.5, 6 (Scaev. 18 *dig.*); D.32.39.1 (Scaev. 20 *dig.*); D.32.101 pr. (Scaev. 16 *dig.*); D.33.4.14 (Scaev. 15 *dig.*); D.33.8.23.2 (Scaev. 15 *dig.*); D.34.1.16.1 (Scaev. 18 *dig.*); D.34.4.30.1, 3 (Scaev. 20 *dig.*); D.40.4.60 (Scaev. 24 *dig.*); D.40.5.41.4 (Scaev. 4 *resp.*); and D.50.9.6 (Scaev. 1 *dig.*).

This inference alone merely suggests that the yield was capitalised, which is consistent with the loan structures proposed by both Bove–Camodeca and Verboven. There is, however, one critical feature that suggests that Verboven’s thesis ought to be preferred. In the passage immediately preceding the Callimachus loan – that is, D.45.1.122 pr., the Distant Province loan – the borrower received his money as a *mutuum* – ‘*qui Romae mutuam pecuniam acceperat*’ – and then immediately repaid a portion of it to the lender. In the following text, Callimachus received his loan on the same basis – ‘*Callimachus mutuam pecuniam nauticam accepit*’ – the only difference being that the money was understood to be ‘*nautica*’. In my view, Scaevola’s use of the word was intended to invoke the Hellenic meaning traced by Cohen of money lent for a fixed yield with an uncertain due date. Although we are not explicitly told that Callimachus paid ‘future interest’ upfront, both the context supplied by the previous text and the telling absence of an interest clause suggest that he did. Finally, the condition that required Callimachus to leave Brentesium with a new cargo before 13 September makes sense in light of this structure. If he failed to leave by this date, he was obliged to pay everything he owed to Eros at Brentesium, as if the voyage had come to an end (*redderet universam continuo pecuniam quasi perfecto navigio*). Clearly the borrower owed a fixed sum; and in the context of the structure of the loan, this meant an equivalent amount to that originally transferred by the lender, notwithstanding Callimachus’ voluntary repayment of a portion of the proceeds upfront. The condition was therefore penal in character: since the yield had been paid in advance and negotiated in the context of a round trip during which two lots of cargo were intended to be bought and sold, repayment at the half-way stage would have required Callimachus to find the difference between what he had taken away and what he owed before having enjoyed the benefit of selling two lots of cargo.

Summary of 3.1.1.1:

It is my submission that the 5,160 dr. recorded in SB VI 9571 represents the yield demanded by Celer and Chares on a maritime loan. Like the loans in the

Sulpician archive, the yield was ‘capitalised’ to create an acknowledgment by the borrowers for the whole amount of the debt. It is possible that this was achieved according to the method of paying the yield upfront, which is attested elsewhere in the juristic sources. There are several indications that this was also the technique used in the Callimachus loan. In sum, the evidence adduced in this part is consistent with the second method described by the *naukleroi* in Nov. 106: of money advanced in return for a fixed financial yield calculated as a proportion of the sum lent.

3.1.1.2 ‘*Quid pro quo*’ Loans.

SB III 7169:⁶²

- 1 [.]εντα ἀπὸ τῆς προκειμένης ἡμ[έ]ρ[ας]
]δημος μὲν πρὸς χαλκὸν [-ca.?-]
- 2 [.]σι, Μηνοδώραι(*) δὲ ὡσαύτως πρὸς ἀργύριον
]ας πενήκοντα καὶ τῶν [-ca.?-]
- 3 [.]ε. ὑπάρχων τῆς/ αὐτῆς(*) ἡμέρας ἀγνευτικὰς
 [.] . ι καὶ οὐθενὸς αὐτῶν ἐλατ[τουμένου] [-ca.?-]
- 4 [.]υτου πάλιν παρ[α]διδόναι αὐτὴν ἀπὸ τῶν προκ[ειμένων]
 τοῦς] ἐσομένους τόκους. [-ca.?-]
- 5 [.]ς ἐδάνεισεν Ἄρχιπ[π]ρος Δη[μητριῶ]] vac. ? [-ca.?-]
- 6 [ἐδάνει]σεν Ἄρχιππος Εὐδῆ[μου]]τι
 [.] . [.] . α ὡς ἐ[τῶν] [-ca.?-]
- 7 [.]ς οὐλή μετώπῳ ἐξ ἀρισ[τ]ε[ρ]ῶς [Δημητριῶ]
] . [.]ξεως ὡς ἐ[τῶν] [-ca.?-]
- 8 [.]προσώπῳ οὐλή μετώπῳ μέσῳ καὶ Ἰππ[α]ρχῳ Ἰππ[α]ρχου
]ε. ρ. . . [-ca.?-]
- 9 [.]ἀνα]φαλάντῳ μακροπροσώπῳ οὐλή μετώπῳ καὶ
 Δ[.] τῆς] ἐπιγ[ον]ῆς ὡς ἐ[τῶν] [-ca.?-]
- 10 [.]]γενειον(*) καὶ Σ.]χι Λ[υ]σιμάχου [Λακε]δαιμονίῳ [.] ὡς
 ἐ[τῶν]]κον]τα πέντε μέσῳ [-ca.?-]
- 11 [οὐλή μετ]ώπῳ ἐ[κ] δεξιῶν καὶ Τρ.]ω Τρε.] Μεσ]σαλιώτῃ
 [.] . ουπ.] . [.] . ε. [-ca.?-]
- 12 [.]κλαστῳ μακροπροσώπῳ οὐλή χ[ειρὶ ἀ]ριστερῇ τοῖς ε τοῖς εἰς] τὴν
 Ἄρω[ματο]φ[όρον] συ]νπλοῖς διὰ Γναίου ἐξ[-ca.?-]
- 13 [.]κα εἰς ἐ[ν]ια[υ]τ[ὸν] ἀπὸ τοῦ προ[ο]κειμένου] μηνός. [ἀποδότησαν δὲ]
 οἱ δεδα[νεισ]μέ[νοι τῶ]ι δεδανεικότι τ[ὸ δάνειον] [-ca.?-]
- 14 [.] . τα. ἐὰν δ' ἐκπε[σ]ό[ν]τ[ε]ς τοῦ χρόν[ου] παραγένω[νται ἀπὸ τῆς]
 Ἀρ[ω]μα[το]φ[όρου] εἰς] τὴν χώραν, ὁμοίως. . [-ca.?-]
- 15 [.]ηε. . , ἀφ' ἧς ἂν ἡμέρας παραγένωνται [ε]ἰς τὴν χώραν [ἡμερῶν]

⁶² = P. Berol. 5883 + 5853.

-]ήκοντα. ἐὰν δὲ μὴ ἀποδῶσιν ἐν τ[ῷ ὠρισμένῳ χρόνῳ,
ἀποτεισάτωσαν παραχρῆμα τὸ δάνειον ἡμιό]-
- 16 [λιον καὶ] τοῦ ὑπ[ε]ρπεσόνοτος χρόνου τοὺς κατὰ τὸ διάγραμ[μα τόκους
διδ]ράχμους τῆι μναὶ τὸν μῆνα ἕκασ[τον. ἔγγυοι εἰς ἕκτεισιν]-ca.?-]
- 17 [. Θ]εσσαλονικεὺς ἡγεμῶν ἕξω τάξεων ὡς ἐτῶν [. ἐπ]τὰ μέσος,
μ[ε]λίχρως, τετανὸς, στρ[ογγυλοπ]ρόσωπος, οὐλή]-ca.?- καὶ]-ca.?-]
- 18 [.]του Ἐλεάτης τῶν μετὰ τοῦ βασιλέως καταπε
[. δ(?)]ευτέρων ἐπιλέκτων ὡς ἐτῶν τεσσ[α]ράκοντα]- ca.?-]
- 19 [.] δεξιᾶ καὶ Κίντος. . . . νιος Μεσσαλιώτηι(*) τῶν αὐ[τῶν ὡς ἐτῶν
τ]εσσαράκοντα εὐμεγεθηι(*)μελίχρο[υς]-ca.?-]
- 20 [ἀριστε]ρὰν καὶ Δημήτριος Ἀπολλωνίου Καρ[χη]δόνιος [τῶν τὴν ἕξω
θάλ(?)]ασσαν πλοιοζομένων ὡς ἐτῶν τρία[κοντα]-ca.?-]
- 21 [.] σύνοφρυς ἡσυχῆ καὶ Κίντος Κιντο[. . .].
[. τ]ακτόμισθος ὡς ἐτῶν τεσσαράκον[τα]-ca.?-]
- 22 [.]. ση καὶ ἡ πράξις ἔστω Ἀρχίππῳ ἐξ αὐτῶν τε τῶν δεδανεισμ]ένων
καὶ τῶν ἐγγύων/ καὶ ἐκ τῶν ὑπαρχόντ[ω]ν αὐτοῖς π[άντων καθάπερ ἐκ
δίκης. ἐπιθέτωσαν δὲ]. ὀ]
- 23 [προγεγρ]αμμένος Δημήτριος καὶ Ἴππαρχος
ἀπ[.]. ἰώματα τῶν ἐκ τῆς π[ρογ]εγραμ[μένης]-ca.?-]
- 24 [.], οὗ ἂν ἡ ἐξαίρεσις γένηται τῶν ἀρω[μάτων (?)]. κατὰ τὰ
ἐπιβάλλοντ' αὐτοῖς ἐκ τοῦ αὐτοῦ πλόου]-ca.?-]
- 25 [.]. ἰ τὰ παρασταθησόμενα ὑπὸ τοῦ Ἀρχίππου(?)
.]. ς ὥστε ἀποκαταστήσαι εἰς τὴν χώρ[αν]-ca.?-]
- 26 [.] ὀλκῆς τῶν ἀρωμάτων παραγενομ[εν].]. ε. ἐὰν
δὲ μὴ {ἐὰν δὲ μὴ} ἐπιθῶσιν, καθ[ὼς πρόκειται]-ca.?-]

SB III 7169, first edited by Wilcken in 1925, contains the fragmentary contents of an acknowledgment of debt made at Alexandria about the middle of the second century BCE.⁶³ The capital for the loan was provided by a certain Archippos, son of Eudemos, to five *synploi*, or associates, for a journey to the Aromatophoros, which was probably located on the Horn of Africa.⁶⁴ Two of the associates, Demetrios and Hipparchos (one a Lacaedemonian, the other a Massiliote), are specifically designed as *naukleroi*, the other three simply as *socii*.⁶⁵ Archippos does not appear to have taken security over the cargo or

⁶³ Ulrich Wilcken, 'Punt-Fahrten in der Ptolemäerzeit', *Zeitschrift für ägyptische Sprache und Altertumskunde* 60 (1925): 86–102.

⁶⁴ On the location, Matthew A. Cobb, *Rome and the Indian Ocean Trade from Augustus to the Early Third Century CE* (Leiden and Boston: Brill, 2018), 32; also, Steven E. Sidebotham, *Berenike and the Ancient Maritime Spice Route* (Los Angeles and London: University of California Press, 2011), 34.

⁶⁵ Rafał Taubenschlag, 'Die societates negotiationis im Rechte der Papyri', *ZSS* 52 (1932): 64–77. Heichelheim has pointed out the similarities between this enterprise and the maritime

ship; instead, three Ptolemaic army officers – a Thessalonican, an Elean, and a third with a celtic name – and two merchants – a Massiliote and a Carthaginian – stood as surety for the loan (ll. 17-21).⁶⁶ To add to the international character of the arrangement, the loan was given *διὰ Γναίου* (l.12); that is, through an Italian called Cnaeus, who was probably a banker.⁶⁷

The five associates had a year to complete the enterprise, after which they would be liable to pay a penalty (*ἡμιόλιον*) equal to one-and-a-half times amount of the debt (i.e., a 50% uplift) in addition to interest at the rate of 2% per month (24% *per annum*) (l.16).⁶⁸ Even if the traders were delayed, however, they would still be allowed a grace period of either 50, 70, 80, or 90 days to tranship the goods from the Red Sea coast to Alexandria for sale before interest began to run.⁶⁹ Most scholars have assumed that the loan was ‘maritime’, in the sense that the lender shouldered the risk until the vessel’s safe return. As Thür has rightly said, however, there is no explicit evidence of such a clause in the document, even if the nature of the enterprise suggests this possibility.⁷⁰

The most interesting feature of the loan from our perspective is that it was given *[ἄτο]κα* (l.13).⁷¹ As in the case of the Sulpician archive, it is hardly likely that Archippos was content to lend gratuitously. Several scholars have followed Wilcken’s suggestion that the parties negotiated a profit-sharing

loan reported to have been negotiated by Cato in Plut., *Cat. mai.* 21.5-6: ‘Zu Pap. Berol. 5883 + 5853’, *Aegyptus* 13, no. 1/2 (1933): 187–92.

⁶⁶ Michael I. Rostovtzeff, ‘Foreign Commerce of Ptolemaic Egypt’, *Journal of Economic and Business History* 4, no. 4 (1932): 756; Peter M. Fraser, *Ptolemaic Alexandria*, vol. 2 (Oxford: Clarendon Press, 1972), 275, note 216. On the military personnel, Louis Robert, *Études épigraphiques et philologiques* (Paris: Champion, 1938), 206; also, Hans Hauben, ‘“Ceux qui naviguent sur la mer extérieure” (“SB” III 7169)’, *ZPE* 59 (1985): 135–36.

⁶⁷ Raymond Bogaert, ‘Banquiers, courtiers et prêts maritimes à Athènes et à Alexandrie’, *Chronique d’Égypte* 40 (1965): 146–54; also, Pierre Jouguet, ‘Dédicace grecque de Médamoud’, *Le Bulletin de l’Institut français d’archéologie orientale* 31 (1931): 22 and 25.

⁶⁸ Wilcken, ‘Punt-Fahrten’, 95–96; Bogaert, ‘Banquiers’, 148.

⁶⁹ De Romanis, ‘Time to Repay’, 76.

⁷⁰ Gerhard Thür, ‘Hypotheken-Urkunde eines Seedarlehens für eine Reise nach Muziris und Apographe für die Tetarte in Alexandria: (zu P. Vindob.G. 40.822)’, *Tyche* 2 (1987): 243; also urging caution, Claire Préaux, *L’économie royale des Lagides* (Brussels: Éditions de la Fondation Égyptologique Reine Élisabeth, 1939), 364; Bogaert, ‘Banquiers’, 149–51.

⁷¹ Wilcken confidently supplies the reconstruction: ‘Punt-Fahrten’, 95; also, Paul M. Meyer, ‘Juristischer Papyrusbericht IV’, *ZSS* 46 (1926): 330; Vincenzo Arangio-Ruiz, *Lineamenti del sistema contrattuale nel diritto dei papiri* (Milan: Vita e pensiero, 1928), 83–84.

arrangement in lieu of interest, according to which Archippos would participate in the gains from the sale of the merchandise on the traders' return.⁷² Even more intriguing is Wilhelm's hypothesis that the words τὰ παρασταθησόμενα ὑπὸ τοῦ Ἀρχίππου refer to articles supplied by the creditor and entrusted for transport and sale to the traders receiving the loan.⁷³ According to him, the clauses in lines 22-26 are governed by the verb ἐπιθέσθαι, so that, if l.25 were to be restored ἐπιθεῖναι δὲ χαρὶ τὰ παρασταθησόμενα ὑπὸ τοῦ Ἀρχίππου, the meaning of the verb, otherwise unattested, could be something like 'to put a load upon another load or upon a ship'. Archippos, he concludes, appears to have been a partner in the whole business, the contract obliging Demetrios and Hipparchos (the two *naukleroï*) to ship the creditor's goods and imposing a fine on them should they fail. The creditor may well therefore have negotiated a *quid pro quo* in return for extending the loan, either wholly or partly in place of interest. As Pestman's study has shown, however, ἄτοκα loans need not have been given in return for a *quid pro quo* but could also involve the capitalisation of the interest.⁷⁴ This is Thür's preferred interpretation of the structure employed here: the (unknown) sum of the debt acknowledged by the borrowers included both the principal and the yield.⁷⁵ In truth, neither technique for profiting from the loan can be ruled out.

It is not possible to say beyond doubt which of these two structures was used to facilitate the loan documented in SB III 7169. We should not discount the possibility, however, that the creditor's anticipated return was achieved by demanding both a financial yield and a *quid pro quo*, as was reported to be customary by the *naukleroï* in Nov. 106. Certainly, in a venture of this scale and complexity, it is not beyond the realms of possibility that Archippos discounted a portion of the yield in return for the carriers and traders providing their services as both conveyors and purveyors of his goods.

⁷² Wilcken, 'Punt-Fahrten', 96; Meyer, 'Juristischer Papyrusbericht', 330; Arangio-Ruiz, *Lineamenti*, 84; Jouguet, 'Dédicace grecque', 22.

⁷³ Adolf Wilhelm, 'Papyrus Tebtunis 33', *JRS* 27 (1937): 149; also, Sidebotham, *Berenike*, 34.

⁷⁴ Pestman, 'Loans', 24–26.

⁷⁵ Thür, 'Hypotheken-Urkunde eines Seedarlehens', 243.

TPSulp. 78:⁷⁶

- p. 1 Ἐπὶ ὑπάτων Μάρκου Ἀκύλα Ἰουλι-
ανοῦ καὶ Ποπλίου Νωνίου Ἄσ-
πρήνα πρὸ τριῶν εἰδῶν
Ἄπριλίῳ ἐν Δικαρχίᾳ.
5 Μενέλαος Εἰρηναίου Κερα-
μῆτης ἔγραψα ἀπέχιν μαι
παρὰ Πρίμου Ποπλίου Ἀπτίου Σεβή-
ρου δούλου(λου) δηνάρια χίλια
ἐκ ναυλωτικῆς ἐκσφραγισμένης,
10 ἃ καὶ ἀποδώσω ἀκ(ου)λούθως
τῇ ναυλωτικῇ, ἥ<v> πεποίημαι πρὸς
αὐτόν. Κατέστησα δὲ ἔνγυον
p. 2 εἰς ἔκτισιν τῶν προγεγραμμένων
δηναρίων χιλίων Μάρκον Βαρ-
βάτιον Κέλερα.
Q(uintus) Aelius Romanus scripsi rogatu et
5 *mandatu M(arci) Barbatii Celeris coram*
ipso, quod is litteris nesciret, eum
*sua fide iubere eos * ∞, q(ui) s(upra) s(cripti) sunt,*
Primo P(ublii) Atti Severi ser(vo) pro Menela-
uo Irenaei f(ilio) Ceramietae, ita
10 *uti supra scriptum es[et]. (S) (S) (S)*

TPSulp. 78 consists of a diptych of wax tablets containing two *chirographa* dated to 11 April 38 CE.⁷⁷ The first chirograph, which was written in Greek, contained declarations made by a peregrine shipper called Menelaos, son of Irenaios, who hailed from Keramos in Caria (Asia Minor). In the document Menelaos declared: first (p.1, ll. 5-9), that he had received 1000 *denarii* (=HS 4000) from a certain Primus, slave of P. Attius Severus, 'arising from' a sealed *naulotike* (ἐκ ναυλωτικῆς ἐκσφραγισμένης); second (p.1, ll. 10-12), that he would willingly repay the loan 'according to' the *naulotike* concluded between them; and third (p. 1, l. 12 – p.2, l. 3), that a certain M. Barbatius Celer would stand as surety in his stead. The second chirograph, which was composed in Latin, contained a declaration made by a certain Q. Aelius Romanus that,

⁷⁶ = *Tab. Pomp.* 13.

⁷⁷ The presence of two *chirographa* in the same document is unusual, but not unique: Camodeca, *Tabulae Pompeianae Sulpiciorum*, 2:178; also, Joseph G. Wolf, 'Aus dem neuen pompejanischen Urkundenfund: Die "naulotike" des Menelaos – Seedarlehen oder Seefrachtvertrag?', in *Iuris vincula: studi in onore di Mario Talamasca* (Naples: Jovene, 2001), 426.

because M. Barbatius Celer was illiterate, he was acting on his behalf, and that the latter agreed to stand as surety for Menelaos for the 1000 *d.* constituting the loan.

Since the proposed interpretation of the tablet put forward by Joseph G. Wolf in 1979, numerous competing theories concerning the character of the transaction have been advanced. According to him, the *naulotike* was a *Seefrachtvertrag* (maritime freight agreement).⁷⁸ Wolf also claimed that, because Menelaos had not received the 1000 *d.* as a payment on the contract, but rather with a commitment to return the money (ἀποδώσω, i.e., *reddam*), the intention behind the transaction was that the shipper would transport the money itself as cargo and pass it on at the port of destination.⁷⁹ As Jakab has pointed out, however, the use of the verb ἀποδώσω in the Graeco-Egyptian papyri tends to indicate the repayment of money given intendedly as a loan, and not the return of property handed over for transport.⁸⁰ In addition, although it is true that the format of the both chirographs diverges from that of other *chirographa* documenting loans in the archive (for example, no stipulations are concluded), the translation of the formulaic '*scripsi me accipisse*' into the Greek phrase 'ἔγραψα ἀπέχιν μοι' does suggest that the parties intended the document as evidence of the receipt of a *mutuum*.⁸¹

In contrast to Wolf's thesis, Ankum argued that the *naulotike* was not a shipping contract, but rather a maritime loan agreement. In support of this position, Ankum cited a constitution of Justinian from 528 (already referred to above in connection with Nov. 106) in which the expression *contractus traiecticus* was used.⁸² This expression, Ankum concluded, was already in use by the late Republican or classical period and was translated into Greek by the scribe responsible for writing the tablet as 'ναυλοτικῆ (συγγραφῆ)'.⁸³ Although

⁷⁸ Joseph G. Wolf, 'Aus dem neuen pompejanischen Urkundenfund. Der Seefrachtvertrag des Menelaos', *Freiburger Universitätsblätter* 65 (1979): 23–36.

⁷⁹ Wolf, 34.

⁸⁰ Éva Jakab, 'Vectura pro mutua: Überlegungen zu TP 13 und Ulp. D. 19, 2, 15, 61', *ZSS* 117 (2000): 250.

⁸¹ Camodeca, *Tabulae Pompeianae Sulpiciorum*, 2:179.

⁸² C.4.32.26.2 (*Iust.*, 528): on which, *supra*, 67, nt. 4.

⁸³ Hans Ankum, 'Tabula Pompeiana 13: ein Seefrachtvertrag oder ein Seedarlehen?', *IURA* 29 (1978): 168–69; also, 'Minima de Tabula Pompeiana 13', *Cahiers d'histoire. Navires et*

Ankum has been followed by a number of scholars, his reliance upon a sixth-century constitution as evidence for the meaning of a phrase used in a document from 500 years earlier has drawn criticism.⁸⁴ In addition, as both Jakab and Rathbone have suggested, the sum of 1000 *d.* appears at first sight to have been too low to constitute a maritime loan, when during the same period a skilled slave could sell for twice that amount.⁸⁵

Next, a new interpretation was offered by Gofas in 1993, according to which the *naulotike* was considered, in line with Wolf, a maritime freight agreement, but configured as a '*Versicherungsdarlehen*' ('insurance loan').⁸⁶ Relying upon comparative evidence, Gofas explained how carriers in later periods were accustomed to give loans equivalent to the value of the cargo they had agreed to transport, the repayment of which was conditional upon the ship's safe arrival. If the ship sank in transit the merchants whose goods had perished would have no obligation to repay, so that the proceeds of the loan which they were entitled to retain functioned as a kind of insurance. However, as Jakab has rightly observed, in *TPSulp.* 78 the roles of the parties are reversed: Menelaos, the carrier, is the person receiving the money, not the person dispensing it.⁸⁷ In order to remedy this inconsistency Gofas was compelled to argue that the loan given by Primus was fictitious, which steers the interpretation yet further away from the sources.⁸⁸

commerces de la Méditerranée Antique. Homage à Jean Rougé 33 (1988): 282; and 'Observations sur le prêt maritime romain, sujet cher à Henryk Kupiszewski', in *Le droit romain et le monde contemporain: Melanges à la mémoire de Henryk Kupiszewski*, ed. Witold Wołodkiewicz and Maria Zabłocka (Warsaw: Université de Varsovie, 1996), 67–68.

⁸⁴ Following Ankum, Jean Macqueron, *Contractus scripturae. Contrats et quittances dans la pratique romaine* (Camerino: Facoltà di giurisprudenza dell'Università di Camerino, 1982), 173–75; Arnaldo Biscardi, 'Minima de iura civili', in *Sodalitas: scritti in onore di Antonio Guarino*, ed. Vincenzo Giuffrè, vol. 4 (Naples: Jovene, 1984), 1534–36; Purpura, 'Tabulae Pompeianae 13 e 34', 1252–53; also, 'Ricerche', 233–34; Gröschler, *Die Tabellae-Urkunden*, 160–61. For criticism, Jakab, 'Vectura pro mutua', 252.

⁸⁵ Jakab, 'Vectura pro mutua', 251–52; also, Rathbone, 'Financing', 209, note 46.

⁸⁶ Dimitri Gofas, 'Encore une fois sur la Tabula Pompeiana 13 (essai d'une interprétation nouvelle)', in *Symposion 1993. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Graz-Andritz, 12-16 September 1993)*, ed. Gerhard Thür (Cologne and Vienna: Böhlau, 1994), 251–66; followed by Arnaud, 'Ancient Sailing-Routes', 68.

⁸⁷ Jakab, 'Vectura pro mutua', 253.

⁸⁸ Gofas, 'Encore une fois', 265.

Building on Gofas' thesis, Thür argued that the 1000 *d.* that Menelaos claimed to have received was intended as an 'Aestimationsabrede'.⁸⁹ On this account, the sum stated in the chirograph was a valuation of the cargo received by Menelaos under the freight agreement, for which Menelaos as carrier had assumed the risk during transport. According to Thür, the valuation was dressed as a loan so that, in the event the ship did not return, the lender could sue using a simple *condictio*. In this way, the loan was just an 'empty form', such that in return for assuming the risk for the merchandise the carrier charged an increased amount on the freight.⁹⁰ Again, however, as Jakab has observed, the papyrological evidence tends to show that estimations of this kind could be included in the main body of agreements without difficulty and need not have been framed as a separate transaction.⁹¹

Jakab, in turn, has provided an altogether different explanation. According to her, the transaction documented in *TPSulp.* 78 is an example of *vectura* paid *pro mutua*; that is, a freight charge paid in the form of a loan.⁹² Having confirmed that the chirograph was intended as evidence of the receipt of a loan, Jakab also shows that the word '*naulotike*' invariably carries the meaning of a maritime freight agreement in the Ptolemaic and Graeco-Egyptian papyri. She then argues that the transaction executed by Primus and Menelaos was analogous to one described by Ulpian in D.19.2.15.6 (Ulp. 32 *ad ed.*), in which the jurist reported a rescript of Caracalla to the effect that a person who had paid for the transport of his goods in advance could seek a remission of the *merces* if the ship was lost in transit. Consequently, Jakab maintains that the

⁸⁹ Gerhard Thür, 'Die Aestimationsabrede im Seefrachtvertrag: Diskussionsbeitrag zum Referat Dimitri C. Gofas', in *Symposion 1993. Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Graz-Andritz, 12-16 September 1993), 267–71. Camodeca has expressed his support for this view: *Tabulae Pompeianae Sulpiciorum*, 2:178–79; also, 'Il credito negli archivi campani: il caso di Puteoli e di Herculaneum', in *Credito e moneta nel mondo romano: atti degli Incontri capresi di storia dell'economia antica* (Capri 12-14 ottobre 2000), ed. Elio Lo Cascio (Bari: Edipuglia, 2003), 88–89.

⁹⁰ Thür, 'Die Aestimationsabrede', 271.

⁹¹ Jakab, 'Vectura pro mutua', 253–54.

⁹² Jakab, 'Vectura pro mutua'; also, Jakab and Manthe, 'Recht', 295–300. This interpretation has been accepted by, among others, Stephan Schuster, *Das Seedarlehen in den Gerichtsreden des Demosthenes: mit einem Ausblick auf die weitere historische Entwicklung des Rechtsinstitutes: dáneion nautikón, fenus nauticum und Bodmerei* (Berlin: Duncker und Humblot, 2005), 178, note 10.

1000 *d.* received by Menelaos was an advanced freight payment made on condition that the ship reached its destination.

Finally, Dominic Rathbone has suggested that the money was lent for the purpose of paying customs duties on the cargo that Menelaos had agreed to transport, though this view is offered without substantiation.⁹³

In contrast to all these theories, it is my submission that Nov. 106 provides evidence of a loan structure that is consistent with the transaction documented by *TPSulp.* 78. For the purpose of this argument, I accept the claims of Jakab and others that: i) Menelaos received the 1000 *d.* as a loan; and ii) the *naulotike* refers to a maritime freight agreement. In Nov. 106, the first customary loan structure attested to by the shippers was described as follows:

Should the lenders have so chosen, they would load one *modius* of wheat or barley aboard the ship for each coin of whatever sum they lent, without making any payment on it to the public tax-collectors; as far as they were concerned, the vessels would sail tax-free, and they would have that as profit on what they had lent. Additionally, they would receive interest at just one gold piece in ten, with the risk of the venture being the regard of the lenders themselves (trans. Miller and Sarris 2018, 2:698).

According to this method, the creditor lent a sum of money for which he assumed the risk. As a reward, the lender demanded not only a yield equivalent to the value of one-tenth of the sum lent, but also that the shipper carry his goods and pay duties on them during transit. In other words, the lender negotiated that part of the yield due on the loan was to consist of services performed by the carrier.

⁹³ Initially Rathbone sought to develop Jakab's thesis by suggesting that the loan was fictive: 'Financing', 208–9; but subsequently, in favour of a (possibly fictive) loan for the purpose of paying duties, 'Merchant Networks in the Greek World: The Impact of Rome', *Mediterranean Historical Review* 22, no. 2 (2007): 315.

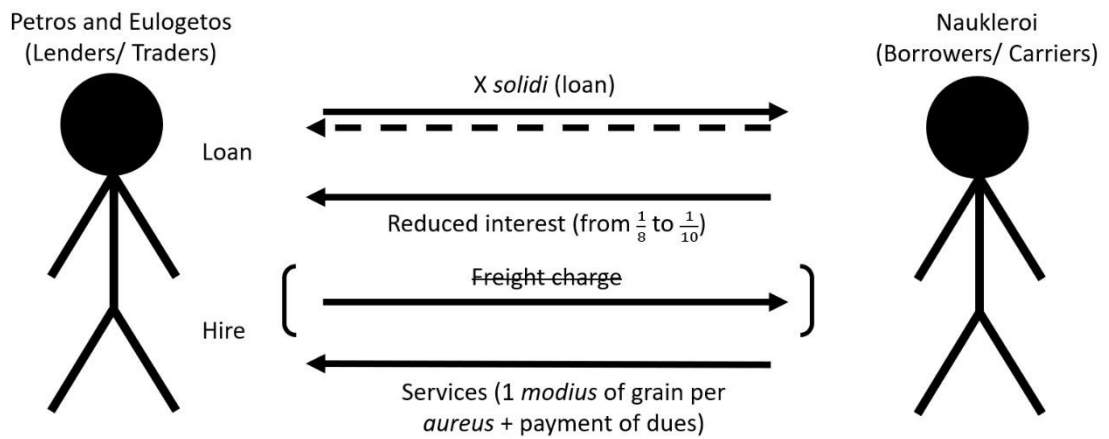


Fig. 5: Reconstruction of the first loan structure reported in Nov. 106.

In light of the loan structure described in Nov. 106, an alternative reconstruction of the transaction documented in *TPSulp. 78* comes into view. Menelaos (the carrier) received 1000 *d.* as a loan and agreed in the *naulotike* to render his services partly or wholly in place of paying interest. We cannot tell if Primus assumed the risk for the loan: if the 1000 *d.* had been given *sine periculo creditoris* Menelaos would have had to repay it under all circumstances; if at the risk of the lender (as described in Nov. 106), only if the voyage was successfully completed. The structure is different to the one proposed by Jakab: according to her, Menelaos *did not* have to repay the money unless the ship went down; on the account given here, Menelaos *did* have to repay the loan, either come what may or, if the lender assumed the risk, unless the ship went down.

Why did Primus and Menelaos not simply enter into a freight agreement? The answer to this question is that the arrangement described above was commercially beneficial for both parties. It is highly likely, as Camodeca has pointed out, that Primus' master – P. Attius Severus – is the same P. Attius Severus whose name is attested on *tituli picti* dating to the Julio-Claudian period which show that he was a trader in *garum*.⁹⁴ We also know from the archaeological evidence discovered at numerous wreck sites from the same period that merchant vessels frequently carried consignments owned by

⁹⁴ Dr. 7-11 and 20 (CIL XV 3642-5; 4748-9): on which, Camodeca, *Tabulae Pompeianae Sulpiciorum*, 2:179.

multiple traders at the same time as carrying goods belonging to the carrier himself.⁹⁵

Let us therefore suppose not only that Primus was a lender and Menelaos a carrier, but that both were traders at the same time. Primus had capital to lend and goods to transport; Menelaos had his services as a carrier to offer and sought to raise capital to invest in merchandise to convey and sell himself. One way of meeting their needs would have been for Menelaos to borrow money from Primus at interest, and for Primus to pay Menelaos to ship his goods: that is, two separate transactions, the first a loan, the second a contract of hire. What appears to have happened here is that these arrangements were rolled into one: instead of Primus paying freight, and Menelaos paying interest, these two obligations were offset so that what remained was a sum of money lent by Primus in return for services rendered by Menelaos.

As Gordley has argued in relation to barter, there are sound social and economic reasons why the parties might prefer an 'innominate' bargain to one that conformed with the orthodox contractual categories.⁹⁶ In this case, it is likely that both Primus and Menelaos were taking advantage of the fact that each happened to be able to provide the very goods and services that the other required. From Primus' point of view, instead of paying away money for freight that could not be recouped, he could pay for the carrier's services by putting capital at his disposal. From Menelaos' perspective, he raised a greater sum of money than he could earn on a straightforward contract of hire, which could then be invested in goods to be sold on at a profit. Crucially, by combining these arrangements the parties avoided the need to reach consensus on the financial value of the loan to Menelaos and, conversely, the value of the shipping contract to Primus. It was enough that the bargain was mutually beneficial, and at the same time convenient that the cost of reaching valuations

⁹⁵ For example, the wreck at Dramont A (mid-first century BCE), where both an anchor and amphorae stoppers inscribed with the name of a certain Sex. Arrius have been recovered, along with amphora stoppers bearing the names of other traders: on which, *supra*, 26 *et seq.* and 56.

⁹⁶ James Gordley, 'In Defense of Roman Contract Law', in *Comparative Contract Law*, ed. Pier Giuseppe Monateri (Cheltenham and Northampton, MA.: Edward Elgar, 2017), 23–26.

could be avoided. In the uncertain environment of maritime trade, it may also have been attractive that neither party could enforce the agreement until they had made performance themselves.

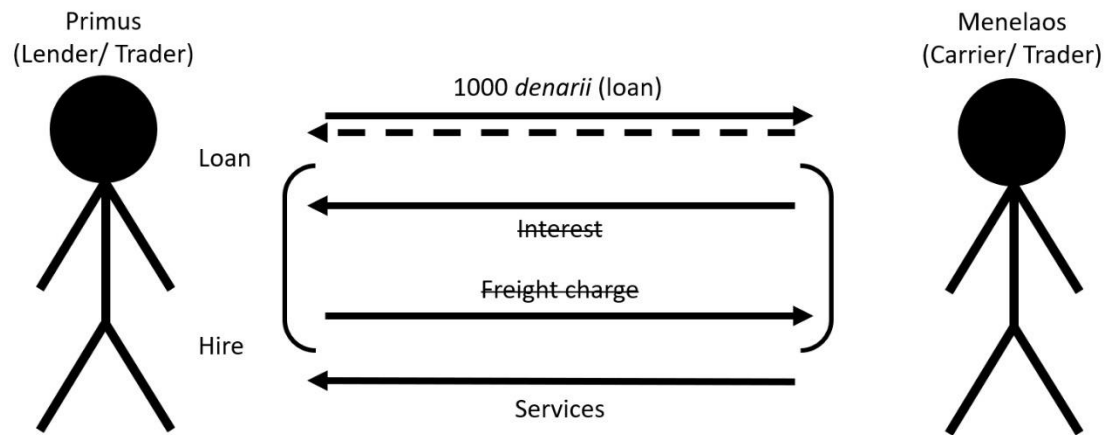


Fig. 6: Hypothetical structure of the loan documented in *TPSulp.* 78.

Finally, the receipt of a *quid pro quo* in place of interest is not wholly without precedent elsewhere in the sources. Under the arrangement called *antichresis*, the creditor lent money on security of a *res* and, having taken possession, agreed to receive the fruits of the property in place of interest.⁹⁷ In a papyrus recovered at Oxyrhynchus dating to 44 CE, for example, a certain Lucius – apparently a Roman citizen – borrowed 400 drachmas for a period of 13(?) years from a lady, Didyme, who in return received ‘ἀντὶ τῶν τούτων τόκῳ’ the right to live in the borrower’s house.⁹⁸ Two imperial constitutions, issued in the first half of the third century CE by the emperors Philip and Alexander Severus respectively, also indicate that the fruits received under such an agreement would not be deemed to exceed the legal limit on the rate of interest: in the case of rental income, because its receipt was subject to uncertainty; and in the event that the creditor inhabited the property and a higher rental income could have been obtained, because the creditor was

⁹⁷ D.20.1.11.1 (Marcian. *l. s. ad form. hypoth.*); D.20.2.8 (Paul. 2 *sent.*).

⁹⁸ P. Fouad. 44; also, P. Cairo Masp. III 67.309 (6th century CE), in which part of the loan bore ordinary interest, the remainder being ἀτοχί on the understanding that the creditor had the right to live in the borrower’s house. Pestman also identified three loans in which the debtor appears to have been expected to provide some *quid pro quo* in place of interest: Stud. Pal. 4, p. 117 (2nd century CE); BGU III 725 (7th century CE); and P. Mon. 3 (6th century CE) (though the latter two involve arrangements between husbands and wives): ‘Loans’, 24–25, note 69.

deemed to be living in the property at a low rent.⁹⁹ Though not an exact parallel with our case, *antichresis* arrangements show that it was not unusual for lenders and borrowers to find innovative ways to configure their relationships to their mutual benefit.

To sum up, the question concerning the identity of the transaction documented in *TPSulp.* 78 has frequently been framed as an alternative between, as Wolf put it, *ein Seedarlehen oder Seefrachtvertrag*. From the perspective of Nov. 106, there is no reason why it should not have combined elements of both: Menelaos received the 1000 *denarii* as a loan and offered his services as a carrier either wholly or partly in the place of the yield. This is consistent with the view of both Gofas and Jakab, that (maritime) loan agreements likely often featured as part of more wide-ranging arrangements, such as contracts for warehousing and freight.¹⁰⁰

D.22.2.5 (Scaev. 6 *resp.*):

[pr.] Periculi pretium est et si condicione quamvis poenali non existente recepturus sis quod dederis et insuper aliquid praeter pecuniam, si modo in <aleae> speciem non cadat: veluti ea, ex quibus <conditiones> nasci solent, ut "si <non> manumittas", "si non illud facias", "si non convaluero" et cetera. nec dubitabis, si piscatori erogaturo in apparatus plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si vicisset, redderet. **[1]** In his autem omnibus et pactum sine stipulatione ad augendam obligationem prodest.

This text will be considered in more detail below.¹⁰¹ For the purpose of this section, I wish only to focus on the structure of the arrangements described in the second half of the *principium*; namely, those involving the fisherman and the athlete. In the first, a fisherman is given money to purchase equipment on condition that if he makes a catch he will repay it. In the second, a sponsor funds an athlete's training, subject to the condition that the athlete will only repay the money if he is victorious. It is almost certain that these examples are authentic Scaevola, not least because the language used by the author to

⁹⁹ C.4.32.17 (Philipp. A. et Philipp. C. Aurelio Euxeno); C.4.32.14 (Alex. A. Aurelio Arcasiani).

¹⁰⁰ Gofas, 'Encore une fois', 261; Éva Jakab, 'Horrea, sûretés et commerce maritime dans les archives des Sulpicii', in *Inter cives necnon peregrinos: Essays in Honour of Boudewijn Sirks*, ed. Jan Hallebeek et al. (Göttingen: V&R Unipress, 2014), 338.

¹⁰¹ *Infra*, 105 *et seq.*

describe the activities of the athlete is almost identical to that used by Quintilian on the same subject.¹⁰² Both these arrangements are analogous to agreements involving *pecunia traiecticia*: a person had been given money to fund an enterprise, on condition that he would be obliged to make a return if the venture was successful.

As with several of the other loans we have seen those given to the fisherman and the athlete appear to be gratuitous. In light of the loan structures examined above, however, there are two likely possibilities. In the first place, it is possible that the yield was capitalised and therefore concealed in the obligation to pay the principal. The other possibility, which has been suggested by Arangio-Ruiz, is that the fisherman and the athlete provided the creditor with a *quid pro quo*, either wholly or partly in place of the yield.¹⁰³ In my view, this is the more likely structure for the examples given here. As Marzano has shown, there is ample evidence for fishing activity on a substantial scale in the Roman world. Moreover, the significant capital investment required to finance the purchase of nets, traps, and other equipment was probably provided by wealthy individuals.¹⁰⁴ Though we do not have any direct evidence of how these arrangements were structured, it is certainly possible that, rather than demanding a fixed yield on the sum lent, the creditor might have agreed, for example, to share in the catch or the profits made from any fish that were sold. Turning to the athlete, again it appears likely that a *quid pro quo* was involved. As Jakab has suggested, it was common in the Hellenic and Roman period for

¹⁰² Quint. *Inst.* 12.10. According to Noodt, *exhibere* in this context is synonymous with *alere*, i.e., to nourish oneself with a healthy diet: *De foenore et usuris libri tres: in quibus multa juris civilis, aliorumque veterum scriptorum loca, aut illustrantur aut emendantur* (Lugdunum Batavorum: Fredericum Haaring, 1698), II.7. On the financing of sport and its legal implications in ancient Rome, Andreas Wacke, 'Athleten als Darlehensnehmer nach römischem Recht', *SDHI* 44 (1978): 439–52; Eugenia Franciosi, 'Gloriae et virtutis causa: status sociale e giuridico degli atleti nel mondo romano', in *Studi per Giovanni Nicosia*, vol. 3 (Milan: Giuffrè, 2007), 437–68; and Éva Jakab, 'Sponsoren und Athleten im römischen Recht: Das "Ausbildungsdarlehen" der Athleten?', in *Sport und Recht in der Antike*, ed. Kaja Harter-Uibopou and Thomas Kruse (Vienna: Holzhausen Verlag, 2014), 249–73.

¹⁰³ Arangio-Ruiz, *Lineamenti*, 85.

¹⁰⁴ Annalisa Marzano, *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (Oxford and New York: Oxford University Press, 2013), 266; and on fishing equipment, Tønnes Bekker-Nielsen, 'Nets, Boats and Fishing in the Roman World', *Classica et Mediaevalia: Revue Danoise de Philologie et d'histoire* 53 (2002): 215–33.

wealthy citizens to sponsor athletes in competitions and events.¹⁰⁵ In return for the loan, the athlete performed under the name of his (or her) sponsor, whose association with a winning competitor enhanced their social prestige. Perhaps in some cases the sponsor might also have claimed a share of the winnings.

Summary of 3.1.1.2:

It is my submission that all or part of the yield in SB III 7169 is likely to have been offered in the form of a *quid pro quo*. It is also my view that the arrangement documented in *TPSulp.* 78 involved the replacement, either whole or in part, of a financial yield by the provision of services. Finally, there are good reasons to believe that the loans described by Q. Cervidius Scaevola in D.22.2.5 contained an element of *quid pro quo*. In sum, these arrangements are consistent with the first maritime loan structure spoken to by the *naukleroi* in Nov. 106: i.e., of money lent in return for the combination of a financial yield and the provision of a *quid pro quo*. This second type of loan demonstrates a high degree of integration between financing arrangements and the other relationships that were essential to the conduct of a maritime enterprise.

3.1.2 Conclusion.

In Part I, I argued that Nov. 106 is good evidence for the proposition that there were customarily two ways structuring maritime loan agreements during the Roman period. According to one method, the money was lent at the creditor's risk in return for a fixed yield, typically of one-eighth of the sum lent. According to the other method, part of the financial yield was forgone in favour of a *quid pro quo*, which ordinarily consisted of services offered by the carrier in addition to his payment of duties on the lender's goods.

In Part II, I examined the typical structure of maritime loans in which the yield was purely financial. In SB VI 9571 (second century CE), I argued that a maritime loan for 7 talents had been given on the expectation of a yield of almost precisely one-eighth of the principal (i.e., 5,160 drachmas). I also suggested, as appears to have been the case in the Sulpician loans (first

¹⁰⁵ Jakob, 'Sponsoren und Athleten', 267.

century CE), that the yield was 'capitalised' to create a single obligation on the part of the borrower to return the whole amount of the debt. Turning to the juristic sources, I relied upon Verboven's hypothesis to argue that this was sometimes achieved by the method of paying the yield upfront (i.e., as 'future interest'). I then demonstrated that there is evidence to suggest that this was also the method used in the so-called Callimachus loan (second century CE).

In Part III, I examined the structure of (maritime) loans in which all or part of the yield was demanded in the form of a *quid pro quo*. In SB III 7169 (Ptolemaic Alexandria, second century BCE), I set out the reasons for believing that the yield at least partly consisted of either a share in the profits of the enterprise and/ or the provision of services by the borrowers. Again, in *TPSulp.* 78 I argued that the carrier (Menelaos) offered his services either wholly or partly in place of the financial yield. Finally, in D.22.2.5 I suggested that the analogous cases of the fisherman and the athlete were probably also examples of loans given in return for a *quid pro quo*.

I conclude this section with an observation made by Arangio-Ruiz in 1928. Shortly after the publication of SB III 7169 by Wilcken, the jurist wrote that Archippos' loan was:¹⁰⁶

...the paradigm of a second type of contract, practiced equally by the navigators of the Mediterranean basin and received, together with the more usual type, into the *ius gentium* of the Romans. If some fortunate Egyptian discovery, or – better yet – one made in the marvellous Vesuvian region... sheds new light on the maritime law of the ancients, we will be able to mark in more precise and lasting terms the structure of the business arrangements of which the Alexandrian papyrus [SB III 7169] and the passage authored by Scaevola [D.22.2.5] give us some glimpses.

Arangio-Ruiz died in 1964, shortly after the discovery of the archive of the Sulpicii. It is my submission that the great Italian glimpsed what, I suggest, can now be more firmly established in light of *TPSulp.* 78: that there were customarily two ways of structuring a maritime loan, just as the Constantinopolitan *naukleroï* attested.

¹⁰⁶ Arangio-Ruiz, *Lineamenti*, 85.

Section 3.2: *Pecunia traiectica*: The Legal Sources.

From the survey of the evidence conducted in the last section, it is apparent that contracts involving loans of travelling money typically possessed some or all of the following features:

- i) One party putting loan capital at the disposal of another;
- ii) A return that was either financial, a *quid pro quo*, or a combination of both;
- iii) If all or part of the return was financial, a yield that was capitalised or expressed as a stipulation (or pact) for interest. Equally, if the return was a *quid pro quo*, the terms of performance could be set out in the freight contract;
- iv) A condition that repayment of the whole debt was contingent upon the safe arrival of the ship at its destination. If this was agreed, it followed that: a) the due date was uncertain, so that the yield would be calculated as a fixed proportion of the sum lent; and b) the risk would be shouldered by the lender for the duration of the voyage;
- v) An itinerary with instructions for the borrower to perform either a single or return trip. There might also be time limits within which he was expected to complete certain legs of the journey;
- vi) A stipulation for the services of the lender's representative, which usually included a penalty for delayed repayment; and,
- vii) Security over the cargo, and possibly also over the ship or landed property.

Owing to Pontoriero's recent and thorough study of the subject, a complete exegesis of all the legal sources bearing upon loans of *pecunia traiectica* will not be attempted here.¹⁰⁷ Rather, the aim of this section will be limited to an analysis of the juristic treatment of penalties and interest in light of the structures argued for above.

¹⁰⁷ Pontoriero, *Il prestito marittimo*.

3.2.1 Penalties: Function, Structure, and Operation.

In general, the Republican and high-classical sources focussed on questions arising in connection with stipulations and the debtor's default (i.e., questions of enforcement).¹⁰⁸ Both Labeo and Africanus state that it was usual (*uti solet/uti adsolet*) for the debtor to promise a penalty in connection with a maritime loan.¹⁰⁹ According to the latter, the penalty was normally introduced into the stipulation for the services of the lender's representative for failing to perform by a certain date. This, as it happens, is how the (crypto-)penalty was framed in Scaevola's account of the loan agreement in D.45.1.122.1: if Callimachus failed to leave Brindisi by 13 September he promised to repay the whole amount of the debt early and pay for Eros to take the money to Rome.¹¹⁰

So far as the opinions of the earlier jurists have survived, they concentrated on the circumstances in which the debtor would be held in default. Ulpian, for example, reported an opinion of Servius that the creditor would be refused an action for the payment of a penalty if it was his fault that repayment of the loan was not accepted within the prescribed time.¹¹¹ Two opinions attributed to Labeo also bear on the matter.¹¹² In the first, the Augustan jurist considered the legal mechanisms by which a debtor could be formally placed *in mora*, after

¹⁰⁸ Arnaldo Biscardi, 'La double configuration de la clause pénale en droit romain', in *De iustitia et iure. Festgabe für Ulrich von Lübtow zum 80. Geburtstag*, ed. Manfred Harder and Georg Thielmann (Berlin: Duncker & Humblot, 1980), 261.

¹⁰⁹ D.22.2.9 (Lab. 5 *pith. a Paulo epit.*); D.44.7.23 (Afr. 7 *quaest.*).

¹¹⁰ D.45.1.122.1 (Scaev. 28 *dig.*); also D.22.2.4.1 (Pap. 3 *resp.*).

¹¹¹ D.22.2.8 (Ulp. 77 *ad ed.*); also, D.4.8.40 (Pomp. 11 *ex var. lect.*), which contains a general restatement of the rule. On both texts, David Daube, 'Condition Prevented from Materializing', *TvR* 28 (1960): 280; Salvatore Riccobono Jr., 'Profilo storico della dottrina della mora nel diritto romano', *AUPA* 29 (1962): 154–62; Alan Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Oxford University Press, 1965), 2; Amalia Sicari, *Pena convenzionale e responsabilità* (Bari: Cacucci, 2001), 337–45; Massimo Miglietta, 'Servius respondit'. *Studi intorno a metodo e interpretazione nella scuola giuridica serviana. Prolegomena I* (Trento: Università degli Studi di Trento, 2010), 449–50; Pontoriero, *Il prestito marittimo*, 107–8.

¹¹² D.22.2.9 (Lab. 5 *pith. a Paulo epit.*); also, D.22.2.2 (Pomp. 3 *ex Plaut.*). Some scholars have argued that the texts originally belonged to the same passage: Arnaldo Biscardi, 'La struttura classica del "fenus nauticum"', in *Studi in memoria di Aldo Albertoni*, ed. Pietro Ciapessoni, vol. 2 (Padua: CEDAM, 1937), 359; also, *Actio pecuniae traiecticiae*, 30–31, note 1; Purpura, 'Ricerche', 312; Vincenzo Giuffrè, "'Faenus" e intraprese commerciali', *Seminarios complutenses de derecho romano* 7 (1995): 152 and note 49; though cf. Sicari, *Pena convenzionale e responsabilità*, 251 and 268, note 69; and Jan Dirk Harke, *Mora debitoris und mora creditoris im klassischen römischen Recht* (Berlin: Duncker & Humblot, 2005), 53–54, note 11.

which time he would be liable to pay all the stipulated penalties and costs.¹¹³ Ordinarily, the creditor would be able to serve notice (an *interpellatio*) on the debtor that (notwithstanding any customary grace period) his time for repayment had expired. If, however, there was no one to whom notice could be served (for example, if the borrower was still at sea after the term of the loan had passed), it was Labeo's view that a *testatio* – i.e., a ceremony performed in front of witnesses – would have the same legal effect. It was also his 'plausible view' that even if no one was alive who owed the money at the time agreed for its repayment, the penalty would fall due as if there was an heir (*ac si fuisset heres debitoris*).¹¹⁴ The interpretation of this 'fiction' depends upon whether Labeo considered the *hereditas* to be *vacans* or *iacens*. If, as Pontoriero has observed, the majority view that the inheritance should be interpreted as *iacens* is correct, then the fiction was that the debtor's heir had already accepted the inheritance on the date the loan fell due, which meant that the penalty could run from that time.¹¹⁵

How were these penalties structured? The starting point here is that in several juristic texts penal stipulations made in connection with loans of *pecunia traiectica* are considered alongside penalties promised by the parties to an arbitration for failure to abide by the award.¹¹⁶ As Biscardi pointed out, this indicates that the *stipulatio poenae traiecticae pecuniae causa* was typically – to use the modern terminology – a non-genuine, or independent, penalty, like its counterpart the *poena ex compromisso*.¹¹⁷ In short, this meant that the obligation it generated was not in any way connected to the principal obligation

¹¹³ D.22.2.2 (Pomp. 3 *ex Plaut.*): on which, Heinrich Siber, 'Interpellatio und Mora', ZSS 29 (1908): 98–99; Hans Ankum, 'Some Aspects of Maritime Loans in Old-Greek and in Roman Law', in *Timai Iōannou Triantaphyllopoulou* (Athens: Ant. N. Sakkoula, 2000), 304; Pontoriero, *Il prestito marittimo*, 119–21. Cf. Bas. 53.5.2, in which the rule is restated.

¹¹⁴ D.22.2.9 (Lab. 5 *pith. a Paulo epit.*). For a similar line of reasoning, D.4.8.27.1 (Ulp. 13 *ad ed.*): on which, Peter Stein, 'Roman Arbitration: An English Perspective', *Israel Law Review* 29 (1995): 223–24.

¹¹⁵ On the whole question, Pontoriero, *Il prestito marittimo*, 115–19; cf. Sicari, *Pena convenzionale e responsabilità*, 254–55.

¹¹⁶ D.3.5.12 (Paul. 9 *ad ed.*); D.15.1.3.8 (Ulp. 29 *ad ed.*); D.44.7.23 (Afr. 7 *quaest.*).

¹¹⁷ Biscardi, 'La double configuration', 263.

of the debtor to perform. Paul, for example, described the operation of independent penalties as follows:¹¹⁸

Si ita stipulatus sim: 'si fundum non dederis, centum dare spondes?' sola centum in stipulatione sunt, in exsolutione fundus.

If a person promised to pay 100 if he did not transfer a *fundus*, only the penalty was owed, there being no obligation to perform the act upon which the penalty was conditional. If, however, the debtor did hand over the estate, this would be sufficient to discharge the obligation to pay the penalty. With this in mind, Biscardi suggested that penal stipulations in loans of *pecunia traiectica* may have taken the following form:¹¹⁹

si ad diem pecunia, ut inter eos convenit, salva nave soluta non erit, sestertium tot milia poenae nomine dari stipulatus est L. Titius promisit C. Seius.

The question that arises concerns the functions that these penalties served in relation to each of the loan structures argued for above. In general, as Zimmermann has outlined, penal stipulations served three main functions.¹²⁰ First, they provided for the straightforward assessment of damages. This was especially important where the principal obligation was for the debtor to do something for the creditor (*facere*) or to hand over *certa res*. In both these cases the assessment of damages – which had to be pecuniary – was at the judge's discretion. The existence of a penal clause, however, established the value of performance and therefore obviated the need to adduce evidence, enabling the creditor to recover more safely, swiftly, and completely.

The second main function of penal stipulations was to place the debtor *in terrorem*, and so to create an incentive for him to perform according to the terms of the agreement. Recalling the Callimachus loan, for instance, the borrower's promise to pay back the whole debt early if he failed to leave Brindisi by a certain date was partly intended to incentivise him to do so.

¹¹⁸ D.44.7.44.5 (Paul. 74 *ad ed.*). On the distinction between genuine and non-genuine penalties, Reinhard Zimmermann, 'Stipulatio Poenae', *South African Law Journal* 104, no. 3 (1987): 401–6; also, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990), 98–102.

¹¹⁹ Biscardi, 'La double configuration', 262.

¹²⁰ Zimmermann, 'Stipulatio Poenae', 399–401; *The Law of Obligations*, 95–97.

Finally, the third main function was to provide for the indirect enforcement of unenforceable acts. The problem here was that, owing to the *omnia condemnatio pecunia* rule, it was not possible to condemn the defender if the value of his performance to the pursuer was not financially quantifiable. It was therefore common for the person seeking to secure the other party's performance to circumvent this issue by stipulating for a penalty that specified its value in pecuniary terms. Q. Cervidius Scaevola, in the fragment immediately following the Callimachus loan, gave an example of stipulations of this kind:

D.45.1.122.2 (Scaev. 28 *dig.*):

Flavius Hermes hominem Stichum manumissionis causa donavit et ita de eo stipulatus est: "si hominem Stichum, de quo agitur, quem hac die tibi donationis causa manumissionisque dedi, a te heredeque tuo manumissus vindictaque liberatus non erit, quod dolo malo meo non fiat, poenae nomine quinquaginta dari stipulatus est Flavius Hermes, spondit Claudius". quaero, an Flavius Hermes Claudium de libertate Stichi convenire potest. respondit nihil proponi, cur non potest...

In this case, Scaevola described how a certain Flavius Hermes had gifted a slave to Claudius for the purpose of manumission and had stipulated for a penalty of fifty if he or his heirs failed to manumit. When asked about the enforceability of the stipulation, Scaevola apparently responded that there was nothing in the facts to suggest that Flavius Hermes could not collect the penalty if Claudius (or his heirs) neglected to free the slave.¹²¹

Exegesis of D.22.2.5 (Scaev. 6 *resp.*):

The operation of penal stipulations performing this third function was further explored by Scaevola in a text included by the compilers in the *Digest* title on *faenus nauticum*:

[pr.] Periculi pretium est et si condicione quamvis poenali non exsistente recepturus sis quod dederis et insuper aliquid praeter pecuniam, si modo

¹²¹ This response was considered interpolated by Michel Alliot: 'D., XLV, 1, 122, § 2, et la date des Digesta de Cervidius Scaevola', *RHD* 30 (1953): 561–62; cf. Rolf Knütel, *Stipulatio poenae: Studien zur römischen Vertragsstrafe* (Cologne and Vienna: Böhlau, 1976), 172–74.

in <aleae>¹²² speciem non cadat: veluti ea, ex quibus <condictiones>¹²³ nasci solent, ut 'si <non>¹²⁴ manumittas', 'si non illud facias', 'si non convaluero' et cetera. nec dubitabis, si piscatori erogaturo in apparatus plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si vicisset, redderet. [1] In his autem omnibus et pactum sine stipulatione ad augendam obligationem prodest.

Before anything can be said about this text at all, it will be evident from the reproduction given above that it suffers from considerable uncertainty about its form.¹²⁵ I have therefore indicated those words on the identity of which the manuscript tradition differs, notwithstanding that one of the emendations depends upon a suggestion made by Cujas on the basis of a manuscript now lost.¹²⁶ To compound this uncertainty, the text has been considered heavily interpolated, and it is possible that it is not in its original form.¹²⁷ This may be due not only to interventions made by the compilers, but also by postclassical editors of the text. According to Schulz, Scaevola's *responsa* were first edited and published in the third century CE, probably under the title *digesta*, only to be abridged again in the fourth century and published as the *responsorum libri vi*.¹²⁸ It therefore makes little difference whether a text was attributed by the compilers to Scaevola's *digesta* or *responsa*: both were edited collections of

¹²² aleae] *FV*^a, alie *P*^a, aliam *P^bV^bU*: μόνον μέντοι μη ἐπὶ κόπτῳ *B*.

¹²³ condictiones] ἐξ ὧν ἀρμόξει *condicticios B*, *condiciones F*: following Pontoriero, *Il prestito marittimo*, 81–82 and notes 25–27. Noodt observed that the subject of nasci is more likely to be a *condictio* than a *condicio*: *De foenore et usuris libri tres*, 134. Litewski suggested that *condiciones* was a copyist's error: 'Römisches Seedarlehen', *IURA* 24 (1973): 161, note 224. This may be correct in light of D.39.6.35.3 (Paul. 6 *ad l. lul. et Pap.*), for which the Florentine ms. also has *condicio* where Mommsen prefers *condictio*.

¹²⁴ si non manumittas] *Cuiacius*: ἵνα μη ἐλεγθερώσης *B*, si manumittas *libri nostri*.

¹²⁵ The Dutch jurist Cornelis van Eck (1662–1732) included the text in his doctoral work *De septem damnatis legibus Pandectarum seu crucibus jurisconsultorum*: on which, G. C. J. Van den Bergh, *Die holländische elegante Schule: ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500–1800* (Frankfurt: Klostermann, 2002), 178–79.

¹²⁶ On this, Huvelin, *Droit commercial romain*, 99.

¹²⁷ Salvatore Riccobono, 'Stipulatio ed instrumentum nel Diritto giustiniano', *ZSS* 43 (1922): 358; also, *Corso di diritto romano: stipulationes, contractus, pacta* (Milan: Giuffrè, 1935), 411–13; Huvelin, *Droit commercial romain*, 107; Arangio-Ruiz, *Lineamenti*, 85, note 2; Fritz Schwarz, *Die Grundlage der Condictio im klassischen römischen Recht* (Münster: Böhlau, 1952), 263. Litewski maintained the examples as genuine, while suggesting that they were originally placed in a different context: 'Römisches Seedarlehen', 163.

¹²⁸ Fritz Schulz, *History of Roman Legal Science* (Oxford: Oxford University Press, 1946), 232–33; also, 'Überlieferungsgeschichte der Responsa des Cervidius Scaevola', in *Symbolae Friburgenses in honorem Ottonis Lenel* (Leipzig: Tauchnitz, 1931); and Samter, 'Das Verhältnis'.

replies given, but not published, by the jurist during the second century CE. Finally, to complicate matters yet further, several scholars have argued that the fragment was probably derived from a book of the Scaevola's *quaestiones*, and that its attribution to his *responsa* was an error.¹²⁹ However, the attribution is probably correct, not least on account of its paligenetic environment. Among the four other excerpts from the same book grouped by Lenel, some address the common theme of financial transactions, of which a few are directly concerned with either conditions or pacts.¹³⁰

In light of all this, the most effective way to proceed is to treat the text as it stands, and to leave any conclusions about its likely classical content to the end. This is best achieved by treating the passage in parts:

Periculi pretium est... et cetera...

The construction *periculi pretium est* is a possessive genitive, so that the phrase literally translates as 'the price is of the risk', or, to rephrase, 'the risk has a price'. Two questions arise: first, what is the 'risk'? And second, what is the 'price'? On the first point, as MacCormack has shown, the word '*periculum*' generally carries the meaning of 'chance of loss' in Roman juristic writing.¹³¹ Here, it emerges that the chance of loss is an inherent feature of the kind of transactions under discussion. These, says Scaevola, are those from which *condictiones* usually arise, which are characterised by the inclusion of conditions such as 'if you do not manumit', 'if you do not do that', and 'if I do not get well'.

To take the first example, the expression '*ut... manumittas*' appears in fifteen different texts in the *Digest*.¹³² According to Paul, an agreement to manumit a

¹²⁹ Huvelin, *Droit commercial romain*, 98, note 1 and 107-8; also, Julia Maria Gokel, *Sprachliche Indizien für inneres System bei Q. Cervidius Scaevola* (Berlin: Duncker & Humblot, 2014), 305-6.

¹³⁰ Otto Lenel, *Palingenesia iuris civilis*, vol. 2 (Leipzig: Tauchnitz, 1889), 315-16, nos. 310-14. D.35.2.27 (Scaev. 6 *resp.*) and D.46.1.63 (Scaev. 6 *resp.*) are concerned with pacts and conditions: Jakab, 'Sponsoren und Athleten', 261-62.

¹³¹ Geoffrey MacCormack, 'Periculum', *ZSS* 96 (1979): 129-72; also, 'Further on "Periculum"', *BIDR* 82 (1979): 11-37.

¹³² In the titles *de pactis* – D.2.14.7.2 (Ulp. 4 *ad ed.*); *de condictione causa data causa non secuta* – D.12.4.3.1, 2, and 3 (Ulp. 26 *ad ed.*); *de praescriptis verbis et in factum actionibus*

slave could not give rise to a *locatio conductio*, and instead fell to be classified as a transaction of the kind ‘*do ut facias*’ (‘I give so that you may do’).¹³³ The second example – ‘if you do not do that’ – is simply a generalisation of the first. If we interpret the third – ‘if I do not get well’ – as consistent with the two preceding examples, then the arrangement seems to be one in which a person had agreed to help another recover from ill health.¹³⁴ If the sick person did not get better, then the helper would be obliged to pay a penalty.

The orthodox position at civil law was that such an agreement was not directly enforceable because the pursuer’s *interesse* in the debtor’s performance was unquantifiable.¹³⁵ In other words, these were the kinds of agreements for which penal stipulations serving the third of Zimmermann’s functions were indispensable. It gradually came to be recognised, however, that agreements that fell outside the boundaries of the contractual system were nevertheless enforceable in their own right.¹³⁶ A glance across the fifteen texts in which agreements to manumit are discussed indicates that there is, superficially at least, a connection between conditions of the kind ‘*ut... manumittas*’ and recovery by means of both the *condictio ob rem dati* and the *agere praescriptis verbis*.¹³⁷ Indeed, it is clear from the texts in book 12 of the *Digest* that an agreement in which one person paid another to manumit a slave would be a

– D.19.5.5.2 (Paul. 5 *quaest.*) and D.19.5.7 (Pap. 2 *quaest.*); and *de nautico faenore* – D.22.2.5 (Scaev. 6 *resp.*): Jakob, ‘Sponsoren und Athleten’, 264.

¹³³ D.19.5.5.2 (Paul. 5 *quaest.*). Schwarz alleged that the text was probably transmitted in a revised form: *Condictio*, 139; cf. Geoffrey MacCormack, ‘Contractual Theory and the Innominate Contracts’, *SDHI* 51 (1985): 146. Lenel placed the text under the proposed heading ‘*Empti venditi*’ and immediately after D.2.14.43 (Paul. 5 *quaest.*), which introduces the problem of contracts where the role of the parties is not instantly apparent: *Palingenesia iuris civilis*, vol. 1 (Leipzig: Tauchnitz, 1889), 1194–95, no. 1322.

¹³⁴ Jacques Cujas, *Praeclarissimi, observationum et emendationum libri XXVIII: quibus multa in lure corrupta et non intellecta restituuntur* (Coloniae Agrippinae: Gymnicus, 1598), 386. Cf. Huvelin, *Droit commercial romain*, 101; Litewski, ‘Römisches Seedarlehen’, 162; Biscardi, *Actio pecuniae traiecticiae*, 88; Pontoriero, *Il prestito marittimo*, 86.

¹³⁵ Zimmermann, ‘Stipulatio Poenae’, 401–2.

¹³⁶ For the course of this development, Roberto Fiori, ‘Rise and Fall of the Specificity of Contracts’, in *Nova Ratione: Change of Paradigms in Roman Law*, ed. Adriaan J. B. Sirks (Wiesbaden: Harrassowitz Verlag, 2014), 46–48.

¹³⁷ According to Schwarz, the expressions *causa data causa non secuta* and *ob causam datorum*, which are used for the titles of D.12.4 and C.4.6 respectively, are Justinianic. The classical jurists used expressions such as ‘*ob rem dare*’, ‘*dare ob causam*’, and *condictio ‘re non secuta*’: *Condictio*, 117.

valid ground for bringing the *condictio ob rem dati*.¹³⁸ Papinian clarified when each of these actions might be used, again in the context of a payment made for the manumission of a slave.¹³⁹ In these circumstances, the *agere praescriptis verbis* would be appropriate if the pursuer wished to recover his *interesse* (i.e., damages to the extent of his interest in the other party's performance); the *condictio* when the objective was simply to recover the original object or payment.¹⁴⁰

The problem settled upon by Scaevola was therefore the relationship between the *agere praescriptis verbis* and any penalties that had been agreed upon by the parties. His reply is best set against the backdrop of another text, in which Julian reported an opinion of Urseius Ferox (first century CE):

D.19.1.28 (Iul. 3 *ad Urs. Ferozem*):

Praedia mihi vendidisti et convenit, ut aliquid facerem: quod si non fecissem, poenam promisi. respondit: venditor antequam poenam ex stipulatu petat, ex vendito agere potest: si consecutus fuerit, quantum poenae nomine stipulatus esset, agentem ex stipulatu doli mali exceptio summovebit: si ex stipulatu poenam consecutus fueris, ipso iure ex vendito agere non poteris nisi in id, quod pluris eius interfuerit id fieri.

Although the text has frequently been assailed, I agree with Thomas that its substance is authentic.¹⁴¹ The facts were that land had been sold in return for the buyer's undertaking to perform some act (*aliquid facere*), failing which he had promised to pay a penalty (*quod si... poenam promisi*). According to Julian, Urseius Ferox held that the seller could proceed both *ex stipulatu* (for the penalty) and *ex vendito*.¹⁴² If, *inter alia*, he proceeded *ex stipulatu* first, he was only entitled to recover *ex vendito* to the extent that his *interesse*

¹³⁸ D.12.1.19 pr. (Iul. 10 *dig.*); D.12.4.1 pr. (Ulp. 26 *ad ed.*); D.12.4.3.2-4 (Ulp. 26 *ad ed.*); D.12.4.5.1-4 (Ulp. 2 *disp.*); on which, Detlef Liebs, 'Bereicherungsanspruch wegen Mißerfolgs und Wegfall der Geschäftsgrundlage', *JuristenZeitung* 33, no. 21 (1978): 698; also, Geoffrey MacCormack, 'The condictio causa data causa non secuta', in *The Civil Law Tradition in Scotland*, ed. Robin Evans-Jones (Edinburgh: The Stair Society, 1995), 253–76.

¹³⁹ D.19.5.7 (Pap. 2 *quaest.*).

¹⁴⁰ MacCormack, 'Condictio causa data', 254; Robin Evans-Jones, 'The Claim to Recover what was Transferred for a Lawful Purpose Outwith Contract (condictio causa data causa non secuta)', *Acta Juridica*, 1997, 139, note 2.

¹⁴¹ J. A. C. Thomas, 'Concurrence of Actions with Actio Pro Socio', *Irish Jurist* 7 (1972): 153.

¹⁴² David Daube, 'Certainty of Price', in *Studies in the Roman Law of Sale*, ed. David Daube (Oxford: Clarendon Press, 1959), 33–34.

exceeded the sum already obtained. In other words, as Mackintosh observed, the penalty was not considered conclusive of the measure of damages, and any deficiency in the amount recovered could be sought by resorting to the *bonae fidei iudicium*.¹⁴³

In this light, Scaevola's response was as follows. The *periculum* to which he referred was precisely the chance of loss inherent to agreements *do ut facias*; sc., that the person who gave would not be able to enforce performance because he could not establish the extent of his pecuniary interest. Correspondingly, the *pretium* was the penalty that the other party typically promised to pay if he failed to perform. Scaevola's opinion was therefore that: where the risk (i.e., of the debtor's non-performance) had a price (i.e., a penalty attached), and provided the agreement was not aleatory (and therefore *contra legem*), the person who gave could recover what he had given as well as his *interesse*, notwithstanding the (non-)fulfilment of any penal condition.¹⁴⁴ In other words, Scaevola considered the applicability of the *condictio ob rem dati* and *agere praescriptis verbis* to be independent of the fulfilment or otherwise of any connected penalties, in the same way that Urseius Ferox considered the *actio venditi* to lie independently from the *actio ex stipulatu*.

nec dubitabis... redderet.

The connection of the reply to loans of *pecunia traiecticia* emerges from the second part of the *principium*. The words '*nec dubitabis*' connect this section with the last and indicate that the examples involving the fisherman and the athlete are also arrangements from which *condictiones* arise.¹⁴⁵ In the first, a fisherman is given money to purchase equipment on condition that if he makes a catch he will repay it. In the second, a sponsor funds an athlete's training,

¹⁴³ James Mackintosh, *The Roman Law of Sale* (Edinburgh: T. & T. Clark, 1892), 198–99.

¹⁴⁴ Paul reports that aleatory agreements had been forbidden by a *senatusconsultum*: D.11.5.2.1 (Paul. 19 *ad ed.*). For a short definition, Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1953), 359, s.v. 'alea'.

¹⁴⁵ Gokel, *Sprachliche Indizien*, 317, note 1412. For debates concerning the authenticity of the expression '*nec dubitabis*' and the classicity of the whole section, Litewski, 'Römisches Seedarlehen', 163–64, note 236. Riccobono considered *nec dubitabis* to be interpolated for the reason that the classical jurists seldom address the reader in the second person singular: 'Stipulatio ed instrumentum', 358.

subject to the condition that the athlete will only repay the money if he is victorious. Both these arrangements are analogous to agreements involving *pecunia traiecticia*: a person had been given money to fund an enterprise, on condition that he would be obliged to make a return if the venture was successful.

These arrangements are a development on those addressed in the first part of the passage. At base, they are agreements *do ut facias* insofar as they involve money being transferred on the expectation that the debtor will apply it to an agreed purpose (e.g., buying fishing equipment). In these examples, however, the money was intended as a loan, the return of which was conditional on the success of the enterprise. This raised the problem that, because the debtor's obligation to repay was contingent upon the occurrence of an uncertain event, it was not possible to establish the *interesse* of the person giving the loan in the debtor's performance. The problem that remained was therefore precisely the one that marked out these bargains from the start; namely, that because the first party's *interesse* was unquantifiable the recipient's performance could not be enforced, so that in the absence of a penal stipulation the lender did not have an effective remedy. Scaevola therefore extended the opinion put forward in the first part of the *principium* to these transactions as well by interpreting them as innominate contracts of the kind *do ut facias*.

in his autem... obligationem prodest.

In light of the foregoing, the final part of the fragment can be dealt with briefly. Here, Scaevola asserted that in all these cases a pact would be sufficient to add to the obligation without the need for a stipulation. In other words, if a person brought the *agere praescriptis verbis*, the *intentio* of which was framed *incerta* and *ex fide bona*,¹⁴⁶ the amount agreed upon by way of a penalty could supplement the pursuer's *interesse*. This was especially crucial if his *interesse* was otherwise unquantifiable, so that the penalty effectively defined the value of the obligation to the parties. Turning back finally to the documentary

¹⁴⁶ Lihong Zhang, *Contratti innominati nel diritto romano: impostazioni di Labeone e di Aristone* (Milan: Giuffrè, 2007), 207; Fiori, 'Rise and Fall', 36–37.

evidence, the relevance of this legal discussion is clear: neither SB VI 9571 nor *TPSulp. 78* show any evidence of a stipulation having been concluded, despite the parties to both transactions operating in the shadow of Roman legal institutions.

3.2.2 Interest and *periculum creditoris*.

One question that has attracted the attention of Romanists for some considerable time has been whether the assumption of the risk by the lender was essential to the formation of a maritime loan.¹⁴⁷ The prevailing opinion until the middle of the first half of the twentieth century was that the assumption of the risk by the creditor was essential.¹⁴⁸ De Martino, however, challenged this view, and sought to demonstrate that *periculum creditoris* was – in Roman law – incidental to the contract.¹⁴⁹ Following De Martino, a number of authors offered variations of this position: Kupiszewski argued that the obligation of the borrower to pay interest was essential while the assumption of risk by the lender was not;¹⁵⁰ Litewski, meanwhile, proposed that the sources diverge according to the cultural background of the jurist who authored the text.¹⁵¹ Others straightforwardly agreed that the assumption of risk by the lender was incidental rather than essential.¹⁵² On the other hand, the majority of scholars have continued to assert that *periculum creditoris* was essential to the Roman maritime loan, and this has again become the dominant view.¹⁵³

¹⁴⁷ For a review of the literature, Pontoriero, *Il prestito marittimo*, 37–38.

¹⁴⁸ See, e.g., Hermann Kleinschmidt, *Das Foenus Nauticum und dessen Bedeutung im römischen Rechte* (Heidelberg: J. Hörning, 1878), 23; and F. Klingmüller, 'Fenus', in *Paulys Real-Encyclopädie der classischen Altertumswissenschaft*, ed. August F. Pauly and Georg Wissowa, vol. 6.2 (Stuttgart: J. B. Metzler, 1909), 2202–3.

¹⁴⁹ Francesco De Martino, 'Sul foenus nauticum', *RDN* 1, no. 3 (1935): 217–47; reaffirmed in 'Ancora sul foenus nauticum', *RDN* 2, no. 4 (1936): 433–45.

¹⁵⁰ Henryk Kupiszewski, 'Sul prestito marittimo nel diritto romano classico: profili sostanziali e processuali', *Index* 3 (1972): 378.

¹⁵¹ Litewski suggested that Ulpian, Cervidius Scaevola and Modestinus considered *periculum creditoris* to be essential on account of their personal connections to the eastern Mediterranean; whereas Paul, Papinian and Diocletian (or his chancery) did not: 'Römisches Seedarlehen', 135; also, 'Bemerkungen zum Romischen Seedarlehen', in *Studi in onore di Cesare Sanfilippo*, vol. 4 (Milan: Giuffrè, 1983), 381–97.

¹⁵² Vittorio De Villa, *Le 'usurae ex pacto' nel diritto romano* (Rome: Foro italiano, 1937), 105; Ankum, 'Some Aspects of Maritime Loans', 299; though cf. 'Observations', 62. See, also, Sicari, *Penal convenzionale e responsabilità*, 231–49.

¹⁵³ Biscardi, 'La struttura classica'; also, *Actio pecuniae traiecticiae*, 119–28; Ulrich von Lübtow, 'Catos Seedarlehen', in *Festschrift für Erwin Seidl zum 70. Geburtstag*, ed. Heinz

The question, however, is predicated on the idea that the Roman jurists conceived of the maritime loan as a contractual type, the terms of which could be separated out into those that were *essentialia*, *naturalia* and *accidentalia negotii*.¹⁵⁴ It is important to acknowledge that this way of breaking down a contract into its elements is not classical in origin. The juristic texts – as Coing pointed out in relation to the law of sale, but in a way that rings true here – consist largely of practical rules for the decision of cases, connected by their association with particular edicts and *formulae*.¹⁵⁵ It was the Byzantine jurists who, in the absence of a system based on actions, developed the concept of the *natura contractus*, which united individual rules under the umbrella of contractual types.¹⁵⁶ Moreover, the demarcation of rules according to whether they were essential, natural, or incidental to a particular contract was the work of the glossators and commentators during the medieval period.¹⁵⁷ They freely adapted the Aristotelian distinction between those features of an object which were *essentiale*, *proprium* (or *naturale*), and *accidens* into a legal context.¹⁵⁸ The question posed by the scholarship is therefore anachronistic; and it is no surprise that, after the best part of a century, the texts remain irreconcilable, just as the views of scholars on opposing sides of the debate.

Hübner, Ernst Klingmüller, and Andreas Wacke (Cologne: Hanstein, 1975), 106; Amelia Castresana Herrero, *El préstamo marítimo griego y la pecunia traiectica romana* (Salamanca: Ediciones Universidad de Salamanca, 1982), 69–90; Purpura, 'Ricerche', 194 and 281–318; Giuffrè, 'Faenus', 136, note 10 and 153–54; José Luis Zamora Manzano, 'Algunas notas en relación a los antecedentes romanos del seguro marítimo como desviación de la «pecunia traiectica»', *BIDR* 39 (1997): 673; Christoph Krampe, 'Fenus nauticum', in *Der neue Pauly: Enzyklopädie der Antike*, ed. Hubert Cancik, Helmut Schneider, and August F. Pauly, vol. 4 (Stuttgart: J.B. Metzler, 1998), 471; Schuster, *Das Seedarlehen*, 188; Pontoriero, *Il prestito marittimo*, 31 and 37–67.

¹⁵⁴ Essential terms are those which are required to be agreed upon for the contract to be legally valid. They also determine the nature of the contract, and therefore the set of background rules which arise for the purpose of governing the relationship between the parties (the *naturalia negotii*). The *accidentalia negotii* are those terms which are neither essential nor natural, and which must be explicitly agreed upon in order for them to form part of the arrangement: James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press, 1991), 61.

¹⁵⁵ Helmut Coing, 'A Typical Development in the Roman Law of Sale', in *Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht, 1947-1975*, 1947-1975, vol. 1 (Frankfurt: Klostermann, 1982), 71–72.

¹⁵⁶ Coing, 72–73.

¹⁵⁷ Coing, 73–74; Zimmermann, *The Law of Obligations*, 234, note 27; Gordley, *Philosophical Origins*, 61–65.

¹⁵⁸ Coing, 'A Typical Development', 73–74; Gordley, *Philosophical Origins*, 61–65.

In my view, the texts can only be understood from the perspective of the problem faced by the lawyers themselves, which was how to reconcile their understanding of contractual practice with the state's imposition of a maximum legal limit on the rate of interest. The challenge was, in short, to identify when a transaction qualified as exempt from the maximum legal rate. This, it appears, was only considered an issue from the severan period, which is consistent with the view that the late-classical jurists paid particular attention to matters with a fiscal content.

The starting point here is to recall that, in Greek thought, a loan was considered 'maritime' if the calculation of its yield bore no relation to time-denominated interest. Further, the reason that the interest could not be figured by time, but only as a fixed proportion of the sum lent, was that the loan's due date was uncertain. In other words, a loan was 'maritime' precisely because the duty to repay was contingent upon the occurrence of an uncertain event (e.g., the safe return of the ship). In my opinion, the Roman sources invoke this tradition when they use expressions such as '*nauticum faenus*', '*usuris maritimis*', and '*pecunia nautica*'. If this is right, then even though, for example, no mention of the allocation of risk is made in the Callimachus loan, its assumption by the lender is implied by Scaevola's introduction of the arrangement as '*pecunia nautica*'.

This leaves the expression '*pecunia traiectica*'. By the time Nov. 106 was published, it is clear that the 'νόμος *traiectica*' had entirely converged with the Greek tradition. Moreover, this convergence had begun as early as the mid-third century. Modestinus, for instance, defined the meaning of the expression as follows:

D.22.2.1 (Mod. 10 *pand.*):

Traiectica ea pecunia est quae trans mare vehitur: ceterum si eodem loci consumatur, non erit traiectica. sed videndum, an merces ex ea pecunia comparatae in ea causa habentur? et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiectica pecunia fit.

Although the text has been considered interpolated, I agree with Pontoriero that – some degree of epitomisation notwithstanding – the internal logic is

coherent and shows no clear sign of having been expanded or altered.¹⁵⁹ This being accepted, the palingenetic context of the excerpt is illuminating: Lenel placed the fragment alongside a text concerned with the use of penal stipulations to evade the legal maximum rate of interest, which indicates that this excerpt was also intended to address the same issue.¹⁶⁰

The text itself sets out Modestinus' view that money counted as *traiecticia* if it was carried across the sea, and so not if it was spent in the same place. On the other hand, if the money was used to purchase goods, it would count as *traiecticia* so long as the merchandise was transported at the lender's risk. Modestinus therefore considered money to be *traiecticia* if: first, the money itself was carried overseas; or second, it was used to acquire goods that were transported at the lender's risk.¹⁶¹

Taking text and context together, the problem confronted by the jurist was that if money was spent at the place it was received, there was nothing to differentiate it from an ordinary loan and therefore no reason to exempt the transaction from the legal maximum rate of interest. His solution was to respond that only money used to acquire goods that remained at the lender's risk qualified as *traiecticia*. This achieved the convergence of the Roman concept of *pecunia traiecticia* (that is, money carried overseas) with the Greek tradition, in which the designation of a loan as 'maritime' indicated that its repayment was contingent on an uncertain event. By the second half of the third century, a fragment from the *Pauli Sententiae* shows that the convergence between the two traditions was complete:¹⁶²

¹⁵⁹ Pontoriero, *Il prestito marittimo*, 29; cf. De Martino, 'Sul foenus nauticum', 230; Biscardi, *Actio pecuniae traiecticiae*, 108, note 2; Giuffrè, 'Faenus', 147–49; also, 'Il prestito ad "interessi marittimi" nel tardo impero', in *Atti dell'Accademia romanistica costantiniana: 12. Convegno internazionale in onore di Manlio Sargenti*, ed. Giuliano Crifò and Stefano Giglio (Naples: Edizioni scientifiche italiane, 1998), 360–62.

¹⁶⁰ D.22.1.44 (Mod. 10 *pand.*): Lenel, *Palingenesia*, 1889, 1:725, nos. 135 and 136.

¹⁶¹ Emmanuelle Chevreau, 'La traiecticia pecunia: un mode de financement du commerce international', *Mémoires de la Société pour l'Histoire du Droit et des institutions des anciens pays bourguignons, comtois et romands* 65 (2008): 45–46.

¹⁶² On which, Pontoriero, *Il prestito marittimo*, 33.

PS.2.14.3:

Traiecticia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas usuras recipere potest.

At root, it was the assumption of the risk by the lender (as a result of the uncertain due date) that set 'travelling money' apart from an ordinary loan and exempted it from the legal maximum rate.¹⁶³

Two texts from the late-classical period show that this degree of convergence had not been achieved by the time of the severans.

D.22.2.6 (Paul. 25 *quaest.*):

Faenerator pecuniam usuris maritimis mutuam dando quasdam merces in nave pignori accepit, ex quibus si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum propriisque faeneratoribus obligatarum si quid superfuisset, pignori accepit. quaesitum est nave propria perempta, ex qua totum solvi potuit, an id damnum ad creditorem pertineat, intra praestitutos dies amissa nave, an ad ceterarum navium superfluum admitti possit. respondi: alias quidem pignoris deminutio ad damnum debitoris, non etiam ad creditoris pertinet: sed cum traiectica pecunia ita datur, ut non alias petitio eius creditori competat, quam si salva navis intra statuta tempora pervenerit, ipsius crediti obligatio non existente condicione defecisse videtur, et ideo pignorum quoque persecutio perempta est etiam eorum, quae non sunt amissa. si navis intra praestitutos dies perisset, et condicionem stipulationis defecisse videri, ideoque sine causa de pignorum persecutione, quae in aliis navibus fuerunt, quaeri. quando ergo ad illorum pignorum persecutionem creditor admitti potuerit? scilicet tunc cum condicio exstiterit obligationis et alio casu pignus amissum fuerit vel vilius distractum vel si navis postea perierit, quam dies praefinitus periculo exactus fuerit.

In this passage, Paul responded to a question concerning the status of rights in security in loans of travelling money. The circumstances were that a loan had been given at a maritime rate of interest (*usuris maritimis*) and secured not only against the goods in the principal vessel but also over cargo in other ships as well. In my view, Paul's use to the expression '*usuris maritimis*' immediately indicates that the loan was given at the lender's risk.¹⁶⁴ The jurist was asked

¹⁶³ The same reasoning underpins C.4.32.17 (Philipp. A. et Philipp. C. Aurelio Euxeno): on which, *supra*, 96 *et seq.*

¹⁶⁴ See, also, D.22.2.7 (Paul. 3 *ad ed.*), in which the severan jurist referred to a loan received '*cum certis usuris*'. In my view, the use of the word '*certum*' is meant to refer to the fact that the yield was calculated as a fixed proportion of the sum lent.

whether, in the event that the principal vessel perished before the expiration of the time limit, the lender would be entitled to realise the security he held in the other ships. Paul answered that if the specified ship was lost within the time limit then the condition which underpinned the borrower's obligation to repay was not fulfilled (*non existente condicione*). As a consequence, the lender was not entitled to realise his security – even over the goods in the other ships which had arrived safely – since his right to claim was accessory to the obligation of the borrower to repay.

The question that arises is, what did Paul mean by the sentence beginning '*cum traiecticia pecunia ita datur...*'? Scholars favouring the view that the assumption of risk by the lender was essential have argued that Paul intended to introduce a causal clause.¹⁶⁵ However, it is more likely that a clause leading *cum* with the indicative was meant to be temporal.¹⁶⁶ With this in mind, Paul's opinion may be given as follows: whereas a reduction in the value of security normally fell on the debtor, and so did not pertain to the creditor; when *pecunia traiecticia* was given on terms that the creditor could sue for it only if the ship arrived safely within the prescribed time (as was the case here), it appeared that the failure of the condition led to the discharge of the debt itself. Importantly, the construction '*ita... ut*' suggests an alternative: namely, that *pecunia traiecticia* might equally be given without a condition of this sort.¹⁶⁷ The

¹⁶⁵ This position is maintained by Biscardi: *Actio pecuniae traiecticiae*, 121, note 1 and 182, note 57 ('evidente il valore causale, e non temporale, del cum!'); also, 'Pecunia traiecticia', 281. Castresana Herrero has claimed that Paul uses the construction *sed cum* with the indicative in a number of other instances to denote a meaning akin to a causal clause, and also that this usage was more common in later Latin in the type of construction employed in juristic literature: *El préstamo marítimo*, 79–80.

¹⁶⁶ De Martino, 'Sul foenus nauticum', 226–27; Litewski, 'Römisches Seedarlehen', 130; also, 'rec. A. Castresana', *IURA* 34 (1983): 119. Röhle argued that Paul used the construction *sed cum* with the indicative to denote a recurring action (i.e., *cum iterativum*, in the sense of *quotiens*): 'Zum Beispiel D. 22,2,6', *SDHI* 45 (1979): 557. This view was rightly rejected by Castresana Herrero as too rigid – the usage in the texts is more flexible. However, Röhle's observation that Paul frequently uses *cum* with the subjunctive to denote the meaning '*sed si*' mitigates against the view that he intended the clause to be causal: if this was the case, we would expect *detur* rather than *datur*. On this point, Ph. Eduard Huschke, *Die Lehre des römischen Rechts vom Darlehn und den dazu gehörigen Materien: eine civilistische Monographie* (Stuttgart: F. Enke, 1882), 222, note 5; also, Ankum, 'Some Aspects of Maritime Loans', 300, note 25.

¹⁶⁷ For suggested translations see Röhle, 'Zum Beispiel D. 22,2,6', 557.

implication is that Paul understood that the parties could decide to omit the clause and instead negotiate *traiecticia pecunia sine periculo creditoris*.

D.22.2.4 (Pap. 3 *resp.*):

[pr.] Nihil interest, traiecticia pecunia sine periculo creditoris accepta sit an post diem praestitutum et condicionem impletam periculum esse creditoris desierit. utrubique igitur maius legitima usura faenus non debetur, sed in priore quidem specie semper, in altera vero discusso periculo: nec pignora vel hypothecae titulo maioris usurae tenebuntur. [1] Pro operis servi traiecticiae pecuniae gratia secuti quod in singulos dies in stipulatum deductum est, ad finem centesimae non ultra duplum debetur. in stipulatione faenoris post diem periculi separatim interposita quod in ea legitimae usurae deerit, per alteram stipulationem operarum supplebitur.

Again, although the classicity of the fragment has been impugned, the prevailing view is in favour of its authenticity.¹⁶⁸ In short, Papinian's opinion was that unlimited interest could only be demanded for the period during which the lender assumed the risk; and therefore not if the money had been given *sine periculo creditoris* or once the term of the loan had expired. The second part of the passage develops and reinforces this point. Here, the jurist stated that the rate stipulated for *operae servi* (i.e., for the services of the slave sent to accompany the loan) was not permitted to exceed the legal limit. Moreover, for the time during which the risk was on the borrower the rate for *operae servi* and any further interest on the loan itself could not exceed double this amount when combined.¹⁶⁹ The opinion therefore targeted lenders seeking to evade the interest rate cap by artificially inflating the amount charged for *operae servi*. Indeed, the discussion in D.22.2.4 pr. stands as a prelude to this more specific legal observation.

Returning to the *principium*, several scholars have had difficulty accepting Papinian's statement that *pecunia traiecticia* could be received *sine periculo*

¹⁶⁸ Kupiszewski, 'Sul prestito marittimo', 370–71; Litewski, 'Römisches Seedarlehen', 129–30; Purpura, 'Ricerche', 282; Sicari, *Pena convenzionale e responsabilità*, 240; Pontoriero, *Il prestito marittimo*, 41. Cf. De Martino, 'Sul foenus nauticum', 226 and 241, note 1; Biscardi, *Actio pecuniae traiecticiae*, 121–22.

¹⁶⁹ Billeter rightly pointed out that the phrase *non ultra duplum* is a Justinianic interpolation: *Geschichte des Zinsfusses im griechisch-römischen Altertum bis auf Justinian*, 249, note 1. See, also, De Martino, 'Sul foenus nauticum', 227; Litewski, 'Römisches Seedarlehen', 156; Purpura, 'Ricerche', 289, note 288; Ankum, 'Some Aspects of Maritime Loans', 306; and the literature cited by Pontoriero, *Il prestito marittimo*, 44, note 14.

creditoris.¹⁷⁰ A plain reading of the text, however, counts against these interpretations. Instead of trying to reconcile the statements made by Paul, Papinian, and Modestinus, the solution is to seek a reason for why they held different views. In my opinion, what we are observing is the convergence of two different traditions. On the one hand, the Roman conception of *pecunia traiectica* initially appears to have referred simply to money that was carried overseas. On the other, *pecunia nautica*, or money borrowed at ‘maritime interest’, invoked the Greek notion of a loan whose yield bore no relation to time-denominated interest. Beginning with Modestinus, these traditions were brought together, so that by the sixth century Justinian was able to explain that the δανειὸν ναυτικὸν was governed by the ‘νόμος *traiectica*’. Just as Litewski observed, the differences in the meaning of the expressions used by different jurists was therefore partly due to their cultural backgrounds, but also partly due to the convergence of these traditions over time.

Conclusion:

Merchants seeking to fund the acquisition of a cargo for transport overseas turned to financiers as a source of credit. In the context of long-distance trade, there was a tradition of maritime lending in the eastern part of the Mediterranean that can be traced back to at least late-fifth century Athens, if not to ancient Mesopotamia and Babylon.¹⁷¹ This tradition basically consisted of customs to do with, among other things: the structure of the transaction (one-way or return); the way in which interest was demanded; the amount of the yield; and grace periods for repayment on arrival. These customs appear to have continued to be observed for the duration of the Roman period and right up to the sixth century CE.¹⁷²

From a juridical perspective, the absence of any praetorian intervention (*pace* Biscardi) meant that the Roman legal authorities operated directly at the

¹⁷⁰ Purpura, ‘Ricerche’, 283; also, Pontoriero, *Il prestito marittimo*, 47.

¹⁷¹ Jean Andreau, ‘Prêt maritime’, in *Dictionnaire de l’Antiquité*, ed. Jean Leclant (Paris: Presses Universitaires de France, 2005), 1766; also, De Ste. Croix, ‘Ancient Greek and Roman Maritime Loans’, 59. Purpura has described a set of provisions in the Code of Hammurabi as ‘un remoto precedente del prestito marittimo greco’: ‘Ricerche’, 198–99.

¹⁷² Purpura, ‘Ricerche’, 235.

frontier of contractual practice. During the late Republic and classical period, the main feature that drew the jurists' attention was the penal stipulation. The early jurists (Servius and Labeo) focussed on the moment at which a debtor would be held in default and the consequences that followed. The classical jurists, most notably Q. Cervidius Scaevola, dealt with complex questions about the relationship between penalties and the underlying contract, which by the second half of the second century CE had been classified as innominate. Turning to interest, it is my view that the Roman conception of *pecunia traiectica* was not coextensive with the eastern tradition of maritime lending until Modestinus achieved their convergence in the middle part of the third century CE. If this is right, then it would indicate that contractual practice in this area was not entirely uniform, which may explain the hybrid character of transactions such as the one recorded in *TPSulp. 78*.¹⁷³ Nevertheless, there were certainly areas of significant overlap, so that by the sixth century Justinian was able to declare that maritime loans (in the Greek sense) were wholly subject to the 'νόμος *traiectica*'.

¹⁷³ Rathbone, 'Financing', 212.

CHAPTER 4

MERCHANT AND *EXERCITOR*

Once the merchant had acquired the goods his next aim was to transport them to his intended market. The two principal (groups of) actors who facilitated this objective were warehousemen and *exercitores*, who were involved in the storage and transportation of the merchandise respectively. For reasons of space, only the relationship between merchants and *exercitores* will be analysed here. To this end, the chapter will consist of three sections, concerning: i) the *actio exercitoria*; ii) the *actiones locati* and *conducti* (including a treatment of the *lex Rhodia* and an excursus on D.19.2.31); and iii) the *actiones in factum* (*de recepto*; *furti* and *damni adversus nautas*).

Section 4.1: The *actio exercitoria*.

4.1.1 The Terms of the Praetor's Edict.

The wording of the edict can be reconstructed from passages written by Gaius and Ulpian, the former of which said the following:

G.4.71:

... exercitoria locum habet, cum pater dominusve filium servumve magistrum navi praeposuerit et quid cum eo eius rei gratia cui praepositus fuerit /negotium /gestum erit. cum enim ea quoque res ex voluntate patris dominive contrahi videatur, aequissimum esse visum est in solidum actionem dari; quin etiam licet extraneum quisque magistrum navi praeposuerit, sive servum sive liberum, tamen ea praetoria actio in eum redditur...

According to Gaius, the *actio exercitoria* lay against a person who had appointed a *magister navis* with whom business was conducted in connection with the matters for which he was appointed (*cum pater... gestum erit*). Ulpian used the same language in his treatment of the edict in the 28th book of his commentary *ad edictum*, which is excerpted and reproduced as the first text in D.14.1 (*de exercitoria actione*). In this passage, the jurist proceeds to offer an interpretation of the edict's principal terms, apparently in the order in which they appeared. These were: *magister* (D.14.1.1.1-5); *navis* (D.14.1.1.6);

gestum eius rei nomine cui ibi praepositus fuerit (D.14.1.1.7-14); and *in eum qui navem exercuerit* (D.14.1.1.15-18). From this, and the preceding text by Gaius, Lenel was able to reconstruct the terms of the opening clause of the edict as follows:¹

Quod cum magistro navis gestum erit eius rei nomine, cui ibi praepositus fuerit, in eum, qui eam navem exercuerit, iudicium dabo.

Where business is conducted with a shipmaster in connection with those matters for which he was appointed, I will grant an action against the person exploiting the ship.

Having treated the opening clause of the edict, Ulpian continued by quoting the terms of a second part, seemingly verbatim. Huvelin reconstructed this clause as follows:²

Si is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium dabo.

If the person exploiting the vessel is in the *potestas* of another and is acting according to their will, where business is conducted with a shipmaster, I will grant an action against the person in whose *potestas* the person exploiting the ship is.

Together, these two clauses made up the edict underpinning the *actio exercitoria*, at least from the time of the compilation of the *edictum perpetuum* by Julian in about the middle of the second century CE.

4.1.1.1 The First Part of the Edict.

The rationale behind the edict, according to Gaius, was that just as the *actio quod iussu* made a father or master liable *in solidum* for bargains struck at his behest, so too it was entirely fair (*aequissimum*) that fathers or masters whose sons or slaves had acted *ex voluntate patris dominive* (i.e., according to the will of their father or master) should be held to the same standard.³ This, he

¹ Otto Lenel, *Das Edictum perpetuum: ein Versuch zu dessen Wiederherstellung*, 3rd ed. (Leipzig: Tauchnitz, 1927), 257–58.

² D.14.1.1.19 (Ulp. 28 *ad ed.*). The Ulpianic text is exactly the same except for the substitution of *dabo* for *datur*. Paul Huvelin, *Études d'histoire du droit commercial romain (histoire externe-droit maritime)* (Paris: Recueil Sirey, 1929), 162; also, Lenel, *EP*³, 258.

³ G.4.71. Liability *in solidum* may be understood as unlimited liability: András Földi, 'Remarks on the Legal Structure of Enterprises in Roman Law', *RIDA* 43 (1996): 188; also, Manuel Jesús García Garrido, 'Responsabilidad in solidum en la casuística de la actio exercitoria', in *Miscelánea romanística*, ed. Manuel Jesús García Garrido, Federico Fernández de

explained, was because in both cases the person dealing with the son or slave relied more on the *fides* of the person issuing the order (*iussum*) or making the appointment (*praepositio*) than on that of the son or slave actually executing the transaction.⁴ The same reasoning is at the heart of Ulpian's explanation, in which the jurist held up the edict as the fair (*aequum*) solution to the problem of having to deal with shipmasters whose status and character were unknown.⁵ This problem, he continued, was particularly acute in the context of maritime trade, where place and time did not admit of a fuller judgement about the standing of the shipmaster being arrived at.

Quod cum magistro navis...

The first question that arose with respect to the scope of the edict concerned the meaning of the expression *magister navis*. Ulpian described the *magister navis*, or shipmaster, as 'the person who is entrusted with the care of the whole ship'.⁶ The word *navis*, he continued, was held to include vessels of any size operating on the sea, on a river, or on a lake.⁷ Of all the personnel employed on board a vessel only a *magister* could bind the person exploiting the ship (i.e., the *exercitor*) in contract.⁸

According to Ulpian, both the shipmaster's status and his relationship to the *exercitor* were irrelevant so far as the edict was concerned; that is, whether he was a free person or a slave, whether of the *exercitor* or someone else, and

Buján Fernández, and Fernando Reinoso Barbero, vol. 3 (Madrid: Universidad Nacional de Educación a Distancia, 2013), 1153–64.

⁴ G.4.70-71. Solazzi considered 'in primis' and 'eadem ratione' interpolated: 'L'età dell'actio exercitoria', in *Scritti di diritto romano*, vol. 4 (Naples: Jovene, 1963), 261–62. The passage was cited by Emilio Costa in support of the view that the *actio quod iussu* predated the exercitorian and institorian actions: *Le azioni exercitoria e institoria nel diritto romano* (Parma: Casa ed. L. Battei, 1891), 24; also, Jean-Jacques Aubert, *Business Managers in Ancient Rome: A Social and Economic Study of Institores, 200 B.C. - A.D. 250* (Leiden: Brill, 1994), 78–84.

⁵ D.14.1.1 pr. (Ulp. 28 *ad ed.*). Aubert has defended the authenticity of the passage: *Business Managers*, 59, note 80; cf. Giannetto Longo, 'Actio exercitoria, actio institoria, actio quasi institoria', in *Studi in onore di Gaetano Scherillo*, ed. Giuseppe Grosso, vol. 2 (Milan: Cisalpino-La Goliardica, 1972), 584–86.

⁶ D.14.1.1.1 (Ulp. 28 *ad ed.*): '*Magistrum navis accipere debemus, cui totius navis cura mandata est*'.

⁷ D.14.1.1.6 (Ulp. 28 *ad ed.*).

⁸ D.14.1.1.2 (Ulp. 28 *ad ed.*).

no matter what age he was.⁹ Gaius, too, indicated that the edict applied not only if the *magister* was a dependant of the *exercitor*, but also if he was an *extraneus* (i.e., neither the son nor the slave of the person exploiting the ship):¹⁰

G.4.69-71:

[69] Quia tamen superius mentionem habuimus de actione, qua in peculium filiorum familias servorumque ageretur, opus est, ut de hac actione et de ceteris, quae eorundum nomine in parentes dominosve dari solent, diligentius admoneamus. [70] In primis itaque si iussu patris dominive negotium gestum erit, in solidum praetor actionem in patrem dominumve comparavit; et recte, quia qui ita negotium gerit, magis patris dominive quam filii servive fidem sequitur. [71] Eadem ratione comparavit duas alias actiones, exercitoriam et institoriam. tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navi praeposuerit et quid cum eo eius rei gratia cui praepositus fuerit /negotium /gestum erit. cum enim ea quoque res ex voluntate patris dominive contrahi videatur, aequissimum esse visum est in solidum actionem dari; quin etiam licet extraneum quisque magistrum navi praeposuerit, sive servum sive liberum, tamen ea praetoria actio in eum redditur. ideo autem exercitoria actio appellatur, quia exercitor vocatur is, ad quem cottidianus navis quaestus pervenit. institoria vero formula tum locum habet, cum quis tabernae aut cuilibet negotiationi filium servumve aut quemlibet extraneum, sive servum sive liberum, praeposuerit et quid cum eo eius rei gratia cui praepositus est contractum fuerit. ideo autem institoria vocatur, quia qui tabernae praeponitur, institor appellatur. quae et ipsa formula in solidum est.

Strictly, the legal sources only indicate that by the middle of the second century CE the sole relationship between an *exercitor* and his or her *magister navis* that was of any consequence to the edict was that established by the *praepositio*. Two connected issues arise: first, whether this was the case from the start; and second, if this was not the case, when and under what circumstances the edict reached this state of development.

Several scholars have argued, often on the strength of the treatment afforded to both the exercitorian and institorian actions by Gaius, that the edicts at one time only applied if the *praepositus* was a son or slave of the person making

⁹ D.14.1.1.4 (Ulp. 28 *ad ed.*).

¹⁰ Cf. J.Inst.4.7.2, in which Gaius' words are substantially repeated, except for the omission of any reference to fathers and sons.

the appointment.¹¹ For these authors, it follows that at some point between the introduction of each action (which in each case could have been more than three centuries before the time of Gaius) and the middle of the second century CE, the scope of the application of each edict was extended to include cases in which the *praepositus* was neither the son nor the slave of the person making the appointment. I do not think, however, that Gaius' treatment necessarily implies a chronological development. Rather, his discussion of the actions in question occurs in the context of a more general consideration of the *actio de peculio* and the other remedies that he says were usually given against parents or masters in connection with the activities of their dependants (*et de ceteris, quae eorundem nomine in parentes dominosve dari solent*). Consequently, Gaius framed all the so-called *actiones adiecticiae qualitatis* according to this common theme (namely, that they were all available against fathers or masters whose dependants had entered into contracts), adding that in the exceptional case of the exercitorian and institorian actions they were also available for business conducted by a *praepositus* who was not in the power of the *praeponeus*.¹² It is perfectly possible that Gaius structured his discussion of the so-called *actiones adiecticiae qualitatis* in this way for pedagogical reasons.

Although this passage does not, in my view, necessarily imply a chronological development, neither does it rule this possibility out. If such an extension did take place, there are several ways in which it could have been achieved. On the one hand, it is possible that the exercitorian and institorian edicts initially contained wording similar to that in, for example, the *actiones tributoria* and *quod iussu*; sc., a clause that stated that the praetor would give an action against the person in whose power the *praepositus* was (i.e., *in eum, in cuius*

¹¹ Gustav von Mandry, *Das gemeine Familiengüterrecht mit Ausschluss des ehelichen Güterrechtes*, vol. 2 (Tübingen: Verlag der H. Laupp'schen Buchhandlung, 1876), 212–15; André Auzoux, 'Action exercitoire' (Thèse pour le doctorat, Faculté de droit de Paris, 1894), 27–28; Paulus Fabricius, *Der gewaltfreie Institor im klassischen römischen Recht* (Würzburg: Albert-Ludwigs-Universität Freiburg im Breisgau, 1926); Andrea Di Porto, *Impresa collettiva e schiavo 'manager' in Roma antica (II sec. a.C. - II sec. d.C.)* (Milan: Giuffrè, 1984), 37.

¹² Also, J.Inst.4.7.2a, in which the application of the edict to *praepositi* not in the power of their *exercitor* is justified with reference to its *aequitas*.

potestate erit...).¹³ At some point, the praetor may either have dropped this wording or, as Fabricius argued in the context of the *actio institoria*, circumvented it by means of an *actio utilis*.¹⁴ As Huvelin noted, however, there is no evidence for the granting of an *actio utilis* in relation to the *actio exercitoria*, and separately, there is no evidence for any change in the wording of either action before the time of Julian's redaction. Another explanation could therefore be that the edicts were unrestricted from the start, though interpreted in light of the prevailing socio-economic conditions.¹⁵ In other words, it may have been 'self-understood' that the edicts initially applied to business conducted with *praepositi in potestate*, but that as principals began to appoint persons who were not in their power so too the edict was interpreted to cover these cases as well.¹⁶ I prefer the latter view, though the state of the evidence makes any position largely conjectural.

Whatever the case, those scholars who hold that an extension of some kind did occur also differ as to its timing. Given the close relationship between the actions it is likely, as Aubert has suggested, that the extension of both edicts occurred within a short time of one another.¹⁷ Fabricius, Huvelin, and Di Porto (the first in relation to the *actio institoria*, the latter two the *actio exercitoria*), all argued that the extension did not occur until the middle of the second century CE.¹⁸ Several authors, however, have put forward the view that the institorian and exercitorian actions were available in cases involving extraneous

¹³ For the likely wording of the edicts that grounded the *actiones tributoria* and *quod iussu*: Lenel, *EP*³, 270–73 and 277–78.

¹⁴ Specifically, Fabricius argued that the praetor made use of the fiction '*si liber esset*': *Der gewaltfrei Institor*, 18–23.

¹⁵ Cf. Sven E. Wunner, *Contractus: sein Wortgebrauch und Willensgehalt im klassischen römischen Recht* (Cologne and Graz: Böhlau, 1964); Alfons Bürge, 'Review of Andrea Di Porto, *Impresa collettiva e schiavo "manager" in Roma antica (II sec. a. C. — II sec. d. C.)*', *ZSS* 105 (1988): 856; and Andreas Wacke, 'Die adjektivischen Klagen im Überblick. Erster Teil: Von der Reeder- und der Betriebsleiterklage zur direkten Stellvertretung', *ZSS* 111 (1994): 296.

¹⁶ Generally, David Daube, 'The Self-Understood in Legal History', in *Collected Studies in Roman Law*, ed. David Cohen and Dieter Simon, vol. 2 (Frankfurt am Main: Vittorio Klostermann, 1991), 1277–85.

¹⁷ Aubert, *Business Managers*, 92, and on the whole question, 91–95. Gábor Hamza has argued that the *actio exercitoria* was likely changed first: 'Gewillkürte Stellvertretung im römischen Recht', *Acta juridica Academiae Scientiarum Hungaricae* 25 (1983): 93–94.

¹⁸ Fabricius, *Der gewaltfrei Institor*, 18–23; Huvelin, *Droit commercial romain*, 161–62; and Di Porto, *Impresa collettiva*, 37–42.

praepositi from before the middle of the second century. Arguing against Fabricius, Watson (following Kaser) adopted this position, though neither Watson nor Kaser indicated if they believed that the *actio institoria* had this scope from the start or whether and when it was later extended.¹⁹ Aubert, on the other hand, in his survey of the literary and epigraphic sources, has concluded that it appears likely that *vilici* (including business managers) could be freedmen by the time of Cicero, even though the evidence suggests that the great majority of those holding these positions were slaves.²⁰ Together with the evidence for the increased role of freedmen in trade during the late Republic and early Principate, and the demand this is likely to have created for remedies that reflected the changing socio-economic environment, it is plausible to suggest that both actions were available for business conducted with extraneous *praepositi* before the middle of the second century CE, and probably by the time of the early Principate. In this respect I am inclined to agree with Costa, who suggested that any extension (if indeed there was one) was likely to have occurred during the course of the late Republic.²¹

The question as to whether a shipmaster could sub-appoint a *magister* also presents difficulty. The relevant passage is D.14.1.1.5 (Ulp. 28 *ad ed.*):

Magistrum autem accipimus non solum, quem exercitor praeposuit, sed et eum, quem magister: et hoc consultus Iulianus in ignorante exercitore respondit: ceterum si scit et passus est eum in nave magisterio fungi, ipse eum imposuisse videtur. quae sententia mihi videtur probabilis: omnia enim facta magistri debeo praestare qui eum praeposui, alioquin contrahentes decipientur: et facilius hoc in magistro quam institore admittendum propter utilitatem. quid tamen si sic magistrum praeposuit, ne alium ei liceret praepone? an adhuc Iuliani sententiam admittimus, videndum est: finge enim et nominatim eum prohibuisse, ne Titio magistro utaris. dicendum tamen erit eo usque producendam utilitatem navigantium.

¹⁹ Alan Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Oxford University Press, 1965), 192, note 1; Max Kaser, *Das römische Privatrecht*, vol. 1 (Munich: C.H. Beck, 1971), 608, note 27; also, Wunner, *Contractus*, 110–11.

²⁰ Aubert, *Business Managers*, 417.

²¹ Costa, *Le azioni exercitoria e institoria*, 42. Cf. de Ligt, who has (tentatively) connected the extension of both actions to the increased role of freedmen in trade during the second century BCE: 'Roman Law and the Roman Economy: Three Case Studies', *Latomus* 66 (2007): 14.

Ulpian begins by citing an opinion of Julian that a person would be considered a *magister* not only if he had been appointed by the *exercitor*, but also if he had been appointed by another shipmaster. He then proceeded to consider the scope of this opinion in relation to three cases: the first, in which the sub-appointment was made with the *exercitor's* knowledge and consent (*sciens et patiens*); the second, in which the *exercitor* was ignorant of the sub-appointment (*ignorans*); and the third, in which the *exercitor* had expressly prohibited such an appointment being made (*prohibens*). According to Ulpian, Julian's view, which he approved, was that the sub-appointment would count as a *magister* in both of the first two cases. The reason given for the first opinion is that an *exercitor sciens et patiens* was simply regarded as having made the sub-appointment himself. Ulpian then explained that the extension of the rule to cover an *exercitor ignorans* was required for practical reasons (*propter utilitatem*); and finally, that Julian's opinion should also apply in the case of an *exercitor prohibens* to protect the interests of those involved in navigation (*utilitas navigantium*).

The extent to which these opinions have been considered authentic has changed over time. Prior to the 1960s, the exegesis of the passage was bound up closely with the method of interpolation criticism.²² In particular, De Martino and Solazzi argued that the invocation of *utilitas* as a reason for widening the limits of the *exercitor's* liability was unclassical, which in turn cast doubt on the classical origin of the opinions themselves.²³ In the past half century, however, scholars have tended to affirm the authenticity of the opinions contained within the text, principally on the basis that *utilitas* was a concept familiar to classical

²² Cf. Ludwig Mitteis, Ernst Levy, and Ernst Rabel, eds., *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, vol. 1 (Weimar: Böhlau, 1929), 234. For an overview of the history of the criticism of the text, Aldo Petrucci, 'Ulteriori osservazioni sulla protezione dei contraenti con gli institores ed i magisteri navis nel diritto romano dell'età commerciale', *IURA* 53 (2002): 51.

²³ Francesco De Martino went so far as to argue that Julian's opinion was the reverse of that reported in the text, emending it to read '*magistrum autem accipimus [non] solum quem exercitor praeposuit [sed et] <non> eum quem magister*': 'Studii sull'actio exercitoria', *RDN* 7, no. 1–2 (1941): 14–20; 'Ancora sull'actio exercitoria', *Labeo* 4 (1958): 278–83; also, F. Ghionda, 'Sul magister navis', *RDN* 1 (1935): 327–55; Solazzi, 'L'età dell'actio exercitoria', 1963, 246–49; and Longo, 'Actio exercitoria, actio institoria', 588–90. Cf. Giovanni Pugliese, 'In tema di actio exercitoria', *Labeo* 3 (1957): 294–98; Wunner, *Contractus*, 114–25.

jurisprudential thinking.²⁴ Even if this latter view is correct, there is no evidence that Julian's opinion that a sub-appointment could bind an *exercitor ignorans* was accepted before his own time, nor that the view attributed to Ulpian concerning the *exercitor prohibens* was accepted before the early third century CE (at the earliest). It is therefore likely that before the time of Julian a sub-appointment could only bind an *exercitor* if the latter both knew about and consented to his appointment as *magister*.

... *eius rei nomine, cui ibi praepositus fuerit*...

According to Ulpian, the praetor did not state that he would give an action on every ground (*ex omni causa*), but only 'in connection with those matters for which [the *magister*] was appointed'.²⁵ Typically shipmasters were appointed to manage the commercial operation of a vessel, which included letting out space on board, taking on the job of transporting cargoes and passengers, and keeping the ship provisioned.²⁶ This latter task could involve purchasing equipment useful for navigation (such as sails), contracting for repairs, and paying the crew's wages.²⁷

Whether borrowing money counted as an activity performed 'in connection with those matters' for which the shipmaster was appointed was a matter of juristic

²⁴ Hans Ankum's study of the use of the concept of *utilitas* in juristic reasoning has been influential in this respect: "Utilitatis Causa Receptum". On the Pragmatic Methods of the Roman Lawyers', in *Symbolae iuridicae et historicae Martino David dedicatae*, ed. Hans Ankum, Robert Feenstra, and Wilhelmus F. Leemans (Leiden: Brill, 1968), 1–31, esp. p. 20; also, 'The Functions of Expressions with Utilitatis Causa in the Works of the Classical Roman Lawyers', *Fundamina* 16 (2010): 5–22; and the instructive study by Marialuisa Navarra: *Ricerche sulla utilitas nel pensiero dei giuristi romani* (Turin: Giappichelli, 2002). Accepting the substantial authenticity of the passage, Wacke, 'Die adjektivischen Klagen', 309–11; András Földi, 'La responsabilità dell'avente potestà per atti compiuti dall'*exercitor* suo sottoposto', *SDHI* 64 (1998): 186, note 28; Pietro Cerami, "Mutua pecunia a magistro 'navis reficiendae causa' sumpta" e "praepositio exercitoris": Profilo storico-comparatistico', *AUPA* 46 (2000): 136, note 8; Petrucci, 'Ulteriori osservazioni', 49–54; and Maria Miceli, *Sulla struttura formulare delle 'actiones adiecticiae qualitatis'* (Turin: Giappichelli, 2001), 203, note 32; also, *Studi sulla rappresentanza nel diritto romano* (Milan: Giuffrè, 2008), 79–80, note 102. Cf. Kirschenbaum, who considered the opinion concerning the *exercitor ignorans* to be classical, but that concerning the *exercitor prohibens* postclassical: *Sons, Slaves, and Freedmen in Roman Commerce* (Jerusalem: Magnes Press, Hebrew University, 1987), 101–4; and taking the same view, Aubert, *Business Managers*, 60–61.

²⁵ D.14.1.1.7 (Ulp. 28 *ad ed.*): 'Non autem ex omni causa praetor dat in exercitorem actionem, sed eius rei nomine, cuius ibi praepositus fuerit...' (Mommsen corrects *cuius* to *cui*.)

²⁶ D.14.1.1.3 (Ulp. 28 *ad ed.*).

²⁷ D.14.1.1.7 (Ulp. 28 *ad ed.*) and D.14.1.7 (Afr. 8 *quaest.*).

discussion.²⁸ Ulpian's treatment of the subject commences in D.14.1.1.8 (Ulp. 28 *ad ed.*) and concludes at the beginning of D.14.1.1.12 (Ulp. 28 *ad ed.*):

[8] Quid si mutuam pecuniam sumpserit, an eius rei nomine videatur gestum? et Pegasus existimat, si ad usum eius rei, in quam praepositus est, fuerit mutuatus, dandam actionem, quam sententiam puto veram: quid enim si ad armandam instruendamve navem vel nautas exhibendos mutuatus est? [9] Unde quaerit Ofilius, si ad reficiendam navem mutuatus nummos in suos usus converterit, an in exercitorem detur actio. et ait, si hac lege accepit quasi in navem impensurus, mox mutavit voluntatem, teneri exercitorem imputaturum sibi, cur talem praeposuerit: quod si ab initio consilium cepit fraudandi creditoris et hoc specialiter non expresserit, quod ad navis causam accipit, contra esse: quam distinctionem Pedius probat. [10] Sed et si in pretiis rerum emptarum fefellit magister, exercitoris erit damnum, non creditoris. [11] Sed si ab alio mutuatus liberavit eum, qui in navis refectionem crediderat, puto etiam huic dandam actionem, quasi in navem crediderit. [12] Igitur praepositio certam legem dat contrahentibus...

Ulpian begins by approving the view of Pegasus (first century CE) that the exercitorian action would lie if the proceeds of a loan were used in connection with a matter for which the shipmaster had been appointed (*si ad usum eius rei, in quam praepositus est*).²⁹ This is followed up by a specific question concerning money borrowed to fit out or equip the ship or to furnish a crew (*ad armandam instruendamve navem vel nautas exhibendos*). On this point, Ulpian cites a distinction made by the late Republican jurist Ofilius, which we are told was later approved by Pedius (second half of the first century CE).³⁰ The text is significant, not only because it provides a *terminus ante quem* for the introduction of the *actio exercitoria*, but also an indication that the expression *eius rei nomine, cui ibi praepositus fuerit* – or at least a phrase with the same substantive content – constituted part of the edict's wording in the latter half of the first century BCE. The question Ofilius is reported to have posed was whether the *actio exercitoria* would be granted if a *magister* borrowed money for the purpose of repairing a ship (*ad reficiendam navem*)

²⁸ D.14.1.1.8 (Ulp. 28 *ad ed.*).

²⁹ D.14.1.1.8 (Ulp. 28 *ad ed.*). Pegasus held offices under both Vespasian and Domitian: Wolfgang Kunkel, *Die römischen Juristen: Herkunft und soziale Stellung*, 2nd ed. (Cologne, Weimar, and Vienna: Böhlau Verlag, 2001), 133–34.

³⁰ D.14.1.1.9 (Ulp. 28 *ad ed.*). For Ofilius, Kunkel, 29–30; and Pedius, 168–69.

and subsequently turned the funds to his own use. Ulpian therefore moves from his approval of Pegasus' opinion to consider the circumstances in which the action might lie despite the proceeds of the loan having been used for a purpose not in connection with the shipmaster's appointment.

Identifying the precise content of the distinction drawn by Ofilius, however, is a difficult task, not least because the text may not be in its original form and has been considered interpolated.³¹ Thus, Beseler doubted the phrases *mox mutavit voluntatem* and *consilium fraudandi creditoris*.³² Pringsheim, following Beseler, excised *mox mutavit voluntatem*, removed *imputatum... esse*, and substituted *sententiam* for *distinctionem* to reflect the reality of what remained.³³ Eisele, too, supposed that *et hoc... accipit* was a later addition and also doubted the authenticity of *imputatum... praeposuit*.³⁴

First, it does not matter for our purposes whether the phrase *imputatum... praeposuit* was inserted into the text by the compilers or not, since it does not affect the interpretation of the passage from a legal perspective. Second, I agree with Watson that the arguments that all or part of the section *quod si... esse* has been interpolated are not strong enough to warrant regarding it as inauthentic.³⁵ This leaves the phrase *mox mutavit voluntatem*. According to Beseler the words *ad reficiendam navem* are ambiguous in the sense that they could either refer to a purpose that had been agreed upon by the parties or to one intended privately by the borrower. The words *hac lege*, he continued, can only refer to an agreed purpose; and since the expression *mox mutavit voluntatem* implies that *hac lege* carries both meanings, it cannot have been written by Ofilius.³⁶ Miceli, however, has argued that the expression is

³¹ Cf. Mitteis, Levy, and Rabel, *Index*, 1:235.

³² Gerhard Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, vol. 2 (Tübingen: J. C. B. Mohr, 1911), 125.

³³ Fritz Pringsheim, 'Beryt und Bologna', in *Gesammelte Abhandlungen*, vol. 1 (Heidelberg: Carl Winter, 1961), 406–7.

³⁴ Fridolin Eisele, 'Beiträge zur Erkenntniss der Digesteninterpolationen', *ZSS* 18 (1897): 20; also, De Martino, 'Studii sull'actio exercitoria', 10; Watson, *Obligations*, 190; and Longo, 'Actio exercitoria, actio institoria', 591–92.

³⁵ Watson's critique of these arguments, which shall not be repeated here, are convincing: *Obligations*, 190–91.

³⁶ Beseler's argument is quoted by Pringsheim as follows: '*ad reficiendam navem* ist undeutlich; kann "der Abrede nach zu dem Zwecke" oder "der wirklichen Absicht nach zu

genuine.³⁷ According to her, the shipmaster's intentions are not considered separately from the fact of any agreement, but rather together with it. Thus, in the first case, the *magister's* change of mind is mentioned to underline the fact that the sums were not spent as stated in the *lex*; and in the second, his fraudulent intent is provided as justification for his decision not to state what the funds would be used for.

Both interpretations lead to the conclusion that, for Ofilius, the only materially relevant consideration was whether the *magister* had agreed to put the proceeds of the loan toward a purpose in connection with his appointment. This is the conclusion reached not only by Pugliese, Watson, and Miceli;³⁸ but also by Cerami, who has gone as far as to assert that the basis for the *exercitor's* liability in these circumstances was the inclusion of a specific and explicit destination clause (*clausola di destinazione*) in the loan contract by the *magister*.³⁹ The content of Ofilius' distinction, according to this latter scholar, was therefore between those cases in which such a clause had been agreed, and those in which it had not.

I do not find this interpretation convincing. Rather, it is my opinion that the likely content of Ofilius' distinction can be established by placing the text alongside a response reported by African (middle part of the second century CE) in D.14.1.7 pr.-1 (Afr. 8 *quaest.*):

[pr.] Lucius Titius Stichum magistrum navis praeposuit: is pecuniam mutuatus cavit se in refectionem navis eam accepisse: quaesitum est, an non aliter Titius exercitoria teneretur, quam si creditor probaret pecuniam in refectionem navis esse consumptam. respondit creditorem utiliter acturum, si, cum pecunia crederetur, navis in ea causa fuisset, ut refici deberet: etenim ut non oportet creditorem ad hoc adstringi, ut ipse reficiendae navis curam suscipiat et negotium domini gerat (quod certe

dem Zwecke" bedeuten. Ofilius ersetzt in seiner Antwort, um den zweiten Begriff auszuschließen, jenen Ausdruck durch *hac lege. Mox mutavit voluntatem* tut so, als bedeute *hac lege* "der Abrede nach und auch in Wirklichkeit zu dem Zwecke", folglich ist es nicht von Ofilius: 'Beryt und Bologna', 406. Watson considers the argument 'very strong': *Obligations*, 190.

³⁷ Miceli, *Sulla struttura formulare*, 197–98, note 17.

³⁸ Pugliese, 'In tema', 317; Watson, *Obligations*, 191. Cf. Micele, who reaches the same conclusion: *Sulla struttura formulare*, 197–99.

³⁹ Cerami, 'Mutua pecunia', 135–36; also, Pietro Cerami and Aldo Petrucci, *Diritto commerciale romano: profilo storico*, 3rd ed. (Turin: G. Giappichelli, 2010), 278–81.

futurum sit, si necesse habeat probare pecuniam in refectioem erogatam esse), ita illud exigendum, ut sciat in hoc se credere, cui rei magister quis sit praepositus, quod certe aliter fieri non potest, quam si illud quoque scierit necessariam refectioem pecuniam esse: quare etsi in ea causa fuerit navis, ut refici deberet, multo tamen maior pecunia credita fuerit, quam ad eam rem esset necessaria, non debere in solidum adversus dominum navis actionem dari. [1] Interdum etiam illud aestimandum, an in eo loco pecunia credita sit, in quo id, propter quod credebatur, comparari potuerit: quid enim, inquit, si ad velum emendum in eiusmodi insula pecuniam quis crediderit, in qua omnino velum comparari non potest? et in summa aliquam diligentiam in ea creditorem debere praestare.

The text begins with the hypothetical situation in which a *magister navis* had borrowed money for the express purpose of repairing the ship.⁴⁰ The question that arose was whether the *exercitor* would only be liable if the creditor proved that the money had actually been spent on the vessel. The reported response, which probably came from Julian, was that although the creditor did not have to prove how the money had been spent, the *actio exercitoria* would only lie if the ship was actually in need of repair at the time the money was handed over.⁴¹ The justification for this opinion was that, although the creditor ought not to be bound to oversee the conduct of the work itself (which would be the consequence of expecting him to prove how the money had been spent), it was reasonable to require him to know that he was lending for a purpose in connection with those matters for which the shipmaster was appointed (*ita illud exigendum, ut sciat in hoc se credere, cui rei magister quis sit praepositus*). This necessarily involved knowing that the money was actually required for the purposes of the ship.

⁴⁰ De Martino argued that *cavit* indicates that the agreement was executed as a *stipulatio* recorded in a *cautio*: ‘Studii sull’actio exercitoria’, 12; ‘Ancora sull’actio exercitoria’, 283–86. Cf. Pugliese, who suggested it should be interpreted in light of the *lex* referred to by Ofilius in D.14.1.1.9 (i.e., as though the shipmaster had not so much formally committed to spending the money toward a specific purpose as stated that he had received it to that end): ‘In tema’, 318–19, note 23; also, Cerami, ‘Mutua pecunia’, 135, note 7; Cerami and Petrucci, *Diritto commerciale romano*, 278–81; Miceli, *Sulla struttura formulare*, 199, note 19; and *Studi*, 74–76.

⁴¹ African was Julian’s pupil, and the extent to which the texts attributed to him contain his own views, as opposed to that of his mentor, is often unclear. See, Álvaro d’Ors, *Las Quaestiones de Africano* (Rome: Pontificia Università Lateranense - Mursia, 1997), 15. Cerami is confident in the attribution: ‘Mutua pecunia’, 138; also, Patricio Lazo, ‘La interpretación de la cláusula eius rei nomine de los edictos de exercitoria y de institoria actione’, *Revista Chilena de Derecho* 43, no. 3 (2016): 1094–95.

The reasoning here is that because the edict made the *exercitor* liable for bargains struck 'in connection with those matters for which [the shipmaster] was appointed', an agreement to borrow money could only bind the *exercitor* to the extent that there was in reality a matter (*res*) to which it was connected.⁴² In other words, if there was no factual basis for the agreed purpose of the loan, the act of borrowing the money could not be said to be *eius rei nomine*, etc. It followed that the creditor could only sue the *exercitor* for as much as was required to carry out the purpose, and that it was his responsibility, for example, to establish whether articles for the purchase of which money had been lent could be acquired at the location in question. To the extent that the lender was *sciens*, therefore, he could ensure that the credit he extended was fully recoverable from the *exercitor*.⁴³

Returning to D.14.1.1.9, the significance of the expression *mox mutavit voluntatem* is not just in its attribution of an initial intention to the shipmaster to spend the loan on repairs for the ship, but crucially in the implication that there was actually a real purpose toward which the money could have been put. In fact, Ofilius' distinction only makes sense if one infers from this phrase that the loan was given in the context of the ship actually needing repairs. In this light, the distinction drawn by the jurist was between a *magister navis* who had borrowed money both intending and agreeing to put it toward repairs that were actually required, but who subsequently turned the funds to his own use; and one who, in the context of the need for repairs, neither intended nor agreed to spend the money in this way. In the first scenario the *exercitor* would be liable, but not in the second. Ofilius' opinion was therefore that the *exercitor* would only be liable *in solidum* if the *magister navis* had agreed to put the money toward a purpose that was both in connection with a matter for which he was appointed and actually existing at the time of receipt. This is entirely consistent with the view of the respondent in D.14.1.7 (Afr. 8 *quaest.*), who emphasised

⁴² Cf. Johnston's accurate reading of the text: 'Limiting Liability: Roman Law and the Civil Law Tradition', *Chicago-Kent Law Review* 70 (1995): 1520.

⁴³ Valiño del Río suggested that the appropriate action to raise against an *exercitor* whose shipmaster had borrowed money having made such a declaration was the *condictio exercitoria*: 'Las relaciones básicas de las acciones adyecticias', *Anuario de Historia del Derecho Español* 38 (1968): 420.

that it was up to the creditor to establish the factual basis for the loan and added that the *exercitor* would only be fully liable to the extent of the funds that were required.

The text therefore does not stand for the wider proposition that, as Watson put it, 'when a *magister navis* borrows money expressly for the purposes of the ship, the *exercitor* is liable even if the *magister* is completely fraudulent'.⁴⁴ This interpretation not only negates the need for there to be a factual basis for the loan for the *exercitor* to be liable, but also renders the second part of the distinction, as Watson himself admits, 'irrelevant to the question put'.⁴⁵ I therefore submit that the substance of the text is genuine, and that Ofilius only sought to address the narrow situation in which a *magister navis* had borrowed money both intending and agreeing to put it toward repairs that were actually required, but who subsequently decided to turn the funds to his own use.⁴⁶

This interpretation is also consistent with the observation made by Ulpian immediately following D.14.1.1.9, which was that an *exercitor* would be liable if his or her *magister navis* was deceitful about the price of goods he had purchased with borrowed money.⁴⁷ In these circumstances, although the loan was one that fell squarely within the ambit of Pegasus' opinion (i.e., one in which the proceeds were put *ad usum eius rei, in quam praepositus est*), the shipmaster's conduct contained an element of fraud similar to the scenario described in the second part of Ofilius' distinction. Ulpian's conclusion was that, unlike in Ofilius' second scenario, a *magister navis* who intended to use the loan as agreed but was deceitful about the cost would bind his *exercitor*.⁴⁸ Finally, Ulpian considered that a person who lent money so that a shipmaster could pay off another lender who had funded repairs could sue the *exercitor* as if the money had been put toward the purpose directly (*quasi in navem crediderit*).⁴⁹

⁴⁴ Watson, *Obligations*, 191.

⁴⁵ Watson, 191.

⁴⁶ Valiño del Río also doubts that the text has been interpolated: 'Las relaciones básicas', 420.

⁴⁷ D.14.1.1.10 (Ulp. 28 *ad ed.*).

⁴⁸ The contrast is indicated by the expression '*sed et si...*'

⁴⁹ D.14.1.1.11 (Ulp. 28 *ad ed.*).

The whole section culminates with the statement that ‘the appointment therefore provides a governing framework for the contracting parties’ (*igitur praepositio certam legem dat contrahentibus*).⁵⁰ This was the case because, as Gaius made explicit, the fact of the appointment was demonstrative of the *exercitor*’s willingness (*voluntas*) to be bound by contracts entered into by his or her *magister navis*; and since the *praepositio* was at the heart of the edict, defining those transactions for which the praetor was willing to grant an *iudicium*, it was the touchstone which determined whether any given act was one for which an *exercitor* was liable *in solidum*.

The remainder of D.14.1.1.12 and the succeeding two texts simply set out the ways in which an *exercitor* could expand or restrict the acts for which he would be held liable. The appointment itself could be specific, so that, for example, a shipmaster could be instructed to act as either a carrier of goods or passengers (if not both), and, if a carrier of goods, to either let out space on the ship to merchants or else take on the task of transport the merchandise himself.⁵¹ In the event that multiple shipmasters had been appointed, each would bind the *exercitor* to the full extent of the *praepositio* unless their responsibilities had been explicitly divided.⁵²

⁵⁰ D.14.1.1.12 (Ulp. 28 *ad ed.*). Aubert translates *certam legem* contextually as a ‘set charter’: *Business Managers*, 10. On the documentation that probably accompanied such appointments, Aubert, 9–16; and more generally, Brigitte Schlösser, ‘Die Bedeutung der praepositio für den Handelsverkehr im antiken Rom’ (Dissertation, Humboldt-Universität, 2008); Gérard Minaud, *Les gens de commerce et le droit à Rome* (Aix-en-Provence: Presses universitaires d’Aix-Marseille, 2011), 189–93. Beseler thought the expression suspect: *Beiträge zur Kritik der römischen Rechtsquellen*, vol. 3 (Tübingen: J. C. B. Mohr, 1913), 106; cf. Longo, ‘Actio exercitoria, actio institoria’, 590. The expression is almost certainly genuine, as indicated by the similar phrasing used by the Ulpian in D.45.1.52 pr. (Ulp. 7 *disp.*): ‘*In conventionalibus stipulationibus contractui formam contrahentes dant*’. On the text itself, Petrucci, ‘Ulteriori osservazioni’, 47–48; Cerami and Petrucci, *Diritto commerciale romano*, 225–26.

⁵¹ i.e., to act as either a *locator* or *conductor* in relation to the person whose merchandise was being transported.

⁵² D.14.1.1.13 (Ulp. 28 *ad ed.*). Casson argued that a ship could only have one *magister* at any given time, and that the references to multiple shipmasters must refer to the situation in which an *exercitor* was exploiting a fleet of ships: *Ships and Seamanship in the Ancient World* (Baltimore: Johns Hopkins University Press, 1995), 318; also, ‘New Light on Maritime Loans: P. Vindob. G 19792’, in *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and William V. Harris (Leiden: Brill, 1986), 15; cf., Aubert, *Business Managers*, 62; also, Gérard Minaud, ‘Accounting and Maritime Trade in Ancient Rome’, in *Proceedings of the Eleventh World Congress of Accounting Historians* (Nantes, 2006).

The *exercitor* could extend or limit his exposure by specifying the terms on which the business was to be conducted. He could, for instance, impose conditions on the types of goods the *magister* was permitted to transport and the routes he ought to follow.⁵³ Again, if multiple shipmasters had been appointed and the terms were that no single *magister* could conduct business without the involvement of the others, a bargain struck in contravention of this requirement would fail to bind the *exercitor*.⁵⁴ In the case of land-based businesses, Ulpian indicated that these *proscriptiones* were only effective if they had been displayed on a public notice at the front of the place of business in clear writing, and it is likely that similar requirements applied in the case of maritime enterprises as well.⁵⁵

...*in eum, qui eam navem exercuerit*...

In the classical edict, the praetor declared that he was willing to grant an action 'against the person exploiting the ship'. In the juristic sources, this person was routinely referred to as the '*exercitor*', who Gaius identified as 'the person to whom all the everyday earnings of the ship come in'.⁵⁶ Ulpian, too, described him as 'the person to whom all the revenues and returns arrive', adding that he could either be the outright owner of the vessel or a person hiring it from the owner, whether for a temporary or unlimited duration.⁵⁷ He continued that

⁵³ D.14.1.1.12 (Ulp. 28 *ad ed.*).

⁵⁴ D.14.1.1.14 (Ulp. 28 *ad ed.*); also, in the context of the *actio institoria*, D.14.3.11.5 (Ulp. 28 *ad ed.*).

⁵⁵ D.14.3.11.2-4 (Ulp. 28 *ad ed.*). Taking the same view, Apollonia J. M. Meyer-Termeer, *Die Haftung der Schiffer im griechischen und römischen Recht* (Zutphen: Terra, 1978), 152–53; Miceli, *Sulla struttura formulare*, 193; Petrucci, 'Ulteriori osservazioni', 48; Cerami and Petrucci, *Diritto commerciale romano*, 226; also, Jean-Jacques Aubert, 'Dealing with the Abyss: The Nature and Purpose of the Rhodian Sea-Law on Jettison (Lex Rhodia de lactu, D 14.2) and the Making of Justinian's Digest', in *Beyond Dogmatics: Law and Society in the Roman World*, ed. John W. Cairns and Paul J. du Plessis (Edinburgh: Edinburgh University Press, 2007), 169.

⁵⁶ G.4.71: '...*exercitor vocatur is, ad quem cottidianus navis quaestus pervenit*'. Cf. J.Inst.4.7.2, in which Gaius' definition is restated, though with '*pervenit*' substituted for '*pertinet*'.

⁵⁷ D.14.1.1.15 (Ulp. 28 *ad ed.*): '*Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit sive a domino navem per aversionem conduxit vel ad tempus vel in perpetuum*'. I agree with Coppola Bisazza that the text is probably authentic: 'Alcune riflessioni in tema di *exercitor* e di *actio exercitoria*', in *Studi in memoria di Elio Fanara*, ed. Umberto La Torre et al., vol. 1 (Milan: Giuffrè, 2006), 189–90. Cf., e.g., Solazzi, who asserted that '*obventiones*' is a gloss: 'L'età dell'*actio exercitoria*', 1963, 261, note 68.

it was a matter of little importance whether the *exercitor* was male or female, a *paterfamilias*, son-in-power, or slave; provided that if the person exploiting the ship was a *pupillus* he or she was acting with the authority of their tutor.⁵⁸

Although the term '*exercitor*' had a particular meaning within the context of the edict, it is clear from both the juristic and literary sources that the word could also be used to refer to other kinds of business activities.⁵⁹ Moreover, as Földi has argued, the evidence suggests that the terminology used to refer to the different actors engaged in typical shipping operations changed over time. Thus, according to Földi:⁶⁰

The oldest configuration was simple; at first the '*nauta*' was at the same time the *dominus*, *exercitor*, and *magister navis*. In the second phase the *nauta* was joined by a shipmaster who was in his power, who was probably initially known as an *exercitor*. In the third phase, the *exercitores* themselves became increasingly *sui iuris* and shipowners in their own right. The shipmasters that they in turn appointed became known as the *magister navis*. This is how the classical structure of the relationship between the *exercitor* and *magister* came into being, supplemented occasionally by the expression *dominus navis*. The word *nauta* was downgraded [to refer to a member of the crew], the word *exercitor* upgraded.

The argument is attractive, not least because it provides an explanation for the incongruity between the names of the institorian and exercitorian actions, the first of which refers to the *praepositus*, the second, at least by the time of the classical period, to the person making the appointment.⁶¹ The relevance of Földi's linguistic analysis for this study, however, consists in his conclusion that if the terminology changed as the evidence appears to suggest, so too it is likely that the original edict – which he dates to the second century BCE – was different to the version that appeared in the *edictum perpetuum*. Földi therefore offers the following reconstruction:⁶²

⁵⁸ D.14.1.1.16 (Ulp. 28 *ad ed.*); also, D.14.3.7.1 (Ulp. 28 *ad ed.*).

⁵⁹ On this, Aubert, *Business Managers*, 87; also, Földi, 'La responsabilità', 179–80.

⁶⁰ András Földi, 'Die Entwicklung der sich auf die Schiffer beziehenden Terminologie im römischen Recht', *TvR* 63 (1995): 7.

⁶¹ Földi, 6; cf. Aubert, *Business Managers*, 87–89.

⁶² Földi, 'Die Entwicklung', 4.

In nautas, quod cum exercitoribus ab eis praepositus eius rei nomine gestum erit, cui ibi praepositi fuerint, iudicium dabo.

As the author himself admits, the exercise is necessarily speculative. Nevertheless, if his suppositions are correct, it is likely that the original edict will have granted an action against the *nauta* for contracts entered into with his *exercitor* (in the sense of the meanings attributed to the words in phase two of Földi's suggested development). It is also clear that Földi believes that the rest of the edict remained stable between its creation and Julian's redaction. Again, this is conjectural, though as I have already indicated, the distinction reported to have been made by Ofilius in D.14.1.1.9 suggests that the edictal relationship between the *praepositus* and the person making the appointment remained consistent at least from the second half of the first century BCE.

4.1.1.2 The Second Part of the Edict.

The edict's second clause dealt with contracts entered into with a *magister navis* whose *exercitor* was in the power of another. It therefore addressed the complex situation in which the structure of a maritime enterprise consisted of multiple levels: that is, of a *paterfamilias* – *filius familias* – *praepositus*, or a *dominus* – *servus ordinarius* – *praepositus*.⁶³

Si is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium datur.

If the person exploiting the vessel is in the *potestas* of another and is acting according to their will, where business is conducted with a shipmaster, an action is granted against the person in whose *potestas* the person exploiting the ship is.

Although a handful of scholars have considered the text interpolated, I am convinced by the arguments put forward by, *inter alios*, Pugliese and Wunner, that its substance is genuine.⁶⁴ Ulpian's commentary indicates that the edict was in existence by the time of Julian's redaction. However, the absence of

⁶³ D.14.1.1.19 (Ulp. 28 *ad ed.*). For a synoptic table setting out the different possible variations, Földi, 'Remarks', 192–93.

⁶⁴ Pugliese, 'In tema', 321–23; Wunner, *Contractus*, 125–32; also, Aubert, *Business Managers*, 61–62; Földi, 'La responsabilità', 182; and Cerami and Petrucci, *Diritto commerciale romano*, 230–31. For the previous literature, including the objections raised by Beseler and De Martino, Miceli, *Sulla struttura formulare*, 215, note 57.

any reference to the views of jurists before Julian and Pomponius means that there is no trace of its development before the first half of the second century CE.

Notwithstanding these limitations, Földi has argued that the edict's peculiar phrasing suggests that the version given by Ulpian was somewhat different to that of its earlier iterations.⁶⁵ The scholar makes two observations. First, he regards the threefold repetition of the phrase '*is qui navem exercuerit*' as suspicious and argues that it was probably used in place of the simpler '*exercitor*' to avoid any ambiguity arising from the changes in the meaning of the latter word over time. Second, he casts doubt on the expression '*in aliena potestate*', which he argues was the result of a later juristic tendency towards generalisation. Instead, he suggests, the original edict is likely to have referred exclusively to servile *exercitores* (i.e., those *in potestate domini*), and later also to sons-in-power (i.e., those *in potestate patris dominive*). Földi therefore offers the following reconstruction of the original edict:⁶⁶

Si <nauta> in potestate <domini> erit eiusque voluntate navem exercuerit,
quod cum <exercitore> eius gestum erit, in <dominum> iudicium dabo.

Földi's reconstructions must, of course, be treated with caution, for the obvious reason that they do not proceed from direct evidence. On the other hand, his arguments are reasonable, and if one accepts that the core content of the edicts remained relatively stable between the time of their introduction and their inclusion by Julian in the *edictum perpetuum*, then they are likely to reflect, at least broadly, the scope of the edict in one of its earlier forms. As I have already indicated, there is no evidence for the existence of the second part of the edict before the time of Julian; though Földi implies that it was introduced during the same period as the first (that is, during the second stage of his terminological development).

If Földi's argument is right, Ulpian's commentary is based on a classical version of the edict. As in the case of the first part of the edict, the jurist successively

⁶⁵ András Földi, 'Appunti sulla Responsabilità per l'*exercitor in Potestate*', *Studia Iuridica Auctoritate Universitatis Pecs* 123 (1996): 73–76; also, 'La responsabilità', 182–84.

⁶⁶ Földi, 'La responsabilità', 184.

interpreted the relevant phrases. These are, in order of treatment: *eiusque voluntate navem exercuerit, in aliena potestate*; and *quod cum magistro eius gestum erit*. Since many of the considerations that arose in relation to the first part of the edict also applied here, the jurist's discussion is focused exclusively on those aspects that were either directly or exclusively relevant to the specific situation addressed by the second part.

According to Ulpian, the justification for the full liability of a father or master for business conducted by a *magister navis* appointed by a person in his power was that the exploitation of ships was of the greatest public importance (*ad summam rem publicam*):⁶⁷

D.14.1.1.20 (Ulp. 28 *ad ed.*):

Licet autem detur ^{^datur^} actio in eum, cuius in potestate est qui navem exercet, tamen ita demum datur, si voluntate eius exercent. ideo autem ex voluntate in solidum tenentur qui habent in potestate exercitorem, quia ad summam rem publicam navium exercitio perinet. at institorum non idem usus est: ea propter in tributum dumtaxat vocantur, qui contraxerunt cum eo, qui in merce peculiari sciente domino negotiatur. sed si sciente dumtaxat, non etiam volente cum magistro contractum sit, utrum quasi in volentem damus actionem in solidum an vero exemplo tributoriae dabimus? in re igitur dubia melius est verbis edicti servire et neque scientiam solam et nudam patris dominive in navibus onerare neque in peculiaribus mercibus voluntatem extendere ad solidi obligationem. et ita videtur et Pomponius significare, si sit in aliena potestate, si quidem voluntate gerat, in solidum eum obligari, si minus, in peculium.

If this was the justification for unlimited liability in the context of the second part of the edict, an additional consideration concerned the circumstances in which that unlimited liability would apply. Here, the extent of the father or master's liability was rationalised according to the degree to which he was aware of the enterprises being carried on by those in his power (i.e., whether he was *volens*, *sciens*, or *ignorans*). The issue that arose was a subtle one: whereas the exercitorian edict made a father or master liable *in solidum* for business conducted with a shipmaster who had been appointed by a son or slave who

⁶⁷ According to Sirks, Ulpian had the *annona* in mind: *Food for Rome: The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople* (Amsterdam: Gieben, 1991), 120–21.

was acting according to his will (*voluntas*), the institorian edict made no such provision. Consequently, there was nothing in the institorian context to prevent the application of the *actio tributoria*, which in these circumstances would lie for debts incurred by an *institor* whose *praeponens* was trading out of a *peculium* with their father or master's knowledge (*scientia*). The question that followed was therefore whether the *actio tributoria* should also lie in the exercitorian context, even though the second part of the edict specified that the father or master's liability depended upon their *voluntas*.

For Ulpian, extending the exercitorian edict to cover the situation in which a son or slave carried on a maritime enterprise against the will of his father or master but with his knowledge meant either extending the edictal meaning of *voluntas* to cover *scientia* or granting an action on the analogy of the *actio tributoria* (*exemplo tributoriae*). The jurist rejected the first suggestion stating that in cases of doubt it was better to adhere to the words of the edict. Correspondingly, it was his view that the meaning of *voluntas* should not extend the full liability of a father or master to maritime enterprises carried on by those in his power with his bare knowledge (*nuda scientia*). This position, he continued, appeared also to have been adopted by Pomponius, who reportedly took the view that the father or master would be fully liable for business conducted according to his will, but only to the extent of the *peculium* if he was anything other than *volens*.

Whether Ulpian thought that an action *ad exemplum tributoriae* should be granted in the circumstances described above cannot, in my view, be determined from this text alone. First, as Földi has argued, the meaning of the expression *in peculium* is ambiguous, since it is not clear whether it refers to the father or master's liability specifically under the *actio de peculio* or more generally to the *actio tributoria* as well.⁶⁸ Second, since Ulpian only deals in this text with the scope of the meaning of *voluntas*, it is not clear whether he cites Pomponius exclusively in support of his conclusion on this point, or as an endorsement of the wider proposition that an action on the analogy of the *actio*

⁶⁸ Földi, 'La responsabilità', 189; also, 'Appunti sulla Responsabilità', 81.

tributoria should also be refused. In any case, a text taken from Ulpian's commentary on the edict *de recepto* indicates that he did in fact take the view that, in the absence of *voluntas*, the only liability of the father or master was *de peculio*.⁶⁹ Whatever the jurist's thoughts on the matter, Paul stated his succinctly in the sixth book of his *brevium ad edictum*, in which he noted that a master who was *sciens* but not *volens* would be liable *quasi tributoria*, and one who was *ignorans* only to the *actio de peculio*.⁷⁰

So far as the edictal expression '*in potestate*' was concerned, Ulpian held it to include people of either sex, sons or daughter, male or female slaves.⁷¹ Moreover, in the event that the *exercitor* was a slave in the *peculium* of someone who was themselves a dependant (that is, part of a three level enterprise according to the structure *pater – filius familias – servus peculiaris – praepositus*, or, *dominus – servus ordinarius – servus vicarius – praepositus*), the degree to which both actors senior to the *exercitor* were aware of the enterprise determined the extent of their liability.⁷² Thus, if both were *volens*, both would be liable in full, whereas if the *servus ordinarius* or son-in-power was *volens*, but the father or master was not, the former would be fully liable, the latter only to the *actio de peculio*. Finally, at least with respect to the second part of the edict, Ulpian confirmed Julian's view that the praetor's promise to grant an action for business conducted with a shipmaster (*si cum magistro eius gestum sit*) also extended to contracts entered into with an *exercitor* who was *in potestate*.⁷³

4.1.2 The Action and its *formula*.

One of the most vexing questions with respect to the *actio exercitoria* (and indeed the other so-called *actiones adiecticiae qualitatis*) concerns the

⁶⁹ D.4.9.3.3 (Ulp. 14 *ad ed.*); and in this connection, PS.2.6.1. In support of this position, Pugliese, 'In tema', 330–33; Di Porto, *Impresa collettiva*, 228; Aubert, *Business Managers*, 61–62; also, Földi, 'Remarks', 208; though cf. 'Appunti sulla Responsabilità', 80–81.

⁷⁰ D.14.1.6 pr. (Paul. 6 *brev.*): on which, Földi, 'La responsabilità', 194–96; Wunner, *Contractus*, 130–31; Cerami and Petrucci, *Diritto commerciale romano*, 234.

⁷¹ D.14.1.1.21 (Ulp. 28 *ad ed.*).

⁷² D.14.1.1.22 (Ulp. 28 *ad ed.*): on which, Földi, 'Remarks', 203; also, Cerami and Petrucci, *Diritto commerciale romano*, 235–36.

⁷³ D.14.1.1.23 (Ulp. 28 *ad ed.*): on which, Cerami and Petrucci, *Diritto commerciale romano*, 232.

structure of its *formula*.⁷⁴ In the literature, the *formulae* of the *actiones adiecticiae qualitatis* are often treated together, so that conclusions drawn about, for example, the *actiones de peculio* and *institoria* have been readily extended to the *actio exercitoria* as well. The assumption is therefore that whichever technique was used to implement the declaration in these edicts was also used for the others as well. As we have seen, the exercitorian edict promised that if business was conducted with a *magister navis* in connection with the matters for which he was appointed, the praetor would grant an action against the person exploiting the ship (or the person in whose power he or she was). There are three main accounts of how this was achieved. For our purposes, the aim of this section will not be to argue which of these accounts is correct, but rather to identify their differences from a substantive point of view.

The earliest and most influential account was first put forward by Keller in 1827 and argued for again by Lenel a century later.⁷⁵ In their view, the so-called *actiones adiecticiae qualitatis* (including the institorian and exercitorian actions) were modifications of existing *formulae*. Where the transaction at issue was one that would ordinarily give rise to a *formula in ius concepta*, the *intentio* would be framed in relation to the *praepositus*, while the liability of the *praeponens* was achieved by transposing his or her name into the *condemnatio*. Where the *praepositus* was a slave, the duty attributed to him in the *intentio* was maintained by means of the fiction that he was a free person (*si liber esset*).⁷⁶ The result of this manoeuvre was that the *exercitor* became the defender to an action predicated on an obligation that had been incurred

⁷⁴ On the whole question, Huvelin, *Droit commercial romain*, 168–76; also, William W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: The University Press, 1908), 706–12. For a comprehensive bibliography, Miceli, *Sulla struttura formulare*, 7, note 1.

⁷⁵ Friedrich Ludwig von Keller, *Über Litis Contestation und Urtheil nach classischem römischem Recht* (Zurich, 1827), 420; Lenel, *EP*³, 264–70.

⁷⁶ Gradenwitz suggested that the fiction was that the slave had been manumitted at the time of the transaction (i.e., ‘*si... manumissus esset*’): ‘Zwei Bemerkungen zur Actio de peculio’, *ZSS* 27 (1906): 231–32.

either actually or notionally by his or her *magister navis*. If this account is correct, the *formula* probably ran as follows:⁷⁷

C. Aquilius iudex esto. Quod A^s A^s de L. Titio, cum is a N^o N^o magister navi praepositus esset, eius rei nomine decem pondo olei emit, q.d.r.a., quidquid ob eam rem L. Titium A^o A^o dare facere oportet ex fide bona, eius iudex N^m N^m A^o A^o c.s.n.p.a.

An alternative account was provided by Mandry and Brinz.⁷⁸ According to these authors, the notion that a slave could have been named as the source of an obligation to give or do something *ex iure civile* was an insurmountable difficulty. Consequently, it was their view that the *formula* must have been framed *in factum concepta*; that is, in such a way as to instruct the judge to condemn or absolve the defender according to a set of facts, rather than with reference to what he ought to give or do (e.g., *si paret A^m A^m de L. Titio decem pondo olei emisse, etc.*). This thesis appears to conform quite closely to the texts – at least in relation to the *actio exercitoria* – for the *formula* would only have required that the facts of the situation at issue fall within the scope of the edict, on the sole basis of which the *praeponens* was obliged (i.e., *propter honorariam obligationem*).⁷⁹ On the other hand, as Huvelin noted, the argument encounters several difficulties. First, the evidence in relation to the other *actiones adiecticiae qualitatis* suggests the use of fictions (especially in relation to the *actio de peculio*), which would not have been necessary in an *actio in factum*.⁸⁰ Second, and most significantly for our purposes, a *formula in factum concepta* would have instructed the judge to condemn or absolve on the strength of the facts alone. However, if the transaction was one that

⁷⁷ Cf. Huvelin, *Droit commercial romain*, 170. The transposition thesis is followed by Mantovani in his reconstructions of the *formulae* of the *actiones adiecticiae qualitatis*: *Le formule del processo privato romano. Per la didattica delle istituzioni di diritto romano* (Como: New Press, 1992), 70–72, nos. 95–99.

⁷⁸ Mandry, *Das gemeine Familiengüterrecht*, 2:259–63; Aloys von Brinz, *Lehrbuch der Pandekten*, vol. 2 Aufl., 2.1 (Erlangen: A. Deichert, 1879), 204; also, ‘Gutachten für die königliche Akademie in München’, ZSS 4 (1883): 166–67.

⁷⁹ D.14.1.1.24 (Ulp. 28 *ad ed.*).

⁸⁰ E.g., in relation to the *actio de peculio*, D.45.2.12.1 (Ven. 2 *stipul.*). With respect to the *actio institoria*, Huvelin cites D.14.3.11.8 (Ulp. 28 *ad ed.*) and D.14.3.12 (Iul. 11 *dig.*), in which scenario Julian proposed that an *actio utilis* ought to be granted. The scholar remarks that, if the *actiones adiecticiae qualitatis* were *actiones in factum* as Mandry suggests, there would have been no need to grant an *actio utilis* in the situation described: *Droit commercial romain*, 170–73.

ordinarily gave rise to an *actio bonae fidei*, this would mean that the judge was instructed only to establish whether, for example, a sale had taken place, without inquiring into what the parties owed to one another *ex fide bona*. For this reason, Miceli considers it inconceivable that contractual relationships – and especially contractual relationships involving good faith – could have been adjudicated differently depending on whether the bargain had been struck with a *praepositus* or not.⁸¹

The final account is that of Baron and Miceli.⁸² According to these scholars, the *actiones adiecticiae qualitatis* consisted of modified *formulae in ius* (as Keller and Lenel), though their *intentiones* expressed a duty in the *praeponeus* (or the person in whose power he or she was) rather than in the *praepositus*.⁸³

C. Aquilius iudex esto. Quod A^s A^s de L. Titio, cum is a N^o N^o magister navi praepositus esset, eius rei nomine decem pondo olei emit, q.d.r.a., quidquid ob eam rem N^m N^m A^o A^o dare facere oportet ex fide bona, eius iudex N^m N^m A^o A^o c.s.n.p.a.

The main objection to this thesis has been that although it was within the power of the magistrate to grant and refuse remedies and to extend existing ones by means of fictions, the transposition of subjects, etc., he was not competent to create a civil obligation *ex novo*; sc., by instructing a judge to condemn or absolve according to what it was proper for the defender to give or do (*dare facere oportere*). As Miceli has argued, however, this objection rests on the proposition that the distinction between civil and praetorian actions was drawn just as sharply at the time the *actiones adiecticiae qualitatis* were introduced as during the classical period of Roman jurisprudence. If, as the author suggests, this was not the case, and it was possible for the praetor to implement the promises contained in his edict by issuing *formulae* on the model of those later referred to as *in ius conceptae*, then, so the argument runs, one of the main obstacles to the naming of the *praeponeus* in the *intentio* is removed.⁸⁴

⁸¹ Miceli, *Sulla struttura formulare*, 26.

⁸² Julius Baron, *Abhandlungen aus dem römischen Civilprozess*, vol. 2. Die Adjecticischen Klagen (Berlin, 1882), 136; Miceli, *Sulla struttura formulare*, 35.

⁸³ See, for example, the *formulae* suggested by Miceli: *Sulla struttura formulare*, 360–63.

⁸⁴ Miceli, 344–50.

The practical differences between the accounts offered by Keller and Lenel on the one hand, and Baron and Miceli on the other, are not very great, since in both versions the *actio exercitoria* is conceived as a modification of *formulae in ius*. In contrast, the difference between these accounts and that of Mandry and Brinz is very great indeed. This is because if the *formula* was framed *in factum*, the judge would not be able to assess the duties of the parties according to good faith.⁸⁵ I do not think it is impossible, as Miceli contends, that this divergence can have been tolerated.⁸⁶ If the *actio exercitoria* was one of the earliest of the *actiones adiecticiae qualitatis* – and especially if it was introduced earlier than the *actio institoria* – it may well have been the praetor's intention to grant relief only in the narrow circumstances described by the edict and not to hold the *praeponens* liable *in solidum* with reference to the *bona fides* of the son or slave. It is hard to see, however, how this state of affairs can have persisted for very long. The operation of the *lex Rhodia*, for example, which had been at least partially interpreted into the framework of Roman law by the second half of the first century BCE at the latest, was achieved by making *contributio* a matter of good faith between the parties to a *locatio conductio*. If the *actio exercitoria* was *in factum*, there does not appear to be any way in which a person whose cargo had been jettisoned could sue an *exercitor* for contribution on the basis of a contract of letting and hiring concluded with his or her *magister navis*. In effect, a *praepositus* would only be bound to act in good faith on his own account, and not on behalf of the *praeponens*. For this and other reasons, either of the theses advanced by Keller/ Lenel and Baron/ Miceli are to be preferred.

With these possibilities in mind, it remains to consider some of the action's procedural aspects. According to Ulpian, it was up to the third party whether to sue the *exercitor* or the *magister navis*.⁸⁷ If the shipmaster was the *exercitor's* dependant, Gaius was clear that the *actio exercitoria* was to be preferred over

⁸⁵ The *actio in factum civilis* mentioned by Labeo in D.19.5.1.1 (Pap. 8 *quaest.*) does not pose a problem in this respect, as its *intentio* was most likely *incerta ex fide bona* (i.e., *quidquid... dare facere oportet ex fide bona*): on which, *infra*, 169 *et seq.*

⁸⁶ Miceli, *Sulla struttura formulare*, 26.

⁸⁷ D.14.1.1.17 (Ulp. 28 *ad ed.*).

the *actiones de peculio* and *de in rem verso* for the reason that the former was *in solidum* and less onerous in terms of proof.⁸⁸ Conversely, if he was not in the power of the *exercitor*, the third party would only have the *actio exercitoria* to rely on with respect to the *praeponens*, though he could choose to sue the *magister* using a standard contractual remedy.⁸⁹ These options were alternative because a suit joined against one consumed the obligation of the other (at the moment of *litis contestatio*); for, as Ulpian explained, the action against the *exercitor* was given *ex persona magistri*.⁹⁰ In addition, payments made toward the reduction of the obligation of one would simultaneously reduce what was owed by the other. It is not clear how a third party who had struck a bargain with an *exercitor in potestate* (as per Julian's opinion in D.14.1.1.23) could go about suing the father or master: if the *actio exercitoria* was *in factum* then this presents little difficulty; if a modification of a *formula in ius concepta*, then, as Pugliese suggested, an *actio utilis* is likely to have been given.⁹¹ Finally, although the *exercitor* could not sue a third party who had dealt with a *magister extraneus* directly, he could recover from the shipmaster on the contract of hire or mandate for losses he had incurred on his account.⁹²

Paul emphasised that the edictal liability of the person who had appointed a shipmaster lay notwithstanding any other civilian or praetorian relationship between the actors involved. This meant, for example, that if a master let the services of his slave to a third party who subsequently appointed him as a *magister*, any bargains struck between the master and the slave in his capacity as shipmaster would give rise to exercitorian liability on the part of the *praeponens*.⁹³ In the institorian context, Julian stated that the appropriate action for the master to use in this scenario was an *actio utilis*, though this level

⁸⁸ G.4.74; also, J.Inst.4.7.5.

⁸⁹ D.14.1.5.1 (Paul. 29 *ad ed.*): '*...hoc enim edicto non transfertur actio, sed adicitur*'.

⁹⁰ D.14.1.1.24 (Ulp. 28 *ad ed.*). In relation to the *actio institoria*, Ulpian appears to suggest that bringing a suit on this account would not bar the *actio tributoria*: D.14.3.11.7 (Ulp. 28 *ad ed.*). Buckland considered this an issue for the exercitorian action as well: *The Roman Law of Slavery*, 712. However, if it was Ulpian's view that the *actio tributoria* did not lie alongside the *actio exercitoria*, then the problem does not arise: D.14.1.1.20 (Ulp. 28 *ad ed.*).

⁹¹ Pugliese, 'In tema', 334–35.

⁹² D.14.1.1.18 (Ulp. 28 *ad ed.*).

⁹³ D.14.1.5 pr. (Paul. 29 *ad ed.*).

of detail is not forthcoming from Paul.⁹⁴ In the other direction, the *praeponeus* could sue the master *ex conducto* to compel him to transfer any actions acquired on account of his power over the *magister*.⁹⁵ In addition, Ulpian noted that, with respect to the second part of the edict, a master who alienated a slave who had been exploiting a ship *voluntate domini* remained liable despite the transfer.⁹⁶

If there were multiple *exercitores*, each was jointly and severally liable *in solidum* for bargains struck with the *praepositus*.⁹⁷ This appears to have been the case at least from the time of Julian, who stated that this rule would apply in the institorian context *exemplo exercitorum*.⁹⁸ The justification provided by Gaius was that it avoided the necessity for third parties to split up their suit between defenders.⁹⁹ Paul continued that, if the *exercitores* were partners, the balance could be redressed by their suing one another *pro socio* (or *communi dividundo*).¹⁰⁰ On the other hand, if several *exercitores* were exploiting the ship personally without having appointed a *magister navis*, each would only be liable to the extent of their share in the enterprise.¹⁰¹ As soon as they appointed a shipmaster from among them, however, the normal rules would apply, and each would be jointly and severally liable *in solidum* for dealings with the *praepositus*.¹⁰² Ulpian extended this reasoning to the second part of the edict, so that a servile *exercitor* who exploited a ship according to the will of his owners in common made them all jointly and severally liable in full.¹⁰³ Further, it was his view that even if only one of the owners in common was *volens*, all

⁹⁴ D.14.3.11.8 (Ulp. 28 *ad ed.*) and D.14.3.12 (Iul. 11 *dig.*).

⁹⁵ D.14.1.5 pr. (Paul. 29 *ad ed.*).

⁹⁶ D.14.1.4.3 (Ulp. 29[28?] *ad ed.*). Aubert is right to query whether this passage has been wrongly attributed to book 29 of Ulpian's commentary *ad edictum: Business Managers*, 63, note 102.

⁹⁷ D.14.1.1.25 (Ulp. 28 *ad ed.*). On collective liability in the context of the *actio exercitoria*: Di Porto, *Impresa collettiva*, 175; Feliciano Serrao, *Impresa e responsabilità a Roma nell'età commerciale: forme giuridiche di un'economia-mondo* (Pisa: Pacini, 2002), 76; Aubert, *Business Managers*, 63; Földi, 'Remarks', 198–205; Cerami and Petrucci, *Diritto commerciale romano*, 239–45.

⁹⁸ D.14.3.13.2 (Ulp. 28 *ad ed.*): on which, Solazzi, 'L'età dell'actio exercitoria', 1963, 249–50.

⁹⁹ D.14.1.2 (Gai. 9 *ad ed. provinc.*).

¹⁰⁰ D.14.1.3 (Paul. 29 *ad ed.*).

¹⁰¹ D.14.1.4 pr. (Ulp. 29[28?] *ad ed.*).

¹⁰² D.14.1.4.1 (Ulp. 29[28?] *ad ed.*).

¹⁰³ D.14.1.4.2 (Ulp. 29[28?] *ad ed.*); also, D.14.1.6.1 (Paul. 6 *brev.*): on both of which, Cerami and Petrucci, *Diritto commerciale romano*, 244–45.

would be liable *in solidum*. The exercitorian action, unlike the *actio de peculio*, was perpetual (i.e., not time barred), and was not extinguished by the death of either the *exercitor* or the shipmaster.¹⁰⁴

4.1.3 Conclusion.

The *actio exercitoria* lay *in solidum* (i.e., without limit) against a person who had appointed a shipmaster (*magister navis*) for contracts entered into with him in connection with the matters for which he was appointed. By the time of the classical period the edict consisted of two parts, which enabled the aggrieved party to proceed against both the *exercitor* and the person in whose *potestas* he or she was. In both cases the edict applied irrespective of the status of the *magister* and even if he was an *extraneus* (i.e., not in the power of the *exercitor* or his *paterfamilias*); though whether this was the case from the start or a later innovation is uncertain. In this and other respects the action was similar to the *actio institoria*, which introduced a remedy for transactions entered into with the managers of land-based enterprises (*institores*), and for this reason the two are usually considered together. As de Ligt has pointed out, Plautus' exclusive references to *peculia* where *praepositiones* might otherwise have been mentioned suggests that both actions were probably unknown to the playwright, and therefore likely introduced after his death in 184 BCE.¹⁰⁵ This argument, however, is far from definitive.

The first attestation of these actions in the juristic sources can be attributed to Servius and Ofilius respectively.¹⁰⁶ In the text in which Servius' view is reported, however, we are told that his observations were made as a comment upon the writings of M. Iunius Brutus (pr. c. 140 BCE), who Aubert has cautiously connected with the introduction of the *actio institoria*.¹⁰⁷ This is supported by the most likely structure of the *formula* of these actions – according to which the name of the principal was transposed into the

¹⁰⁴ D.14.1.4.4 (Ulp. 29[28?] *ad ed.*): on which, Aubert, *Business Managers*, 63.

¹⁰⁵ Luuk de Ligt, 'Legal History and Economic History: The Case of the Actiones Adiecticiae Qualitatis', *TvR* 67 (1999): 225–26.

¹⁰⁶ For the *actio institoria*, D.14.3.5.1 (Ulp. 28 *ad ed.*); and for the *actio exercitoria*, D.14.1.1.9 (Ulp. 28 *ad ed.*): on which, Siro Solazzi, 'L'età dell'*actio exercitoria*', *Rivista di diritto della navigazione* 7 (1941): 259.

¹⁰⁷ Aubert, *Business Managers*, 76–77.

condemnatio for that of the *praepositus*, against whom the claim was made in the *intentio* – which is analogous to that of another remedy (the *formula Rutiliana*), thought to have been introduced by 118 BCE at the latest.¹⁰⁸ It is usually conceded that the *actio exercitoria* was introduced earlier than the *actio institoria*, though Aubert has recently contested this view.¹⁰⁹ It is unlikely, however, that they were introduced far apart from one another, and for this reason I agree with Aubert that both actions were introduced in the late second century BCE.¹¹⁰ This is consistent with the view of those scholars who date the development of the so-called *actiones adiecticiae qualitatis* to the second century BCE more generally.¹¹¹

The evidence also provides some insights into how the wording and interpretation of the edict changed over time. With respect to the first part, the distinction made by Ofilius indicates that the expression *eius rei nomine, cui ibi praepositus fuerit* – or at least a phrase with the same substantive content – constituted part of the edict's phrasing from at least the second half of the first century BCE. It is possible that before this time the first part of edict specified that it only applied if the *praepositus* was in the power of the *exercitor*, but even if this was the case, this restriction is likely to have been removed by the late Republic. It is also possible, as Földi has argued, that changes in the meaning of certain words led to changes in the wording of the edict (though not necessarily to its substantive content). So far as the interpretation of this part of the edict was concerned, the evidence suggests that before the time of Julian the sub-appointment of a shipmaster by another *magister navis* only made the *exercitor* liable if he or she was *volens*. In addition, the circumstances

¹⁰⁸ Aubert, 77–78.

¹⁰⁹ Aubert, 90–91, with bibliography at 84, note 182; also, Jean-Jacques Aubert, 'The Republican Economy and Roman Law: Regulation, Promotion, or Reflection?', in *The Cambridge Companion to the Roman Republic*, ed. Harriet I. Flower, 2nd ed. (Cambridge: Cambridge University Press, 2014), 171–72. De Ligt prefers the priority of the *actio exercitoria*: 'Actiones Adiecticiae Qualitatis', 219–20.

¹¹⁰ Aubert, *Business Managers*, 77; also, Emilio Valiño del Río, 'Las "actiones adiecticiae qualitatis" y sus relaciones básicas en Derecho Romano', *Anuario de Historia del Derecho Español* 37 (1967): 382.

¹¹¹ For a bibliography of scholars taking this view, de Ligt, 'Actiones Adiecticiae Qualitatis', 222, note 60. De Ligt himself argues for the introduction of the earliest *actiones adiecticiae qualitatis* 'before the last quarter of the third century B.C.': 223. In agreement, Miceli, *Studi*, 37.

in which borrowing money counted as an activity in connection with the matters for which a shipmaster had been appointed appears to have been a topic of discussion across several centuries. Whether, therefore, this was always the case is doubtful, though the earliest evidence is supplied by Ofilius, who suggested that borrowing money could count for these purposes in certain limited circumstances.

Turning to the second part of the edict, the first direct evidence for its existence is provided by Ulpian, though his treatment of the topic *ad edictum* and citation of earlier jurists indicates that it was in existence by the middle of the second century CE. This does not preclude, however, the possibility that it was introduced earlier; sc., at some point between the introduction of the first part of the edict and the time of Julian and Pomponius. It is possible, as Földi has suggested, that the edict was originally restricted to slaves embarking on a maritime venture with the consent of their master, and later also to sons-in-power. This, however, is largely conjectural. If the edict was introduced earlier than the middle of the second century, then, as in the first part, there are likely to have been terminological changes over time. With respect to the edict's interpretation, whether the *actio tributoria* could be brought in the exercitorian context was not a settled matter, even by the time of Ulpian and Paul. In addition, it was only after about the middle of the second century CE that a father or master could be held liable for contracts entered into by a son or slave who was acting in his capacity as an *exercitor*. Finally, the procedural mechanism by which both parts of the edict were realised is likely to have consisted of a modification to *formulae in ius conceptae*.

Section 4.2: The *actiones locati* and *conducti*.

4.2.1 Shipping Contracts and *locatio conductio*.

The merchant's objective was to transport goods to their intended market so that he could exchange them for money or for some other property. If he did not possess the means to achieve this himself, he needed to engage an *exercitor*, either by hiring a ship or the services of someone in control of a ship.

Contracts that involved one party putting his ship or services under the control of another in return for money fell within the ambit of the only long-term bilateral contract known to the Romans: *locatio conductio* (letting and hiring). Although the verbs *locare* ('to rent/ let out') and *conducere* ('to hire/ accept something on hire') appear in the sources from the fifth century BCE onwards, the use of these words probably bears little resemblance to their technical use in the context of the consensual contract.¹¹² The first explicit reference to *bonae fidei* character of the agreement is provided by Cicero, but there is little doubt that it was characterised by good faith significantly before the advent of the first century BCE. Several hypotheses have been advanced in this respect, the most convincing of which locate the creation of the consensual contract at some point between the mid-third and mid-second centuries BCE.¹¹³ The absence of any reference to stipulations by Cato in some passages concerning hiring arrangements indicates that the contract was consensual by c. 160 BCE, and several scenes in Plautus tend to suggest an earlier date.¹¹⁴ At any rate, it has been suggested that the introduction of the bilateral form of the agreement simply granted legal recognition to an already-existing state of affairs and involved little more than the conceptual reorganisation of the earlier forms of letting and hiring into a *bonae fidei iudicium*.¹¹⁵

¹¹² Paul J. du Plessis, *Letting and Hiring in Roman Legal Thought 27 BCE-284 CE* (Leiden and Boston: Brill, 2012), 9–10; also, Theo Mayer-Maly, 'Römische Grundlagen des modernen Arbeitsrecht', *Recht der Arbeit* 8–9 (1967): 283; and Roberto Fiori, *La definizione della 'locatio conductio': giurisprudenza romana e tradizione romanistica* (Naples: Jovene, 1999), 13–14, 18, 21.

¹¹³ According to El Bouzidi, for example, the contract arose out of the socio-economic conditions of agricultural production on the Italian peninsula during the transformation of the second century BCE: 'Les formes de negotiations des contrats. Une évolution institutionnelle dans le monde rural au II^eme s. av. J.C.', *Gerión. Revista de Historia Antigua* 18 (2000): 147–58. For the hypothesis, following Kaser, that the contract was developed as early as the mid-third century BCE, Armando José Torrent Ruiz, 'La polémica sobre la tricotomía "res", "operae", "opus" y los origenes de la "locatio-conductio"', *Teoría e storia del diritto privato* 4 (2011): 9 and 36.

¹¹⁴ Cato, *Agr.* 144-45: on which, Watson, *Obligations*, 101. Mayer-Maly cited several scenes in Plautus' *Aulularia* in support of the proposition that the contract was consensual by the time of the play's composition (Plaut., *Aul.* 280-82; 448; and 455-59): *Locatio conductio: eine untersuchung zum klassischen römischen Recht* (Vienna: Herold, 1956), 81; though cf. Watson, *Obligations*, 100–101.

¹¹⁵ Horst Kaufmann, *Die altrömische Miete, ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung* (Cologne and Graz: Böhlau-Verlag, 1964), § 7; Barend C. Stoop, 'Werkers en werk in die Klassieke Romeinse Reg' (University of South Africa, 1994), 197.

If one of the parties wished to sue the other for breach of the agreement, he could rely (at least initially) on one of two remedies: the *actio locati*, if he qualified as the *locator*, and the *actio conducti*, if he qualified as the *conductor*. In the second and third editions of Lenel's *edictum perpetuum*, the author gave the following reconstruction of the classical *formulae*:¹¹⁶

Actio locati/ conducti:

Quod Aulus Agerius Numerio Negidio fundum (opus faciendum, operas) quo de agitur locavit/ conduxit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

Whereas Aulus Agerius let/ hired the land (task to be done, tasks) which is the subject of this action to Numerius Negidius, which matter is the subject of this suit, whatever on that account Numerius Negidius ought in good faith to give or do for Aulus Agerius, for the value of that let the judge condemn Numerius Negidius to Aulus Agerius; if it does not appear let him absolve (trans. Birks 2014, 97).

Lenel's reconstruction is controversial on account of the suggestion that the obligation arising from a contract of letting and hiring had three possible permutations: sc., the letting/ hiring of a *res*, of a task to be done, or of *operae*. This was different from the *formula* of the *actio locati* proposed in Lenel's first edition, which followed Rudorff's earlier reconstruction by differentiating solely between the letting and hiring of *res* or *operae*.¹¹⁷ The trichotomy adopted by Lenel in the later editions was likely a response to Pandectist scholarship at the turn of the nineteenth and twentieth centuries, which was informed by the anachronistic notion that an obligation consisted of its 'contents' and had certain permissible 'objects'.¹¹⁸ Rather, as Fiori has demonstrated, the Roman jurists themselves had a unitary conception of the contract as an agreement

¹¹⁶ Otto Lenel, *Das Edictum perpetuum: ein Versuch zu dessen Wiederherstellung*, 2nd ed. (Leipzig: Tauchnitz, 1907), 290; *EP*³, 299–300.

¹¹⁷ Otto Lenel, *Das Edictum perpetuum: ein Versuch zu dessen Wiederherstellung*, 1st ed. (Leipzig: Tauchnitz, 1883), 240; also, Adolfus F. Rudorff, *De iuris dictione edictum. Edicti perpetui quae reliqua sunt* (Lipsiae: Hirzelium, 1869), 125. On the whole question, Fiori, *La definizione*, 313.

¹¹⁸ Fiori, *La definizione*, 7–10; Attila P. Kovács, 'Quelques observations sur la division de la locatio conductio', in *Iura Antiqua - Iura Moderna: Festschrift für Ferenc Benedek zum 75. Geburtstag* (Pécs: Dialóg Campus Kiadó, 2001), 217–30; also, Armando José Torrent Ruiz, 'The Controversy on the Trichotomy "Res, Operae, Opus" and the Origin of the "locatio-Conductio"', *RIDROM: Revista Internacional de Derecho Romano [Online]* 9 (2012): 378–420.

founded on a reciprocal obligation (*synallagma*) created by consent.¹¹⁹ In the context of letting and hiring, the jurists understood this obligation to consist of the exchange of rent (*merces*) for either the permissible use and enjoyment (*uti frui*) of a *res*, or for the tasks (*operae*) of a person (*homo*).¹²⁰ In light of the work of Fiori and others, the versions of the *formulae* put forward by Rudorff and in Lenel's first edition are therefore the ones preferred here, since they only differentiate between the letting and hiring of *res* or *operae*.¹²¹

Although there is no direct evidence that the *actiones locati* and *conducti* remained the same from the time of their introduction to their inclusion in the *edictum perpetuum*, the continuity between the jurisprudence of the late Republican and Augustan jurists and that of the jurists of the second and third centuries CE strongly suggests that the *formulae* were in their classical form from at least the first half of the first century BCE.¹²²

The *formulae* of the *actiones locati* and *conducti* gave rise to two questions: first, the interpretation of what the parties had agreed (*id quod actum est*); and second, the duties arising *ex fide bona* in light of that agreement. As early as the time of Servius, interpreting the *actum* had widened beyond the formulation of the agreement (the *dictum*) to involve a consideration of the transaction as a whole, which included both its formulation and any accompanying circumstances or negotiations.¹²³ In the context of letting and hiring agreements, the interpretation of the *actum* was a primary concern because it determined which of the parties was to be considered the *locator* and which the *conductor*, and therefore the duties that they owed toward one another in good faith. Like sale, the designation of the parties was important because their duties were asymmetrical, and so what each of them ought to give or do for the other *ex fide bona* differed according to their role in the transaction.

¹¹⁹ Fiori, *La definizione*, 286–90; also, du Plessis, *Letting and Hiring*, 13–14.

¹²⁰ Fiori, *La definizione*, 289; du Plessis, *Letting and Hiring*, 14.

¹²¹ That is, '*Quod Aulus Agerius Numerio Negidio fundum (operas) locavit/ conduxit*', etc. In any case, Kaser is probably correct that the edictal *formula* simply reported an example, such as in connection with a *fundus Cornelianus* or the like: 'Review of Amirante L., *Ricerche in tema di locazione* (1959)', *IURA* 11 (1960): 234.

¹²² Fiori, *La definizione*, 180.

¹²³ David Daube, 'Slightly Different', *IURA* 12 (1961): 113; also, Fritz Pringsheim, 'Id quod actum est', *ZSS* 78 (1961): 17.

However, unlike sale, the direction in which the money passed was not determinative.¹²⁴ Consequently, the legal qualification of the relationship rested on the interpretation of what the parties had agreed in each case, which was unavoidably a question of fact.¹²⁵ Only once this had been established could the duties of the parties – a matter for the *intentio* – be sensibly discussed.

One of the earliest juristic discussions of *locatio conductio* in connection with sea transport occurs in a text which contains contributions by Servius, Alfenus, and Paul.¹²⁶ Beyond the juristic sources, the earliest references to private contracts involving Roman sea transport appear in the plays of Plautus and Terence. In the prologue to Plautus' *Rudens*, which was probably first performed in the last decade of the third century BCE, a pimp (*leno*) hires a ship (*navis clanculum conducitur*) for the purpose of sailing to Sicily.¹²⁷ The same language is employed by Terence in the *Adelphi* (c. 160 BCE), in which a character charters a vessel (*navem conductam*) with the intention of shipping a cargo to Cyprus.¹²⁸ Two further references to private transport contracts can also be found elsewhere in Plautus: the first in the *Asinaria* (c. 211 BCE), in which a transport charge (*vectura*) for a cargo of oil is due;¹²⁹ and the second in the *Mostellaria* (perhaps first decade of the second century), in which a character states that he paid three minas for two doorposts, besides the

¹²⁴ Peter Birks, *The Roman Law of Obligations*, ed. Eric Descheemaeker (Oxford: Oxford University Press, 2014), 98–99.

¹²⁵ Pringsheim, 'Id quod', 11–17; also, generally, Ulrike Babusiaux, *Id quod actum est: zur Ermittlung des Parteiwillens im klassischen römischen Zivilprozess* (Munich: C.H. Beck, 2006).

¹²⁶ D.19.2.31 (Alf. 5 *dig. a Paulo epit.*): on which, *infra*, 190 *et seq.*

¹²⁷ Plaut., *Rud.* 57-9: on which, Léon R. Ménager, 'Naulum et receptum rem salvam fore. Contribution à l'étude de la responsabilité contractuelle dans les transports maritimes, en droit romain', *RHD* 38 (1960): 186–87; Nicole Charbonnel, 'Aux sources du droit maritime à Rome: Le «Rudens» de Plaute et le droit d'épaves', *RHD* 73 (1995): 311–12. For the dating of the play, Erich Woytek, 'Sprach- und Kontextbeobachtung im Dienste der Prioritätsbestimmung bei Plautus: Zur Datierung von Rudens, Mercator und Persa', *Wiener Studien* 114 (2001): 119–42.

¹²⁸ Ter., *Ad.* 225-26.

¹²⁹ Plaut., *Asin.* 433.

transport fee (*praeter vecturam*; this latter example probably refers to carriage by land).¹³⁰

It is significant to note that the vocabulary used by both Plautus and Terence demonstrates an awareness of the alternative contractual configurations that could distinguish different kinds of shipping arrangement.¹³¹ Generally, it was the Roman conception that a person who ‘placed out’ a thing (*res*) or task (*opus*) for hire was the *locator*, and that the person who either took control of the thing or undertook to perform the task was the *conductor*.¹³² In the first two examples, the use of *conducere* indicates that the charterers had hired a ship with a view to operating the vessel themselves. According to this model the person letting out the ship (or space on board) was designed as the *locator*, the charterer the *conductor*.¹³³ In contrast, the references to payments of *vectura* suggest that the characters involved in these latter transactions had paid other people to perform the task (*opus*) of transporting the goods for them (similar to a modern contract of carriage). Under this arrangement, the shipper was designed the *locator*, the person undertaking to perform the task (i.e., the carrier) the *conductor*.¹³⁴ It was therefore possible, for example, that an *exercitor* could be hiring a vessel as *conductor* from a shipowner at the same time as acting as either *locator* or *conductor* in relation to a shipper, depending upon the configuration of their arrangement.

¹³⁰ Plaut., *Mostell.* 823: on which, J. A. C. Thomas, ‘Juridical Aspects of Carriage by Sea and Warehousing in Roman Law’, in *Les grandes escales: I, Antiquité et moyen-âge* (Brussels: Librairie encyclopédique, 1974), 122, note 31.

¹³¹ See, e.g., Huvelin, *Droit commercial romain*, 91; J. A. C. Thomas, ‘Carriage by Sea’, *RIDA* 7 (1960): 496–97; also, ‘Juridical Aspects’, 118–20; and, more recently, Dominique Gaurier, *Le droit maritime romain* (Rennes: Presses Universitaires de Rennes, 2004), 64–65.

¹³² Birks, *Obligations*, 98.

¹³³ The sources refer to the letting and hiring of ships *per aversionem* (D.14.1.1.15 (Ulp. 28 *ad ed.*); D.14.2.10.2 (Lab. 1 *pith. a Paulo epit.*)) or *totam navem* (D.4.9.3.1 (Ulp. 14 *ad ed.*); D.14.2.2 pr. (Paul. 34 *ad ed.*)), as well as to the hiring of spaces on board as *conductio loca in navem* (D.14.2.2 pr.). For these examples, Cerami and Petrucci, *Diritto commerciale romano*, 249–50; and further, Thomas, ‘Juridical Aspects’, 118–20.

¹³⁴ The sources speak of *locare* and *conducere res perferendas* (D.4.9.3.1 (Ulp. 14 *ad ed.*)); *mancipia vehendas* (D.14.2.10 pr. (Lab. 1 *pith. a Paulo epit.*)); *onus vehendum* (D.19.2.13.1 (Ulp. 32 *ad ed.*)); and *merces vehendas* (D.14.2.2 pr. (Paul. 34 *ad ed.*); D.19.5.1.1 (Pap. 8 *quaest.*)).

In practice, however, shipping contracts could involve complex agreements that required greater specification than the dichotomy between *res* and *operae* allowed. As Fiori has shown, both the juridical sources and the evidence for the contents of shipping contracts provided by the Greco-Egyptian papyri reveals that there were, broadly speaking, four different ways in which the parties could structure their agreement.¹³⁵ In short, these loosely corresponded with the modern categories of bareboat charters, voyage charters, time charters, and contracts of carriage. In Fiori's view the overriding concerns of the parties were economic, so that the structure of the arrangements varied according to the extent to which each was willing to take responsibility for the conduct of the enterprise, and by extension the risk (*periculum*) should things go wrong.

Given the potential complexity of shipping contracts, the jurists were faced with two immediate problems: first, they needed to be able to interpret what the parties had agreed and design them as *locator* and *conductor* respectively; and second, in light of the configuration of the agreement, they needed to interpret what each of the parties owed one another *ex fide bona*. This sets the context for the three further parts in which this section will unfold. These will concern: first, Labeo's interpretation of the *actiones locati* and *conducti* from the perspective of shipping contracts; second, the interpretation of the *intentio* from the perspective of the *lex Rhodia de iactu*; and third, an excursus on D.19.2.31 (Alf. 5 dig. a Paulo epit.).

4.2.2 Labeo and the Interpretation of the *actiones locati* and *conducti* from the Perspective of Shipping Contracts.

Three excerpts derived from Paul's epitome of a work attributed to Labeo provide an insight into the latter's approach to the interpretation of shipping contracts. All three belonged to a work referred to as a collection of *pithana*, which means 'probabilities' or 'plausible views' and shares a name with a genre

¹³⁵ Roberto Fiori, 'L'allocatione del rischio nei contratti relativi al trasporto', in *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero)*, ed. Elio Lo Cascio and Dario Mantovani (Pavia: Pavia University Press, 2018), 560–61.

of Stoic philosophical literature.¹³⁶ There is some doubt about the extent to which Labeo's views have been accurately reported by Paul. Although it is possible that the *pithana* was an independent work published during Labeo's lifetime, it cannot be ruled out that it was in fact a collection of decisions excerpted from his *Posteriora* and brought together by an unknown editor after the jurist's death.¹³⁷ This would explain their casuistic style, despite the philosophical genre to which the work apparently belonged.¹³⁸ The polemical style of Paul's epitome also raises questions about the extent to which he may have modified Labeo's views, in the words of Thomas, to 'score points off the great jurist of the past'.¹³⁹ Several scholars, however, have argued that Paul set out his predecessor's words mostly as they appeared in the original.¹⁴⁰ In my opinion this latter position is correct.

The key to understanding these texts is to reconstruct the context from which Labeo's views were drawn. Two other fragments, both of which derive from an epitome of Labeo's *Posteriora* authored by Javolenus, help with this task:

¹³⁶ Fritz Schulz, *History of Roman Legal Science* (Oxford: Oxford University Press, 1946), 226–27; Ulrike Babusiaux, 'Legal Writing and Legal Reasoning', in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 181–82.

¹³⁷ For this hypothesis, J. A. C. Thomas, 'Pithanon Labeonis a Paulo Epitomatorum Libri VIII', in *Daube Noster. Essays in Legal History for David Daube*, ed. Alan Watson (Edinburgh and London: Scottish Academic Press, 1974), 319; cf. Franz Wieacker, *Textstufen klassischer Juristen* (Göttingen: Vandenhoeck & Ruprecht, 1960), 144. Whatever the case, the texts composing the *pithana* were likely among Labeo's later productions, since they include a reference to the *lex Iulia de maritandis ordinibus* of 18 BCE: Mario Bretone, 'Ricerche labeoniane: ΠΙΘΑΝΑ', *La Parola del Passato* 28 (1973): 170.

¹³⁸ Remarking on the casuistic style of the work: Schulz, *Roman Legal Science*, 227; Bretone, 'Ricerche labeoniana', 176–77; Mario Talamanca, 'I "Pithana" di Labeone e la logica stoica', *IURA* 26 (1975): 35; Bruno Schmidlin, 'Horoi, pithana und regulae - Zum Einfluß der Rhetorik und Kialektik auf die juristische Regelbildung', in *Aufstieg und Niedergang der römischen Welt*, ed. Hildegard Temporini and Wolfgang Haase, vol. II:15 (Berlin: De Gruyter, 1976), 115.

¹³⁹ Thomas, 'Pithanon Labeonis', 323. Babusiaux describes the format as a 'sequence of two opposing legal opinions [that] can be interpreted as an imitation of a dialogue, the first speaker being Labeo, the second being Paul, posthumously criticising the first': 'Legal Writing', 182.

¹⁴⁰ Talamanca, 'I "Pithana" di Labeone', 3–5. According to Babusiaux, 'Paul often cites Labeo's opinion verbatim': 'Legal Writing', 182.

D.18.1.80.2 (Lab. 5 *post. a lav. epit.*):

Silva caedua in quinquennium venierat: quaerebatur, cum glans decidisset, utrius esset. scio Servium respondisse, primum sequendum esse quod appareret actum esse: quod si in obscuro esset, quaecumque glans ex his arboribus quae caesae non essent cecidisset, venditoris esse, eam autem, quae in arboribus fuisset eo tempore cum haec caederentur, emptoris.

D.18.1.77 (lav. 4 *ex post. Labeonis*):

In lege fundi vendundi lapidicinae in eo fundo ubique essent exceptae erant, et post multum temporis in eo fundo repertae erant lapidicinae. eas quoque venditoris esse Tubero respondit: Labeo referre quid actum sit: si non appareat, non videri eas lapidicinas esse exceptas: neminem enim nec vendere nec excipere quod non sit, et lapidicinas nullas esse, nisi quae apparent et caedantur: aliter interpretantibus totum fundum lapidicinarum fore, si forte toto eo sub terra esset lapis. hoc probo.

In the first text, the right to fell timber in a wood was sold for five years, and it was asked which of the parties was entitled to any fruits that fell from the trees.¹⁴¹ Labeo approved Servius' view that the first consideration was what the parties appeared to have intended (*quod appareret actum esse*). However, if this was not forthcoming (*in obscuro*), Labeo's position was that the fruits that had fallen from trees that had not yet been felled belonged to the vendor, but that those on the trees at the time of their felling belonged to the purchaser.

In the second text, a contract for the sale of a plot of land included a term that quarries were excluded from the bargain. Some time after the sale quarries were established by the purchaser, which the late Republican jurist Q. Aelius Tubero held belonged to the vendor. In contrast, Labeo stated that one had first to refer to what the parties had agreed (*quid actum sit*), and if this was not apparent, then only those quarries that were active at the time of the sale were excluded from the agreement.

In both texts Labeo's reasoning follows the same pattern: when confronted with uncertainty over the interpretation of an agreement, the first consideration was the *actum*, and if this was not apparent, then it was possible to put forward

¹⁴¹ According to Gaius, Javolenus used the word *glans* (literally 'acorns') to refer to all fruits: D.50.16.236 (Gai. 4 *ad l. XII tab.*).

a solution based on what the parties' intentions were likely to have been.¹⁴² In each case, the plausible view presupposes that the *actum* was *in obscuro*. It is therefore submitted that the 'plausible views' epitomised by Paul were decisions similar to those in the texts epitomised by Javolenus, which were put forward by Labeo as the most likely interpretation of the parties' intentions in circumstances where they were not immediately apparent.¹⁴³

D.14.2.10 pr. (Lab. 1 *pith. a Paulo epit.*):¹⁴⁴

Si vehenda mancipia conduxisti, pro eo mancipio, quod in nave mortuum est, vectura tibi non debetur. Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium.

In light of the above, it is my view that Labeo's opinion can be expanded as follows:

If you have undertaken to transport slaves [and the *actum* is not apparent, then the plausible view is that] you are not owed *vectura* for any who die in transit.

It is clear from the terminology employed that the Augustan jurist was referring to a *locatio mercium vehendarum* in which one party had undertaken the task (*opus*) of transporting a consignment of slaves (as *conductor*) in return for a reward.¹⁴⁵ Furthermore, given that he indicates that the death of a slave would lead to a reduction of the *merces*, without any mention of damages besides, it must be assumed that he was envisaging losses that were attributable to *vis maior*.¹⁴⁶ Labeo's view therefore appears to have been that, if the precise

¹⁴² Labeo used *verisimile* elsewhere as a tool to discern the likely intention of a testator: D.32.30.4 (Lab. 2 *post. a lav. epit.*). On *verisimile* as a means of reaching juridical solutions: Tomasz Giaro, 'Knowledge of Law as Knowledge of Facts. The Roman Experience', in *Roman Law and Legal Knowledge. Studies in Memory of Henryk Kupiszewski*, ed. Tomasz Giaro (Warsaw: University of Warsaw, 2011), 220–22.

¹⁴³ One could also consider D.18.4.25 (Lab. 2 *pith.*), which follows precisely the same pattern as D.14.2.10 pr. and 2.

¹⁴⁴ For a comprehensive bibliography of authors who have treated this text, Gianpiero Mancinetti, *L'emersione dei doveri 'accessori' nella 'locatio conductio'* (Milan: Wolters Kluwer, 2017), 338, note 42.

¹⁴⁵ In D.19.5.1.1 (Pap. 8 *quaest.*), in which Labeo is cited, the same configuration is given as *locare merces vehendas*: Fiori, *La definizione*, 133.

¹⁴⁶ Fiori, 133; also, 'Forme e regole dei contratti di trasporto marittimo nel diritto romano', *RDN* 39, no. 1 (2010): 155.

content of the *actum* was *in obscuro*, the reward in a *locatio mercium vehendarum* was only owed for those goods that the *conductor* successfully transported to their destination; or, to put it another way, that the *locator's* duty to pay the *merces* was reciprocal to the *conductor's* obligation to successfully complete the task he had undertaken.¹⁴⁷

Turning to Paul, although some authors have cast doubt on the authenticity of his response, most treat this part of the text as substantially genuine.¹⁴⁸ This being accepted, the severan jurist's contribution was to point out that the attempt to discern the *actum* had not yet been exhausted: rather, the question was whether payment was due in relation to the number of slaves loaded on departure (*pro his qui impositi... essent*) or the number unloaded on arrival (*pro his qui deportati... essent*). Moreover, if this was not apparent, it would be enough for the *nauta* to show that the slave in question was on board at the time of departure.

Paul's discussion can be treated in two parts (*immo quaeritur... merces daretur* and *quod si... fin.*). With respect to the first part, the first question that arises is precisely what he was suggesting could be inferred from the method by which the *merces* was calculated. The implication of the second section, in which the author indicated that it would favour the *nauta* to show that the slaves were put on board, is that under the first method of calculation (i.e., by number of slaves loaded) the *vectura* would still be owing, while under the second method the reverse would be true. According to Fiori and Babusiaux, Paul

¹⁴⁷ The underlying idea appears to have been that of *mutuality*, which was described by Erskine in terms that 'No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either cannot or will not perform the counter-part': *An Institute of the Law of Scotland*, 1st ed. (Edinburgh, 1773), ¶ III.3.86. This position is consistent with that adopted by jurists belonging to the Servian school in, among other texts, D.19.2.15.2 (Ulp. 32 *ad ed.*): on which, Fiori, *La definizione*, 133–34. As Fiori has noted, it is also significant that slaves are non-fungible: if the property had been fungible, Alfenus' observation in D.19.2.31 (Alf. 5 *dig. a Paulo epit.*) – that a *nauta* who undertook the task of transporting goods in bulk became their owner during transit – would have been a relevant consideration: 'L'allocazione del rischio', 519.

¹⁴⁸ Haymann argued that the whole of Paul's response was interpolated: 'Textkritische Studien zum römischen Obligationenrecht. II. Periculum est emptoris', ZSS 41 (1920): 155–56; 'Zur Klassizität des periculum emptoris', ZSS 48 (1928): 407, note 3. Cf. Daube, who suspected the phrasing from *satis* onwards: 'Slightly Different', 113. In favour of its authenticity, see, e.g., Fiori, *La definizione*, 131.

interpreted an agreement to pay the *merces* on slaves loaded as evidence that the parties intended a *conductio navis* (or *loci in nave*), so that the *nauta*'s obligation to furnish the vessel (or, indeed, spaces on board) was fulfilled as soon as the slaves were installed.¹⁴⁹ In contrast, a clause stating that the *vectura* would be calculated according to the number of slaves unloaded implied that the parties had intended to conclude a *locatio mercium vehendarum*, so that the *nauta*'s obligation only became fulfilled on completion of the task. On this reading, Paul did not so much contradict Labeo's position as nuance it, by introducing a criterion (the method by which the *merces* had been calculated) as a means of interpreting the *actum* with a greater degree of sensitivity than the Augustan jurist's view allowed.

In the second section, however, Paul departs from Labeo by suggesting that, if the method by which the *vectura* was arrived at was not apparent, it would be enough for the *nauta* to show that the slaves had been loaded to ground an inference (*coniectura*) that he had fulfilled his duties under the contract.¹⁵⁰ In the absence of any evidence to the contrary, Paul was therefore willing to presume in favour of the position that was least onerous for the *nauta*, so that if he could prove that he had fulfilled his duties under a *conductio navis* (or *loci in nave*) he would be able to claim the *vectura* in return.¹⁵¹

D.14.2.10.2 (Lab. 1 *pith. a Paulo epit.*):

Si conduxisti navem amphorarum duo milium et ibi amphoras portasti, pro duobus milibus amphorarum pretium debes. Paulus: immo si aversione navis conducta est, pro duobus milibus debetur merces: si pro numero impositarum amphorarum merces constituta est, contra se habet: nam pro tot amphoris pretium debes, quot portasti.

¹⁴⁹ Fiori, *La definizione*, 137–38; 'Forme e regole', 158–59; also, Babusiaux, *Id quod actum est*, 231–32. For the alternative theories and their refutation, Fiori, *La definizione*, 135–37; also, 'Forme e regole', 156–59; and now, Mancinetti, *L'emersione*, 339–41.

¹⁵⁰ Babusiaux, *Id quod actum est*, 232.

¹⁵¹ In Fiori's opinion, Paul's reasoning can be explained with reference to the papyrological evidence, which indicates that, as a rule, *naukleroi* usually undertook to provide the means of conducting the enterprise in private transactions, whereas they normally undertook to deliver a result in those with a public dimension: 'L'allocatione del rischio', 521.

Again, it is my submission that Labeo's view can be reconstructed as follows:

If you have hired a ship of a capacity of two thousand amphorae and have loaded amphorae on board [and the *actum* is not apparent, then the plausible view is that] you owe *vectura* for two thousand amphorae.

The Augustan jurist's reference to a *conductio navis* has led most scholars to conclude that the arrangement described by the jurist was akin to a bareboat charter.¹⁵² Fiori, however, has recently drawn attention to the fact that the person hiring the vessel was also loading goods on board (*ibi amphoras portasti*), which indicates that the jurist probably had a contract between an *exercitor* and a shipper in mind.¹⁵³ In these circumstances, the person hiring the vessel was the shipper, who paid the *merces* to the *exercitor* with reference to its capacity and therefore regardless of the number of goods actually put on board. Labeo's plausible view therefore appears to have been that, if the parties' intentions were not apparent, a person who had both hired a ship and loaded goods on board owed for the hire of the whole vessel.

Again, Paul's critique was that it was not necessary to fall back on a plausible view if the *actum* could be discerned from the method by which payment had been calculated. Thus, if the ship had been hired *per aversionem* (i.e., as a whole) then Labeo's view would hold; but if the *merces* had been calculated with reference to the number of amphorae loaded (*pro numero impositarum amphorarum*) it would be due in proportion to the latter.¹⁵⁴ This distinction has been variously interpreted as relating to the distinction between a bareboat charter and the hiring of spaces on board, or alternatively, between a bareboat charter and a contract of carriage.¹⁵⁵ However, Fiori's observation that Labeo had a contract between a shipper and *exercitor* in mind makes it more likely that Paul was seeking to differentiate between arrangements similar to modern time and voyage charters. On this reading, Paul had already distinguished between voyage charters and contracts of carriage in the *principium*, on the

¹⁵² This was the position originally taken by Fiori: *La definizione*, 139–40; also, 'Forme e regole', 158–60.

¹⁵³ Fiori, 'L'allocatione del rischio', 534.

¹⁵⁴ On the sale and hire of property *per aversionem*, Nicola De Marco, 'L'avversio: una clausola dell'emptio venditio e della locatio conductio', *Index* 28 (2000): 355–78.

¹⁵⁵ For a summary, Cerami and Petrucci, *Diritto commerciale romano*, 253.

basis that the former involved the calculation of the *merces* in relation to the quantity of goods loaded (*impositae*) and the latter in relation to the quantity unloaded. Now, it was also necessary to differentiate between voyage and time charters, since both kinds of arrangement involved the hiring of the vessel and were therefore not easily distinguishable. Thus, according to Paul, where the shipper had paid the *merces* with reference to the ship's capacity, a time charter was meant, whereas if it had been figured with reference to the number of goods loaded, a voyage charter was intended.¹⁵⁶

D.14.2.10.1 (Lab. 1 *pith. a Paulo epit.*):

Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriolem, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem. Paulus: immo contra, si modo ea navigatione utraque navis periiit, cum id sine dolo et culpa nautarum factum esset. idem iuris erit, si prior nauta publice retentus navigare cum tuis mercibus prohibitus fuerit. idem iuris erit, cum ea condicione a te conduxisset, ut certam poenam tibi praestaret, nisi ante constitutum diem merces tuas eo loci exposuisset, in quem devehendae eas merces locasse<s>[t],¹⁵⁷ nec per eum staret, quo minus remissa sibi ea poena spectaret.¹⁵⁸ idem iuris in eodem genere cogitationis observabimus, si probatum fuerit nautam morbo impeditum navigare non potuisse. idem dicemus, si navis eius vitium fecerit sine dolo malo et culpa eius.

In this text, Labeo begins by describing an agreement in which a shipper hired a vessel on condition that it was used to transport his goods. If the *nauta* unnecessarily transferred the merchandise to a worse ship against the wishes of the shipper, the jurist held that an *actio ex conducto locato* would lie if the goods subsequently became lost.

The first question that arises concerns the legal qualification of the relationship. The terminology (*navem conduxisti*) indicates that the arrangement involved

¹⁵⁶ Fiori, 'L'allocatione del rischio', 535.

¹⁵⁷ The Florentine has *locasset*, but for various reasons most scholars agree that *locasses* is more likely: Jean-François Gerkens, '*Aequae perituris...*': *une approche de la causalité dépassante en droit romain classique* (Liège: Collection Scientifique de la Faculté de Droit de Liège, 1997), 239–42; Fiori, *La definizione*, 151, note 78.

¹⁵⁸ The *Vaticanus* has *expectaret*, but *spectaret* is retained. For discussion, Gerkens, *Aequae perituris...*, 234–39; Fiori, *La definizione*, 151, note 80.

the hiring of the vessel by the shipper. However, as Fiori has observed, the condition that the shipper's goods would be carried in the vessel introduces an obligation on the *nauta* to perform a task, which was interpreted in the Accursian Gloss as a duty to deliver the merchandise '*ad aliquem locum*'.¹⁵⁹ The mixed character of the relationship is further indicated by the jurist's assertion that in certain circumstances an *actio ex conducto locato* would lie against the *nauta*. Some scholars have suggested that this expression is the result of an interpolation, or else has no special meaning.¹⁶⁰ However, as Fiori has argued, it is more likely that it results from the fact that Labeo conceived the arrangement as a unitary relationship which gave rise to two separate actions, each of which could be relied upon by either party depending upon which part of the agreement they wanted to enforce.¹⁶¹ Fiori's view is therefore that the arrangement was akin to a voyage charter, in the sense that the *nauta* (as *locator*) had put a specific vessel at the disposal of the shipper and also undertaken the task (as *conductor*) of transporting the goods to their intended destination.¹⁶²

If Fiori is right, then Labeo's 'plausible view' was that under this arrangement – in which the designation of the parties was uncertain – the shipper could proceed both *ex conducto* and *ex locato* against the *nauta* if he unnecessarily transferred the merchandise to a worse vessel against his wishes.¹⁶³ On the one hand, the *nauta*'s liability *ex conducto* arose from having transferred the goods against the shipper's wishes, since the transfer itself constituted a failure to furnish the use and enjoyment of the vessel. On the other hand, the *actio ex locato* lay against the *nauta* on the basis that the loss of the goods constituted a failure to successfully transport them. In this case, however, it is significant that the transfer was unnecessary and to a worse ship, since the basis of the *nauta*'s liability was his culpable conduct (i.e., *culpa*), not the fact of the transfer itself.

¹⁵⁹ Fiori, *La definizione*, 143; 'Forme e regole', 163.

¹⁶⁰ For a summary of these views, Fiori, *La definizione*, 143–44, notes 49 and 50.

¹⁶¹ Fiori, 144–45; 'Forme e regole', 164–65.

¹⁶² Fiori, 'L'allocazione del rischio', 536–39.

¹⁶³ Fiori, *La definizione*, 147–48; 'Forme e regole', 167–69.

This interpretation is consistent with another opinion attributed to Labeo, this time reported by Ulpian in D.19.2.13.1 (Ulp. 32 *ad ed.*):

Si navicularius onus Minturnas vehendum conduxerit et, cum flumen Minturnense navis ea subire non posset, in aliam navem merces transtulerit eaque navis in ostio fluminis perierit, tenetur primus navicularius? Labeo, si culpa caret, non teneri ait: ceterum si vel invito domino fecit vel quo non debuit tempore aut si minus idoneae navi, tunc ex locato agendum.

In this text, which does not indicate the source of Labeo's opinion, a *navicularius* who had undertaken the task of carrying merchandise to Minturnae transferred the goods from one vessel to another because the first was incapable of navigating upstream.¹⁶⁴ In the event that the goods were lost with the second vessel, Labeo held that the *navicularius* would not be liable if he was free from *culpa*, but that the *actio ex locato* would lie if he had transferred the goods against the shipper's wishes, to a less suitable vessel, or at an improper time.

The text has frequently been held interpolated, sometimes with a view to arguing that the *navicularius*' liability was originally considered to have arisen *ex recepto*.¹⁶⁵ However, as Robaye has pointed out, even if we doubt the authenticity of the words *si culpa caret*, the discussion remains founded on the *navicularius*' liability *ex locato* for conduct falling short of that expected from a professional carrier.¹⁶⁶ Thus, in Labeo's view, where a *navicularius* had undertaken to deliver a consignment of goods to a certain destination (here, Minturnae), he would be liable if their loss could be attributed to his fault. In this case, transferring the goods from one ship to another for a good reason did not constitute *culpa* by itself, but moving them against the wishes of the

¹⁶⁴ For a comprehensive bibliography, Mancinetti, *L'emersione*, 187, note 55; also, Riccardo Fercia, *Responsabilità per fatto di ausiliari nel diritto romano* (Padua: CEDAM, 2008), 66, note 81.

¹⁶⁵ E.g., by Thomas: 'Carriage by Sea', 502–3; cf. Julius C. van Oven, 'Actio de recepto et actio locati', *TvR* 24 (1956): 148. For a comprehensive bibliography of those scholars holding the text interpolated, Fiori, *La definizione*, 148, note 69.

¹⁶⁶ René Robaye, *L'obligation de garde: essai sur la responsabilité contractuelle en droit romain* (Brussels: Publications des Facultés universitaires Saint-Louis, 1987), 90; also, Geoffrey MacCormack, 'Custodia and Culpa', *ZSS* 89 (1972): 201, note 148; Rolf Knütel, 'Die Haftung für Hilfspersonen im römischen Recht', *ZSS* 100 (1983): 417; Riccardo Cardilli, *L'obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano (II sec. a.C.-II sec. d.C.)* (Milan: Giuffrè, 1995), 353–57.

shipper, to a less suitable vessel, or at an improper time, would provide grounds for the shipper to proceed against him *ex locato*.

Returning to D.14.2.10.1, Paul's response moves through five different situations in which the jurist held that the *nauta* would escape liability for transferring the goods despite their subsequent loss.¹⁶⁷ In the first case, Paul held that the *nauta* would not be liable for the transfer if both ships were wrecked during the same voyage. The reasoning here appears to be that an occurrence of *vis maior* that overwhelmed both vessels would break the connection between the *nauta's culpa* and the ultimate loss of the merchandise. The same reasoning applied (*idem iuris erit*) if the first *nauta* transferred the goods to a second because he had been held back by a public authority (i.e., the transfer of the merchandise had been made for a reason beyond his control); and also if the *nauta* had agreed to pay a penalty for failure to deliver the goods to a certain place by a specified time, provided there was an understanding that the penalty would be remitted if he was not at fault for any delay.¹⁶⁸ More straightforwardly, the *nauta* was also excused if the transfer had been made because he was incapacitated by illness or because his ship was unseaworthy through no fault of his own.

To conclude, in D.14.2.10.1 Labeo held that both the *actiones locati* and *conducti* could lie against the *nauta* if the merchandise was lost following a transfer that was both unnecessary and culpable. In D.19.2.13.1 he excluded the liability of the *navicularius* for making necessary transfers, unless his conduct was also culpable. Paul, meanwhile, excluded the *nauta's* liability if the effect of his *culpa* was negated by the intervention of *vis maior*, and extended this reasoning to excuse him for transfers that were both necessary and free from *culpa*.

¹⁶⁷ Gerken, *Aeque perituris...*, 233.

¹⁶⁸ The section '*idem iuris erit, cum ea condicione... spectare*' has given rise to several interpretations. Fiori's is preferred, not least because it does not require any modification of the text: *La definizione*, 151–52. Cf., e.g., Gerken, who has proposed inserting '*nisi*' before the words '*remissa sibi ea poena*': *Aeque perituris...*, 239; also, Huvelin, *Droit commercial romain*, 92.

D.19.5.1.1 (Pap. 8 *quaest.*):

Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit.

One final text reporting the views of Labeo provides an insight into the procedural aspects of enforcing shipping contracts. As Fiori has shown, shipping contracts were all simply examples of letting and hiring agreements that were shaped by the commercial needs of the parties.¹⁶⁹ For the purpose of bringing an action, however, there was a need to establish which of the parties qualified as the *locator* and which the *conductor*, so that the judge could assess what they ought to do for one another in good faith. In most cases this was relatively straightforward: in a bareboat charter the person with legal entitlement to the ship was the *locator* and the person hiring it the *conductor*; in a time charter, too, the person placing out the vessel and its crew was the *locator* and the shipper the *conductor*; and in contracts of carriage the reverse was true, since the shipper was conceived as the *locator*, placing out a task for the carrier to undertake as the *conductor*.

In certain cases, however, the contract could defy simple categorisation because it gave rise to obligations both in relation to the use and enjoyment of a thing (*res*) and with respect to the undertaking of a task (*opus*). Labeo's observation, which was approved by Papinian, was that if it was uncertain (*incertum*) whether the agreement qualified as a *conductio navis* or a *locatio mercium vehendarum*, then an *actio civilis in factum* would lie.¹⁷⁰ According to some scholars, the notion that an action could be civilian and *in factum* at the same time is unclassical and must therefore be the result of an interpolation.¹⁷¹ However, although some degree of epitomisation cannot be excluded, none of the arguments against the text's authenticity are persuasive.¹⁷² These being

¹⁶⁹ Fiori, 'L'allocatione del rischio', 540.

¹⁷⁰ According to Fiori, the generic terminology conceals the fact that Labeo was referring specifically to time and voyage charters: 542.

¹⁷¹ For a comprehensive bibliography of scholars taking this view, Fiori, *La definizione*, 129, note 5; 'Forme e regole', 176–77, note 84.

¹⁷² In favour of the text's authenticity, Filippo Gallo, 'Eredità di giuristi romani in materia contrattuale', in *Le teorie contrattualistiche romane nella storiografia contemporanea. Atti del Convegno (Siena, 14-15 aprile 1989)*, ed. Nicla Bellocci (Naples: Jovene, 1991), 36;

rejected, the *actio* to which Labeo referred was probably decretal in character (i.e., granted by the praetor on an *ad hoc* basis without reference to an edict) and involved the insertion of *praescripta verba* at the head of the *formula*.¹⁷³ In this way, the determination of the role of the parties was deferred *apud iudicem*, so that the judge was free to assess what the parties owed to one another *ex fide bona* directly with reference to the agreement and without being bound to identify them with any particular role.¹⁷⁴ If the action was indeed decretal, then this procedural innovation is unlikely to have been resorted to before the middle part of the first century BCE.

Conclusion:

Several texts attributed to Labeo on the subject of the interpretation of shipping contracts have survived. In all three texts epitomised by Paul, the Augustan jurist put forward ‘plausible views’ concerning the duties owed by the parties *ex fide bona* in cases where he considered the *actum* obscure. In D.14.2.10 pr. and 2, the discussion focused on those duties owed by the *nauta* that were understood to be reciprocal to the shipper’s payment of *vectura*. Paul’s contribution in both cases was to draw attention to the way in which the *merces* had been calculated as a guide to interpreting the *actum*, which negated the need to fall back on a plausible view. In D.14.2.10.1 and D.19.2.13.1, Labeo considered the circumstances in which a *nauta* would be held liable for the loss of the goods: if his actions demonstrated *culpa* and were not compelled by *necessitas*, liability would ensue. Finally, Labeo’s opinion was that if it was

Synallagma e conventio nel contratto. Ricerca degli archetipi della categoria contrattuale e spunti per la revisione di ipostazioni moderne, vol. 1 (Turin: Giappichelli, 1992), 235; Fiori, *La definizione*, 129; ‘Forme e regole’, 176–77; Lihong Zhang, ‘Studies on Actio in Factum Civilis’, in *Aus der Werkstatt römischer Juristen. Vorträge der Europäisch-Ostasiatischen Tagung 2013 in Fukuoka*, ed. Ulrich Manthe, Shigeo Nishimura, and Mariko Igimi (Berlin: Duncker & Humblot, 2016), 492–93.

¹⁷³ Mario Talamanca, ‘La tipicità dei contratti romani fra “conventio” e “stipulatio” fino a Labeone’, in *Contractus e Pactum: Tipicità e libertà negoziale nell’esperienza tardo-repubblicana (Atti Copanello, 1988)*, ed. Francesco Milazzo (Rome and Naples: Ed. Scientifiche Italiane, 1990), 100, note 250; Peter Gröschler, *Actiones in factum: eine Untersuchung zur Klage-Neuschöpfung im nichtvertraglichen Bereich* (Berlin: Duncker & Humblot, 2002), 13–14; Roberto Fiori, ‘Rise and Fall of the Specificity of Contracts’, in *Nova Ratione: Change of Paradigms in Roman Law*, ed. Adriaan J. B. Sirks (Wiesbaden: Harrassowitz Verlag, 2014), 36–37. According to Zhang, the use of the word ‘*dandam*’ indicates the decretal character of the action: ‘Studies’, 492–93.

¹⁷⁴ Fiori, ‘Rise and Fall’, 37.

uncertain whether the agreement qualified as a *conductio navis* or a *locatio mercium vehendarum*, then an *actio civilis in factum* would lie.

4.2.3 The *lex Rhodia de iactu*.

4.2.3.1 The *lex Rhodia* and Roman Law.

Any attempt to date the introduction of the application of the *lex Rhodia* within the framework of Roman law must necessarily address three questions: first, its origins; second, its legal basis; and third, its place within the Roman legal order. The Rhodian origins of the *lex* are attested by three main sources. The first consists of two complementary fragments, both attributed to the second book of the *Pauli Sententiae*:

D.14.2.1 (Paul. 2 *sent.*):

Lege Rodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.

PS.2.7.1:

Levandae navis gratia iactus cum mercium factus est, omnium intributione sarciatur, quod pro omnibus iactum est.

The authorial history of the *Sententiae* is somewhat complicated.¹⁷⁵ As Liebs has shown, the work was most likely composed by an unknown author in Numidia during the latter stages of the third century CE.¹⁷⁶ An epitome was then appended to the Breviary of Alaric in 506 and selected texts included in the *Digest* some thirty years later. With respect to the fragments presented above, the main discrepancy consists in the inclusion of the words '*Lege Rodia... ut si*' in the Justinianic version, which are absent from the text transmitted through the Breviary. This could be explained as an interpolation;¹⁷⁷ except that, as Badoud has argued, the recent discovery of an

¹⁷⁵ A useful overview is given by Iolanda Ruggiero, 'Immagini di ius receptum nelle Pauli Sententiae', in *Studi in onore di Remo Martini*, ed. Pietro Rossi, vol. 3 (Milan: Giuffrè, 2009), 270–76.

¹⁷⁶ Detlef Liebs, 'Römische Jurisprudenz in Africa', *ZSS* 106 (1989): 233–40; also, *Römische Jurisprudenz in Africa: mit Studien zu den pseudopaulinischen Sentenzen* (Berlin: Duncker & Humblot, 1993), 28–43.

¹⁷⁷ So, for example, Hans Kreller, 'Lex Rhodia. Untersuchungen zur Quellengeschichte des römischen Seerechtes', *Zeitschrift für das Gesamte Handels- und Konkursrecht* 85 (1921): 337.

inscription at the site of the ancient port of Rhodes (our second source) appears to corroborate the authenticity of the version presented in the *Digest*.¹⁷⁸ The inscription, which was originally published by Marcou in 1995, reads as follows:¹⁷⁹

Lex Rodia de yactu: | si levandae navis gratia | yactu<s> mercium factus
est, | omnium contributione sarcitur | quod pro omnibus | datum est.

Although it was initially considered possible that the inscription had been produced at the time of the Italian administration of the Dodecanese (1912-1943) and temporarily lost after the bombing of the port in 1944, there are powerful arguments to suggest that it dates to the second or third century CE.¹⁸⁰ This being accepted, the almost exact replication of the wording of the inscription by the author of the *Sententiae* (including the unusual spelling of 'Rodia') suggests that the *Digest* text was excerpted directly from the original work of Pseudo-Paul, which itself was a faithful reproduction of (part of) the *lex Rhodia* as it was represented, for example, in the inscription at the port of Rhodes.

The third source comprises a second *Digest* text, this time attributed to a monograph on the *lex Rhodia* by the jurist L. Volusius Maecianus (second century CE):

¹⁷⁸ Nathan Badoud, 'Une inscription du port de Rhodes mentionnant la lex rhodia de iactu', in *XIV Congressus Internationalis Epigraphiae Graecae et Latinae. 27.-31. Augusti MMXII. Akten*, ed. Werner Eck and Peter Funke (Berlin: De Gruyter, 2014), 450–52.

¹⁷⁹ A photo is provided in Marcou's original publication: 'Nomos Rhodion Nautikos e la scoperta a Rodi di una colonna di marmo con l'iscrizione di Paolo (D.14.2)', in *Studi in onore di Antonio Lefebvre d'Ovidio in occasione dei cinquant'anni del diritto della navigazione*, ed. Elda T. Bulgherini, vol. 1 (Milan: Giuffrè, 1995), 651. The text given here is provided by Badoud: 'Une inscription du port de Rhodes', 451.

¹⁸⁰ For these, Badoud, 'Une inscription du port de Rhodes', 451; also, Gianfranco Purpura, '«Ius naufragii», «sylai» e «lex Rhodia»: genesi delle consuetudini marittime mediterranee', *AUPA* 47 (2002): 288–90; Emmanuelle Chevreau, 'La lex Rhodia de iactu: un exemple de la réception d'une institution étrangère dans le droit romain', *TvR* 73 (2005): 71–72.

D.14.2.9 (Maec. ex I. Rhodia):¹⁸¹

Ἀξίωσις Εὐδαίμονος Νικομηδεῶς πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ <Ἰκαρία> διηρπάγημεν ὑπὸ τῶν δημοσίων <δημοσίωνων> τῶν τὰς Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θεϊότατος Αὐγουστος ἔκρινεν.

Petition of Eudaemon of Nicomedia to the emperor Antoninus: “My lord the emperor Antoninus, after having suffered shipwreck in the Icarian sea, we were robbed of our property by the public officials resident in the Cyclades Islands. Antoninus replied to Eudaemon: “I indeed am master of the whole earth, but the law of the sea is to be decided by the maritime law of the Rhodians in matters in which our own law does not oppose it.” And Divus Augustus made the same decision (trans. Atkinson 1974, 48).

The text itself reports a case in which a provincial named Eudaimon of Nicomedia sought clarification of the law from a certain emperor Antoninus (most likely Pius or Marcus Aurelius) with respect to his alleged maltreatment by the local authorities on an island in the Cyclades near which his ship had been wrecked. More specifically, Eudaimon’s complaint concerned the status of his shipwrecked goods, which he claimed had been seized by public officials on the island. The emperor’s response was that the matter ought to be decided with reference to the maritime law of the Rhodians, provided it was not in conflict Roman law. The text ends with the observation that this ruling was consistent with a similar decision reached by an earlier Augustus, probably Octavian.¹⁸²

¹⁸¹ The text provided here is supplied by Atkinson: ‘Rome and the Rhodian Sea-Law’, *IURA* 25 (1974): 47–48; see, also, Gianfranco Purpura, ‘Il regolamento doganale di Cauno e la Lex Rhodia in D.14,2,9’, *AUPA* 38 (1985): 303. It differs from the Mommsen edition by the removal of two bits of punctuation: i) the full stop after τῆς θαλάσσης; and ii) the comma after κρινέσθω τῷ ναυτικῷ. The translation is based upon this emended version. The emendation of Ἰκαρία for Ἰταλία, first suggested by Gothofredus, is widely accepted. Some authors have followed Salmasius by reading δημοσίωνων (i.e., *publicani*) for δημοσίων (local public officials). The latter is preferred here: Atkinson, ‘Rhodian Sea-Law’, 58–59; also, Aubert, ‘Dealing with the Abyss’, 166, note 30.

¹⁸² For the identity of the emperors in this text, Arrigo Diego Manfredini, ‘Il naufragio di Eudemone (D.14,2,9)’, *SDHI* 49 (1983): 376, note 4, with bibliography. The use of the definite article (ὁ θεϊότατος Αὐγουστος) and the title make Octavian the most likely source (I am grateful to Thomas Kruse for this observation).

Although the authenticity of the text has been impugned, most scholars now agree that it is substantially genuine, though sometimes with the caveat that it reached the compilers by means of a postclassical paraphrase.¹⁸³ Maecianus' production of a monograph dedicated to the *lex Rhodia* is unsurprising in light of his service at Ostia as prefect of the corn supply and patron of the *lenuncularii tabularii auxiliarii* ('boatmen for the service of checking and control') in 152.¹⁸⁴ Further, he later served as secretary *a libellis* under Antoninus Pius and as a leading advisor on the *consilium* of Marcus Aurelius and Verus, in both of which capacities he will have been intimately involved in the production of imperial constitutions. This being the case, these three sources together stand as good evidence that the Rhodian origins of the *lex* were acknowledged by the second half of the second century CE at the latest.

The second question that arises concerns the legal basis of the *lex*, which was evidently not a conventionally promulgated Roman statute.¹⁸⁵ As several scholars have pointed out, the decision reported by Maecianus indicates that the law had a broader scope of application than the singular provision concerning contribution for jettison presented in both the inscription and the *Sententiae*.¹⁸⁶ According to Purpura, there are good reasons to believe that the *lex Rhodia* was initially a customs law applied in the port at Rhodes that regulated, *inter alia*, the payment of duties, the formalities for entering and

¹⁸³ The substantial authenticity of the text has been defended by, *inter alios*, Francesco M. de Robertis, 'Lex Rhodia: critica e anticritica su D.14.2.9', in *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento*, ed. Achille Vogliano, Amalia Cinotti, and Anna Maria Colombo, vol. 3 (Naples: Jovene, 1953), 173; Jean Rougé, *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire romain* (Paris: S.E.V.P.E.N., 1966), 409–11; Atkinson, 'Rhodian Sea-Law', 64; Gianfranco Purpura, 'Relitti di navi e diritti di fisco. Una congettura sulla lex Rhodia', *AUPA* 36 (1976): 74; Manfredini, 'Il naufragio di Eudemone', 381. Both De Robertis and Manfredini acknowledged the possibility of a postclassical paraphrase, as Schulz, *Roman Legal Science*, 255.

¹⁸⁴ For Maecianus' career: Kunkel, *Die römischen Juristen*, 174–76. According to Casson, the *lenuncularii tabularii auxiliarii* were 'boatmen for the service of checking and control'. He concluded that 'the tugboat skippers, being the first to greet a new arrival, were a natural choice to charge with making a preliminary check of a ship's papers and assigning it a provisional berth': *Ships and Seamanship*, 337.

¹⁸⁵ Cf. Ludwig Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians*, vol. 1: Grundbegriffe und Lehre von den juristischen Personen (Leipzig: Duncker & Humblot, 1908), 18.

¹⁸⁶ Waclaw Osuchowski, 'Appunti sul problema del "iactus" in diritto romano', *IURA* 1 (1950): 297; Atkinson, 'Rhodian Sea-Law', 51–52; Purpura, 'Relitti di navi', 84; Chevreau, 'La lex Rhodia de iactu', 73; Aubert, 'Dealing with the Abyss', 166.

leaving port, and the terms and conditions surrounding the loading and unloading of merchandise.¹⁸⁷ This interpretation is also consistent with Cicero's reference to a Rhodian law that any beaked (i.e., military) ships discovered in the port would be confiscated by the authorities.¹⁸⁸ If Cicero was referring to the same *lex* as that treated in the legal sources, then the law was already familiar to a Roman audience by the first half of the first century BCE.

The assertion that the *lex Rhodia* originally consisted of specific legislation is further supported by its treatment in the juristic literature. First, with reference to the *iactus* provision, its presentation in both the inscription and the *Sententiae* is consistent with the way in which the terms of other *leges* are reported. So, for example, the first chapter of the *lex Aquilia*:

D.9.2.2 pr. (Gai. 7 *ad ed. provinc.*):

Lege Aquilia capite primo cavetur: 'ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto'.

Second, the juristic texts contained within the title (almost all of which predate the *Sententiae*) typically raise questions that refer to the provision as reported by Pseudo-Paul, which – together with the inscription – suggests that there was a stable, authoritative text that acted as a common point of reference. Finally, Julian's treatment of the *lex* in the 86th book of his *Digesta* – that is, alongside other *leges* and in that part of the work traditionally dedicated to the treatment of *leges* – indicates that the *iactus* provision could reasonably be considered both in the context of *locatio conductio* (through which it was given effect) or as part of a *lex* in the more conventional sense.¹⁸⁹

¹⁸⁷ Purpura reaches this conclusion by comparing the fragmentary evidence for the scope of the *lex Rhodia* with the provisions set out in a customs law in force at the port of Caunus in the first century CE: 'Relitti di navi', 85; also, generally, 'Il regolamento'; and '«lus naufragii»', 272 and 292; also, Dietmar Schanbacher, 'Zur Rezeption und Entwicklung des rhodischen Seewurfrechts in Rom', in *Humaniora: Medizin - Recht - Geschichte. Festschrift für Adolf Laufs zum 70. Geburtstag*, ed. Bernd-Rüdiger Kern et al. (Berlin and Heidelberg: Springer, 2006), 261; cf. Chevreau, 'La lex Rhodia de iactu', 68 and 79; and note Aubert's scepticism: 'Dealing with the Abyss', 170, note 39.

¹⁸⁸ Cic. *De inv.* 2.32.98.

¹⁸⁹ D.14.2.6 (Iul. 86 *dig.*). For the surrounding texts attributed to book 86, which is entirely dedicated to a systematic treatment of several *leges*, Otto Lenel, *Palingenesia iuris civilis*, vol. 1 (Leipzig: Tauchnitz, 1889), 480–84. Aubert suspects that the attribution is a mistake: 'Dealing with the Abyss', 165, note 28. However, the placement of the text is entirely

The third and final question concerns the relationship of the *lex Rhodia* to Roman law. It is clear from the texts contained in D.14.2 that the *iactus* provision was given effect within the framework of Roman law by the Republican jurists, who, in Thomas' words, 'simply incorporated the substance of the Rhodian custom into their conception of what was due *ex fide bona* as between the parties to *locationes conductiones* which had a sea venture as their object'.¹⁹⁰ The decision reported by Maecianus, however, also indicates that the *lex Rhodia* consisted of more than the contribution principle alone and was regarded as a body of rules that operated alongside, but subordinate to, Roman law. In my view, the way in which the law was conceived can be seen in the analogous case of the *lex Hieronica*. According to Cicero, the *lex Hieronica* was a law introduced by King Hiero II of Syracuse (d. 216 BCE) that regulated the process by which the right to collect taxes was sold.¹⁹¹ In his monograph on the law, Carcopino argued that the its provisions were preserved after the Romans had reduced Sicily to a province in 241 by their inclusion (either directly or by reference) in the edicts issued by governors from one year to the next.¹⁹² Once the province had been formally organised by P. Rupilius in 132, the law's provisions were given a more permanent footing by their inclusion (again, either directly or by reference) in the *lex Rupilia* of that year.¹⁹³ Finally, Carcopino argued that the *lex Hieronica* was at last fully assimilated into the Roman legal order when in 75 BCE the consuls Terentius

consistent with the systematic and customary ordering of *digesta*, which Schulz says – at least from the time of Celsus and Julian – began with a treatment of the Edict before moving on to a series of *leges*, *senatus consulta*, and imperial constitutions: *Roman Legal Science*, 226.

¹⁹⁰ Servius, Alfenus, and Ofilius are all cited in connection with the *lex*, as are Labeo and Sabinus; Thomas, 'Juridical Aspects', 155.

¹⁹¹ Cic. II *Verr.* 3.14-5. According to Pritchard, the law was likely first introduced after about 265–64 BCE: 'Cicero and the "Lex Hieronica"', *Historia* 19, no. 3 (1970): 367.

¹⁹² Jérôme Carcopino, *La loi de Hiéron et les Romains* (Paris: De Boccard, 1914), 71. The best dedicated account of the law remains Carcopino's; though see Helmut Berve, *König Hieron II* (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1959), 51–55 and 66–69; Antonio Pinzone, 'Maiorum sapientia e lex Hieronica: Roma e l'organizzazione della provincia Sicilia da Gaio Flaminio a Cicerone', in *Provincia Sicilia. Ricerche di storia della Sicilia romana da Gaio Flaminio a Gregorio Magno* (Catania: Edizioni del Prisma, 1999), 1–37; and Malcolm Bell, III, 'An Archaeologist's Perspective on the Lex Hieronica', in *La Sicile de Cicéron: lecture des Verrines. Actes du colloque de Paris (19-20 mai 2006)*, ed. Julien Dubouloz and Sylvie Pittia (Besançon: Presses Universitaires de Franche-Comté, 2007), 187–204.

¹⁹³ Carcopino, *La loi de Hiéron*, 71–73.

and Cassius, as well as the provincial governor L. Metellus (the successor of Verres in Sicily), announced their intention to affirm the method of tax-collection in the province according to the *lex*.¹⁹⁴

If Carcopino's account is correct, the status of the *lex Hieronica* provides a useful analogy for the *lex Rhodia*. Cicero's account demonstrates that the *lex Hieronica* was not a conventionally promulgated statute, but rather an existing legal framework of foreign origin that was adopted by the Romans for pragmatic reasons. In the case of the *lex Rhodia*, Antoninus (and reportedly also Octavian) apparently saw no need to impose Roman law in a situation that was already adequately dealt with by a pre-existing body of rules that posed no challenge to Roman authority. It is therefore likely that the *lex Rhodia* was of a similar character to the *lex Hieronica*: that is, a pre-existing body of rules that was adopted by the Romans in as far as its provisions did not conflict with Roman law.

4.2.3.2 Exegesis of D.14.2.

Digest title 14.2 consists of ten fragments of varying length authored by Julian, Volusius Maecianus, Papinian, Paul, Callistratus, and Hermogenian; some of whom cite earlier interventions by jurists such as Servius, Ofilius, Alfenus, Labeo, Sabinus, and Papirius Fronto. As several scholars have remarked, the placement of the title between D.14.1 (*de exercitoria actione*) and D.14.3 (*de institoria actione*) appears an odd choice: in the *Sententiae*, the *Codex*, and the *Institutes* of both Gaius and Justinian, the exercitorian and institorian actions are treated in sequence.¹⁹⁵ An explanation, however, has been provided by Aubert, who has argued that the compilers conceived the *lex Rhodia* as part of the *certa lex* of the *magister navis*; that is, the contractual framework governing his relationship with both the *exercitor* and those with whom he transacted within the scope of his appointment.¹⁹⁶

¹⁹⁴ Carcopino, 74.

¹⁹⁵ Osuchowski, 'Appunti', 299.

¹⁹⁶ Aubert, 'Dealing with the Abyss', 269–70; cf. Thomas, 'Juridical Aspects', 154–55.

The title opens with the statement of a provision in the *lex Rhodia*, which provided that if goods had been jettisoned to lighten a ship, the sacrifice made for the benefit of all ought to be made good by the contribution of all.¹⁹⁷ One of the reasons adduced earlier for believing that this provision was a stable text was that most of the questions addressed by fragments later in the title in some way refer back to issues of interpretation arising from its wording. In my view, the most sensible way to proceed is therefore to address each of these issues in turn and the opinions given by various jurists on the matter.

The first question that arises concerns the procedural mechanism by which the provision was given effect. The most significant passage in this connection derives from the 34th book of Paul's commentary *ad edictum*, which was dedicated to the treatment of *locatio conductio*:

D.14.2.2 pr. (Paul. 34 *ad ed.*):

Si laborante nave iactus factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent: is deinde cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. Servius quidem respondit ex locato agere cum magistro navis debere, ut ceterorum vectorum merces retineat, donec portionem damni praestent. immo etsi ^{non}¹⁹⁸ retineat merces magister, ultro ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint, qui nullas sarcinas habeant? plane commodius est, si sint, retinere eas. at si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt: aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent.

The fragment begins with the view of Paul, that if goods had been jettisoned from a vessel in distress, then the owners of the lost goods were entitled to proceed *ex locato* against the person who had undertaken the task of transporting them. The carrier could then raise an action *ex conducto* against the shippers whose goods had been saved, so that the losses could be distributed proportionately. This, it appears, was an elaboration of the view of

¹⁹⁷ D.14.2.1 (Paul 2 *sent.*); cf. PS.2.7.1.

¹⁹⁸ As Mommsen indicates, the sense of the passage demands the insertion of *non* in the phrase *immo etsi <non> retineat merces magister* etc. For the manuscript tradition, Schanbacher, 'Zur Rezeption und Entwicklung', 268–69.

Servius, who Paul reports gave a *responsum* to the effect that the *magister navis*, once he had been sued *ex locato*, was entitled to retain the merchandise of the more fortunate shippers until the damage (*damnum*) had been made good. The fragment concludes with the severan jurist's view that the shipmaster could also proceed *ex locato* against any passengers on board (since they might not have any goods to retain); and equally that both passengers and traders who had hired space on the ship could proceed *ex conducto* against the *magister*, provided that they had not hired the whole vessel.

Although the genuineness of the *principium* – and particularly parts of the section *immo... salvas haberent* – has been doubted, I agree with those scholars who have maintained its substantial authenticity, even if its form may have been altered.¹⁹⁹ This being accepted, several questions arise. With respect to Servius' opinion, different interpretations have been offered concerning the *magister's* right to retain goods pending contribution. On one view, the whole procedure was founded on pacts concluded by the parties.²⁰⁰ To accommodate this argument, it has been supposed that the text was reorganised and altered by the compilers, who derived the shipmaster's contractual position from *aequitas* instead. A more convincing interpretation, however, has been put forward by Wieacker and Cardilli, who have argued that the *magister navis* was granted an *exceptio ex iure tertii* as a defence against those shippers who raised an action against him without having paid their share of the contribution.²⁰¹ In other words, having been sued *ex locato*,

¹⁹⁹ For a history of the textual criticism of the fragment, Mancinetti, *L'emersione*, 137–38, notes 50 and 51. Among those scholars maintaining the substantial authenticity of the fragment, though casting doubt on the order in which its various parts are presented, Matteo Marrone, 'D. 14. 2. 2 pr.: "retentio" e "iudicia bonae fidei"', *IURA* 6 (1955): 172–75; also, Maria Gabriella Zoz, 'Il ruolo della buona fede nel contratto di trasporto marittimo', in *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea: Atti del Convegno internazionale di studi in onore di Alberto Burdese (Padova - Venezia - Treviso, 14-15-16 giugno 2001)*, ed. Luigi Garofalo, vol. 4 (Padova: CEDAM, 2003), 561–62.

²⁰⁰ Francesco De Martino, 'Lex Rhodia. Note di diritto romano marittimo', *RDN* 4, no. 1–2 (1938): 22 and 210–11; Siro Solazzi, 'Su C. I. 11. 6 "De Naufragiis"', *RDN* 5, no. 3 (1939): 253.

²⁰¹ Franz Wieacker, 'Iactus in tributum nave salva venit (D. 14, 2, 4 pr.): Exegesen zur lex Rhodia de iactu', ed. Vincenzo Arangio-Ruiz and Giuseppe Lavaggi, *Studi in memoria di Emilio Albertario* 1 (1953): 517; also, Ingo Reichard, *Die Frage des Drittschadenersatzes im klassischen römischen Recht* (Cologne: Böhlau, 1994), 135–36; Cardilli, *L'obbligazione*

the carrier could repel claims by the more fortunate shippers for so long as their contribution remained outstanding.

By the time of Paul, this indirect method of giving effect to the *iactus* provision had been refined so that it was possible for the carrier to proceed *ex conducto* directly against shippers who had failed to pay their share. The question that arises is whether, during the late Republic, the application of the *iactus* provision was confined to *locationes mercium vehendarum* (i.e., contracts of carriage). Servius' opinion – reported though it is – only speaks of proceeding against the shipmaster *ex locato*, while the latter part of the text appears to indicate that the ability of passengers and traders to give effect to the *iactus* provision *ex conducto*, and shipmasters *ex locato*, was a later innovation.

The likelihood that this was in fact the case is strengthened by the substantive content of Paul's commentary. In short, it was his view that the *iactus* provision could be given effect through the actions on letting and hiring if: i) a *locatio mercium vehendarum* had been concluded; and ii) the arrangement was one in which the passengers and traders had hired space on board. Conversely, no recourse was available to a person who had hired the whole ship. These conclusions accord with the obligations owed by the parties in each of these contractual arrangements. Where a contract of carriage had been concluded, the carrier was obliged to transport the merchandise to its destination, so that his contractual relationship with the shipper was already concerned with the goods' survival. In contrast, for those arrangements in which a passenger or trader had hired space on board, Paul relied on *aequitas* (*aequissimum enim est...*) to justify the provision's extension because the obligation of the shipmaster to perform was not connected with the fate of any property being transported. He was not, however, willing to go so far as to say that the *exercitor* of a vessel should be liable for the loss of jettisoned goods by a person who had hired the whole ship.

di 'praestare', 266; Chevreau, 'La lex Rhodia de iactu', 79; and now, Mancinetti, *L'emersione*, 139–40.

The application of the *iactus* provision therefore appears to have been extended over time: from its limited application between the parties to contracts of carriage concluded with the same *magister* to almost every contract of letting and hiring which had a sea venture as its object. All this may explain the inclusion of D.14.2.10 in the title, because reaching conclusions about what the parties had agreed (i.e., *id quod actum est*) would have had a bearing on whether they were entitled to participate in the distribution.²⁰²

Having set out the substance of the process in the *principium*, Paul elaborated on some of its finer points. Later in the same passage he confirms that the *iactus* provision could be given effect by passengers and traders *ex conducto*.²⁰³ If any of the contributors was insolvent, however, the *magister* would not be expected to bear the loss.²⁰⁴ Finally, if jettisoned property resurfaced and contribution had already been paid, the process could be unwound by bringing the appropriate actions against the shipmaster and the owners of the jettisoned goods respectively.²⁰⁵ On this latter point, the implication was that no contribution was due because no sacrifice had been made.

levandae navis gratia iactus mercium factus est...

The interpretation of this clause involves several connected issues. One question that arose concerned the scope of the word '*merces*': that is, whether there were circumstances in which the owner of the vessel could claim contribution for damage to the ship's gear. In both Paul and Julian's view, a distinction could be drawn between damage incurred in the ordinary course of this vessel's operations (for example, if the ship's mast had been struck by lightning and the *magister* was forced put in for repairs) and the destruction of equipment either on the express orders of the passengers or arising from their fearful reaction to a common danger.²⁰⁶ In the latter sets of circumstances,

²⁰² *Supra*, 161 *et seq.*

²⁰³ D.14.2.2.2 (Paul. 34 *ad ed.*).

²⁰⁴ D.14.2.2.6 (Paul. 34 *ad ed.*).

²⁰⁵ D.14.2.2.7 (Paul. 34 *ad ed.*).

²⁰⁶ D.14.2.2.1 (Paul. 34 *ad ed.*); D.14.2.6 (Iul. 86 *dig.*).

both Papinian and Hermogenian agreed that contribution would be due if the jettison of the equipment was intended to avert a common calamity.²⁰⁷

A second question concerned the interpretation of the word '*iactus*' and the circumstances in which it could be said to have achieved the purpose of lightening the ship (*levandae navis*). In this connection, Paul cited the jointly held views of Servius, Ofilius, and Labeo:

D.14.2.2.3 (Paul. 34 *ad ed.*):²⁰⁸

Si navis a piratis redempta sit, Servius Ofilius Labeo omnes conferre debere aiunt: quod vero praedones abstulerint, eum perdere cuius fuerint, nec conferendum ei, qui suas merces redemerit.

According to Paul's three predecessors, contribution would be due if a ship had been ransomed from pirates, but not for goods that had been stolen by the bandits or for money paid by individuals to ransom their own property back. Several scholars have reached different conclusions about the circumstances underpinning the opinion. According to Honsell, the situation giving rise to the distinction was one in which a shipper had paid to ransom the ship and the whole cargo, only for the pirates to hold back some of the goods and demand further ransoms from individual owners.²⁰⁹ However, as Stolfi has pointed out (drawing inspiration from Cujas), it is more likely that the distinction arose from two kinds of ransom payment: first, one made toward the safety of the whole ship (and possibly also the lives of those on board), notwithstanding that the pirates may still have intended to remove the cargo; and second, toward the retention of merchandise by individual owners, which might otherwise be taken

²⁰⁷ D.14.2.3 (Pap. 19 *resp.*); D.14.2.5.1 (Hermog. 2 *iuris epit.*).

²⁰⁸ For a comprehensive bibliography, Mancinetti, *L'emersione*, 141, note 62. See, also, Anna Tarwacka, *Romans and Pirates. Legal Perspective* (Warsaw: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2009), 157–58; Sebastiano Tafaro, 'Roma e la pirateria', in *Nuove piraterie e ordinamenti giuridici interni e internazionali: atti del Convegno tenuto a Taranto il 16 e 17 giugno 2009*, ed. Antonio Uricchio, Corrado Petrocelli, and Antonio Tajani (Bari: Cacucci, 2010), 61; and Mancinetti, *L'emersione*, 210–15.

²⁰⁹ Heinrich Honsell, 'Ut omnium contributione sarciatur quod pro omnibus datum est: die Kontribution nach der Lex Rhodia de iactu', in *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag*, ed. Martin J. Schermaier and Zoltán Végh (Stuttgart: Steiner, 1993), 148; cf. Herbert Wagner, 'Die Lex Rhodia de iactu', *RIDA* 44 (1997): 368.

away.²¹⁰ In the first case contribution was due, because it constituted a sacrifice made for the common good; in the second it was not, because the payment was made for the benefit of the cargo-owner alone.²¹¹

Whatever the case, the opinion clearly demonstrates that by the period of the late Republic and early Principate several leading jurists were agreed that ransom payments could fall within the meaning of *iactus*, provided that the other requirements of the provision were met.²¹² A second passage, attributed to Callistratus, is also relevant in this connection. In an extended discourse at the end of the excerpt, the severan jurist approved the view of Papirius Fronto (official under the *divi fratres*) that damage sustained by cargo on board a vessel while other goods were being jettisoned also qualified for contribution.²¹³ Earlier in the same passage, Callistratus cited a *responsum* given by Sabinus (*cos. suff.* 69 CE):²¹⁴

D.14.2.4 pr. (Call. 2 *quaest.*):²¹⁵

Navis onustae levandae causa, quia intrare flumen vel portum non potuerat cum onere, si quaedam merces in scapham traiectae sunt, ne aut extra flumen periclitetur aut in ipso ostio vel portu, eaque scapha summersa est, ratio haberi debet inter eos, qui in nave merces salvas habent, cum his qui in scapha perdiderunt, proinde tamquam si iactura facta esset: idque Sabinus quoque libro secundo responsorum probat. contra si scapha cum parte mercium salva est, navis perit, ratio haberi non debet eorum, qui in nave perdiderunt, quia iactus in tributum nave salva venit.

²¹⁰ Emanuele Stolfi, 'Quaestiones iuris. Casistica e insegnamento giuridico in romanisti e civilisti napoletani di fine ottocento', *Teoría e storia del diritto privato* 1 (2008): 1251; cf. Mancinetti, *L'emersione*, 210–15.

²¹¹ Cf. Cardilli, *L'obbligazione di 'praestare'*, 268.

²¹² As Aubert notes, this may not have been an extension, as one cannot rule out that the legal arrangement developed simultaneously in connection with both piracy and shipwreck: 'Dealing with the Abyss', 163.

²¹³ D.14.2.4.2 (Call. 2 *quaest.*). The passage has been considered heavily interpolated: cf. Mitteis, Levy, and Rabel, *Index*, 1:237; also, Wieacker, 'iactus', 528–29. For Papirius Iustus, Kunkel, *Die römischen Juristen*, 216–17.

²¹⁴ For Sabinus, who exercised considerable influence under Vespasian, Kunkel, *Die römischen Juristen*, 131–33.

²¹⁵ Cf. PS.2.7.4. The *Digest* text is substantially genuine. Only the last phrase – *quia iactus in tributum nave salva venit* – has been doubted: Gerhard Beseler, 'Miscellanea', *ZSS* 44 (1924): 389; cf. Wieacker, 'iactus', 518–22; and Christoph Krampe, 'Lex Rhodia de iactu: contributio nave salva', in *Festschrift für Rolf Knütel zum 70. Geburtstag*, ed. Holger Altmeyden, Ingo Reichard, and Martin J. Schermaier (Heidelberg: C.F. Müller, 2009), 589–93.

In the first part of the text (*Navis onustae... rēponsorum probat*) Callistratus held that if merchandise had been offloaded into a lighter (*scapha*) to disburden a ship, the draught of which was too low to enter a river or harbour, contribution would be due to the owners of the disembarked goods if the lighter became submerged 'as if the merchandise had been thrown overboard'. The reasoning is transparent: the goods had been removed to ensure the safe passage of the ship, and their loss was analogous to the sacrifice of jettison. This view, he reported, was approved by Sabinus, who had given a *responsum* to this effect.²¹⁶ In the latter part of the fragment (*contra... salva venit*), the severan jurist elaborated on this position by clarifying that if, on the other hand, the vessel had sunk and the lighter had survived, no contribution would be due to those who lost their goods with the ship, 'because jettison leads to contribution only if the ship is saved'.

Altogether, these texts show that by the time of the early Principate the *iactus* provision had been extended to cover ransom paid to pirates and losses resulting from the transfer of merchandise to lighters for the purpose of increasing the navigability of a vessel. Again, by the second half of the second century CE, damage inflicted to a ship either at the behest of the passengers, or as a result of their spontaneous reaction to a perilous situation, and to cargo while other goods were being jettisoned, also came within the scope of the provision.

...omnium contributione sarciatur quod pro omnibus datum est.

The terms of the *iactus* provision were that a sacrifice made for the benefit of all had to be made good by the contribution of all. One question that arose was whether goods that had been saved or salvaged by their owner fell to be included in the distribution. The earliest jurist to address this issue was Alfenus:

D.14.2.7 (Alf. 3 *dig. a Paulo epit.*):

Cum depressa navis aut deiecta esset, quod quisque ex ea suum servasset, sibi servare respondit, tamquam ex incendio.

²¹⁶ Wieacker has suggested that the extension probably dates back to the Republican period: 'lactus', 517.

The fragment, which is drawn from the third book of Paul's epitome of the republican jurist's *Digest*, begins with a subordinate clause in which a ship is described as *depressa aut deiecta*.²¹⁷ For *deiecta* Mommsen suggested *disiecta* (i.e., dashed to pieces), though there are several instances in the literary sources in which the word *deiecta* is used in connection with ships that were driven off course and sometimes stranded.²¹⁸ *Depressa navis*, on the other hand, invariably carries the meaning of a ship that had sunk to the bottom.²¹⁹

With this in mind, Alfenus' opinion was that if a ship sank or was driven off course (and possibly stranded), each person could keep what he saved of his own property, just as in a fire. In the context of a situation in which jettison had occurred, this opinion amounted to the view that property rescued by its owner either during or after a wreck did not count as having been saved by an act of jettison. For the purpose of the *iactus* provision, then, it was Alfenus' view that only goods that had been saved as a result of an act of jettison fell to be included in the distribution, and therefore not property rescued by other means.²²⁰

The next fragment consists of the report of a response given by Sabinus on the issue:

²¹⁷ The third book of Alfenus' *Digesta* was dedicated, among other things, to *locatio conductio*: Hans-Jörg Roth, *Alfeni Digesta. Eine spätrepublikanische Juristenschrift* (Berlin: Duncker & Humblot, 1999), 194.

²¹⁸ Livy, 23.34.16 and 40.6; Caes. *BGall.* 4.28.2. Cf. Krampe, who argues that *deiecta* here means 'stranded': 'Lex Rhodia de iactu', 595. While it is true that in some of the cited examples the ships end up becoming stranded, the participle *deiecta* only refers to that part of the action in which the vessel gets driven off course.

²¹⁹ In this connection, Caes. *BCiv.* 1.58, 2.6-7 and 43; Ov. *Met.* 14.185; Tac. *Hist.* 4.79. I agree with Mommsen's suggestion that the word *depressa* in D.14.2.6 (lul. 86 *dig.*) ought to be read *deprensa*, which in a nautical context usually indicates that the subject has been caught or overtaken by a storm: e.g., Lucr. 6.429; Catull. 25.14; Ov. *Met.* 11.663; also, *Her.* 7.66; Verg. *Aen.* 5.52; also, G. 4.421. Cf. Krampe, 595.

²²⁰ Cf. Eike Ullmann, 'Der Verlust von Fracht und Schiff. Lex Rhodia de iactu und die große Haverei. Exegese zu Hermog.D.14.2.5.pr.-1. Ein Beitrag zur Kontinuität des Rechts', in *Festschrift für Henning Piper*, ed. Willi Erdmann, Wolfgang Gloy, and Rolf Herber (Munich: C.H. Beck, 1996), 1054–55.

D.14.2.4.1 (Call. 2 *quaest.*):²²¹

Sed si navis, quae in tempestate iactu mercium unius mercatoris levata est, in alio loco summersa est et aliquorum mercatorum merces per urinatores extractae sunt data mercede, rationem haberi debere eius, cuius merces in navigatione levandae navis causa iactae sunt, ab his, qui postea sua per urinatores servaverunt, Sabinus aequae respondit. eorum vero, qui ita servaverunt, invicem rationem haberi non debere ab eo, qui in navigatione iactum fecit, si quaedam ex his mercibus per urinatores extractae sunt: eorum enim merces non possunt videri servandae navis causa iactae esse, quae perit.

According to Callistratus, Sabinus had advised on a case in which merchandise had been jettisoned to save a ship that had been caught in a storm (*in tempestate*) only for the goods that had been saved to become wrecked at another place (*in alio loco*). If, Sabinus held, the goods that had been lost in the wreck were recovered by hired divers (*per urinatores servaverunt*), they would have to account to the owner of the jettisoned goods for contribution. Conversely, if some of the jettisoned goods had been recovered by divers, no contribution would be due by their owner to those of the merchandise lost in the wreck, because their property had not been thrown overboard for the purpose of saving the ship.

There are good reasons to believe that Sabinus was aware of Alfenus' reply when crafting his response. Though it is not stated explicitly, the question was whether owners who had salvaged their own cargoes had to share in the distribution if their goods had been saved by an act of jettison earlier in the same voyage. Alfenus' view was that goods that had been saved by their owner did not fall to be included in the distribution. The underlying principle, however, was that contribution was only due from property that had been saved by an act of jettison. In the case considered by Sabinus, several owners had salvaged their own goods by paying divers. If, on the one hand, the act of jettison and the loss of the goods had occurred as part of the same event, Alfenus' opinion would hold. If, however, the goods had been saved by an act of jettison earlier in the same voyage, Sabinus' view was that contribution was due because the jettison had succeeded in saving the property in the first

²²¹ Cf. PS.2.7.3.

instance, so that the ultimate survival of the salvaged merchandise could be traced back to the sacrificing act. On the other hand, it is implied that no contribution was due from goods that remained on the seabed, because it could not be said that they had survived as a result of the earlier jettison. A person was therefore liable to pay contribution for goods that had been saved, lost, and then recovered; but not for goods that had been saved and then lost. Turning to the second part of the fragment (*eorum vero... quae perit*), it is not clear whether this section represents the views of Callistratus alone, or a continuation of Sabinus' response.²²² There are also several textual issues, though none that go to the heart of the decision.²²³ This being the case, the reasoning is unobjectionable: goods lost by accident at sea did not qualify for contribution, because they had not been sacrificed for the purpose of saving the ship.

The outstanding issue that remains is the development of the so-called '*navis salva* principle'. According to Wieacker, the rule that *contributio* only became due if the ship was saved can be traced back at least as early as Sabinus, if not to Alfenus.²²⁴ As Krampe has shown, however, the principle was not a hard and fast condition for the application of the *iactus* provision, but rather a casuistic development that emerged from the juristic interpretation of what was owed *ex fide bona* between the parties to a contract of letting and hiring.²²⁵

Certainly, by the end of the third century CE, both Hermogenian and the author of the *Sententiae* took the view that contribution was only due if the act of jettison led to the salvation of the ship.²²⁶ As Kreller argued, this development can probably be traced back to Callistratus, who was likely the author of the

²²² Krampe suggests that the whole section ought to be attributed to Callistratus alone: Krampe, 'Lex Rhodia de iactu', 591; cf. Wieacker, 'lactus', 523–24.

²²³ Wieacker has defended the fragment's substantial authenticity: 'lactus', 523. Mommsen suggested the insertion of a negative in the clause *qui ita <non> servaverunt* to preserve the sense of the passage; but cf. Krampe, 'Lex Rhodia de iactu', 591. The closing words *quae perit* have also been doubted: Mitteis, Levy, and Rabel, *Index*, 1:237; but cf. Wieacker, 'lactus', 523–24.

²²⁴ Wieacker, 'lactus', 528.

²²⁵ Krampe, 'Lex Rhodia de iactu', 597.

²²⁶ D.14.2.5 pr. (Hermog. 2 *iuris epit.*); PS.2.7.5: on which, generally, Ullmann, 'Der Verlust'.

observation that *iactus in tributum nave salva venit*.²²⁷ In my view, however, this was not a principle that was familiar to Sabinus. With respect to the first of Sabinus' *responsa* (reported in D.14.2.4 pr.), it is possible – as Callistratus appears to have done – to interpret Sabinus' reasoning to have been that contribution was only due if there was a connection between the act of jettison and the survival of the ship. As the next *responsum* shows (D.14.2.4.1), however, the relevant connection for Sabinus was between the sacrificial act and the property thus saved. If the interpretations I have offered above are accepted, then this was a principle that had been elaborated by Alfenus and applied in both the *responsa* given by Sabinus. The so-called *navis salva* principle was therefore a product of severan jurisprudence at the earliest.

Finally, the questions concerning when contribution would be due, to whom, and in what proportion, were also raised by Paul in his commentary *ad edictum*. In one elaborate passage the severan jurist identified several issues arising out of a situation in which goods had been jettisoned from a ship that was carrying both a plurality of traders with different cargoes and passengers who were both slave and free.²²⁸ The jurist held that:

- i) Everyone who benefited from the jettison by the preservation of their property was obliged to contribute, including the shipowner;
- ii) The loss was to be apportioned in relation to the market value of the property that had been saved. In a later excerpt Paul explained that the jettisoned goods ought to be valued at their purchase price; the preserved property at the price at which it would sell.²²⁹
- iii) Except for food brought on board for consumption – which in times of shortage was considered common fare – all property was to be taken into account, including items that did not add to the weight of the ship (such as clothes and jewellery) and, by implication, unfree passengers.²³⁰ In

²²⁷ Kreller, 'Lex Rhodia', 297–98; cf. Wieacker, 'lactus', 521–22.

²²⁸ D.14.2.2.2 (Paul. 34 *ad ed.*).

²²⁹ D.14.2.2.4 (Paul. 34 *ad ed.*).

²³⁰ See, in this connection, *Philogelos* 80. In this joke, a *scholastikos* who was holding a chirograph recording a debt of one-and-a-half million drachmae on board a storm-tossed ship crossed out half a million and declared that he had made the vessel that much lighter.

this latter connection, Paul made the humane observation later in his commentary that slaves who perished at sea did not qualify for *contributio*: no doubt to remove the incentive to throw human beings to their death;²³¹

- iv) Finally, the owners of the property that had been lost could proceed against the *nauta ex conducto*.

4.2.3.3 Conclusion.

The *lex Rhodia* likely consisted of a customs law first introduced at the port of Rhodes during the time of the island state's thalassocracy during the third and early second centuries BCE.²³² Although there is no evidence that the *lex* was ever provided with a formal legal footing (e.g., by the incorporation of its terms into a provincial Edict or the like), the decision reported by Maecianus indicates that it was conceived in a way analogous to the *lex Hieronica*. The most enduring provision of the *lex* for the purposes of maritime trade was that concerning contribution for jettison. However, because the law was not a conventionally promulgated Roman statute, its terms could not be directly relied upon as part of the *ius civile*. This was solved by means of juristic *interpretatio*, which gave effect to the substance of the provision through the *actiones locati* and *conducti*: institutions of the *ius gentium* and constituent elements of the praetor's Edict. The process was certainly complete by the time of Servius and was probably underway by the turn of the second and first centuries BCE.²³³ The application of the law's other provisions (at least in cases involving *peregrini*) was later confirmed by the authority of the emperor

I agree with Rougé that the document probably recorded a debt, possibly in the form of a maritime loan: 'Le Philogélôs et la navigation', *Journal des Savants*, no. 1–2 (1987): 10–11. For the interpretation of this joke from a legal perspective, Anna Tarwacka, *European Legal Culture through the Prism of Jokes. The Example of the Philogelos* (Wrocław: Europe of Nations and Freedom, 2018), 124–28.

²³¹ D.14.2.2.5 (Paul. 34 *ad ed.*). For the reality of throwing slaves overboard, *supra*, 54.

²³² For a brief summary of the Rhodian ascendancy in the Eastern Mediterranean, Atkinson, 'Rhodian Sea-Law', 74–76.

²³³ Chevreau, 'La lex Rhodia de iactu', 72–73; also, Stanisław Plodzień, *Lex Rhodia de iactu. Studium historycznoprawne z zakresu rzymskiego prawa handlowomorskiego* (Lublin: Wydawnictwo Kul, 2010) (with English summary at 163–69).

in response to petitions, first Augustus and later Antoninus Pius or Marcus Aurelius.

In terms of juristic interpretation, it is my view that the application of the *iactus* provision was originally confined to contracts of carriage, and only later extended to almost all contracts of letting and hiring which had a sea venture as their object. Further, the jurists extended the meaning of the provision by analogy to include (in certain circumstances) the jettison of the ship's gear; the ransoming of merchandise from pirates; the loss of goods that had been offloaded to lighten a vessel; and damage caused to goods on board while the act of jettison was taking place. Finally, for the duration of the late Republic and classical period, it was accepted that contribution was only due for those goods whose survival could be directly attributed to the act of jettison. The so-called *navis salva* principle was therefore a severan development at the earliest.

4.2.4 Excursus on D.19.2.31 (Alf. 5 *dig. a Paulo epit.*).

The reason for treating this text here is that it provides some important insights into the Republican conception of *locatio conductio* in the context of shipping contracts. At the same time, it is my submission that the fragment is evidence for the practice of granting decretal actions to merchants in the form of so-called *actiones oneris aversi*.

In navem Saufei cum complures frumentum confuderant, Saufeius uni ex his frumentum reddiderat de communi et navis perierat: quaesitum est, an ceteri pro sua parte frumenti cum nauta agere possunt oneris aversi actione. respondit rerum locatarum duo genera esse, ut aut idem redderetur (sicuti cum vestimenta fulloni curanda locarentur) aut eiusdem generis redderetur (veluti cum argentum pusulatum fabro daretur, ut vasa fierent, aut aurum, ut anuli): ex superiore causa rem domini manere, ex posteriore in creditum iri. idem iuris esse in deposito: nam si quis pecuniam numeratam ita deposuisset, ut neque clusam neque obsignatam traderet, sed adnumeraret, nihil alius eum debere apud quem deposita esset, nisi tantundem pecuniae solveret. secundum quae videri triticum factum Saufei et recte datum. quod si separatim tabulis aut heronibus aut in alia cupa clusum uniuscuiusque triticum fuisset, ita ut internosci posset quid cuiusque esset, non potuisse nos permutationem facere, sed tum posse eum cuius fuisset triticum quod nauta solvisset vindicare. et ideo se improbare actiones oneris aversi: quia sive eius generis essent merces,

quae nautae traderentur, ut continuo eius fierent et mercator in creditum iret, non videretur onus esse aversum, quippe quod nautae fuisset: sive eadem res, quae tradita esset, reddi deberet, furti esse actionem locatori et ideo supervacuum esse iudicium oneris aversi. sed si ita datum esset, ut in simili re solvi possit, conductorem culpam dumtaxat debere (nam in re, quae utriusque causa contraheretur, culpam deberi) neque omnimodo culpam esse, quod uni reddidisset ex frumento, quoniam alicui primum reddere eum necesse fuisset, tametsi meliorem eius condicionem faceret quam ceterorum.

The text has given rise to an extensive secondary literature and a range of competing interpretations.²³⁴ The inscription indicates that the fragment originally belonged to Paul's epitome of the fifth book of Alfenus' *Digesta*.²³⁵ According to Lenel, Paul included the text under the heading *de furtis et onere averso*, though the compilers altered this context by including it under the rubric of letting and hiring (D.19.2).²³⁶

The fragment begins with a brief exposition of the facts (the *casus*) and the *quaestio*. Several *complures* had shot their grain loose into Saufeius' ship, and after he had returned a share of the grain to one of them out of the common store, the ship was lost. The question was whether the other *complures* could proceed against the *nauta* for their share of the grain by raising an action for *onus aversum*.

Although the configuration of the contractual relationship between the parties is not made explicit, the references to the *nauta* as *conductor* and the *complures* as *locatores* later in the fragment indicate that the parties had in each case agreed a *locatio mercium vehendarum* in which Saufeius had undertaken the task of transporting grain to a certain location.²³⁷ Saufeius and

²³⁴ For a comprehensive bibliography, Ivan Siklosi, 'Remarks on the Problems of Actio Oneris Aversi', *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae* 51 (2014): 7, note 2; and for a thorough literature review, Andreas Bessenyo, 'Das Rätsel der actio oneris aversi. Eine Exegese von D. 19, 2, 31', *Studia Iuridica Auctoritate Universitatis Pecs* 127 (2001): 23–55.

²³⁵ For the time being, Alfenus will be treated as the principal author. On the attribution of parts of the text to different authors, Fiori, *La definizione*, 66, note 3; Benedikt Forschner, 'Das Schiff des Saufeius. Anmerkungen zu D.19.2.31', *Forum Historiae Iuris*, 2011, ¶ 22-5, <http://www.forhistiur.de/zitat/1111forschner.htm>.

²³⁶ Lenel, *Palingenesia*, 1889, 1:52; cf. Roth, *Alfeni Digesta*, 194.

²³⁷ Siro Solazzi, 'Appunti di diritto romano marittimo: L'actio oneris aversi', in *Scritti di diritto romano*, vol. 3 (Naples: Jovene, 1960), 519; J. A. C. Thomas, 'Trasporto marittimo, locazione ed «actio oneris aversi»', in *Antologia giuridica romanistica ed antiquaria*, vol. 1

the *complures* were therefore carrier and shippers respectively, and it is likely that the situation Alfenus had in mind was one in which, for example, the ship had arrived at its destination, but sank while the cargo was being discharged to the shippers or their agents in port.²³⁸

The *responsum*:

Alfenus began the response by making two distinctions. The first distinction concerned the legal status of each of the parties in relation to two different kinds of property handed over in virtue of a contract of letting and hiring (*duo genera rerum locatarum*).²³⁹ If the same (*idem*) piece of property was expected in return, the person handing it over remained the owner (*rem domini manere*), whereas if performance was expected in kind (*eiusdem generis*), he became a creditor (*in creditum iri*). The second distinction concerned the status of each of the parties in relation to property handed over as a deposit according to the manner of the *datio* and the way in which it was stored. According to Alfenus, the same principle applied (*idem iuris esse*): if the money had been deliberately enclosed in some way, then the exact same coins were expected in return and the depositor remained their owner; whereas if the coins had been counted out (the typical method of making a loan), only an equal sum was due and the depositor became a creditor.²⁴⁰

(Milan: Giuffrè, 1968), 229–30; ‘Juridical Aspects’, 144; also, Nicola De Marco, ‘L’actio oneris aversi—appunti su un equivoco ricostruttivo’, *Labeo* 99 (2003): 154.

²³⁸ Cardilli, *L’obbligazione di ‘praestare’*, 271; Roth, *Alfeni Digesta*, 134–35; Éva Jakab, ‘Vertragsformulare im Imperium Romanum’, *ZSS* 123 (2006): 101; Gianfranco Purpura, ‘Il χειρέμβολον e il caso di Saufeio: responsabilità e documentazione nel trasporto marittimo romano’, *AUPA* 57 (2014): 139.

²³⁹ Fiori, *La definizione*, 70.

²⁴⁰ On sealed and unsealed deposits, Jean Andreau, *Banking and Business in the Roman World*, trans. Janet Lloyd (Cambridge and New York: Cambridge University Press, 1999), 40–42.



Frescoes of cupids engaged as fullers (treading the clothes in vats, carding, inspecting, and folding the clean garments) and goldsmiths (operating a furnace, shaping a bowl, hammering upon an anvil and using scales for weighing) from the *oecus* of the House of the Vettii, Pompeii, 62 – 79 CE. Source: Scholars Research Collection.

Turning to the case in hand, Alfenus stated that the grain appeared to have passed to Saufeius and that there had been an appropriate *datio* (*secundum quae... recte datum*). More precisely, the indication is that, in light of the foregoing distinctions, the grain handed to Saufeius both belonged to the category of *res locatae* to be returned *eiusdem generis* and had been handed over in a manner analogous to money counted out as a deposit. This, in turn, sets up the answer to the *quaestio*. If, the jurist wrote, the shippers' grain had been stored separately, then each would have retained ownership of his respective merchandise and would have a *vindicatio* for its return. Turning to the *duo genera rerum locatarum*, he continued that actions for *onus aversum* did not appear to be appropriate here either. On the one hand, because the grain belonged to the category of *res locatae* to be returned in kind, so that the *nauta* became its owner and the shipper a creditor, it did not appear that *onus aversum* could occur; and on the other, if it had been the case that the same

property (*eadem res*) was expected in return, the *locator* would have an action for theft. Alfenus therefore concluded that since conduct amounting to *onus aversum* was already covered by existing actions in every possible combination, granting a special *iudicium* was over and above what was necessary.



Fresco depicting the *Isis Geminiana* (first half of the third century CE), from the Ostiense Necropolis on the Via Laurentina, columbarium 31, now preserved in the Vatican Museum. Abascantus supervises a person emptying produce (*res* – possibly grain) into a *modius*. At the fore, a person sits beside another *modius* marked with the word '*fecit*' as more produce is brought up the gangplank. The whole scene is overseen by the *magister navis*, Farnaces. Source: Navis II database (photo: Vatican Museum).

It will be immediately apparent that I have not included the final section of the text (*sed si... fin.*) as part of the original *responsum*. The reason for this is that the reply is delivered in the form of a chiasmus with the following structure:²⁴¹

²⁴¹ According to Fiori, the part of the text *quod si... fin.* is organised as a 'complex chiasmus' comprised of four elements combining the two kinds of *res locatae* with penal and reipersecutory remedies: *La definizione*, 77–78; also, Purpura, 'Il χειρέμβολον', 141. Although I agree with Fiori that there is a chiasmus in the text, in my view it is to be found elsewhere.

- (A) respondit rerum locatarum duo genera esse, ut aut idem redderetur (sicuti cum vestimenta fulloni curanda locarentur)
- (B) aut eiusdem generis redderetur (veluti cum argentum pusulatum fabro daretur, ut vasa fierent, aut aurum, ut anuli): ex superiore causa rem domini manere, ex posteriore in creditum iri.
- (C) idem iuris esse in deposito: nam si quis pecuniam numeratam ita deposuisset, ut neque clusam neque obsignatam traderet, sed adnumeraret, nihil alius eum debere apud quem deposita esset, nisi tantundem pecuniae solveret.
- (D) secundum quae videri triticum factum Saufeii et recte datum.
- (C') quod si separatim tabulis aut heronibus aut in alia cupa clusum uniuscuiusque triticum fuisset, ita ut internosci posset quid cuiusque esset, non potuisse nos permutationem facere, sed tum posse eum cuius fuisset triticum quod nauta solvisset vindicare.
- (B') et ideo se improbare actiones oneris aversi: quia sive eius generis essent merces, quae nautae traderentur, ut continuo eius fierent et mercator in creditum iret, non videretur onus esse aversum, quippe quod nautae fuisset:
- (A') sive eadem res, quae tradita esset, reddi deberet, furti esse actionem locatori et ideo supervacuum esse iudicium oneris aversi.

Engel has described Chiasmus as:²⁴²

... a form of inverted parallelism... that presents subjects in the order A, B, C and then discusses them C, B, A, sometimes using exact repetition, sometimes displaying the successive clauses by means of parallel syntax. The seed of chiasmus is to be found wherever framing devices, cyclic form, or symmetry are used.

The technique may be thought of as 'the use of bilateral symmetry about a central axis',²⁴³ though subject to the caveat that symmetry, to the ancient mind, was just one aspect of the broader concept of *symmetria*, which related to the commensurability of parts to one another and the whole.²⁴⁴ As Thomas has noted, a chiasmus does not require an exact mirror image (e.g., ABBA, ABCBA), but rather an *inverted* parallelism between pairs of elements in a sort

²⁴² William E. Engel, *Chiastic Designs in English Literature from Sidney to Shakespeare* (Aldershot: Ashgate, 2009), 5.

²⁴³ Ralf Norman, *Samuel Butler and the Meaning of Chiasmus* (London: Macmillan, 1986), 276.

²⁴⁴ Edmund V. Thomas, 'Chiasmus in Art and Text', *Greece and Rome* 60 (2013): 56.

of 'criss-cross' relation (e.g., ABB'A', ABCB'A').²⁴⁵ In Thomson's view, the formation is therefore said to occur:

...if the text exhibits bilateral symmetry of four or more elements about a central axis, which may itself lie between two elements, or be a unique central element, the symmetry consisting of any combination of verbal, grammatical or syntactical elements, or, indeed, of ideas and concepts in a given pattern.²⁴⁶

To the Roman, a successful chiasmus was indicative of the author's good rhetorical style.²⁴⁷ The technique was a mainstay of an education in the liberal arts and its use was advocated by both Quintilian and Lucian, the latter of whom argued that passages ought to be 'mixed and tied together by their ends'.²⁴⁸ The form was used extensively by authors such as Cicero, Vergil, and Livy, and was also employed by the practitioners of technical disciplines such as architecture and land surveying.²⁴⁹

As Welch has pointed out, however, not every occurrence of repetition, balance, inclusion, or symmetry amounts to a chiasmus; and even if such characteristics are apparent, the degree to which the structure was intended by the author may be obscure.²⁵⁰ Objectively, he suggests, 'the reader must be able to identify significant, balanced repetitions in an inverted parallel order with a focus or shift at the centre'.²⁵¹ Welch goes on to outline fifteen criteria according to which the 'chiasticity' of a passage can be assessed.²⁵² These include, *inter alia*: the purpose to which the technique is employed; the length of the formation; the reasonableness of its start and end points; the centrality

²⁴⁵ Thomas, 57.

²⁴⁶ Ian H. Thomson, *Chiasmus in the Pauline Letters* (Sheffield: Sheffield Academic Press, 1995), 25–26.

²⁴⁷ Thomas, 'Chiasmus', 69.

²⁴⁸ Lucian, *Hist. conscr.* 55; also, Quint. *Inst.* 9.3.85, 10.3.9-10.

²⁴⁹ Steele noted that the chiastic technique was used by Cicero, Seneca, Pliny, and Fronto in about 850 passages (though almost always as shorter instances): 'Chiasmus in the Epistles of Cicero, Seneca, Pliny, and Fronto', in *Studies in Honor of Basil L. Gildersleeve* (Baltimore, MD.: Johns Hopkins University Press, 1902), 339; also, John W. Welch, 'Chiasmus in Ancient Greek and Latin Literatures', in *Chiasmus in Antiquity: Structures, Analyses, Exegesis*, ed. John W. Welch (Provo, UT.: Maxwell, 1998), 259. For the use of chiasmus by Vitruvius and the land surveyors, Thomas, 'Chiasmus', 70–71 and 78-9.

²⁵⁰ John W. Welch, 'Criteria for Identifying and Evaluating the Presence of Chiasmus', *Journal of Book of Mormon Studies* 4, no. 2 (1995): 4 and 10-13.

²⁵¹ Welch, 2.

²⁵² Welch, 4–10.

of the turning point; the balance between the two halves; the density of the formation (i.e., the extent to which it contains unrelated material); and its aesthetic effect.

In our text, the build-up to the 'central axis' (*secundum quae... recte datum*) consists of a distinction between the relationship of *locatores* to the two different kinds of *res locatae*: first, property handed over on terms that *eadem res* would be returned (A); and second, property handed over on terms that the *conductor* was allowed to return *eiusdem generis* (B). This is followed by the observation that the manner in which the *datio* was made was also a relevant factor (C). The discussion turns on the application of these principles to the case in hand (D). The respondent then follows through the analysis in reverse order. He affirms: first, the availability of a *vindicatio* for property stored separately (C'); second, the inapplicability of *onus aversum* where grain was to be returned *eiusdem generis* (B'); and third, the availability of an action for theft if *eadem res* was expected in return (A'). At this point the jurist had returned to his point of departure and concluded that a special *iudicium* for *onus aversum* was therefore unnecessary.

It is submitted, on Welch's criteria, that the part of the passage *respondit... iudicium oneris aversi* is an objectively identifiable chiasmus. The author presents his interpretation of the law and the application of the law to the facts within the framework of an inverted parallel structure (ABCDC'B'A'). The formation is lengthy by Roman standards but maintains its density throughout.²⁵³ The two halves are balanced (the ratio, by word count, is 76:90) as are each of the paired elements within each half. Most significantly, the chiasmic structure places emphasis on the central axis, which acts as the point of convergence between the jurist's abstract legal reasoning and the application of those principles to the *quaestio* at hand. The effect, as Hofmann observed of the technique generally, is to place the emphasis on decisive points in the passage and to give the argument a sense of continuity and

²⁵³ An example of a lengthier chiasmus may be found in Verg. G. 4.453-527: on which, Gilbert Norwood, 'Vergil, Georgics IV, 453-527', *The Classical Journal* 36, no. 6 (1941): 354; also, Welch, 'Chiasmus', 262-63.

completeness.²⁵⁴ Altogether, the chiasmus increases the persuasiveness of the jurist's reply by providing it with the structure, balance, and harmony characteristic of *symmetria*.

In addition to the chiastic structure of the *responsum*, the legal argument is constructed in such a way as to generate movement within the text. The key to this, as Jakab has pointed out, is to see that the examples of materials handed over for various reasons correspond with the standard juristic category of property *quae pondere numero mensura constant* (i.e., dealt by weight, number, or measure).²⁵⁵ With this in mind, the legal 'spine' of the text comes into view. The movement is from metal to money to grain: that is, following the trichotomy of *res* dealt with by weight, number, and measure. The treatment of specific items bookends this movement and contains the motion it generates within the scaffolding of the chiastic structure.

For simplicity, the structure of the *responsum* may therefore be presented as follows:

- | | | |
|---------|------|---|
| | (A) | <i>Eadem res: locator</i> remains the owner. |
| PONDERE | (B) | <i>Eiusdem generis: locator</i> becomes <i>in creditum</i> . |
| ↓ | (C) | Manner of <i>datio</i> : if stored separately, as (A); if counted out, as (B). |
| NUMERO | | |
| ↓ | (D) | Interpretation of the case in hand in light of these principles. |
| MENSURA | | |
| ↓ | (C') | Manner of <i>datio</i> : if stored separately, <i>locator</i> owner, therefore availability of <i>vindicatio</i> . |
| | (B') | <i>Eiusdem generis</i> (if not stored separately): <i>locator</i> creditor, therefore <i>onus aversum</i> impossible. |
| | (A') | <i>Eadem res: locator</i> owner, therefore availability of an action for theft. |

Conclusion: special *iudicium* for *onus aversum* unnecessary.

²⁵⁴ Johann B. Hofmann, *Lateinische Umgangssprache* (Heidelberg: Carl Winter, 1951), 123.

²⁵⁵ Jakab, 'Vertragsformulare', 98.

Several Issues:

The recognition that the *responsum* has a chiasmic structure provides a basis upon which to ground arguments concerning the composition and interpretation of the text more generally. First, it has already been suggested that the text has a complex authorial history, and could reasonably be considered to consist of republican, Pauline, and Justinianic elements. The chiasmic structure of the *responsum*, however, indicates that the section *respondit... iudicium oneris aversi* is genuinely republican in its entirety.²⁵⁶ Servius, for instance, studied the liberal arts with Cicero at Rhodes and was praised by the latter as one of the foremost rhetoricians of his generation.²⁵⁷ Moreover, the whole section *in navem... iudicium oneris aversi* is typical of the ‘*casus – quaestio – responsum*’ structure employed by Servius elsewhere.²⁵⁸ In my view, these considerations point to Servius as the most likely author.

The distinctive boundaries of the *responsum* also raise questions about the latter part of the text (*sed si... fin.*), which is likely to have been a later addition.²⁵⁹ If, as several scholars have argued, the parenthesis *nam in re... culpam deberi* was a post-classical (though pre-Justinianic gloss), then the final section was probably authored by Paul.²⁶⁰ On the face of it, Paul’s addition of material concerning *locatio conductio* to a text that he placed in a title *de furtis* appears problematic. However, the other texts attributable to the same book of his epitome show that they were all generally concerned with theft in the context of other contractual arrangements (i.e., *commodatum*, *pignus*, and *locatio conductio*), which reduces the significance of this tension.²⁶¹ In sum, it

²⁵⁶ Among those upholding the authenticity of this part of the text, Watson, *Obligations*, 121; Fiori, *La definizione*, 67; Roth, *Alfeni Digesta*, 144; Jakab, ‘Vertragsformulare’, 87–100; and Purpura, ‘Il χειρέμβολον’, 139.

²⁵⁷ Cic. *Brut.* 41.151.

²⁵⁸ Massimo Miglietta, ‘*Servius respondit*’. *Studi intorno a metodo e interpretazione nella scuola giuridica serviana. Prolegomena I* (Trento: Università degli Studi di Trento, 2010), 216–26.

²⁵⁹ Cf. Cardilli, *L’obbligazione di ‘praestare’*, 273–74.

²⁶⁰ Nikolaus Benke, ‘Zum Eigentumserwerb des Unternehmers bei der “locatio conductio irregularis”’, *ZSS* 104 (1987): 206; Roth, *Alfeni Digesta*, 143–44; also, Fiori, *La definizione*, 78.

²⁶¹ The three texts attributable to the fifth book of Paul’s epitome are: D.12.6.36 (Paul. 5 *epit. Alf. dig.*); D.13.7.30 (Paul. 5 *epit. Alf. dig.*); and D.19.2.31: Lenel, *Palingenesia*, 1889, 1:52.

is my view that the text can be attributed to the hands of three principal authors: i) Servius (reported by Alfenus) (*in navem... iudicium oneris aversi*); and ii) Paul (*sed si... fin.*).

A second issue concerns the possibility of transferring ownership within *locatio conductio* and deposit. Strictly, Servius does not say that ownership passed to the *conductor* in the examples given, but only that the *locator* became *in creditum*. I agree with Fiori, however, that the implication is that ownership did pass, which position is consistent with the course of the jurist's reasoning in the remainder of the reply.²⁶² This being accepted, the *responsum* provides good evidence that the republican view was that ownership could transfer within contracts of letting and hiring. As several scholars have pointed out, this position is corroborated by a second text reporting the opinions of Q. Mucius Scaevola, in which the jurist held that gold handed over to a goldsmith for work became the property of the *conductor*.²⁶³ The same observation can also be made in relation to deposit: Servius (and Alfenus) acknowledged that, provided the *datio* was made in a certain way, money left as a deposit would become the property of the depositor.

A third and related issue concerns the legal significance of the expression '*in creditum iri*'. The expression occurs twice in the text – at B and B' – first as an alternative to the retention of ownership by the person handing the property over; and second, as part of the explanation for the impossibility of *onus aversum* where the property that had been handed over was not stored separately and property *eiusdem generis* was expected in return. Elsewhere, the term appears in the rubric of D.12.1 (*de rebus creditis si certum petetur et de condictione*) in connection with *condictiones* and *mutuum*. According to Paul, a person who gave property as a *mutuum* did not expect the exact same material in return, but property of the same kind (*idem genus*).²⁶⁴ Further, if

²⁶² Fiori, *La definizione*, 79–80; cf. Benke, 'Zum Eigentumserwerb', 202–7; Jakab, 'Vertragsformulare', 99.

²⁶³ D.34.2.34 pr. (Pomp. 9 ad Q. Muc.): on which, Watson, *Obligations*, 107–8; Benke, 'Zum Eigentumserwerb', 222–23; Fiori, *La definizione*, 70–72; Roth, *Alfeni Digesta*, 135–36; Jean-Louis Ferrary, Aldo Schiavone, and Emanuele Stolfi, *Quintus Mucius Scaevola. Opera* (Rome: L'ERMA di Bretschneider, 2018), 252–57.

²⁶⁴ D.12.1.2 pr. (Paul. 28 ad ed.).

property of a different kind were given in return (for example, wine for grain), the transaction would not count as a *mutuum*. Significantly, the severan jurist states that a person stood *in creditum ire* where property *quae pondere numero mensura constant* (i.e., dealt by weight, number, or measure) had been handed over as a *mutuum*, because the purpose of the transaction demanded that performance could be made in kind.²⁶⁵

As Cannata has observed, however, a person could become *in creditum* for reasons other than a *mutuum*.²⁶⁶ In his view, the expression generally covered any person who had a *condictio* on the basis that he had handed over property for a *causa* (e.g., *locatio conductio*, *commodatum*, deposit, etc.). On this interpretation, Servius' position was that if property expected to be returned *eiusdem generis* was handed over for a *causa* and not stored separately, the person receiving the property was obliged to restore the same quantity of the same material in kind *on the strength of the datio alone*. The consequence of this position is that, for example, a *nauta* who had received grain in the circumstances described above and failed to return the same quantity would be liable: i) to a *condictio* for the grain that he had failed to restore; and ii) to the *actio locati* for *id quod interest* if the failure to return the grain could be attributed to his *culpa* or worse.²⁶⁷ There is, however, nothing in this text to suggest that a *condictio* lay for the *locator* or depositor who became a creditor, and so whether the expression was intended to carry such a meaning in this case is far from certain.

A fourth and final issue concerns the legal significance of the expression '*actio oneris aversi*'. Two questions arise in sequence. First, it is disputed whether a specific *actio* ever existed at all. On the one hand, most scholars have interpreted the *quaestio* to refer to an (otherwise unattested) action that was contained in the praetor's Edict but that had fallen out by the completion of

²⁶⁵ D.12.1.2.1 (Paul. 28 *ad ed.*).

²⁶⁶ Carlo A. Cannata, "'Creditum' e 'obligationes'", *Labeo* 20 (1974): 115; also, Jakob, 'Vertragsformulare', 98.

²⁶⁷ On the consequences of these permutations for risk allocation, Ralph Backhaus, 'Die Gefahrtragung bei gemeinsamen Unternehmungen und ihre Modifikation durch Parteiabsprachen im klassischen römischen Recht', *ZSS* 121 (2004): 252–59.

Julian's redaction.²⁶⁸ On the other, De Marco has argued that the question was not whether a specific action known as the *actio oneris aversi* lay in the shippers' favour, but rather whether an already existing action lay for conduct amounting to *onus aversum* on the facts presented.²⁶⁹ In my view, neither of these interpretations is sufficiently sensitive to the correspondence between the *quaestio* and the reply. Since, as I have argued, the *responsum* has a chiasmic structure and therefore ends with the statement *supervacuum esse iudicium oneris aversi*, the question and reply can be briefly stated as follows:

quaesitum est, an ceteri pro sua parte frumenti cum nauta agere possunt
oneris aversi actione.

respondit... supervacuum esse iudicium oneris aversi.

The question is, can the remaining shippers proceed against the *nauta* for their share of the grain by means of an action for *onus aversum*?

He responded: ...a (special) *iudicium* for *onus aversum* is unnecessary.

It is my submission that the shippers were inquiring about the availability of a decretal action (i.e., granted by the praetor on an *ad hoc* basis without reference to an edict) for conduct amounting to *onus aversum*. This explains the use of the plural (*actiones oneris aversi*) later in the passage, since it is perfectly possible that the praetor was – at the time of the reply's composition – in the habit of granting actions for *onus aversum* on a case-by-case basis. Further, it produces a direct correspondence between the question and response, which is to the effect that granting an *iudicium* for *onus aversum* was unnecessary because: i) the owner of merchandise already had sufficient protection; and ii) it was not possible for a *conductor* who had become the owner of the goods to be responsible for *onus aversum* in the first place. Whether Servius/ Alfenus' disapproval (*improbare*) put an end to the practice is unknown.

²⁶⁸ This is the view preferred by the majority of commentators, with the exception of those in the following note.

²⁶⁹ De Marco, 'Labeo', 154–58; also, Purpura, 'Ἰλ χερέμβολον', 139–40. Solazzi argued that the remedy referred to by Alfenus as the *actio oneris aversi* was identical with the *actio furti in factum adversus nautas*: 'L'actio oneris aversi', 526–27.

The second question concerns the meaning of the expression '*onus aversum*'. The context supplied by the text – sc., the delivery of grain to one shipper ahead of the others – and the later assertion that a *vindicatio* could be brought to retrieve grain that had been stored separately and delivered to someone other than the owner (C'), indicates that the expression was likely intended to carry the meaning of 'misdelivery' or 'misallocation' (i.e., to the wrong person). In the first place, this is consistent with the literal meaning of the adjective '*aversum*', which Cicero used to describe how Verres had turned an incalculable quantity of grain away from the *res publica* (*innumerabilem frumenti numerum per triennium aversum ab re publica*).²⁷⁰ Second, it is easy to see how, in the discharge of cargo carried in bulk, a *nauta* might restore the wrong quantity to one of the shippers early in the process, leaving the final recipients with less than they had handed over. It is therefore submitted that, in this context, the expression '*onus aversum*' meant 'the turning away of the cargo from its proper or lawful destination', or, more succinctly, 'misdelivery (or misallocation) of the goods'.

Conclusion:

The recognition that the *responsum* at the heart of the text is structured as a chiasmus enables several conclusions to be drawn. Most significantly, the integrity of the formation indicates that the passage is genuinely republican in its entirety and is therefore good evidence of the state of jurisprudence at the time. In this connection, it enables us to say with some confidence that it was Alfenus' (and probably also Servius') view that ownership could pass within *locatio conductio* and deposit.²⁷¹ Separately, it is my view that although the praetor's Edict never contained a remedy known as the *actio oneris aversi*, occupants of the magistracy were in the habit of granting *iudicia* on a case-by-case basis for *onus aversum* at the request of litigants. Whether this continued into the early Principate, despite the disapproval of Servius and Alfenus,

²⁷⁰ Cic. 2 *Verr.* 69.163.

²⁷¹ By the time of the classical period this view no longer prevailed: Watson, *Obligations*, 108. In Fiori's opinion, the text has the character of a 'fossil' preserved in the *corpus iuris* of a doctrine long-since abandoned: *La definizione*, 74; also, Francesco M. de Robertis, 'D. 19,2,31 e il regime dei trasporti marittimi nell'ultima età repubblicana', *SDHI* 31 (1965): 103.

cannot be ascertained. *Onus aversum* likely meant the misdelivery or misallocation of goods, though it is not clear whether this had to be deliberate for the *nauta* to be held liable.

Section 4.3: The *actiones in factum*.

4.3.1 *Actio in factum de recepto*.

The principal sources for the existence of the *receptum nautarum* are the juristic texts contained within the *Digest*. Beyond these, several studies have examined the Graeco-Egyptian papyri with a view to discovering whether the institution found expression in the contractual documentation from Ptolemaic and Roman Egypt.²⁷² Only one document – P. Grenf. II 108 (dated to 167 CE) – which contains the verb *recipere* in the form *recipisse* on two occasions, has been considered a possible candidate in this respect.²⁷³ Strictly, however, the most that can be said is that the fragment appears to be part of a receipt issued by the owner of goods to the person restoring them to his possession.²⁷⁴ Although it is therefore possible that the acknowledgment was delivered to a *nauta* following the restoration of merchandise to a consignor, the absence of any firm evidence in this direction makes any conclusions necessarily speculative. This being the case, it serves to look to the juristic excerpts.

²⁷² Christoph H. Brecht, *Zur Haftung der Schiffer im antiken Recht* (Munich: C.H. Beck, 1962); also, Meyer-Termeyer, *Die Haftung der Schiffer*.

²⁷³ The document, first published by Grenfell and Hunt, and later by Mitteis, has been faithfully reproduced by Brecht: *Zur Haftung der Schiffer*, 76–77. The most suggestive clause is that contained in ll. 7-8: ‘...*quas has res intra scriptas meas salbas sanas recipisse scripsi*’ etc. For a review of the literature, Patricio-Ignacio Carvajal, ‘El “Receptum Nautarum” y el Papiro Grenf. II 108’, *Revista de Estudios Histórico-Jurídicos* 28 (2006): 147–50.

²⁷⁴ In this connection, e.g., Meyer-Termeyer, *Die Haftung der Schiffer*, 174, note 1; also, Edoardo Carelli, ‘Responsabilità ex recepto del nauta e legittimazione ad agire di danno’, *Rivista dell diritto della navigazione* 4 (1938): 323, note 1; Carvajal, ‘El “Receptum Nautarum”’, 150.

4.3.1.1 Edict and *formula*.

Ulpian reports the wording of the edict as follows:²⁷⁵

Ait praetor: 'nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo'.

The praetor says: 'unless seamen, innkeepers, and stablekeepers restore what they have undertaken to keep safe, I will give an action against them'.

As for the *formula*, both Rudorff (first) and Lenel (second) provide similar reconstructions:²⁷⁶

Iudex esto. Si paret N^{um} N^{um} (servum, filium, institorem Nⁱ Nⁱ voluntate eius), cum navem (cauponam, stabulum) exerceret, Nⁱ Nⁱ res, quibus de agitur, salvas fore recepisse neque restituisse, quanti ea res erit, tantam pecuniam iudex N^{um} N^{um} A^o A^o condemna, si n. p. a.

S. p. N^m N^m, cum navem exerceret, Aⁱ Aⁱ res q. d. a. salvas fore recepisse, nisi restituet, q. e. r. e., t. p. iudex N^m N^m A^o A^o c. s. n. p. a.

Mantovani, whose reconstruction is substantially the same as Lenel's, gives the following for the so-called *exceptio Labeoniana*: '*si naufragium aut per vim piratarum non perierint*'.²⁷⁷

4.3.1.2 Interpretation of the Edict.

As in the case of the exercitorian edict, the compilers included a central text drawn from Ulpian's commentary *ad edictum* (book 14), together with contributions by Gaius and Paul. Again, Ulpian's commentary proceeds in a systematic fashion: first, the praetor's declaration; second, a *laudatio*; third, a sequential interpretation of the edict's clauses; and fourth, observations *ad*

²⁷⁵ D.4.9.1 pr. (Ulp. 14 *ad ed.*). Both Rudorff and Lenel retained this wording in their reconstructions of the edict: Rudorff, *Edicti perpetui*, 65; also, Lenel, *EP*³, 131. Cf. Ménager, who proposed *cuique* for *cuiusque* on grammatical grounds: 'Naulum et receptum', 193. As Robaye has pointed out, the correction does not substantially alter the sense of the text: *L'obligation de garde*, 82.

²⁷⁶ Rudorff, *Edicti perpetui*, 65; Lenel, *EP*³, 131; cf. Jean Paris, 'La responsabilité de la custodia en droit romain' (Université de Nancy, 1926), 14, note 5. For a discussion of the differences (e.g., Rudorff's *salvas fore recepisse neque restituisse* for *salvas fore recepisse, nisi restituet* in Lenel), Martín Serrano-Vicente, *Custodiam praestare: la prestación de custodia en el derecho romano* (Madrid: Tebar, 2007), 325, note 1034.

²⁷⁷ Mantovani's reconstruction is the same as Lenel's, except that he gives '*neque restituisse*' for '*nisi restituet*': *Le formule*, 60–61, no. 68 and note 259.

formulam.²⁷⁸ Thus, having stated the terms of the edict, Ulpian praised it for its *maxima utilitas*:

D.4.9.1.1 (Ulp. 14 *ad ed.*):

Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodiae eorum committere. ne quisquam putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus.

According to Ulpian, the edict was of the greatest utility because it was very often necessary to rely on the *fides* and commit property into the safekeeping (*custodia*) of those to whom the declaration applied.²⁷⁹ Further, he defended the burden placed on *nautae* etc. as a result, for it was at their discretion whether to undertake and/ or receive goods under the edict (*ne quem recipiant*); and without the provision they would have the means to conspire with thieves against their customers, which still occurred in spite of the praetor's declaration.

Although the authenticity of parts of the fragment have been doubted,²⁸⁰ the severan jurist's attitude toward the tradespeople affected by the edict is typical of the prejudice displayed by other classical authors.²⁸¹ Moreover, this attitude

²⁷⁸ This is reflected by Lenel: *Palingenesia iuris civilis*, vol. 2 (Leipzig: Tauchnitz, 1889), 490–91.

²⁷⁹ Cf. Ulpian's very similar justification for the *actio exercitoria*, which was premised on the necessity of contracting with persons whose character and status were unknown: D.14.1.1 pr. (Ulp. 28 *ad ed.*): on which, *supra*, 123.

²⁸⁰ According to Schulz, the section '*et nisi... fin.*' was 'a silly post-classical attempt to justify the severe liability': *Classical Roman Law* (Oxford: Clarendon Press, 1951), 565. De Robertis argued that the same section was originally written in connection with the *actio furti in factum adversus nautas* and interpolated by the compilers: *Receptum nautarum. Studio sulla responsabilità dell' armatore in diritto romano, con riferimento alla disciplina particolare concernente il caupo e lo stabularius* (Bari: Cressati, 1952), 136–40; cf. Julius C. van Oven, 'Rev. de Robertis, "Receptum Nautarum", Bari, 1952', *RIDA* 3 (1955): 425–26.

²⁸¹ E.g., Hor. *Sat.* 1.5.3-4 and 1.1.29; cf. Mart. *Epigrams*, 3.57. The point has been developed by Van den Bergh: 'Custodiam Praestare: Custodia-Liability or Liability for Failing Custodia', *TvR* 43 (1975): 67; also, James Mackintosh, 'Nautae Caupones Stabularii: Special Liabilities of Shipmasters, Innkeepers and Stablers', *Juridical Review* 47 (1935): 65; and Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990), 515–16. On Roman attitudes to trades generally, Sarah Bond, *Trade and Taboo: Disreputable Professions in the Roman Mediterranean* (Ann Arbor, MI.: University of Michigan Press, 2016). Cf. Schulz, who maintained that neither *nautae* nor *stabularii* were regarded as disreputable: *Classical Roman Law*, 565.

is consistent with Pomponius's reported comment later in the same passage that one of the reasons for the promulgation of the edict was the praetor's desire to repress the dishonesty (*improbitas*) of 'these kinds of people' (*hoc genus hominus*).²⁸² Nor is it unsurprising that the prospect of collusion with thieves features so prominently: if comparative evidence is anything to go by, cargo theft by longshoremen and stevedores was a perennial problem for the modern shipping industry until the advent of containerisation in the 1950s.²⁸³

Ait praetor 'nautae'...

D.4.9.1.2-4 (Ulp. 14 *ad ed.*):

[2] Qui sunt igitur, qui teneantur, videndum est. ait praetor "nautae". nautam accipere debemus eum qui navem exercet: quamvis nautae appellantur omnes, qui navis navigandae causa in nave sint: sed de exercitore solummodo praetor sentit. nec enim debet, inquit Pomponius, per remigem aut mesonautam obligari, sed per se vel per navis magistrum: quamquam si ipse alicui e nautis committi iussit, sine dubio debeat obligari. [3] Et sunt quidam in navibus, qui custodiae gratia navibus praeponuntur, ut ναυφύλακες et diaetarii. si quis igitur ex his receperit, puto in exercitorem dandam actionem, quia is, qui eos huiusmodi officio praeponit, committi eis permittit, quamquam ipse navicularius vel magister id faciat, quod χειρέμβολον appellant. sed et si hoc non exercet, tamen de recepto navicularius tenebitur. [4] De exercitoribus rarium, item lyntrarii nihil cavetur: sed idem constitui oportere Labeo scribit, et hoc iure utimur.

Ulpian's interpretation of the edict begins with a consideration of the scope of the word '*nauta*'. In the first place, he observed that although the word usually referred to anyone who was on board a vessel for the purpose of its navigation, the praetor's intention was that the edict should only apply to those *qui navem exercet* (i.e., the *exercitor*).²⁸⁴ In line with the exercitorian edict, Ulpian approved Pomponius' view that the *exercitor* would be bound by the acts of

²⁸² D.4.9.3.1 (Ulp. 14 *ad ed.*). This point has been well made by Zimmermann: *The Law of Obligations*, 515–16.

²⁸³ Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (Princeton, N.J. and Oxford: Princeton University Press, 2016), 36–37 and 109–110. According to one Leith docker, longshoremen prided themselves on their ability to tap whiskey from sealed casks stowed in the ship's hold: Ian MacDougall, *Voices of Leith Docks: Personal Recollections of Working Lives* (Edinburgh: Mercat Press, 2001), 115.

²⁸⁴ The expression *qui navem exercet* purposefully invokes the terms of the exercitorian edict. For Ulpian's use of the word '*nauta*', cf. D.47.5.1.1 (Ulp. 38 *ad ed.*).

his or her *magister navis*; and also by those of anyone to whom they had directed (*iussit*) goods to be committed. Moreover, any appointments whose duties included safeguarding goods on board the vessel – such as *nauphylakes* (ship’s guards) and *diaetarii* (valets) – were also capable of binding the *exercitor*, on the basis that he had authorised goods to be entrusted to them.²⁸⁵ Paul added that a *receptum* could arise between two *nautae*; which raises the prospect of contractual relations between two exercitorian hierarchies.²⁸⁶ Whether or not the *exercitor* was bound, however, was separate from the performance of a ‘*cheirembolon*’, which may have consisted of a symbolic gesture,²⁸⁷ a receipt given to the person handing over the merchandise,²⁸⁸ a stamp affixed to the contract or related documents,²⁸⁹ or, as

²⁸⁵ *Nauphylakes* were ship’s guards, charged with overseeing the safety of the goods and passengers on board: Rougé, *Recherches*, 218; also, Casson, *Ships and Seamanship*, 320. The identity of the *diaetarius* is more obscure. The word is etymologically derived from ‘*diaeta*’, or ‘dwelling-room’, and elsewhere Ulpian used it to refer to a *valet-de-chambre* working as part of an urban household (*urbana familia*): D.33.7.12.42 (Ulp. 20 *ad Sab.*). According to Casson, his role was restricted to tending the cabin of his superior officer: 319; cf. Claude Alzon, *Problèmes relatifs à la location des entrepôts en droit romain* (Paris: Éditions Cujas, 1966), 196, note 907. I agree with Robaye, however, that, since Ulpian refers to the *diaetarius* directly in connection with the *receptum*, he was probably closer to a *valet* on deck charged with tending to the needs of the passengers: *L’obligation de garde*, 83.

²⁸⁶ D.4.9.4.1 (Paul. 13 *ad ed.*): on which, María Salazar Revuelta, *La responsabilidad objetiva en el transporte marítimo y terrestre en Roma. Estudio sobre el receptum nautarum, cauponum et stabulariorum: entre la utilitas contrahentium y el desarrollo comercial* (Madrid: Dykinson, 2007), 131–32; also, ‘Responsables sine culpa en el contrato de transporte y alojamiento en la Roma de la época comercial’, *RIDA* 55 (2008): 466.

²⁸⁷ Paris, ‘La responsabilité’, 33; De Martino, ‘Lex Rhodia (1938)’, 209; de Robertis, *Receptum nautarum*, 72–73; Aldo Petrucci, *Per una storia della protezione dei contraenti con gli imprenditori*, vol. 1 (Turin: Giappichelli, 2007), 143; though cf. Julia Vélissaropoulos-Karakostas, ‘Χειρέμβολον. En marge de l’histoire du droit maritime’, in *Byzantine Law. Proceedings of the International Symposium of Jurists (Thessaloniki, 10-13 december 1998)* (Thessaloniki: Bar Association of Thessaloniki, 2001), 212. Martini has argued that the man sitting on the bow of the *Isis Geminiana* (*supra*, 194) was raising his hand to signify that he undertook legal responsibility for the sack of grain marked ‘*fecit*’: ‘Χειρέμβολον (Noterella in margine al “receptum nautarum”’, in *Studi in onore di Edoardo Volterra*, ed. Luigi Aru and Guido Astuti, vol. 4 (Milan: Giuffrè, 1971), 197–207.

²⁸⁸ Álvaro D’Ors, ‘ΧΕΙPEMBOΛON’, *Humanitas* 2 (1948): 254–60; followed by, e.g., Robaye, *L’obligation de garde*, 83–84.

²⁸⁹ Nicola De Marco, ‘Un problema minimo: il χειρέμβολον’, *SDHI* 65 (1999): 355–62. Cf. Bove, who has argued that *TPSulp.* 80 is part of a letter conferring a mandate for the collection of goods by the consignee: ‘*TPSulp.* 80 (= Tab. Pomp. 47): un mandatum per epistulam (con χειρέμβολον: Ulp. D. 4.9.1.3)?’, in *Studi in onore di Francesco Grelle*, ed. Marina Silvestrini, Tullio Spagnuolo Vigorita, and Giuliano Volpe (Bari: Edipuglia, 2006), 21–25. Cf., however, Rougé, *Recherches*, 368; and, more convincingly, Giuseppe Camodeca, *Tabulae Pompeianae Sulpiciorum (TPSulp.)*. *Edizione critica dell’archivio puteolano dei Sulpicii*, vol. 2 (Rome: Quasar, 1999), 184.

Purpura has argued, the act of marking containers to identify the owner of the goods inside.²⁹⁰ Finally, Ulpian confirmed Labeo's opinion that the edict also applied to those who operated rafts (impliedly, fluvial transport) and harbour craft, which in any case was the present practice.²⁹¹

Ait praetor: 'quod cuiusque salvum fore receperint...'

D.4.9.1.6-8 (Ulp. 14 *ad ed.*):

Ait praetor: 'quod cuiusque salvum fore receperint': hoc est quamcumque rem sive mercem receperint. inde apud Vivianum relatam est ad eas quoque res hoc edictum pertinere, quae mercibus accederent, veluti vestimenta quibus in navibus uterentur et cetera quae ad cottidianum usum habemus. **[7]** Item Pomponius libro trigensimo quarto scribit parvi referre, res nostras an alienas intulerimus, si tamen nostra intersit salvae esse: etenim nobis magis, quam quorum sunt, debent solvi. et ideo si pignori merces accepero ob pecuniam nauticam, mihi magis quam debitori nauta tenebitur, si [ante] <a me>²⁹² eas suscepit. **[8]** Recipit autem salvum fore utrum si in navem res missae ei adsignatae sunt: an et si non sint adsignatae, hoc tamen ipso, quod in navem missae sunt, receptae videntur? et puto omnium eum recipere custodiam, quae in navem illatae sunt, et factum non solum nautarum praestare debere, sed et vectorum...

D.4.9.3 pr. (Ulp 14 *ad ed.*):

...Et ita de facto vectorum etiam Pomponius libro trigensimo quarto scribit. idem ait, etiamsi nondum sint res in navem receptae, sed in litore perierint, quas semel recepit, periculum ad eum pertinere.

According to Ulpian, the expression 'what they have undertaken to keep safe' referred to property (*res*) and merchandise (*merces*) received by the *nauta*. In this connection, he cited the view of Vivianus (end of the first and start of the second centuries CE) that the edict also covered property additional to the cargo such as passengers' clothes and everyday items.²⁹³ The same opinion was reported by Paul, with the extra detail that Vivianus held this position for property brought onto the ship after the contract (*locatio*) had been concluded

²⁹⁰ Purpura, 'Il χειρέμβολον'.

²⁹¹ Salazar Revuelta, *La responsabilidad objetiva*, 124. For *lyntrarii*, Lionel Casson, 'Harbour and River Boats of Ancient Rome', *JRS* 55 (1965): 34; also, *Ships and Seamanship*, 335.

²⁹² On this emendation, Salazar Revuelta, *La responsabilidad objetiva*, 130–31; also, 'Responsables sine culpa', 466.

²⁹³ Cerami and Petrucci, *Diritto commerciale romano*, 264–65. For Vivianus, Kunkel, *Die römischen Juristen*, 146; also, generally, Carmela Russo Ruggeri, *Viviano giurista minore?* (Milan: Giuffrè, 1997).

and the cargo installed, because even though no *vectura* was owed, these items were still to be regarded as part of the agreement:

D.4.9.4.2 (Paul. 13 *ad ed.*):²⁹⁴

Vivianus dixit etiam ad eas res hoc edictum pertinere, quae post impositas merces in navem locatasque inferentur, etsi earum vectura non debetur, ut vestimentorum, penoris cottidiani, quia haec ipsa ceterarum rerum locationi accedunt.

As several scholars have pointed out, these two texts indicate that before Vivianus the edict was only considered to cover those goods with which the contract was directly concerned.²⁹⁵

In the next fragment, Ulpian approved Pomponius' comment that it did not matter for the purpose of the edict whether the person was the owner of the goods, provided that they had an interest in their restoration. So, for example, if a person brought property held as a pledge against a maritime loan (*pecunia nautica*) on board, the *nauta* would be responsible to him, because he both had an interest in the goods as a creditor and was the person from whom the property had been taken on (*susceperit*).²⁹⁶

The final question that arose in connection with this clause was precisely when goods counted as 'received'.²⁹⁷ For Ulpian it was not enough that the property had been sent to the ship; it had to have been committed to the care of the *nauta* (*adsignatae*), which occurred when the goods were brought on board (*in navem illatae sunt*). The severan jurist also reported Pomponius' opinion that once responsibility for the goods had been taken, the *nauta* would bear the risk (*periculum*) for them even if they were lost on shore. Lastly, both jurists agreed that from the point at which the goods had been taken over the *nauta*

²⁹⁴ On which, Mancinetti, *L'emersione*, 333–35, with bibliography at 333, note 37.

²⁹⁵ Cerami and Petrucci, *Diritto commerciale romano*, 265, with bibliography at note 35; also, Salazar Revuelta, *La responsabilidad objetiva*, 111–12. Cf. Brecht's thesis that the *actio in factum de recepto* was originally introduced to cover the personal items of travellers: *Zur Haftung der Schiffer*, 99–112.

²⁹⁶ Salazar Revuelta, *La responsabilidad objetiva*, 130–31; also, Fercia, *Responsabilità per fatto di ausiliari nel diritto romano*, 297.

²⁹⁷ Cerami and Petrucci, *Diritto commerciale romano*, 266.

would be responsible not only for the acts of his crew, but also for those of any passengers.

Ait praetor. 'nisi restituent, in eos iudicium dabo'.

D.4.9.3.1 (Ulp. 14 *ad ed.*):²⁹⁸

Ait praetor: 'nisi restituent, in eos iudicium dabo'. ex hoc edicto in factum actio proficiscitur. sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: [sed] <scl.> si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res preferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res perit vel damnum datum est, [nisi si quid damno fatali contingit]. inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. idem erit dicendum et si in stabulo aut in caupona vis maior contigerit.

With respect to the final part of the edict, Ulpian observed that the action given by the praetor was *in factum*. In practical terms, this meant that the action's *formula* simply stated that the judge ought to condemn the defender if he had failed to restore what he had undertaken to keep safe, without reference to any external considerations (such as good faith).²⁹⁹ The question that arose was whether this remedy was necessary, given that civil law actions also lay against the *nauta* on the same grounds. Thus, if the *nauta* had let out the whole ship for a financial reward, the *actio conducti* would lie for goods that went missing (*de rebus quae desunt*); and equally, the *actio locati* if he had undertaken the task of transporting the merchandise.³⁰⁰ Again, if the goods

²⁹⁸ For an up-to-date bibliography of scholars who have treated this text, Mancinetti, *L'emersione*, 192, note 63; and for a literature review, Maria Casola, 'Le regole della navigazione: la responsabilità dell'armatore nell'età dei Severi', *Civitas et Lex* 3 (2014): 57–70.

²⁹⁹ Meyer-Termier, *Die Haftung der Schiffer*, 197; also, Maximilien Philonenko, "Intentio" dans le Formules "in Factum conceptae", *RIDA* 3 (1949): 243–46.

³⁰⁰ Lenel pointed out that the section *si quidem... convenietur* is structured as a chiasmus according to the pattern ABB'A': 'Kritisches und Antikritisches', *ZSS* 49 (1929): 2; also, Ménager, 'Naulum et receptum', 400, note 146.

had been taken on for free (*gratis res susceptae sint*), it was Pomponius' view that the action on deposit would be available.

Despite Lenel's argument that the opinions expressed in the next section were Ulpian's (*miratur igitur... contingit*), a plain reading of the text suggests that the severan jurist continued to report those of Pomponius.³⁰¹ This being accepted, Pomponius is reported to have expressed surprise (*miratur igitur...*) at the introduction of the honorary action when civil law actions were available. This could be explained, however, if it had been the praetor's intention to check the dishonesty of the persons affected by the edict. In addition, he continued, the edict made the *nauta* responsible for everything he received (*omnimodo qui recipit tenetur*), even if the property had been lost or damaged through no fault of his own (*sine culpa*), whereas in *locatio conductio* and deposit he only answered for *culpa* and *dolus* respectively.³⁰² The fragment concludes with the view of Labeo, who is reported to have held that it was not inequitable for the praetor to grant a defence if the property had been lost to shipwreck or piracy.³⁰³ As Magdelain has pointed out, it is not possible to say whether the *exceptio* recommended by Labeo was included in the praetor's Album or granted on an *ad hoc* basis.³⁰⁴

³⁰¹ Lenel, 'Kritisches und Antikritisches', 4–5; cf. Brecht, *Zur Haftung der Schiffer*, 94–95.

³⁰² For a detailed bibliography of scholars expressing views as to the text's integrity, Mancinetti, *L'emersione*, 201, note 88. I agree with, *inter alios*, MacCormack, that the text is substantially genuine: 'Custodia and Culpa', 163, note 47. The only clause that raises legitimate suspicions is that comprising '*nisi... contingit*': see, e.g., Alfredo De Medio, 'Caso fortuito e forza maggiore in diritto romano', *BIDR* 20 (1908): 193; Paris, 'La responsabilité', 284; Vincenzo Arangio-Ruiz, *Responsabilità contrattuale in diritto romano*, 2nd ed. (Naples: Jovene, 1958), 106, note 2; Giuseppe I. Luzzatto, *Caso fortuito e forza maggiore come limite alla responsabilità contrattuale* (Milan: Giuffrè, 1938), 176–77; de Robertis, *Receptum nautarum*, 85; Manlio Sargenti, 'Problemi della responsabilità contrattuale', *SDHI* 20 (1954): 133; André Magdelain, *Le consensualisme dans l'édit du prêteur* (Paris: Recueil Sirey, 1958), 145, notes 322 and 323; and Ménager, 'Naulum et receptum', 407, note 165.

³⁰³ The *exceptio Labeoniana*, which has been considered inauthentic by a handful of scholars, is now widely thought to be genuine: cf. Huvelin, *Droit commercial romain*, 150–51; also, Gerhard Beseler, 'Romanistische Studien', in *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento*, vol. I (Palermo: Arti Grafiche, 1936), 306; and Franz Haymann, 'Textkritische Studien zum römischen Obligationenrecht', *ZSS* 40 (1919): 205–9; though note Schulz's remark that 'F. Haymann's unmethodical and misleading paper should be ignored': *Classical Roman Law*, 517. Cf., also, De Martino, 'Lex Rhodia (1938)', 189–93.

³⁰⁴ Magdelain, *Le consensualisme*, 146. Ménager conjectured that the defence was given on an *ad hoc* basis and therefore not included in the Album: 'Naulum et receptum', 140.

Ulpian's final observations were made *ad formulam*. Thus, if a son or slave received goods in accordance with the *voluntas* of their father or master, the latter would be liable *in solidum* under the exercitorian edict; and, conversely, if the goods had been received *sine voluntate*, the action would be given *de peculio*.³⁰⁵ Again, if a slave of the *exercitor* stole or damaged property that had been received, a noxal action was not available because the slave's owner could already be sued directly under the edict.³⁰⁶ As to whether it was possible to bring the *actiones de recepto* and *furti* in respect of the same object, Ulpian went beyond the doubt expressed by Pomponius to say that if the pursuer attempted to bring both suits, one could be repelled either by application to the judge (*officio iudicis*) or by means of the *exceptio doli*.³⁰⁷ Finally, as Pomponius observed, because the action was reipersecutory in character it was allowed against the defender's heirs and without limitation of time.³⁰⁸

4.3.1.3 Several Issues.

4.3.1.3.1 The Meaning of 'recipere'.

The first issue that arises concerns the edictal meaning of the word 'recipere'. The debate in modern scholarship has tended to set up a binary between two alternative meanings, in the sense that the word could be used to refer to either an express undertaking or to the physical receipt of the property itself.³⁰⁹ As a result, several scholars have argued for a narrative of historical change whereby the necessity of providing an express undertaking was superseded by an implied term in contracts of letting and hiring.³¹⁰ At this point, the focus

³⁰⁵ D.4.9.3.3 (Ulp. 14 *ad ed.*); also, PS.2.6: on which, Riccardo Fercia, *Criteri di responsabilità dell'exercitor: modelli culturali dell'attribuzione di rischio e 'regime' della nossalità nelle azioni penali in factum contra nautas, caupones et stabularios* (Turin: Giappichelli, 2002), 231–32.

³⁰⁶ Fercia, 128–30.

³⁰⁷ D.4.9.3.5 (Ulp. 14 *ad ed.*).

³⁰⁸ D.4.9.3.4 (Ulp. 14 *ad ed.*).

³⁰⁹ Cf. Carvajal, 'El "Receptum Nautarum"', 145–48; also, 'La persistencia de "recipere" en su acepción de "prometer" y de la desvinculación entre vis maior y la exceptio labeonis en época postclásica: "salvum recipere obligare" y "suscipere in fidem suam"', in *Studi in onore di Antonino Metro*, ed. Carmela Russo Ruggeri (Milan: Giuffrè, 2009), 409–15; van Oven, 'Actio de recepto et actio locati', 149; Robaye, *L'obligation de garde*, 80–82.

³¹⁰ E.g., Zimmermann, *The Law of Obligations*, 519–20; also, David S. Bogen, 'Ignoring History: The Liability of Ships' Masters, Innkeepers and Stablekeepers under Roman Law', *The American Journal of Legal History* 36, no. 3 (1992): 349–52. For a comprehensive bibliography, András Földi, 'Anmerkungen zum Zusammenhang zwischen der Haftung «ex

turns to when this change took place, some holding that it had already occurred by the time of Ulpian; others that it was a post-classical or Justinianic innovation.³¹¹

In my view, this approach has not been sufficiently sensitive to the meaning of the word in its juristic context. First, it is important to note that the labelling of the various *recepta* (*argentarii*, *arbitri*, *nautae* etc.) as *pacta praetoria* is a modern development.³¹² The classical jurists never discussed *recepta* in connection with pacts, and so to try to comprehend them through that lens only serves to distort an already complex picture.

The meaning of the word must therefore be understood on its own terms. In general, '*recipere*' means 'to take to oneself', or 'to take upon oneself', and is used in a range of contexts from the receipt or retention of an object (in the sense of taking a piece of property to oneself) to the giving of an undertaking (in the sense of taking a task upon oneself).³¹³ In its juridical context, however, it stands in contrast to the verb '*suscipere*', which has the same general meaning (i.e., 'to take to or upon oneself'), but with the inflection that the action was performed voluntarily or as a favour.³¹⁴ Heumann and Seckel attributed both words with the same general meaning, but did not distinguish between them at a juridical level.³¹⁵ Beginning with D.4.9, however, the verb '*suscipere*' appears twice: first, in D.4.9.3.1, where the goods are said to have been taken on for free as a deposit (*gratis res susceptae sint*); and second, in D.4.9.1.7, where the goods the *nauta* took on (*susceptae*) were not those for which

recepto nautarum cauponum stabuliorum» und der Haftung für «custodia», *RIDA* 40 (1993): 267, note 9.

³¹¹ For a bibliography of scholars taking a position on the matter, Mancinetti, *L'emersione*, 194, note 65.

³¹² E.g., E. Ude, 'Das receptum nautarum, ein pactum praetorium', *ZSS* 12 (1891): 66–74. Textbook treatments frequently employ this categorisation: e.g., Cerami and Petrucci, *Diritto commerciale romano*, 262. For the observation that the categorisation is unclassical: Schulz, *Classical Roman Law*, 564; Magdelain, *Le consensualisme*, 175; Salazar Revuelta, *La responsabilidad objetiva*, 134.

³¹³ 'Recipio', in Charlton T. Lewis and Charles Short, *A Latin Dictionary: Founded on Andrews' Edition of Freund's Latin Dictionary* (Oxford: Oxford University Press, 1879).

³¹⁴ 'Suscipio', in Lewis and Short. Carvajal has explored the contrast in relation to the undertakings given by *navicularii*: 'La persistencia de "recipere"', 441–50.

³¹⁵ According to the authors, *recipere* meant 'auf sich nehmen, übernehmen = *suscipere*, *excipere*': 'Recipere', in Hermann G. Heumann and Emil Seckel, *Handlexicon zu den Quellen des römischen Rechts* (Jena: G. Fischer, 1891).

vectura had been paid and belonged to someone else. Again, in D.4.8 – the title concerning the *receptum arbitri*, which applied where a person had agreed to preside over a dispute in return for a reward – the verb appears several times in connection with arbiters who occupied public positions and therefore took up their position without remuneration.³¹⁶ This is consistent with the use of the word throughout the *Digest*, where it is typically associated with actions performed in connection with gratuitous contracts (such as *commodatum*, deposit, and mandate).³¹⁷

In light of the general meaning of both words and their contrasting use in the juristic sources, it is submitted that while *suscipere* was typically used where a person was acting in connection with a gratuitous arrangement, *recipere* was the appropriate word when he or she was acting for profit.³¹⁸ This interpretation is consistent with Vivianus' discussion of the scope of the word's meaning in D.4.9.1.6 and D.4.9.4.2. As Paul reported, the jurist's view was that property accessory to a contract of letting and hiring also counted as having been taken on by the *nauta*, even though no *vectura* was owed for its transport. Vivianus' contribution was therefore to extend the word's edictal meaning beyond those goods for which freight was due, which until that point was impliedly the only property covered by the edict as a matter of course.

Further, the distinction between the meaning of the two verbs explains the tenor of Ulpian's treatment of the clause '*quod cuiusque salvum fore receperint*'. Having explained that the property covered by the edict included some items for which no *vectura* had been paid, the severan jurist focused upon the moment at which the *nauta* would be regarded as having taken the goods on. This, he stated, would only happen once they had been committed to his care (*adsignatae*); that is, when they were put on board, and even if no *cheirembolon* had been performed (D.4.9.1.3). All this presupposed the existence of a *locatio conductio* between the *nauta* and the consignor; and

³¹⁶ D.4.8.3.2 (Ulp. 13 *ad ed.*): '*Ait praetor: "qui arbitrium pecunia compromissa receperit"*'. In connection with magistracies: D.4.8.3.3 (Ulp. 13 *ad ed.*) and D.4.8.4 pr. (Paul. 13 *ad ed.*); and with priesthoods, D.4.8.32.4 (Paul. 13 *ad ed.*).

³¹⁷ 'Suscipere', in Heumann and Seckel, *Handlexicon*.

³¹⁸ Cf. Van den Bergh, 'Custodiam Praestare', 67.

given that there is never any mention of an express undertaking in this connection, it is my view that the edict automatically applied to property that had been committed to the care of a *nauta* in virtue of an agreement in which the payment of the *merces* was reciprocal to the restoration of the goods (e.g., a *locatio conductio mercium vehendarum*), and became operative from the moment the committal took place.³¹⁹

This interpretation is strengthened by a text concerning the question as to whether, a letter having been stolen, the *actio furti* lay in favour of the missive's owner or the messenger (*nuntius*):

D.47.2.14.17 (Ulp. 29 *ad Sab.*):

... quis ergo furti aget? is cuius interfuit eam non subripi, id est ad cuius utilitatem pertinebant ea quae scripta sunt. et ideo quaeri potest, an etiam is, cui data est preferenda, furti agere possit. et si custodia eius ad eum pertineat, potest: sed et si interfuit eius epistulam reddere, furti habebit actionem. finge eam epistulam fuisse, quae continebat, ut ei quid redderetur fieretve: potest habere furti actionem: vel si custodiam eius rei recepit vel mercedem preferendae accipit. et erit in hunc casum similis causa eius et cauponis aut magistri navis: nam his damus furti actionem, si sint solvendo, quoniam periculum rerum ad eos pertinet.

After an initial section in which the ownership of the letter was explored, Ulpian stated that the *actio furti* lay for the person who had an interest in the missive not being stolen. If, among other things, the *nuntius* was responsible for *custodia*; or again, if he had undertaken to furnish *custodia* or accepted a reward for carrying the letter, then the action was his. In this sense, Ulpian concluded that the messenger's case was similar to those of the *caupo* or *magister navis*, who were both granted the *actio furti* (provided they were solvent) because the risk for the goods pertained to them.

Although the text has been considered interpolated by several scholars, I agree with Buckland that the core is essentially classical.³²⁰ For our purposes,

³¹⁹ Cf. Ménager, 'Naulum et receptum', 390.

³²⁰ William W. Buckland, 'Digest XLVII. 2 (De Furtis) and the Methods of the Compilers', *TvR* 10 (1930): 135–36; also, MacCormack, 'Custodia and Culpa', 165, note 52. For a bibliography of scholars who have treated the text, Hans-Peter Benöhr, 'Der Brief. Korrespondenz, menschlich und rechtlich gesehen. Ciceros Briefe an Atticus und die Rechte an Briefen in Rom', *ZSS* 115 (1998): 131, note 116.

the text indicates that the messenger's obligation to furnish *custodia* could arise either because he took it upon himself (*custodiam eius rei recepit*) or because he had accepted a reward in return for carrying the letter (*mercedem perferendae accipit*). Further, the relation of this clause to the next suggests that the *caupo* and the shipmaster were similar with respect to the provision of the undertaking and the receipt of *merces* for carriage respectively.³²¹ The implication is that the physical receipt of the goods by the *nauta* was enough for him to bear the risk if he had undertaken to transport them for a reward.

Finally, this reading accords with the legal position set out by Servius/ Alfenus in D.19.2.31.³²² In that text, Saufeius became the owner of grain that had been shot loose into the hold and was therefore liable to the consignors (who stood *in creditum*) for the return of an equivalent quantity come what may. Under the edict *de recepto*, a *nauta* who received *res locatae* of the first type – sc., property handed over in virtue of a contract of letting and hiring where the same item (*eadem res*) was expected to be returned – was also liable to restore it in all circumstances. The edict and the Republican *responsum* were therefore complementary (at least before the time of Labeo), in the sense that together they accounted for both types of *res locatae* and generated an equivalent risk regime for each.

In light of the above, it is my submission that the edict initially applied in two circumstances: first, if property had been committed to the care of a *nauta* in virtue of an agreement in which the payment of the *merces* was reciprocal to the restoration of the goods; and second, if this was not the case, if an express undertaking to furnish *custodia* had been given. At the turn of the first and second centuries CE, Vivianus extended the edict's automatic application to property accessory to a contract in which *vectura* had been paid. By the third quarter of the second century CE, the requirement for there to be a connection between the *merces* and the property covered by the edict was dropped

³²¹ According to Robaye, the risk assumed by the *caupo* and *magister navis* was a result of the edict *de recepto*, in contrast to the *nuntius'* obligation to furnish *custodia*, which arose *ex conducto*: *L'obligation de garde*, 204.

³²² D.19.2.31 (Alf. 5 *dig. a Paulo epit.*): on which, *supra*, 190 *et seq.*

altogether by analogy with the obligation to furnish *custodia* in contract. This latter development can be detected in a series of texts concerned, again, with the availability of the *actio furti*:

D.19.2.40 (Gai. 5 *ad ed. provinc.*):

Qui mercedem accipit pro custodia alicuius rei, is huius periculum custodiae praestat.

D.4.9.5 pr.-1 (Gai. 5 *ad ed provinc.*):

[pr.] Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiat, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur. nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur. [1] Quaecumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere³²³ videatur.

Despite the inclusion of D.19.2.40 in the *Digest* title on letting and hiring, both fragments were excerpted from Gaius' treatment of the edict *de recepto* in the fifth book of his commentary on the Provincial Edict.³²⁴ According to Lenel, the texts originally formed a continuous passage, though some scholars have argued that they were separated by an intermediate section.³²⁵ Certainly some of the context is missing: at the beginning of D.4.9.5.1, Gaius states that what he has said about the availability of the *actio furti* applies equally to *damnum iniuria datum*; but whatever was said about *furtum* has not survived. Despite this excision, I agree with Feenstra that the sense and order of the ideas contained in both fragments has been transmitted intact.³²⁶ Again, the section '*nam et fullo... ex locato tenentur*' has been considered a gloss.³²⁷ In my view, however, the sense of the passage counts in favour of its authenticity.

³²³ The Florentine has '*recedere*' for '*recipere*'.

³²⁴ For a bibliography of scholars who have defended the authenticity of D.19.2.40, Robert Feenstra, 'Deux textes de Gaius sur la responsabilité contractuelle: D. 19, 2, 40 et D. 4, 9, 5', in *Droits de l'Antiquité et sociologie juridique: mélanges Henri Lévy-Bruhl* (Paris: Sirey, 1959), 106, note 4.

³²⁵ Lenel, *Palingenesia*, 1889, 1:198. Arguing for an intermediate section, Carl F. Lehmann, 'Die Haftung des conductor operis für custodia', *ZSS 9* (1888): 114; also, van Oven, 'Actio de recepto et actio locati', 155.

³²⁶ Feenstra, 'Deux textes de Gaius', 108; also, Cardilli, *L'obbligazione di 'praestare'*, 490.

³²⁷ Cf. Feenstra, 'Deux textes de Gaius', 118.

In the first fragment, Gaius states that a person who accepts payment for safekeeping (*pro custodia*) shoulders the attendant risk (*periculum custodiae*). In D.4.9.5 pr., – probably after a short comment concerning the duty of such a person to prevent theft³²⁸ – he continued that just as fullers and tailors were liable *ex locato* for *custodia* even though they received *merces* for their skill (*pro arte*), and not to keep the goods safe (*non pro custodia*); so too *nautae* etc. were under the same obligation, even though they did not receive payment for safekeeping, but rather to transport passengers, provide accommodation, and stable animals. Finally, Gaius put forward his view that a person who undertook to keep property safe (*salvum fore recipit*) was obliged not only to prevent theft but also damage caused by third parties.

In my view, the key to interpreting this passage is to recall that D.19.2.40, though included by the compilers in the title on *locatio conductio*, was originally composed in the context of the edict *de recepto*. Gaius therefore reasoned as follows: i) just as in the context of the edict a person who accepted *merces* in return for furnishing *custodia* shouldered the risk; ii) so too *nautae* etc. who did not receive payment *pro custodia*, but for the provision of transport, accommodation, and stabling, were liable by analogy with the responsibility of fullers and tailors *ex locato*; iii) they were therefore obliged to prevent both theft and damage to the property in their charge. If this interpretation is accepted, the passage indicates that by the time of Gaius the requirement for there to be a direct connection between the *merces* and the safety of the goods for the edict to apply without the need for an express undertaking had been further relaxed. More specifically, Gaius used the analogy of the obligation *custodiam praestare* imposed on fullers and tailors *ex locato* to justify the automatic application of the edict to *nautae* etc. who acted as *conductores*.

4.3.1.3.2 The Relationship between the Edict *de recepto* and the Obligation to Furnish *custodia* in Contract.

This is a complicated and vexing problem, which requires to draw together the history of the development of the edict *de recepto* with that of the obligation to

³²⁸ Cf. Cardilli, *L'obbligazione di 'praestare'*, 490.

furnish *custodia* in the *bonae fidei iudicia*. Besides bringing these two strands together, it is also necessary to differentiate between the range of legal relationships to which each was applicable, and the extent of the defender's liability under the edict and in contract respectively.

According to Cannata, the expression '*custodiam praestare*' referred to the existence of a contractual obligation;³²⁹ so that, as MacCormack has argued, it carried the meaning of 'to show, furnish *custodia*', in the sense that persons in particular legal relationships were required to keep some object safe.³³⁰ The earliest use of the expression was by Labeo, who used it in relation to contracts of letting and hiring in which the reward was reciprocal to the activity of keeping some property safe (e.g., warehousing arrangements).³³¹ As Serrano-Vicente has shown, the custodial obligation that arose in these arrangements was extended to other legal relationships through the medium of good faith, in line with the idea that a person who was obliged to hand over or return an object (*tradere/ reddere*) ought to prevent it from being lost or damaged while it was in his care (e.g., fullers and tailors).³³² Although the content of the obligation was fluid and depended upon the context of the transaction at issue, it generally involved a duty to prevent harm to the object by third parties, whether by theft or *damnum iniuria*.³³³ As a rule, the most onerous duties were preserved for those who kept the property for the purpose of making a profit, and in particular small shopkeepers and tradesmen.³³⁴

In light of this course of development and the changes in the interpretation of the edict described above, it is my submission that the edict *de recepto* and the obligation to furnish *custodia* were both expressions of the same basic principle: namely, that if a person had been paid to restore property at a later time, that person ought to answer for any harm done to the goods in the

³²⁹ Carlo A. Cannata, *Ricerche sulla responsabilità contrattuale nel diritto romano* (Milan: Giuffrè, 1966), 128.

³³⁰ MacCormack, 'Custodia and Culpa', 155 and 158.

³³¹ Serrano-Vicente, *Custodiam praestare*, 120.

³³² Serrano-Vicente, 371–72.

³³³ MacCormack, 'Custodia and Culpa', 216 and 179; also, in this connection, Levin Goldschmidt, 'Das receptum nautarum, cauponum, stabulariorum', *Zeitschrift für das gesamte Handelsrecht* 3 (1860): 58 and 71-2.

³³⁴ Van den Bergh, 'Custodiam Praestare', 67.

intervening period, even if that harm was inflicted by a third party. The qualitative difference between the *nauta's* liability under the edict and in contract were, on this view, simply a consequence of the different procedural means by which this principle was given effect. Thus, whereas the scope of the edict depended upon the direct interpretation of its terms, the content of the obligation to furnish *custodia* was dependent upon the interpretation of what the defender ought to give or do for the pursuer *ex fide bona*. Over time, the concept of good faith proved more susceptible to interpretation than the static terms of the edict: even if, as Cannata has suggested, the latter originally served as a model for the development of the former.³³⁵

In general, the interpretation of the edict lagged behind, but was pegged to, changes in the interpretation of the obligation to furnish *custodia* in the *bonae fidei iudicia*. With respect to the extent of the defender's liability, the obligation to furnish *custodia* – first discussed by Labeo – was already conditioned by the proposition established by Servius and his school, that a party to a contract of letting and hiring who shouldered the risk ought not to bear it if the property was lost due to an external and irresistible force.³³⁶ Since this equitable inroad was given effect through the prism of good faith, and therefore had no bearing on the *actio in factum de recepto*, it fell to Labeo to propose a mechanism by which liability under the edict could be made consistent with the obligation *custodiam praestare*.³³⁷ This was achieved by the recommendation of an *exceptio*, which lay if the goods had been lost due to shipwreck or piracy.

Turning to the range of relationships to which each of the edict and the obligation to furnish *custodia* were applicable, again the latter set the standard. Although the obligation *custodiam praestare* initially arose as a component of

³³⁵ Cannata, *Ricerche*, 109; also, Alfred Pernice, *Marcus Antistius Labeo. Das römische Privatrecht im ersten Jahrhunderte der Kaiserzeit*, vol. 2:1 (Halle: Max Niemeyer, 1878), 347–49.

³³⁶ The relevant text is D.19.2.15.2 (Ulp. 32 *ad ed.*): on which, Cardilli, *L'obbligazione di 'praestare'*, 233–57; Fiori, *La definizione*, 85–91.

³³⁷ Cf. the outlandish suggestion made by González Romanillos, that the reason why the praetor did not initially exclude shipwreck and piracy was that at the time of the edict's introduction seafaring was restricted to rivers and cabotage: 'Evolución de la responsabilidad del nauta en el Derecho romano', *Foro. Revista de Ciencias Jurídicas y Sociales, Nueva Época* 3 (2006): 487.

synallagmatic agreements in which the safekeeping of the property was reciprocal to the reward (e.g., warehousing), it was quickly extended to all those relationships in which restoration of the property was expected, even if, for example, the *merces* had been paid *non pro custodia, sed pro arte* (e.g., as was the case for fullers and tailors).³³⁸ The extension of the edict to the whole spectrum of relationships entered into by *nautae* etc. was a much slower affair: since the praetor's declaration was that he would only grant an action if the property had been received *salvum fore*, its application was confined to those cases in which the synallagma involved the restoration of the property or an express undertaking to furnish *custodia* had been given. Extending the range of relationships automatically covered by the edict therefore required various tricks of interpretation: Vivianus, for example, relied upon the concept of *accessio* to argue that property brought on board for which no *vectura* had been paid should be regarded as the accessory of those goods for which the reward was due; and Gaius invoked the analogy of the fuller and tailor's obligation to furnish *custodia, ex locato*, as a template according to which *nautae* etc. who provided transport, accommodation, and stabling, could be held automatically responsible *ex recepto*. By the third quarter of the second century CE the edict *de recepto* and the obligation *custodiam praestare* were, for all intents and purposes, coextensive.³³⁹

4.3.2 The *actiones furti* and *damni in factum adversus nautas* etc.

These were two *actiones in factum* that lay against an *exercitor* for theft or damage to property that had been committed on board the vessel by members of the ship's crew.³⁴⁰ According to Gaius, the justification for both actions was that, even though the *exercitor* had not committed a *maleficium* himself, he was held liable as if he had committed a delict (*quasi ex maleficio*) because he carried the blame for using the services of *mali homines*.³⁴¹ Although each

³³⁸ For a list of tradespeople who were obliged to furnish *custodia*, Van den Bergh, 'Custodiam Praestare', 67.

³³⁹ Cannata, *Ricerche*, 110.

³⁴⁰ The name of the *actio damni in factum* is a modern invention, created by Huvelin for the sake of convenience: *Droit commercial romain*, 127.

³⁴¹ D.44.7.5.6 (Gai. 3 *aur.*). Ulpian gave the same justification for the *actio damni* etc. in D.4.9.7.4 (Ulp. 18 *ad ed.*). Whether the notion of *culpa in eligendo* was of classical or

action was distinct, their obvious similarities generated a significant degree of overlap, so that in many respects the conclusions drawn by the jurists with respect to one applied equally to the other. For the purpose of this exegesis the actions will therefore be treated together, though the context in which each juristic observation was made will be indicated where appropriate.

4.3.2.1 Edict and *formulae*.

The *actio furti in factum* had an edictal foundation, the terms of which were reported by Ulpian in D.47.5.1 pr. (Ulp. 38 *ad ed.*):

In eos, qui naves cauponas stabula exercebunt, si quid a quoquo eorum quosve ibi habebunt furtum factum esse dicetur, iudicium datur, sive furtum ope consilio exercitoris factum sit, sive eorum cuius, qui in ea navi navigandi causa esset.

An action is given against those who operate ships, inns, and stables, if a theft is alleged to have been committed by them or by anyone they have on their ship or premises; whether the theft was committed with the aid and counsel of the *exercitor* or those who were on board the vessel for the purpose of sailing it.

As Lenel pointed out, although the first half of the fragment (*In eos... iudicium datur*) appears to quote the words of the praetor's declaration verbatim, the second part (*sive furtum...fin.*) is incongruent in several respects.³⁴² This has led several scholars, including Lenel, to regard the second section as interpolated: though with the caveat that the words themselves were derived from a classical source.³⁴³ Thus, according to Lenel, the section was drawn from the action's *formula* and was included for the purpose of clarifying that the edict would also apply if a theft had been committed with the aid and encouragement of the *exercitor* or his crew.³⁴⁴ For de Robertis, on the other

Byzantine origin will not detain us here, for in either case the *exercitor's* liability according to the *formulae* of both actions remained strict: Geoffrey MacCormack, 'Culpa in Eligendo', *RIDA* 18 (1971): 549–50.

³⁴² The two principal objections are that: i) the sequence '*factum esse... factum sit*' is grammatically suspect; and ii) the first section names all three categories of tradespeople affected by the edict, whereas the latter section is confined to *exercitores*: Lenel, *EP*³, 333–34; also, de Robertis, *Receptum nautarum*, 134–36.

³⁴³ Lenel, *EP*³, 333–34; Huvelin, *Droit commercial romain*, 120–22; Siro Solazzi, 'Appunti di diritto romano marittimo: le azioni contro il nauta', in *Scritti di diritto romano*, vol. 3 (Naples: Jovene, 1960), 506–7; de Robertis, *Receptum nautarum*, 134–36; see, also, Fercia, *Criteri di responsabilità*, 122–23; *Responsabilità per fatto*, 338–44.

³⁴⁴ Lenel, *Palingenesia*, 1889, 2:682, note 1; also, *EP*³, 334.

hand, the first and second sections originally comprised separate edicts that were amalgamated into one by the compilers.³⁴⁵

The *formula* of the action, which was based upon the *formula* of the *actio furti nec manifesti*, has been reconstructed by several authors, though Huvelin's adheres most closely to the evidence:³⁴⁶

Si paret A° A° ope consilio Nⁱ Nⁱ eorumve cuius qui in ea navi navigandi causa erant, furtum factum esse paterae aureae, quanti ea res fuit, cum furtum factum est, tantam pecuniam duplam iudex N^m N^m A° A° c. s. n. p. a.

Turning to the *actio damni* etc., there are several indications that the action did not possess an edictal foundation. Thus, unlike the *actio furti in factum*, which commanded its own *Digest* title (47.5) and was treated by Ulpian in book 38 of his commentary alongside the other edicts *de furtis*, the texts concerning the *actio damni in factum* were inserted by the compilers in the title on the *receptum nautarum* (D.4.9) and were derived from commentaries dedicated to the *lex Aquilia* more broadly.³⁴⁷ The action was therefore probably decretal, with a *formula* modelled on that of the *actio legis Aquiliae*. The following reconstruction has been suggested by Lenel:³⁴⁸

Si paret in nave, quam N^s N^s tum exercebat, N^m N^m eumve, quem N^s N^s eius navis navigandae causa ibi tum habuit, A° A° damnum iniuria dedisse, q. d. r. a., quanti ea res in eo anno plurimi fuit, tantam pecuniam duplam iudex N^m N^m A° A° c. s. n. p. a.

As Huvelin noted, the *formula* could be adapted depending upon whether the pursuer wished to rely upon the first or third chapter of the *lex*.³⁴⁹

³⁴⁵ de Robertis, *Receptum nautarum*, 136.

³⁴⁶ Huvelin, *Droit commercial romain*, 127. Lenel's reconstruction is substantially the same, though differs on some points of style: *EP*³, 334 (*intentio*) and 328 (*condemnatio*). Cf. Rudorff, *Edicti perpetui*, 137, no. 139.

³⁴⁷ Namely, D.4.9.6 (Paul. 22 *ad ed.*) and D.4.9.7 (Ulp. 18 *ad ed.*): on which, Lenel, *Palingenesia*, 1889, 1:1012, no. 374; and *Palingenesia*, 1889, 2:682, nos. 1068-69. For these arguments, Huvelin, *Droit commercial romain*, 127–28. Cf. Rudorff, who proposed that the action was based upon the following edict: '*in eos qui naves cauponas stabula exercebunt si quid a quoque eorum quosve ibi habebunt damnum iniuria datum factumve esse dicetur in duplum iudicium dabo*': *Edicti perpetui*, 84.

³⁴⁸ Lenel, *EP*³, 205–6; cf. Rudorff, *Edicti perpetui*, 84; Huvelin, *Droit commercial romain*, 129–30; and Mantovani, *Le formule*, 65, no. 81. For a detailed discussion, Fercia, *Responsabilità per fatto*, 341, note 30.

³⁴⁹ Huvelin, *Droit commercial romain*, 129–30.

4.3.2.2 Interpretation of the *actiones furti* and *damni in factum*.

Both *formulae* were framed so as to make the *exercitor* liable for theft or damage to property committed by those who were on board the vessel *navigandae causa*.³⁵⁰ In relation to the *actio furti in factum*, Ulpian stated that the expression referred to those involved in the ship's navigation (i.e., *nautae*).³⁵¹ Correspondingly, although the edict provided an action against the *exercitor* for thefts committed by members of his crew, it did not make him liable for those committed by passengers.³⁵² The severan jurist provided further detail in relation to the scope of the *actio damni in factum*. Thus, it did not matter for the purpose of bringing the action whether the *nauta* was free or slave.³⁵³ Moreover, if the damage had been caused by the slave of a *nauta*, though the slave himself was not a seaman, Ulpian recommended that an *actio utilis* be given.³⁵⁴ These actions, however, would only lie against the *exercitor* if the damage had been inflicted on board.³⁵⁵ Conversely, if the *exercitor* had issued a disclaimer with the passengers' assent, that each should look after his own belongings and that the *exercitor* was to be free from all liability for damage or loss, then no action would lie.³⁵⁶ Again, the *exercitor* was not to be held to account for damage inflicted by crewmembers to one another's property. In the case of *nautae* who were also *mercatores*, however, they would be allowed to sue; as would so-called '*nauteπibatai*' (persons working their passage), for whose acts the *exercitor* was also held liable, since they counted as both *nautae* and passengers.³⁵⁷

The remaining points of interpretation were predominantly technical in character. In the context of the *actio furti in factum*, Ulpian discussed the

³⁵⁰ See, e.g., D.14.1.1.2 (Ulp. 28 *ad ed.*): '*...Sed si cum quolibet nautarum sit contractum, non datur actio in exercitorem, quamquam ex delicto cuiusvis eorum, qui navis navigandae causa in nave sint, detur actio in exercitorem*'.

³⁵¹ D.47.5.1.1 (Ulp. 38 *ad ed.*). Fercia suspects that the phrase '*hoc est nautae*' is a gloss: *Criteri di responsabilita*, 127.

³⁵² D.47.5.1.6 (Ulp. 38 *ad ed.*); also, in connection with *caupones*, D.4.9.6.3 (Paul. 22 *ad ed.*).

³⁵³ D.4.9.7 pr. (Ulp. 18 *ad ed.*): on which, Fercia, *Criteri di responsabilita*, 105–6.

³⁵⁴ D.4.9.7.3 (Ulp. 18 *ad ed.*).

³⁵⁵ D.4.9.7 pr. (Ulp. 18 *ad ed.*).

³⁵⁶ D.4.9.7 pr. (Ulp. 18 *ad ed.*).

³⁵⁷ D.4.9.7.2 (Ulp. 18 *ad ed.*). For ναυτεπιβάται, Rougé, *Recherches*, 217–18.

position of the parties with respect to the civil law action on theft.³⁵⁸ Thus, if property had been lost on a ship, the pursuer could bring either the *actio in factum* against the *exercitor* or the *actio furti* against the actual thief.³⁵⁹ As Paul noted in relation to both actions, however, a person who chose the latter option had to be able to demonstrate that a particular person had committed the act.³⁶⁰ Returning to theft, it was Ulpian's view that if the *exercitor* had received the goods *salvum fore*, the *actio furti* lay for him and not the owner, because by his receipt of the goods he came under the risk of *custodia*.³⁶¹ Whichever course the pursuer chose, the civil and praetorian remedies were alternative.³⁶² If he brought the *actio in factum* successfully against the *exercitor*, then he ought to make over his rights of action to him; conversely, if either the *exercitor* or the alleged perpetrator were absolved on the first attempt, the person who remained nominally liable would be granted a defence, ostensibly to prevent the same matter being investigated repeatedly. Whether Ulpian considered the *actiones in factum* to be noxal has been contested. In two fragments concerning the *actiones furti* and *damni in factum* respectively, the severan jurist reportedly took the view that an *exercitor* who was sued for the act of his own slave could surrender him to the pursuer to avoid condemnation.³⁶³ Both fragments, however, have been suspected of interpolation, most recently by Fercia, whose detailed study of the problem has yielded the conclusion that the *noxae deditio* in these actions was a novelty introduced by the compilers.³⁶⁴ If this is correct, then the classical position was that the *exercitor* could not escape condemnation on the basis that the perpetrator was a slave owned by him.

³⁵⁸ In the literature, the issue is frequently referred under the heading of 'active legitimation'; i.e., the capacity of a person to assume the position of the pursuer for the purpose of bringing a suit.

³⁵⁹ D.47.5.1.3 (Ulp. 38 *ad ed.*).

³⁶⁰ D.4.9.6.4 (Paul. 22 *ad ed.*).

³⁶¹ D.47.5.1.4 (Ulp. 38 *ad ed.*). See, also, D.47.2.14.17 (Ulp. 29 *ad Sab.*): on which *supra*, 216 *et seq.*

³⁶² D.4.9.6.4 (Paul. 22 *ad ed.*).

³⁶³ D.47.5.1.5 (Ulp. 38 *ad ed.*) and D.4.9.7.4 (Ulp. 18 *ad ed.*).

³⁶⁴ Fercia, *Criterî di responsabilità*, 121; also, *Responsabilità per fatto*, 330; cf. Serrao, *Impresa*, 152 and 170.

Both actions lay for double,³⁶⁵ and it did not matter whether the contractual relationship between the pursuer and the *exercitor* was lucrative or gratuitous.³⁶⁶ Since the actions were *in factum*, the *exercitor* was liable even if the perpetrator was the slave of the pursuer.³⁶⁷ If there were multiple *exercitores*, each was liable in proportion to his share in the enterprise;³⁶⁸ and if the *exercitor* was acting with the *voluntas* of his father or master, he too would be liable in line with the second part of the exercitorian edict.³⁶⁹ If the perpetrator died, the action would continue to lie.³⁷⁰ On the other hand, if the *exercitor* died, the action would not lie against the heirs.³⁷¹ Finally, the action was perpetual, and therefore without limitation of time.

4.3.3 The Relationship between the Actions bearing on the Liability of the *nauta* and their Chronology.

The lack of any citations of Republican jurists in connection with all three of these actions makes any attempt to suggest a date for their introduction necessarily tentative.³⁷² In terms of pure chronology, the edict *de recepto* was known to Labeo, so that – excepting Thomas’ suggestion that the Augustan jurist was responsible for its introduction – it was probably first issued during the Republic.³⁷³ Turning to the two delictual actions, The *actio furti in factum* was likely the first to be introduced, since it appears to have belonged to the class of actions (like the *actio Serviana*) that were initially granted by the praetor without recourse to an edict, but which, once stabilised, came to be included in the annual Edict.³⁷⁴ A relatively early date is therefore possible: if it

³⁶⁵ D.47.5.1.2 (Ulp. 38 *ad ed.*); D.4.9.7.1 (Ulp. 18 *ad ed.*).

³⁶⁶ D.4.9.6 pr. (Paul. 22 *ad ed.*).

³⁶⁷ D.4.9.6.1 (Paul. 22 *ad ed.*). This position is consistent with that taken by the same jurist in relation to the *actio exercitoria*: D.14.1.5 pr. (Paul. 29 *ad ed.*).

³⁶⁸ D.4.9.7.5 (Ulp. 18 *ad ed.*).

³⁶⁹ D.4.9.7.6 (Ulp. 18 *ad ed.*).

³⁷⁰ D.4.9.7.4 (Ulp. 18 *ad ed.*).

³⁷¹ D.4.9.7.6 (Ulp. 18 *ad ed.*).

³⁷² According to Thomas, the absence of any mention of the *actio in factum de recepto* in D.19.2.31 indicates that the edict was not in existence by the time of Alfenus: ‘Juridical Aspects’, 146; but cf. Solazzi, ‘le azioni contro il nauta’, 515; and Watson, *Obligations*, 122.

³⁷³ Thomas, ‘Carriage by Sea’, 504–5.

³⁷⁴ Alan Watson, *Law Making in the Later Roman Republic* (Oxford: Oxford University Press, 1974), 54; also, Manlio Sargenti, ‘Osservazioni sulla responsabilità dell’*exercitor navis* in diritto romano’, in *Studi in memoria di Emilio Albertario*, ed. Vincenzo Arangio-Ruiz and

was coeval with several other *actiones* sharing the same qualities, a date in the second half of the second century BCE is plausible.³⁷⁵ On the other hand, if its *formula* was in fact edictal in origin, a date in the first half of the first century BCE would be more likely.³⁷⁶ Turning to the *actio damni in factum*, it has occasionally been doubted whether it was a praetorian creation at all.³⁷⁷ The most convincing arguments, however, fall in favour of its classicity.³⁷⁸ Since the action initially appears to have been decretal it was probably in existence no earlier than the time of Servius.³⁷⁹

The question that arises is whether it is possible to narrow down the period during which the *actio in factum de recepto* was introduced by looking to its relationship with other remedies. The problem has given rise to a number of different theories concerning the reason for the introduction of the edict, some more plausible than others.³⁸⁰ In my view, the best approach is to explore the relationship between the *actio in factum* and the other relevant actions in turn. Beginning with the *bonae fidei iudicium* of letting and hiring, it has already been said that the *actiones locati* and *conducti* were first granted at some point between the middle of the third and second centuries BCE. Recalling D.14.2.10 pr., the text stands as good evidence for the proposition that, up to and including the time of Labeo, the shipper's payment of the *merces* in a contract of carriage was conceived as reciprocal to the carrier's obligation to

Giuseppe Lavaggi (Milan: Giuffrè, 1953), 555–56; Salazar Revuelta, *La responsabilidad objetiva*, 172.

³⁷⁵ Aubert, *Business Managers*, 76.

³⁷⁶ Huvelin preferred a date before 77 BCE; i.e., the year in which the praetor M. Terentius Lucullus published the edict concerning *rapina*: *Droit commercial romain*, 134.

³⁷⁷ M. Pampaloni, 'Sopra alcune azioni attinenti al delitto di furto (actiones furti utiles)', *Studi Senesi* 17 (1900): 149–75 and 253–69; Sargenti, 'Osservazioni', 558–67.

³⁷⁸ Arguing for its classicity, Filippo Messina Vitrano, *Note intorno alle azioni 'in factum' di danno e furto contro il 'nauta', il 'caupo' e lo 'stabularius'* (Palermo: Alberto Reber, 1909); Teresa Giménez-Candela, *Los llamados cuasidelitos* (Madrid: Trivium, 1990), 139; Serrao, *Impresa*, 157; Fercia, *Criteri di responsabilità*, 100–101, note 2; Salazar Revuelta, *La responsabilidad objetiva*, 172–74.

³⁷⁹ Watson, *Law Making*, 54–55 and 92; also, Huvelin, *Droit commercial romain*, 133–35.

³⁸⁰ These have recently been surveyed by Kordasiewicz, and so will not be reiterated here: 'Receptum Nautarum and Custodiam Praestare Revisited', *RIDA* 58 (2011): 194–97; also, Maria F. Cursi, 'Actio de recepto e actio furti (damni) in factum adversus nautas, caupones, stabularios: logiche differenziali di un sistema composito', in *Studi per Giovanni Nicosia*, ed. Eleonora Nicosia, vol. 3 (Milan: Giuffrè, 2007), 118–27.

deliver the goods to their destination.³⁸¹ However, although the shipper was not obliged to pay *vectura* for any goods that the carrier failed to deliver – whatever the cause – the good faith character of the actions meant that the latter could only be pursued for *id quod interest* if he was at fault for the loss. The carrier was therefore not contractually obliged to prevent, for example, theft and damage by third parties; that is, to furnish *custodia*.³⁸²

This being accepted, the edict *de recepto* and the *actiones locati* and *conducti* complemented one another in several important respects. Earlier, I put forward the view that the edict automatically applied if a carrier received goods having accepted *vectura* for their transport. Since the *actio in factum* did not contain a clause *ex fide bona*, the *nauta* could be sued for *quanti ea res fuit* if he failed to restore the merchandise with or without fault. In effect, because the edict applied irrespective of *culpa*, it made the carrier liable for both acts of God and those of third parties where the *bonae fidei iudicium* did not. Moreover, the combined application of the edict and *locatio conductio* with respect to goods that were non-fungible and/ or stored separately was consistent with the treatment of fungible goods shot loose into the hold, for which the *nauta* shouldered the risk as their owner.

In truth, none of this helps very much toward disentangling the chronological relationship between the two remedies. If, however, Ulpian's statement that the edict was useful partly because it deterred *nautae* from conspiring with thieves is taken at face value, then it is possible to interpret the edict as a response to the limitations of the *bonae fidei iudicium*. The requirement for the pursuer to show fault or *dolus* would have been a difficult threshold to meet if goods that had been left with a *nauta* subsequently disappeared. On balance, my view is that the actions on letting and hiring were likely earlier than the edict *de recepto*.³⁸³

³⁸¹ Cf. Thomas, 'Carriage by Sea', 500–501. For the text, *supra*, 161 *et seq.*

³⁸² Robaye, *L'obligation de garde*, 204 and 86-8; also, Cannata, *Ricerche*, 107–10; Fercia, *Criteri di responsabilità*, 189–94; Cursi, 'Actio de recepto', 135–38; Cerami and Petrucci, *Diritto commerciale romano*, 293–94; cf. Kordasiewicz, 'Receptum Nautarum', 208–10.

³⁸³ Schulz, *Classical Roman Law*, 565; de Robertis, *Receptum nautarum*, 39–41; Brecht, *Zur Haftung der Schiffer*, 99–100; Thomas, 'Carriage by Sea'; Meyer-Termeer, *Die Haftung der*

The next action, which will only be considered briefly, is the *actio exercitoria*. The edict was probably issued during the second half of the second century BCE. According to Solazzi, the action was likely introduced before the edict *de recepto*, because the latter contained the word ‘*exercere*’ in its *formula*.³⁸⁴ In contrast, Földi has taken the opposite view, on the basis that the praetor’s use of the word ‘*nauta*’ indicates that the edict *de recepto* was an earlier creation.³⁸⁵ Although, in my view, Földi’s argument is more persuasive, neither is decisive. Finally, despite the obvious overlap between the *actio in factum de recepto* and the two (quasi-)delictual remedies, each had its own characteristics.³⁸⁶ The delictual *actiones in factum* were penal actions that lay for double. As Paul indicated, their utility was mainly probative: whereas the civil actions on which they were modelled required the precise identification of the culprit, the *actiones in factum* could be brought against the *exercitor* and only required that the act had been committed by a member of his or her crew.³⁸⁷ In this sense their scope was somewhat limited, because the *exercitor* bore no responsibility for theft or damage caused by anyone who was not a crewmember; and in any case, he could waive his liability with his customers’ agreement. On the other hand, the actions made the *exercitor* potentially liable for all the goods on board, irrespective of his contractual relationship with the owners.

In contrast, the *actio in factum de recepto* lay for simple damages (i.e., for *quanti ea res erit*, and no more). In one sense, the action was wider in scope than its delictual counterparts, because the *nauta* was held responsible for a failure to restore the property in his care, no matter the cause of the loss

Schiffer, 185; and, Zimmermann, *The Law of Obligations*, 518; cf. van Oven, ‘Actio de recepto et actio locati’; Földi, ‘Anmerkungen’, 276–80.

³⁸⁴ Solazzi, ‘L’età dell’*actio exercitoria*’, 1941, 212; also, Huvelin, *Droit commercial romain*, 157–58.

³⁸⁵ Földi, ‘Anmerkungen’, 279–80; also, de Robertis, *Receptum nautarum*, 39, note 2 and 40, note 3.

³⁸⁶ For comparisons between the actions, Cerami and Petrucci, *Diritto commerciale romano*, 292–93; also, Hartmut Wicke, *Respondeat Superior: Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht* (Berlin: Duncker & Humblot, 2000), 91.

³⁸⁷ D.4.9.6.4 (Paul. 22 *ad ed.*). For this point, Huvelin, *Droit commercial romain*, 120 and 130–31.

(Labeo's *exceptio* notwithstanding). On the other hand, the edict only applied to those goods for which the *nauta* shouldered the risk of *custodia*, whether that was because he was being paid for this purpose or he had expressly undertaken to keep the property safe.

The main difference between the *actiones in factum* can therefore be summarised as follows: whereas the delictual actions made the *exercitor* potentially liable for all the goods on board, but only for the specific acts of members of his crew; the edict *de recepto* only applied to property committed to his care, but for all acts and whomsoever was responsible. For so long as the edict did not automatically apply to all property brought on board in virtue of any contract concluded with the *nauta* – which appears to have been the case until at least the late-classical period – the delictual *actiones in factum* will have been important remedies in their own right. A person whose goods had not been committed to the *nauta*'s care, but whose property was stolen or damaged by a member of his crew, could rely upon the actions despite not being able to prove the precise identity of the culprit. Moreover, even if the *nauta* had assumed the risk of *custodia*, the delictual actions lay for double the value of the claim.³⁸⁸

In light of the foregoing, my view is that the liability of the *nauta* for property brought onto his vessel developed in the following way. The earliest innovation was the *bonae fidei iudicium* of letting and hiring. In the first instance, the content of the obligation binding the parties depended upon what they had agreed. If, however, a *nauta* had undertaken the task of transporting goods for a reward, then he could be sued using the *actio locati* for what he ought to give or do for the defender in good faith. In these circumstances, since the *vectura* was viewed as reciprocal to delivery of the merchandise, the carrier was only owed the *merces* for those goods that he delivered. On the other hand, if any goods were lost or damaged in transit, he was only liable for the pursuer's interest in the property if the harm could be attributed to his fault.

³⁸⁸ For Wicke, the principal difference was that the delictual actions lay for double, the *actio in factum de recepto* only for simple damages: *Respondeat Superior*, 91.

This left a gap which, as Ulpian indicated, more unscrupulous *nautae* were willing to exploit. Since they were only liable for fault, and therefore not for acts committed by third parties, it was straightforward for them to conspire with thieves who would steal the goods and share the profits. The solution was for the praetor to declare that if a *nauta* failed to restore the goods entrusted to him, he would be liable come what may. In my view, the declaration automatically covered all goods for which *vectura* had been paid. If, on the other hand, the *nauta* had furnished a ship or space on board (as *locator*), the counterparty would have to secure an express undertaking for the edict to apply.

So far, apart from property that the *nauta* expressly undertook to keep safe, his only legal responsibility was for merchandise that he had been contracted to transport. This, however, did not represent all the property brought on board (e.g., by passengers), that was vulnerable to theft or damage caused by members of the crew. If this occurred, the only remedies that were available were the *actiones furti* and *legis Aquiliae*, both of which required the precise identification of the culprit. The praetor therefore declared that, if a person suffered theft and, later, damage to property at the hands of the crew once the goods had been embarked, they could sue the *exercitor* for double the value of the claim. The underlying idea was simply that the *exercitor* ought to answer for the acts of those he was responsible for appointing. Although the principle was later designed as *culpa in eligendo*, the *exercitor's* quasi-delictual liability in this instance was close in substance to his contractual liability under the exercitorian edict.

Altogether, it is therefore my submission that these remedies were introduced in the following order: i) the *bonae fidei iudicium* of *locatio conductio* (between the middle of the third and second centuries BCE); ii) the edict *de recepto* (after *locatio conductio*, and probably during the second century BCE);³⁸⁹ iii) the *actio*

³⁸⁹ In favour of a second century date, Josef Partsch, 'Der ediktale Garantievertrag durch receptum', *ZSS* 29 (1908): 422; Robaye, *L'obligation de garde*, 72; Cerami and Petrucci, *Diritto commerciale romano*, 261–62; also, de Robertis, who canvassed the possibility that the edict was introduced as early as the third century: 'La responsabilità del "nauta"', *Labeo* 11 (1965): 386. Cf. Solazzi and Thomas, who both preferred a date toward the end of the

furti in factum adversus nautas (after the edict *de recepto*, and before about the middle of the first century BCE); iv) the *actio damni in factum adversus nautas* (probably no earlier than the middle of the first century BCE). Finally, the edict *de recepto* was used as a model for the obligation *custodiam praestare* by Labeo, after which time the interpretation of the former was pegged to changes in the interpretation of the latter. This necessarily changed the relationship between the remedies as the classical period drew on.

Republic or (in the case of Thomas) at the beginning of the Principate: Solazzi, 'le azioni contro il nauta', 515; Thomas, 'Juridical Aspects', 138. González Romanillos prefers a date in the middle of the first century BCE, if not before: 'Evolución', 486.

CHAPTER 5

CONCLUSION

Section 5.1: Parallel Developments in Roman Law and Maritime Trade during the Late Republic and Early Principate.

This thesis began with an analysis of the shipwreck evidence collated by Wilson and Strauss. Taking account of the problems that arise out of the presentation of the data as a chronological distribution, the graph nevertheless shows that long-distance trading activity in the (western) Mediterranean intensified greatly between the end of the Second Punic War and the first century CE. Further, I adduced evidence to suggest that this trend was at least partly driven by the rapid increase in the volume of trade conducted between the Italian peninsula and Gaul in the second and first centuries BCE. I therefore used this route as a case study from which to construct a model of a typical Roman long-distance trading enterprise. It is hardly surprising that, since merchants took it upon themselves to make a profit by connecting producers with consumers, they were the characters whose activities drove the process. In short, a typical long-distance trading enterprise involved the acquisition of goods by a merchant from a producer; the creation of legal relationships with financiers, warehousemen, and *exercitores*; and the sale of the merchandise to consumers at the intended destination. Of course, it goes without saying that every individual enterprise will have had its own features and characteristics: but it is submitted that most enterprises tended toward the model presented.

In the third and fourth chapters, I examined the historical development of the Roman legal institutions that governed two of the relationships that merchants typically entered into in the conduct of long-distance trading enterprises. With respect to the relationship between merchants and financiers, the main institution that found expression in the sources was the maritime loan. Turning to the relationship between merchants and *exercitores*, several institutions are of note: the *actio exercitoria*; the *bonae fidei iudicium* of letting and hiring; the *lex Rhodia de iactu*; decretal actions (such as the *actiones oneris aversi*); the

actio in factum de recepto; and the *actiones furti* and *damni in factum adversus nautas*. These represent some of the main Roman legal innovations relevant to the conduct of long-distance trade. This, however, is not a comprehensive list, and a handful of laws, edicts, and other actions could also have been discussed. For the sake of completeness, it serves to briefly deal with the chronology of these ‘sundries’ here.

The *leges Claudia* (c. 218 BCE) and *Iulia de repetundis* (59 BCE), which initially prohibited senators and their sons from possessing seagoing ships with a capacity of more than 300 amphorae and later from profiting from seagoing vessels, have already been discussed in chapter 2.¹

Besides *locatio conductio*, the other consensual *bonae fidei* contracts were all relied upon by merchants engaging in maritime trading enterprises. Chief among these was the contract of sale (*emptio venditio*), which gave rise to two actions (the *actiones empti* and *venditi*) for the purchaser and the seller respectively. A number of texts belonging to Cato’s *de agri cultura* (c. 160 BCE) indicate that the contract was consensual by this date.² Beyond this, there is little agreement as to the origins of the *bonae fidei iudicium* and the date at which it first became consensual.³ Few scholars, however, have proposed a date earlier than about the middle of the third century BCE.⁴

Another important early innovation was the introduction of the good faith *actio pro socio*, which enabled partners to enforce the duties they owed toward one another under a contract of *societas*. It is likely that the action was first granted by an unknown urban praetor in the second half of the third century BCE, but originally in connection with arrangements in which the partners had agreed to pool all their assets (*societas omnium bonorum*).⁵ The earliest attestation of

¹ *Supra*, 28.

² Cato, *Agr.* 144-50: on which, Alan Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Oxford University Press, 1965), 40–41.

³ For a review of the different theories, Herbert F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge: Cambridge University Press, 1972), 288–91.

⁴ See, e.g., Alan Watson, ‘The Origins of Consensual Sale: A Hypothesis’, *TvR* 32 (1964): 253; also, *Obligations*, 40.

⁵ Generally, Franz-Stefan Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages* (Frankfurt am Main: Peter Lang, 2004), 13–15; also, Watson, *Obligations*, 126.

the use of partnerships in the context of Roman maritime trade comes from Plutarch, who described an arrangement between Cato the Elder and fifty traders to whom he was extending credit.⁶ Again, the jurist A. Cascellius (quaestor by 73 BCE) is reported to have made a joke about the partners to a shipping enterprise.⁷ The ‘one-purpose partnership’ (*societas unius negotiationis/ rei*), of which Cato’s arrangement is an example, was therefore almost certainly in existence by the second quarter of the second century BCE. The final consensual good faith action was the *actio mandati*, which lay when one person agreed to act gratuitously on behalf of another in the performance of a task. In the context of a maritime enterprise, the contract governed the relationship between a shipmaster and the person responsible for his appointment if the former was both a free person and acting gratuitously.⁸ The action was certainly introduced before 123 BCE, because the *Rhetorica ad Herennium* records the decision of a certain Sex. Iulius Caesar on the subject, who was urban praetor in that year.⁹ The earliest plausible date for the action’s introduction, however, is a matter of controversy. Watson preferred a date between the passage of the *lex Aebutia* (which he placed around the middle of the second century) and 123, and later remarked that ‘few scholars, if any, would suggest a date before 140’.¹⁰ Others, however, have connected the *actio mandati* with the intensification of Roman commercial activity and the rise of the peregrine praetor’s jurisdiction during the late third and second centuries BCE.¹¹ If Watson’s critique of these arguments is accepted, however, it is

⁶ Plut., *Cat. mai.* 21.6.

⁷ According to Macrobius, when a merchant asked Cascellius how he ought to divide a ship with his partner (*socius*), he replied ‘*navem si dividis, nec tu nec socius habebitis*’: *Sat.* 2.6.2. Quintilian put the exchange differently, Cascellius simply replying ‘*perdes*’: *Inst.* 6.3.87.

⁸ Both Ulpian and Paul refer to this situation: D.14.1.1.18 (Ulp. 28 *ad ed.*); D.14.1.5 pr. (Paul. 29 *ad ed.*). Q. Cervidius Scaevola mentioned the possibility that the agent of the lender of a maritime loan could be contracted as a mandatory: D.45.1.122.1 (Scaev. 28 *dig.*).

⁹ *Rhet. Her.* 2.13.19: on which, Alan Watson, *The Contract of Mandate in Roman Law* (Oxford: Clarendon Press, 1961), 22; also, Salvo Randazzo, *Mandare. Radici della doverosità e percorsi consensualistici nell’evoluzione del mandato romano* (Milan: Giuffrè, 2005), 117–18.

¹⁰ Watson, *Mandate*, 22–23; and for the later remark, *Law Making in the Later Roman Republic* (Oxford: Oxford University Press, 1974), 43.

¹¹ Vincenzo Arangio-Ruiz, *Il mandato in diritto romano* (Naples: Jovene, 1965), 44–46; cf. Randazzo, *Mandare*, 136–37.

unlikely that the action was first granted any earlier than the middle part of the second century.¹²

One delictual and two contractual remedies remain. The two contractual remedies, which both principally bear upon the relationship between merchants and financiers, are the so-called *condictio triticaria* and *actio de eo quod certo loco*.¹³ The *condictio triticaria*, the name of which was probably a postclassical creation, was originally a species of *condictio certae rei* (i.e., claim for a specific thing) that enabled the recovery of a quantity of fungibles other than money.¹⁴ In the context of long-distance trade the action is likely to have been of some utility to traders who were dealing in bulk goods, such as wine, oil, and grain (that is, the three staples mentioned by Gaius, which also happen to constitute the 'Mediterranean triad').¹⁵ According to Lenel, the *formula* was included under the more general rubric '*si certum petetur*' in the praetor's *album*.¹⁶ Ulpian's report of an opinion given by Servius in connection with the time at which the valuation of the goods ought to be made indicates that the remedy was already in existence by the middle part of the first century BCE at the latest.¹⁷

The second contractual remedy was the so-called *actio de eo quod certo loco*, which addressed the problems that arose when the parties to a transaction wanted to transact in one place and expect performance in another. This was legally problematic for two reasons. First, the default rule was that a party wishing to bring a suit could only do so at the defender's domicile or in the specified place of performance (in other words, at the *locus solutionis*); an

¹² Watson, *Mandate*, 16–21.

¹³ For the *condictio triticaria*, D.13.3 (*de condictione triticaria*); and for the *actio de eo quod certo loco*, D.13.4 (*de eo quod certo loco dari oportet*): on both of which, Otto Lenel, *Das Edictum perpetuum: ein Versuch zu dessen Wiederherstellung*, 3rd ed. (Leipzig: Tauchnitz, 1927), 239–47.

¹⁴ William W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, ed. Peter G. Stein, 3rd ed. (Cambridge: Cambridge University Press, 1963), 676–77. Cf. Schol. on Bas. 24.8.7, in which Stephanus commented that the name *condictio triticaria* was derived from the old *formula*.

¹⁵ D.13.3.4 (Gai. 9 *ad ed. provinc.*): on which, Alfons Bürge, 'Der Witz im antiken Seefrachtvertrag: Beobachtungen zur Vertragspraxis im antiken Mittelmeerraum', *Index 22* (1994): 398.

¹⁶ Lenel, *EP*³, 239–40.

¹⁷ D.13.3.3 (Ulp. 27 *ad ed.*).

obvious problem if his counterpart could not be reached in those places.¹⁸ Second, if the obligation to perform was not *bonae fidei* (for example, if money had been lent on the strength of a *mutuum* or *stipulatio*), the orthodox actions for its enforcement could not take account of the *interesse* that either party had in performance at the promised place. To address these issues the praetor granted an *actio utilis* with certain special features.¹⁹ First, the action could be brought anywhere, and so was free from the ordinary constraints on the location at which an action could be raised. Second, although the action's *intentio* was for a certain sum (*certum*) and did not contain a clause *ex fide bona*, the judge could exercise his discretion (*arbitrium*) to adjust the sum in the *condemnatio* to take account of either parties' *interesse* in performance being made at the designated place.²⁰ As Ulpian explained, these features were important for traders who were frequently engaged in complex transactions with different parties across multiple locations.²¹ In this connection, a citation of Labeo, who Ulpian reports was followed by Julian on the topic of the *interesse* that a pursuer could have in performance at a specific place, indicates that the edict was in place by the time of Augustus.²²

This leaves the delictual *edictum de incendio ruina naufragio rate nave expugnata*, which gave an action for a fourfold penalty against a person who had either committed robbery or wrongfully received goods obtained during the course of various catastrophic situations, including shipwreck and the forcible boarding of vessels.²³ Two citations of Labeo by Ulpian indicate that the edict was in existence by the time of Augustus.²⁴ According to Balzarini, it

¹⁸ D.13.4.1 (Gai. 9 *ad ed. provinc.*); also, D.5.1.19.4 (Ulp. 60 *ad ed.*): on which, Francesca Pulitanò, *De eo quod certo loco* (Milan: Giuffrè, 2009), 27–41.

¹⁹ D.13.4.1 (Gai. 9 *ad ed. provinc.*): on which, Max Kaser and Karl Hackl, *Das römische Zivilprozessrecht*, 2nd ed. (Munich: C.H. Beck, 1996), ¶ 47.II.2.

²⁰ D.13.4.2 pr. (Ulp. 27 *ad ed.*).

²¹ D.13.4.2.8 (Ulp. 27 *ad ed.*).

²² Lenel suggested that Labeo had treated the action in his commentary *ad edictum praetoris: Palingenesia iuris civilis*, vol. 1 (Leipzig: Tauchnitz, 1889), 510–11; also, generally, *EP*³, 240–47; and in agreement, Auguste Dumas, 'L'action de eo quod certo loco dari oportet en droit classique', *RHD* 34 (1910): 630–31; cf. Pulitanò, *De eo*, 25.

²³ Generally, D.47.9 (*de incendio ruina naufragio rate nave expugnata*): on which, Lenel, *EP*³, 396–97.

²⁴ D.47.9.3.2, 7 (Ulp. 56 *ad ed.*). Several authors have considered the latter of the two texts to be interpolated, though none have sought to expunge the citation of Labeo entirely: Jean-François Gerken, 'Aeque perituris...': *une approche de la causalité dépassante en droit*

was introduced shortly after the passage of the *lex Iulia de vi* (17 BCE), some of the provisions of which created penalties for activities similar to those penalised by the edict.²⁵ However, as both Mataix-Ferrándiz and Tarwacka have argued, the similarity of the edict with several other praetorian remedies that were introduced to combat violence between 80 – 60 BCE makes it likely that it was first promulgated during this period.²⁶

Conclusion:

The correlation between the increase in the volume of Roman maritime traffic and the introduction of legal innovations relevant to the conduct of long-distance trade can be illustrated visually. The image at the end of this thesis (Appendix: Fig. 7) consists of the distribution of known Mediterranean wrecks (distributed into 25-year periods: Fig. 1) overlaid by the likely chronological range within which legal innovations relevant to the conduct of long-distance trade were introduced. The outer limits of the date ranges have been indicated by plotting a red dot for the earliest plausible date and a green dot for the latest plausible date for each innovation's introduction (so far as this can be reasonably established). Within this range, it is possible in some cases to suggest a narrower period within which an innovation was introduced. This has been indicated by plotting a yellow dot for the time before which an innovation was probably not in existence, and a blue dot for the time by which an innovation had probably been introduced. The arguments used to define the scope of these narrower ranges, however, are often made on the basis of certain assumptions and evidence that is seldom more than circumstantial. They therefore ought to be treated with caution.

Nevertheless, the graphic enables one simple conclusion to be drawn: sc., that the volume of maritime traffic in the (western) Mediterranean increased at the

romain classique (Liège: Collection Scientifique de la Faculté de Droit de Liège, 1997), 98–103.

²⁵ Marco Balzarini, *Ricerche in tema di danno violento e rapina nel diritto romano* (Padova: CEDAM, 1969), 213–15, note 85.

²⁶ Emilia Mataix Ferrándiz, 'El edicto de incendio ruina naufragio rate nave expugnata (D. 47, 9, 1). Responsabilidad penal por cuestión de naufragio' (Universitat de València, 2016), 37–38; also, Anna Tarwacka, *Romans and Pirates. Legal Perspective* (Warsaw: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2009), 159–62.

same time as legal institutions useful for the conduct of long-distance trade were introduced and refined at Rome. On its own, the observation that Roman law developed more or less *pari passu* with the intensification of long-distance trading activity provides nothing more than a *nihil obstat* to the view that the two developments were connected.²⁷ Since we are permitted to hold this view (the statement bearing no recognisable marks of being untrue), the question that arises concerns the nature of the relationship. Here, as Johnston put it, a general methodological problem has to be confronted: did economic activity stimulate legal change? And/ or, did legal change furnish the conditions for the intensification of economic activity?²⁸ The second question is, in effect, a restatement of the 'big question' posed at the beginning of this study (sc., the role played by legal development in Roman economic history). Though it is beyond the scope of this thesis to tackle this problem (it involves answering many other questions which have yet to be addressed), the results presented here are consistent with the argument put forward by Douglass North in his debut article, that the intensification of commercial traffic across the Atlantic during the period 1600 – 1850 CE owed more to the decline in piracy and the development of markets and international trade (i.e., institutional change) than to any other factor.²⁹ Whatever the case, any solutions to these issues must be sensitive to the shifting picture provided by the evidence. Both the quantitative changes in the intensity of shipping activity and the qualitative changes to the institutional environment are subject to significant chronological uncertainty, and so their correlation can at best be considered as a 'loose fit'.

²⁷ For a similar conclusion, Luuk de Ligt, 'Law-Making and Economic Change during the Republic and Early Empire', in *Roman Law and Economics*, ed. Giuseppe Dari-Mattiacci and Dennis P. Kehoe (Oxford: Oxford University Press, Forthcoming).

²⁸ For the framing of these questions, David Johnston, 'Law and Commercial Life of Rome', *The Cambridge Classical Journal* 43 (1998): 53–54.

²⁹ Douglass C. North, 'Sources of Productivity Change in Ocean Shipping, 1600-1850', *Journal of Political Economy* 76, no. 5 (1968): 953–70.

Section 5.2: The Development of Roman ‘Merchant Law’.

The first question – did economic activity stimulate legal change? – is perhaps easier to answer. My immediate conclusion is that the intensification of long-distance trade and the process by which it was carried out provided both the stimulus and the framework for the development of Roman legal institutions relevant to its conduct. In my view, this occurred in the following manner. At the beginning of our period, the Roman understanding of their own legal landscape was dominated by the distinction between citizens and non-citizens. The law that pertained exclusively to citizens was the *ius civile*, which consisted of a combination of *mores* and *leges*, all given effect through the archaic *legis actiones*.³⁰ The Roman conception of law, however, was not positivistic.³¹ Thus, alongside the *ius civile*, the Romans also conceived of the *ius gentium*, which (among other things) expressed their belief in the existence of a common law, beyond the law of any particular citizen body, that was observed by all peoples.³² Moreover, this common law could be ascertained from the customs and practices that were common to all people.³³ According to Fiori, the conception was Roman in origin and can be traced back through the sources to the second century BCE, if not earlier. Its connection from the time of Cicero with the Stoic (and, by extension, Aristotelian) idea of natural law was a later development that began in the last half of the second century BCE at the earliest.³⁴

From our perspective, the two outstanding developments of the last few centuries of the Republic were the willingness of the praetors to adapt civil procedure to give legal protection to transactions involving non-citizens and

³⁰ Cic. *Rosc. Am.* 49.143: on which, Roberto Fiori, ‘La nozione di *ius gentium* nelle fonti di età repubblicana’, in *Scritti per Alessandro Corbino*, ed. Isabella Piro, vol. 3 (Tricase (LE): Libellula, 2016), 121.

³¹ See, e.g., Roberto Fiori, ‘*Ius civile, ius gentium, ius honorarium: il problema della “recezione” dei iudicia bonae fidei*’, *BIDR* 101–102 (1998–1999): 165–97.

³² Fiori, ‘La nozione di *ius gentium*’, 127–29; cf. Max Kaser, *Das römische Privatrecht*, vol. 1 (Munich: C.H. Beck, 1971), 202–5; also, generally, *Ius gentium* (Cologne: Böhlau, 1993).

³³ According to Maine, the *ius gentium* was ‘generalised from a comparison of various customs’: *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1861), 59.

³⁴ Fiori, ‘La nozione di *ius gentium*’, 120. More or less the same thesis was advanced by Maine: *Ancient Law*, 58–61.

the secularisation of jurisprudence. To begin with the praetor, this was primarily achieved by their exercise of *imperium* to grant new actions.³⁵ First, there were those actions (such as the *bonae fidei iudicia*) that were understood as having their roots in the *ius gentium*, but which were also considered part of the *ius civile*. Second, the praetor also began to grant actions (such as *actiones in factum*) for which there was no source of obligation save for the fact that he, as a magistrate with *iurisdictio*, was willing to recognise the transaction as deserving of protection.³⁶ Finally, from about the time of Servius, the praetor was sufficiently emboldened to grant remedies on an *ad hoc* basis for which there was no foundation either in the Edict or *in ius* (so-called decretal actions); and likewise, to refuse actions even though they had such a foundation.³⁷ Together, as Fiori has argued, the stabilisation of the first and second type of action contributed to the development of the formulary procedure, which was capable of producing civil effects by about the middle part of the second century BCE.³⁸ Its availability to citizens and non-citizens alike, and its reliance on pleadings *per concepta verba*, makes it likely that the new procedure had surpassed the *legis actiones* in popularity – even among citizens – long before the latter’s eventual abolition toward the end of the first century BCE.

Despite the novelty of the actions themselves, they were often conceived, to paraphrase Cicero, as giving effect to certain customary principles established by common consent and lapse of time.³⁹ In this way, the praetor’s Edict, which was the vehicle for the introduction and long-term survival of these actions, was the chief medium through which legal custom (whether Roman or

³⁵ For the methods by which the praetors manipulated procedure to accomplish new legal effects, Watson, *Law Making*, 88.

³⁶ These formed the basis of the *ius honorarium*: Roberto Fiori, ‘Contracts, Commerce and Roman Society’, in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 584–85.

³⁷ Watson, *Law Making*, 88 and 92.

³⁸ Generally, Roberto Fiori, *Ea res agatur: i due modelli del processo formulare repubblicano* (Milan: Giuffrè, 2003); also, ‘Rise and Fall of the Specificity of Contracts’, in *Nova Ratione: Change of Paradigms in Roman Law*, ed. Adriaan J. B. Sirks (Wiesbaden: Harrassowitz Verlag, 2014), 34.

³⁹ Cic. *Inv. rhet.* 2.22.67.

otherwise) was recognised and expressed.⁴⁰ With respect to the Edict's development, I therefore agree with Schiller that 'customary usage, and particularly business practice, played a most significant part'.⁴¹

The second outstanding development, which shall only be outlined briefly, was the secularisation of jurisprudence. One of the chief ways in which jurists could influence legal development was by means of the interpretations they offered in response to questions put to them. In the early period, juristic *interpretatio* had been bound up closely with religious authority in the person of the pontiffs. The extent to which a response was considered persuasive depended largely upon the *auctoritas* of the respondent, which was initially largely a measure his social and political standing in the community.⁴² By the turn of the second and first centuries BCE, however, a jurist's *auctoritas* came to depend more closely on the extent to which his opinions had gained general acceptance.⁴³ This, in turn, was accompanied by a change in the Roman intellectual environment, that resulted in a greater emphasis being placed upon, for example, the rhetorical and dialectical persuasiveness of legal interpretations, rather than the traditional authority upon which they rested.⁴⁴ Together, this opened the

⁴⁰ Generally, Alfred Pernice, 'Parerga. Zum römischen Gewohnheitsrechte', ZSS 20 (1899): 127–71; also, Abel H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford: Clarendon Press, 1901), 91–93; and A. Arthur Schiller, 'Custom in Classical Roman Law', in *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, ed. Alison Dundes Renteln and Alan Dundes, vol. 1 (Madison, WI.: University of Wisconsin Press, 1995), 38–39.

⁴¹ Schiller, 'Custom', 38–39. For the historical development of the praetor's Edict: John M. Kelly, 'The Growth-Pattern of the Praetor's Edict', *Irish Jurist* 1, no. 2 (1966): 341–55; Watson, *Law Making*, 31–62; and Feliciano Serrao, *Impresa e responsabilità a Roma nell'età commerciale: forme giuridiche di un'economia-mondo* (Pisa: Pacini, 2002), 283–308. The first significant attempt to reconstruct the pattern of the Edict's development was made by Dernburg: 'Untersuchungen über das Alter der einzelnen Satzungen des prätorischen Edicts', in *Festgaben für August Wilhelm Heffter zum III. August MDCCCLXXIII*, ed. Ludwig Heydemann et al. (Berlin: Weidmannsche Buchhandlung, 1873), 91–132. Dernburg's method, however, which involved dating individual provisions of the Edict by analysing the style of language employed, has been shown to be flawed by, *inter alios*, Max Kaser, 'Zum Ediktsstil', in *Festschrift Fritz Schulz*, vol. 2 (Weimar: Hermann Böhlaus Nachfolger, 1951), 24–25; and (for different reasons), Watson, *Law Making*, 33–34.

⁴² Generally, Richard A. Bauman, *Lawyers in Roman Republican Politics: A Study of the Roman Jurists in Their Political Setting, 316-82 BC* (Munich: C.H. Beck, 1983), 1–6.

⁴³ A. Arthur Schiller, *Roman Law: Mechanisms of Development* (The Hague, Paris and New York: Walter de Gruyter, 1978), 276–77.

⁴⁴ Claudia Moatti, *The Birth of Critical Thinking in Republican Rome*, trans. Janet Lloyd (Cambridge: Cambridge University Press, 2015), 205.

way for a juristic discourse that situated *auctoritas* in argument rather than tradition.

All this sets the context for the development depicted here, which at the same time constitutes part of the evidence for the changes described above. To begin with the praetor, among the earliest of the new form of remedies were the consensual *bonae fidei iudicia*, including *locatio conductio*, which were introduced between about the midpoints of the third and second centuries BCE. Although there is no evidence to suggest that they were introduced specifically to address disputes arising out of long-distance trade, they were certainly relevant to its conduct. Slightly later – between about the first half of the second century BCE and the end of the Republic – *actiones in factum* began to be introduced. The *actio in factum de recepto*, for example, amounted to a praetorian recognition of customary usage.⁴⁵ On the other hand, the *actiones furti* and *damni in factum* were refinements of existing remedies designed to meet the exigencies of maritime trade. Equally, the *actio exercitoria* (which likely consisted of a modification to *formulae in ius conceptae*) was introduced to ameliorate the civilian contractual framework to the realities of commercial practice. Finally, by the end of our period, the praetor was also granting decretal actions, such as the *actiones oneris aversi*, which were intended to address disputes arising directly out of the trading environment.

Turning to the jurists, they applied their skills of interpretation to the edicts and *formulae* described immediately above, developing a detailed body of substantive law in the process. Labeo, for example, relied on his knowledge of contractual practice to produce interpretations about the parties' intentions with respect to the *actiones locati* and *conducti*. In addition, customary principles, such as the *iactus provision* contained in the *lex Rhodia*, were given legal effect in Roman courts by their interpretation as an aspect of good faith. Finally, in the event that there was no special remedy that dealt with a commercial institution – such as loans of *pecunia traiectica* – the jurists treated contractual

⁴⁵ Pernice, 'Parerga', 132–33; also, Schiller, 'Custom', 38–39.

practice directly through the lens of orthodox actions such as the *condictio* and *actio ex stipulatu*.

The question that arises is how we are to characterise this development. In Roman legal scholarship, the issue crystallises around the contention as to whether the Romans can be said to have developed their own ‘commercial law’ (i.e., in the words of Aubert, ‘a set of legal rules originating with merchants, designed for merchants, and enforced – partly, at least – by merchants’).⁴⁶ According to Kaser, the answer is negative: ‘Ein besonderes Handelsrecht haben die Römer daneben nicht ausgebildet’ (‘the Romans did not develop a specific, autonomous commercial law’).⁴⁷ Moreover, in Sirks’ view, the concept of ancient commercial law is anachronistic, since the idea can only be traced back as far as the Middle Ages.⁴⁸ On the other hand, there is no shortage of works structured on the premise that Roman legal institutions lend themselves to conceptual organisation in these terms.⁴⁹

In my view, the crucial point, which has been extensively elaborated in this thesis, is that wherever merchants typically entered into relationships with other commercial actors (be it financiers, warehousemen, or *exercitores*), legal remedies were introduced and refined to address the issues that arose (see Appendix: Fig. 8). The conceptual coherence of these remedies as a body of law depends upon their common origins in the process by which long-distance trade was conducted. The evidence therefore tends strongly to the conclusion that the legal developments depicted here were a response to mercantile

⁴⁶ Jean-Jacques Aubert, ‘Commerce’, in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 213. For a discussion, Gérard Minaud, *Les gens de commerce et le droit à Rome* (Aix-en-Provence: Presses universitaires d’Aix-Marseille, 2011), 372–79.

⁴⁷ Kaser, *RP*, 1:474–75; also, Mario Bretone, *Storia del diritto romano*, 10th ed. (Bari and Rome: Laterza, 2004), 127.

⁴⁸ Adriaan J. B. Sirks, ‘Law, Commerce, and Finance in the Roman Empire’, in *Trade, Commerce, and the State in the Roman World*, ed. Andrew I. Wilson and Alan K. Bowman (Oxford: Oxford University Press, 2018), 53.

⁴⁹ Most notably, Levin Goldschmidt, *Handbuch des Handelsrechts* (Stuttgart: F. Enke, 1891), 52–94; Paul Huvelin, *Études d’histoire du droit commercial romain (histoire externe-droit maritime)* (Paris: Recueil Sirey, 1929); Pietro Cerami and Aldo Petrucci, *Diritto commerciale romano: profilo storico*, 3rd ed. (Turin: G. Giappichelli, 2010). Also, e.g., Carlo Fadda, *Istituti commerciali del diritto romano. Introduzione* (Naples: Jovene, 1903); and Serrao, *Impresa*. For a review of the literature, Aubert, ‘Commerce’, 237, note 4.

activity and introduced with mercantile relationships in mind.⁵⁰ In this way, economic activity stimulated legal activity, as magistrates and jurists sought to provide juridical solutions to practical problems.⁵¹

At the very least, these conclusions satisfy two of the three criteria that constitute Aubert's definition of 'commercial law'. With respect to the third – sc., the existence of special courts reserved for traders – Aubert's observations are that there is no evidence for: i) a Roman equivalent of the Athenian *emporikai dikai*; and ii) special courts presided over by merchants. As Harris has argued, however, the *emporikai dikai* was not a special court, but rather an expedited form of procedure that was open to citizens and foreigners alike, albeit only for disputes arising out of maritime trade.⁵² From this perspective, the formulary procedure – which partly developed out of remedies granted for the purpose of facilitating long-distance trade – performed the same basic function as the *emporikai dikai*, though with a much more expansive breadth of application.⁵³ Moreover, though Aubert is right that there is no evidence for Roman courts exclusively presided over by businessmen, there is ample evidence to suggest that, insofar as there was a desire for specialist dispute resolution, arbitration played an important part in ancient commercial life.⁵⁴ It is therefore my submission that the Romans did possess – if not a fully-fledged 'commercial law' – a 'merchant law' that found expression and was given substance by the Edicts of the praetors.

Understood on its own terms, Roman merchant law was in the first instance a body of remedies that gave shape to an expedited form of procedure, and in

⁵⁰ This is consistent with the conclusions reached by Di Salvo: 'Ius gentium e lex mercatoria', *SDHI* 80 (2014): 356–57.

⁵¹ In this connection, de Ligt, 'Law-Making and Economic Change'.

⁵² Edward Harris, 'The Meaning of the Legal Term Symbolaion, the Law about Dikai Emporikai and the Role of the Paragraphe Procedure', *Dike* 18 (2015): 7–36; cf. Edward E. Cohen, *Ancient Athenian Maritime Courts* (Princeton, NJ: Princeton University Press, 1973).

⁵³ Cf. Baker's view that 'the medieval law merchant was not so much a corpus of mercantile practice or commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law': 'The Law Merchant and the Common Law before 1700', *The Cambridge Law Journal* 38, no. 2 (1979): 301.

⁵⁴ See, generally, Leanne Bablitz, 'Roman Courts and Private Arbitration', in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 234–44.

the second a corpus of substantive rules generated by the interpretative activity of the jurists. Moreover, the sensitivity of the legal authorities to the process by which trade was carried out, and the Roman conception of law as arising from multiple sources, including the *ius gentium*, laid the foundations for a fusion that enabled the customary practices of maritime trade to find expression in Roman legal forms. A century and a half ago it was Maine's observation that 'substantive law has at first the look of being gradually secreted in the interstices of procedure'.⁵⁵ It is my conclusion that the remedies that gave substance to the procedure, and by extension the substantive law, emerged partly out of the interstices of long-distance trade.

⁵⁵ Henry S. Maine, *Dissertations on Early Law and Custom* (London: John Murray, 1883), 389.

APPENDIX

Fig. 1: Mediterranean shipwrecks by quarter-century (no. = 1,716), graphed according to an equal probability of sinking in any year during the date range for each wreck (200 BCE – 1 BCE shaded red).

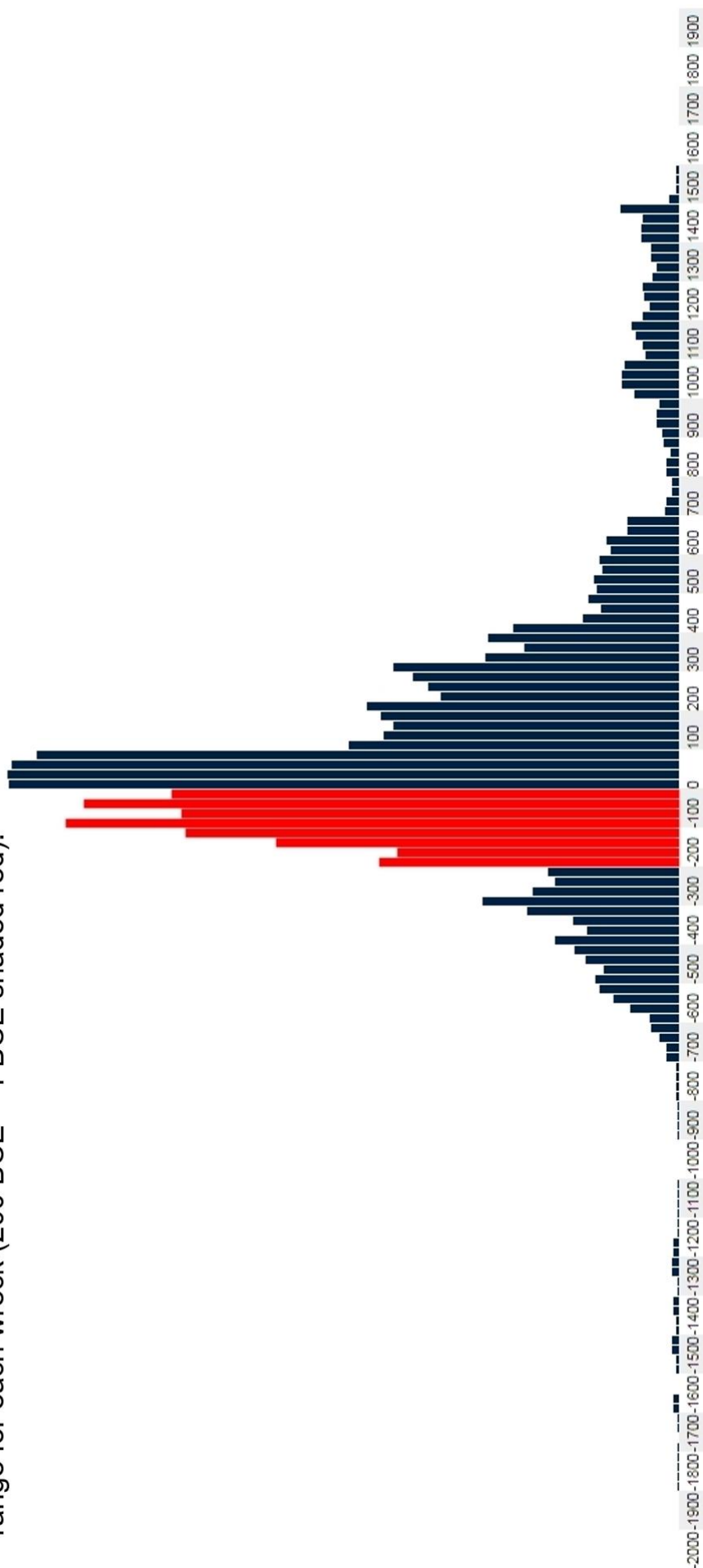


Fig. 2: Geographical distribution of Mediterranean shipwrecks by location (no. = 1,716).

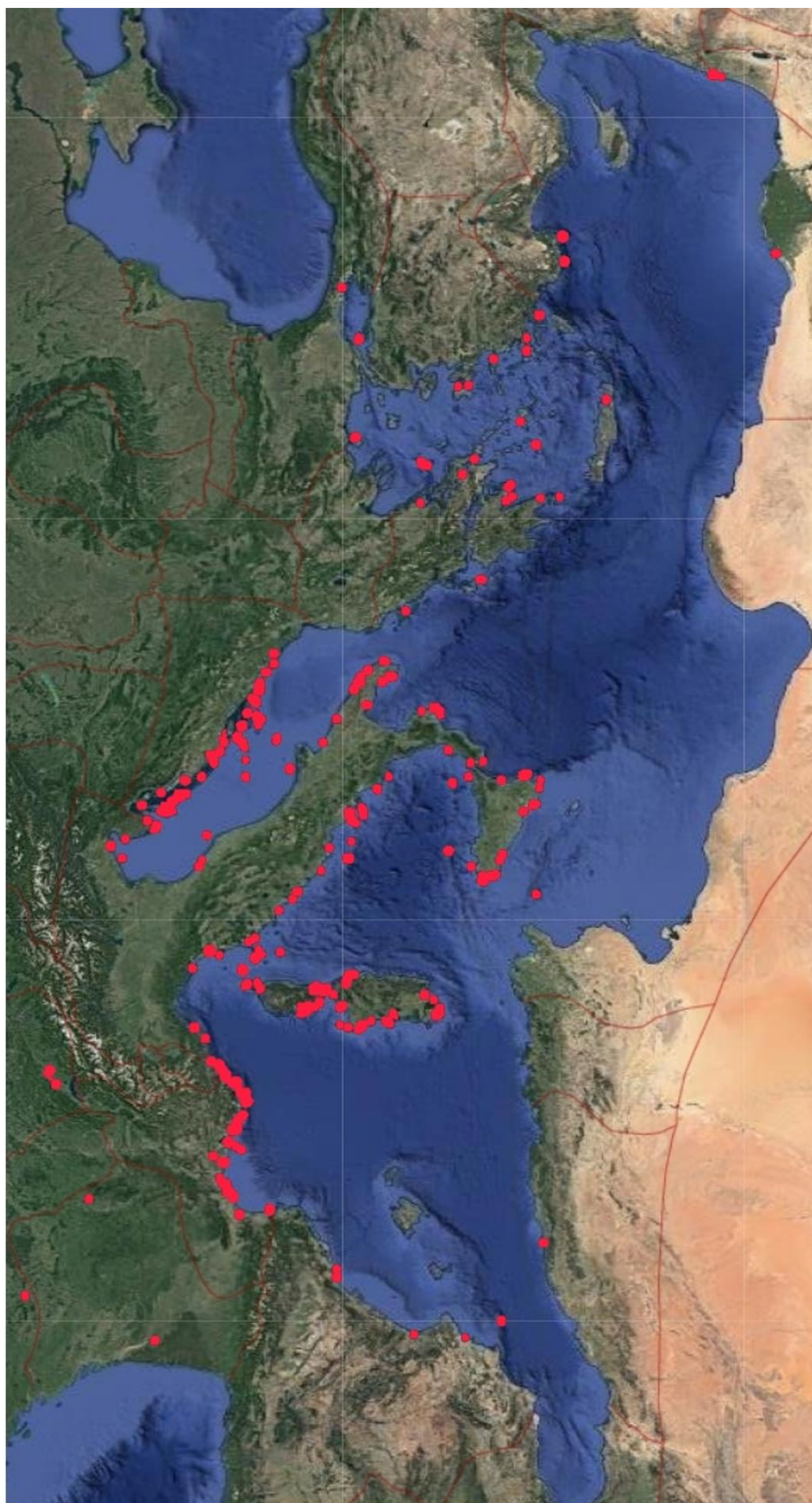


Fig. 3: Shipwrecks located in the West Mediterranean, Tyrrhenian, and Adriatic Seas by quarter-century (no. = 589), graphed according to an equal probability of sinking in any year during the date range for each wreck (200 BCE – 1 BCE shaded red).

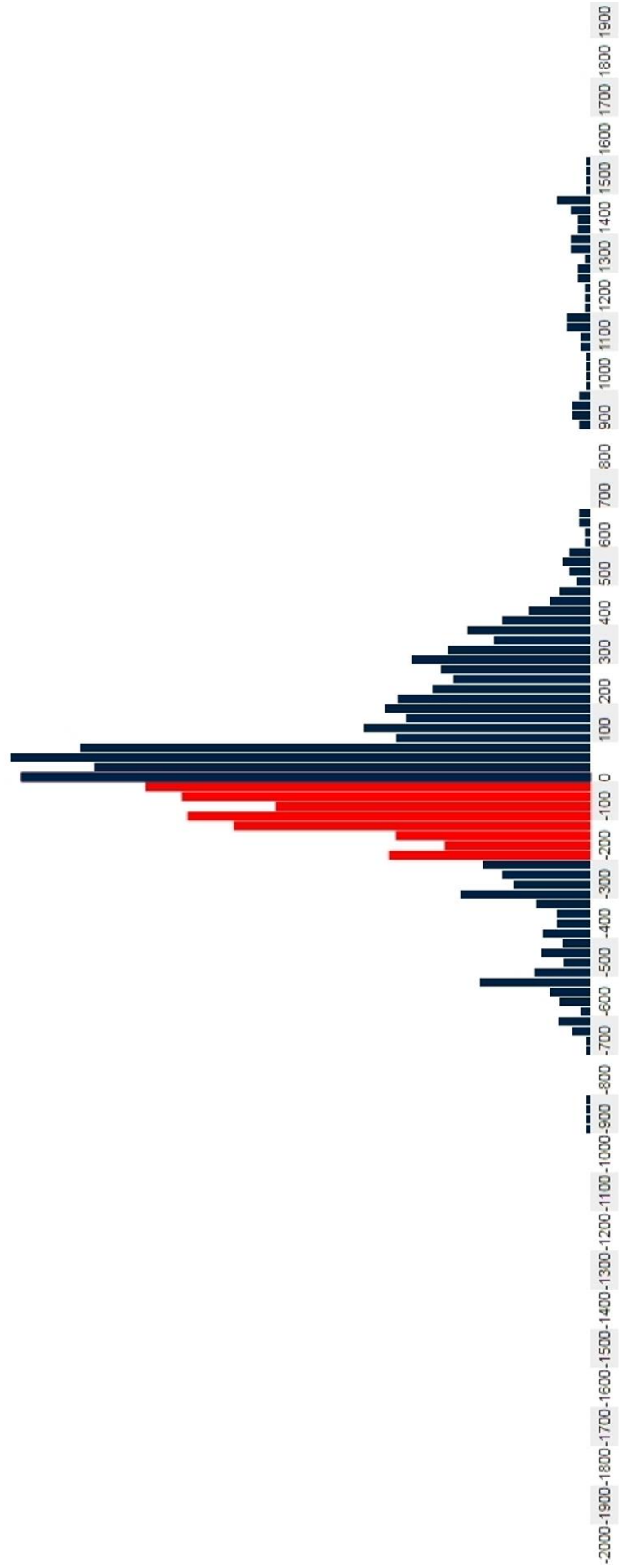


Fig. 7: Mediterranean shipwrecks by quarter-century (no. = 1,716), graphed according to an equal probability of sinking in any year during the date range for each wreck (Fig. 1), overlaid with the likely date ranges for the introduction of Roman legal innovations relevant to the conduct of long-distance trade.

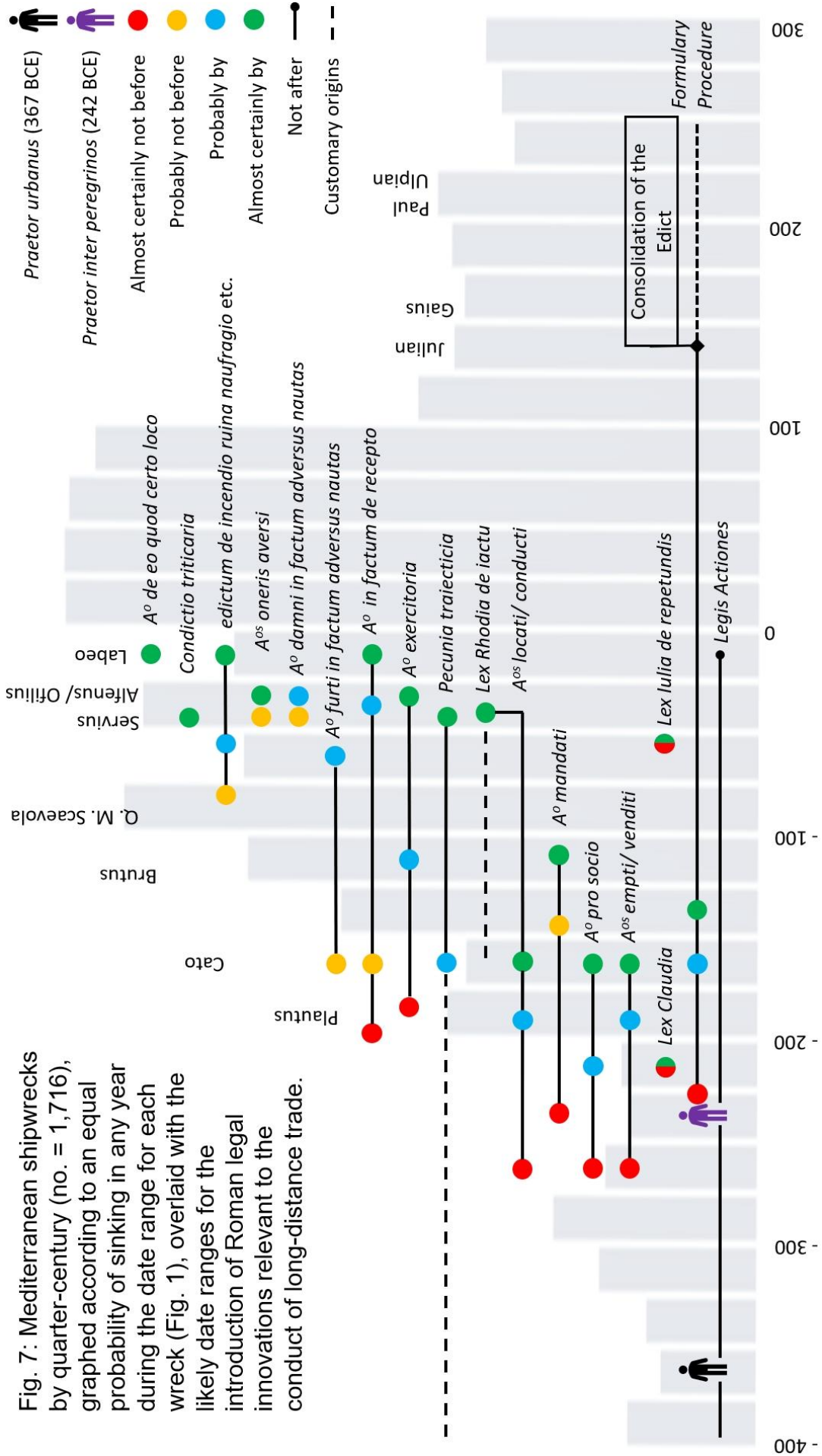


Fig. 8: Table of remedies and legal interpretations relevant to the conduct of long-distance trade.

Mercantile Relationships:	Financier	Exercitor	Warehouseman
Contracts:	<i>mutuum</i> <i>stipulatio</i>	<i>Locatio conductio</i>	<i>Locatio conductio</i>
Specific Remedies/ Interpretations:	<i>Pecunia traiecticia</i> <i>A° de eo quod certo loco</i> <i>Condictio triticaria</i>	<i>A° exercitoria</i> <i>Locatio conductio:</i> <i>- lex Rhodia de iactu</i> <i>A^{os} in factum:</i> <i>- A° in factum de recepto</i> <i>- A^{os} furti/ damni in factum</i> <i>adversus nautas</i> <i>Decretal actions:</i> <i>- A^{os} oneris aversi</i>	<i>Locatio conductio:</i> <i>- Custodia</i>

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