THE EARLY HISTORY OF INIURIA

by

PETER B. H. BIRKS (London)

I. The Problem of the Delict's Name

The trespasses of the Lord's Prayer are wrongs, in the widest sense. When the word was common outside the law, it bore that general meaning. Yet in the English common law it seemed that trespass had always been a direct and forcible harm, a particular tort. Until quite recently this would have provided as good material as any to one wishing to illustrate the perverse capacity of lawyers to abuse ordinary language. But three articles by Professor Milsom showed that trespass did not come into the common law fully formed 1). Thirteenth century lawyers used the word much in the modern sense of "tort". The development of the technical term was an explicable process. The old lawyers did not lack common sense, they did not seek to distort the language of the day, until the peculiar logic of their profession brought them to it by degrees.

Professor Milsom's illumination of the story of English trespass throws a tantalising light on the problems of the Roman iniuria. For in the earliest surviving literature iniuria has all the generality that Ulpian later attributed to its ordinary meaning 2): Iniuria ex eo dicta est quod non iure fiat: omne enim quod non iure fit, iniuria fieri dicitur. If, being a lawyer, Ulpian meant his reader to think here only in terms of lawful and unlawful rather than of right and wrong, the early lay sources show iniuria still wider; in Plautus and Terence iniuriae are wrongs, in the widest sense — they are the trespasses of the Lord's Prayer, unfair acts, injustices 3). But in

2) D. 47, 10, 1pr.
3) Further discussion below, p. 171.
the Twelve Tables \textit{iniuria} appears as a specific delict, with its own penalty: \textit{Si iniuriam alteri faxsit, viginti quinque poenae sunto} \textsuperscript{4}). The prevailing opinion of this delict confines it, with greater or less rigour, to the field of minor personal violence \textsuperscript{5}), setting as wide a gap between Roman lay and legal usage as ever divided the two English concepts of trespass. But one factor complicates the Roman story. If it was an independent delict, the \textit{iniuria} of the Twelve Tables cannot have been anything but narrow and concrete. It will not have borne the least resemblance to its classical descendant, for the jurisprudence of 450 B.C. could not have coped with a delict whose only unity depended on an abstract organising principle and which could therefore be manifested in a wide variety of acts. The single penalty of twenty-five \textit{asses} shows that no great variety of conduct could be in question.

If, learning from Professor Milsom's treatment of trespass, we reject the possibility that the ancient lawyers perversely selected a downright inappropriate name, the incompatibility between the necessarily limited dimensions of the delict and the enormous generality of its name raises a rather stark dilemma: either a rational explanation of the terminology exists, whether

\textsuperscript{4}) Tab. VIII, 4. \textit{FIRA, Leges}, p. 54. The manuscripts of Gellius, \textit{NA} 20.1.12, which reports the provision, have \textit{iniuriam}, which is emended to the accusative chiefly on account of the clash between an ablative and the dative of \textit{altri}. Cf. Pugliese, \textit{Studi sull'iniuria}, 1941, p. 2, n.1. (This work is cited hereafter simply as Pugliese.)

\textsuperscript{5}) \textit{Pugliese}, pp. 34ff. Simon, \textit{Begriff und Tatbestand der ,,Iniuria" im altrömischen Recht} (cited hereafter simply as Simon) ZSS 82 (1965) p. 174. Buckland, \textit{Textbook} p. 589. Girard, \textit{Manuel}, p. 420. Arangio-Ruiz, \textit{Istituzioni}, p. 372. Kaser, \textit{RPR} I pp. 139—40, makes the provision include „andere Körperverletzungen (i.e. those less than \textit{membrum rumpe}re, Tab. VIII, 2, and \textit{os frangere}, Tab. VIII, 3) Freiheitsberaubung, stuprum, aber auch unberechtigte Eigenmacht bei der Rechtsverfolgung.” Cf. Huvelin, Mélanges Appleton, 1903, pp. 460ff. But this wider interpretation is doubted by Pugliese, pp. 35ff and Simon, pp. 170ff. The restriction to violence is rejected by V. Da Nobrega, \textit{L'iniuria dans la loi des XII tables}, Romanitas, 8 (1967) 250, which I regret not having seen at the time of writing. Basing his study largely on comparative material, Da Nobrega concludes that the decemviral \textit{iniuria} was already a matter of insult, not battery. It is, however, to be doubted whether other ancient codes, whose testimony is not unequivocal, can bear such reliance — and the problem of the terminology remains.