A NEW ARGUMENT FOR A NARROW VIEW OF LITEM SUAM FACERE*

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There are two main questions about the iudex qui litem suam fecit. The first concerns the scope of his liability: for what misconduct could he be sued? The second concerns the classification of his liability: why was his obligation to the dissatisfied litigant said to arise quasi ex delicto rather than simply ex delicto? This paper is directed only to the first of these. It has the limited purpose of advancing a new species of argument to support a very restricted interpretation of the judge’s liability, namely that it was confined, in the absence of fraud, to patent errors or, as might be said in English law, to errors ‘on the face of the record’. The argument extends only to the period of litigation per formulas.

One reason which strongly favours a restricted view of litem suam facere is the need for realism in the assessment of burdens which judges could reasonably be expected to bear. A general liability in damages for errors of law or fact is unthinkable. D.N. MacCormick puts it this way: ‘To have allowed any reopening of a case on the pure merits of the matter would have been to destroy the system. We can be clear about that. To have done so would necessarily have been to pave the road to infinite rearguing of effectively the same point before a series of different judges. Only within an appellate structure can cases be reconsidered at a higher level on the merits’¹. And Kelly has rightly argued that this same approach suffices, in the absence of clear contrary evidence, to exclude not merely liability for objective errors but equally liability for errors attributable to imprudentia: ‘In an era when there was no appeal from the decision of a iudex, it seems likely that a large number of litigants — those of sufficient standing, at any rate — would, on losing their case, immediately proceed against the iudex if they felt — as many would, rightly or wrongly — that he had been imprudens. It follows from this that liability for judicial imprudentia in an era of no appeals would have made the judicial machinery unworkable as well as its operation unpopular. The absence in the formulary period until about A.D. 100 of a proper system of civil appeals from iudices privati, so far from being a reason for supposing liability for imprudentia before that date, as some writers think it to be, would seem on the contrary to be a strong argument against it”². This is a robust a priori ar-

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argument. It makes for a safe starting-point. It does not extend to cases of fraud, to which we shall return below.

Very recently an extreme version of the restrictive view of *litem suam facere* has been advanced by D'Ors\(^3\). In his opinion the liability had nothing whatever to do with bad or unjust judgments. It was concerned with, and only with, the failure to give any judgment at all. There were two typical ways in which a judge might fail in his duty to deliver a *sententia*. He might simply fail to turn up on the appointed day; or he might cause the *judicium* to go off by not granting a valid extension of time for an adjourned hearing (*diem diffindere*). To these cases D'Ors would add a third example, namely that in which the judge does indeed deliver a *sententia* but one which is a nullity because it exceeds the terms of the formula empowering him to act\(^6\). Apart from this case in which the *sententia* is patently *ultra vires* the formula, D'Ors does not contemplate the possibility of other more obscure or latent causes of nullity, and he does not admit that even fraudulent misapplication of the law would entail liability for *litem suam facere*. In his view fraudulent decisions would be examples of bad judgments which were, none the less, given, while the wrong of *litem suam facere* was concerned with judgments not given at all. As every modern lawyer knows, that distinction is somewhat less than clear; but, subject to a continuing difficulty on that score and in particular to a disagreement on the question of fraud, I believe that the extremely restrictive view taken by D'Ors can be shown to be substantially correct by an argument which he does not in fact use.

D'Ors does not rely directly on the *a priori* argument which was introduced above. He founds his case chiefly on parts of the *lex Irnitana*, discovered near Seville in 1981 but still unpublished. There is no doubt, from the glimpses of the *lex* which D'Ors gives us, that the six tables of the *lex Irnitana* will turn out to have been one of the most important finds of modern times. Indeed we are told that, though it dates from Domitian, it may be nothing less than a revised edition of one of the two *leges Juliae*, of Augustus, referred to by Gaius in connexion with the final abolition of the *legis actiones*\(^9\). It is obviously a marvellous discovery which will add enormously to our knowledge of formulary procedure. And there is equally no doubt that, in the particular context of *litem suam facere*, it confirms that the judge must bear the loss arising from failure either to give a valid adjournment or to utter his *sententia*\(^10\). What will remain less clear until we see a published text of the *lex* is whether it can in itself confirm the negative aspects of D'Ors' thesis, namely that liability did not extend beyond these mat-

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10. *Semble*, however, that the words '*litem suam facere*' are not actually used; rather, the form 'uti lis iudici arbitrove danni sit'.