Terminus motus

by Geoffrey MacCormack
(*Aberdeen*)

The texts which evidence this crime fall into three groups, each widely separated in time and showing strong marks of difference from the others. Indeed, one should perhaps speak of several distinct offences relating to the removal of boundary stones rather than assume there is a single offence revealed throughout its history in varying guises. The literature speaks of *terminus motus* or *crimen termini moti* and considers all the evidence under this head. (1) The merit of so treating the material is to underline the significance attached to boundary stones throughout Roman legal history. But there is a certain danger in that important differences are overlooked or insufficiently appreciated. The texts belonging to each group need to be examined with some care in order to determine whether in fact it is a question in all cases of the same offence. In the

(1) I have seen the following accounts: W. Rein, *Das Kriminalrecht der Römer* (1844, reprinted 1962), 822; A. Rudorff, *Gromatische Institutionen*, in *Gromatici veteres: Die Schriften der römischen Feldmesser*, ed. F. Blume, K. Lachmann, A. Rudorff II (1852), 243; M. Voigt, *Leges regiae*, in *Abhandlungen der philolog.-hist. Classe der königlich sächsischen Gesellschaft der Wissenschaften* 7 (1879), 602 (48 of essay); M. Voigt, *Die XII Tafeln: Das Civil- und Criminalrecht* 2 (1883), 809; T. Mommsen, *Römisches Strafrecht* (1899, reprinted 1961), 822; Ch. Lécrivain, *Terminus motus*, in *Dictionnaire des antiquités grecques et romaines*, ed. C. Daremberg et L. Saglio, V (1911), 122; G. Falchi, *Diritto penale romano (I singoli reati)*, (1942), 207; R. Taubenschlag, *Terminus motus*, RE 2I 5 (1934) 784; P. van Warmelo, *Crimen termini moti*, in *Études offertes à Jean Macqueron* (1970), 671; F.T. Hinrichs, *Die Geschichte der gromatischen Institutionen* (1974), 174.

first group are the passages evidencing the existence of a law of Numa, in the second the surviving chapters of a late Republican agrarian law, the lex Mamilia Roscia, and in the third a few texts from the Digest, mainly late classical but in some cases preserving rules established at an earlier period. Of the latter the most important are contained in a rescript of Hadrian.

The law attributed to Numa is recorded by Festus in a short explanation of the word terminus: *Termino sacra faciebant, quod in eius tutela fines agrorum esse putabant. Denique Numa Pompilius statuit, eum, qui terminum exarasset, et ipsum et boves sacros esse* (2). This information may be supplemented from accounts of Numa's reforms given by Dionysius of Halicarnassus and Plutarch. Since the details are important I quote the relevant passages in translation:

> Dion.Hal.2.74: First, to the end that people should be content with what they had and should not covet what belonged to others, there was the law that appointed boundaries to every man's possessions. For, having ordered every one to draw a line around his own land and to place stones on the bounds, he (Numa) consecrated those stones to Jupiter Terminalis and ordained that all should assemble at the place every year on a fixed day and offer sacrifices to them ... He also enacted that, if any person demolished or displaced these boundary stones he should be looked upon as devoted to the god, to the end that anyone who wished might kill him as a sacrilegious person with impunity and without incurring any stain of guilt. He established this law with reference not only to private possessions but also to those belonging to the public; for he marked these also with boundary stones, to the end that the gods of boundaries might distinguish the lands of the Romans from those of their neighbours, and the public lands from such as belonged to private persons (3).
>
> Plutarch, *Numa* 16: Terminus signifies boundary and to

(2) 505L.

(3) Loeb ed. volume 1, 531,3. The passage continues with an injunction to respect boundaries and a stricture on those covetous of their neighbour's possessions.

> this god they make public and private sacrifices where their fields are set off by boundaries ... And it is quite apparent that it was this king (Numa) who set bounds to the territory of the city, for Romulus was unwilling to acknowledge, by measuring off his own, how much he had taken away from others ... And indeed the city's territory was not extensive at first, but Romulus acquired most of it later with the spear. All this was distributed by Numa among the indigent citizens ... Numa ... divided the city's territory into districts, to which he gave the name of 'pagi'. (4)
>
> Plutarch, *Roman Questions* 15: But Numa Pompilius ... marked out the boundary between Rome and her neighbours and dedicated the frontier marks to Terminus as the overseer and guardian of peace and friendly relations. (5)

It is clear that Roman tradition ascribed to Numa regulations concerning boundaries and boundary stones, and the penalty to be incurred for removing the latter. Nor does there seem any good reason for doubting that such regulations were made in the time of Numa (6). Even if one is sceptical of the accuracy with which particular rules may be assigned to a particular king, at the very least one may accept that regulations on boundaries were introduced in the early Royal period. The real difficulty lies in determining more closely the nature of the regulations. Dionysius gives a fairly detailed and even precise account. If one could be sure of its accuracy much of one's difficulty would be removed. However it would be rash to take the account as literally true. Its very fullness and its over moral tone make one suspect that Dionysius's main object was to give a respectable antiquity to practices he thought should be observed in his own day. Hence there is the possibility that he credited Numa with more than was actually accomplished by that king. The best course of action is to distinguish the various issues which arise in connection with Numa's regulations on boundaries and consider how the evidence bears on each.

(4) Loeb ed. of Plutarch's *Lives*, volume 1,363.

(5) H.J. Rose, *The Roman Questions of Plutarch* (1924), 125-6.

(6) The procedure by which they were made is here irrelevant.

The first issue is the cult associated with boundary stones and the relationship these were deemed to have with the gods. There are several accounts of the ritual practised and the sacrifices made in connection with boundary stones (7). Some specifically attribute to Numa the initiation of the rites (8). One cannot be sure of the extent to which these practices were in fact carried out even in the time of the writers who recorded them, still less be sure of the position in the early Royal period. Unless one discards the tradition altogether, a step for which there is no justification, one has to accept that at the time of Numa boundary stones were the object of certain ritual acts performed probably both when they were first established and at intervals thereafter. Although the existence of a cult shows that there was believed to be a connection between boundary stones and the gods the nature of the connection is not immediately obvious. It seems clear that the early Romans did not number among their gods a specific god of boundaries (Terminus) (9). On the other hand, one cannot deduce from the acts of veneration directed towards boundary stones (pouring of libations, adorning with garlands and so on) evidence of some crude animistic belief according to which each stone was believed to contain a spirit (10). One cannot now recapture the possibly quite complex beliefs associated with boundary stones. It is perhaps enough to suggest that the ritual is explicable not

(7) The most detailed are those of Siculus Flaccus, *De condicionibus agrorum*, ed. LACHMANN, in *Gromatici veteres* I (1848), 140 and Ovid, *Fasti* II, 641-684. Briefer references are provided by Dion. Hal. 2.74; Plutarch, *Numa* 16, *Qu.rom.* 15.

(8) Dion.Hal. 2.74; Plutarch, *Numa* 16.

(9) Cf. G. WISSOWA, *Religion und Kultus der Römer*, 2nd. ed. (1912), 136, and his article *Terminus* in W.H. ROSCHER, *Ausführliches Lexikon der griechischen und römischen Mythologie* (1916-24), Vol.I, 380; K. LATTE, *Römische Religionsgeschichte* (1960), 64.

(10) For varying views, see (apart from the literature cited in the preceding note) W. WARDE FOWLER, *The Roman Festivals of the Period of the Republic* (1899), 326; *The Religious Experience of the Roman People* (1911), 117; J.G. FRAZER, *The Fasti of Ovid* II (1929), 481; E. MARBACH, *Terminus*, in RE R2 5 (1934), 781; F. BÖMER, *Die Fasten* II (1958), 129.

as veneration due to the spirit of the stones but as recognition, appropriately expressed, of the fact that boundaries and the stones marking them were of concern to the gods, especially to Jupiter. Of course the problem is, what is meant by concern? No doubt the relationship between the boundary stone and the gods was conceived in various way. One can imagine that the understanding of the priests was not the same as that of the farmers. Generally speaking there may have been the notion that the gods were interested in boundaries primarily because these were the most obvious visual expression of the extent of the community. Involved also may have been the belief that boundaries and boundary stones were under the protection of the gods.

So far I have spoken simply of boundaries and boundary stones. But the question arises — and this is the second issue to be discussed — was it only stones marking certain boundaries that were the object of a cult? The following types of boundary may be distinguished: (i) that between Roman and foreign soil, (ii) that between distinct communities or villages on Roman soil, (iii) that between public (including sacred) and private land, (iv) that between farms or fields owned by private individuals. The cult described by Siculus Flaccus and Ovid relates to stones placed on boundaries between fields or estates all of which are privately owned, though the latter also refers to a sacrifice made at the sixth milestone on the Via Laurentina (11). This may be a relic of a cult devoted to a stone marking the boundary between the Roman and the Laurentine communities (12). Dionysius writes that Numa established stones to mark the boundaries not only between Roman and foreign territory but also between privately owned farms and between public and private land (13). Plutarch in his Roman Questions speaks only of boundaries between Roman and foreign territory (14); in his life of Numa he mentions also the division of

(11) FASTI II, 679-82.
(12) Cf. FRAZER, *op.cit.*, (note 10). WISSOWA, cited note 10.
(13) 2.74 (above).
(14) 15 (above).

Roman territory into *pagi,* and perhaps implies that Numa established boundary stones between privately owned farms (15).

Although I have summarised the opinions of the ancient authorities on Numa and boundaries, I do not think they have great value for determining what Numa did establish. I prefer the account of Plutarch with its emphasis on boundaries between states and districts to that of Dionysius. Certainly one may accept that in the Republic there came to be a cult of boundary stones dividing privately owned fields or estates. But there is at least some doubt whether this should be read back to the time of Numa. The essence of the doubt concerns the institution of private property. Both what is meant by 'private property' and the process by which individuals, as distinct from families or larger groups, came to extend their rights in land are highly controverted subjects. All that needs to be said here is that the *paterfamilias* of the early Royal period may have possessed extensive powers of use and control over specified areas of land. Yet it does not seem certain that such land would have been marked off from other individually possessed land by means of boundary stones which formed the object of a cult. The latter presupposes a fixity in the distribution of land among individuals which it would be rash to assume was the case. One does not know what residual powers remained in the *gens* or the circumstances under which land assigned to one person for cultivation might be taken away and given to another (16).

(15) 16 (above).

(16) It does seem to me possible to deduce from the *lex Numae* the existence either of individual ownership or individual control of land. Cf. M. KASER, *Eigentum und Besitz im älteren römischen Recht*, 2nd ed. (1956), 237 and n29 (citing further literature). C.W. WESTRUP on the other hand remarks: 'The institution of the *terminalia* festival attributed to Numa, as well as the introduction of a special god of boundaries, Juppiter Terminus, and of the sacred boundary stones (*termini*), the ploughing up of which ... made the perpetrator and his ox team *sacer*, would also seem to be best explained as reminiscences from a time when no division of the land (*ager*) into private property had yet occurred', *Introduction to Early Roman Law* II (1934), 48.

If one hesitates to accept the existence of boundary stones between fields cultivated by individual possessors, one might have less hesitation in supposing that Numa established boundary stones between Roman and foreign territory. One might indeed expect such frontiers to have been marked by a natural feature such as a stream or wood or a range of hills, or by an artificial structure such as a ditch or wall and perhaps also by the establishment of a series of fortified posts. However, in some cases especially where peace had been firmly established it seems possible that the Romans would have marked their side of the frontier by a stone or series of stones to which sacrifices were made. The sacrifice offered to the sixth mile stone on the via Laurentina still practised in Ovid's time may be a survival from a time in which the stone marked the boundary between the territories of Rome and Lavinium.

There remains the possibility of boundary stones separating districts or public or sacred land from private. I can see no objection to supposing that distinct communities within the Roman territory marked by means of stones the limits of their lands. The boundaries would neither be subject to change nor require to be fortified. Nor can I see any objection to supposing that lands set aside for the gods, such as those assigned to a particular temple, would have been marked by boundary stones (17). The question of 'public land' is more complicated. One can see that roads and streets may have been separated

(17) It has been suggested that the archaic *lapis niger* (CIL 1,2,1) bearing an inscription whose opening words contain the phrase *sakros esed*, was a boundary stone marking public or sacred land. Cf. HOLLAND, *American Journal of Archaeology* 37 (1933), 549 (criticised however by LATTE, *Römische Religionsgeschichte*, 3 n4); E.H. WARMINGTON, *Remains of Old Latin* IV (1940, Loeb), 244; R.E.A. PALMER, *The King and the Comitium*, Historia Einzelschriften 11 (1969). On the other hand R.M. OGILVIE, *A Commentary on Livy Books* 1-5 (1965), 211, seems to treat the stone as marking the boundary of private property. From the third century B.C. come stones inscribed with regulations governing the use of sacred ground (*lex luci Lucerini, lex luci Spoletini*). Whether these are really to be treated as boundary stones is uncertain.

from other land and marked by means of stones (18). The same may be said for areas of land specifically reserved for public purposes such as meetings or military exercises. Likewise lands belonging to the royal family may have been delimited by means of stones. It is not clear what other categories of 'public' land may have existed.

If my argument is correct that the boundary stones in use at the time of Numa were those placed on the frontiers of Roman territory, those dividing communities on Roman territory or those dividing sacred or public land from that in the possession of individuals or families, then it seems that the cult of the boundary stone was more a public than a private matter. Representatives of the king and the gods would have performed the rites for stones delimiting the Roman frontiers or public or sacred land. Stones dividing communities would have been the concern of the communities as a whole and not just of neighbouring farmers. Hence the private cult described by Siculus Flaccus and Ovid must be seen as a later development.

The central point I have tried to bring out is the uncertainty concerning the type of boundary stone to which the *lex Numae* referred. In particular it appears doubtful whether stones marking the boundaries between individually owned farms were in use at the time the *lex* introduced. It cannot be determined whether in a subsequent period the *lex* was applied to those boundary stones. There is also uncertainty concerning the nature of the offence established by the *lex* (the third issue). Festus describes it with the word *'exarare'* and Dionysius speaks of 'demolish or displace'. Both authors seem to have contemplated an act by which the plough removed or destroyed

(18) MOMMSEN, *Strafrecht*, 822, appears to have held that the offence of removal of boundary stones related only to those marking streets or roads, though he also speaks more generally of 'das Abpflügen von öffentlichen Wegen und die Verrückung der öffentlichen Grenzsteine': Certainly he excludes stones marking the boundaries of private property form the scope of the offence. This view is criticised in an instructive note by HINRICHS, *Geschichte der gromatischen Institutionen*, 176 n28.

the stone in such a way that all trace of the boundary was lost. In essence the offence appears to be that of obliteration of the boundary. Yet it is not certain that the offence was originally conceived in this way. For want of a better mode of description one might say that the boundary stone stands under the protection of the gods. Hence any 'violence' offered to it may have been deemed to infringe the rights of the gods and so constitute an offence. In other words the offence may have been committed if the stone was in any way displaced even though in fact it remained clear where the boundary was. It does not seem that *dolus* was a requirement of the offence or that any attention was paid to the degree of carelessness involved.

A further problem is posed by the penalty attached to the offence (the fourth issue). Both ploughman and oxen are to be *sacer*. Festus does not specify a god with respect to whom the quality of being *sacer* is incurred, but it has been suggested that the law stipulated Jupiter (19). One cannot be sure about this. How is the phrase *sacer esto* to be understood? The basic meaning of *sacer* in this context seems to be 'removed from the sphere of men and placed in that of the gods' (20). The difficulty lies in determining the practical consequences of this change of status. An ancillary difficulty concerns the nature of the proceedings by which the occurrence of the offence and the attachment of the penalty were determined. On this point it does not seem possible to progress beyond the suggestion that the matter probably came before a tribunal of some sort (21).

First, I consider the meaning of *sacer* as applied to the ploughman and then as applied to the oxen. The view most frequently expressed in the literature is that the individual by his act incurred the anger of the gods and so was exposed to

(19) E.g. WISSOWA, cited note 10, but cf. LATTE, *Römische Religionsgeschichte*, 38 n2, and see also SAMTER, *Archiv für Religionswissenschaft* 16 (1913), 141.

(20) LATTE, *op.cit.*, 38.

(21) Cf., the remarks of M. KASER, *Das altrömische Ius* (1949), 51.

their revenge (22). Further the divine revenge would be transferred to the community unless it took steps to deliver the offender to the gods by putting him to death. The chief evidence cited in support of this view is a passage from Festus and one from Macrobius.

> Festus 424L: *At homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eum immolari, sed, qui occidit, parricidi non damnatur; nam lege tribunicia prima cavetur, 'si quis eum, qui eo plebei scito sacer sit, occiderit, parricida ne sit'.*
>
> Macr. *Sat.*3.7.5-7: *Hoc loco non alienum videtur de condicione eorum hominum referre, quos leges sacros esse certis diis iubent, quia non ignoro, quibusdam mirum videri, quod, cum cetera sacra violari nefas sit, hominem sacrum ius fuerit occidi. cuius rei causa haec est. veteres nullum animal sacrum in finibus suis esse patiebantur, sed abigebant ad fines deorum, quibus sacrum esset, animas vero sacratorum hominum ... dis debitas aestimabant. quem ad modum igitur quod sacrum ad deos ipsos mitti non poterat, a se tamen dimittere non dubitabant, sic animas, quas sacras in caelum mitti posse arbitrati sunt, viduatas corpore quam primum ire illo voluerunt.*

Festus appears to be considering a *homo sacer* as established by the *plebiscita* enacted, according to tradition, by the plebeians on the Mons Sacer in 494 B.C. (23). The principal enactment provided, in the words of Livy, *ut qui tribunis plebis ... nocuisset, eius caput Iovi sacrum esset familia ad aedem Cereris Liberi Liberaeque venum iret* (24). It came to be understood that the penalty involved the death of the offender, but it was not clear how this was to take place. Festus explains that it was not a question of sacrificing the offender to the gods, which might imply a duty on the part of the offender to

(22) See esp. KASER, *op.cit.* 25f, 45f, and cf. also H. FUGIER, *Recherches sur l'expression du sacré dans la langue latine* (1963), 224ff. The position is put more correctly, I think, by W. KUNKEL, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (1962), 41 n153.

(23) Livy, 2,33,2-3.

(24) 3.55.7, on which OGILVIE, *Commentary*, 500.

carry out the sacrifice. No duty to kill is in fact imposed. The effect of the *plebeiscitum* is that anyone who should kill the offender does not commit the offence of *parricidium*. I think that the context of Festus's discussion deserves to be stressed. He is defining the position of a specific *homo sacer*, namely one who has infringed the *plebeiscitum* providing for the *sacrosanctitas* of the tribunes. It does not follow that the penalty *sacer esto* was to be understood in the same way in all the other cases in which it occurs. Macrobius writes generally of (*homines*), *quos leges sacros esse certis dis iubent*, and may have intended to include the *lex Numae* on boundaries. However, I doubt whether his statement really takes one beyond that of Festus. It does not give the impression of being based on detailed or reliable sources, it misleadingly implies that there is a duty to kill the *homo sacer*, and the explanation offered for the duty strikes me as fanciful rather than historically accurate.

I am arguing not that the evidence of Festus and Macrobius should be altogether disregarded but that considerable caution should be exercised in its evaluation. Two points in particular require re-examination: the basic meaning of *sacer esto*, and the practical consequences of the penalty in individual offences. It does not seem to me that the quality of being *sacer* has any necessary connection with being put to death. The individual who is *sacer* is removed from the community of men and placed within a sphere under the peculiar control of the gods. Since the underlying idea appears to be that he enters this sphere because he has committed an offence against the gods, one is justified in supposing that they will exercise their control over him in a malevolent fashion. In other words the force of the penalty *sacer esto* is that the offender should be an outcast, left to punishment by the gods. There is no implication that humans should anticipate the divine will by putting the outcast to death. But the very fact that the person who had become *sacer* was removed from he human community created a problem if in fact he should be killed. How was the act of killing to be considered? What penalty, if any, had the killer incurred? It was these questions that the law settled by

providing that the killing of a *homo sacer* did not count as parricide. I have already suggested that the question may have arisen where someone who had infringed the *lex* on the *sacrosanctitas* of the tribunes had been killed (25). Later, it appears, the matter was confused by the supposition of a duty to kill and introduction of the notion of sacrifice.

To say that a person declared *sacer* became an outcast does not make plain the actual, practical consequences of his state. Was he driven from his home, or even expelled from Roman territory? Or was he allowed to remain but deprived of the right to take part in public life or in the transactions of the *ius civile*? Or did none of these consequences follow? Was the *homo sacer* perhaps merely shunned by his relatives and left to the attentions of the gods? (26) Was his state redeemable by some appropriate act of expiation? One may speculate on the degree of plausibility represented by these various possibilities but I doubt whether certain answers can be found. What I would suggest is that there may have been some flexibility in the operation of the penalty. A person made *sacer* in respect of a particular offence may not have been treated in the same way as one made *sacer* in respect of some other offence.

There remains the problem of the oxen. They like their driver are to be *sacer*. Presumably *sacer* has the same fundamental sense in both cases and means that the oxen are outcast from the Roman community and pass into the sphere of the gods. But again it is not easy to discover the practical consequences.

(25) It is in this situation that political passions would most likely lead to killing.

(26) Such slight evidence as there is (admittedly from a later period) rather points in this direction. One stone bears the inscription: *quisquis hoc sustulerit aut lacserit ultimus suorum moriatur* (ORELLI, *Inscriptionum latinarum selectarum* II, No.4332). Cf. also the reconstructed inscription in F. BUCHELER, *Carmina latina epigraphica*, No.269 (on which WISSOWA, *Religion and Kultus*, 2nd ed., 138 n3; article *Terminus* in ROSCHER, cited note 9, 382), and the 'curse' enunciated in the piece of Etruscan writing generally referred to as Vegoia's Prophecy (text in *Gromatici veteres* 1, 448 and see now W.V. HARRIS, *Rome in Etruria and Umbria* (1971), 31).

Were the oxen driven from the community? Did their owner lose ownership? Did they pass into the ownership of the gods in the sense that they became the property of the priests? (27) Were they to be sacrificed at the site of the displaced stone? I do not think it is possible to resolve these questions. The important point is to see that they exist and to avoid a dogmatic approach that singles out one possibility as the correct solution (28).

Nothing further is heard of the removal of boundary stones until the *lex Mamilia Roscia*, generally assigned to Julius Caesar but certainly from the late Republic (29). Here the offence is of a very different complexion to that established by the *lex Numae*. The *lex Mamilia* appears to have belonged to the category of agrarian legislation and been concerned at least in part with the regulation of boundaries. Its provisions relate to the establishment of a *colonia, municipium* or other small community. Chapter 53 provides: *qui ager intra fines eorum erit, qui termini in eo agro statuti erunt, quo in loco terminus non stabit, in eo loco is, cuius is ager erit, terminum restituendum curato.* Chapter 54 deals with boundaries but not boundary stones. Chapter 55, the most important for boundary stones, states:

> *Qui hac lege coloniam deduxerit, municipium praefecturam forum conciliabulum constituerit, in eo agro, qui ager intra fines eius coloniae municipii fori conciliabuli praefecturae erit, limites decimanique ut fiant terminique statuantur curato. quosque fines ita statuerit, ii fines eorum sunto; dum ne extra agrum colonicum territoriumve fines ducat. quique termini hac lege statuti erunt, nequis*

(27) This is not the same as the *consecratio bonorum* which affected, for example, the *familia* of the *homo sacer* who had injured a tribune (above).

(28) Sometimes it is assumed that notions of guilt and punishment underly the 'penalty' imposed on the oxen (cf. A. HÄGERSTRÖM, *Der römische Obligationsbegriff* I (1927), 284n; DÜLL, ZSS 61 (1941), 5f). Others have denied this and held that the oxen were sacrificed to Jupiter as an atonement to turn away his anger (HAYMANN, ZSS 42 (1921), 368). MOMMSEN's position is unclear (*Strafrecht*, 66 n1, 822 n2).

(29) Cf. HINRICHS, *Historia* 18 (1969), 521.

eorum quem eicito neve loco moveto sciens dolo malo. si quis adversus ea fecerit, is in terminos singulos, quos eiecerit locove moverit sciens dolo malo, HS V milia nummum in publicum eorum, quorum intra fines is ager erit, dare damnas esto; deque ea re curatoris, qui hac lege erit, iuris dictio reciperatorumque datio addictio esto (30).

I have given the terms of the *lex* in more detail than is usually found because they bear on the problem, in respect of what boundary stones precisely is the offence established? Where the state 'resumes' land and developes it as a colony or municipality several types of boundary are involved. There is the outer boundary of the land designated as colony or municipality, the boundaries formed by the 'centuries' into which it is measured and the boundaries of the individual allotments assigned to settlers. The *termini* regulated by the *lex* appear to be those marking the outer boundary of the land designated as colony or municipality or those marking the division between centuries. Chapter 53 is ambiguous since the phrase *qui termini in eo agro statuti erunt* might refer to boundary stones established anywhere on the land. Indeed the obligation placed on *is cuius is ager erit* to replace or restore missing stones might suggest a boundary between individual allotments. But the phrase could refer to the owner of the land adjacent to the portion of the outer boundary which lacks the stone (31), or to the street or road separating centuries. However, in the chapter which establishes the offence of removal of a boundary stone the language clearly refers to stones marking the outer limit of the community or to those dividing centuries. It specifies the duty laid on the promoter of the community as: *in eo agro, qui ager intra fines eius coloniae ... erit, limites decimanique ut fiant terminique statuantur curato.* Then comes the clause: *quosque fines ita statuerit, ii fines eorum sunto.* The emphasis appears to be upon the establishment of the boundary of the colony or municipality or other community and the placing of stones to mark it. Yet the phrase *limites*

(30) The gist of this provision is also given by Call. D. 47.21.3.pr.

(31) So understood by A.C. CHESTER, P.R. COLEMAN-NORTON, F.C. BOURNE, *Ancient Roman Statutes* (1961), 81.

decimanique seems to refer also to the mapping out of the land into centuries; these are the terms used in centuriate measurement (32). Hence it is probable that the *lex* contemplated the placing of stones on the boundaries between centuries, which normally were used as roads or farm tracks (33). The offence of removal relates to *quique termini hac lege statuti erunt,* that is, to stones marking either the outer boundary or the roads created between centuries. There is no reference to stones marking the boundaries between individual allotments.

The offences established by the *lex Numae* and the *lex Mamilia* have in common the reference to boundary stones; otherwise they differ in all respects. Although there is some uncertainty as to the boundary stones contemplated by the *lex Numae,* it is clear that the *lex Mamilia* relates only to those established under its provisions. The offence is not that of removal (possibly accidental) in the course of ploughing but deliberate removal by any means, and it does not seem that the act of removal was viewed as an offence against the gods (34).

(32) See O.A.W. DILKE, *The Roman Land Surveyors* (1971), 87f.

(33) It is difficult to be sure of the exact meaning of the phrase *limites decimanique.* It might be used to express a contrast between *decimani* as the roads between centuries and *limites* as the tracks within centuries; or, and this seems to me more likely, the whole phrase might simply express the roads lying between centuries. See on this DILKE, *op.cit.*, 87, 88, 93, 134, 232. It is not impossible that the *lex* should have contemplated the placing of stones on paths made within the centuries. If so their function would have been to mark not the boundaries of individual allotments but the paths within a land division. Another republican statute (*lex Agraria,* 111 B.C.) refers to the placing of *termini* to mark boundaries and perhaps divisions of public land acquired by the Roman state through the capture of Corinth (96ff). Also evidenced for the same period is the use of boundary stones to mark the limits of the territory of two communities within Italy (*Sententia Minuciorum* 117 B.C., 3, 7, 13-15). On the other hand one cannot be sure that stones were regularly used at this time to demarcate public from private land. No mention is made by Livy (42.1) or Appian (*Bella Civilia* I, 18), of boundary stones in the accounts they give of the difficulties in determining the extent of public and private holdings. (I owe these references to Dr. A. LINTOTT).

(34) It does not seem that the stones used to mark the boundaries of centuries were the object of a ritual. Cf. DILKE, *op.cit.*, 98 on the distinction between centuriation and other boundary stones.

Indeed the object of the provision is unclear. It has been suggested that it may have been designed to meet acts of spite carried out by former, expropriated possessors of the land (35). This is possible. But it may also have been a 'public order' measure directed at anyone tempted to commit the nuisance of removing boundary stones. There is nothing to show that the evil to be remedied was the removal or misplacing of boundary stones in order to secure more land. The nature of the penalty (payment of a fine) and its destination (half to the local treasury and half to the person by whose means the conviction is secured) also suggest that the offence was introduced in order to preserve good order and prevent acts of vandalism within the colony or municipality (36).

Next is reported another piece of agrarian legislation from the time of Nerva:

> Call. *5 de cog.* D. 47.21.3.1: *Alia quoque lege agraria, quam divus Nerva tulit, cavetur, ut, si servus servave insciente domino dolo malo fecerit, ei capital esse, nisi dominus dominave multam sufferre maluerit.*

Nothing else is known of Nerva's law. But it seems to have been a statute of the same type as the *lex Mamilia*. The principal difference may have been the express mention of slaves, and the capital penalty introduced for them should their masters choose not to pay a fine. One suspects that the provision was intended to deal with some specific problem caused by the riotous behaviour of bands of slaves, unchecked by their masters (37).

A rescript of Hadrian marks a significant development in the law relating to *terminus motus*, and perhaps should even be regarded as introducing a new offence. Certainly it differs from the preceding rules in a number of important particulars.

(35) HINRICHS, *Geschichte der gromatischen Institutionen*, 186.

(36) On the procedure cf. RUDORFF, *Gromatici veteres* II, 246f.

(37) RUDORFF, *op.cit.*, 248 writes: so tritt noch die alte Kapitalstrafe ein. This is misleading in so far as some connection or historical continuity with the old *sacer* penalty is meant. It does not seem to me that the two have anything to do with each other.

> Call. *3 de cog.* D. 47.21.2: *Divus Hadrianus in haec verba rescripsit: 'Quin pessimum factum sit eorum, qui terminos finium causa positos propulerunt, dubitari non potest. de poena tamen modus ex condicione personae et mente facientis magis statui potest: nam si splendidiores personae sunt, quae convincuntur, non dubie occupandorum alienorum finium causa id admiserunt, et possunt in tempus, ut cuiusque patiatur aetas, relegari, id est si iuvenior in longius, si senior recisius. si vero alii negotium gesserunt et ministerio functi sunt, castigari et ad opus biennio dari. quod si per ignorantiam aut fortuito lapides furati sunt, sufficiet eos verberibus decidere'* (38).

The first question which arises is the bearing of the rescript on the earlier agrarian legislation. Is one to assume that rules introduced by Hadrian supplanted the provisions of the *lex Mamilia Roscia*, the law of Nerva and possibly other *leges* of the same character? From the width and generality of the rescript one might deduce that it was intended to apply to all cases of removal of boundary stones and that in practice it displaced the previous rules. Whether these latter counted as technically annulled might be open to doubt. However, there is also another possibility. The earlier *leges* appear to have been concerned with the establishment of particular colonies or communities and to have laid down rules only with relevance to these communities. If the rules on *terminus motus* contained in these agrarian statutes did apply only in the community which the statute itself established, then it is possible that even after Hadrian's enactment they continued in force within those communities. The plausibility of this argument depends upon the assumption that the communities governed by *leges* or charters containing rules on the removal of boundary stones were few in number. If (as is possible) it was standard practice for the governing *lex* or particular charter of a community to contain such rules the more reasonable assumption is that at

(38) The rescript is also recorded by Ulpian in the *Collatio*, 13.3.2. The main difference between the two versions is that *Collatio* contains the phrase *usus causa* between the words *lapides* and *furati sunt*. On the textual comparison see F. WIEACKER, *Textstufen klassischer Juristen* (1960), 404.

least in practice they were displaced by the rules contained in Hadrian's rescript.

The next point of interest is the type of boundary to which the rescript refers. The very fact that it is not a section of an agrarian statute suggests that it is not necessarily confined to stones on boundaries around colonies or on streets and tracks within them. Furthermore the phrase *occupandorum alienorum finium causa* yields a wide-ranging implication. It might, I suppose, be construed as relating to those who alter the boundary stones of roads and thereby manage to encroach upon their neighbour's land. Yet a more natural interpretation would refer the phrase to cases in which stones marking the boundary between two private properties had been removed or reordered. Can one find any evidence that such stones commonly existed? On this question the *libri coloniarum* provide some help (39). The details given for two colonies show that stones might be used to mark the boundaries between allotments assigned to individual settlers. Of the *colonia Florentina deducta a triumviris, adsignata lege Iulia,* one reads: *ceteri proportionales (termini) sunt et intercisivos limites servant; quos veterani pro observatione partim statutos custodiunt; qui non ad rationem vel vecturas limitum pertinent, sed ad modum iugerationis custodiendum et distant a se alius ab alio pedes sescentenos* (40). Another entry states: *Colonia Graviscos ab Augusto deduci iussa est: nam ager eius in absoluto tenebatur. postea imp. Tiberius Caesar iugerationis modum servandi causa lapidibus emensis r.p. loca adsignavit. nam inter privatos egregios terminos posuit, qui ita a se distant ut brevi intervallo facile repperiantur* (41). Not only were stones placed on the boundaries of the allotments granted to the original settlers, but, it seems from the information given in the surveying

(39) See DILKE, *Roman Land Surveyors*, 185f.

(40) *Gromatici veteres* (cited note 7) I, 213.

(41) *Op.cit.*, 220. Cf. also the details listed for a colony founded by Vespasian in Sicily where it is said: *nam sunt termini proportionales, quos milites veterani inter se emensos posuerunt et custodiunt lineas consortales*, id. 211.

manuals that settlers divided their land among their children and established stones to mark the division (42).

It seems clear, therefore, that at least in some colonies the settlers not only established boundary stones for their original lots but also subdivided the lots and marked the subdivisions with stones. One cannot be sure how prevalent this practice was. Many entries in the *libri coloniarum* record the existence of *termini* but it is difficult to determine whether they are referring only to those marking the outer boundary of the colony and its main internal boundaries (*limites*) or include also stones marking the individual allotments. Also uncertain is the question of the authorisation necessary for the placing of the stones. One entry states that stones were placed on the instructions of the emperor. Although nothing about this is said in the other entries, one has, I think, to bear in mind the possibility that some kind of authority was needed for the placing of stones around individual allotments. It is also necessary to register a doubt concerning the extent to which the allotments might be subdivided and the subdivisions marked with stones. The only case mentioned in the sources is that of a division among children.

Boundaries between individual allotments in certain colonies cannot have been the only boundaries between private properties marked by stones in the late Republic and early empire. The descriptions of the rites associated with boundary stones given by Siculus Flaccus and Ovid seem clearly to contemplate stones marking the boundaries between farms and cannot have been based upon the practices observed in some colonies (43). Yet the problem is to determine whether Hadrian's rescript applied to all stones marking the boundary between private

(42) Frontinus in *Gromatici veteres* I, 40, and cf. RUDORFF, *op.cit.*, II, 381, referring to « die gewöhnliche *divisio parentum inter liberos* durch *termini comportionales* ».

(43) Cf. the remarks of Siculus Flaccus, *Gromatici veteres* I, 163: *Territoria inter civitates, id est inter municipia et colonias et praefecturas, alia fluminibus finiuntur alia summis montium iugis ac divergiis aquarum, alia etiam lapidibus positis praesignibus, qui a privatorum terminorum forma differunt.*

properties. Perhaps the way to approach an answer is to consider what dangers may have been seen in the placing of stones by individuals along their boundaries. Suppose an individual chooses to place stones along his boundaries, perhaps in the absence of his neighbour. Subsequently the latter alleges that the boundaries have been incorrectly marked and himself removes the stones to whose position he objects. The danger is that he would thereby expose himself to criminal proceedings even though the original placing of the stone had been incorrect, perhaps deliberately so. This raises a doubt whether the rescript would have been applied in such a case. One may say that the rescript certainly applied to all cases of boundary stones established under public authority. It may also have applied to stones whose position was generally accepted within the locality, but not to those placed by individuals when they chose. An important role in determining general acceptance may have been played by the ritual associated with boundary stones. Where the land owners on both sides of the boundary had joined in making sacrifice to the stone general acceptance of the boundary as so marked would be conclusively shown (44).

The rescript provides for a more comprehensive set of offences than that of the earlier law. Although the language of *dolus, dolus malus* is not used, it seems that the phrase *occupandorum alienorum finium causa* describes roughly the type of case (or at least the main case) subsumed by the earlier provisions under the head of *dolus*. For the first time, it seems, since the archaic *lex Numae* a penalty is introduced for the removal of boundary stones without *dolus*, that is, without the intention of falsifying boundary lines. The rescript, oddly, speaks of stones 'stolen' or taken away by stealth (*furati sunt*) *per ignorantiam aut fortuito,* and the version in the *Collatio* specifies that they are taken *usus causa*, that is, presumably for building purposes. Hence the force of *per ignorantiam aut*

(44) There are references in the Latin poets to the removal of boundary stones marking private property (Horace, *Carmina* II, 18, 23f; Juvenal, *Saturae* 16, 36f). These are interesting because no secular penalty appears to be contemplated.

fortuito is not that one removes a boundary stone without knowing that one has done so but that one removes it not knowing it to be a boundary stone (45). But what of the case where one does know the stone is a boundary stone and nevertheless removes it but not for the purpose of falsifying the boundary? It hardly seems that such a case can come under either of the heads distinguished in the rescript. Would it have come under the head of removal *dolo* in the earlier provisions? This line of thought suggests either that the wording of the rescript has not been accurately recorded or that it was not intended to cover all circumstances in which boundary stones were improperly removed. In certain cases, on the latter alternative, the old law would continue to apply (46).

There are a few other texts from the late classical period which refer to the removal of boundary stones (47). On the whole these give unhelpful generalisations or summarise the gist of the enactment of Hadrian (48). One is more interesting because it raises the question of 'concurrence of actions':

> Paul *23 ad ed.* D. 10.1.4.4.: *Si dicantur termini deiecti vel exarati, iudex, qui de crimine cognoscit, etiam de finibus cognoscere potest.*

Where a *iudex* exercising *cognito* is examining an allegation that the offence of removing a boundary stone has been committed he may also examine any question thereby arising concerning the distribution of boundaries. The sort of case that arose in practice was probably one in which the defendant alleged that he had moved a boundary stone because it was incorrectly placed (49). The judge will determine not only

(45) Cf. esp. WIEACKER, *Textstufen*, 404 and 405 n75.

(46) On the question of penalties, procedure and the distinction between *splendidiores* and *humiliores* see esp. P. GARNSEY, *Social Status and Legal Privilege in the Roman Empire* (1970), 155f, 167f. 170f.

(47) Mod. D. 47.21.1; *Paul Sent.* 1.16, 5.22.2; D. 10.1.4.4; C. 9.2.1 (Alex. 222 A.D.).

(48) The fullest is *Paul Sent.* 5.22.2 which elaborates the distinctions between classes of persons drawn in Hadrian's rescript.

(49) Cf. L. RAGGI, *Studi sulle impugnazioni civili nel processo romano* I (1961), 200.

whether the offence of removal has been committed but also what the correct position of the boundary is. However, the real problem again concerns the type of boundary. I have suggested that the offence of removal was concerned mainly with stones marking 'public' boundaries, that is, the boundaries of communities or of streets and public places within these communities. It is not impossible that a dispute over boundaries should be connected with the removal of such stones. There may, for example, be a question whether a road takes land which an individual alleges is his. But much the more likely situation to yield a dispute over boundaries is that in which stones marking a boundary between privately owned estates or farms have been removed. I have already argued that there is at least some doubt whether stones on many 'private' boundaries came within the terms of the rules prohibiting removal. Consequently it seems to me unlikely that the cases of 'overlap' between removal of stone and dispute as to boundary would have been frequent. Most cases involving disputes over boundaries and the correct placing of stones would have arisen between adjacent land owners. These properly were the province of the *actio finium regundorum* (50) (51).

(50) The *controversia de positione terminorum* mentioned by the *agrimensores* appears to be the type of dispute that would have fallen under the *actio finium regundorum*. See RUDORFF, *Gromatici veteres* II, 431f and the references there given.

(51) I am grateful to Dr. A. LINTOTT for his comments on a draft of this paper.