PROBLEMS OF THE ROMAN CRIMINAL LAW

BY

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IN TWO VOLUMES

VOLUME I

OXFORD
AT THE CLARENDON PRESS
MDCCCCXII

HENRY FROWDE, M.A.
PUBLISHER TO THE UNIVERSITY OF OXFORD
LONDON, EDINBURGH, NEW YORK
TORONTO AND MELBOURNE

IN MEMORIAM

A. H. J. GREENIDGE

RERVM ROMANARVM PERITISSIMI

MORTE PRAEMATVRA ABREPTI

PREFACE

THIS book has developed out of a criticism of Mommsen's *Römisches Strafrecht*, published in the *English Historical Review* for April 1902. Paragraphs from that article are by the kind permission of the Editor embedded in these pages.

I ventured at the time to prophesy that future workers in the field would necessarily take Mommsen's great treatise as the foundation of their labours. As my work progressed, I have found this more and more true in my own case, and I should wish my book to be regarded as, in the main, a supplement to Mommsen. In the first place the presence of Mommsen's *Strafrecht* absolves me from the task of attempting a complete and systematic account of the Roman Criminal Law; and I am thus enabled to concentrate attention on certain definite problems and difficulties, lying thickly along the main lines of the subject, which seem to call urgently for solution; in dealing with these, however, I have endeavoured to indicate something of a continuous thread of principle and development. In the second place, the narrowing of the field enables me to attempt that which Mommsen declared impossible for himself in the span of life allotted to him, namely, to discuss the arguments and opinions of modern scholars on the various questions in dispute. Besides criticizing the doctrines of Mommsen himself, I have passed in review some of those of Danz, Geib, Girard, Greenidge, Ihering, Madvig, Maine, Rein, Wlassak, and Zumpt, and frequent quotations from these writers find

their place in my book. The names of many others will be mentioned in due course. The critical method may seem to be contentious, but it is difficult in any other way fairly to present the questions at issue. It must be remembered likewise that the matters in which I have ventured to differ from these eminent scholars are necessarily brought into prominence, and that they show out before a background of general agreement. This is notably the case whenever I find myself disputing with Mommsen. His authority is so great that his pronouncements can hardly ever be passed over in silence, and I have felt bound to express in each case either concurrence or dissent. I have something of the same feeling towards Girard and Greenidge.

Two excellent criticisms of Mommsen's *Strafrecht* have been published, one by Esmein in the *Nouvelle Revue Historique* (1902), the other by Hitzig in the *Schweizerische Zeitschrift für Strafrecht, Revue Pénale Suisse* (1900); from these I have gathered many valuable hints. I must, however, confess a certain disappointment at the small amount of interest which seems to have been taken in Mommsen's great work by jurists and historians. The learned periodicals cordially greeted the appearance of the book and in some cases published good summaries of its contents, but so far as I am aware they have not, except in the two instances named above, attempted any detailed criticism. In one instance, however, Mommsen has been treated with the respect of which he is worthy, that is to say by Girard in his *Organisations Judiciaires*, which, so far as it has yet gone, supplies an admirable commentary on the *Strafrecht*. I consider myself unfortunate in the circumstance that Girard's first volume appeared simultaneously with my own review of Mommsen, and that I thus committed myself in print to some opinions on the earlier period which I have seen reason

to modify in the present book after studying Girard's work. The same would very likely be the case in my discussion of the more numerous and interesting problems of the next age of the Roman Criminal Law, if I could see how they are to be treated by Girard; but my book goes to press without my having the advantage of consulting the second volume of the *Organisations Judiciaires*, for which scholars are still waiting.

For another opportunity missed I have myself to blame. Until the publication in the present year of Girard's *Mélanges de Droit Romain* I was ignorant of the long and instructive controversy between himself, Wlassak, and Lenel respecting the Lex Aebutia, which ought to have been noticed in my fourth and fifth chapters.

The first number of the *Journal of Roman Studies* contains an article on 'Some questions of Roman Public Law', by Professor J. S. Reid, of Cambridge. This paper, likewise, has come into my hands too late for me to make use of it in the text. I am glad to find myself in agreement with Professor Reid on several points discussed in the following pages.

Finally, I would record my thanks for the valuable assistance supplied me by friends who have read portions of my book in proof, or have given information and criticism on individual difficulties. I must mention more especially A. C. Clark, Fellow of Queen's College, Oxford, Professor A. V. Dicey, Fellow of All Souls College, E. N. A. Finlay, Scholar of Balliol, W. Warde Fowler, Fellow of Lincoln College, W. M. Geldart, Professor of English Law, and H. Goudy, Professor of Civil Law, both Fellows of All Souls, Professor Haverfield, Fellow of Brasenose, E. Hilliard, Fellow of Balliol, Andrew Lang, late Fellow of Merton, J. B. Moyle, Fellow of New College, H. J. Roby, late Fellow

of St. John's College, Cambridge, and Professor Vinogradoff, Fellow of Corpus Christi College, Oxford. Death has deprived me, since I commenced this task, of the aid of two Oxford friends, to whom I should have looked with confidence for sympathetic interest and counsel, Professor Henry Pelham, President of Trinity College, and A. H. J. Greenidge, Fellow of St. John's College. I have to thank Walter Gibson of Balliol College for welcome assistance throughout the Index, of which the Second and Third Parts are almost entirely his work. I have likewise to express my acknowledgements to the authorities of the University Press for their patience and indulgence in the matter of revises and corrections in the course of the printing.

J. L. STRACHAN-DAVIDSON.

Balliol College, Oxford
April, 1912

TABLE OF CONTENTS

VOLUME I

	PAGES
Preface	v–viii
List of Problems discussed	xi–xxi
Chapter I. Religion as a Source of Law	1–27
Chapter II. Criminal Law and the Family	28–35
Chapter III. Self-help as a Source of Law	36–45
Chapter IV. The Legis Actio Sacramenti	46–66
Chapter V. The Formulary System	67–84
Appendix to Chapter V. Exherision of a Son	85–95
Chapter VI. The Magistrate as a Criminal Judge	96–114
Chapter VII. The Jurisdiction of the Magistrate outside the Walls	115–126
Chapter VIII. Appeal to the People	127–145
Appendix to Chapter VIII. Provocatio in Lex Acilia	146–151
Chapter IX. Capital Trials before the People	152–169

PAGES

CHAPTER X.
JURISDICTION IN CASE OF PECUNIARY PENALTIES 170–187

CHAPTER XI.
THE TRIAL OF CAIUS RABIRIUS . . . 188–204

CHAPTER XII.
THE RUDIMENTS OF TRIAL BY JURY . . 205–224

CHAPTER XIII.
TRIALS BY SPECIAL COMMISSION, AND THE SENATUS CONSULTUM ULTIMUM 225–245

VOLUME II

CHAPTER XIV.
JURY TRIALS FOR EXTORTION 1–15

CHAPTER XV.
CAPITAL TRIALS BEFORE JURY COURTS . . 16–50

CHAPTER XVI.
MOMMSEN'S THEORY OF EXILIUM UNDER SULLA'S LAWS 51–74

CHAPTER XVII.
THE JURORS 75–111

CHAPTER XVIII.
PROCEDURE IN TRIALS BEFORE JURIES . . 112–152

CHAPTER XIX.
CRIMINAL COURTS UNDER THE PRINCIPATE . 153–175

CHAPTER XX.
APPEALS UNDER THE PRINCIPATE . . . 176–217

INDEX 219–287

I. SUBJECT-MATTER 221–246

II. ANCIENT AUTHORITIES 247–282

III. MODERN AUTHORITIES 283–287

LIST OF PROBLEMS DISCUSSED IN THIS BOOK

VOLUME I

CHAPTER I (RELIGION AS A SOURCE OF LAW) . Vol. I, pp. 1–27

Is the death-punishment a human sacrifice? . pp. 1–3 and pp. 5–9

Is *sacratio* merely a threat of capital punishment, following on a legal trial and conviction? (Mommsen) p. 6 and pp. 17–19

Do *θῦμα* and *θύεσθαι* applied to the *homo sacer* mean public execution? . . . . . pp. 5, 6

or—Is the *homo sacer* devoted to the vengeance of Heaven and so liable to be killed by any one? . . . p. 7 seq.

What is the parallel between the *homo sacer* and the sacrificial beast? . . . . . pp. 8, 9

To what cases was outlawry by *sacratio* specially applicable? p. 10 seq.

Were the tribunes empowered to execute without appeal the man who has incurred *sacratio*? . . . . pp. 14–17

Did the Lex Valeria authorize tyrannicide? . . pp. 17–19

What is the difference between the *sacratio* and the oath of vengeance? . . . . . p. 18 n. 2

Does the transgressor of international law, surrendered to the enemy but refused by them, forfeit life or citizenship? pp. 19–21

What is the derivation and early meaning of 'parricida'? p. 22

Is the death of the parricide in the sack the survival of the ancient punishment for all murderers? (Mommsen) . p. 22

Or is it a *procuratio prodigii*? (Brünnenmeister) . . . p. 24

What is the meaning of *sanguineae virgae*? . . . p. 25 n. 3

How does the division between spiritual and secular authority arise? . . . . . pp. 25–27

CHAPTER II (CRIMINAL LAW AND THE FAMILY) . Vol. I, pp. 28–35

Is the power of the king to punish derived from that of the *paterfamilias*? . . . . . pp. 28, 29

Is the Roman monarchy patriarchal? . . . . . p. 29

Were the Vestal Virgins in the *patria potestas* of the pontiff? . . . . . pp. 29–32

By what right does the pontiff scourge to death without appeal the paramour of the Vestal? . . . . . p. 30
Is the *tutela gentilium* over women equivalent to *patria potestas*? . . . . . pp. 33, 34
Why are criminous women handed over for punishment to *cognati* and *propinqui*? . . . . . pp. 32–35

CHAPTER III (SELF-HELP AS A SOURCE OF LAW) . Vol. I, pp. 36–45
How does self-help lead to magisterial intervention? . . p. 37
Is the trial of *delicta* under the forms of private action a portion of the criminal law? (Mommsen) . pp. 39, 40
What are the characteristics of the private criminal law? . p. 40
How does it develope out of revenge? . . . pp. 41–45
Does the magistrate assist the injured man to exact vengeance? . . . . . pp. 43, 44

CHAPTER IV (THE LEGIS ACTIO SACRAMENTI) . Vol. I, pp. 46–66
Is the *sacramentum* an oath by which each party to a suit affirmed the righteousness of his plea? (Danz) . pp. 46 seq.
Could such an oath involve the community in guilt? . . p. 48
Does the civil jurisdiction of the king arise out of his criminal jurisdiction in the matter of a false oath? (Girard) . . . . . p. 48
Is the sacrifice of a beast always the substitute for the sacrifice of a man? . . . . . pp. 49–51
What is the interpretation of the fragment of Cato in Festus' article *sacramento*? . . . . . pp. 52–54
Were the functions of *triumviri capitales* judicial or executive? p. 53 n. 1
Is the phrase 'actio sacramenti' earlier or later than the legal wager? . . . . . pp. 55, 59
How are we to understand the Homeric trial-scene? . p. 59
Does *sacramentum* always mean 'oath', or does it sometimes mean 'animals destined for sacrifice'? . . pp. 58, 60
Is the magistrate properly said *judicare*? pp. 61, 62 and p. 76 n. 3
Was there any law (prior to the Twelve Tables) which compelled the magistrate to refer questions to a private *judex*? or did the change from *judicare* to *judicari jubere* develope from custom? . . . . . pp. 62, 63
Are the functions of the praetor only automatic? . pp. 64–66

CHAPTER V (THE FORMULARY SYSTEM) . . . Vol. I, pp. 67–84
Has the praetor any voice in the selection of the *judex*? pp. 67, 68
What was effected by the Lex Aebutia? . . . pp. 69, 70

Was the procedure by formula substituted once for all for the 'legis actiones' or did the two exist side by side? . . p. 71 and below p. 210
How did the authority of the praetor's edict develope? . p. 72
What is the distinction between proceedings *in jure* and *in judicio*? Are the two essentially opposed to one another? p. 76 with p. 62 above
Why is the verdict of the juror not liable to appeal? . . p. 74
How far are recorded decisions of the Courts a source of law at Rome? . . . . . pp. 78 seq.
What is meant by Justinian's edict against case-law? . p. 79
What are the defects of case-law? and how did the Romans meet them? . . . . . pp. 80–84

APPENDIX TO CHAPTER V (EXHERISION OF A SON) Vol. I, pp. 85–95
Was express *exheredatio* of *sui* necessary under the Law of the Twelve Tables and previously? . . . . pp. 86, 92
Had the *filiusfamilias* a *condominium* in his father's lifetime? . . . . . p. 87
Under what circumstances does the birth of a *postumus* 'break' a Will? . . . . . pp. 88, 93
What is the sense of 'ceteri exheredes sunto'? . . pp. 90, 92
Was this phrase used by the testator in the case of the soldier-son? . . . . . p. 90

CHAPTER VI (THE MAGISTRATE AS CRIMINAL JUDGE) Vol. I, pp. 96–114
What is the place of the magistrate in criminal jurisdiction? p. 96
What is the relation of *judicatio* and *coercitio*? . . pp. 97–100
What is the meaning of *imperium militiae, gladii potestas, imperium merum*? . . . . . pp. 100–103. See also below, Vol. II pp. 166–169
Does the public criminal law begin only with the Valerian law? . . . . . pp. 103, 104
What was the nature of the earliest judicial inquiries? . p. 104
What crimes are recognized as capital in the Twelve Tables? p. 107
Do they include bribery at elections? . . . . . p. 106
Or lampooning? What is *malum carmen*? . . . p. 107 n. 3
Is the proceeding by magistrate and *comitia* applicable only where a previous law has been broken? (Mommsen) pp. 105, 106
What was the procedure in case of a new crime? . . p. 108
Are the several magistrates legally limited in the species of crime with which they deal? . . . . . p. 108
What is the *verberare* forbidden in the Valerian law? p. 110 n. 1
What are the limits of magisterial *coercitio*? . . . p. 109

On what occasions are these limits overstepped? . p. 110 seq.
How are we to account for the case of Matienus, and other similar ones? . . . . . p. 111 seq.
What is the function of the tribunate in regulating such cases? . . . . . p. 112
What are the consequences of the doctrine of magisterial jurisdiction on the severity of the Roman criminal law? p. 114

CHAPTER VII (THE JURISDICTION OF THE MAGISTRATE OUTSIDE THE WALLS) . . . . . Vol. I, pp. 115–126

Was a Latin under the later Republic liable to be scourged and beheaded? . . . . . p. 116
Was a Roman legally protected from such punishment outside Rome? . . . . . p. 115 seq.
Did Verres break any positive law when he crucified a Roman citizen? . . . . . pp. 118, 119
How do we account for the centurion's vine-stock? . . p. 119
What is the explanation of the action of Scaevola, of Crassus, of Quintus Cicero, and of Galba? . . . . pp. 121–124
To what date are we to attribute the immunity of Roman Citizens? . . . . . pp. 124–126

CHAPTER VIII (APPEAL TO THE PEOPLE) . Vol. I, pp. 127–145

By what process does the People judge in cases of life and death? . . . . . p. 127 seq.
Is it by a sentence *in judicio* authorized by a mandate of the magistrate acting *in jure*? (Zumpt) . pp. 128–131 and p. 138
Or is it by a Bill of pains and penalties directed against the offender in each case? (Maine) . . . . . p. 131 seq.
Or is the preliminary always a condemnation by a magistrate, from which the prisoner appeals to the People for pardon? (Mommsen) . . . . . pp. 133–137
What conclusions are to be drawn from Cicero's account of criminal jurisdiction in the *de Legibus*? pp. 135, 136 and p. 141 n. 1
What is the significance in criminal trials of the phrases *provocare, certare, perduellionem judicare*? . . pp. 134–136
What are the various senses of '*injussu populi*'? . p. 139 n. 1
What happens if the People fail to pronounce, or if the prisoner fail to say *provoco*? . . . . . pp. 138–140
Was *provocatio* allowed to women? . . . . pp. 141–143
In what sense was there *provocatio* from the King? . p. 144 n. 1
What was the sanction of the *lex Valeria*? . . . p. 144
What is the significance of the removal of the axe from the fasces? . . . . . p. 145

APPENDIX TO CHAPTER VIII (PROVOCATIO IN LEX ACILIA) Vol. I, pp. 146–151

Was *provocatio* offered as a reward to the provincial accuser under the *lex Acilia* if he declined the Roman citizenship? or was this alternative confined to the Latins? p. 146 seq.
Was the attainment of the Roman citizenship by magistrates a privilege of all Latin towns or only of the later Latin colonies? . . . . . pp. 150, 151

CHAPTER IX (CAPITAL TRIALS BEFORE THE PEOPLE) Vol. I, pp. 152–169

Are consuls and praetors forbidden by law to pronounce sentences liable to appeal, or do they only refrain by custom from so doing? . . . . . p. 152
Was a special decree of the People required to constitute *duumviri perduellionis*? . . . . . p. 153
Were they elected or nominated? . . . . . p. 153
How are quaestors and tribunes enabled to preside at the *comitia centuriata*? . . . . . p. 157
How are we to interpret 'dum aut ad praetorem aut ad consulem mittas auspicium petitum'? . . . . . p. 158
Does the magistrate consult the Senate before putting the question to the People at a criminal trial? . . p. 159
What is the cause of the disappearance of the death penalty? . . . . . pp. 160–164
What is the explanation of cases of prolonged imprisonment? . . . . . pp. 164, 165
How are we to understand Caesar's *sententia* on the Catilinarians? . . . . . pp. 165, 166
What was done with the 'common malefactor' at Rome? . . . . . p. 167 seq.

CHAPTER X (JURISDICTION IN CASE OF PECUNIARY PENALTIES) . . . . . Vol. I, pp. 170–187

What is the meaning of *multa maxima* or *suprema*? pp. 170–172
Why do the superior magistrates never inflict a fine above this limit? . . . . . p. 173
Is there any value in the distinction between *multa dicta* and *multa irrogata*? . . . . . pp. 174–177
What is the meaning of *irrogare multam*? . . pp. 175–177
What is the import of the two methods of procedure indicated by Papinian's distinction between *poena* and *multa*? pp. 179–182
How are these words used in practice? . pp. 179 n. 4 and 181
What is the meaning of *in sacrum judicare*? . . . p. 182
What is the history of *consecratio bonorum*? . . pp. 183–185
Why was its employment by the tribunes ineffectual? pp. 186–187

CHAPTER XI (THE TRIAL OF CAIUS RABIRIUS) . Vol I, pp. 188–204

On what occasion was Cicero's extant speech *Pro Rabirio* delivered? . . . . . p. 189 seq.
Was it before or after Metellus struck the flag on the Janiculum? . . . . . pp. 192–194
What does Cicero mean by 'judicium perduellionis a me sublatum'? . . . . . pp. 192 and 197
Was the *multae irrogatio* of Labienus subsequent to or parallel with the action of Caesar as duumvir? . . . p. 198
Why did Caesar yield to Metellus' intervention? . p. 201 seq.

CHAPTER XII (THE RUDIMENTS OF TRIAL BY JURY) Vol. I, pp. 205–224

What is the function of a *consilium*? . . . . pp. 205, 206
What is the meaning of Gaius' division of *judicia* into *legitima* and *imperio continentia*? . . . . . p. 207
Who are the *arbitri* of the Twelve Tables? . . . p. 208
Who are the *decemviri litibus judicandis*? . . . . p. 209
What are the functions of the *centumviri*? p. 210 (see above, p. 77)
What devices were employed by the ancients to enable a foreigner to sue and be sued? . . . . . p. 211
How are *recuperatoria judicia* used for this purpose? . p. 212
What is the connection between *recuperatoria judicia* and *testimonii denuntiatio*? . . . . . p. 213
What were the advantages of *recuperatoria judicia*? pp. 214, 215
Did the system arise in the court of the *praetor peregrinus* and spread to that of the *praetor urbanus*? pp. 216–218 and p. 223
How were *recuperatores* used in the civil *actio injuriarum*? . . . . . pp. 218–220
What change did Sulla make in this matter? . . . p. 220
To what extent do *recuperatoria judicia* prevail in the *Municipia*? . . . . . pp. 221, 222
Were they ever employed in an *actio furti*? . . pp. 222, 223
What is their connection with cases of *repetundae*? . . p. 224

CHAPTER XIII (TRIALS BY SPECIAL COMMISSION, AND THE SENATUS CONSULTUM ULTIMUM) . . . Vol. I, pp. 225–245

On what occasions did Special Commissions exercise Capital jurisdiction in the Middle Republic? . . . p. 226 seq.
What are the distinguishing features of these *quaestiones*? . pp. 229, 230, 236
Should a distinction be drawn according as the *quaesitor* is or is not bound by the vote of his *consilium*? . pp. 232 and 238
Is Mommsen right in bringing these State Trials into the same category as the proceedings under the *Senatus Consultum Ultimum*? . . pp. 232 and 237 and 240 seq.

How are we to analyse the case of the Bacchanalians? Were they allowed appeal? . . . . . p. 232 seq.
Had the Senate the right to institute such Commissions without a decree of the People? . . . pp. 235, 236, 239, 240
What alterations were made by the Law of Caius Gracchus? pp. 240, 244
What is the nature of the *Senatus Consultum Ultimum*? pp. 240–245
When was it first employed? . . . . . p. 241
How does it avoid traversing the law of Caius Gracchus? p. 240 seq.

VOLUME II

CHAPTER XIV (JURY TRIALS FOR EXTORTION) . Vol. II, pp. 1–15

Why did the proconsuls of Spain condemned for *repetundae* in 172 B. C. go into exile? . . . . . pp. 2–4
Is a trial for *repetundae* under the *lex Calpurnia* of 149 B. C. 'a private suit with a sharpened process'? (Mommsen) pp. 5 and 17 n. 2
What is the title and date of the *lex repetundarum*, the fragments of which are extant? . . . . . p. 6
What matters may be included in the *litis aestimatio* for *repetundae*? . . . . . pp. 8, 9
Were any penalties, other than pecuniary, attached to condemnation for *repetundae*? . . . . . pp. 10–12
Did persons condemned for *repetundae* habitually betake themselves to *exilium*? . . . . . pp. 11, 15
Was this the necessary result of condemnation? . pp. 13, 14

CHAPTER XV (CAPITAL TRIALS BEFORE JURY COURTS) . Vol. II, pp. 16–50

Is a jury court a 'Committee of the Legislature' 'exercising all powers which that body was in the habit of exercising'? (Maine) . . . . . p. 16
Do the jury courts exercise any discretion in the penalty awarded? . . . . p. 17. See also above, p. 8 n. 4
Are the powers of a jury court limited by those of the assembly which has appointed it? (Maine and Beesly) . p. 18
Does such limitation account for the disappearance of the death penalty? . . . . . pp. 18, 19
What change in respect of the infliction of death is effected by the substitution of jury courts for comitial trials? pp. 20, 24
What jury courts existed before Sulla, and what were established by the *leges Corneliae*? . . . . . pp. 20–22
What is the 'poena legis Corneliae'? . . . . . p. 23

What is *exilium*? Does Cicero's account of it in the *pro Caecina* hold good only for the period before Sulla? . pp. 24–29
What is the meaning of *aquae et ignis interdictio*? . p. 30 seq.
Is it equivalent to *proscriptio* and *sacratio capitis*? . pp. 31–33
Did the sentence of *aquae et ignis interdictio* admit of degrees of efficacy? . . . . . pp. 33–35
How are we to account for the presence in Italy of Pompeius Rufus and Oppianicus? . . . p. 35 seq. and below p. 69
What was the local limit of *interdictio*? . . . pp. 35, 37
What is the difference in the effect of *aquae et ignis interdictio*, according as the *interdictus* has or has not become the member of another State? . . . p. 39 and below p. 54
How did Sulla connect the *aquae et ignis interdictio* with the verdict of a jury? . . . . . p. 40 seq.
What is the difference in legality between an absolute and a conditional sentence? . . . . . pp. 41, 42
Did the People by the *lex Fufia* in 61 B.C. pass against Clodius a sentence of death by *interdictio*, but conditional on the finding of a jury? . . . . . pp. 41 and 44
And similarly on Caesar's *rogatio* in 46 B.C. against all whom a jury should find guilty of *vis* or *majestas*? . . . p. 48
Why is subsequent appeal to the people barred in such cases? . . . . . pp. 48, 49
What is the analogy between such trials and the civil suits under the formulary system? and what is the part played in them respectively by the People, the president of the Court, and the jurors? . . . . . p. 43 seq.
From what sources are the various features of the jury-trials borrowed? . . . . . pp. 49, 50

CHAPTER XVI (MOMMSEN'S THEORY OF EXILIUM UNDER SULLA'S LAWS) . . . . . Vol. II, pp. 51–74
Is *interdictio* truly described as a death sentence? . pp. 51, 52
How may a man shelter himself from the execution of a Roman sentence? . . . . . p. 52
Does the *interdictus* cease to be a Roman? pp. 53–55 and 68 seq.
What changes in the effects of *interdictio* were introduced by the emperor Tiberius? . . . . . pp. 55–58
Why cannot the *deportatus* make a Will? . . . . . p. 58
Does the significance of *solum vertere exilii causa* remain unchanged down to the time of Tiberius? . . pp. 56, 60
Is *exilium* under Sulla's law merely *relegatio*? (Mommsen) pp. 61–65
Is there any contradiction between the accounts of *exilium* given by Polybius and Sallust? . . . . pp. 61–64

What is the opposition between *interdictio* and *relegatio*? pp. 67–69
Did Oppianicus become an *exul*? . . . . . pp. 69, 70
How are we to explain the disqualification for office of condemned men in the *lex Julia Municipalis*? . . pp. 70–72
Is the evidence conclusive against Mommsen's theory about Sulla's changes? . . . . . pp. 73, 74

CHAPTER XVII (THE JURORS) . . . . Vol. II, pp. 75–111
What was the number of names on the *album* under Aurelius Cotta's Law? . . . . . pp. 75, 76
How are we to disentangle the conflicting accounts of our authorities as to the jury-laws of Caius Gracchus, of Caepio, and of Livius Drusus? . . . . . pp. 76–81
Can regulations respecting the juries find a place in laws dealing with particular offences, or are they always in separate *leges judiciariae*? . . . . . pp. 81–83
Was there before Sulla any general *album* from which jurors to try all offences must be taken? . . pp. 83, 84, 109
Who are the *Gracchani judices*? . . . . . p. 85 seq.
Is the treatise of Quintus Cicero *de Petitione Consulatus* genuine? . . . . . p 89
In what senses is the phrase *equester ordo* used? . pp. 85–89, 94
How are the *equites Romani* to be distinguished from the *tribuni aerarii* in Cotta's Law? . . . . pp. 90–93
What is the number of jurors in individual trials? . . p. 97
What are the various methods of empanelling juries? p. 98 seq.
What is the meaning of *edititius judex*? . . . p. 98 n. 2
What were the arrangements for challenge at Verres' trial? pp. 99–101
How was the jury selected in the trial of Roscius of Ameria? p. 102
Does the method of selection described in *pro Plancio*, 17. 41, and in the Bobiensian scholia on the passage, refer to the period between Glaucia and Sulla or to the proposals of Servius Sulpicius Rufus in 63 B.C.? . . . pp. 103–108
What is meant by 'non ex delectis judicibus'? . . pp. 105, 109
What were the provisions of the *lex Licinia de Sodaliciis*? p. 108 seq.
How were juries empanelled in Pompey's sole consulship? p. 111

CHAPTER XVIII (PROCEDURE IN TRIALS BEFORE JURIES) . Vol. II, pp. 112–152
What are the main features of the 'accusatorial' as opposed to the 'inquisitorial' procedure? . p. 112, with pp. 164, 165
What was the order of speeches and of examination of witnesses in a Roman court? . . . . . pp. 113, 114

What is the difference between Roman and English procedure regarding the evidence of absent witnesses? pp. 115–118
What is the relative importance of the witnesses and the reputation of the prisoner? . . . . . pp. 119–121
Had the Romans any 'Law of Evidence'? . . . p. 121 seq.
What evidence, admissible at Rome, would be excluded by the English practice? . . . . . pp. 121–124
How is the exclusion of evidence conditioned by the functions assigned to the President of the Court? . . . p. 125
Under what conditions was the evidence of slaves admitted? pp. 126–128
What is the meaning of *ire in consilium*? p. 128, with p. 46 (above)
What is the effect of neutral votes, *non liquere* and *sine suffragio*? . . . . . pp. 129–134
Why are the votes of the three orders unequal in the trials in Pompey's sole consulship? . . . . . p. 135
Did the presiding magistrate vote as one of the jurors? . p. 136
What are the penalties for *praevaricatio* and *calumnia*? pp. 137–139
Did the *lex Remmia* prescribe branding? . . . pp. 140–142
What courts tried cases of murder and other serious crime committed by Roman citizens in the *municipia*? . pp. 142–152

CHAPTER XIX (CRIMINAL COURTS UNDER THE PRINCIPATE) Vol. II, pp. 153–175
What is the nature of the evidence supplied by the *Digest* and the *Codes*? . . . . . pp. 153–156
How did the jury-system disappear? . . . . pp. 156–158
What is the history of *cognitio*? . . . . . p. 159
What is the procedure *extra ordinem* under the Principate? pp. 160–161
In what respects does criminal justice become more elastic under the Principate? . . . . . p. 161
What are *crimina publica* and *crimina extraordinaria*? . p. 162
What is *stellionatus*? . . . . . p. 163
How far does the 'accusatorial' disappear before the 'inquisitorial' procedure? . . . . . pp. 164, 165
What is the *jus gladii* and how is it conferred? . . pp. 166–169
What is the distinction in the matter of liability to punishments between *honestiores* and *humiliores*? . . . pp. 170–175
What are the privileges of *decuriones*? . . pp. 171, 172 and 175

CHAPTER XX (APPEALS UNDER THE PRINCIPATE) Vol. II, pp. 176–217
How did *provocatio* come to be used as synonymous with *appellatio*? . . . . . p. 176

What is the importance of the distinction between appeals which quash and appeals which alter a sentence? . p. 177
How are *consultatio* and *supplicatio* distinguished from *appellatio*? . . . . p. 178. See also below, p. 202 n. 1
What is the practice at different epochs with regard to the denial of the jurisdiction of provincial governors over senators? . . . . . pp. 179, 180
In what cases may the principle of the *forum delicti* be overridden? . . . . . p. 179 n. 2, and p. 180
In what cases must the emperor be consulted before sentence is passed? . . . . . p. 181
What exceptions are found to the principle that all capital cases admit of appeal? . . . . . pp. 182–184
How far are the rescripts of the emperor conclusive? pp. 184, 185
What was done with prisoners pending appeal? . pp. 187–189
What is the procedure in the personal hearing of appeals by the emperor? . . . . . pp. 189–191
To whom do the phrases *auditorium sacrum*, and *sacra vice* apply? . . . . . pp. 192–194
Do they invest their possessors, especially the *praefectus urbi*, with inappellability? . . . . . p. 194
Is appeal or *supplicatio* allowed from the sentence of a *praefectus praetorio*? . . . . . p. 195 seq.
What is the meaning of *ad comitatum nostrum*? . pp. 199, 200
And of *praefectus praetorio qui est in comitatu nostro*? . p. 200 seq.
What is the constitution of the appeal Court as finally established? . . . . . p. 202
How is the possibility of appeal affected by the political and military disorder of the later Empire? . . pp. 203–205
What abuses prevailed in the law courts of this period? . pp. 205 and 209 seq.
What is the nature of *patrocinium*, and what scandals arose from this practice? . . . . . pp. 211–216
How did the clergy interfere with the course of Justice? . p. 217

CHAPTER I

RELIGION AS A SOURCE OF LAW

THE infliction of death, by public no less than by private vengeance, may once have been nothing more than the realization of the brutish instinct, 'hates any man the thing he would not kill?' But with growing reflection some further motive and justification comes to be demanded by the conscience of society, and this justification is sometimes found in the doctrine that the execution is a sacrifice to an offended deity, whose wrath might otherwise fall on the whole community. It is a readily accepted article of primitive faith that the evil thing must be put away from amongst us, if the nation is to escape from being involved in guilt. Thus it was that the seven sons of Saul were delivered over to the Gibeonites, who 'hanged them up unto the Lord in Gibeah', and 'after that God was entreated for the land'[1] and the famine ceased. Religious obligation has thus insinuated itself to account for the infliction of punishment, and we reach the stage of which Girard[2] writes: 'At Rome the first executioner was a sacrificer: in old times there was no capital execution which was not performed in honour of some god.'

This conception, though over-ridden by considerations more appropriate to civilized man, has left some traces on the later doctrine and practice of the Romans. So far as

[1] 2 Sam. xxi. 14.

[2] Girard, *Organisations Judiciaires*, p. 33. Girard speaks of a comparatively advanced and reflective people. Savages, such as the aborigines of Australia, have capital punishment, but are ignorant of sacrifice.

I know, there is only one instance in historical times of a normal execution being described as a sacrifice, that namely of the harvest-thief, who is ordered in the Twelve Tables 'Cereri suspensum necari'.[1] But the similar punishment ordained for Horatius[2] in case his appeal had failed leads one to conjecture that here too the notion of an offended deity was not wanting. Possibly the burning of the incendiary prescribed in the Twelve Tables[3] may likewise have been meant as an offering to the fire-god whose element had been misused; but our texts contain no such reference, and it may be merely a case of the *lex talionis*.

The presence of the axe as the death-dealing implement in the *fasces* of the magistrate seems to indicate beheading as, from the first, the prevailing method of execution. This method survived wherever the *imperium* was unfettered, as for the dictator and, outside the walls, for the consul; or again when the magisterial act of power was directed against unprivileged foreigners. All this seems to show that the axe was in old times the regular instrument of death. It is probably more than fancy which connects this weapon with the instrument by which sacrificial victims were in all ages of Roman society immolated before the altar.[4] There is a strange story in Dio Cassius' account of Caesar's dictatorship, which may serve, if not as proof of the theory, yet as showing that the human criminal might sometimes be offered up with the same solemnities as the brute victim—'two men[5] were slain as victims with a kind of ritual;

[1] Bruns, *Fontes Juris Romani*[7], p. 31.

[2] 'Infelici arbori reste suspendito,' Livy, I. 26. 6.

[3] Bruns, *Fontes*[7], p. 31.

[4] Girard (*Org. Jud.*, p. 34, n. 1) aptly quotes Florus' (*Epit.* I. 21) description of the execution of Roman envoys by the Illyrians, 'ne gladio quidem sed ut victimas securi percutiunt.'

[5] Dio Cassius, XLIII. 24. 4. Mr. Warde Fowler has pointed out to me the curious parallelism of the details with those described in Festus ad voc.: 'October Equus appellabatur, qui in Campo Martio mense Octobri immolabatur. De cujus capite magna erat contentio inter Suburanienses et Sacravienses, ut hi in Regiae pariete, illi ad turrim Mamiliam id figerent.'

and the reason for this I cannot tell, for it was not prescribed by the Sibyl or any other such oracle; anyhow, they were sacrificed on the Campus Martius by the pontiffs and the priest of Mars, and their heads were set on the Regia'. These were certainly criminals, and Mommsen's explanation—'that this is without doubt a recurrence to an antique form of execution'—may perhaps be accepted as the most probable solution.

A further token of the religious obligation on which the criminal law rested may be found in the use of the famous word *sanctio* to denote the penalty proposed for breaking a law; this is evidently connected with *sanctus*, *sacer*, and *sacratio*. These last two words, however, *sacer* and *sacratio*, bring us within sight of a difficult problem. One would expect to find these words used in the closest connexion with the quasi-sacrificial execution by the axe. But, on the contrary, we find them over and over again in cases where there was no execution at all resembling a sacrifice. The most notable instances are from the proceedings of tribunes who employ a method quite different. Our best authority, Festus,[1] when he attempts to define 'sacer homo', gives a most perplexing utterance. On the one hand his description, 'sacer homo is est quem populus judicavit ob maleficium,' shows that there is no incon-

[1] Festus, a writer of the Antonine age, epitomized the work of Verrius Flaccus who lived in the time of Augustus, and was in turn epitomized by Paulus Diaconus some centuries later. All the information therefore which we gather from the fragments of Festus and Paulus really dates back to Verrius Flaccus, though of course it may have been somewhat contorted in the passage from hand to hand.

sistency between *sacratio capitis* and a proper criminal trial. As the words stand they would naturally point to the criminal regularly tried, condemned, and executed in the normal manner with the axe. But the next words, 'neque fas est eum immolari, sed qui occidit parricidii non damnatur,' lead us in quite another direction. We seem to have to do here with a man about whom the law does not trouble itself, whom it leaves to the casual vengeance of the public.

Mommsen tries to get over the difficulty by supposing that the sentence before us represents the stretching of the conception of *sacratio* from the 'death-penalty executed in accordance with strict law by the magistrate of the community, which alone possesses this "sacral" character', to cover that which 'follows on the ordinances of the plebs, and which is treated merely as killing without liability to punishment'. Mommsen[1] adopts an interpretation, which seems to me untenable, of the words of Festus, 'neque fas est eum immolari, sed qui occidit parricidii non damnatur.' He sees in them an 'antithesis between the magisterial execution by way of *immolatio*, carried out according to *fas*, and the private and plebeian execution carried out by way of self-help without magisterial action'. Now such an antithesis between the action of the patrician and the plebeian magistracy did, no doubt, exist in fact at Rome,[2] but there is nothing of the sort in this passage. Mommsen apparently intends us to take 'neque fas est' as part of the dependent relative sentence, and to translate 'a person who is condemned, but whom under certain circumstances (the absence of a patrician magistrate) it is improper to sacrifice'. Obviously both sense and Latin compel us to take the words as part of the principal sentence, and to translate, 'not that

[1] Mommsen, *Strafrecht*, p. 902, note 1.

[2] See below, p. 13.

it is lawful that he should be sacrificed, but any one who kills him is not guilty of murder.'[1] The intention of Festus, or of Verrius Flaccus, from whom he draws, clearly is to negative emphatically the shocking supposition which might seem to be conveyed by the word *sacer*, that a human sacrifice was actually contemplated. If my translation be correct, this passage does not advance us much. It leaves us still face to face with the question, Why was such an outlaw called *sacer*?

The same difficulty arises when we turn to the account of specific cases. Are we to understand that the criminal who removed boundary stones was publicly executed? Festus (s.v. *Termino*) tells us that 'Numa Pompilius statuit eum, qui terminum exarasset, et ipsum et boves sacros esse'. One would think that the seizure and sacrifice of the oxen would be accomplished by some public authority after a judicial inquiry, and that the fate of the ploughman would be the same as that of his beasts. Yet in the parallel passage of Dionysius[2] we read: 'If any one destroyed or disturbed the boundary stones, Numa decreed that the criminal should be sacred to the God, so that whoever chose to kill him as a sacrilegious person should be unpunished and clean of any guilt.' In another passage[3] Dionysius speaks of the violator of the tie which binds patron and client: 'If any one were proved to[4] have committed such acts, he was liable under the law of treason passed by Romulus, and it was lawful for any one who pleased to kill the guilty man[4] as a sacrifice to the Jupiter of the nether

[1] The sentence does not seem difficult, but it has puzzled the critics. Danz (*Der sacrale Schutz im römischen Rechtsverkehr*, p. 84) actually (reading *immolare*) wishes to translate 'it is not lawful for him to offer sacrifice'.

[2] Dionysius Halicarnasensis, II. 74. [3] Ibid., II. 10.

[4] The words ἐλεγχθείη and τὸν ἁλόντα may perhaps be reconciled with the rest of the passage by the consideration that after the death

world. For it is the custom of the Romans when they wish a man to be put to death with impunity, to dedicate his person to some one or other of the gods, and more especially to the infernal deities.' Here again we have the same difficulty as in the first passage quoted from Festus. If the criminal was to be a sacrifice (*θῦμα*), why was he not publicly smitten with the axe? Amongst other offenders, according to the tradition of Regal Law, we have the son who uses violence to his father: 'si parentem puer verberit, ast olle plorassit parens, puer divis parentum sacer estod';[1] and the husband who sells his wife into slavery, and who is ordered by Romulus *θύεσθαι*[2] *χθονίοις θεοῖς*. Are we to understand this last of public execution? or does Plutarch intend us to explain away *θύεσθαι* as Dionysius explains away *θῦμα*? In all these passages the ancient writers never seem to have made up their minds as to what they wish to present, whether a trial followed by magisterial execution, or popular vengeance invoked immediately on the crime.

Mommsen, throughout his *Strafrecht*, insists that *sacratio capitis* is only a way of threatening capital punishment, and maintains that a trial and pronouncement by the magistrate was always necessary. This seems the logical correlative to the doctrine that every execution was a sacrifice, and therefore every criminal put to death a *homo sacer*. The theory is strongly supported by Festus' definition, 'quem populus judicavit ob maleficium.'[3]

of the criminal the avenger might be called upon to prove to the satisfaction of a court of law that the guilt of his victim justified the slaying. See Plutarch, *Poplicola*, 12. 1 *κτείναντα δὲ φόνου καθαρὸν ἐποίησεν, εἰ παράσχοιτο τοῦ ἀδικήματος τοὺς ἐλέγχους.*

[1] Festus, s.v. *plorare*. [2] Plutarch, *Romulus*, 22. 3.

[3] I think that it is impossible to accept the interpretation of Lange 'de consecratione capitis et bonorum' (*Kleine Schriften*, Vol. II, p. 114), that 'judicavit' is to be taken of the vague informal verdict of public opinion.

Brunnenmeister, on the other hand, would exclude trial in a court of justice, and indeed any intervention of State authority. He holds that the simpler faith of antiquity would regard any anticipation of the divine vengeance as impious, and that man must not dare officiously to charge himself with what is the business of the gods.[1] In the same spirit Ihering lays stress on the passive attitude of the State in such cases. Punishment, according to him,[2] is 'no unmixed evil, but has the effect of purifying the offender and reconciling him again with gods and men'. But the *sacer homo* is not any ordinary offender, but one who is by the very fact of his crime cut off from human society. He is not allowed even to expiate his guilt by suffering punishment; 'the sword of justice would be sullied with his blood; he stands outside the law to such a degree that not even the justicer will meddle with him.' He is to be shunned for fear of the contagion of guilt,[3] and 'avoided by all, unless indeed any one happens to think it a good deed to put him out of the world'.

Much of this appears to me to be fanciful. I do not believe that the magistrate would have thought any offender too vile to taste the edge of the sword of justice, or would have felt any scruple about interfering with the will of

[1] Brunnenmeister, *Tödtungsverbrechen*, p. 152. Compare the sentiment of Lucan (*Pharsalia*, III. 317):

> Non tamen auderet pietas humana vel armis
> Vel votis prodesse Jovi.

[2] Ihering, *Geist des römischen Rechts*, Vol. I, p. 279.

[3] Mr. Warde Fowler suggests that here, rather than in any primitive notions of sacrifice, we may perhaps find the point of contact between 'sacer' and 'banned'. According to Robertson Smith (*Religion of the Semites*, pp. 431–434), 'holy' things, no less than 'unclean' things, infect the meddler with mischief; and so both are alike *tabu*, and contact with them must be avoided. This is a fascinating hypothesis, but I think, on the whole, that the explanations of Servius and Macrobius lead us in a safer direction.

Heaven. But, on the other hand, I do not think that it is safe to neglect, as Mommsen does, the repeated assertion of our authorities, that the *sacer homo* is he who may be killed by any one with impunity.[1]

Perhaps a reconciliation may be found in a curious disquisition of Macrobius.[2] Macrobius is indeed a late writer, belonging to the end of the fourth century; but as he refers us for further information to the 'Religiones' of Trebatius Testa, Cicero's lawyer friend, it may be presumed that the sentences which I am going to quote have a good pedigree. 'At this point it may not be inopportune to consider the condition of those men whom the laws order to be "sacred" to certain deities; for I know well that some have thought it strange that while it is impious to violate other "sacred" things, a "sacred" man may lawfully be killed. The reason is this. The ancients allowed no sacred animal[3] to be on their lands, but drove them on to the lands of the Gods to whom they were consecrated; and they judged that the souls of men "devoted" (whom the Greeks called †zanas†) were the due of the gods. Just then as the "sacred" thing could not be actually sent to the gods, yet men did not hesitate to send it away from themselves, so with the souls. Those which were sacred might be dispatched, so they thought, to the realms of the

[1] Girard (*Org. Jud.*, p. 29, note 1) rightly lays stress on the need for taking into account both the duty of the magistrate and that imposed on the private man.

[2] Macrobius, *Sat.* III. 7. 5.

[3] That is an animal reserved and destined for sacrifice, for as Macrobius has said in a previous sentence: 'quidquid destinatum est dis, sacrum vocatur.' Compare Horace, *Od.* III. 23. 9:

Nam quae nivali pascitur Algido
Devota quercus inter et ilices,
Aut crescit Albanis in herbis
Victima pontificum secures
Cervice tinget.

gods, and therefore they wished them to be stripped of their bodies and sent thither as soon as possible.'

A comment by Servius on Virgil makes the fate of the escaped sacrificial beast still more parallel to that of the *homo sacer*, though he refers to the latter only by implication. Sinon has escaped from the altar, and in prospect of being put to death by the Trojans, he utters the words:[1] 'Hoc Ithacus velit et magno mercentur Atridae.' Why, asks Servius, should the Greek kings so much desire this? 'Because,' is the answer, 'it is part of the sacred ordinances, that a victim which escapes should be killed wherever it is found, for fear that a cause of pollution should accrue.'

The *sacer homo* then answers to the sacrificial victim. He may be the victim awaiting the stroke of the axe before the altar, but this is not necessary. The 'devoted' man may have escaped his proper doom, and be wandering like Cain, but without Cain's protection. In that case any man may with impunity hasten the erring soul to its appointed place. Normally the offender would die under the hand of the executioner; but by accident or by the neglect of the magistrate he may escape the operation of the ordinary law. Then comes in the *ultima ratio*, which arms each man's hand against him. This last situation is so much more picturesque than that of the criminal on whom the vulgar course of justice is being executed, that it is little wonder if our authorities show a tendency to leave the latter out of sight and to lay the main stress on the more interesting and exciting possibility.

The subsequent history of the criminal law emphasized this more specific application of the generic word *sacratio*. The ordinary course of justice becomes in the Republican epoch at once more certain and more secular. The words

[1] Virgil, *Aeneid*, II. 104.

sanctum and *sanctio* lose their original connexion with religion.[1] The axe ceases to have any sacral significance, and becomes merely the symbol of unrestricted *imperium*. By the time of Verrius Flaccus, a writer of the Augustan age, the idea of human sacrifice was, as we have seen above,[2] hinted at only to be promptly repudiated, and we were left to reconstruct the missing link between the word *sacer* and the dangers and disabilities of legal outlawry. On the other hand, we find the word commonly used in connexion with certain complications with which the ordinary law is hardly competent to deal; and now the possibilities, which the second part of the doctrine of *sacratio* involves, develope themselves. This aspect of *sacratio*, not as execution but as outlawry, is most commonly in evidence in cases where the parties stood in some relation which precluded an ordinary action at law between them,[3] so that the intervention of divine power might well be called for, just as it was by the appeal to an oath in some other instances which seemed to evade legal action.[4] Thus the wretch, by whose act—

Pulsatusve parens aut fraus innexa clienti,[5]

was regarded as specially marked out for the more spontaneous and mysterious form of punishment here and here-

[1] Ulpian, *Digest*, I. 8. 9. § 3 'quod enim sanctione quadam subnixum est, id sanctum est, etsi deo non sit consecratum'.

[2] See above, p. 5.

[3] See Paulus, *Digest*, XLVII. 2. 16 'non magis cum his, quos in potestate habemus, quam nobiscum ipsis agere possumus'.

[4] As for example in the oath to sanction an agreement between the master and his slave whom he intends to manumit under conditions, but with whom he cannot make a legal contract. In this case, however, and in this alone, the State stretches its functions by bringing to bear civil compulsion as a supplement to the religious sanction. See Mommsen, *Röm. Forsch.*, Vol. I, p. 370.

[5] Virgil, *Aeneid*, VI. 609, with Servius' comment 'ex lege XII Tab. venit, in quibus scriptum est "patronus si clienti fraudem fecerit, sacer esto".' See Bruns, *Fontes*[7], p. 33.

after. The regular course of law, if not powerless against such an offender, was at least more difficult to set in motion than when the parties were strangers, and could sustain a legal action against one another; and so Heaven was invoked to hunt down the criminal by casual agency, in which Providence would guide the avenging hand.

The same process of *sacratio*, combined with another primitive method, the self-help which every citizen exercises against those who attack him or his, appears likewise as the avenging force for certain public wrongs against which the regular course of law seems to offer insufficient provision. The most notable of these are the attempt, whether successful or not, to restore the kingship,[1] and the violation of the sanctity of the tribune. The two instances can hardly be treated apart, though they differ in some incidental points. In both cases we find the obligation which lies on the people to punish such crimes confirmed by an oath, 'which gives the stamp of unalterableness to the decree,'[2] and in both cases the penalty takes the form of the *sacratio* of the life and goods of the offender.

Let us consider first the case of the tribunes. The jurists, says Livy,[3] held that a man was not *ipso facto* constituted 'sacrosanct' by the sole circumstance that the person who outraged him was so devoted. For instance, the consular law of Valerius and Horatius, passed after the deposition of the decemvirs, in 449 B.C., decreed 'ut qui tribunis plebis aedilibus judicibus decemviris nocuisset, ejus caput Jovi

[1] Livy in II. 8. 2 speaks of 'sacrando cum bonis capite ejus qui regni occupandi consilia inisset'; in III. 55. 5 the man who creates a magistrate without appeal is named as the offender. No doubt in both laws king and king-maker were made equally liable to punishment, and it is owing merely to Livy's carelessness that only one is mentioned on each occasion.

[2] Mommsen, *Strafrecht*, p. 553.

[3] Livy, III. 55. 8.

sacrum esset, familia ad aedem Cereris Liberi Liberaeque venum iret', but, nevertheless, the aediles and the other officers named[1] did not possess *sacrosanctitas*; this quality was reserved for the tribunes, and conferred on them 'vetere jurejurando plebis, quum primum eam potestatem creavit'.[2] So far Livy. Festus (s. v. *sacramentum*) tells us that Cato did not agree with Livy as to the law, and held that the plebeian aedile was *sacrosanct*; but he too made the *sacrosanctitas* depend on the circumstance that 'jurejurando interposito est institutum, si quis id violasset ut morte poenas penderet'. Cicero, on the other hand, seems to hold[3] that *sacrosanctitas* may accrue *either* from the character of the penalty (*sacratio*) attached, *or* from the confirmation by an oath of that which is decreed.

The explanation seems to be as follows. At the time of the original secession to the Mons Sacer, in 494 B.C., the decrees of the plebs had not the force of law, and some basis of inviolability outside the law had to be found for the tribunes. The consular law of Valerius and Horatius, regularly passed in an assembly of the whole Roman People, forty-five years later, gave to the tribunate the legal defence which it had not originally possessed. Logically, perhaps, this tardy recognition ought to have sufficed for all purposes; but in fact the plebs did not on that account renounce its older method of enforcing respect. The plebeians, when they founded the tribunate, had not only negatively em-

[1] It is uncertain what is meant by *judices* and *decemviri*. See below, pp. 62 and 209.

[2] i.e. in 494 B.C. It is noticeable that the cognate phrase 'sacrata lex' was by some jurists limited to the constituent ordinance passed on that occasion at the Mons Sacer, while others extended it to comprise any law, for the breach of which it was decreed that the offender became 'sacer'. (Festus, s.v. *sacratae leges*.)

[3] Cicero, *pro Balbo*, 14. 33. See Mommsen, *Staatsrecht*, II³, p. 303, note 2, for a commentary on this difficult and corrupt passage.

powered any man to put the assailant of a tribune to death as 'sacer', but had sworn positively for themselves and their descendants that they would actually put this power into exercise against the offender. It is only this positive obligation that constitutes its beneficiary 'sacrosanct'.[1]

'The "*sacrosancta potestas*" of the tribune,' says Mommsen,[2] 'is originally an euphemism for revolutionary self-help'; and again,[3] 'In place of the death penalty prescribed by law for the violation of the magistrate,[4] we find the political self-help, confirmed by oath, which intervenes whenever the law is exhausted, especially in case of the ban laid on the kingship or any equivalent power.'[5] The same doctrine is presented in Mommsen's latest work:[6] 'With respect to legal protection of the tribune and of plebeian privilege generally, the confirmation of the law by the permission of popular execution is asserted with especial emphasis; and this is natural enough, since legal magisterial execution was not applicable to these essentially revolutionary ordinances, and these same private tribunician ordinances without such a revolutionary appeal to the self-help of the plebeians, would have been a dead letter.' In the few cases[7] in which the punishment of death is stated to have been actually inflicted or attempted by a tribune, the method is that of popular execution; the tribune has no lictors or axes, and can only throw the

[1] See below, p. 18, note 2.

[2] *Staatsrecht*, II³, p. 287.

[3] *Staatsrecht*, ibid.

[4] i.e. the 'patricius magistratus', the 'magistratus Populi Romani'.

[5] 'or any equivalent power.' Mommsen's words are justified by the passage which he quotes (*Strafrecht*, p. 551, note 1) from Cicero, *de Republica*, II. 27. 50 'Nostri omnes "reges" vocitaverunt qui soli in populo perpetuam potestatem haberent'.

[6] *Strafrecht*, p. 937.

[7] e.g. Icilius and the lictor in Dionysius Halicarnasensis, X. 31.

offender from the Tarpeian Rock.[1] Thus we get the curious result which has been hinted at above,[2] that the killing unavenged of the *homo sacer*, as of the fugitive sacrificial beast, survives in precisely that form of execution which is furthest removed from any primitive ritual of sacrifice. It is probable that later writers are thinking mainly of the criminal executed in this tumultuary fashion, when they speak of the *homo sacer*.

As a general rule the tribune's sentence admits of an appeal to the *comitia*: in case of fines, he himself convokes the *plebs* to hear the appeal, and in case of capital sentences 'he asks the *praetor urbanus* for a day' of the *comitia centuriata*. Such is the procedure against the censors, Claudius and Gracchus, who were adjudged guilty of *perduellio* by a tribune for supposed contempt of his office in the year 169 B. C. The censors were finally acquitted by the People, but if they had been condemned they would, like other criminals of that period, have escaped death by exile.[3] Sometimes, however, we hear of a far shorter and sharper method. In the year 131 B. C. a tribune, Atinius Labeo, actually laid hold on the censor Metellus (again for contempt) and dragged him to the top of the Tarpeian Rock. The execution was prevented by the *auxilium* of another tribune,[4] the right of Labeo being thus, as Mommsen has remarked,[5] 'at once acknowledged and frustrated by intercession.' In

[1] Mommsen, *Strafrecht*, p. 933. Sextus Lucilius, tribune in 88 B. C., was in the next year thrown from the rock by his successor, Publius Laenas (Velleius, II. 24. 2).

[2] See above, p. 3.

[3] Gracchus saved his fellow censor by swearing that 'si collega damnatus esset, non expectato de se judicio, comitem exilii ejus futurum' (Livy, XLIII. 16. 15).

[4] Pliny, *Hist. Nat.* VII. 44, 143 'Quum resistendi sacroque sanctum repellendi jus non esset, virtutis opera et censurae periturus, aegre tribuno qui intercederet reperto, a limine ipso mortis revocatus, alieno beneficio postea vixit'.

[5] *Strafrecht*, p. 47.

the reported cases the self-help is always the work of the aggrieved tribune himself or of his colleague. There is no recorded instance of the private plebeian having ever been called upon, in obedience to his oath, to avenge an outrage on a tribune; but the knowledge that such vengeance would be forthcoming, if necessary, was sufficient to enable the tribune to act, as Mommsen says,[1] 'without instruments by the grip of his own hand, to which the inviolability of his person gave the necessary power.' Cicero has this ultimate sanction in mind when he illustrates the unfairness of the contest between Clodius and himself, 'tribuniciique sanguinis ultores esse praesentes, meae mortis poenas judicio et posteritati (the future) reservari.'[2] The passage last quoted indicates pretty clearly that condemnation before a legal tribunal is not a necessary preliminary to the self-help of the *plebs*, and the same conclusion may be drawn from the circumstance that we find appeal made, with however little warrant, to the unquestioned existence of such a right of self-help, as a justification by analogy for private violence.[3]

On this point the utterances of Mommsen are somewhat wavering. In the *Staatsrecht*[4] we read: 'In its better times the democracy certainly treated every attack on the tribunate as a crime worthy of death, but did not thereby sacrifice the dearest right of the commons, the right of appeal; and the usurpation obviously never became recognized law. According to the theory of the later democracy the slaying of him who violated a tribune was permitted to every citizen, without judgement and without law, just as the slaying of him who aspired to kingly power. Whoever acted on this doctrine—and no instance is recorded—could call his deed

[1] *Strafrecht*, p. 932.

[2] Cicero, *post Reditum in Senatu*, 13. 33.

[3] Cicero, *pro Tullio*, 5. 49.

[4] *Staatsrecht*, II[3], p. 305.

an execution only in the sense in which Brutus and his fellows claimed to have executed the law on the dictator Caesar.' In one passage of the *Strafrecht*[1] again, Mommsen certainly seems to suggest a negative answer to the question 'whether the tribune is legally entitled to proceed without further ado to such executions, a doctrine which, for the matter of that, was never fully acknowledged, and only appears as the claim of the advanced democracy'; and to give preference to the other alternative—'or whether, as after the conclusion of the struggle of the orders was the recognized right, he required confirmation by the people before he executed capital punishment.'

We find, however, presented elsewhere in the *Strafrecht*,[2] another, and, it seems to me, a more correct view of the case:

'The tribunician right over life and death rests not on the 'same ground as that of the patrician magistrate, but on the 'constituent ordinances of the *plebs*, on the power, namely, 'similar to that of the patrician *imperium* thereby guaranteed 'to its leaders, and afterwards recognized by the law. Now, 'since the right of the patrician consuls over the life and death 'of the citizens was by the Valerian law bound up with the 'assent of the *populus*, it was only proper for the representa-'tives of the plebs to connect their similar power with the 'consent of the *plebs*, or later on of the whole people. But 'strictly speaking it might be said that the tribunes possessed 'a right, similar to the original right of the consuls, and that 'they were not limited, like the latter, by the Valerian law. 'In fact we know of one fully accredited historical instance 'of tribunician action,[3] clearly justified by the letter of the 'law, wherein trial and appeal were excluded, and the tribune 'treated the Roman citizen as if he were a foreign criminal.'

[1] *Strafrecht*, p. 932. [2] Ibid., p. 46.
[3] The instance, of course, is that of Labeo and Metellus.

On the whole, the judgement indicated in the passage last quoted may be taken as the sounder of the two. We have seen[1] that the Romans of Cicero's time allowed the doctrine, even in its extreme form, as justifying the action of private men. Mommsen has most lucidly set before us[2] that its maintenance was necessary for the tribunate in its inception, and though it must be acknowledged that the doctrine was very liable to abuse, and that the practice of the middle republic allowed it to fall into desuetude, these considerations do not justify us in ascribing the doctrine itself merely to a party theory of the extreme democrats in the last age of the free State.

The case of the violator of the tribunician sanctity, and that of the usurper of monarchical power are, as Mommsen clearly sees, precisely parallel; only as regards the latter the necessity of the case shows us more distinctly what was the intention of the legislator. Mommsen ascribes the current and obvious interpretation in this case too to 'the party doctrine of the republican legitimists'. In the discussion of it[3] he seems to me to create an opposition, not founded on reality, between the oath—'in which might be found not indeed the legal, but the moral and political obligation to treat such a king as equivalent without more ado to a public enemy'—and the *sacratio*, of which he says that 'it is nothing more than a threat of capital punishment, the execution of which must be preceded even in this case by a legal conviction'. This is of course in flat contradiction of our authorities, especially of the ἄνευ κρίσεως of Plutarch.[4] But apart from this it is manifest that the

[1] See above, p. 15. [2] See above, p. 13.
[3] *Strafrecht*, p. 552.
[4] Plutarch, *Poplicola*, 12. 1. We find the same *totidem verbis* about the violation of the tribunate, καὶ ἄκριτον τὸν ποιήσαντα αὐτὸ ὡς καὶ ἐναγῆ ἀπολλύναι (Dio Cassius, LIII. 17. 9).

same act, killing without trial, is the object both of the *sacratio* and of the oath. That Brutus[1] should mention the oath rather than the *sacratio* is natural enough, because it goes further, and establishes not only a justification but an obligation. A valid moral and political obligation, imposed by the sovereign body to the performance of an act, necessarily comprehends and implies the lawfulness of that to which the subject is obliged. In this case the *sacratio* legally permitted that to which the oath 'morally or politically obliged'.[2]

But the crushing objection to Mommsen's interpretation is that it reduces the action of the legislator to mere childishness. When the Romans laid down concerning the monarch or his abettor, 'eum jus fasque esset occidi, neve ea caedes capitalis noxae haberetur,'[3] is it possible that they can have intended the futility of granting the slayer immunity only on condition of a proceeding so hopeless as the formal trial of the usurper? How could he be brought to trial?

> Treason doth ne'er succeed; and what 's the reason?
> When it succeeds, no man dare call it treason.

This is so obvious that I think that the proposition that the Roman law authorized tyrannicide would never have been disputed, if this law had not unhappily served to supply a *doctrinaire* motive to the assassins of Caesar. Mommsen feels instinctively that they must not be acquitted, and he scorns to resort, as some have done, to the subterfuge that

[1] Appian, *Bellum Civile*, II. 119. See Mommsen, *Strafrecht*, p. 552, notes 1 and 3.

[2] Since I first wrote these words, I find that the case has been more neatly put in Latin—'quod lege sanctum erat ut fas esset, cuicumque videretur hominem sacrum interimere, jurisjurandi religione sic firmatum est, ut nefas et piaculum esset, si quis noluisset.' Lübbert, *Commentationes Pontificales*, p. 169. See also above, p. 13.

[3] Livy, III. 55. 5.

Caesar was not a king. It would have been better if, instead of wresting the sense of the Valerian laws, Mommsen had been content to take up the impregnable position that assassination as a political weapon is never to be justified, and that a law or oath which prescribed it to all future generations ought never to have weighed in the minds of persons professing to be serious statesmen. Discussions as to its binding character should have been left to Roman antiquarians and Greek philosophers.

The influence of religion is conspicuous in the treatment of international questions; a whole department of law, the *jus fetiale* grew up for their settlement, and in some cases the infliction of punishment was involved. It was essential for the Romans to get the favour of Heaven on their side, and to avert any cause of the Divine wrath. When, therefore, they found themselves put clearly in the wrong by the action of one of their officers, they borrowed from private law the device of the 'noxal surrender', by which the *paterfamilias* frees himself from responsibility by handing over an offending son or slave to the injured party.[1] In cases of international wrong, if the other side accepts the surrender, all is well; the State has made its peace with the gods, and may fight on with a clear conscience. But complications, both legal and religious, arise if the other party refuses the proffered scapegoat.

We find the Senate in 160 B.C. declining the surrender by the King of Syria of two persons judged to be guilty of the assassination of Gnaeus Octavius, a Roman envoy. Of these two, Isocrates, an abettor after the fact, went raving mad with fright; but Leptines, the actual assassin, who had him-

[1] See below, p. 39. The violation by the Romans of this duty was believed to have led to the destruction of the City by the Gauls (Plutarch, *Numa*, 12. 5).

self suggested the surrender, cheerfully protested that he had nothing to fear, and he proved to be right. The Romans, as Polybius[1] says, wished to keep the quarrel alive, so as to have it ready to use hereafter, if desirable. There are several instances of such surrender on the part of the Romans themselves, for instance, that of Postumius and his fellow sponsors after the disaster of the Caudine Forks,[2] of Marcus Claudius to the Corsicans in 236 B. C.,[3] and of C. Hostilius Mancinus to the Numantines in 136 B. C. On each of these occasions the enemy refused to be 'robbed of his best grievance', and rejected the tender of the prisoner. We are not told of the fate of Postumius; in the case of Claudius, it was held that Rome could cleanse herself only with his blood, and he was put to death in prison. A hundred years later public opinion was less stringent, and Mancinus' life does not appear to have been in danger. It was, however, a matter of grave doubt whether the *deditio*, though incomplete,[4] had not extinguished his citizenship. Cicero,[5] alluding to the case two generations later, pronounces in the negative; but at the time P. Mucius Scaevola, *pontifex maximus* and praetor in that same year, seems, says Pomponius,[6] to have been of the opposite opinion, and held that

[1] Polybius, XXXII. 7. 12. [2] Livy, IX. 10.

[3] Valerius Maximus, VI. 3. 3.

[4] Postumius, in assaulting the Roman fetial, had claimed that he belonged to the Samnites, and that they were responsible for his actions from the moment of his tender. Livy, IX. 10. 10 'se Samnitem civem esse', &c.

[5] Cicero, *pro Caecina*, 34. 98 and *Topica*, 8. 37.

[6] Pomponius, *Digest*, L. 7. 18. I think that the parallel 'sicut faceret (populus) quum aqua et igni interdiceret' is not from either of the Scaevolas, but is an illustration added by Pomponius himself, in whose time (the reign of Hadrian) the *interdictus* lost his citizenship *ipso facto*, See below, Vol. II, p. 58, n. 2. Perhaps a better parallel would be that of the *sacer homo*, whose existence entailed pollution (see above, p. 9), but I do not find this suggested in any of our authorities.

the people had driven him from them, and that no return home was allowed. We cannot gather from the discussion in Pomponius what was the opinion on this particular point of Scaevola's more famous son (Q. Mucius P. F. Scaevola), also in his day *pontifex maximus*, though as to the necessity of a surrender he had no doubt. The actual case was eventually decided, and against the elder Scaevola, by a decree of the People, in which Mancinus' citizenship was affirmed. Cicero's conclusion was doubtless founded on this decision.

Before leaving the question of the influence of religion on the criminal law of Rome, it will be well to say a few words about the dreadful punishment of the parricide. All the details, the head muffled in a wolf-skin, the feet thrust into wooden shoes,[1] the noxious beasts enclosed with the criminal in the sack, the black oxen which dragged the wretch to the sea,[2] and his end—'living while he may, yet unable to breathe the air of heaven, dying yet not allowed to touch the earth with his bones, tossed by the waves yet never washed by them, cast out, it may be, at last on the shore, but not allowed to rest on the rocks'[3]—all these point to a religious horror and loathing heightened by every symbol in which primitive man could express himself. But for whom is this gloomy ritual prepared? Cicero and the jurors who listened to him undoubtedly believed that this was and had been from the first[4] the punishment ordained for the son who killed his parent. The difficulty is that the most ancient traditions

[1] Cicero, *ad Herennium*, I. 13. 23, of the parricide Malleolus.

[2] 'In mare profundum,' says Modestinus (*Digest*, XLVIII. 9. 9). Cicero speaks of him as plunged in the river which will carry him down to the sea. Constantine (*Cod. Theod.* IX. 15. 1) says: 'vel in vicinum mare vel in amnem.'

[3] Cicero, *pro Roscio Amerino*, 26. 72.

[4] Cicero, ibid., 25. 70.

give a much wider scope to the word 'parricida'. In his explanation of the *Parricidii quaestores*, Festus says, 'solebant creari causa rerum capitalium quaerendarum. Nam parricida non utique is qui parentem occidisset, dicebatur, sed qualemcumque hominem indemnatum. Ita fuisse indicat lex Numae Pompilii regis, his composita verbis, "si qui hominem liberum dolo sciens morti duit parricidas esto."'

Mommsen[1] attempts to reconcile the discrepancy by the supposition that death by the sack was in regal times the normal method of punishment for all murderers, and that the separation into a class apart of the murderers of near kindred was an afterthought, and arose from the circumstance that when ordinary murder came to be treated by a milder process in the jury-courts, these worst cases were alone reserved for trial before the People, which made it possible that the ghastly penalty should be actually inflicted. Mommsen rightly rejects the etymology of *parricidium* as a contraction of *patricidium*, and himself gives a derivation which, though it has not been approved by philologists, seems in itself sufficiently plausible. He holds that the first part of the word is the prefix 'per', meaning 'evil', as in *per-peram*, *per-duellis* and *per-jurus*.[2] *Parricidium* then would mean simply 'foul-killing', 'murder'. We may accept this as a possible explanation of the word; and nevertheless decline to follow Mommsen in associating the punishment of the sack, of which Festus says nothing, with 'parricidium' in the wide extension which Festus gives to the word in the passage quoted above.

I should agree with Brünnenmeister that the words of

[1] *Strafrecht*, p. 922.

[2] The lengthening of the first syllable may have occurred when the letter *r* was doubled owing to the popular etymology of *patricida*.

Numa's law imply the expansion of an already existing conception of 'foul-killing' to a wider category of cases. I do not think we can tell how the category was limited before Numa. Brunnenmeister's attempts to define it[1] are coupled with his derivation of *parricida* from *πηός*, in the sense of a kinsman. In any case, we may adopt his main contention that we should look at the older *parricidium* as the antithesis to the killing of one outside some mutually protecting group. In the case of the outsider, the slaying would be punishable only so far as the fear of the vengeance of other outsiders might lead to a 'noxal surrender',[2] while inside the group (whatever it was) the sanctity of life was guaranteed, and its violation must be punished. Though the previous boundary-line of *parricidium* is unknown to us, the uncertainty vanishes with Numa's law. Henceforth it includes the wilful slaying of any free man, whether fellow tribesman or stranger, citizen or alien. The punishment is not defined by Numa, so we may naturally suppose that it was the normal capital punishment of beheading.

The sack, on the other hand, has, as I believe, nothing to do with *parricidium* in Numa's sense, but must be connected, according to the universal Roman tradition, with the killing of a parent by a son. The peculiar punishment and the peculiar crime being connected together from the first, the word 'parricida' must have been linked to them at a later time by the false etymology of 'patricida'. We may conjecture with Mommsen that this occurred at a period when the punishment of death for ordinary murder had become obsolete through the operation of the jury-courts, from which custom reserved these blackest cases.[3]

Of the actual execution as described by Modestinus

[1] Brunnenmeister, *Tödtungsverbrechen*, pp. 101–12.

[2] See below, p. 39.

[3] See below, p. 162.

and by Cicero,[1] the most probable explanation is that of Brunnenmeister,[2] that the unnatural crime was treated on the analogy of a monstrous birth, as a prodigy foreboding evil, a pollution, of which the universe must rid itself. He gives many instances in which such births are put away in a river or in the sea. The best is from Livy[3]—'Soothsayers brought from Etruria pronounced that this was a foul and ill-omened prodigy, and that it must be plunged in the depths, outside of Roman territory and far from the touch of land. Accordingly they enclosed it alive in a chest, carried it out to sea and threw it overboard.' This brings us very near to the parricide in the sack, as described by Cicero.

While agreeing with Brunnenmeister that this drowning is the *procuratio*[4] of a prodigy, I should not follow him in excluding from it any idea of punishment. 'From the first,' he says, 'it is foreign to the nature of punishment, it is neither spiritual nor temporal punishment, neither *supplicium* nor *poena*.' I do not believe that the primitive Roman distinguished with such accuracy, and I find no difficulty in the statement of Modestinus[5] that according to the most ancient custom the victim was scourged, a statement which Brunnenmeister finds himself obliged to disbelieve, so far as early times are concerned. On the contrary, I think that men might well express their loathing for the accursed thing in this, as in any other form of outrage. We read that in time of plague or famine certain human scapegoats (*φαρμακοί*) were beaten with twigs of the

[1] See above, p. 21.

[2] Brunnenmeister, *Tödtungsverbrechen*, pp. 193 seq.

[3] Livy, XXVII. 37. 6.

[4] That is to say, a provision by which the mischief of the evil thing may be averted from the State (Livy, VII. 6. 7) or from an individual (Livy, V. 15. 6).

[5] See *Digest*, XLVIII. 9. 9.

wild fig-tree and with weighty squills[1] on their way to be burned alive on the beach, and have their ashes scattered on the waves.[2] If, as I am inclined to believe, the phrase of Modestinus, 'sanguineis virgis verberatus,' indicates that the rods for the parricide were made from the wood of a special shrub, and that a shrub with medicinal or magical qualities,[3] the primitive and ritual nature of the punishment would be the more apparent.[4]

I will conclude this chapter by noticing a feature in the history of the Roman law, which has been admirably elucidated by Mommsen and by Girard. Not only is the influence of religion on law in historical times a vanishing quantity—this is the normal course of events in a progressive community—but in this case the process is aided by a circumstance peculiar to Roman history. The original functions of the *imperium* were concentrated in the person of the

[1] This is the *scilla maritima* or 'sea onion', the biggest of all the *bulbi* according to Pliny (*Hist. Nat.* XIX. 30), and a formidable instrument of assault. It has a stalk three or four feet long, and a bulbous root, mostly above ground, somewhat like a turnip. I am indebted to Mr. Claridge Druce, F.L.S. for help in this note.

[2] This account is taken from Joannes Tsetzes, a Byzantine of the twelfth century. He refers (*Chiliades*, V. 725 seq.) to Lycophron, an Alexandrian tragedian, and to Hipponax, a writer of satirical iambics in the sixth century B. C. It is uncertain whether the ceremonies of the Attic Thargelia, which Frazer (*Golden Bough*, 2nd ed. 1900, Vol. III, p. 127) includes under 'fertility magic', are to be associated with those described by Tsetzes.

[3] Besides casual notices of *sanguinei frutices* in *Hist. Nat.* XVI. 74 and 176, Pliny tells us (ibid., XXIV. 73) that the inner bark of the *sanguinea virga* scarifies wounds which have healed too quickly, and again (ibid., XIX. 180) that *sanguineae virgae* are used to touch any plants which you wish to preserve from caterpillars. Some critics, however, think that *sanguineis* in Modestinus means that the rods were painted red (Hitzig, *Tödtungsverbrechen*, in *Revue Pénale Suisse*, 1896, p. 41), and others that they are called *sanguineae*, because stained with the blood of the victim.

[4] In later times scourging would be forbidden by the *lex Porcia*; see below, p. 125, note 5.

king, who was likewise the head of the State religion. It is the same person who acts as supreme in things religious and things secular; there is no need for him to specify in which capacity he is acting on each occasion;[1] and the citizens are not called upon to disentangle the spiritual from the temporal. This naturally tends to keep the two in close connexion. But with the *regifugium* comes an important change. The Romans were evidently nervous lest their action might have involved them in some contradiction of the divine pleasure.[2] They avoided the danger by two expedients; in the first place they set up a puppet with the kingly title (*rex sacrorum*), that the gods might not miss their accustomed celebrant; in the second place they transferred all the regulation of things sacred from the magistrates of the State to a new spiritual officer, the Head of the College of Pontiffs. So anxious were they to keep his position distinct from that of the secular magistrate, that they would not allow him to be appointed by the People.[3] From henceforth, except so far as concerns official misdoings of the

[1] See Girard, *Org. Jud.*, p. 20.

[2] For a similar reason down to Cicero's time they added to each new law a clause: 'Si quid jus non esset rogarier, ejus ea lege nihilum rogatum.' Cicero (*pro Caecina*, 33. 95) takes these words as intended to protect the liberties of the individual citizen from the omnipotence of the popular vote. They might certainly have this effect: a *privilegium*, for instance, would be *non jure rogatum*. But I think that originally the clause was meant rather to protect the People collectively from unwittingly sanctioning an act which might prove to be an impiety. The question whether the line had been overstepped, and nullity thereby incurred, in each case, would be referred to expert interpreters, the pontiffs and augurs. See Cicero, *de Legibus*, II. 12. 31.

[3] Even when in the later Republic the political importance of this and other spiritual offices and the jealousy felt towards close corporations led as a practical result to popular election, its appearance was sedulously avoided. The pontiff or augur was elected by seventeen of the thirty-five tribes chosen by lot, so that it was never the majority of the Roman People which voted.

priests in their celebration of sacred rites,[1] 'those who had the right to punish had no longer the right to meddle with things divine, and those who regulated religion had no right to punish'.[2] Thus the good fortune of the Roman People severed the old connexion, so that the secular and the spiritual drifted apart. When under the principate the two functions were again placed in one hand, it was too late for religion to exercise its baneful influence on law.

[1] See below, p. 31.

[2] Girard, *Org. Jud.*, p. 55. Clodius' case is a good instance. When the pontiffs have pronounced that the invasion of the mysteries of the Bona Dea was *nefas* (Cicero, *ad Atticum*, I. 13. 3), the consuls and senate are bound to take up the case; but the pontiffs themselves have nothing to do with trial or punishment, nor the consuls with religion.

There is an apparent exception in the *lex Ursonensis* (chap. LXVI; Bruns, *Fontes*[7], p. 125): 'De auspiciis quaeque ad eas res pertinebunt augurum juris dictio judicatio esto.' I should agree with Mommsen (*Juristische Schriften*, Vol. I, p. 251) that the draftsman of the law has by a slip ascribed to the augurs what really belongs to them only indirectly, because the magistrates are bound to follow their instructions in these matters.

CHAPTER II

CRIMINAL LAW AND THE FAMILY

Is the right of the State to punish derived from any notion that the king is the father of the community, and that he exercises his rights over its members on the same title as the *paterfamilias* over those of his own household? Mommsen would seem in some passages to answer this question in the affirmative. He had long ago laid it down[1] that the king 'acquired in its entireness that power over the community which belonged to the house-father in his household', and in the *Strafrecht*[2] he speaks of the 'transference of household discipline to the ordering of the State, since the relations of king and citizens were assimilated to those of the house-master and his subjects'; and again,[3] 'as he who wishes to know the stream must never forget its source, so the Roman Criminal Law can be understood only on the basis of household justice.'

This doctrine seems to me unsound. No Roman writer, so far as I know, has ever attributed the *patria potestas* either to the magistrate, whether king or consul, or to the sovereign people itself, and there is no trace of the powers exercised by the State authorities developing out of those exercised by the head of a family. The very basis of the *domestica disciplina*, the right of ownership, is wanting to

[1] Mommsen, *Rom. Hist.*, Book I, chap. V.
[2] *Strafrecht*, p. 28.
[3] Mommsen, ibid., p. 17.

the State. Ihering[1] has well remarked that it would be strange indeed if the State were organized on the model of a patriarchal household, while the intermediate organization, the *gens*, is 'republican down to its roots', and is founded on the equality of the *gentiles*. It may be added that if the Romans had believed their monarchy to be patriarchal, the belief would have been reflected in their legends, and the succeeding kings would certainly have traced their descent to Romulus.

The connexion between the two, the State and the household, which he assumes, does not lead Mommsen far astray, for shortly after the last passage quoted he supplies[2] qualifications which practically negative the original thesis: 'Further the individual, who is subject to the household power, if he offends, can be called to account either by the master of the house in virtue of his ownership or by the State in virtue of its supreme power; and this household procedure not only does not itself belong to the criminal law, but can never be transferred to it, both because the contrary nature of the two must be clearly maintained, and because the law of the master of the house partly overlaps and partly supplements the criminal law of the State.' This seems to me to be the true theory. The relation between the two jurisdictions is one of resemblance and parallelism, not of origin and development.

There are two difficult and doubtful questions which touch on the relations of household law to the State. The first is that of the Vestal Virgins. There is no question that the *pontifex maximus* has over them the right of corporal chastisement, if they neglect their duties—as for instance by allowing the sacred fire to go out—and the fullest power of life

[1] Ihering, *Geist des römischen Rechts*, Vol. I, p. 259.
[2] *Strafrecht*, p. 17.

and death in case of unchastity. The paramour of the Vestal was likewise scourged to death by the pontiff, without being allowed the right of *provocatio*. Mommsen was formerly of opinion that the execution of the male culprit is a survival of the right of avenging his honour possessed by a householder against the seducer of his daughter. In his latest work[1] he is disposed to consider that it is of comparatively late origin and depends upon positive legislation by the People.[2] He still maintains, however, that the punishment of the Vestal herself is a case of *patria potestas*.[3]

The theory has in it much that is attractive. The Vestal fulfils the duty of a daughter on the hearth of the State, and it seems only natural that she should have the legal relation of daughter to the king or the chief priest who has 'laid his hand on her and taken her from the parent in whose power she was '.[4] Again, this theory supplies a logical explanation of a legal position otherwise difficult to understand; for if the power of the pontiff be that of the head of a household it will follow naturally that it shall be concurrent with the power of the State, and that neither can exclude the other. Such a relation we do find very precisely realized in fact. In the year 113 B.C. two Vestals, who had already been acquitted by the pontiff, were again arraigned before a tribunal instituted by a special law of the People,[5] and both were condemned. It is probable, though not certain, that the

[1] *Strafrecht*, p. 20.

[2] He rests this belief on Festus' statement (s.v. *probrum*), 'Probrum virginis Vestalis ut capite puniretur, vir, qui eam incestavisset, verberibus necaretur; lex fixa in atrio libertatis cum multis aliis legibus incendio consumpta est, ut ait Cato.'

[3] Girard, *Org. Jud.*, p. 37, note 1, is inclined to agree with Mommsen's earlier view.

[4] Aulus Gellius, *Noct. Att.* I. 12. 13.

[5] See below, p. 237, note 2.

full penalty was exacted. At any rate the Vestals were not allowed to plead the one jurisdiction against the other. If we deny the *patria potestas*, we must suppose that the pontiff is using in this case the magisterial power which he possesses over the other priests as head of the State religion.[1] There is no doubt that, for instance, he can, subject to appeal to the People, fine a defaulting flamen or augur.[2] But if in the case of the Vestals too he is exercising an authority committed to him by the People, it would be against all Republican usage that the State should not recognize a formal acquittal by him as final.[3] We thus seem driven to the conclusion that the previous acquittal was that of a household tribunal and not of a public one.

On the other hand, it is a very serious objection to Mommsen's theory that the Vestal Virgin is not in any matter of private law under the *patria potestas* of the pontiff, but is a person, *sui juris*, with all the rights of an owner. This is shown by the circumstance that in case of suspicion the pontiffs have to command her to retain her slaves in her own power;[4] otherwise there would have been nothing

[1] See Mommsen, *Strafrecht*, p. 37: 'the magisterial power granted him within certain limitations over the other priests.' This doctrine is to be preferred to that of Danz (*Sacrale Schutz*, p. 81), that the flamen is under the *patria potestas* of the pontiff. If he had been, he certainly could not have appealed to the people against the pontiff's sentence (Livy, XXXVII. 51. 4). The *flamen Dialis*, however, though he did not become the son of the pontiff, obtained, like the Vestal, freedom from his natural father (Gaius, *Inst.* I. 130).

[2] There are many instances; but perhaps the most interesting is that reported by Festus, s.v. *Saturno* (Müller, p. 343). An augur was fined by the pontiff for not obeying his summons to attend him at some feast of Saturn, and appealed to the People against the sentence. His excuse was that sacrifices to Saturn were made bare-headed, whereas he was engaged in some family rites which obliged him to keep his head veiled. The plea was admitted.

[3] See below, Vol. II, p. 177.

[4] Livy, VIII. 15. 8. See below, Vol. II, p. 126.

to prevent her manumitting any slave who might be wanted as a witness. Not only does she own property, but, unlike other women, she may administer it without the intervention of a guardian. This is granted her, says Gaius,[1] 'in honorem sacerdotii.' This same 'honor sacerdotii' may possibly account for the privilege of holding property as well; but in that case it is strange that Gaius should not mention it. That a woman under *patria potestas*, and therefore a person *alieni juris*, should be allowed to have property of her own, is a much more striking glorification of the priesthood than that a woman, already *sui juris*, should be relieved from *tutela*. The question must be left unsolved, since no ancient writer has thought it worth while to tell us, at any rate for the time prior to the law posted in the *Atrium Libertatis*, on what basis the jurisdiction of the pontiff over the male and the female offender really rested.

The second case in which household discipline appears in connexion with the ordinary law is that of women convicted of criminal acts. Over and over again we find the actual execution of punishment, capital or otherwise,[2] committed to the relatives of the culprits instead of being carried out by the servants of the State. The noticeable point is that this occurs not only with those who are under the *potestas* of father or husband (in such a case the persons *quorum in manu essent* have a clear right to deal with them), but with women who are *sui juris*,[3] and who are nevertheless put to death or banished by *propinqui* or *cognati*.

Mommsen considers this to be a survival from a supposed

[1] Gaius, *Inst.* I. 145.

[2] Livy, XXXIX. 18. 6 and Tacitus, *Annales*, II. 50. 5 'adulterii graviorem poenam deprecatus, ut exemplo majorum propinquis suis ultra ducentesimum lapidem removeretur suasit'.

[3] The two categories are distinguished in the case of the Bacchanalian women (Livy, XXXIX. 18. 6).

'original order of things', according to which a woman always and necessarily remained under *patria potestas*. If there were neither father nor husband to claim it, the absolute rights over her person and property passed (such is the hypothesis) to the *gens*, and the primitive *tutela gentilium* is set down as probably equivalent to the *manus*, with the consequence that a woman under this system could never be *sui juris*. This is a hard saying, and is certainly not to be justified by straining (as Mommsen does)[1] the words of so easy-going a writer as Livy:[2] 'majores nostri feminas voluerunt in manu esse parentium, *fratrum*, virorum,' nor by the cases[3] adduced by Girard, in which a *potestas* is descriptively ascribed to the *tutor*. In Roman law, as we know it, *tutela* is possible only in case of persons who are *sui juris*; its intention is to give to persons otherwise capable of legal acts, but of weak age or sex, protection from the consequences of acts by which they would, but for such protection, be bound. Persons *alieni juris*, a slave, a son or a daughter, are essentially incapable of legal acts binding on themselves, and the notion of protection in their exercise becomes absurd. Thus the conditions under which these two relations exist are mutually exclusive;[4] and that *tutela*

[1] *Strafrecht*, p. 18.

[2] Livy, XXXIV. 2. 11.

[3] Girard, *Org. Jud.*, p. 97, note 1. See Cicero, *pro Murena*, 12. 27. Servius couples with *potestas* another descriptive phrase, either *jus* (Justinian, *Inst.* I. 13. 1) or *vis* (*Digest*, XXVI. 1. 1), and adds that these are given 'ad tuendum'. The strongest case is that of the maniac (quoted from the Twelve Tables by Cicero, *de Inventione*, II. 50, 148) 'Si furiosus escit, agnatum gentiliumque in eo pecuniaque ejus potestas esto'; but this *potestas* is something very different from the absolute right of property. The *tutores* could not convert the goods of the madman to their own use, as they might have done had he become *alieni juris* (as by adoption): on the contrary they were liable to an action *negotiorum gestorum* (Julianus, *Digest*, XXVII. 10. 7).

[4] See Gaius, *Inst.* I. 146 'Nepotibus autem neptibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem recasuri non sint'.

is in any case equivalent to *manus* is a proposition which could be accepted only on the strongest evidence. In this case the evidence is not forthcoming. We know that as early as the law of the Twelve Tables a woman was capable of holding property, and that on the death of a father the daughters, who were at the time under his *patria potestas*, inherited their share of the property equally with their brothers.[1] It seems to follow of course that they became persons *sui juris*, calling for the protection of a guardian. Mommsen admits this freely, and his hypothesis relates solely to a primitive, prehistoric era. I cannot do better than quote what he himself says on this point :

'The woman under *potestas* enjoys the protection of a free-'woman as against third parties, but, like a slave, is treated 'by her master as his property. If he kills her the act does 'not in itself fall under the category of murder. It has been 'shown that in historical times this holds only in case of the 'paternal or marital power. It may have held in the earliest 'times in case of the gentile guardianship over the unmarried 'fatherless woman. But the universal servitude of women 'has disappeared from the legal system by the time when we 'have any knowledge of it.'[2]

It appears then that the hypothesis as to the primitive state of things is required only to explain the custom as regards the execution of female criminals, with which we started ; and here it is not impossible to find a less hazardous explanation in each case. The most difficult instance is that of Publilia and Licinia,[3] who had poisoned their husbands,

[1] See Gaius, *Inst.* III. 7 and 14 ; Ulpian, *Regulae*, XXVI. 1 and 6, and especially Paulus (in *Collatio Legum Mosaicarum et Romanarum*, XVI. 3. 20) : 'Lex duodecim Tabularum sine ulla discretione sexus admittit.'

[2] *Strafrecht*, p. 617.

[3] Livy, *Epitome*, 48 ; Valerius Maximus, VI. 3. 8.

and were arraigned on this count before the ordinary courts ; before, however, the State tribunals could pronounce on them they were put to death by their *propinqui* or *cognati*. I believe that these women were not *sui juris*, that they had never passed in *manum viri*, and so remained in the *potestas* of their respective fathers, and that the *cognati* or *propinqui* were simply the friends[1] summoned by the father *in consilium*, in accordance with whose recommendation he put his daughter to death. In all the other cases it seems as if the State had already tried and condemned the offenders, and that the magistrates from motives of decency preferred that the women should not be put to public execution, or thrown into the common jail. Under these circumstances it is easy to conceive not only that they called on the father or husband, where there was one, to exercise his power in their stead, but that even in case of women *sui juris* they selected an *idoneus auctor supplicii* (to use Livy's description) from among the relatives, and delegated to him a power of execution which he did not possess in his own right.

[1] Though I should not wish to insist too much on the phraseology, it may be noticed that, if this explanation be correct, the words used by Livy and Valerius, *propinqui* and *cognati*, not *agnati* and *gentiles*, would be fully justified ; for to such an advisory council all relatives would doubtless be summoned, not only those on the father's side.

CHAPTER III

SELF-HELP AS A SOURCE OF LAW

IT is now fifty years since Sir Henry Maine first published his work on *Ancient Law*. The effect of this book on English thought and opinion can hardly be overestimated. I shall be constrained later on to express dissent from some of the author's theories; but meanwhile I would express the gratitude which, in common with all who were commencing their student life at that period, I owe to Maine for the stimulus given to reflection, and the interest then awakened in the legal problems of antiquity. It is with pleasure that I turn to the familiar pages, and quote a few admirably lucid paragraphs[1] respecting the more immediate subject of this chapter.

'I have spoken of primitive jurisprudence as giving to '*criminal* law a priority unknown in a later age. The ex- 'pression has been used for convenience' sake, but in fact the 'inspection of ancient codes shows that the law which they 'exhibit in unusual quantities is not true criminal law. All 'civilized systems agree in drawing a distinction between 'offences against the State and offences against the Individual, 'and the two classes of injuries thus kept apart, I may here, 'without pretending that the terms have always been em- 'ployed consistently in jurisprudence, call crimes and wrongs, '*crimina* and *delicta*. . . . Now the penal law of Ancient 'Communities is not the law of crimes; it is the law of 'wrongs, or, to use the English technical word, of Torts. . . .

[1] Maine, *Ancient Law*, p. 369 seq.

'There were in the Athenian and in the Roman States laws 'punishing *sins*. There were also laws punishing *torts*. The 'conception of offence against God produced the first class of 'ordinances; the conception of offence against one's neigh- 'bour produced the second; but the idea of offence against 'the State or aggregate community did not at first produce 'a true criminal jurisprudence.'

A little lower down Maine proceeds:[1]

'How little the notion of injury to the community had to 'do with the earliest interference of the State through its 'tribunals, is shown by the curious circumstance that in the 'original administration of justice the proceedings were a 'close imitation of the series of acts which were likely to be 'gone through in private life by persons who were disputing, 'but who afterwards suffered their quarrel to be appeased. 'The magistrate carefully simulated the demeanour of a 'private arbitrator casually called in.'[2]

After relating the formalities of the 'actio Sacramenti' as described by Gaius, Maine continues:

'Such was the necessary preface of every ancient Roman 'suit. It is impossible, I think, to refuse assent to the sugges- 'tion of those who see in it a dramatization of the origin of 'Justice. Two armed men are wrangling about some dis- 'puted property. The Praetor, *vir pietate gravis*, happens to 'be going by, and interposes to stop the contest. The dis- 'putants state their case to him and agree that he shall 'arbitrate between them, it being arranged that the loser, 'besides resigning the subject of quarrel, shall pay a sum of

[1] Maine, *Ancient Law*, p. 374.

[2] In another passage (ibid., p. 378) Maine adduces the severer penalties imposed on the thief caught in the act as a further illustration of how the law took as its standard 'the probable acts of persons engaged in a private quarrel'.

'money to the umpire as remuneration for his trouble and 'loss of time.'

The picture of early Roman society may be easily reconstructed from these paragraphs. We must imagine a number of households, each united under its own *paterfamilias*. Inside the household the father is the sole judge. The relations of the household and its members to other households resemble, as Maine[1] points out, international concerns rather than transactions between individuals. Alike to assert the rights and to avenge the wrongs of himself and his followers, the *ultima ratio* for the chief of the family is private war. He must look to his force and to the force supplied him by his kindred and dependants. Property was to be held by the strong hand. In the law of the Twelve Tables, as detailed in Gaius,[2] the fictive struggle is presented by the claimants pretending to cross spears[3] over the slave or chattel in dispute, and by each laying his hand on the object, and only dropping it at the command of the Praetor, 'mittite ambo hominem.' Cicero[4] tells us that in his time men still went through the form of leaving the court in order to fight on the ground for the disputed possession of a farm, 'ex jure manum consertum.'

If any of the subordinate persons in a family commits an offence against the member of another group, the chief has to fear the vengeance of that other group, and if he be not

[1] Maine, *Ancient Law*, p. 126. [2] Gaius, *Inst.* IV. 16.

[3] This is afterwards referred to as an essential point in the verbal dispute—'Anne dicis qua ex causa vindicaveris?'; 'Jus feci sicut vindictam imposui.' Poste (*Gaius*, p. 409), reading 'peregi' for 'feci' with the older editors, translates, 'I stated my title before I touched him with my lance.' The reading 'feci', which results from a more careful study of the palimpsest, confirms Danz's rendering—'I was in my right, I was claiming my own, when I laid the spear on him' (*Sacrale Schutz*, p. 162).

[4] Cicero, *pro Murena*, 12. 26.

strong enough (as George Buchanan said of King James) 'to thole his feud and a' his clan's', he must buy security by the surrender of the culprit. Theft is dealt with by seizing the robber caught in the fact, and holding him in bondage, or, if he be already a slave, by flinging him from a precipice; if the robber has escaped, the stolen goods must be sought for in a grotesque and ceremonial inquisition over the neighbour's house-plot. Bodily injuries are avenged under the *lex talionis*, seduction of the women of the household by the immediate infliction of death or personal chastisement.

The extent to which the primitive self-help[1] is to be reckoned a source of Roman criminal law may be roughly gauged by ascertaining what offences were at any historical time dealt with, as *delicta*, under the forms of civil action; for all civil action is a development from the old *actio sacramenti*, and that *actio* again arises from the regulation of self-help. Theft in all its forms, including fraud, embezzlement, and breach of trust,[2] all personal outrages, assaults, woundings and insults (*injuria*), all trespass on the rights of property, all libel, slander, and false witness, all invasion of the chastity of members of the family (*stuprum*),[3] are dealt with, in whole or in part, as private wrongs.

Mommsen rightly refuses to allow the differences of procedure to obscure the essential fact that such trials are really part of the criminal law. 'The fundamental characteristic,'

[1] Another form of self-help, that of the *plebs* and its tribunes, has left its mark in other ways; this has been described above (p. 13); and there will be occasion hereafter to notice yet another form under the discussion of *ignis et aquae interdictio* and of proscription; see below, Vol. II, p. 31 seq.

[2] *Tutela* in Twelve Tables (see Ulpian, *Digest*, XXVI. 10. 1. § 2, and Cicero, *de Oratore*, I. 36. 166), *circumscriptio* in lex Plaetoria (see Cicero, *de Officiis*, III. 15. 61).

[3] For *testimonium falsum* see Mommsen, *Strafrecht*, p. 668; for *stuprum*, ibid., p. 690.

he says,[1] 'of a moral law broken, and a reparation prescribed therefor by the State, unites the two spheres in an essential identity, and the difference, whether the reparation is realized in a suit at public or at private law, appears in comparison superficial and accidental.' Hitzig, in his review of the *Strafrecht*,[2] adduces an argument which perhaps appeals more strongly to a jurist than the moral considerations named by Mommsen. He points out that the doctrine 'in poenam heres non succedit', the distinctive mark of criminal as opposed to civil liability, holds equally for the public and the private criminal law.[3] In these suits under the forms of private law, the penalty inflicted, as on the thief caught in the fact, may be hardly less severe than that which the State dispenses in its 'public' justice. We may perhaps include the fate of the 'judgement debtor', who may be seized *per manus injectionem pro judicato*, and then put to death or sold into slavery across the Tiber,[4] as in effect a terrible punishment entailed by condemnation in a private suit. Nevertheless, the practical difference which follows the distinction in procedure is very great; for the result is that in all the cases which I have named, the law may be set in motion by the private man, that the penalty, whatever it is, may in historical times always be compounded for, if the offender can find the money, and that from all such suits there is excluded the possibility of an appeal to the People.

[1] *Strafrecht*, p. 4.

[2] Hitzig, *Revue Pénale Suisse*, 1900, p. 189.

[3] As we shall see later on, the line of demarcation between the two becomes very shadowy, with the institution of the *quaestio repetundarum*; and in the case of money-penalties imposed by law we sometimes find an option between the public and the private suit. See below, p. 182, note 2.

[4] Aulus Gellius, *Noct. Att.* XX. 1. 47 'Tertiis autem nundinis capite poenas dabant, aut trans Tiberim peregre venum ibant'.

How then does the action at private law for the redress of personal wrongs develope out of the primitive order? Here we find our best answer in the law of the Twelve Tables, which stereotypes procedure at the moment of transition from the rule of private vengeance to that of state adjudication. It was, of course, always possible that the injured party might allow himself to be pacified by the offer of some compensation from the person who had wronged him, and this possibility was laid hold of and developed by the officers of the State. Just as in the struggle over property 'on some memorable day in the progress of civilization, before the combat had terminated fatally to one of the combatants, some Numa Pompilius, of sufficient authority to make so great an innovation, interposed and induced the parties to refer the case to arbitration',[1] so in the case of wrong done by man to man. 'The magistrate,' says Mommsen,[2] 'here interposes between the contending parties as a mediator: on the one hand he settles or causes to be settled the question of fact; on the other hand, when a wrong has been proved, he either gives self-help its course, or else enjoins the injured party to renounce it on consideration of receiving compensation.'

In the execution likewise of the penalty, the private and personal origin of the vengeance still appears; the magistrate acts only indirectly, and his action is ancillary to self-help. In the rare cases where the penalty of death follows condemnation in such private suits—the most notable are those of false witness[3] and of theft committed by a slave caught red-handed—death was inflicted by the primitive form of lynch law, and the offender was flung from the

[1] Poste, *Gaius*, p. 411.

[2] *Strafrecht*, p. 905.

[3] Aulus Gellius, *Noct. Att.* XX. 1. 53; in § 7 of the same chapter he mentions the bribed *judex* as capitally punished.

Tarpeian Rock—'the usual form of execution, where infliction by a magistrate is excluded.'[1] In the case of personal injuries, Mommsen's German experience supplies him with an interesting parallel.[2] 'When the injured person demands it, just as the so-called Courts of Honour, in the re-barbarising of our nation, which is now beginning, license the duel, so the Roman courts of justice granted leave on the part of the State for the aggrieved to proceed against the aggressor by way of self-help, on the principle of "Be done by as you did", *Si membrum rupit, ni cum eo pacit, talio esto.*'

Thus the criminal law still to a great extent 'rested on the blood-revenge'.[3] But such practice did not long survive the legislation of the decemvirs. Either the State itself undertakes the punishment of crimes (there are notable instances even in the Twelve Tables), or in the development of the private criminal suit 'self-help is completely set aside, and every wrong is subject to the compulsory compensation prescribed by the State for the outraged person'.[4] Aulus Gellius' friend, the jurist Sex. Caecilius, is represented as arguing that the permission of *talio* in the Twelve Tables was only granted when the culprit had refused to offer a proper reparation, 'praesertim cum habeas facultatem paciscendi, et non necesse sit pati talionem nisi eam tu elegeris.'[5] According to this the plaintiff is assumed not to refuse a reasonable satisfaction. He cannot say, with Shylock,—

> What if my house be troubled with a rat,
> And I be pleased to give ten thousand ducats
> To have it baned?

[1] Mommsen, *Strafrecht*, p. 931.
[2] Ibid., p. 62. For references see Bruns, *Fontes*[7], p. 29.
[3] Ibid., p. 940. [4] Ibid., p. 905.
[5] Aulus Gellius, *Noct. Att.* XX. 1. 36.

Caecilius probably antedates the legal situation: it is more likely that at first the decisive word lay with the injured man, and that the pressure which the judge could apply to induce him to 'take thrice thy money, bid me tear the bond', gradually increased until it became compulsion.

It is not difficult to reconstruct the lines along which the progress of obligatory composition must have advanced. The exaction of the *talio* carries with it the defect of its origin in anarchical self-help. The ancient practice seems to be embodied in the words[1] 'si quis membrum rupit aut os fregit, talione proximus cognatus ulciscitur'. But this was to lay a heavy task on the injured man and his kindred. What if they were weak, poor and without influence, while the culprit had a strong body and a powerful family connexion? In such a case, from the time when the State emerged from anarchy, the king or the consul would doubtless lend his magisterial force to help the weakness of the aggrieved.[2]

[1] Priscian, *Inst. Gramm.* Book VI. ch. 13. § 69 'quidam veterum "ossium" preferebant, Cato tamen "os" protulit in IV Orig. "si quis,"' &c. (as in text). See Bruns, *Fontes*[7], p. 29.

[2] This is vigorously denied by Danz (*Sacrale Schutz*, p. 228), who maintains that the action of the State is purely negative and permissive; the injured person avenges himself 'how he can and how he will'. I would admit that there is no record of the punishment being carried out by the public authorities, or even of their assisting the private man in his execution of vengeance; but it must be remembered that there is no specific instance recorded of such vengeance being carried out at all. Danz (*Sacrale Schutz*, pp. 48, 231) attributes the same passivity to the Roman gods, and thinks that the utmost they can do is to withdraw their protection from the offender. That was certainly not the belief of the Fetial, who prayed—'tum illo die, Juppiter, populum Romanum sic ferito ut ego hunc porcum hic hodie feriam' (Livy, I. 24. 8). That the magistrate does not always shrink from acting on his own account is shown by the circumstance that his lictors scourge the condemned thief before he is handed over to the aggrieved person (see Bruns, *Fontes*[7], p. 32). In case the thief is a boy the whole punishment is 'praetoris arbitratu verberari'.

But this assistance again might easily be withdrawn if the plaintiff had turned a deaf ear to the persuasions of the judge who suggested the acceptance of compensation. Even in cases where the defendant had put himself in the wrong by refusing to offer an adequate *solatium*, the court soon discovered a more circuitous method of coercion by fining him in a definite sum, 'si reus qui depecisci noluerat judici talionem imperanti non parebat, aestimata lite judex hominem pecuniae damnabat.'[1] The plaintiff is now in the position of a judgement creditor, and may proceed *per manus injectionem*. This again is a method of self-help, for it may be initiated, *non expectata judicis auctoritate*.[2] But here comes a distinction. In case of matters still unadjudicated it is allowed to the defendant to resist seizure, *manum depellere*, but if the claim is founded on a previous judgement, the formula runs, 'tibi pro judicato manum injicio'; in that case Gaius tells us,[3] 'nec licebat judicato manum depellere.' This, I think, can only mean that in case of resistance the officer of State will lend his force to compel submission;[4] otherwise the reign of law would in the last resort result in chaos. Thus the high-handed offender will be reduced either to be sold across the Tiber as an *addictus* for the debt, or to pay the sum in which he has been condemned. For injuries not involving the actual loss of a limb, the Twelve Tables already dispense with the *talio* in favour of a fixed penalty, 300 asses for a broken bone, 25 asses in all other cases. Later on, the fixed sums are in turn replaced under the praetors' edict by an assessment of damage, 'praetores postea hanc (legem) abolescere et relinqui censuerunt, in-

[1] Aulus Gellius, *Noct. Att.* XX. 1. 38.

[2] Servius, On Virgil, *Aeneid*, X. 419. See Danz, *Sacrale Schutz*, p. 49. See also below, p. 54.

[3] Gaius, *Inst.* IV. 21–25. For the converse case see below, p. 63.

[4] See below, p. 53, note 3.

juriisque aestimandis recuperatores se daturos edixerunt.'[1] In the meanwhile the private infliction of the *talio*, an infliction hardly consonant with the social order of a decently civilized state, has silently dropped out of the alternatives presented to the parties.

The result of these changes in judicial practice is well summed up by Mommsen.[2] 'From that time forward capital punishment by private suit is set aside, and never reappears. The conception of the ransom money, which has from the first entered with effect into the procedure for crimes against individuals, henceforth reigns supreme in this sphere.' Those crimes which the Romans desired to punish otherwise than by pecuniary damages were removed by them to the sphere of public justice. As Mommsen says, 'this practically comes to the abolition of the blood feud.'

[1] Labeo, *apud* Gellium, *Noct. Att.* XX. 1. 13. See below, p. 219, note 1.

[2] *Strafrecht*, p. 941.

CHAPTER IV

THE LEGIS ACTIO SACRAMENTI

INSTEAD of the appeal to force, the contending parties now challenge one another under a form, the *provocatio sacramento*, which, as Gaius tells us,[1] constituted a *generalis actio*, applicable in all cases where no separate procedure had been prescribed by some special law. Originally, doubtless, the device of a magistrate of great originality and influence, the procedure gradually crystallized, and what was at first a derogation from the inherent rights or mights of the individual in favour of the representative of public peace and order, becomes by subsequent recognition an *actio legis*. The precise nature of the *sacramentum* thus appears as a highly interesting subject of inquiry; and since the plan of this book lends itself to the criticism of any disputed points which may arise by the way, I will now proceed to discuss some theories which have been framed concerning the meaning and usage of the word.

The most important of these is due to Danz,[2] and is supported by Huschke,[3] Eisele,[4] and Greenidge;[5] but I find the clearest exposition in Girard, and in the following discussion I propose to deal in the main with Girard's presentation.[6] According to this hypothesis the *sacramentum* is an oath which each party took to the righteousness of his plea;

[1] Gaius, *Inst.* IV. 13. [2] Danz, *Sacrale Schutz*, p. 151 seq.
[3] Huschke, *Multa und Sacramentum*, p. 353 seq.
[4] Eisele, *Römische Rechtsgeschichte*, p. 218 seq.
[5] Greenidge, *The Legal Procedure of Cicero's Time*, p. 53.
[6] Girard, *Org. Jud.*, p. 41.

a false oath would render him *sacer* to the god invoked, and so lead to his death. The supposition is that originally the penalty was inflicted without any regard to extenuating circumstances;[1] but that with the advent of humaner conceptions, brute victims might be substituted in case the error was not wilful, just as by the Law of Numa in case of accidental homicide the slayer offered a ram instead of being himself put to death. Each party therefore to the suit provides beforehand the beasts (or the money for their purchase) which shall cleanse him from guilt in case he turns out to have sworn wrongly by inadvertence. The analogy is suggested of the *hostiae succidaneae*, which were provided to supply the place of those which had failed to be offered up owing to any accident in the public sacrifices; and the analogy would be the closer if we could believe that these were sometimes even immolated beforehand (*hostiae praecidaneae*)[2] to compensate for any irregularities which might hereafter chance to leave a gap in the promised number of victims. Girard[3] further believes that we have here the justification for the interference of the magistrate in these private concerns. The king would not, it is supposed, or at any rate need not, touch the controversies between man and man as such, but when two contradictory oaths have been sworn, it is his business to save the community from the religious

This hypothesis is, of course, inconsistent with that of the voluntary submission of the dispute by the parties to the judge, as set forth in the last chapter. Maine's 'vir pietate gravis' would have a hard task indeed in persuading the disputants to stake their lives on the issue of his decision.

[2] So Girard (*Org. Jud.*, p. 41, note). But Aulus Gellius (*Noct. Att* IV. 6, 7), while interpreting the *succidaneae* in Girard's sense, hardly bears him out as to the *praecidaneae*. These are described as offered before the main sacrifice, not with a view to possible future omissions, but to get rid of pollution which might have already accrued.

[3] Girard, *Org. Jud.*, p. 40; likewise Danz, *Sacrale Schutz*, p. 166.

pollution which must needs have been incurred on the one side or the other. Thus, according to him,[1] 'the procedure of the *sacramentum* bears evidence that at least in the most normal cases, alike in actions respecting property and in the ordinary personal actions, the magistrate already invested with the prerogatives of a criminal judge was invested with those of a civil judge by an expedient which, being derived from the religious powers of the king, is at least anterior to the fall of the kingship.'

What are we to say to this ingenious and seductive theory? It seems at first sight so plausible, so complete and so self-consistent, that one shrinks from spoiling its symmetry by adverse criticism. Still there is another side to the question. First as to the conclusion; the hypothesis that the magistrate felt himself constrained to intervene to punish a false oath is contrary to all we know about the Roman practice or indeed about the early practice among all peoples in regard to perjury. The Roman people could incur the wrath of Heaven only by the breach of an oath taken by the representative of the people, the Fetial. Perjury by a private man is a matter which from first to last is left to the vengeance of the gods, and the law never threatens secular penalties against the offender.[2] Tiberius' refusal to make punishable a false oath by the deified Augustus is justified by his appeal to the unquestioned analogy of an oath by the gods of Olympus; 'Jusjurandum perinde

[1] Girard, *Org. Jud.*, p. 45.

[2] The exception which proves the rule is the oath *per genium* or *per fortunas* of the living emperor, who is still a man, and therefore liable to be injured by his name being taken in vain, just as the Scythian king in Herodotus (IV. 68) was supposed to sicken if any one swore falsely by his hearth. See also below, Vol. II, p. 167, note 2. In the special case of the freedman's oath cited above on p. 10, note 4, the law enforces the performance of the promise by civil methods, but does not prescribe punishment for the breach of oath as for a crime.

aestimandum quam si Jovem fefellisset; deorum injurias dis curae';[1] and Cicero gives as the penalties for perjury destruction from Heaven, but from man only blame and contempt.[2] Nor will it serve to represent[3] such utterances as merely the outcome of the scepticism of later days. If the contrary doctrine of the duty of the State had ever obtained, we should certainly have found some survival of it embodied in the laws and institutions of Rome. But of such survival there is not a trace.

If the conclusion is thus barred, the premises in their turn will be found not to stand the test of careful investigation. The solution of antiquarian problems by explanations drawn from religious analogies is a most fascinating process, and for that very reason it tempts us to exaggerate and is apt to lead into fanciful theories. It is of course true that in *some* instances a beast is substituted when, for whatever reason, the deity is disappointed of a human victim. Abraham's ram caught in the thicket would be a case in point; so would be the expiatory offerings ordered after Horatius' acquittal,[4] or whenever the man devoted to death in battle survives, when he ought to have perished.[5] There are other instances again, where this is a possible but not a certain explanation. When the harlot who has touched the altar of Juno is ordered to let down her hair and sacrifice a ewe-lamb, this *may* be the redemption of her life, but it is at least as likely to have been merely a fine and an act of contrition.[6] Again, under

[1] Tacitus, *Annales*, I. 73. 5. [2] Cicero, *de Legibus*, II. 9. 22.

[3] As does Girard, *Org. Jud.*, p. 55.

[4] Livy, I. 26. 13. [5] Livy, VIII. 10. 12.

[6] Festus, s.v. *paelices*. This case and the next are cited in support of Girard's theory. With the sacrifice of the lamb to atone for an indecency, we may compare the law of Numa forbidding a widow to remarry within ten months from her husband's death: ἡ δὲ πρότερον γαμηθεῖσα βοῦν ἐγκύμονα κατέθυεν, ἐκείνου νομοθετήσαντος (Plutarch, *Numa*, 12. 2).

Numa's law, the slayer by accident is required 'offerre in concione agnatis arietem', or 'subigere arietem', and Brunnenmeister[1] and Girard[2] may be right when they regard only Labeo's explanation[3] of *subigere*—'dare arietem qui pro se agatur caedatur', confirmed as it is by Servius' description[4] of the ram 'qui antea pro domino capital dari consueverat', and when they reject the other comment of Servius,[5] where the ram is said to be given 'pro capite occisi'. But here again the second reason may after all be the correct one; and when the relatives renounced the blood revenge, the ram may have been presented to them as a formal weregild for the dead man, and sacrificed perhaps to still his ghost and prevent his walking the earth.[6]

Primitive religion has 'reasons as plenty as blackberries' for its various manifestations, and sacrifice is no exception to the rule. Sometimes the sacrifice is only symbolic of the divine vengeance—such is the smiting of a pig by the Fetial concluding a Treaty,[7] and the sacrifice of victims which we find so frequently in connexion with an oath. Sometimes the motive for sacrifice was the belief that the dead could drink the blood of the victims, as the ghosts did in the *Odyssey*, and that the deities of the sky drew pleasure and nourishment from the steam of the altars. This last notion meets us in testimonies so far apart as the record of Noah's

[1] Brunnenmeister, *Tödtungsverbrechen*, p. 158.
[2] Girard, *Org. Jud.*, p. 32.
[3] Festus, s.v. *subigere*.
[4] Servius, On Virgil, *Georgics*, III. 387.
[5] Servius, On Virgil, *Eclogues*, IV. 43.
[6] If I understand him rightly, this is the view of Rubino (*Römische Verfassung*, note on p. 465).
[7] Livy, I. 24. 8 (see above, p. 43, note 2), and Homer, *Iliad*, III. 292; XIX. 266, the belief is enshrined in the common Greek phrase ὅρκια τέμνειν.

sacrifice[1] on the one hand and the plot of Aristophanes' *Birds*[2] on the other, and the Roman who approaches Jupiter or Janus with the words 'be strengthened with this dish',[3] seems to subscribe to the same doctrine. The notion of feeding the gods might be used by similar stretches of fancy to explain every phenomenon, just as the notion of expiatory substitution has been used. But all such processes of argument are dangerous, and each case requires rigorous sifting. In the present instance Girard certainly goes too far, when to his assertion that the 'fines are employed for expiatory sacrifice, . . . that for a false oath in a sacrifice to the god whose name has been taken in vain' he adds in a note,[4] 'The proof of this is found in the employment for sacrifice of the animals deposited by the loser in the procedure of the *Sacramentum*.' To me it seems that this falls very far short of proof.

It is a stronger recommendation of the theory that it reduces to a common term the various senses of the word *sacramentum*. Sometimes undoubtedly it means an oath. 'Sacramento dicitur,' says Festus,[5] 'quod jurisjurandi sacratione interposita actum est.' Hence comes the famous usage by which the word denotes the military oath which bound the soldier to his commander. It may be fairly

[1] 'And the Lord smelled a sweet savour, and the Lord said in His heart, I will not again curse the ground any more for man's sake.' Gen. viii. 21.
[2] The Birds establish a blockade in the middle sky, cutting off the sacrificial vapours from the gods, and so starve them into submission.
[3] 'Macte fercto esto', 'macte vino esto'.—Cato, *de Re Rustica*, 134.
[4] Girard, *Org. Jud.*, p. 33, note 1.
[5] Festus, *ad voc.* (Bruns, *Fontes*[7], App., p. 33). The sentence here quoted is certainly correct, as it is confirmed by the paraphrase of Paulus Diaconus, 'Sacramentum dicitur quod jurisjurandi sacratione interposita geritur.' The rest of this fragmentary article of Festus is very doubtful; but see below, pp. 53 and 54, note 1.

presumed that in this case the oath is called *sacramentum*, because the mischief which the swearer imprecates on his own head, if the

fides servataque ferro
militiae pietas[1]

be found wanting in him, is that he shall become a *homo sacer*. If the 'actio sacramenti' can be explained in the same way we have at least a gain in symmetry and elegance. The question is whether the passages of Festus and Gaius, on which our evidence rests, really admit of this identification. In the discussion of the matter I must for the moment leave Girard, and deal directly with the detailed arguments of Danz himself. It will be best to begin by quoting at length the definitions given by Festus. The words in italics are the conjectural supplement of Müller.

'I. Sacramento dicitur quod *juris jurandi sacrati*-one 'interposita actum *est*. *unde quis sacramen*-to dicitur interro-'gari, quia *jusjurandum interponitur*. Cato in Q. Thermum 'de X. *hominibus* "*Atque etiam ad*-erant ne mala *fide apparere*-t '"scelera nefaria fie-*ri noscentis ut sacrame*-nto traderentur, '"lege est [*aestimarentur*,[2] Müller]."'

'II. Sacramentum aes significat, quod poenae nomine 'penditur, sive eo quis interrogatur, sive contendit;[3] id in 'aliis rebus quinquaginta assium est, in aliis quingentorum 'inter eos, qui judicio inter se contenderent. Qua de re lege 'L. Papirii Tr. pl. sanctum est his verbis: Quicunque Praetor 'post hoc factus erit, qui inter cives jus dicet, tres viros

[1] Lucan, *Pharsalia*, IV. 498. Cf. Livy, X. 38. 3.

[2] Perhaps '*ut turpi sacrame*-nto traderentur lege est *cautum*'; see below, p. 54, note 1. Compare the 'turpissimum auctoramentum', of gladiators (below, p. 121), called also 'sacramentum' in Petronius, *Satyricon*, ch. 117. 5.

[3] i. e. whether a man is called on to plead (as defendant in an action for tort) or is a party to a suit (in a case of disputed ownership).

'Capitales populum rogato, hique tres viri *capitales* quicunque '*posthac fa*-cti erunt, sacramenta ex-*igunto* judicantoque, 'eodemque jure sunto, uti ex legibus plebeique scitis exigere, 'judicare que †esse† esseque opportet. Sacramenti autem 'nomine id aes diei coeptum est, quod et propter aerarii 'inopiam et sacrorum publicorum multitudinem consume-'batur id in rebus divinis.'

The lines following the words *actum est* in the first article are very fragmentary and obscure. We may not be able to reconstruct Cato's words;[1] but we know from Aulus Gellius[2] that the Ten men mentioned were the officers of some allied State, who had been flogged by Thermus. It is therefore impossible to suppose that the matter in hand can be the same as that dealt with in the *lex Papiria* quoted in the second article. This *lex Papiria* is undoubtedly concerned with the *Triumviri capitales* and seems to attribute to them the collection on behalf of the State of the penalty-money forfeited by a vanquished suitor after a lawsuit has been concluded.[3] This is

[1] I give for what it is worth my own solution on p. 52, note 2 and p. 54, note 1.

[2] Aulus Gellius, *Noct. Att.* X. 3. 17.

[3] Lest we should be led from the use of the word 'judicanto' to suppose that the *III viri capitales* have a part in the actual decision of the main lawsuit, we must bear in mind that all officers connected with finance have the power of deciding judicially on any legal point which may arise in the discharge of their executive functions (see Mommsen, *Staatsrecht*, I³, p. 169 seq., and Girard, *Org. Jud.*, p. 179, note); the word 'judicanto' is inserted merely to endow these particular magistrates with the usual powers. Huschke suggests with much probability that they were exercised whenever the defendant (supported by sureties) denied that he had been really cast in his suit (*Multa und Sacramentum*, p. 478). For certain other supposed judicial functions of the *III viri* see Mommsen, *Strafrecht*, p. 180, note 1; *Staatsrecht*, II³, p. 599, and Girard, *Org. Jud.*, p. 177. From two passages of Plautus (*Persa*, 70, and *Truculentus*, 762), in which it appears that the summary *legis actio per manus injectionem* was available in cases of usury (see also Gaius, *Inst.* IV. 23) and the

the first point on which I am at issue with Danz, who, finding the phrase *sacramento interrogari*[1] in both articles, hurries to the conclusion that 'there can be no doubt whatever that this second passage of Festus speaks of the same transactions as are spoken of in the first passage', and accordingly claims[2] to treat the two articles as a single whole.

Danz next transforms Festus' first statement that all business transacted under oath is said to be transacted *sacramento* into the converse, that all transactions *sacramento* are transactions under oath. 'Thus *sacramento agere* is, according to Festus, nothing else than *agere* "under or with

fraudulent supposition of children, coupled with the mention of the *III viri* in the first passage, it is inferred that after the praetor had settled the preliminaries *in jure* he would refer the *judicium* to the triumvirs. I think it more likely that they were called in to regulate the summary arrest, perhaps until the next *dies fastus*, when the parties could be brought before the praetor, whose presence seems to have been necessary for the formal inception of this, as of every *legis actio* except the *pignoris capio* (Gaius, *Inst.* IV. 29). In the *lex Ursonensis* (chap. LXI, Bruns, *Fontes*[7], p. 123) *manus injectio* seems to be *jure*. Preliminary steps, however, may be taken by anticipation 'non expectata judicis auctoritate' (see above, p. 44), and here the action of the triumvirs would naturally be invoked, as we find it below (Vol. II, p. 24, n. 2, and p. 151, n. 3) in the preliminaries to a summons for murder before Sulla's *quaestio inter sicarios*. There seems no reason to suppose with Mommsen and Girard (loc. cit.) that these triumvirs ever had to find a verdict for their superior.

[1] I have defined above (p. 52, note 3) what I take 'sacramento interrogari' to mean in the second article. In the fragmentary first article 'interrogari' may perhaps be equivalent to 'rogari' which is used of conscription (Livy, XXXV. 2. 8 and Caesar, *Bell. Gall.* VI. 1. 2); and we may conjecture that this and the more significant phrase, 'sacramento traderentur', are to be explained from the concluding paragraph of Gellius' note (*Noct. Att.* X. 3. 19). Cato then would be telling how, by reason of their treason in the Hannibalic War, the 'Bruttiani', who were the instruments of Thermus' cruelty, had come to be bound (like the Gibeonites by Joshua) to the degrading *sacramentum*, which made them serve as drudges and *lorarii*, not as soldiers—'ut turpi sacramento traderentur lege est cautum (if the emendation which I have suggested above (p. 52, note 2) be admitted).

[2] *Sacrale Schutz*, pp. 155 and 172.

the employment of an oath".'[1] Further, recognizing rightly enough that the words 'sacramenti nomine id aes dici coeptum est' imply that we are dealing with a later and secondary application of the word, he proceeds again to invert Festus' argument. What Festus says is that the money staked by way of legal wager (which presumably had at first some other name, if it had a name at all) began to be called *sacramentum* when it came to be spent in sacrifices. Clearly he looked on the *actio* by way of legal wager as already existing before the word *actio sacramenti* came to be applied to it. Danz,[2] on the other hand, tries to make him say that the phrase *actio sacramenti* is prior to the legal wager, and in that case must originally have meant something entirely different, namely 'proceedings under oath'. Going one step further, Danz claims the right to substitute in the second article of Festus for the word *sacramentum* the supposed definition of the word which he has extracted from the first,[3] and this leads him to a translation, which is strange indeed, of the words 'Sacramentum aes significat, quod poenae nomine penditur, sive eo quis interrogatur, sive contendit; id in aliis rebus,' etc. This he renders, '"Oath" has as its secondary meaning the money which is paid as a penalty, when any one has been called on to plead or has been party to a suit under oath (*eo*). This oath-money (*id*) amounted to,' etc.

A theory which logically leads to such extraordinary contortions of the text may well be held to be self-condemned. It would indeed reduce Festus' second article to nonsense. If Festus had really meant *sacramentum* in this sentence to be taken in the sense of 'oath', he would have no occasion for any further explanation why the word *sacramentum* or

[1] *Sacrale Schutz*, p. 154.

[2] Ibid., p. 156.

[3] Ibid., p. 174.

'oath-money' came to be applied to the deposit. In that case it would have been so called for the simple reason that so it was. But Festus in fact thinks it necessary to hunt for another and by no means obvious explanation, and finds it in the accidental circumstance that from the poverty of the exchequer this money came to be expended in providing for the public sacrifices.

A similar straining of the sense appears in Danz's attempt to bring into line with his theory Gaius' statement about the challenge—'Quando injuria vindicasti D aeris sacramento te provoco,'[1] which he would take[2] as equivalent to 'jure-jurando majoris piamenti interposito te provoco'; 'I challenge your claim under my oath, an oath which if not justified, is to be expiated by sacrifices to the amount of 500 asses.' It is an obvious objection that, if this interpretation were correct, the next step would naturally be for each party to take the oath, but that of such an oath as part of the procedure there is not a trace in any of our authorities. In answer to this Danz[3] assumes that the meaning of 'oath' was so firmly and inextricably rooted in the word *sacramentum* that the mere mention 'provoco te sacramento' was held by a legal fiction to imply that the oath was actually taken—as we should say in England, 'the presumption of law was that the oath had been sworn.'

Danz[4] is able to cite abundant contrivances whereby a circumstance inconvenient actually to produce was replaced by an ingenious fiction. An interesting case is that of the *ovis cervaria*, where the sacrifice of a deer was accomplished by calling a sheep *cerva* for the occasion,[5] and another is the device of Brutus,[6] who offered to the gods

[1] Gaius, *Inst.* IV. 16. The adversary replies 'similiter ego te'.
[2] *Sacrale Schutz*, p. 175. [3] Ibid., p. 240. [4] Ibid., p. 237 seq.
[5] Festus, s.v. *cervaria ovis*. [6] Macrobius, *Sat.* I. 7. 35.

'heads', as required, but heads of poppy and garlic. But in the present case no such necessity appears. An appeal to heaven on the justice of your cause is a perfectly easy ceremony and is a natural and obvious way of commencing a legal contest. It was a necessary preliminary to the trial by combat in mediaeval courts,[1] and to the trials before the standing jury-courts of the later Roman Republic, 'si dejuraverit calumniae causa non postulare.'[2] If it had ever found a place in the *actio sacramenti*, it is most unlikely that it should have fallen into desuetude. It must be remembered that every act in the elaborate ritual, even when that act related to conditions which were fictitious or whose practical consequence had vanished, was jealously retained as a survival.[3] Can we believe that the act of taking the oath, which if it existed at all must have been the very kernel of the whole transaction, could have been obliterated and only left to be inferred from an incidental mention?

All these difficulties arise merely because Danz insists on reading his own theory about *sacramentum* into the texts. No one would have thought of such an interpretation as that which I quoted above of the second article of Festus, unless he had brought to the elucidation of the Latin a mind saturated with the conviction that *sacramentum* must always

[1] This was done by the parties grasping hands, of which possibly a survival may be seen in the hand-shaking preliminary to a prize-fight. Poste (*Gaius*, p. 413) throws out the suggestion that this may be the meaning of 'manum conserere in jure' at Rome. But the passage of Ennius—

> Non ex jure manum consertum, sed mage ferro
> Rem repetunt,

clearly postulates the contrast between a fictitious struggle and a real one. There can be no doubt, I think, that *manum conserere* means 'to fight'.
[2] *Lex Acilia*, verse 19; Bruns, *Fontes*[7], p. 62.
[3] See above, p. 38.

mean an oath. Put this prepossession aside, and there is no difficulty in the passage as it stands. It simply says[1] that the money wagered in an action at law is called *sacramentum*, because it is spent in sacrifices. In a similar sense of the word Cicero gives, as the short title of the *lex Aternia-Tarpeia*[2] which limited the magistrate's power of fining, 'de multae sacramento,'[3] 'concerning the number of victims to be paid as fines.'

The word *sacramentum* then has clearly two distinct meanings, dealt with in two distinct articles of Festus, and both amply justified by etymology, first an oath in which *sacratio* is invoked, secondly, animals destined for sacrifice or money to be used in procuring them; and it is in the second sense that the word is used in the phrase *actio sacramenti*. Festus alone gives us this etymology of the word, but Varro[4] and Gaius[5] are at one with him in describing the *sacramentum* as a penalty to be paid by the loser in a suit.

If we ask, why should any such money be paid or any such wager required? Maine[6] would answer that it was originally to remunerate the umpire for his trouble and loss of time, and so 'came to be paid to the State which the praetor represents'. He cites as an illustration a curious passage in the Trial Scene from the Shield of Achilles: 'The judges

[1] Leaving out the sentence about the *lex Papiria*, which is parenthetical.

[2] See Dionysius Halicarnasensis X. 50.

[3] Cicero, *de Republica*, II. 35. 60. I agree with Mommsen's conclusion that there is no occasion to alter the text of Cicero into 'de multa et sacramento', as most modern critics do, though I do not understand Mommsen's argument (*Staatsrecht*, II³, p. 69), and am not sure how he means to translate 'de multae sacramento'. Rubino (*Römische Verfassung*, p. 123, note) seems to take it as I do.

[4] Varro (*de Lingua Latina*, V. 180) says that the money wagered was called *sacramentum* because it was deposited in a temple.

[5] Gaius, *Inst.* IV. 13 and 14.

[6] Maine, *Ancient Law*, p. 376.

spoke their dooms by turns; and in the midst there lay two talents of gold, the prize of him who judged most rightly,'[1] which Maine interprets to mean, that the money goes 'to the judge who shall explain the grounds of his decision most to the satisfaction of the audience'.[2] Most modern critics seem to adopt this rendering of the passage from the *Iliad*, and on the whole I am inclined to follow them, though I do not think that the matter is beyond dispute. However this may be, the important point is that as early as Homer the parties to a suit deposited or staked a sum over and above the matter of litigation, and further that there is no hint either of oath or sacrifice in connexion with this deposit. The same is the case with the Attic *πρυτανεῖα*, or court-fee, which answers in all other respects to the Roman *sacramentum*. This is a strong confirmation of what the words of Festus ('Sacramenti nomine id aes dici coeptum est') seem to indicate, that the spending of the deposit money in sacrifices is a practice of later date than the legal wager itself. For my own part I see no difficulty in being satisfied with the account of Festus as it stands, that the State wanted the money to defray its costly ritual,[3] nor in accepting the explanation of Festus, Gaius, and Varro that the State took

[1] Purves's translation of Homer, *Iliad*, XVIII. 508:

τῷ δόμεν ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

[2] Or perhaps to him whose opinion is confirmed by the majority of the court. This last interpretation has been suggested to me by Professor Vinogradoff, who cites as a parallel the custom in Æthelred's Law of Wantage (III. 13. 2) of fining the jurors who voted 'wrong', that is, against what proved to be the decision of the majority. Possibly this custom may contain the germ of the unanimity required from the English jury.

[3] We may compare the provision of the *lex Ursonensis* (chap. LXV; Bruns, *Fontes*⁷, p. 124), that moneys, exacted as a penalty for failure on the part of contractors to fulfil their bargains with the corporation, shall be used for the public sacrifices and for no other purpose.

it as a penalty from the litigant who was adjudged to be in the wrong.[1]

The silence of Mommsen shows that he gave no credence to the explanation of the phrase *actio sacramenti* which derives it from an oath taken by the parties.[2] Girard[3] himself allows that the consciousness of the *sacramentum*, as an oath followed by an expiation, must have died out before the time (at least as early as the Twelve Tables) when the *sacramentum* was fixed at a lower rate in case of a plea for the liberty of one kept as a slave. He sees that such a lowering would be inconsistent with the idea of expiation, though it fits in well enough with the conception of a legal wager—a 'poena temere litigantium'.[4] It was obvious policy, as Gaius points out,[5] to modify this so as not to deter the assertor of liberty by the magnitude of the stake. By this admission Girard severs himself from Danz's manipulation of the passage of Festus. For if *sacramentum* in this connexion had lost all reference to the notion of an oath by the time of the Twelve Tables, it would be absurd to attribute such a sense to the word in the Augustan Age when Verrius Flaccus[6] wrote. Girard is therefore consistent in completely ignoring Danz's argument, though he accepts his conclusion on other grounds.

If we take the second article of Festus in its obvious sense as authoritative, as I have ventured to do, no difficulty

[1] 'Quod poenae nomine penditur', Festus (*loc. cit.*).

[2] Mommsen's view (*Strafrecht*, p. 903, note 2) is substantially that of Festus, Gaius, and Varro. 'The *sacramentum* is undoubtedly considered as a penal forfeit for an unrighteous plea; it belongs to an epoch which estimated and punished wrong not in itself, but according to certain outward signs which served as legal presumptions.'

[3] Girard, *Org. Jud.*, p. 55.

[4] The phrase is borrowed from the heading of a Title in Justinian's *Institutes* (IV. 16).

[5] Gaius, *Inst.* IV. 14.

[6] See above, p. 3, note 1.

whatever remains in the 'Sacramento D. aeris te provoco'. The sole phrase which might perhaps be more obvious on the other hypothesis is the form of verdict[1] that the *sacramentum* of one of the parties is *justum*. Here I think that we are not doing too much violence to the words, if we assume that to say that 'a man's stake is just' is merely a short way[2] of saying that 'the plea on which he has staked his money is a just one'.

This wager of a *sacramentum*, like its later substitute the *sponsio*, proved useful as a matter of judicial machinery in providing a clear question to which a simple 'yes' or 'no' could be given, the question namely whether a man's *sacramentum* was or was not *justum*. This was of little importance while the magistrate decided everything himself, as according to Cicero[3] the king did at Rome. By the time of the Twelve Tables, however, we find that it is the custom, possibly the duty, of the magistrate to refer this or that point in dispute to the decision of one or more jurymen. It must not be supposed that the *judex* is a delegate or representative, set to act in the praetor's stead and clothed in his powers. He is merely a temporary creation of the praetor's will, a private man on whom the magistrate, by virtue of his *imperium*, chooses to lay the task of finding an answer to some question, whether of law or of fact, which the magistrate thinks fit to put to him.[4] According to the original conception of the magistracy such a reference is by no means necessary. The magistrate himself is *judex*. Livy[5] tells us that some interpreters held that the *judex*,

[1] We gather this from Cicero, *pro Caecina*, 33. 97.

[2] Like Caelius's 'calumniam jurare' in Cicero, *ad Familiares*, VIII. 8. 3, to indicate what is expressed in full in the *lex Acilia*, verse 19 'si dejuraverit calumniae causa non postulare'. Bruns, *Fontes*[7], p. 62.

[3] Cicero, *de Republica*, V. 2. See below, p. 63, note 1.

[4] For the distinction between *jus* and *judicium* see below, pp. 73–76.

[5] Livy, III. 55. 11.

whose person is protected by the Valerio-Horatian law of 449 B.C., is no other than the consul himself. The consuls are certainly designated by this name in the old formula preserved by Varro,[1] 'Omnes Quirites ite ad conventionem huc ad judices,' and in one verse (19) of the *lex Acilia repetundarum* the presiding praetor is designated as 'judicem in eum annum quei ex hac lege factus erit'.[2] Cicero says of his chief magistrates that they may be called *praetores, judices,* or *consules*. Side by side with them is the *juris disceptator*; he is to be called only *praetor*, but his function is, 'qui privata judicet, judicarive jubeat.'[3] How did the change from *judicare* to *judicari jubere* come about? There is the fullest evidence for laws compelling the magistrate to submit his sentence in public procedure to the judgement of the People, but none for any general law compelling him to refer questions of private rights to a juror.[4] I cannot believe that the silence of our authorities is accidental. I think that it points to the conclusion that the practice did not rest on any specific enactment, but that with the increase of business in the Roman law-courts it grew up of itself. Thus the question of the precise date of the change, which has been attributed sometimes on the authority of Dionysius[5] to

[1] Varro, *de Lingua Latina*, VI. 88; Bruns, *Fontes*[7], App., p. 58.

[2] Bruns, *Fontes*[7], p. 62. Likewise in verse 72 (Bruns, *Fontes*[7], p. 70).

[3] Cicero, *de Legibus*, III. 3. 8. It is doubtless true, as Greenidge (*Proc.*, pp. 17, 18) points out, that the reference to an arbiter accepted by both parties is a natural accompaniment of the régime of self-help; but we have already seen that the evidence of the legal ritual points to the praetor himself as the inheritor of the position of the 'vir pietate gravis' who allays the strife. We shall find later on (p. 182) the phrase 'in sacrum judicare' used of the magistrate. See also below (p. 76, note 3), and especially the passage from Mommsen there quoted.

[4] Mommsen (*Strafrecht*, p. 56 and *Staatsrecht*, I[3], p. 228) and Girard (*Org. Jud.*, p. 52) seem too much inclined to put the two on the same footing.

[5] It is doubtful, however, whether Dionysius (IV. 25) refers to the

Servius Tullius, sometimes by a large superstructure on the words of Cicero[1] to the creation of the consulate, becomes unmeaning. Though a gap in the *Institutes* of Gaius forbids us to say precisely how the reference to a *judex* was welded into the ceremonies prescribed for the *actio sacramenti*, sufficient remains of this section[2] to prove (as I think) that the author is still speaking of the *actio sacramenti* in his repeated mention of the *judex*, and of the intervals prescribed for his nomination and his entry on his office.[3] It is probable, then, that such a reference had become an integral part of the procedure by the time that it was stereotyped in the Twelve Tables, and that henceforth[4] in this, the principal *actio legis*, the praetor would always be found *judicari jubere* and not *judicare*. The proceedings in the 'actio per manus injectionem' would lead up to the same result; if it was not the corollary to a previous judgement, the defendant was allowed to resist seizure—'depellere manum et pro se lege agere'; [5] and this probably means (though it is

privatus judex or to the delegacy of jurisdiction to subordinate magistrates.

[1] See Girard, *Manuel*, pp. 20, 21. Cicero says (*de Republica*, V. 2): 'Nec vero quisquam privatus erat disceptator aut arbiter litis; sed omnia conficiebantur judiciis regiis.'

[2] Gaius, *Inst.* IV. 15. In a later section (17 *a*), where some of the phrases (notably the thirty days) recur, it seems rather as if Gaius were on the subject of the *actio per condictionem* in what he describes as its original, as opposed to its later form.

[3] The interval of thirty days, here ascribed by Gaius to the *lex Pinaria*, is expressly referred to the *actio sacramenti* by the Pseudo-Asconius (Bruns, *Fontes*[7], App., p. 71), who is evidently quoting Gaius (see Mommsen, *Juristische Schriften*, Vol. III, p. 528).

[4] The intermediate stage, when custom was hardening into right, may be well expressed by what Cicero (*ad Quintum Fratrem*, I. 2. 10) says of the provincial governor of his own time: 'Quid? praetor solet judicare?' It was still possible but hardly proper.

[5] Gaius, *Inst.* IV. 24. The opposite alternative has been noticed above, p. 44.

never expressly said) that he was required to challenge his opponent's claim, staking a *sacramentum* on the issue, which issue would then be referred to a *judex*.

Before leaving this matter I would say a few words about a supplementary question raised by Girard. He believes that the part taken by the praetor in these actions was automatic, and that he merely registered that which the parties to a suit had the right to prescribe. I should hold, on the contrary,[1] that it would be often for the praetor to decide precisely on what statement the *sacramentum* should be laid, and that he would compel either of the parties to stake his cause on that issue and no other. In later days the same was certainly the case with the *sponsio*, and there is no reason to suppose that the praetor was not always competent in the matter. In the speech *pro Quinctio*,[2] for instance, Cicero bitterly complains that his client had been placed in an unfair position by the question to which the praetor has ordered him to plead, and we find references[3] to a previous stage of the proceedings in which appeal had been laid to the tribunes[4] against the praetor's ruling. I am inclined to believe with Mommsen[5] and Danz,[6] as against Girard[7] and Wlassak,[8] that it is to such discussions before the praetor rather than before the *judex* that we should refer the fragment of the rule of the Twelve Tables,[9] 'ni

[1] I here agree with Wlassak, *Processgesetze*, Vol. II, p. 336, note, rather than with Girard, *Org. Jud.*, pp. 79–81.

[2] Cicero, *pro Quinctio*, 8. 30 seq. [3] Cicero, ibid., 7. 29.

[4] There is another instance in Cicero, *Pro Tullio*, 4. 38. See also reference in Greenidge, *Proc.*, p. 232, to Cicero, *Academica Priora*, II. 30. 97 'Tribunum aliquem censeo adeant, a me istam exceptionem nunquam impetrabunt'.

[5] Mommsen, *Strafrecht*, p. 360.

[6] Danz, *Sacrale Schutz*, p. 215. [7] Girard, *Org. Jud.*, p. 85.

[8] Wlassak, *Processgesetze*, Vol. II, p. 291, note 16.

[9] Bruns, *Fontes*', p. 19.

pacunt in comitio aut in foro ante meridiem causam coiciunto. Com peroranto ambo praesentes. . . . Post meridiem praesenti litem addicito.'[1] The same appears to be the explanation of the often quoted case[2] of the suitor who lost his cause by alleging as his grievance that his 'vines had been cut', whereas the Twelve Tables prescribed an action 'ob arbores succisas'. I think that there can be little doubt that this suit never went to a *judex*, but that when the plaintiff formulated his plea—'aio te ob vites succisas ex lege damnum decidere oportere', and wished to stake a *sacramentum* on the issue, the praetor allowed the objection of the defendant that no breach of the Twelve Tables had been set out, and that he might therefore with impunity decline the challenge.

In the last century of the Republic there is no doubt that the praetor[3] has the decisive word and that preliminary questions before him may be hotly debated. The advocate must 'volitare in foro, haerere in jure ac praetorum tribunalibus'.[4] The jurisconsult Q. Scaevola had to wait for hours, 'between laughter and vexation,' before he heard the end of the controversy in which two opposing advocates, eloquent but ignorant, each entreated the praetor to ordain the precise course which would insure the failure of his own client, in an action arising out of the Law of the Twelve Tables.[5] We find the praetor Asellio, in the year 89 B.C.,

[1] 'Addicere' is one of the 'tria verba' of the praetor, and I know of no case where it is ascribed to the *judex*.

[2] Gaius, *Inst.* IV. 11.

[3] Huschke, *Multa und Sacramentum*, p. 496, note 400, aptly quotes Cicero, *in Verrem*, II. 16. 39 'quis unquam isto praetore, Chelidone invita, lege agere potuit?' See also below, p. 68.

[4] Cicero, *de Oratore*, I. 38. 173.

[5] Cicero, ibid., I. 36. 106. The words 'plus lege agendo petebat quam quantum lex in XII tabulis permiserat' and 'quam quod erat in actione' point to a *legis actio* rather than to a *formula*.

endeavouring to shift on to a *judex* the responsibility which he ought to have borne himself;[1] but in vain, for it is the praetor and not the *judex* who is mobbed and murdered by the indignant suitors. It is the praetor again who decides whether proceedings in bankruptcy shall be directed against the person or against the goods of the defendant, and so it is the 'saevitia praetoris' that is blamed, when the debtor is not allowed 'lege uti, et amisso patrimonio liberum corpus habere'.[2]

[1] *τὴν ἐκ τοῦ νόμου καὶ ἔθους ἀπορίαν ἐς τοὺς δικαστὰς περιφέρων*, Appian, *Bellum Civile*, I. 54. 4.

[2] Sallust, *Catilina*, 33. 1. See below, Vol. II, p. 3.

CHAPTER V

THE FORMULARY SYSTEM

THE elastic nature of the *actio sacramenti* opened the way for the next development of procedure. It was but a slight step forward that the praetor, instead of submitting to the *judex* the question of a 'just' or 'unjust' *sacramentum*, should define more closely in a written document what were the precise points on which he was to decide, and what effect these decisions were to have on his final verdict of acquittal or condemnation; and here we find ourselves in the 'Formulary system'.

The right of the praetor to give instructions to the *judex* flows directly from his right to appoint him.[1] These rights are asserted in the imperative mood in which the whole *formula* is conceived, and in the words with which every *formula* begins, 'Lucius Titius judex esto.' There is no reason to suppose that the power of appointment was invented with the formulary system; it is doubtless an inheritance from the time of *legis actiones*. It is true that the praetor will, if possible, appoint a person on whom both sides are agreed;[2] but if he considers the matter in dispute to be sufficiently important[3] he will require the parties to name a senator, and if they cannot agree he must needs name one himself.[4] Sometimes one of the parties offers to

[1] See Wlassak, *Römische Processgesetze*, Vol. I, p. 135.

[2] Cicero, *pro Cluentio*, 43. 122 'qui inter adversarios convenisset'.

[3] Polybius, VI. 17. 7 *ὅσα μέγεθος ἔχει τῶν ἐγκλημάτων.*

[4] Here again I find myself at issue with Girard, who suggests (*Org. Jud.*, pp. 84 and 174) various devices by which the difficulty

leave the choice to his rival, as the would-be litigant does in Plautus : [1]

habe judicem
De senatu Cyrenensi quemvis opulentum virum
Si tuas esse oportet.

Sometimes he objects even to an apparently unexceptionable suggestion, as Nasica did [2] to the name of P. Mucius Scaevola. In any case the authority of the *judex* and the effect of his sentence comes from the magistrate alone ; as Mommsen has happily put it,[3] when the praetor says to the *judex*, ' si paret . . . condemna,' this is only a polite way of saying, ' si tibi paret, ego condemno.' This point is playfully illustrated in the burlesque formula which Cicero invents [4] to show how the righteous juryman may be made by a wicked praetor to be a wheel in the machinery for evolving an unjust verdict, ' L. Octavius judex esto ; si paret fundum Capenatem, quo de agitur, ex jure Quiritium P. Servilii esse, neque is fundus Q. Catulo restitueretur (Servilium condemna).'

The ' praetor urbanus ', before whom those cases come in which two Roman citizens are engaged, has the most responsible and weighty post, *juris dicundi*, ' in which,' says

of want of agreement might be got over, but peremptorily rejects the obvious solution that the magistrate would then do in fact what he always does in law, appoint the *judex* himself. It appears that the objecting party can only evade in the last resort by an appeal to the tribunes (Asconius, *in Orationem in Toga Candida*, 75). Mommsen (*Strafrecht*, p. 178) evidently does not hold with Girard.

[1] Plautus, *Rudens*, 712 (Lindsay). The end of each line is wanting in the MSS., and Niebuhr (*Rom. Hist.*, Eng. Trans. I, p. 428) fills the gaps otherwise. Happily the words *quemvis opulentum* are sufficient for the present purpose, and these are undoubtedly genuine.

[2] Cicero, *de Oratore*, II. 70. 285.

[3] *Strafrecht*, p. 176, note 4.

[4] Cicero, *in Verrem*, II. 12. 31.

Cicero,[1] ' reputation accrues from the opportunity of dispensing equity ; in this post a wise praetor, and such Murena was, avoids offence by the fairness of his decisions, and gathers good will by his patience in listening.' Such instances must of necessity be taken mainly from the history of the later Republic, of which we know most ; but there is no reason to suppose any breach of continuity ; the essential power of the magistrate remains the same throughout, though expressed in different forms.[2]

The doubtful question of date, which we have seen in the earlier history of the procedure under the *legis actiones*, reappears at its close, when these *actiones* were, save in the exceptional cases noted below,[3] superseded by the formulary system. Here, too, I believe the true answer to be that the change was gradual, and crept in as a matter of practice. The process of change was undoubtedly aided by the *lex Aebutia*, and the precise year [4] of this ' Reformgesetz der Republik ', as Wlassak calls it, has been eagerly debated but never accurately determined. So far as I know, the *lex Aebutia* is mentioned only twice by ancient writers. Gaius tells us,[5] ' Sed istae omnes legis actiones paulatim in odium venerunt ; . . . itaque per legem Aebutiam et duas Julias sublatae sunt istae legis actiones effectumque est ut per concepta verba, id est per formulas, litigemus. Tantum ex duobus causis [6] permissum est lege agere.' This sentence sums up the effect of three laws

[1] Cicero, *pro Murena*, 20. 41.

[2] See above, p. 64.

[3] See note 6 on this page.

[4] Dates have been suggested as far apart as 234 B.C. and 126 B.C. Ortolan, *Instituts de Justinien*, Vol. I, p. 203 ; Girard, *Action d'Injures* (*Mélanges Gérardin*, p. 256).

[5] Gaius, *Inst.* IV. 30.

[6] i. e. in centumviral trials (see below, chap. XII) and in case of apprehended damage (*damnum infectum*). He might have added the fictive action (*vindicta*) for the manumission of a slave.

taken together, and the attempt to discriminate between them cannot be more than a matter of conjecture. The other passage is from Aulus Gellius.[1] Gellius has inquired of a jurisconsult, 'What is the meaning of *proletarius* which occurs in the Twelve Tables and is therefore within your province?' 'Not at all,' replies his friend, 'any more than the laws of the Fauns and the Aborigines. *Proletarii* and *adsidui* and *sanates* and *vades* and *subvades* and the twenty-five asses and *taliones* and the search for stolen goods *cum lance et licio* and all that old-fashioned stuff of the Twelve Tables was laid to rest when the *lex Aebutia* was passed, except in the *legis actiones* for centumviral cases.' He attributes, then, to the *lex Aebutia* the general disappearance of the archaic phraseology of the Twelve Tables from the modern practice of lawyers, except when they may chance to hear of them in the *legis actio*, which still survives in the second century after Christ for centumviral cases. It is dangerous to attempt to draw from this vague and general statement any specific theory as to what the *lex Aebutia* did or did not contain.[2] The most we can say is that it was a step in the process by which the cumbrous technicalities of the older law were gradually disused. In view, probably, of this uncertainty, Mommsen has, so far as I am aware, made no mention of this law in either of his great works.[3]

[1] Aulus Gellius, *Noct. Att.* XVI. 10. 8.

[2] Wlassak's conclusion (*Processgesetze*, Vol. I, pp. 104 and 127, and Vol. II, p. 301 seq.) that the formulary procedure existed in some cases before the *lex Aebutia*, that this law made the usage general but permissive, and the *leges Juliae* compelled the use of written formulae instead of *legis actiones*, is quite probable, though I do not consider it to be proven. For other possible alternatives see Greenidge, *Proc.*, p. 170 seq.

[3] That is to say in the *Staatsrecht* and *Strafrecht*. In the revised edition of his article on the *Judicium Legitimum*, which shortly before his death Mommsen wrote for publication in his collected works, we do find (*Juristische Schriften*, Vol. III, p. 372) a casual reference to this law, 'das dem Legisactionenverfahren den Formularprozess substituirte.'

If we attempt to draw a conclusion from the casual references in the literature of the Republic, we find much to support the contention that Gaius's words, 'paulatim in odium venerunt,' represent the truth of the matter, and that the development was gradual and continuous. Some kind of instruction, written or verbal, given by the praetor to the *judex*, seems to follow directly from the exigencies of the law of the Twelve Tables. How, but by authorization of the magistrate, could the *judex*, who found that his allowance of the *jus talionis* was ineffectual, be empowered to mulct the aggressor in pecuniary damages instead?[1] The cases in which one of the parties was an alien, to whom, unless he came from a privileged community, the Roman procedure of the *legis actio* was not applicable, must needs have been dealt with from very early times in this fashion. There is abundant evidence[2] that the two systems were not mutually exclusive, but that they existed side by side to a late period. In the generation before Cicero, represented by the *dramatis personae* of the dialogue *de Oratore*, when the formulary practice was already common, we find[3] that it was still necessary to know the proper words with which '*herctum ciere*', 'to claim the division of a property' by the 'legis actio per judicis postulationem'. In Cicero's own time, again, we find numerous traces of the survival of the older method in other than centumviral cases. The *sacramentum*, for instance, of the woman of Arretium, one of Cicero's earliest clients,[4] was found to be *justum* by the *decemviri*, at

[1] See above, p. 44.

[2] See Greenidge, *Proc.*, p. 163 seq.; see also below, p. 210.

[3] Cicero, *de Oratore*, I. 56. 237.

[4] Cicero, *pro Caecina*, 33. 97.

that time quite a distinct court.[1] In the *pro Murena* the cumbrous formalities of the 'manum conserere' are represented as still existing in a suit about property in a landed estate,[2] and as being no longer mischievous, not because abolished but because divulged. There is clear reference, likewise, to the 'actio per manus injectionem' in the municipal *lex Ursonensis*[3] of the year of Caesar's death. All these cases are subsequent to the *lex Aebutia*, which cannot therefore have made a very clean sweep of the older forms.

The authoritative character of the praetor's edict, itself the source of most of the other changes, was only gradually established. Here the steps may be easily traced. It was a mere matter of convenience that the magistrate should announce beforehand the main rules by which he intended to be guided in his pronouncements; but soon there came to be recognized a moral obligation on the praetor to abide by what he had laid down in his own edict. When Verres, as *praetor urbanus*, in the year 74 B.C., transgressed this duty in the most glaring manner, he did nothing illegal; but already the mischief was recognized and counteracted by the activity of his colleague,[4] who 'filled several volumes with cases in

[1] The practice by which the 'Decemviri stlitibus judicandis' ceased to have a court of their own and were made presidents of centumviral courts ('centumviralem hastam cogere') was an innovation of Augustus; Suetonius, *Augustus*, 36.

[2] Cicero, *pro Murena*, 12. 26. Yet Cicero's parody of a formula in the Verres case (see above, p. 68) shows clearly that suits about land might be referred to a *judex* under the newer system.

[3] Chap. LXI (Bruns, *Fontes*[7], p. 123) 'judicati jure manus injectio esto,' etc.

[4] L. Piso, the *praetor peregrinus* (Cicero, *in Verrem*, I. 46. 119). In earlier times, when there was but one praetor, the consuls would be at hand to check any flagrant transgression. This consular interference naturally disappears with the multiplication of the praetorships, and only one case is known in later times (66 B.C.), when the consul quashed the praetor's decision as to the capacity of an eunuch-priest to inherit. (Valerius Maximus, VII. 7. 6.) That Plutarch

which he had interposed his veto, because Verres had given decisions contrary to his own edict'. A few years later the law of C. Cornelius, tribune of the plebs in 67 B.C., imposed the duty of conformity to his edict as a direct legal obligation on the praetor. I think that there is little doubt that this is a typical instance, and that all the recorded improvements in procedure were of the nature of insensible revolutions, the innovations being first adopted *de facto* as a matter of convenience, then by usage hardening into a right, and finally elevated by statute to the rank of definite obligation.

It remains to consider one further point. The convenient division of labour between the magistrate and the private juryman leads to a distinction between the proceedings *in jure* and the proceedings *in judicio*. The distinction holds good wherever we have to do with the *judicia ordinaria*, that is to say with trial under the civil forms of the *legis actiones*, and of the formulary system. The essence of *jus* is the presence of the magistrate or his representative.[1] Gaius[2] gives us a distinct definition when he writes 'pignoris capio extra jus peragebatur, id est non apud praetorem', and there are numerous instances, as the 'quando te in jure conspicio' of the plaintiff,[3] and 'antequam ex jure exeat, id est antequam a praetore discedat'.[4] But perhaps the best illustration comes from the history of a phrase. The fictive combat, the *manum conserere*, is described in the Twelve Tables as taking place *in jure*, 'si qui *in* jure

(*Marius*, 38. 4) attributes to his sixth consulship Marius' decision of the dower-case of Titinius and Fannia must be an error. Valerius Maximus (VIII. 2. 3) says 'sumptus inter eos judex'.

[1] For instance the 'praefecti jure dicundo per Italiam' of the Republic and the 'judex extra ordinem datus' of the Principate.

[2] Gaius, *Inst.* IV. 29. [3] Cicero, *pro Murena*, 12. 26.

[4] Gaius, *Inst.* IV. 164. See also the peremptory edict, 'restituas antequam ex jure exeas.' Probus, *de Notis Juris*, excerpt 70 in Krüger, *Jus Antejustinianum*, Vol. II, p. 148.

manum conserunt;'[1] yet Ennius speaks of '*ex* jure manum consertum'. Gellius[2] explains the discrepancy by telling us that the law intended the praetor to go with the parties on to the ground; they would then fight *in jure*: afterwards to save trouble, 'contra duodecim tabulas tacito consensu,' they were sent to the spot without the praetor, and then the battle is *ex jure*. In the ordinary procedure, both under the *legis actiones* and under the formulary system, the decisions of the juryman or the centumvirs are not given in the praetor's presence, and are therefore not *in jure*.

Now all magisterial acts are liable to the *intercessio* of a colleague, as we saw in the case of Verres, or of a tribune,[3] and certain magisterial acts are likewise liable to *provocatio ad populum*. But the peculiar feature of the *judex*[4] is that he is neither a magistrate nor a delegate using magisterial powers, but in form a subordinate private man, who merely performs a task that is set him, and therefore there is no place where either *intercessio* or *provocatio* can come in. The praetor has already given him his orders, whether it be to say if the defendant's *sacramentum* is *justum*, or to answer the more elaborate questions put to him under the terms of a written *formula*; and if the *judex* disobeys these orders, as by shirking his duty of hearing and deciding the case, the praetor may fine or imprison him. But so long as he does just that thing which is commanded him, nothing can reverse the effect which it has pleased the praetor to attach beforehand to his finding. Thus there is no further magisterial act to which either *intercessio* or *provocatio* can

[1] Bruns, *Fontes*[7], p. 25.
[2] Aulus Gellius, *Noct. Att.* XX. 10. 9.
[3] See above, pp. 64 and 72.
[4] The body of *centumviri* has precisely the same functions as the *unus judex*.

attach itself, and the verdict once given is unassailable. When we remember that the *judex* was a man specially selected and accepted on account of the confidence felt in his character and ability, and that his decision was given under the responsibility of an oath, it is not surprising that the Romans should have attached a special sanctity to the *res judicata*,[1] and that, while jealousy of the power of the magistrate meets us at every period of the republican history, we find a complete acquiescence in the supposed infallibility of the *judex*.

The contrast between *jus* and *judicium* is thus sufficiently vital, and it is only to be regretted that some modern critics should have exaggerated its effects, and attempted to introduce the distinction where no Roman could have imagined it to exist. The most notable instance is Zumpt's[2] analysis of trials on appeal before the people. He actually assimilates the action of King Tullius Hostilius in the trial of Horatius to the proceedings of the praetor *in jure*, and the Sovereign People to the *judex* appointed by the magistrate. I am not aware that any one has followed Zumpt in this strange path,[3] nor again that any one but Zumpt has framed his account of the procedure of the *quaestiones perpetuae* on the plan of allotting the various stages in the trial according as some are supposed to take place *in jure* and some *in judicio*.[4] As a matter of fact, in these *quaestiones*, as

[1] See Mommsen, *Strafrecht*, p. 482.
[2] Zumpt, *Criminalrecht*, I. 1, pp. 95 and 98. See below, p. 128 seq.
[3] Bruyant (*Jurisdictions Criminelles à Rome*, p. 26) is a possible exception, but he is not very clear on the point.
[4] The whole of Zumpt's *Criminalprocess* is constructed on these faulty lines. Geib, *Römischer Criminalprocess* (1842), had indeed (p. 285) pointed out that the preliminary proceedings from the *postulatio* to the *nominis receptio* may be considered as a whole, and distinguished from the actual trial; and that this is *analogous* to the difference between the proceedings *in jure* and *in judicio* of

Greenidge[1] remarks, 'the old distinction between *jus* and *judicium* has disappeared.' Perhaps the more complete truth is that their essential unity, as illustrated by the *Regia judicia*,[2] obscured for the moment by the accidental severance of the two in the civil procedure, here reasserts itself. There is really no fundamental antagonism between the two conceptions,[3] and so the Romans found no difficulty in re-establishing in the *quaestio perpetua* a *judicium*, the whole of which was conducted *in jure* in the presence of the magistrate, and of which he was personally the president and the mouthpiece. If it be objected that these trials being *in jure* should be subject to *intercessio*, the answer is that the validity of this doctrine is recognized, and that its consequence is set aside by positive legislation; for in the *lex Acilia repetundarum*[4] we find that all magistrates are expressly forbidden to interfere in these proceedings.[5]

The division between the questions, which either under the *legis actiones* or the formulary system were decided *in jure* and *in judicio* respectively, does not correspond accurately to the modern distinction between 'law' and 'fact'.[6]

the civil trials: but this is a very different thing. Heitland (*pro Rabirio*, p. 12) mentions Zumpt's theory with some approval, but does not commit himself very deeply to its acceptance. Mommsen hints at the distinction once casually in a note (*Strafrecht*, p. 404, note 2), but makes no use of it in his constructive presentment.

[1] Greenidge, *Proc.*, p. 416.

[2] See above, p. 63, note 1.

[3] In his Commentary on the *lex Ursonensis* (*Juristische Schriften*, Vol. I, p. 251) Mommsen has excellently set forth the true doctrine: 'In causis privatis proprie praetoris judicium est summoque jure solus is causarum judex habetur, sed quum privatum jubet sententiam ferre vulgo is et judicasse dicitur et judex appellatur.'

[4] Verses 70–71; Bruns, *Fontes*[7], p. 70.

[5] This did not prevent Vatinius from calling to aid his friend Clodius, nor deter that model tribune from storming the praetor's court with an armed gang. Cicero, *in Vatinium*, 14. 33.

[6] See Greenidge, *Proc.*, p. 150.

The praetor has, as a matter of principle, the right to ask the *judex* questions belonging to either sphere at will; and in the formulae which have been preserved to us, 'si paret fundum, de quo agitur, ex jure Quiritium Auli Agerii esse,' or 'si paret Numerium Negidium Aulo Agerio sestertium mille dare oportere', it is easy to see that questions of law might necessarily be involved. The centumviral cases cited in the First Book of Cicero's dialogue *de Oratore*, seem all to turn on issues of law, the facts not being in dispute. An immigrant, who, having the *jus exulandi* at Rome, was qualified to take up the citizenship on his own account, and stood in no need of a *patronus*, had nevertheless 'applied himself' to a citizen. The centumviri had to decide whether such *applicatio* was or was not a valid act, carrying a claim to the inheritance of the supposed client; and again, whether the plebeian house of the Claudii Marcelli acquired as a *stirps* rights of inheritance over the descendants of their own freedmen, similar to those of *gentilitas*, or whether the *gentiles familiam habento* of the Twelve Tables would designate the patrician namesakes of the Marcelli as heirs;[1] and again, whether an heir instituted as next in succession after the death of any posthumous child of the testator, was entitled to claim the inheritance, if no such child were born.[2]

It is an interesting question how far such decisions acted

[1] On the ground, as I think, that the identity of name implied an original clientship of the plebeian branch, and so excluded them from Scaevola's definition of *gentilitas* (Cicero, *Topica*, 6. 29), 'quorum majorum nemo servitutem servivit.' I believe that the *gentilitas* of those plebeian houses which had no patrician namesakes was unimpeachable. For instance, the *Gens Minucia* (Cicero, *in Verrem*, I. 45. 115) inherited as such. My analysis of both the cases last cited differs from that of Mommsen. It would take too long to argue the points here. I have stated my views in Smith's *Dict. Ant.*, s.v. *Plebs*. Greenidge (*Proc.*, p. 184) seems to agree with me in the main.

[2] Cicero, *de Oratore*, I. 39. 176 and 57. 243.

as precedents for the future, or are to be reckoned as a source of law at Rome. Cicero certainly sometimes refers to decided cases as authoritative on points of law; for instance, the affirmation by a law-court of the citizenship of colonists nominated by Marius is cited[1] to show that the grant of Roman citizenship to the member of a foreign State does not require the consent of that State; again, Cicero's own success in procuring a verdict in the case of the woman of Arretium is quoted in the *pro Caecina* as showing the invalidity of all disfranchising statutes of Sulla.[2] In like manner the verdict of P. Mucius Scaevola on the dowry of Licinia, Caius Gracchus' widow, was preserved in the writings of Labeo, and is quoted as an authority by Javolenus, a jurist of the time of Hadrian.[3] On the other hand we have instances of discordant decisions, without any hint that the later judge stretched his powers in disregarding the authority of his predecessor. Two such cases, one of a magistrate, the other of a private *judex*, are mentioned together in a treatise on forensic rhetoric, once attributed to Cicero.[4] A person who has accepted agency is undoubtedly liable to the *actio mandati* in respect of his proceedings in his principal's behalf: the question is whether his heirs are similarly liable? Marcus Drusus, as *praetor urbanus*, said Yes; Sextus Julius said No. The opinion of Drusus was eventually adopted by Paulus, and incorporated in the legislation of Justinian.[5] In the other case, Caius Caelius, as *judex* affirmed, and Publius Mucius disallowed the right of a poet

[1] Cicero, *pro Balbo*, 21. 48.
[2] Cicero, *pro Caecina*, 33. 97. Compare *de Domo*, 30. 79.
[3] *Digest*, XXIV. 3. 66. See below, p. 184, note 4. We cannot be certain whether Scaevola was himself *judex*, or whether he was consulted by the *judex* who tried the case.
[4] Cicero, *ad Herennium*, II. 13. 19.
[5] *Digest*, XVII. 1. 58.

to prosecute an actor, who had criticized him offensively on the stage.

Cicero[1] defines the civil law as, 'quod in legibus, senatus consultis, *rebus judicatis*, jurisperitorum auctoritate, edictis magistratuum, more, aequitate consistat.' In the Institutes of Gaius and of Justinian, which take up most of the other points of Cicero's enumeration, previous judgements are not reckoned among the sources of law. The omission may perhaps be accounted for, if we remember that under the imperial system the supreme judge was also the legislator. When every case decided by the emperor had the full force of law, there was no occasion to give any special binding force to precedents from the decisions of inferior judges. Thus, Justinian is able to lay his finger on the defects of case-law at the very moment when he is emphatically establishing it in the most important instance. On the one hand, he orders,[2] 'Let no judge or arbiter suppose that he is bound to follow any opinion of a jurist which he considers wrong, and still less the sentences of prefects and other judges, not even if the judicial decisions of the most exalted prefecture, or of any highest magistracy are alleged; for if a wrong decision has been given, that is no reason why the error should spread so as to lead other judges wrong as well.' On the very same day[3] he decrees, 'If the emperor's majesty has taken judicial cognizance of a matter and pronounced a sentence,[4] let all judges in our realm know that the decision is law not only for the case in which it was given, but for all similar ones.' Such decisions are in fact incorporated by hundreds in Justinian's Code.[5] The pronouncements of

[1] Cicero, *Topica*, 5. 28.
[2] *Cod. Just.* VII. 45. 13.
[3] October 29, A. D. 529. *Cod. Just.* I. 14. 12.
[4] A few lines lower down he includes interpretations 'in precibus', i. e. apparently in rescripts in answer to *supplicationes*.
[5] The same should hold good of the judicial decisions of the other

inferior judges may however come in as evidence of the prevalence of custom and general agreement, the force of which Justinian admits when he authorizes, by including them in his *Digest*, sentences like the following,[1] 'Our emperor Severus (Septimius) has laid it down that, on doubtful points of law, custom or the *authority of a continuous series of previous judgements* ought to have the force of law'; or again,[2] 'For since the actual laws bind us because they have been received by the judgement of the People, it follows that those unwritten ordinances which the People has approved, have a binding force on all; for what matters it whether the People declares its will by its voice or by very acts and deeds? And so it is held, and most rightly, that laws are repealed not only by the voice of the lawgiver, but by disuse with the silent consent of all men.'

That succeeding judges should welcome the assistance of the opinions of their predecessors, if they think them sound, is natural and almost necessary. The crucial question, however, as to the authority of previous decisions is that answered so emphatically in the negative by Justinian, Is the judge bound to acknowledge the authority of judgements regularly passed, supposing him to disagree with them?[3] The inconvenience which may arise when this question is answered in the affirmative, as it must be in England, is explained

sovereign authority, the senate; though I do not find it expressly stated. Venuleius Saturninus (*Digest*, XLVIII. 2. 12) gives as an authority 'ex sententia Lentuli dicta Sulla et Trione consulibus' (i. e. A. D. 31), and this may be a judgement given in the senate on an individual case.

[1] Callistratus, *Digest*, I. 3. 38.

[2] Julianus, *Digest*, I. 3. 32.

[3] The case is put with his usual clear-sightedness by the late F. W. Maitland (Letter to Henry Sidgwick in Fisher's *Biographical Memoirs*, p. 47), in a question respecting the practice of the German jurists.

by Mr. Bryce in a passage[1] which supplies an admirable comment on the sentence of Justinian.

'Observe how the English system works. A decision 'is given, perhaps hastily, or by a weak court, which in 'a little while, especially after other similar cases have 'arisen, is felt by the bar and the bench to be unsound. 'There is a general wish to get rid of it, but it is hard 'to do so. People have begun to act on the strength of 'it; it has found its way into the textbooks; inferior or 'possibly even co-ordinate courts have followed it; convey-'ances or agreements have been drawn on the assumption 'that it is good law. The longer it stands the greater its 'weight becomes, yet the plainer may its unsoundness be. 'Cautious practitioners fear to rely on it, because they think 'it may some day be overruled, yet as they cannot tell when 'or whether that will happen, they dare not disregard it. . . .' Even in a superior court, which has power 'to overrule the 'erroneous decision, and resettle the law on a better basis, it 'may be long before the solution is found, because judges are 'chary of disturbing what they find, holding that it is better 'that the law should be certain than that it should be rational,[2] 'and fearing to pull up some of the wheat of good cases with 'the tares of a bad case.'

The authority conceded to previous judgements largely depends on the regularity with which they are reported and

[1] 'Roman and English Legislation,' in *Studies in History and Jurisprudence*, by the Right Hon. James Bryce, British Ambassador to the United States, formerly Regius Professor of Civil Law in Oxford, Vol. II, p. 285.

[2] We may compare the attitude of the House of Lords towards previous decisions. Lord Chancellor Halsbury laid down 'that a decision of the House, once given upon a point of law, is conclusive upon the House afterwards . ... Nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgement of this House' (1898, Appeal Cases, pp. 379–81).

preserved. A remarkable illustration of this is given by Bryce.[1] 'In other countries, such as Germany, legal writers 'are numerous and influential, but the magistrates, their 'decisions having been but little reported, have till our own 'time held for the most part a subordinate place, and played 'a comparatively small part in the development of law. This 'was at one time the case in France also, where cases decided 'by the higher courts of law used to stand little, if at all, 'above treatises composed by legal writers of established 'reputation. Nowadays, however, cases are more fully re-'ported, and an authority is accorded to decisions scarcely 'lower than that which they have long enjoyed in England 'and America.' In England, of course, the decisions of the courts have been carefully reported for many generations, and these reports form the storehouse from which the writers of textbooks, and the barristers who have to argue cases in court, alike draw their material. In former days the reporter sometimes ventured to be a critic as well as a witness, and the note, '*Semble* bad law,' is to be found appended to some judgements, impairing to a certain extent their authority as precedents.

Now, at Rome, the jurisconsults were not able to separate, so clearly as we can, the verdict of a jury (which has no authority as a precedent) from the decision of a judge on a point of law. On the other hand, they had the advantage of being their own reporters, and could by their silence consign to oblivion any decision of which they disapproved. Thus the law was practically built up by the bar,[2] and decisions which approved themselves to the

[1] Bryce, *Studies in History and Jurisprudence*, Vol. II, p. 253.

[2] This was still more notably the case under the principate, when official authority was given by Augustus to the opinions of certain selected jurisconsults (Pomponius in *Digest*, I. 2. 2. § 49). Such opinions continue to be a main source of law after the closing of the praetor's edict by Julianus in Hadrian's time. Justinian's *Digest* is the monument of the work of the Jurisconsults. After the time of Constantine we hear of no further additions to the law by this system, its place being taken by the direct reception into the Codes of the decrees and decisions of the emperors. See below, Vol. II, p. 154.

most eminent lawyers of the day supplied material which might hereafter be taken up into the praetor's edict. This *lex annua*, as Cicero[1] calls it, was an admirable machinery for tentative legislation. Let us hear Bryce[2] again. 'Not 'only is the error of one praetor easily corrected by his 'successor, but the occasion recurs year by year on which it 'must either be corrected or reaffirmed, so that a blemish is 'much less likely to be suffered to remain. If five or six 'successive praetors have each of them in their edicts repeated 'the provision introduced by one of their predecessors, men 'may confidently affirm that it will be supported and per-'petuated by those who come after, either in its original form, 'or possibly in a more general form, which will include its 'substance.'

On the other hand, verdicts given on actual cases in court might draw the attention of jurisconsults and praetors to defects or ambiguities in the law, which might be corrected in like manner. Cicero[3] speaks of an old case, in which substantial injustice was done, which would have been impossible, he says, 'after our friend Aquilius invented the *formulas doli mali*.' There is another case in the *de Oratore*,[4] where what was afterwards established law appears as a matter of controversy. A father hears of the death of his soldier son in Spain, and then himself dies, leaving his property to strangers. The report turns out to have been false, and the son claims to set aside the will. Cicero says

[1] Cicero, *in Verrem*, I. 42. 109.

[2] Bryce, *loc. cit.*, Vol. II, p. 287.

[3] Cicero, *de Officiis*, III. 14. 60.

[4] Cicero, *de Oratore*, I. 38. 175, and 57. 245.

nothing about the verdict, but Valerius Maximus[1] tells us that the soldier won his case by the unanimous vote of the jury. The later law provided that a son could not be disinherited except by specific mention ('filius meus exheres esto'),[2] and there can be little doubt that the result was influenced by the decision of the *centumviri*. There is much question, however, as to what was the point actually established; and, as the controversy is too long to be included in a footnote, I will discuss the matter in an Appendix to this chapter.

I think that, with all these considerations in mind, we may best solve the general question of case-law at Rome by concluding that it was not all decided cases, but only cases sifted by the opinions of jurisconsults, and whose principle won some sort of magisterial recognition, which furnished really authoritative precedent.

Purists of the school of Bentham have always protested against judge-made law, and it has its faults. They have hardly realized, perhaps, the immense advantage which accrues from founding legislation on principles embodied in concrete instances. The Romans seem to have approached more nearly to the solution of the problem than any other people.

[1] Valerius Maximus, VII. 7. 1.

[2] Justinian, *Inst.* II. 13. Augustus decreed that this was not permissible if the son were a soldier, but the law was afterwards repealed; Paulus in *Digest*, XXVIII. 2. 26.

APPENDIX TO CHAPTER V

EXHERISION OF A SON

In dealing with the controversy to which I have referred at the end of the last chapter it will be convenient first to quote the passages from the *de Oratore*, the meaning of which is in dispute:

[Crassus.] 'Quae potuit igitur esse causa major quam 'illius militis? de cujus morte quum domum falsus ab 'exercitu nuntius venisset et pater ejus, re credita, testa-'mentum mutasset et, quem ei visum esset, fecisset heredem 'essetque ipse mortuus: res delata est ad centumviros, 'quum miles domum revenisset egissetque lege in heredita-'tem paternam testamento exheres filius. Nempe in ea 'causa quaesitum est de jure civili, possetne paternorum 'bonorum exheres esse filius, quem pater testamento neque 'heredem neque exheredem scripsisset nominatim.'[1]

And again—[2]

[Antonius.] 'Et credo in illa militis causa, si tu aut 'heredem aut militem defendisses, ad Hostilianas te actiones, 'non ad tuam vim et oratoriam facultatem contulisses. Tu 'vero, vel si testamentum defenderes, sic ageres, ut omne 'omnium testamentorum jus in eo judicio positum videretur, 'vel si causam ageres militis, patrem ejus, ut soles, dicendo 'a mortuis excitasses; statuisses ante oculos; complexus 'esset filium flensque eum centumviris commendasset; 'lapides mehercule omnes flere ac lamentari coegisses, ut 'totum illud "UTI LINGUA NUNCUPASSIT" non in XII tabulis, 'quas tu omnibus bibliothecis anteponis, sed in magistri 'carmine[3] scriptum videretur.'

[1] Cicero, *de Oratore*, I. 38. 175. [2] Ibid. I. 57. 245.

[3] i.e. in a schoolroom repetition.

An interpretation of these passages has been extracted from the comments of Justinian or his adviser Tribonian in a decree[1] regarding *exheredatio* issued in the year A.D. 531. The purport of this edict is to level up the distinction in this matter between sons and daughters, between descendants in different generations, between those born before and after the testator's death, between what might be claimed by law and what under the praetor's edict. All these distinctions he blames as unnecessary refinements of the jurists, and he proceeds to sweep them all away. In this effort after simplicity he claims to be 'following in the steps of our ancestors', and he adds the words 'scimus etenim antea simili modo et filium et alios omnes inter ceteros exheredatos scribere esse concessum, cum etiam centumviri aliam differentiam introduxerunt'. This has generally been interpreted (notably by Girard,[2] Adolf Schmidt,[3] and Roby[4]) to mean that the change introduced by the *centumviri* by their verdict in this case was to forbid disinheriting a son (though not a daughter or a grandchild) by the general clause 'ceteri exheredes sunto'. My view would rather be that this was one of the later subtleties which the jurists founded on this verdict, and that the case really turned on the simple issue whether a son could be disinherited by being merely passed over.

Each of these two explanations seems to postulate a different history of *exheredatio*. The first is that set out with much skill by Girard[5]; he believes that the necessity for this act arose long before the Law of the Twelve Tables in the days when 'a Will' was made by a law actually proposed by the

[1] *Cod. Just.* VI. 28. 4. [2] Girard, *Manuel*, p. 853, n. 3.
[3] Schmidt, *Das formelle Recht der Notherben*, pp. 57 and 61.
[4] Roby, *Roman Private Law*, Vol. I, p. 190.
[5] Girard, *Manuel de Droit Romain*, pp. 853 seq.

pontiffs', and that the necessity is the logical consequence of the doctrine that the son is, in a sense, co-proprietor with the father, so that, as Paulus says, the *sui* 'quasi olim domini erant'.

This subtlety of Paulus occurs in a paragraph[1] which expands and elaborates a passage of Gaius.[2] Both jurists seem to be struggling to find a metaphysical explanation of the phrase 'sui heredes', and of the rule that the son will succeed as heir at law to the father, though there be no Will nominating him as such. The 'continuatio dominii', says Paulus, leads to the result 'ut nulla videatur hereditas fuisse', and that the sons 'post mortem patris non hereditatem percipere videntur sed magis liberam bonorum administrationem consequuntur'. The explanation is far more difficult than the problem. It seems to assume that testamentary heirship is the natural and primitive method, and that the 'legitima successio' requires justification. *Suus heres*, 'an heir to himself,' is really a natural enough description for one who succeeds to a portion of that legal *persona* by which he has hitherto been covered, and the intimate kinship between father and child, and the political and military needs of the State, furnish abundant reason for his succession in case of intestacy. I should agree with Professor Geldart[3] that Paulus' explanation is merely 'a late piece of idealism', and not really any proof of ancient family co-ownership. The whole evidence goes to show that the *filiusfamilias* was during his father's lifetime not a co-owner, but part of the property.

It would be possible, however, to admit Girard's ascription

[1] Paulus, Digest, XXVIII. 2. 11.
[2] Gaius, *Inst.* II. 157.
[3] In a private communication for which I have to express my best thanks.

of the *exheredatio* of *sui* to the days of the comitial testament without necessarily subscribing to Paulus' far-fetched explanation, and so we may continue the history as set forth by Girard. The Law of the Twelve Tables, 'Uti legassit super pecunia tutelave suae rei, ita jus esto,' does not, so he maintains, alter the situation, as the 'legassit' is supposed to be conditioned by the observance of all legal forms, this of institution or exheredation of *sui* amongst them. At first no special words of exheredation were prescribed, and the phrase 'ceteri exheredes sunto' was held to be valid for the exclusion of all possible interveners. This form was used by the father in the case cited by Cicero, and the decision of the *centumviri* against its validity introduced the distinction that it was insufficient in the case of a son, and that 'exheredatio nominatim' was demanded for him though not for a daughter or a grandson. This centumviral decision then terminates the epoch referred to by Justinian when a son could be disinherited 'inter ceteros'. The *postumus* as an 'uncertain person'[1] could not be instituted heir, and as a consequence could not be disinherited. In his case, therefore, the condition for the validity of a will, which underlay the apparent liberty of bequest granted by the Twelve Tables, could never be fulfilled, and so the birth of the *postumus suus* must from the earliest times have hopelessly invalidated a will (agnascendo rumpit testamentum). This obstacle was dealt with, so far as concerned a posthumous son, as early as the generation before Cicero, for Crassus and Antonius in the *de Oratore*[2] discuss the

[1] Ulpian, *Reg.* xxii. 4: 'incerta persona heres institui non potest.' Gaius (*Inst.* ii. 242) confines the incapability to the *postumus alienus*, but that is because the *postumus suus* has been removed from the category of 'incertae personae' by the device of Aquilius and by the Lex Vellaea (see Schmidt, loc. cit., p. 6).

[2] Cicero, *de Oratore*, I. 39. 180 and 57. 243.

case of M'. Curius, who was 'secundum postumum heres institutus', and more fully by the jurist Aquilius Gallus,[1] Cicero's colleague in the praetorship (66 B. C.), who invented a formula to meet the case of a grandson, and finally by the Lex Junia Vellaea probably of the year 26 A. D. This law is said[2] to have removed many obstacles to the validity of wills, evidently by increasing the opportunities for instituting or disinheriting persons (especially those born between the execution of the will and the death of the testator)[3], who might otherwise intervene as *sui*.

So far the theory of the sequence of events seems satisfactory and self-consistent. But it all rests on the assumption that the soldier's father in the Ciceronian case wrote 'ceteri exheredes sunto'.[4] There is no hint of such a thing in Cicero; he says indeed that the soldier was not 'nominatim exheredem', but there is nothing to show that these words were then used, as they certainly had come to be by the time of Gaius or of Ulpian, in a technical sense as the antithesis to 'inter ceteros'. At no time is 'nominatim' held to mean strictly 'by name', but includes anything which indicates that the testator recognized the existence of the person and wished to disinherit him, a conclusion obviously inapplicable to the soldier in this case. For instance, a son is held to be 'nominatim exheredatus' by the words 'quicunque mihi nascetur'[5] or by the words

[1] Cervidius Scaevola in *Digest* XXVIII. 2. 29; from § 13–15 of the same paragraph, it is clear that Gallus' formula (taken up in the first chapter of the Lex Vellaea) allowed such nomination only in the case of potential *sui*—'ut liceat institui nondum natos, qui cum nascentur sui erunt.'

[2] *Digest*, XXVIII. 2. 29, § 6.

[3] Ulpian in *Digest*, XXVIII. 3. 3, § 1.

[4] That everything turns on this is recognized by Girard, *Manuel*, p. 854, note, and by Roby (loc. cit.), and, though less explicitly, by Hölder (*Beiträge zur Geschichte des Römischen Erbrechtes*, p. 107).

[5] Ulpian in *Digest*, XXVIII. 3. 3, § 5.

'ceteri omnes filii filiaeque meae exheredes sunto', unless there were evidence that the father acted in ignorance of the real facts.[1]

Now I find it very difficult to believe that the words 'ceteri exheredes sunto' came into the Will of the soldier's father. These words would have sense only in case of a testator who knew that he had *sui* to disinherit; and they would most naturally arise, not as a mere 'omnibus' formula, but when he was preferring any one or some of these *sui* to the detriment of the others, so that *ceteri* would mean 'my *sui* other than those whom I have named'. In that case the *ceteri* would be a definite class of persons present to the testator's mind, and not a vague generality, and the strong distinction subsequently drawn between these and the *nominatim exheredati* would not arise. Now if anything of the sort had occurred in the soldier's case, if there had been daughters or grandchildren whom the testator wished to disinherit and had disinherited by that clause, the issue whether he had intended to exclude the soldier, if he happened to be alive, along with the rest would have been discussed in a very different tone. But the plain sense of Cicero's story is that the father believed himself to be dying without descendants, so that he would have no *ceteri* to disinherit. The soldier, believed to be dead, was naturally not named,[2] and so became

[1] Paulus in *Digest*, XXVIII. 2. 25: 'de errore patris apud judicem agi oportere.'

[2] 'Neque heredem neque exheredem scripsisset nominatim.' Cicero, *de Oratore*, I. 38. 175. Hölder (loc. cit., p. 107) takes these words as indicating two methods by which the soldier might have been effectively deprived of his position as heir-at-law *ab intestato*, that is to say, either by being named among the testamentary heirs, or by being expressly excluded. He would thus make the words of Crassus a recitation of what the law required (in both instances an absurdity to require from the testator in case of one whom he believed to be

incidentally 'exheres testamento' simply because another was named heir. The difficulty of the soldier's case did not lie in any difference between general and specific wording. If it had turned on this technicality, Antonius[1] must have directed the attention of the soldier's advocate to the precise words used as the seat of the contention which he had to refute; he would have pointed out that the 'ceteri exheredes sunto' was in this case a mere unmeaning draftsman's formula answering to no persons known to the testator. But in fact he points out to him as the weak spot in his case not any 'exheredatio inter ceteros', but 'testamentorum jus', the rights of testamentary heirs, and the words of the Twelve Tables which guaranteed full liberty of testation, 'uti lingua nuncupassit.' It is this which stands in the way of the orator, this which he will be able to brush away, if he can summon up the spirit of the father from the tomb and carry conviction to the jury as to what would have been the real wishes of the deceased, had he known the facts.[2] The whole justification for the rule requiring *exheredatio* is that it furnishes a guarantee that the testator had a certain contingency in his mind, and had provided for it. Here there was no such provision. It is assumed throughout that there was no intention to exclude the soldier, but that he was in fact ignorantly excluded; the whole question is between the unqualified sanctity of a Will on the one hand, and the claims of natural affection on the

dead), whereas I understand him to be summarizing the facts of the particular case.

[1] Antonius has taken up the discourse by the time we come to the second discussion of the case in chap. 57, § 245.

[2] Schmidt (loc. cit., p. 61) seems to ignore the whole spirit of this passage, when he says that at the period of which Cicero speaks the clear intention of the testator was of no account, and only the words mattered.

other. Valerius Maximus,[1] writing in the reign of Tiberius, evidently attributed this meaning to Cicero, for he is full of indignation against those who would have taken advantage of the old man's misapprehension. I cannot understand where, on Girard's supposition, the collision between the Law of the Twelve Tables and the pretensions of the soldier could come in.

If this view be correct, we shall have to rewrite the history of the disinherison of *sui* as given us by Girard. There would be really no occasion for the express mention of an institution or disinheritance while the old comitial testament was the only Will recognized; the pontiffs could allow or disallow the passing over of descendants, as they thought proper in each case. We begin then with the Law of the Twelve Tables.[2] When by this Law a private Will was put on a level with the public one, no corresponding restrictions were imposed, and so an heir at law would be excluded if not mentioned in the Will. Pomponius tells us expressly,[3] 'latissima potestas tributa videtur . . . sed id interpretatione coangustatum est vel legum, vel auctoritate jura constituentium.'

But though he was not compelled by law, it may easily be conceived that a testator who had natural heirs might think it well, if he did not bring them into his Will, to make his intentions quite clear by indicating his wish to exclude them. If the Will merely preferred one *suus heres* over the others, the testator would do this by the phrase 'ceteri [sui] exheredes sunto'; if the property were to pass to a stranger he would probably employ more definite words of repudiation; but it was not necessary that he should do either the one or the other, and if he took the middle course and used indeed a formula of exclusion, but only the vaguer of the two, the son might, as Justinian says, find himself lumped among the 'ceteri'. If I am correct, this would be at a period when no legal rights hinged on the words, and when they were used merely for the purpose of explanation.

[1] Valerius Maximus, VII. 7. 1.

[2] Here I find myself in agreement with Schmidt (loc. cit., p. 1), though we part company later on.

[3] *Digest*, L. 16. 120.

It was otherwise where, believing himself to have no *sui*, the testator naturally said nothing about them. Was this to be taken as evidence that, if there proved after all to be children surviving him, he had acted under a misapprehension which ought to be corrected? The most obvious case is that of persons who were born or became *sui*[1] after the Will had been signed, so that his attention was not called to them at the time. At a comparatively early period it seems to have been held that such an occurrence (like marriage in English law) so completely altered the circumstances that the previous Will could not hold good. As we have seen above, the mischief could not in early times be met by making the *postumus* an heir by Will, so that the only way to protect his natural right was to deny the validity of any Will whatsoever. Cicero makes Antonius[2] name it as an undoubted point of law which no advocate would venture to dispute 'agnascendo rumpi testamentum'. The modifications introduced by the jurists are all methods for evading this consequence, but apart from such evasions the central doctrine remains to the end, that the birth of a *postumus suus* 'breaks' the Will. This doctrine itself was probably introduced by some decision of the *centumviri* to meet some peculiarly hard case, as for instance, if the testator had omitted to cancel

[1] 'Aut agnascendo aut adoptando aut in manum conveniendo aut in locum sui heredis succedendo'; Ulpian, *Reg.* XXIII. 2.

[2] Cicero, *de Oratore*, I. 57. 241, and the same in *pro Caecina*, 25. 72.

an old Will and had died suddenly very soon after his marriage, not recognizing that his wife was with child.

The next step is to treat the son believed to be dead like the son unborn, and to suppose that his father would have named him if he had known of his existence. The ' hard case ' which gave rise to the new rule of law is that recorded for us in the *de Oratore*, and this point was established by the verdict of the *centumviri* in favour of the soldier.

We have seen that in the succeeding generation the jurists, of whom Aquilius Gallus was the most distinguished, occupied themselves with avoiding the hardships which might arise when the potential father or grandfather wished to make a Will including or disinheriting his ' postumus ' but could not do so. This process was continued by the Lex Junia Vellaea ; and here we find fresh subtleties introduced or recognized. The birth of a posthumous child had invalidated a Will irrespective of the sex of that child.[1] But when it comes to avoiding such invalidation by instituting or disinheriting the child, a distinction is for the first time specified in our texts,[2] that a daughter or a granddaughter may be included under the formula ' ceteri exheredes sunto ', whereas the males require more positive mention. Similar distinctions to those between the *postumi* arise to the disadvantage of the females in the case of living heirs, so

[1] Gaius, *Inst.* II. 131.

[2] Gaius, *Inst.* II. 134 : ' In qua (lege Junia Vellaea) simul exheredationis modus notatur, ut virilis sexus nominatim feminini vel nominatim vel inter ceteros exheredentur.' This does not agree in the matter of grandsons with Ulpian, *Reg.* XXII. 22 : ' Nepotes et pronepotes ceterique masculi postumi praeter filium vel nominatim vel inter ceteros cum adjectione legati sunt exheredandi.' In the text I have followed Gaius who seems to quote the Lex Junia Vellaea more precisely, and is confirmed by Cervidius Scaevola's quotation from the same law (*Digest*, XXVIII. 2. 29, § 12) : ' ita verba sunt "qui testamentum faciet is omnes virilis sexus qui ei suus heres futurus erit" et cetera.'

that the lawyers, as Justinian sarcastically remarks, ' seem to find fault with nature for not producing only males.' All these subtleties clustering round the phrase ' ceteri exheredes sunto ' appear then to be not the point at issue in the lawsuit recorded by Cicero, but a result deduced from the verdict of the *centumviri* in that suit, a verdict which, as it happened, was explicit only for the case of a son, and thus it was that ' centumviri aliam differentiam introduxerunt '. These later refinements raised the difference between *exheredatio ' nominatim '* and *' inter ceteros '* to an importance which it had not originally possessed, until the emperor Justinian swept them all into the dust-hole.

The strong point of Girard's presentation is that it brings the case of the soldier into full harmony with the historical development as recorded by Justinian ; its weak point is that it does not agree with the natural meaning of the story as told by Cicero, and introduces an explanation of the words of which no one would have thought for a moment, but for the supposed necessity of making them agree with Justinian. I have tried to reconcile the two statements in some sort. If my reconciliation be considered too forced, and there is really a discrepancy between Cicero and Justinian, I should hold it safer to conclude that the emperor, though right enough in his main argument, that there was at one time no distinction between sons and other *sui*, had somewhat confused the precise bearing of a legal case decided six hundred years before his time ; I should maintain that the authority of Cicero must prevail.

CHAPTER VI

THE MAGISTRATE AS A CRIMINAL JUDGE

So far we have seen the magistrate as the moderator and regulator of the rights and mights of the citizens against one another. We have yet to consider him in those still more important functions in which he brings to bear the collective force of the community against the individual.

'Criminal jurisdiction,' writes Mommsen,[1] 'that is to say 'the bringing about of the punishment of a public or private 'offence which infringes on the rights of the Roman common-'wealth, belongs, as does judgement generally, to the rights 'and duties of the magistrature. . . . Whether the magistrate 'pronounces at his own discretion, and whether this pro-'nouncement is final, or whether it can be cancelled by the 'People, or again whether the magistrate gives decisions con-'ditional on the findings of jurors, or even makes his pro-'nouncement in accordance with the discretion left by him 'to the jurors, in a legal sense, every sentence is a magisterial 'pronouncement.'

The master-mind of Mommsen here lays hold on the main principle, which is to serve as a clue through all the entanglements of Roman procedure. By keeping always in view the principle of the unity and pervasiveness of magisterial powers we shall, as I believe, come to the right solution of each problem, even though the process may sometimes bring us into collision with the opinions as to details of Mommsen himself.

[1] Mommsen, *Strafrecht*, p. 135.

In the present chapter it so happens that the very next matter of interest which meets us is one on which I feel myself obliged to differ from Mommsen. The question at issue relates to the strong distinction which he draws between *judicatio* and *coercitio*. In the original definition, indeed,[1] they would differ, not in the nature of the powers exercised, but only in the end for which they are applied, the one being used to punish past crime, the other to compel present obedience. But, as we proceed, we find that Mommsen reckons as *coercitio* the death sentences[2] inflicted on non-citizens in Rome itself and the whole jurisdiction of the governor, including the capital jurisdiction within his province;[3] and he even says that in this *coercitio* 'is united the military and civil power of the magistracy'.[4] Here, of course, we pass far beyond the limits of the amount of force required to overpower resistance to lawful commands. In case of magisterial action within the walls, Mommsen offers the word as an explanation of the limits to the right of appeal, 'the entire magisterial *coercitio* in the proper sense of the word . . . is not subject to appeal to the people,'[5] and again, 'Appeal can be laid only against the public judgements, whose conception and sphere, as opposed to that of magisterial arbitrary power (*coercitio*), is defined by that very test.' This is surely an argument in a circle. At the most it informs us that, wherever we have punitive action by a magistrate with no appeal, we are to call the process *coercitio* and not *judicatio*. We are as far as ever from explaining why some magisterial acts are and some are not subject to appeal.

In a note on the same page, Mommsen, apparently without

[1] *Strafrecht*, p. 40.
[2] Ibid., p. 647.
[3] Ibid., p. 235.
[4] Ibid., p. 39, note 4.
[5] Ibid., p. 475.

any consciousness of the contradiction, lays it down that 'we may define the original criminal *judicatio* as *coercitio* limited by the right of appeal'. This last passage is quite in accord with Cicero's words, 'magistratus nec obedientem et noxium[1] civem multa vinclis verberibus coerceto, ni par majorve potestas populusve prohibessit, ad quos provocatio esto.' In his latest work[2] Mommsen expressly rejects the attempt of most modern critics to emend the passage by the omission of *populusve*, and if the words are to stand, we must give up the notion that *coercitio* always coincides with the absence of the right to appeal. The fact is that the word has two meanings, a wider and a narrower, and that in this passage of Cicero, as in numerous others to which Mommsen in the same note refers,[3] *coercere* is used in the most general sense of any forcible repressive action of the magistrate or officer, and any pains inflicted by him, whether to punish past

[1] Cicero, *de Legibus*, III. 3. 6. The MS. reading is *innoxium*. Mommsen, so far as I know, alone of modern critics defends that reading, and explains it of the 'disobedient *but* not criminal citizen' who is the object of *coercitio*, as opposed to the criminal proper who (*Strafrecht*, p. 38, note 1) is aimed at in the next sentence, 'quum magistratus judicassit irrogassitve, per populum multae poenae certatio esto.' I do not think that any opposition between the two classes is intended by Cicero, and therefore accept the reading *noxium*.

[2] *Strafrecht*, p. 38, note 1. In the *Staatsrecht* (I[3], p. 157) he says, 'Es sind hier sehr verschiedenartige Dinge unpassend in einander geschoben.' See also *Strafrecht*, p. 473, note 4.

[3] *Strafrecht*, p. 38, note 1. Besides the instances there adduced we may notice Paulus, *Sententiae*, V. 26. 1 'cujus rei poena in humiliores capitis, in honestiores insulae deportatione coercetur'; a rescript of Antoninus Pius (*Digest*, XLVIII. 10. 31) where the emperor is to decide of those who file false documents in a lawsuit, 'quatenus coerceri debeant;' Hermogenianus (*Digest*, XLVIII. 15. 7), 'in hoc crimine (plagio) detecti pro delicti modo coercentur et plerumque in metallum damnantur,' and Callistratus (*Digest*, XLVIII. 19. 28), 'proxima morti poena metalli coercitio.'

crimes or to check present disorder, and whether this action be or be not subject to appeal. More commonly, however, *coercere* is used in a more technical and restricted sense of the milder measures which the magistrate may apply at his own discretion to bring the citizen to order. When Philippus, for instance, the consul of 91 B.C., was provoked by Crassus' bold language in the Senate, 'non tulit ille, et graviter exarsit pignoribusque ablatis Crassum instituit coercere;'[1] and Caesar, in like manner, ordered Cato into arrest for obstructing debate in the discussion of the Agrarian law of his first consulship (59 B.C.).[2] It is in this sense that Paulus says[3] that *jurisdictio* can hardly exist without a *modica coercitio*, and that Pomponius[4] tells us that when the magistrate lost his power of life and death by the application of the law of appeal, 'solum relictum est illis ut coercere possent et in vincula publica duci jubere.' Such methods of compulsion must manifestly be kept within the limits beyond which the law allows an appeal; but it seems a misuse of the word *coercitio* to assume the converse of this, and to call every magisterial action which is not subject to appeal, whether at home or abroad, by this name. *Coercitio*, in the narrow sense, is allowed to be without appeal only because of the pettiness of the punishments which it inflicts, and if we pass to the other end of the scale and try to account for grave punishments, even for death, inflicted without appeal, it is no sort of explanation to say that it is a case of *coercitio*. It would have been small consolation to the deserter Matienus, whose story shall be told later on,[5] to be informed that he was not being punished but only coerced. It will be perhaps safer to avoid the general use

[1] Cicero, *de Oratore*, III. 1. 4.
[2] Dio Cassius, XXXVIII. 3. 2.
[3] Paulus, *Digest*, I. 21. 5.
[4] Pomponius, *Digest*, I. 2. 2. § 16.
[5] See below, p. 111.

of the term, which escapes all attempt at definition, and to employ it only in the restricted sense for the slight penalties allowed for 'contempt of court'.[1]

Let us then set aside the word *coercitio* and attempt to answer the question, what is the origin and nature of the power of the magistrate? The Romans themselves would have said that the answer was not far to seek. Tradition accepted, as the type of magisterial authority in its essence, the unrestricted power exercised by the magistrate of later times outside the walls (*imperium militiae*). The Romans of the historical epoch knew no such thing as a severance between supreme military and supreme civil authority. They merely distinguished between the space inside the walls (*domi*) and the rest of the world, which was comprehended in the locative case by the word *militiae*, 'on service.' This full *imperium*, then, governs all the world, less the city of Rome. *Imperium militiae* does not mean 'military command' in any exclusive sense. It extends itself, alike in civil and criminal matters, over the whole population, Roman and non-Roman, though in the case of the latter it is concurrent with the jurisdiction of the magistrates of subject or allied communities. The distinction between military and civil justice, though in practice it can never have been wholly disregarded, is legally non-existent outside the walls. On the one hand the magistrate settles private controversies, even among the soldiers, under the form of peaceful law, making them enter into bail for appearance,[2] and sometimes referring doubtful questions to the decision of a jury of *recuperatores*.[3] On the other hand the *imperium*

[1] See Esmein, on Mommsen's *Strafrecht*, in *Nouvelle Revue Historique*, June 1902, p. 349.

[2] See stories about Sulla in Livy, *Epitome*, LXXXVI, and Scipio in Aulus Gellius, *Noct. Att.* VI. 1. 9.

[3] See below, p. 216.

militiae explains not only exactions from a peaceful town, such as Livy[1] ascribes to the consul of 173 B.C. at Praeneste; but the intervention of the Senate (that is to say of the consuls on the advice of the Senate), described by Polybius,[2] in cases of 'crime demanding public supervision, as treason, conspiracy, poisoning, and assassination, throughout Italy'. Mommsen[3] sums up the matter in these words: 'The extension of the discipline of the camp to Italians and provincials not on military service is the legal source of that abuse of the powers of the Roman magistracy, of which the last two centuries of the Republic show instances unparalleled in atrocity.' Such is the *imperium militiae*.

It will be convenient to reserve for the next chapter the question how far Roman citizens in the provinces were, in the last age of the Republic, exempted from such jurisdiction; and first to trace the theory of the jurisdiction itself.

The origin of magisterial power at Rome has been depicted by Ihering[4] in a presentation which, if necessarily conjectural, appears to me to be at least a highly probable conjecture. According to Ihering, all the other functions of the king are accretions on an original *status* of commander-in-chief. A leader in time of war was doubtless the primary necessity for the aggregate of households and *gentes* in which the Roman State took its rise. When once the principle was accepted that such a commander should not merely be appointed occasionally on each emergency, but should exist as a standing officer, it was only natural that the citizens should meet any fresh need which arose amongst them by committing an additional charge to the same person. When the growing sense of corporate unity demanded

[1] Livy, XLII. 1. 6.

[2] Polybius, VI. 13. 4.

[3] *Strafrecht*, p. 29.

[4] Ihering, *Geist des römischen Rechts*, Vol. I, p. 252 seq.

common sacrifices and a special intermediary between the State, as a whole, and the gods; or when a convener and president of the general assembly of the burgesses was required, or an arbiter to regulate the action of self-help among the citizens, or a leader to direct the common efforts in extinguishing a fire,[1] it would have been difficult for the Romans to pass over the man whom they had already acknowledged as their captain of the host. Still more certainly would this be the case when a person was needed to bring the force of the community to bear upon those whose action was endangering the safety or order of the State, more especially when the action was such as the People had already pronounced in a general decree to be worthy of repression and punishment.

Here at last we come to the original criminal jurisdiction. It is perhaps best described by the words in which Ulpian[2] defines his conception of *imperium merum* as 'habere gladii potestatem ad animadvertendum in facinorosos homines'; though an earlier age would probably have spoken of the power of the axe rather than of the sword.[3] It is this which forms, in Mommsen's appropriate phrase,[4] 'the germ-

[1] See Cicero, *in Pisonem*, 11. 26.

[2] Ulpian, *Digest*, II. 1. 3. The complementary *imperium mixtum* of the same passage would find its prototype in the magisterial action which has been described above in chapter III.

[3] The sword took the place of the axe under the principate: so Ulpian (*Digest*, XLVIII. 19. 8. § 1) 'animadverti gladio oportet, non securi vel telo vel fusti vel laqueo vel quo alio modo'. The miraculous deliverance of martyrs always ceases to act in presence of the sword, which has become the proper symbol of the power of the civil magistrate, who 'beareth not the sword in vain'. See references in *Légendes Hagiographiques*, by H. Delehaye, p. 109. For the *jus gladii*, see below, Vol. II, p. 166 seq.

[4] *Strafrecht*, p. 543. He calls it, of course, *coercitio* (see above, p. 97), but the unfortunate nomenclature does not affect the main sense.

cell of the criminal law.' Thus the *imperium* according to its original idea, though only a derived and magisterial power, conferred not by Heaven but by the will of the sovereign *populus*, is, when once conferred, a single and indivisible power. The king is equally competent for all his functions, military, judicial, administrative, and religious, and the same *imperium* includes them all, though, no doubt, time and place will give him different opportunities for the exercise of these functions, according as he is inside or outside the walls, and according as Rome is at war or at peace with her neighbours. This *imperium* or supreme magisterial power is from the first the sole basis of criminal jurisdiction.

This doctrine has been admirably stated by Mommsen in the passage which I have quoted at the head of this chapter; but it must be confessed that other passages may be found in his *Strafrecht* which seem hardly consistent with it. 'The household-lord, the war-lord, the bearer of the civic *imperium*,'[1] appear as separate entities on their way to become judges, but not yet worthy of the name. Their activities are all qualified by the term 'arbitrary'. Mommsen[2] makes 'the public criminal law begin only with the Valerian law, which submitted the death-sentence of the magistrate on the Roman citizen to confirmation by the corporation'; though in another passage[3] he admits that the arbitrariness is not altered, but only transferred when the last word is made to lie with the *comitia*. He states his ideal in an eloquent passage.[4] 'The criminal law begins when the arbitrary will 'of him who wields the power to punish and the right of 'judgement has limits placed on it by the law of the State or 'by custom as strong as law. The law indicates objectively

[1] *Strafrecht*, p. 55.

[2] Ibid., p. 56.

[3] Ibid., p. 171.

[4] Ibid., p. 56.

'those immoral acts against which proceedings are to be 'taken on behalf of the community and forbids similar pro- 'ceedings against any other acts. The law orders the process 'of investigation in positive forms. The law establishes a 'corresponding satisfaction for each crime. . . . From that 'time forth there is in Rome no crime without a criminal law, 'no criminal procedure without a law of procedure, no punish- 'ment without a law of punishment.' This is indeed an ideal; but I believe that it is impossible to fix the Valerian law or any other enactment as the date from which the ideal is realized. Here, as in the case of the civil procedure, we must look for a gradual, almost an insensible development, and it is not safe to exclude even the rudimentary beginnings from the conception of criminal law, or to draw any hard and fast line between magisterial power and magisterial *judicatio*.

This may be seen pretty clearly when we come to examine Mommsen's statement of the order of development of such *judicatio*. He is probably right in holding that 'public jurisdiction' first begins in the case of the Roman citizen who, by his own act, has placed himself in the position of an enemy (*perduellis*). The guilt, from the Roman point of view, of the foreign enemy is notorious, and his due is death. 'In hostium numero habere' is the Latin euphemism for a general massacre.[1] But the question whether a man who was once a citizen falls under this category is one which may sometimes demand inquiry.[2] 'The magistrate pro- 'ceeds to inquire, and here we have the beginnings of a 'criminal trial, no matter whether he decides on his own 'authority or whether, as from the first he is justified in 'doing, though not bound to do, he submits to the people the

[1] Caesar, *de Bello Gallico*, I. 28. 2.
[2] *Strafrecht*, p. 59.

'question, whether to remit the death-penalty on the man 'guilty of injuring the community or to let that penalty 'have its course.'

In this passage Mommsen seems to me to be advancing along the true line, and to apply the necessary corrective to the generalities which he has set forth in his former statement. We have here judicial inquiry before we have any judicial power except that of the magistrate. Perhaps we may safely go further, and conjecture that it is the action of the magistrate in each particular case, as it arises, which paves the way for the general precepts of the law, and that for long stretches of time there would be a gradually increasing number of laws laid down respecting crime for the information both of citizen and magistrate, without this advertisement at all implying, as in Mommsen's ideal presentation, the 'forbidding similar proceedings against any other acts'.

The same difficulty recurs when we come to later times. Here, too, Mommsen seems to me to lay too much stress on the opposition which he sees between *judicatio* and *coercitio*. 'Where,' he writes,[1] 'the law (in which, how- 'ever, we must not forget to include the wide and elastic 'conception of treason against the State) does not ordain any 'punishment, the Roman magistrate is entitled to exercise 'his *coercitio*, so far as this extends,[2] but the procedure by 'magistrate and *comitia* can find no place.' I can find no authority for this doctrine. If it be true, the paradoxical consequence will follow that each fresh criminal law does not create a fresh liability to punishment for the offender, but

[1] *Strafrecht*, p. 151, note 1.
[2] It is not quite clear whether Mommsen intends *coercitio* in this sentence to refer only to the petty punishments inside the appeal limit. In the text I have assumed that he uses it in the wider sense, which covers cases like that of Matienus (see below, p. 111).

only removes another offence from the category of those which the magistrate may punish as he pleases to the category of those which he can punish only in a certain way, and under restrictions which provide every chance for escape. It would seem then as if that which the criminal has to dread is the absence rather than the presence in his case of this 'law of punishment without which there is no punishment'. I believe on the contrary that, whether by stretching the definition of *perduellio* or otherwise, the magistrate might treat any offence as an injury to the community, and condemn the offender, subject (after the *lex Valeria*) to the right of the citizen to have the case tried out on appeal. The trial of the censors of 169 B.C. for contempt of tribunician authority,[1] and that of fraudulent contractors in the Second Punic War,[2] may be cited as instances. It is not necessary to suppose that it had been laid down beforehand that the particular actions of the accused were liable to prosecution, whether for a capital or for a pecuniary penalty; the tribunes by prosecuting in each case effectively established the liability.

In the free discretion of the magistrate to name whatever punishment he pleases for any offence is to be found the only probable explanation of the statement of Polybius,[3] that to win an office by bribery is a capital crime. In view of the extreme mildness of Sulla's law (which inflicted only a ten years' disqualification for office), it is impossible to suppose that there was in the previous generation any positive law ordaining the punishment of death for that offence. That tribunes had from time to time instituted

[1] Livy, XLIII. 16. [2] Livy, XXV. 3.

[3] Polybius, VI. 56. 4. I cannot agree with Mommsen who thinks (*Strafrecht*, p. 668) that the passage of Polybius justifies him in adding bribery at elections to the list of capital crimes recognized in the Twelve Tables.

a capital trial against some persons suspected of it is however quite likely: for 'the tribunician criminal procedure', as Mommsen says elsewhere,[1] 'extended itself over the whole sphere of State trials'.

The cases which I have named fall under the category of quasi-political offences, which in later times were dealt with in practice by the tribunes of the *plebs*, who gradually stepped into the place which, according to the primitive theory of the constitution, would more properly be filled by the magistrates of the Roman People, consuls, quaestors, or *duoviri perduellionis*. But this same question arises with respect to another class of crimes, of which *parricidium* is the type, and which were more commonly punished by the quaestors, who in old times bore the title of *quaestores parricidii*.[2] Certain acts, which are primarily offences against individuals, were nevertheless held to be so dangerous to the public that, at least as early as the Twelve Tables, the community interested itself in their punishment. Under this head fall the murder of a freeman, arson, the theft of growing corn, and witchcraft.[3] 'All these are treated as public

[1] *Strafrecht*, p. 156. [2] See above, p. 22.

[3] Especially in the matter of charms to draw away your neighbours' crops ('fruges alienas pellicere veneficiis,' Pliny, *Hist. Nat.* XVIII. 6. 41). In another passage (XXVIII. 2. 17) Pliny obviously takes 'qui fruges excantassit' and 'qui malum carmen incantassit' to be equally practisers of witchcraft, treating both of them under the head of 'incantamenta carminum' (ibid., verse 10). Cicero, on the other hand (*de Rep.* IV. 10. 12), Horace (*Satires*, II. 1. 82), and Festus (s.v. *occentassit*) interpret the 'malum carmen' of the Twelve Tables as referring to the public utterance of scandalous verses against an individual. Bruns (*Fontes*[7], p. 29) makes *occentare* in this sense a distinct crime from *incantare*. On the whole I am inclined to agree with Esmein (*Nouvelle Revue Historique*, June 1902, p. 352) that the two are the same, that the authority of Pliny must prevail, and that Cicero and the Augustan writers have misunderstood the words *malum carmen* and *occentare*. Mommsen (*Strafrecht*, p. 60) takes the opposite view.

'crimes, and every trace of a co-operation of the person 'immediately injured or his *gentiles* thereby disappears.'[1] There are besides certain offences which occupy a position midway between this class of crimes and *perduellio*. Such are the acts of those who appropriate the goods of a temple (*sacrilegium*), steal the public cattle (*peculatus*), or injure the public roads or buildings.

A certain division of labour may be noticed in the crimes dealt with in historical times by the several magistrates. We find the activity of the tribunes generally aimed at offences which directly affect the State, while the quaestors are heard of in murder trials, and the aediles in offences against public morals or infringements of agrarian and other social legislation. Mommsen[2] is inclined to believe that this division answers to a difference in the powers of the several magistrates; but this assumption is unnecessary in itself, and seems inconsistent with the claim which Cicero[3] makes as curule aedile to bring Verres before the People on a charge of *majestas*.

The great difficulty is to discover what was done in the case of new crimes, not as yet mentioned in the Statute book. What, for instance, became of the first forger? It is impossible to suppose that because no laws had yet been passed defining the offence and naming a penalty he would therefore enjoy impunity. I believe that the magistrate (preferably the quaestor) would condemn him for a new crime, and leave him to be tried on appeal to the people. The crime might next become the subject of an edict of the magistrates,[4] and finally the people would be called upon to pass a definite law against it.

[1] Mommsen, *Strafrecht*, p. 60. [2] *Strafrecht*, p. 157.
[3] Cicero, *in Verrem*, I. 5. 13.
[4] As in the case of Marius Gratidianus, who as praetor entered into an agreement with his colleagues and the tribunes to issue a joint edict about the coining of false money ('conscripserunt communiter edictum cum poena et judicio'), and then took all the credit to himself. Cicero, *de Officiis*, III. 20. 80.

The power of *judicatio* originally belonging in all its simplicity to the magistrate was limited, without being removed, by the Valerian laws. The consul was subject, as the king had never been, to the interference of an equal colleague, and was subject likewise to the possibility of appeal in serious cases. These restrictions apply only inside the walls, and outside the original *imperium* appears revealed in all its fullness. Even inside the walls it is unrestricted against all but Roman citizens. The magistrate decides on his own authority, or with the assistance of such advisers as it may please him to consult, on every allegation of crime against any but the members of the privileged class of citizens of Rome. If he finds the accusation proven, he scourges or puts to death, according to his discretion. Marcus Marcellus, consul in 51 B.C., scourged in this manner a misdemeanant Transpadane, simply to show that he did not agree with Caesar's contention that the colonists of the land between the Alps and the Po were Roman citizens.

As against citizens, the republican magistrate, if he wishes to act without the confirmation of his sentence by the People, must commonly confine himself to the moderate punishments which constitute *coercitio*, in the narrower sense of the word. He can fine the citizen a sum not exceeding 3,200 asses (£30):[1] he can seize any of his chattels and publicly destroy them (*concidere pignus*): he can throw him into prison: he can order him to quit Rome (*relegatio*):[2]

[1] Festus, s.v. *peculatus*.
[2] Festus, s.v. *relegati*, says that this may be inflicted 'edicto magistratuum'. Mommsen (*Strafrecht*, p. 48, note 1) mentions several categories of persons (actors, &c.) to whom it was from time to time applied. Perhaps, however, the more interesting cases are

it is possible that down to the time of the Porcian laws he can even flog him.[1] All these operations are, however, subject to the *auxilium* of a colleague or of a tribune.

There are, however, some more serious cases in which, for one reason or another, appeal is not allowed to interfere with the full course of magisterial justice. Mention has been already made of the tribunician self-help, of the execution of the seducer of a Vestal, and that of the offender against international right;[2] the disputed topic of criminal commissions, like that against the Bacchanalians, and of the powers exercised under the *senatus consultum ultimum* must be reserved for the present. Besides these we find two undoubted instances of great importance. In the first place, the appointment of a dictator, before the epoch when the powers of the office were curtailed,[3] suspended the right of *provocatio*; and in the last days again of the Free State, the dictators *reipublicae constituendae*, Sulla and Caesar, and the triumvirs who succeeded to their power, were similarly unfettered. Secondly, the distinction in the criminal law, according as it is exercised over soldiers and over civilians, which, as we have seen, fades away before the universal competence

where this power is directed against an individual, as when Gabinius, consul of 58 B.C., expelled a Roman knight, Aelius Lamia, for upholding with too great fervour the cause of Cicero (*pro Sestio*, 12. 29), or when Cicero himself as consul professed to humour Catiline and give him an opportunity of joining his confederates in arms by ordering him to quit the city (Cicero, *in Catilinam*, I. 8. 20). For the subsequent history of *relegatio* see below, Vol. II, p. 64.

[1] I think, on the whole, that Mommsen (*Strafrecht*, p. 42, note 1) has made out his case, that the 'necare et verberare' forbidden by the Valerian law must refer to scourging preliminary to death, and that stripes alone were not recognized as a substantive punishment in any regular criminal trial, but were left as a means of *coercitio* in the hands of the magistrate until forbidden by the elder Cato (see *Strafrecht*, p. 47, note 3). See also below, p. 125.

[2] See above, pp. 13, 20, and 30. [3] See Festus, s.v. *optima lex*.

of the magistrate outside the walls, does as a matter of fact appear within the city; for military crimes are dealt with inside the walls in a fashion quite distinct from the course of justice which ordinarily obtains there. A certain Matienus, in the year 138 B.C., was scourged and sold as a slave for deserting the army in Spain;[1] the Campanian deserters (cives Romani sine suffragio) who had seized Rhegium after the war with Pyrrhus were captured later on and were beheaded in the Roman Forum.[2] Some objection was raised by the tribunes to the legality of this proceeding, but they did not insist so far as to interpose their *auxilium*. Persons who tried to evade military duty were subject to the same summary process. Augustus[3] sold as a slave a Roman knight who had maimed his sons with this object; a like punishment fell on all who neglected at the census to inscribe their names on the list of those liable to service, and M'. Curius, consul in 275 B.C., treated in the same way the first man who failed to answer to his name at a sudden levy.[4] If we ask how we are to justify such exceptions to the rule which Cicero lays down with such clearness that no Roman can be deprived of citizenship or liberty, we can hardly do

[1] Mommsen (*Strafrecht*, p. 43, note 2) has admirably solved an incidental difficulty in connexion with Matienus. The Epitomator of Livy (Book LV), our authority for the case, says 'accusatus est apud tribunos plebis'. It is obvious that it must be the consul and not the tribune who acts in a case of military discipline; but appeal can always be made to the tribunician *auxilium*, and in this case the tribunes assembled in an administrative council, which Livy treats as a kind of court, and heard the plea of the accused before deciding not to interfere in his behalf. We may compare the case of Sthenius (Cicero, *in Verrem*, II. 41. 100), which is so far parallel that here too the tribunes hold a quasi-judicial inquiry in order to decide how to exercise their executive functions (see below, Vol. II, p. 35).

[2] Valerius Maximus, II. 7. 15.

[3] Suetonius, *Augustus*, 24.

[4] Valerius Maximus, VI. 3. 4.

better than accept Cicero's own answer,[1] that by refusing the duties of citizens and freemen such persons have of their own action renounced their *status* and its corresponding rights. Mommsen[2] condemns this explanation as 'Sophistic'; but it is difficult to suggest another theory which will cover the facts.

Whatever may have been the theory, the practical limit set to magisterial power and the practical compulsion not to use it without consent of the people, is to be found in the tribunician *auxilium*. The instance of the council of Tribunes who sat on the question of Matienus[3] is a typical one. Unless Matienus' case had been very bad indeed, so bad that no possible sympathy could be aroused for him, the tribunes would certainly have forbidden the severe action taken against him. In delineating the respective spheres of the comitial procedure and of independent magisterial action we must remember that the magistrate who elects to take the first method is pretty safe, so long as he confines himself to traditional practice, from the interference of the tribunician veto, whereas if the more arbitrary course is preferred it has to be taken under the scrutiny of ten pairs of watchful eyes. The tribune was eager to pounce on every opportunity for justifying his existence and for vindicating the rights of the private man against any use of the magistrate's power which could be considered tyrannical or excessive. The practical result was that, except in a few specified cases, such action within the walls was limited to the petty matters

[1] 'Ipsum sibi libertatem abjudicavisse,' Cicero, *pro Caecina*, 34. 99. Cf. Arrius Menander in *Digest*, XLIX. 16. 4. § 10 'ut proditores libertatis in servitutem redigebantur'.

[2] *Strafrecht*, p. 945, note 1. Mommsen himself can only repeat the word *coercitio*. I gather that Girard (*Org. Jud.*, p. 108) takes the same view as I do.

[3] See above, p. 111, note 1.

which are the subject of '*coercitio*' in its narrower sense,[1] and that if the magistrate wished to punish severely, he would not be allowed to do so unless he put his sentence in such a form as to give the opportunity for the decision of the People.

It is evidence of the growing frequency and importance of an offence when we find that it becomes worth while for the community to interfere by passing a law against it. I have said above[2] that I do not believe that the passing of such a law was a necessary condition precedent of an appeal to the People; yet practically the law marks out the particular offence as one deserving of severe punishment, and encourages the magistrate to hope that his action will be supported, when he comes before the People to maintain it. A way has then been provided in which the magistrate, without incurring the liability to blame or hindrance, may pretty effectively deal with the misdemeanant. If on the other hand an offence becomes very prevalent or very dangerous, the remedy is a step backwards to magisterial power, sometimes exercised independently, if the tribunes acquiesce, as on Matienus, sometimes stirred up (as we shall see later on)[3] by a charge from senate or People requiring the magistrate to hold a special *quaestio* without appeal on the matter specified.

Let us return for a moment to the thesis with which the chapter opened—that every sentence is a magisterial pronouncement. The principle was fully recognized by the Romans themselves, and it led to practical results, which differentiate their criminal law from that of all other nations. The excess of democracy led the Greeks to execute capital punishment somewhat recklessly, for the criminal was

[1] See above, p. 109.

[2] See above, p. 105.

[3] See chap. XIII.

regarded as matched against the wrath of the people, and the power of the people must not be limited. So at the trial of the generals after Arginusae, it was urged that 'it was intolerable that any one should hinder the people from doing what it pleased'.[1] In Rome the opposite consequence is drawn; the people never strikes directly at an offender;[2] the accused is matched not against the people, but against the magistrate, and so popular liberty comes to be measured by the extent to which the private man is allowed to brave the magistrate by disputing his sentences and by evading or alleviating their effect. So far as citizens were concerned, the criminal law of the Roman Republic, in spite of abundant threats of capital punishment, became in practice the mildest ever known in the history of mankind.

Xenophon, *Hellenica*, I. 7. 12 δεινὸν εἶναι εἰ μή τις ἐάσει τὸν δῆμον πράττειν ὃ ἂν βούληται.

[2] I am aware that this is not the prevalent doctrine, but I hope to justify what I say later on. See below, chap. IX.

CHAPTER VII

THE JURISDICTION OF THE MAGISTRATE OUTSIDE THE WALLS

'MILITIAE ab eo qui imperavit provocatio ne esto.' Are we to take these words of Cicero in the *de Legibus*[1] to be a statement of the law as it existed in his own time (as are undoubtedly most of his prescriptions in this treatise), or are we to take it as a reference back to earlier practice[2] of which Cicero means to express his approval?[3] Most modern critics follow Mommsen in accepting the second alternative. They hold that at some time in the second century B. C., a *lex Sempronia* or a *lex Porcia* extended the sphere of *provocatio* and protected the Roman citizen, even outside Rome, from the infliction of death or scourging by the magistrate on his sole authority. Of recent years, however, the opposite doctrine has been upheld in two important articles by the late Dr. Greenidge,[4] and in view of his arguments the question requires consideration.

It is unfortunate that Greenidge should have created at

[1] Cicero, *de Legibus*, III. 3. 6.

[2] As in the question of open or secret voting.

[3] I assume that by *provocatio* here Cicero means *provocatio ad populum*, and not merely the *intercessio* of a colleague. In a former sentence he has used *provocatio* so as to include the *appellatio* to a *par majorve potestas*, but that is a very different thing from using the word *provocatio* in a sense which excludes the notion of appeal to the People. I do not believe that this is possible. See above, p. 98, and below, Vol. II, p. 176.

[4] Greenidge, *Classical Review*, 1896, Vol. X, p. 226, and 1897, Vol. XI, p. 437.

the outset a prejudice against his theory by attempting to explain away the remark of Sallust[1] about the scourging and beheading of Turpilius: 'Nam is civis ex Latio erat.' He believed that this must be interpreted in connexion with the proposal ascribed[2] to the elder Drusus, 122 B.C., 'that it should be unlawful even on a campaign to scourge a Latin with rods,' and that Sallust means us to understand by the words 'civis ex Latio' that Turpilius had become a Roman citizen, and *therefore* punishment was executed on him which could not have been inflicted if he had remained a Latin.[3] It is difficult to believe that Livius Drusus should have proposed to exempt Latins from scourging if Romans had not been already exempt. I think that, though the expression is strange in any case, 'civis ex Latio' must mean, not one who had become a Roman citizen after being a Latin, but simply a citizen of a Latin town and not of Rome. I should look on the words of Sallust as proving conclusively, first, that the proposal of Livius Drusus was either abandoned before it became law or else immediately repealed, and secondly, that a Roman in the time of the Jugurthine War would not have been subject to the punishment which Turpilius underwent. That a contemporary of Cicero should have said that a man was scourged and beheaded because he was a Roman, is to my mind an interpretation absolutely inadmissible.

[1] Sallust, *Jugurtha*, 69. [2] Plutarch, *Caius Gracchus*, 9. 3.

[3] Greenidge adds that a man so important as to be made *praefectus* in the Roman army would almost certainly have become a magistrate in his native town and so have acquired the Roman citizenship; but we know too little about Turpilius' previous life to be sure of this. The patronage of Metellus (Plutarch, *Marius*, 8. 1) may have secured his promotion in the army at an early age, and have kept him constantly employed in military service. Further, it is not probable that the right of acquiring the citizenship by a magistracy applied to the older Latin towns. See below, p. 151.

If Greenidge's hypothesis as to the limits of *provocatio* absolutely requires as its corollary this rendering of Sallust, then the rendering must drag down the whole hypothesis with it.[1] I certainly thought till lately that the two contentions cohered absolutely together, and I believe that this was Greenidge's own opinion. However, since the death of Dr. Greenidge, it has been pointed out to me by Mr. A. C. Clark,[2] that the obvious interpretation of Sallust's words, which I have given above (an interpretation in which Mr. Clark quite concurs), postulates only that a Roman of the date in question was as a matter of practice never scourged or beheaded, whereas an ally was sometimes so treated, and that the contrast would be valid, whether the Roman was protected by positive law or only by custom and public opinion. On this supposition the passage of Sallust will not be conclusive against Greenidge's main theory, which thus demands further discussion.

Another piece of evidence in the question is a coin of the Porcian *gens*,[3] which represents in the middle of the field a man in armour with his right hand raised; to the right is a smaller figure bearing what appear to be rods—all are agreed that this represents the lictor—and to the left another small figure clothed in the toga; the hand of this one is likewise extended, but not in so conspicuous a fashion. Beneath is the legend PROVOCO. Now Greenidge and Mommsen[4] agree in thinking the tall central figure to be that of the imperator, who is threatening the smaller personage in the toga, and ascribe the word 'provoco' to the latter.

[1] I have expressed this opinion in my article on Mommsen's *Strafrecht* in *English Historical Review*, April 1901.

[2] Fellow of Queen's College, Oxford, and University Reader in Latin.

[3] See Babelon, *Monnaies Consulaires*, 1886, Vol. II, p. 370.

[4] *Strafrecht*, p. 31, note 3.

Mommsen, however, believes that it is the governor who vainly claims to exercise his *imperium* over a Roman civilian in his province; while Greenidge lays the scene in Rome, and thinks that it represents the levy of troops, the general threatening the citizen with the rods to compel him to enlist, and the citizen appealing from his coercion. I will not say that either of these interpretations is impossible, but to me the picture tells a different story. I am inclined to think that the imperator is not visible at all, and that the 'word of might', PROVOCO, should naturally be placed in the mouth of the principal figure—that is to say, of the tall man in the centre. I believe that this figure represents a soldier in the camp, as the lictor approaches him, and that he stretches forth his hand to protest his rights as a Roman. The small figure in the toga will then be a single citizen typical of the whole Roman people at home, at whose judgement-seat the soldier claims to stand. It must be admitted, however, that a picture which admits of being interpreted in so many different ways is not a very strong piece of evidence in favour of the one theory of appeal or the other.

Let us next consider the passage where Cicero[1] accuses Verres of having crucified a Roman citizen. Greenidge allows, of course, that such a deed was reprobated by opinion and custom; but he would look on the action of Verres as cruel, wicked, and shocking, but not illegal. He lays great stress on the circumstance that Cicero never says *totidem verbis* that the act was unlawful. It seems to me that a bald statement of the illegality, such as Greenidge demands, would have been an anticlimax which the instinct of the orator would never have tolerated. In a peculiarly flagrant and brutal murder-case, the jury do not expect the prosecuting counsel to give them chapter and verse for the doctrine

[1] Cicero, *in Verrem*, V. 63 seq.

that murder is an indictable offence. So in this instance; the illegality is assumed throughout, by Verres as well as by his prosecutor. Verres' defence is, not that he had a right to put a citizen to death, but that Gavius was a runaway slave, a spy from Spartacus' band, who falsely claimed to be a Roman citizen. Cicero has sufficient evidence to dispose of this defence, and having done so he naturally proceeds to dwell on the horrors of the outrage inflicted on the Roman name, and on the defilement of that freedom which the men of old had won for the Romans. 'O nomen dulce libertatis! O jus eximium nostrae civitatis! O lex Porcia legesque Semproniae! O graviter desiderata et aliquando reddita plebi Romanae tribunicia potestas!' I should be willing to admit that these words might possibly be justified even though the rights asserted rested rather on custom than on positive law, but I cannot agree that the argument from Cicero's silence proves anything against the existence of such a positive law.

In the same way I find little difficulty in Greenidge's objection that 'the right of appeal, if strictly interpreted, should have abolished flogging in the army', whereas this was notoriously not the case. The answer is, that in the Roman army (as in some modern armies) a strong distinction was drawn between a regular scourging with rods (*virgis caedi*) by the lictor and a caning from the officer's vine-stock. It is only the former punishment from which the citizen is exempt. As early as the Numantine War (134 B.C.) we read[1] of the Roman soldier being chastised, '*vitibus*,'[2] for an offence for which the ally is '*virgis caesus*'. The legionaries of the

[1] Livy, *Epitome*, LVII.

[2] I think, though I am not quite sure, that this is what Pliny is driving at, when he says of the vine-rod in the hand of the centurion, 'atque etiam in delictis poenam ipsam honorat' (*Hist. Nat.* XIV. 1. 19).

Illyrian army in A.D. 14 smarted under the *vitis*,[1] and throughout the Principate the vine-stock is the regular symbol of the centurion's power, and becomes even a synonym for his commission.[2] There is no reason to suppose that there was any breach of continuity in the practice between the time of the younger Scipio and that of Juvenal.

It is not easy, when we are inquiring as to the law of the Roman Republic, to say what place we shall assign to the comments of the lawyers of the Principate on the *lex Julia de vi publica*. Greenidge maintains that the legal prohibitions and limitations were laid down for the first time in this law, though he admits that the *lex Julia* probably only defined and gave legal sanction to what was already the practice. The jurist Paulus[3] tells us that any magistrate who 'killed, tortured, or threw into prison any Roman citizen who made his appeal, formerly to the People, now to the emperor,' was liable under the *lex Julia*. Certain categories of persons, however, cannot claim the benefit of this law; for instance, *judicati* and *confessi* and persons who refuse obedience to the judge or act contrary to public order may be imprisoned. 'Tribunes likewise of the soldiers and prefects of the fleet are exempt from the law, in order that military offences may be repressed without any hindrance from the *lex Julia*.' There is, however, no evidence that the *lex Julia de vi publica* introduced any essential innovation, though perhaps it modified details. The legal principle of the universal right of appeal in all parts of Rome's

[1] Tacitus, *Annales*, I. 23. 4 'Centurio Lucilius interficitur, cui militaribus facetiis vocabulum "cedo alteram" indiderant, quia fracta vite in tergo militis alteram clara voce ac rursus aliam poscebat.' See also Macer *de re Militari*, quoted in *Digest*, XLIX. 16. 13, § 4.

[2] 'Aut vitem posce libello' (Juvenal, *Sat.* XIV. 193).

[3] Paulus, *Sententiae*, V. 26.

dominion may well have been taken up into it from previous legislation.

The chief argument in favour of Greenidge's theory is to be found in the array of actual instances recorded, and the question is whether they can be satisfactorily explained on any other hypothesis.

The younger Balbus, quaestor in Spain in 43 B.C., is said by Asinius Pollio[1] to have burned alive an old Pompeian soldier who refused to re-enlist as a gladiator: 'et illi misero quiritanti "Civis Romanus natus sum" respondit "Abi nunc populi fidem implora";' possibly the circumstance that he had once of his own freewill sold himself as a gladiator into 'illud turpissimum auctoramentum—uri, vinciri ferroque necari',[2] may have been an excuse for treating him as a slave.[3] In any case, the action of a crack-brained partisan (as his other proceedings show him to have been) in the anarchy of a civil war need not perhaps be taken into account. The licence of civil war may likewise be an explanation of Caesar's action in the mutiny at Placentia in the autumn of the year 49 B.C. If we are to trust Lucan, Appian, and Dio,[4] he beheaded the ringleaders. The incident, whatever it was, would fall within the period covered by the lost chapters at the end of the Second Book of Caesar's *Commentaries*. Of another instance of military execution we have a detailed account in Plutarch.[5] Crassus decimated a cohort guilty of cowardice in presence of the enemy during the war with Spartacus (71 B.C.). It is possible that the exception from the *lex Julia*, mentioned by Paulus, in favour of military commanders may have already come

[1] Cicero, *ad Familiares*, X. 32. 3.

[2] Seneca, *Epistolae*, 37. 1.

[3] See Mommsen, *Juristische Schriften*, Vol. III, p. 9.

[4] Lucan, *Pharsalia*, V. 360; Appian, *Bellum Civile*, II. 47; Dio Cassius, XLI. 35. 5.

[5] Plutarch, *Crassus*, 10. 2.

into force ;[1] or perhaps Crassus and Caesar would have justified their action on the ground that soldiers abdicated their citizenship by deserting the post in which their country had placed them, or by rebelling against their lawful commander.[2] In the same way Marcianus, as Greenidge has pointed out, in commenting[3] on the *lex Cornelia de Sicariis*, says that 'deserters may be killed as enemies, wherever found'.

Passing to instances taken from times of peace, the account of Scaevola's proceedings in Asia in the year 94 B.C., which Greenidge quotes from Diodorus,[4] seems to me far from conclusive. It is by no means clear that the words τὰ δὲ θανατικὰ τῶν ἐγκλημάτων ἠξίου κρίσεως θανατικῆς are to be applied to the Roman *publicani* themselves, especially as the sole example he gives, introduced by the explanatory ὅτε δή, relates to the execution of one of their agents who was a slave. Another startling instance, and one occurring after the *lex Julia*, is given by Suetonius. Galba, while he was still governor of Spain under Nero, crucified a guardian who had poisoned his ward, and when the prisoner pleaded his Roman citizenship gave him a taller cross and whitewashed it—'quasi solatio et honore aliquo poenam levaturus.' Suetonius[5] only mildly blames him as 'in coercendis quidem delictis vel immodicus'. I think, however, that Galba's action, like that of Verres, when he chose the shore looking on Italy as the place for Gavius's crucifixion, shows that he denied and mocked at the assertion of the criminal that he

[1] 'If the so-called "leges militares", mentioned in Cicero, *pro Flacco*, 32. 77, dealt with questions of discipline, the extension of the "provocatio" must have been combined with many exceptions in favour of those laws' (Greenidge, *Classical Review*, 1896, Vol. X, p. 228).

[2] See above, p. 112.

[3] Marcianus, *Digest*, XLVIII. 8. 3. § 6.

[4] Diodorus, XXXVII. 5. 2.

[5] Suetonius, *Galba*, 9.

was a Roman, not that he claimed to punish him whether he were a Roman or not.

The strongest cases, however, come from the criticisms of Cicero on the conduct of his brother Quintus when he was governor of Asia in 59 B.C. If Quintus Cicero's own words are valid proof against him, he must stand convicted as much as Verres. This, however, is just the question. In only one case among the Roman citizens, that of Tuscenius, does Marcus Cicero[1] despair of pacifying the aggrieved persons, and we find from a former letter[2] that the extreme of Tuscenius's complaint is pecuniary loss ; Quintus had made him disgorge some ill-gotten gains : 'cujus tu ex impurissimis faucibus inhonestissimam cupidatem eripuisti summa cum aequitate.' The second letter of Marcus Cicero continues : 'Next we have on our hands Catienus, a mean and worthless 'fellow, but still a Roman knight by title of property : even 'he shall be pacified. Now I do not blame you for treating 'this man's father somewhat severely, for I know that you 'had good reason for what you did. But what occasion was 'there to write to the son, "that he was setting up for himself '"that cross from which you had once taken him down, and '"that you would have him smoked to death with the whole '"province applauding?" And then the letter which you 'wrote to some Caius Fabius or other—for Catienus shows this 'round as well—"that you are informed that the kidnapper '"Licinius with his young kite of a boy is levying rates," and 'then you ask Fabius "to burn father and son alive, if he can; '"and, if not, to send them to you to have them burned in '"due course of law".' Now I cannot think that all this is to be taken seriously. Quintus Cicero was an incorrigible bully and blusterer ; but his threatened men live long, and make

[1] Cicero, *ad Quintum Fratrem*, I. 2. 6.

[2] Cicero, ibid., I. 1. 19.

themselves unpleasant afterwards at Rome. If Quintus had really done to Roman citizens any of the things of which he brags, his brother would have something much more serious to say than that 'these letters sent by you as a joke to Caius Fabius, if indeed they are yours, convey, when they are read, the impression of being outrageous and objectionable in their wording'. The utmost we can say is that Quintus may have threatened, in jest or in earnest, that when he had to deal with such scoundrels he would break the law and take his chance—perhaps the citizenship of some of them was not beyond dispute—but that 'his bark was worse than his bite'.

Against such cases we have on the other side two very striking ones. The younger Pliny, while reporting his execution of obstinate Christians,[1] adds: 'There were some infected with the same madness, whom, since they were citizens, I entered on the register to be sent to Rome;' and the proud appeal of St. Paul[2] seems to rest on a sure ground of legal immunity: '"Is it lawful for you to scourge a man who is a Roman and uncondemned?" When the centurion heard that, he went and told the chief captain, saying, "Take heed what thou doest, for this man is a Roman."' And yet again: 'I stand at Caesar's judgement seat, where I ought to be judged . . . I appeal unto Caesar.'

Both these cases are after the *lex Julia de vi publica*, but I do not think that it is possible to refer the acquisition of the right here acknowledged to so late an epoch as the passing of that law. It is indeed quite in accordance with analogy that the immunity should have rested first on opinion and practice, and that it should afterwards have received the sanction of positive law. But I do not believe that the

[1] Pliny, *Epistolae ad Trajanum*, 96. 4.
Acts of the Apostles, XXII. 25 and XXV. 10.

Romans had to wait for such a positive law until the Republic was dead and gone. When we think of the long line of demagogues from Tiberius Gracchus downward, every one of them keenly on the look out to advertise his tribunate by the proposal of a popular measure, can we believe that they should all have allowed so tempting an opportunity to slip, unless they had found in their way some plaguy predecessor, 'qui ante nos nostra dixisset'?

The immunity must have been in full force by the year 122 B.C., for the *lex Acilia*[1] in recounting the privileges granted, as a substitute for the Roman citizenship, to the ally who does not care to accept that citizenship as the reward of a successful prosecution, names *provocatio* without limit of place amongst them. This would have been absurd if the citizenship itself had not guaranteed the same privilege. On the whole I believe that we should attribute the change to Cato the Censor. Cicero speaks of the *lex Porcia*[2] as 'principium justissimae libertatis', and when we find that Livy[3] says, 'Porcia tamen lex sola pro tergo civium lata videtur,' it is, I think, impossible to avoid the conclusion that the *pro tergo* is a reminiscence of Cato's own phrase *pro scapulis*,[4] and that we have found in Cato's law that which protects the Roman citizen in all places and under all circumstances[5] from the lictor's rod. With this prohibition to scourge there is closely connected in many descriptions[6]

[1] See below, Appendix to Chap. VIII, p. 146 seq.
[2] See Asconius, *in Cornelianam*, 69.
[3] Livy, X. 9. 4.
[4] Festus, s.v. *pro scapulis*. The date fits in very well with Scipio's practice in the Numantine War. Above, p. 119.
[5] Even the parricide. There is no mention of scourging among the preliminaries to the execution of Malleolus. See above, p. 25.
[6] e. g. Livy, X. 9. 4 'gravi poena si quis verberasset necassetve civem Romanum sanxit'. Cicero, *pro Rabirio*, 3. 8 'de civibus Romanis contra legem Porciam verberatis aut necatis'.

of the *lex Porcia* the prohibition to put to death, and we may fairly conclude that the first immunity would always imply the second.

From that time forward 'to be subject to the axe and the rods' was the description of the alien as opposed to the Roman citizen. Valerius Maximus tells of the Sicilian who indulged in a repartee to the governor of his province, 'audacius quam virgis et securibus subjecto conveniebat.'[1] Diodorus gives us the speech of an actor pleading for his life to a mob of enraged Italians at the outbreak of the Social War: 'I am no Roman but subject like you to the rods. 'I go hither and thither through Italy, trading in pleasantries 'and in chase of good cheer and laughter; do not kill the 'swallow who is at home everywhere, to whom heaven has 'granted to nest unharmed about every man's house.'[2] In the same way Pliny's well-known account of Balbus of Gades,[3] 'sed accusatus et de jure virgarum in eum judicum in consilium missus,' which might at first sight seem to point to a court martial hesitating whether or not it was right to flog him, is interpreted by Mommsen,[4] without doubt correctly, as referring merely to the suit in which Balbus' Roman citizenship was questioned, and in which Cicero delivered the extant speech for the defence.

[1] Valerius Maximus, IX. 14. It is the old jest, 'Why are we so much alike? Was your mother ever at Rome?' 'No, but my father was.'
[2] Diodorus, XXXVII. 12. 3.
[3] Pliny, *Hist. Nat.* VII. 43. 136.
[4] *Strafrecht*, p. 47, n. 4.

CHAPTER VIII

APPEAL TO THE PEOPLE

'THE people often decides questions of fine, when the 'amount at issue is considerable, and especially in case of 'persons who have held high office. The people alone judges 'in cases of life and death.'[1]

Thus says Polybius, writing in the latter half of the second century B. C. How are these words to be understood? In what fashion was the judgement of the People rendered? What is the nature of *provocatio*? To these questions many answers have been given. I will anticipate my conclusion by saying at once that I believe Mommsen's answer to be correct, and hold with him that the pronouncement of the People is in every case the disallowing or the confirmation of a condemnatory sentence previously uttered by a magistrate and appealed against by the prisoner.[2] As, however, this is not the generally accepted doctrine, it will be necessary in the first place to state and criticize the conclusions arrived at by other scholars.

The first theory to be considered is that of Zumpt. Zumpt allows in so many words that 'all trials before the people rest on the procedure of *provocatio*',[3] but he has reduced the import of this proposition within the very

[1] Polybius, VI. 14. 6.
[2] Mommsen struck the keynote at the very beginning of his career. 'Omnia populi judicia capitalia fuisse ex provocatione' is one of the theses which he defended in suing for his Doctorate in 1843. See *Juristische Schriften*, Vol. III, p. 466.
[3] Zumpt, *Criminalrecht*, I. ii, p. 230.

narrowest limits. In the first place he maintains that in every case in which the guilt of the accused is manifest appeal has no place ; and if we ask who is to decide whether the case is sufficiently doubtful to justify such an appeal, he would answer that the last word lay in old times with the casual crowd of spectators around the judgement seat. The condemned man is driven to beg for their tumultuary aid, 'quiritare,' 'fidem populi implorare,'[1] and if the voice of public opinion does not respond, the magistrate may carry out the execution unhindered.[2] In later years, he thinks, this public opinion is embodied in the tribunes ; if they give their help the stay of execution is allowed, but not otherwise.

In cases where *provocatio* is allowed, Zumpt considers the proceedings which result to be governed by the analogy of private trials under the formulary system.[3] The magistrate has the preliminary proceedings, which are *in jure*, as are also the executive proceedings which follow the sentence, while the sentence itself is given by the People which plays the part of the *judex*[4] to whom a question is referred by the praetor in civil suits. Both in the public and in the private trials only doubtful questions are so referred to a *judicium*.[5] The change effected by the *lex Valeria* at the beginning of the Republic is described as follows :—

'The king had decided according to his own discretion in 'each individual case whether the verdict of the people shall

[1] Varro, *de Lingua Latina*, VI. 68 'quiritare dicitur is qui Quiritium fidem clamans implorat'. Modern scholars, however, believe *quiritare* to be merely a lengthened form of *queri*. See Tyrrell and Purser, *Cicero's Letters*, DCCCXCVI, in note to *ad Familiares*, X. 32. 3.

[2] Zumpt, *Criminalrecht*, I. i, p. 185.

[3] See above, p. 75.

[4] Zumpt, *Criminalrecht*, I. i, p. 192, and I. ii, p. 141.

[5] Zumpt, ibid., I. i, p. 191.

'be taken or not, and whether, when delivered, it shall be 'confirmed or rejected : the consuls promise of their own 'free-will that in certain cases, which they name, they will 'leave the decision to the people and will themselves conform 'to that decision ;'[1]

and again :—

'The Valerian Law includes the full recognition of the 'separation between *jus* and *judicium* and the significance of 'the *judicium* in criminal trials, which survived to the end 'of the Republic.'[2]

Of the trial of Horatius, Zumpt says :[3]

'That which Livy calls a *lex*[4] is the instruction which the 'king gives to the judges whom he commissions. Just as in 'private suits the magistrate sets before the judge the point 'on which the decision is to be given, so the king must needs 'prescribe to the criminal judges set up by him the formula 'under which the verdict is to fall, and define the process, 'which in this case was a composite one.'

And again :[5]

'The king concludes the trial, just as it had proceeded from 'him, a sufficient proof that the duumvirs and the people 'acted on his mandate and under his instructions . . . finally 'he confirms the verdict which has been delivered, and

[1] Zumpt, *Criminalrecht*, I. i, p. 178.

[2] Zumpt, ibid., I. ii, p. 141.

[3] Zumpt, ibid., I. i, p. 95.

[4] Livy, I. 26. 5 'Rex . . . "duumviros", inquit, "qui Horatio perduellionem judicent, secundum legem facio." Lex horrendi carminis erat : "Duumviri perduellionem judicent ; si a duumviris provocarit, de provocatione certato ; si vincent, caput obnubito, infelici arbori reste suspendito, verberato vel intra pomerium vel extra pomerium"'.

[5] Zumpt, *Criminalrecht*, I. i, p. 98.

'can attach conditions (the expiatory ceremonies[1]) to its 'validity.'

We may sum up Zumpt's hypothesis somewhat as follows: According to him *provocatio ad populum* is not an appeal at all. Its essence consists solely in the recognition of a *judicium* by some other than the magistrate himself as a regular part of the procedure.[2] In the normal cases there is no previous decision to be appealed against, the magistrate having referred that decision to his mandatory the People. It is only an accident in the case of the *duumviri perduellionis*, that the formula under which they and the People alike act happens to provide for 'a composite process', an appeal from the one mandatory to the other.

Zumpt maintains[3] that 'the procedure under *provocatio* is not that of a court of second instance', and is very positive that under the Republic there is no such thing as an appellate jurisdiction. 'This conception,' he writes,[4] 'of a court of second instance is in contradiction with the ideas of the Roman Republic, and is calculated to raise misunderstandings; it never existed except in the proceedings wherein *duoviri* deliver a preliminary verdict which they then endeavour to support as accusers before the assembly. This procedure, however, occurs only twice in the whole of Roman history: furthermore the first verdict was a mere form, on which stress was laid only to introduce the real trial before

[1] See above, p. 49. It is perhaps the climax of absurdity in Zumpt's theory that it represents the anxiety of the king lest the acquittal should offend the gods, and the precautions taken in consequence, as a modification of and derogation from the sentence of the people. It would be as reasonable to represent the propitiation of the Eumenides at the end of the Aeschylean trilogy as a derogation from the sentence of the Areopagus.

[2] Zumpt, *Criminalrecht*, I. ii, p. 142.

[3] Zumpt, ibid., I. ii, p. 230.

[4] Zumpt, ibid., I. ii, p. 183.

the people.' Thus[1] 'the Regal and Republican *provocatio* are united by the principle that in doubtful cases the collective body of the burgesses decides the fate of a burgess, but differ in that the first consists of two stages, the second only of one'.

I have tried to state Zumpt's contention as fairly as possible; but I believe it to be erroneous from beginning to end. Apart from all other objections the theory is self-condemned by the consideration that it compels Zumpt to treat as an exception the great archetypal case of Horatius, which is introduced by Livy, as his manner is, with every detail of procedure in order to serve as a pattern, displaying all the main features of *provocatio*.

If we are to deny that criminal trials (other than the duumviral) before the People in the time of the Republic are of the nature of an appeal, it is more logical to go one step further with Rein,[2] Geib,[3] and Greenidge,[4] and to deny that *provocatio* has any place in these trials. According to them, the only connexion is that the possibility of an appeal may act as a motive to the magistrate to 'make no provisional pronouncement of his own, but to go directly to the people', which he does by a '*rogatio* brought before a sovereign assembly exercising legislative power'.[5] This last theory has been most clearly expounded by Maine,[6] who founds on

[1] Zumpt, *Criminalrecht*, I. i, p. 191 (shortened).

[2] In monograph, 'De judiciis Populi Romani provocatione non interposita habitis,' 1841.

[3] Geib, *Römische Criminalprocess*, p. 23.

[4] Greenidge, *Proc.*, p. 306 seq. and p. 344 seq.

[5] Greenidge, ibid., pp. 311 and 347. Zumpt, strange to say, in his second work (*Criminalprocess*, p. 6, note), forgetting all about his own doctrine of *jus* and *judicium*, gives in his adherence. 'The jurisdiction of the tribunes and aediles assisted by the assembly of the people is to be regarded rather as a kind of legislative action.'

[6] Maine, *Ancient Law*, p. 372.

it his whole account of the Roman public criminal law, and ignores *provocatio* altogether.

'When the Roman community conceived itself to be 'injured, the analogy of a personal wrong received was 'carried out to its consequences with absolute literalness, and 'the State avenged itself by a single act on the individual 'wrong-doer. The result was that in the infancy of the 'Commonwealth, every offence vitally touching its security 'or its interests was punished by a separate enactment of the 'legislature. And this is the earliest conception of a *crimen* or 'crime—an act involving such high issues that the State, 'instead of leaving its cognisance to the civil tribunal or the 'religious court, directed a special law or *privilegium* against 'the perpetrator. Every indictment therefore took the form 'of a bill of pains and penalties . . . The procedure was 'identical with the forms of passing an ordinary statute: 'it was set in motion by the same persons and conducted with 'precisely the same solemnities.'

The theory is seductive in its simplicity, but it has the fatal flaw that it is in clear contradiction of the earliest tradition of Roman procedure as embodied in the myth of Horatius. No doubt on the principle of self-help either *populus* or *plebs* might claim to be judge in case of any wrong done against itself; but according to the tradition the corporation exercised its right of vengeance primarily through its magistrates, only reserving to itself the power naturally belonging to the injured party to remit penalties which its magistrates have pronounced. There is no trace in the authorized version of Roman history at any time of a process answering to a bill of pains and penalties.[1] Certainly none

[1] An apparent exception in cases like the trial of Clodius for sacrilege will be treated later on. See below, Vol. II, p. 41.

such could exist after the Laws of the Twelve Tables: for those laws distinctly forbade *privilegia* such as Maine describes. Further, the details of Maine's identification of judgement with legislation will not bear close inspection: neither as regards the 'persons', nor as regards the 'solemnities' is his statement exact. With the sole exception of the tribune there is no magistrate who can 'set in motion' both procedures. The quaestors, aediles, and *duumviri perduellionis* have no initiative in legislation, whereas the consuls and praetors who do propose legislative measures do not appear in criminal trials before the People. Again, though the *promulgatio* over three market days is common to both procedures, there is nothing in the legislative process answering to the triple *anquisitio*[1] or *accusatio* which in the judicial process is preliminary to the *promulgatio*.

What evidence is there in favour of the theories which deny or ignore the appeal from the sentence of a magistrate? Possibly the use of *rogare* and *ferre*[2] in describing criminal trials may be taken as implying legislative action; but this is to build too large a superstructure on the words; as Mommsen[3] says, 'the magistrate by the very fact of defending his own sentence before the people against the petition for pardon cannot help making a proposal to them'; and *ferre de capite* is quite an allowable expression in which to sum up the action of any popular assembly which was deciding on the life or death of a citizen. But the chief argument seems to rest on the circumstance that

[1] See below, p. 154.

[2] Compare Cicero, *de Legibus*, III. 4. 11 'de capite civis nisi per maximum comitiatum ne ferunto', with *ibid.* 19. 44 'Leges praeclarissimae de xii tabulis tralatae . . . altera de capite civis rogari nisi maximo comitiatu vetat.'

[3] Mommsen, *Strafrecht*, p. 477. For the use of the word *irrogare* see below, p. 175 seq.

in the trials on record, though two of the technical phrases in Livy's archetypal formula,[1] *certato* and *perduellionem tibi judico*, meet us frequently, the mention of the word *provoco*, which in Livy connects the two, is extremely rare. We find it, however, as an actual stage of the proceedings in the duumviral trials of Horatius and Rabirius,[2] and in the case of a pontifical fine.[3] The decemvir Appius Claudius uses it after his fall,[4] and Fabius Maximus in resisting execution at the hands of the dictator Papirius.[5] If these cases are taken into account (and they cannot be safely neglected) we must needs accept the solution that the general omission in our story of the word *provoco* is only an accident, and that the stage which it represents[6] is taken for granted as a matter of course. Otherwise we shall be driven with Rein, Geib, and Greenidge[7] to take refuge in a far more perplexing alternative; for we shall have to assume that there were two distinct and separate judicial procedures, in each of which the People had the last word in condemning or acquitting but which differed from one another entirely in the basis of the People's action. This is extremely improbable in itself, and there is no trace in any ancient

[1] See above, p. 129, note 4. [2] Suetonius, *Julius*, 12.

[3] 'Deque ea re cum provocasset, certatum ad populum,' Livy, XL. 42. 9. See also below, p. 135, note 2.

[4] Livy, III. 56. 5. [5] Livy, VIII. 33. 7 and 8.

[6] It would naturally occur immediately after the magistrate had pronounced 'perduellionem se judicare', whether this took place at the commencement of the proceedings, as in the trial of the censors (Livy, XLIII. 16. 11), or after the triple *anquisitio*, as in the trial of Cn. Fulvius (Livy, XXVI. 3. 9).

[7] Maine's theory leads up logically to the same difficulty, though he evades it by not recognizing *provocatio* at all. Willems (*Droit Public*, p. 175), though he does not commit himself to the legislative, accepts the dual theory, 'L'instance d'appel est transformée en juridiction de première instance par la loi des XII Tables "de capite civis nisi per maximum comitiatum ne ferunto".'

authority that the choice of two rival procedures was ever presented to the magistrate. The power of the People to decide is never represented as having two different sources, but always as springing from the various laws Valerian, Porcian or Sempronian which assert the right of the individual to appeal against the action of the magistrate.

Perhaps it may be argued that a procedure other than that of appeal is implied in the words *accusare* and *accusator* constantly applied to the magistrate in these trials. The answer is that there is no inconsistency between the system of appeal and the appearance of the magistrate as accuser. In the primeval case of Horatius, which all must allow to be one of appeal, the proceedings before the People are looked on as a struggle (*certatio*) between the magistrate and the accused, which must end in the victory of the one and the defeat of the other. The magistrate must defend and justify his sentence, which the prisoner of course wishes to upset. 'Si a duumviris provocarit, de provocatione certato: si vincent, caput obnubito' and the rest.[1] This is just another way of saying that the magistrate, though he may be a judge in the first stage of the proceedings, becomes a party—of course the accusing party—in the second stage. The same verb, *certare*, is used by Livy[2] of a fine—'cui certandae cum dies advenisset'; and Cicero[3] in describing a criminal trial before the People in his picture of the Roman constitution says: 'Quum magistratus judicassit irrogassitve[4] per populum mulctae poenae certatio esto.' This sentence comes in the midst of the regulations about *provocatio*, and is the only reference to criminal trials in Cicero's scheme,

[1] See above, p. 129, note 4.

[2] Livy, XXV. 3. 14; also *multae certatio*, of the same occasion, XXV. 4. 8.

[3] Cicero, *de Legibus*, III. 3. 6.

[4] The import of the word *irrogare* will be discussed below, p. 173 seq.

except that certain supplementary rules about *privilegia* and the jurisdiction of the *comitia centuriata* come as an appendix at the end of the statute. If Cicero had known anything of a direct legislative action of the People in criminal trials, he could not have failed to introduce it here. He clearly means to derive the whole action of the People in criminal matters from its functions under the laws about *provocatio*.[1]

That the magistrate does not cease to be a judge because he will afterwards have to defend his sentence, appears still more clearly when we trace the history of the other striking phrase in the Livian pattern trial—'Tum alter ex duumviris: "Publi Horati, tibi perduellionem judico".'[2] Cicero clearly refers to this in the words 'cum magistratus judicassit', and it recurs in the story of actual trials before the people in historical times when the magistrate is practically an accuser. The tribune of 211 B. C. declares 'perduellionis se judicare Cn. Fulvio',[3] and the tribune of 169 B. C. 'utrique censori perduellionem se judicare pronuntiavit'.[4] Caesar in 63 B. C. doubtless used the same words to Rabirius when—'sorte judex in reum ductus tam cupide condemnavit, ut ad populum provocanti nihil aeque ac judicis acerbitas profuerit'.[5] In each case then we have the same word *judico*, implying an actual preliminary sentence by the magistrate, and Zumpt's attempts[6] to explain away the plain meaning of the words seem to me as groundless as his assumption that 'the magistrate can never be a judge in the proper sense,

[1] The same theory seems to be indicated in Pomponius's summary (*Digest*, I. 2. 2, § 16): 'ne [consules] per omnia regiam potestatem sibi vindicarent, lege lata factum est ut ab eis provocatio esset, neve possent in caput civis Romani animadvertere injussu populi.'

[2] Livy, I. 26. 7.

[3] Livy, XXVI. 3. 9.

[4] Livy, XLIII. 16. 11.

[5] Suetonius, *Julius*, 12.

[6] Zumpt, *Criminalrecht*, I. ii, p. 187.

though he is often so called by a kind of misuse of the word'.[1]

The continuity in the procedure thus clearly shown is, I think, sufficient evidence that all trials before the People rest on one and the same basis. We may therefore set aside all the hypotheses which lead up to a dual system and are left face to face with the question, What was the single principle involved in these trials? This question Mommsen and Zumpt alone profess to answer. Mommsen's doctrine is that the People is always confirming or annulling the sentence of a magistrate; that the appeal of the accused, expressed or implied, is the reason for the People's intervention, and that the appeal is in its essence the petition of a condemned man for pardon. Though I have already argued the matter in detail, it will be best to present the summing up in Mommsen's own words:

'Upon the execution of the sentence the condemned man 'can demand the final decision of the sovereign commonalty, 'appeal from the magistrate to the *comitia*. To quash the 'sentence of punishment, as is craved by the condemned, is 'an act of sovereign power. The magistrate has answered 'the question of guilty or not guilty in the affirmative, and 'although the process of the inquiry takes up this question 'again, and an acquittal by the *comitia* may possibly be the 'result of a conviction on the part of the majority of the 'citizens that the accused is innocent, yet the idea that forms 'the base of the proceedings is not that of innocence but of 'remission. This comes out with overwhelming force in the 'Horatius legend. The offence is the most serious conceivable,

[1] Zumpt, *Criminalrecht*, I. ii, p. 191. If there were any 'misuse of the word', it was when the Romans transferred to the private man the style and title of *judex*, more properly belonging to the magistrate. See above, p. 76, note 3.

'the perpetrator notorious and avowing the fact; but there 'is ground for absolution in the patriotism which atones for 'everything. It is quite obvious that the proceedings before 'the *comitia* must be conceived as a petition for grace.'[1]

On the other hand we have Zumpt's theory that all is to be explained by the opposition between the action *in jure* of the magistrate and *in judicio* of the People, the power of the People being according to the original conception derived from the mandate of the magistrate. I have no hesitation in declaring for Mommsen's doctrine. Zumpt seems to me to have been importing without due warrant into the Roman criminal procedure this opposition of *jus* and *judicium*. There is no reference to it in this connexion in any ancient authority.[2] The theory minimizes the great case of Horatius and ignores the repetition of the phraseology of that case in later trials. It obliges Zumpt to explain one word after another in non-natural senses; *provocatio* is not according to him 'an appeal' nor is *judicare* 'to give sentence'. Above all it leads to the absurd conclusion that the sovereign Roman People acts by a power delegated to it by its own magistrates or those of the *plebs*. This is to turn upside down the true doctrine of the Roman constitution.

Mommsen's presentation does not, however, oblige us to give more than a theoretical importance to the principle of magisterial condemnation followed by an appeal for remission. If the principle were rigidly followed out into practice we should expect to find that the magistrate's sentence would be carried out unless it were definitely reversed by the People. This consequence, however, is not

[1] *Strafrecht*, pp. 167 and 477.

[2] The phrase *judicium populi*, as Mommsen (*Strafrecht*, p. 161, n. 3) points out, is not properly technical at all, but is a descriptive expression, which, however, occasionally found its way into an official document. See below, p. 182, note 4, *populi judicio petere*.

drawn. On the contrary the laws on *provocatio* clearly forbade the sentence to be carried out unless it were definitely confirmed by the People.[1] As Dionysius says,[2] the accused 'must suffer nothing in the meantime at the hands of the magistrate, until the People has voted on the case'. It follows that if by any accident, such as a thunderstorm or a tribunician veto, the People fails to make its pronouncement, the accused must escape without punishment, and this is what we find actually takes place.[3] But what would happen if the accused should wilfully take advantage of this by remaining 'mute of malice' and refusing to say *provoco*? Was he to be allowed to render the whole proceedings futile? Under the Common Law of England the judge sometimes found himself in a similar difficulty if a prisoner arraigned of felony refused to plead either Guilty or Not guilty. In old times the *peine forte et dure* was applied to overcome his obstinacy; but if he held out and was 'pressed to death', he died in contempt of court certainly but not an attainted felon, and his lands were saved to his heirs.[4] When the

[1] The words *injussu populi* may mean without such subsequent confirmation. This is certainly their sense in Pomponius (*Digest*, I. 2. 2, § 16), as quoted above (p. 136, note 1) and repeated, though less clearly, in verse 23 of the same paragraph of the *Digest*. It is equally certain that sometimes the phrase means 'without previous commission from the People', as in Livy XXVI. 33. 10 (see below, p. 142, note 2), and in all references to the Law of C. Gracchus, especially in Cicero, *pro Rab.* 4. 12; probably also in Polyb. VI. 16. 2 (below, p. 239, note 3), and in Sallust, *Cat.* 29. 3. Where it is used as a reproach to the *duumviri* who condemned Rabirius (*pro Rab.* 4. 12; see below, p. 196), it cannot be in the first of the two senses, for appeal was notoriously allowed. I believe that it implies that no special law was passed. Dio Cassius seems to take it as referring to the want of popular election of the judges (below, p. 153), but I much doubt if the Latin will bear that sense.

[2] Dionysius Halicarnasensis, V. 19.

[3] See below, p. 155.

[4] So Coke's *Institutes*, Book III, chap. XIII, §745. The most notable instance is that of the repentant Calverley of Calverley in the year

peine forte et dure was abolished in 1772 the prisoner 'mute of malice' was deemed to have pleaded 'Guilty'. At the present day the judge commonly exercises a power conferred on him by a more recent Act of Parliament (7 & 8 Geo. IV. ch. 28) and orders a plea of 'Not guilty' to be recorded. The Romans seem from the first to have adopted a like fiction; the appeal from the sentence of the magistrate, whether audibly expressed or not, is always taken for granted from the beginning of the proceedings; so that the magistrate seems to invite the co-operation of the People without waiting for their intervention to be formally claimed.

It may perhaps be thought that the question whether there are two stages or only one in a Roman criminal trial becomes little more than a verbal one. This seems to be Girard's view,[1] though he agrees with Mommsen on the whole. I have already admitted that *provocatio* in practice transforms the judge into an accuser. But none the less I think it important to keep in mind that continuity of legal principles in which the Romans themselves fully believed, and to insist that in point of law we must hold a sentence by the magistrate to be the necessary preliminary for a sentence by the People. I do not see how any other doctrine can be maintained in face of Cicero's comment on his own scheme of law (which is really the Roman constitution) when he says that 'the power of judgement is given to the magistrate *in order* that the People may have the opportunity of exercising its

1605, who by this endurance preserved the family lands for the infant son, who had alone escaped when he murdered the rest of his children. The story is the foundation of the old play, *The Yorkshire Tragedy*.

[1] Girard, *Org. Jud.*, p. 253. He speaks of 'La justice criminelle régulière rendue par des magistrats du peuple et de la plèbe sous bénéfice de la *provocatio* devant les comices ou le *concilium plebis*, ou si l'on préfère, la justice criminelle rendue en dernier ressort par le peuple ou la plèbe sur les réquisitions de certains magistrats compétents'.

power on appeal'.[1] How easily the preliminary stage may drop out of remembrance may be seen in our two accounts of the trial of Horatius. Whereas in Livy it is the archetypal case of *provocatio*, Dionysius[2] says not a word of *duumviri* or of appeal, and merely states that the king thought it best to leave the inquiry to the People, and that this was the first case in which the Roman People exercised a judicial power of life and death. In the same way if we ask what happens immediately before the tribune demands from the praetor 'a day of the *comitia centuriata*'?[3] In Livy[4] we find *perduellionem judicare*, in Gellius[5] *perduellionis ei diem dicere*. Evidently the first is the legal form, the second (as in the case of *accusare*) the practical result.

Before leaving the subject of *provocatio* it will be well to deal with a doubtful question, whether appeal and its corollary right to a trial before the People was accorded to women. Mommsen[6] has no hesitation in answering this question in the negative. He thinks that a woman and an alien were in the same position in this matter and that either could be put to death or otherwise punished by the simple *fiat* of the magistrate. The chief point in favour of this *thesis* appears to be that Aulus Gellius[7] tells us that a woman could not be adopted by a *lex curiata* because women have not the *communio comitiorum*, and it is argued

[1] Cicero, *de Legibus*, III. 12. 27 'Deinceps igitur omnibus magistratibus auspicia et judicia dantur, judicia ut esset populi potestas ad quam provocaretur, auspicia, ut multos inutiles comitiatus probabiles impedirent morae.'

[2] Dionysius Halicarnasensis, III. 22.

[3] See below, p. 157, note 3.

[4] Livy, XXVI. 3. 9, and XLIII. 16. 11 (where the result 'Comitiis perduellionis dicta dies' follows in the next verse).

[5] Aulus Gellius, *Noct. Att.* VI. 9. 9, quoting Valerius Antias.'

[6] *Strafrecht*, p. 143.

[7] Aulus Gellius, *Noct. Att.* V. 19. 10.

by analogy that the same defect would disable all women from *provocatio*. As a matter of fact the analogy will not hold; for we find that another class of persons—the *cives sine suffragio* who have likewise no *communio comitiorum*, are nevertheless admitted to *provocatio*. We have seen that in 271 B.C. in the case of Campanian soldiers who had deserted, objection was brought to their execution in the city without trial before the People. The objection was withdrawn on that occasion,[1] but later on after the fall of Capua in the year 210 B.C. the senate was obliged to get special leave of the People before dealing with the inhabitants, because they were *cives sine suffragio*.[2] Again we find that Fulvius Flaccus[3] in 125 B.C. proposing the grant of citizenship to the Italians provided that those who did not care to accept it should nevertheless have the right of *provocatio* accorded them, and we find a similar clause in the *lex Acilia*[4] in favour of the ally who has conducted a prosecution to a successful issue. These instances show clearly that the right to vote cannot have been a condition precedent of the right to appeal.

Whether or not the *provocatio* was a matter of right for women, it is manifest that it was generally allowed them, and that as a matter of fact the magistrate did not habitually visit them with severe punishment on his sole authority.[5] We have positive evidence for several trials of women before

[1] Probably on the ground that the offence was a military one. See above, p. 111.

[2] Livy, XXVI. 33. 10 'Per senatum agi de Campanis, qui cives Romani sunt, injussu populi non video posse.' See below, p. 239, note 3.

[3] Valerius Maximus, IX. 5. 1. Cf. Appian, *Bellum Civile*, I. 21.

[4] It is not quite certain that this last instance is a case in point. The question is discussed in the Appendix to this chapter.

[5] Unless indeed he was instructed by the senate or People to hold a special *quaestio*, which was equally applicable to both sexes; see below, p. 233 and p. 239.

the *Comitia*. Claudia, the sister of the P. Claudius who lost the Battle of Drepana in the first Punic War, was accused for having exclaimed, when jostled in the Forum, that she wished that her brother were alive again and in command of a Roman fleet so as to reduce the surplus population. Suetonius says[1] this was a trial before the People for *majestas*, which one would naturally suppose to be his synonym for *perduellio*, but Aulus Gellius[2] says that Claudia was heavily fined by two aediles whose names he gives. As he tells us that Capito included this case in his work *de judiciis publicis* we may conclude that this version of the story likewise recognized a vote of the People on the fine imposed, and the same may be gathered from yet a third version[3] according to which Claudia was accused of some other crime of which she was innocent, and was condemned owing to the popular odium which she had excited by her *improbum votum*.

In the punishments arising out of the aedilician jurisdiction in case of offences against morals we find both in the year 295 B.C.[4] and in the year 212 B.C.[5] that the women are arraigned *apud populum*. Even in case of personal assault by a prostitute the aedile Mancinus 'Maniliae meretrici diem ad populum dixit'.[6] Manilia pleaded justification and induced the tribunes to quash the proceedings; but in this case too there is no indication that the aedile had any discretionary right to punish without the consent of the People. In the absence of any clear case to the contrary,

[1] Suetonius, *Tiberius*, 2.

[2] Aulus Gellius, *Noct. Att.* X. 6. 3.

[3] Valerius Maximus, VIII. 1. *Damn.* 4.

[4] Livy, X. 31. 9.

[5] Livy, XXV. 2. 9. When condemned, they escape punishment by exile, just like the men. See below, Vol. II, p. 62.

[6] Aulus Gellius, *Noct. Att.* IV. 14. 3.

we may, I think, conclude that a woman enjoyed the protection of *provocatio* from the arbitrary act of the magistrate.

The compulsion laid on the magistrate to yield to *provocatio* is universally attributed to the *lex Valeria* of the first year of the Republic, and is thus brought into the closest connexion with the abolition of the kingship.[1] The earlier laws on *provocatio* are said by Livy to have ordained no punishment for transgressors but only the censure *improbe factum videri*. Livy[2] is not unnaturally puzzled at the extreme feebleness of the sanction, but he believes that the mere expression of moral blame was a 'vinculum satis validum legis' in those golden days. Mommsen[3] has a less poetic and more probable explanation of the traditional words; he thinks that they mean that if a magistrate ignores the appeal and carries out the death sentence in spite of it, his office will no longer cover his proceedings, and that the action will be regarded as that of a private man and so punished as murder. I think that there can be little doubt that Mommsen is right.

With *provocatio* in 509 B. C. comes a change in the insignia of the City magistrate by the removal of the executioner's

[1] Cicero indeed (*de Republica*, II. 31. 54) quotes the pontifical and augural books as testifying to *provocatio* even from the kings. Mommsen (*Juristische Schriften*, Vol. III, p. 537) is doubtless correct in his explanation that the king was within his rights in refusing to accept the challenge to the judgement of the people, but that he might hesitate to lay himself open to the imputation that he dared not trust his case to an impartial arbiter. He points out that the Dictator Papirius is challenged (Livy, VIII. 33. 8) in the same way not to insist on his legal rights. Mommsen very happily adduces the analogy of the legal duel of the *sponsio*. There was no compulsion on the person who was 'sponsione lacessitus' to accept his adversary's offer—as when Verres dared not allow a *nummus sestertius* to be staked on the issue, 'ni Apronius dictitaret te sibi in decumis esse socium' (Cicero, *in Verrem*, III. 57. 132), but he was sorely damaged in reputation by not taking up the glove.

[2] Livy, X. 9. 6.

[3] *Strafrecht*, p. 167.

axe from the fasces of his lictors. This innovation does not imply the abolition of the punishment of death, but is merely meant to indicate that inside the walls the magistrate can now no longer use the death-dealing implement on his sole authority. With the consent of the People, not only beheading but yet more cruel punishments[1] are still legally possible. In practice these public executions were doubtless confined to very heinous cases,[2] and private executions by strangling in the prison supplemented them at the discretion of the magistrate for ordinary malefactors.[3] It may well be that the magistrate soon found it necessary to pledge himself beforehand not to inflict the more cruel punishment, lest he should give the accused the opportunity of *miserabiliores epilogos*,[4] which might induce the people to acquit him altogether. The same considerations, or the growing mildness with which the crimes of citizens were viewed, led in some cases, as in that of the man accused of bewitching his neighbour's crops,[5] to the substitution of an aedilician fine for the capital accusation.

[1] See above, p. 2. We may perhaps add the scourging to death characterized under the principate as *more majorum*; see Suetonius, *Nero*, 49.

[2] Including, perhaps (see above, p. 41), the low estate of the criminal under the same head. Compare Tacitus, *Hist.* I. 46 'In Icelum ut in libertum palam animadversum'.

[3] Compare the *sententia* of Q. Fabius about Pleminius: 'vinctum Romam deportari placere et ex vinculis causam dicere, ac, si vera forent quae Locrenses quererentur, in carcere necari bonaque ejus publicari.' Livy, XXIX. 19. 10.

[4] See Cicero, *pro Plancio*, 34. 83. Dio Cassius (XXXVI. 38. 4) notices that in bribery cases the lighter the penalty the easier it was to get convictions.

[5] Pliny, *Hist. Nat.* XVIII. 6. 41.

APPENDIX TO CHAPTER VIII

PROVOCATIO IN LEX ACILIA

On p. 142 I have adduced in support of my argument, as to the possibility of the right to appeal being possessed by those who had not the right to vote, the clause in the *lex Acilia* which allowed to the ally, who did not choose to take up the Roman citizenship, as the reward of a successful prosecution, the option of enjoying, while still a member of his old state, various privileges including the right of *provocatio*. Mommsen[1] interprets the fragmentary passage verse 78 seq. of this law in another way, holding that though the Roman citizenship was offered to every such successful accuser,[2] yet, in case it were declined, the compensating *provocatio* was open only to a Latin. The Latins,[3] who had the right to vote in one tribe chosen by lot, may be held to have a *communio comitiorum*; if the privilege of *provocatio* could be proved to be attainable only by them this would be an argument for the necessary connexion of the two rights, a contention very difficult to reconcile with the fact that 'cives sine suffragio' possessed the one without the other.[4] Are we compelled to sit down helpless in face of this contradiction? I think that we need not do so, and that Mommsen's interpretation of the *lex Acilia*, if closely examined, will be found to be by no means forced on our acceptance.

The *lex Acilia* seems to have been superseded about the

[1] Mommsen, *Juristische Schriften*, Vol. I, p. 63.

[2] Mommsen (ib., p. 61) says that by the subsequent *lex Servilia* of Glaucia all but Latin prosecutors were henceforth debarred from the citizenship. I much doubt whether the passage in Cicero *pro Balbo*, ch. 23 and 24, really proves this.

[3] Or perhaps only those of the older Latin States. See below, p. 150.

[4] See above, p. 142.

year 111 B.C., and the face of the tablet on which it is written was discarded and turned to the wall, so as to enable the other face to be used for the inscription of a *lex Agraria* of that date. The hints given by the connexion of the sense on the back as well as on the front of the bronze have enabled modern scholars by the exercise of unwearied patience and sagacity to determine the relative position both of the extant broken pieces and of the sixteenth-century copies of some which have been since lost. The bronze itself when perfect was about six feet and a half across, and each line of it must have contained about four hundred letters. These long lines form the numbered 'verses' into which the law is divided by the editors for convenience of notation, and I think that we may accept Mommsen's final allocation of each fragment to its proper verse,[1] and likewise, though with more hesitation and subject to the uncertainty of which Mommsen warns us,[2] adopt the number of letters which he indicates for the filling up of each gap in the bronze.

All commentators are agreed that verses 78, 79 are concerned with the alternative rewards guaranteed to the successful prosecutor who has declined the proffered Roman franchise. To understand them we must notice that by some blunder of the engraver verses 72 to 79 are repeated in verses 79 to 86, so that the text can be supplied from the fragments either of the one set of letters or of the other, and that the spaces available for supplements in this part of the Law are consequently much smaller than they would appear to be if we only counted the number of verses and

[1] For a full account of the reconstruction by himself and others see Mommsen, *Juristische Schriften*, Vol. I, pp. 11–15. This is a reprint with few alterations of his text and notes for the *lex Repetundarum* in *Corp. Inscr. Lat.*, Vol. I, pp. 49–71.

[2] Mommsen, ib., p. 16. He says of his own numbers: 'ad quos numeros qui deinceps aut plane non attendet aut iisdem nimium tribuet, non me sed suam ipsius incuriosam vel neglegentiam vel credulitatem accusabit.'

regarded the wide blanks between the fragments in verses 85 and 86.

Verse 86 then really follows close on verse 79, and with verse 87 we finish with the rewards of the allies and pass on to those promised for prosecutors who are Roman citizens. There is thus no room for a separate clause to deal with non-Latin allies. If therefore the paragraph 'de provocatione vocationeque danda' (verses 78, 79, repeated as 85, 86) deals (as Mommsen supposes) only with Latins, then the non-Latin ally who declines the citizenship is passed over in silence, and must miss not only *provocatio* but all the other privileges enumerated in this paragraph. Such an omission is very improbable. It would confine all compensatory alternatives precisely to those who were least likely to need them. The Latin who dwelt among neighbours, having full *connubium* and *commercium* with Romans, and in some cases already themselves Roman citizens by virtue of magistracy, would not have to fear any severance of ties with his fellow-townsmen as the consequence of 'changing his state', and so would be pretty sure gladly to accept the Roman franchise. It might well be otherwise with the inhabitant of a more remote Italian town to whom the choice was open under Fulvius Flaccus' proposal,[1] and still more so with the Greek or the African ally: by becoming the citizen of a new state he would probably cut himself off from connexions of marriage, business and local government in his native place, and so he might very likely prefer to have the compensatory privileges secured to him without the necessity of taking up the actual citizenship of Rome. The choice cannot have been given him unless we suppose (contrary to Mommsen) that the single clause on the subject included other than Latin prosecutors.

I will first give the surviving words on which we have to form our judgement with supplements in italics just

[1] See above, p. 142.

sufficient to indicate the sense, and will place opposite to each fragment the number of the verse to which it belongs. The passage runs as follows:—

De provocatione *vocation*eque[1] danda. Verse 78.

Sei quis eorum, quei . . . [gap of 83 letters] *dicta*tor praetor aedilisve non fuerint ad praetorem quoius ex hace lege quaestio erit . . . *condemnatus* erit, tum qui *eius nomen* detulerit, quoius eorum opera ma*xime*

. . . eius militiae munerisque poplici in *sua quoiusque* Verse 79.
ceivitate

Verses 79–86 (init.)

[Repetition of verses 72–79.]

i petetur, de ea re eius *optio esto* utrum velit vel in sua Verse 86.
civitate[2]

habere liceto. Verse 87.

Sei quis ceivis Romanus ex hace lege alterei *nomen detulerit*

Quoi ex hace lege provocatio erit esseve oportebit. Verse 88.

Now it is obvious that the words 'dictator praetor aedilisve non fuerint' can relate only to Latin communities or to some of them, but it by no means follows that the whole clause is confined to these. Mommsen[3] allows us about 83 letters for the gap at the beginning of verse 78, and surely this gives space for the insertion of other beneficiaries besides those towards whom the exception about the magistrates is directed. Without attempting to determine accurately the words which are to fill the gap, I would suggest a couple of possible readings:—

(1) Sei quis eorum quei [*in amicitia dicione potestate*

[1] The strange spelling *vocatio* for *vacatio* (exemption from military service) is found in this law, in the *lex Julia municipalis*, and in a few other places. See Mommsen, *Juristische Schriften*, Vol. I, pp. 61, 62.

[2] By a comparison with the *Senatus Consultum de Asclepiade* (Bruns, *Fontes*[7], p. 178) Mommsen (ib., Vol. I, p. 63) is able safely to interpret verse 86 as entitling the beneficiary to have his lawsuits tried in Roman or in native courts, as he may prefer.

[3] Mommsen, ib., Vol. I, p. 42.

P. R. sient, sociumve nominisve Latini exve XII coloniis quei eorum dicta]tor praetor, aedilisve non fuerint, &c.

(2) Sei quis eorum quei [*peregrinae civitatis sient nominisve Latini exve duodecim coloniis sei quei in sua civitate dicta*]-tor praetor, &c.

Only if we suppose something of this sort to have filled up the gap in the bronze shall we escape from the baffling conclusion that the Roman citizenship was made optional to the Latin but almost thrust upon the non-Latin ally by the omission of any inducements, great or small, to make it worth his while to decline it. On the other hand if my conjecture be accepted, the inference that it was impossible to grant *provocatio* without citizenship to the non-Latin ally disappears, and the argument about the necessary connexion of *provocatio* with *communio comitiorum* disappears with it; I believe this to be the true solution.

Two additional points may be noticed. I have introduced the 'duodecim coloniae' into my conjectural supplement, and I believe that they must have been mentioned in the text. These twelve colonies are undoubtedly the last twelve Latin colonies founded in Italy, beginning with Ariminum in 268 B.C.[1] Though I differ from Mommsen in many details of his discussion, I think that his main contention is to be accepted, that in these colonies and in these alone the magistrates received the Roman citizenship, that this privilege was in substitution for the ampler right of becoming Romans by migration,[2] and of voting meanwhile in one tribe,[3] enjoyed by the earlier Latins, and that the two privileges were never possessed together by the same

[1] See Cicero, *pro Caecina*, 35. 102. [2] Livy, XLI. 8.

[3] Livy, XXV. 3. 16 'sitellaque lata est ut sortirentur ubi Latini suffragium ferrent'. I cannot agree with Mommsen (*Staatsrecht*, III. p. 397, n. 1) that this practice lasted on after the Social War into Cicero's time. The only evidence is the mention of a *sitella* in certain passages which Mommsen quotes, but the ballot-box may have been wanted for quite other purposes, as, for instance, to determine the order in which the tribes were to vote.

town.[1] The right of the magistrates to the citizenship was the main feature of the Latinitas granted to the Transpadanes in 89 B.C.,[2] and to the Latin states of the principate.[3] Infringing, as it does, the principle that no man can be a member of two states at the same time,[4] it bears all the marks of the invention of an age when Rome's predominance was established, and cannot have been part of the reciprocal courtesy of primitive Latium. This accounts for there being no reference to it in the harangue of the consuls to the magistrates of the recalcitrant colonies[5] in 209 B.C.

Next it may be asked what is the sense, in a clause dealing with the rewards of those who decline the Roman citizenship, of excluding persons who, being Roman citizens already, were sufficiently debarred from either accepting or declining it? We can only admit that the exception is wholly superfluous, and that Gracchus' draftsman was by no means an adept in his business. Rather than pass over these persons in silence he clumsily forbids them a choice which they could not in any case have exercised. With a like superfluity in verse 22 he forbids the prosecutor to name any senator in selecting a hundred jurors out of a list from which senators have been already carefully excluded.[6] In much the same way in verse 71 he is so anxious to show that he knows 'tacking' to be improper, that he foists in an exception (extra quam sei quid in saturam feretur), which could only have the effect of making such tacking easier by prohibiting the respectable citizens on his jury from going to vote against the abuse.

[1] 'Wo dieses galt, ist jenes weiter-greifende (i.e. migration) ausgeschlossen', Mommsen, *Staatsrecht*, III. p. 638.

[2] Τόδε γὰρ ἰσχύει τὸ Λάτιον, Appian, *Bellum Civile*, II. 26. See also Asconius *in Pisonianam*, 3.

[3] Law of Salpensa, ch. 21 (Bruns, *Fontes*', p. 143).

[4] I should disagree with Mommsen's conjecture (*Staatsrecht*, III. p. 641) that in Republican times the Latin magistrate gained the Roman citizenship only by renouncing his old State.

[5] Livy, XXVII. 9. All the colonies there addressed were founded before 268 B.C. [6] See below, Vol. II, p. 71, note 2.

CHAPTER IX

CAPITAL TRIALS BEFORE THE PEOPLE

THE first important consequence of *provocatio* on procedure is that the superior magistrate withdraws from administering ordinary criminal justice. When King Tullus Hostilius resolves that an appeal shall be granted to Horatius, he omits himself to judge and condemn, but appoints special officers for the purpose. So under the Republic the chief magistrate thinks it beneath his dignity to utter a sentence which may possibly be reversed, and designates for this function less eminent persons, quaestors or aediles or duumvirs, who 'cannot plead their estimation', and the same task is undertaken by the tribunes, who for all their power are modest folk when compared with the splendour of the great magistrates who represent the kingly office. It is not necessary to suppose that criminal proceedings leading on to *provocatio* were ever formally forbidden to consuls or praetors; it is sufficient that in practice they did not exercise them. When once the practice had obtained, it would, no doubt, be followed as implicitly as if it had been a law.[1]

Judicial functions seem to have attached to the quaestors from the early days of the Republic.[2] These were standing officials, but the *duumviri perduellionis* were appointed only

[1] I should agree in this matter with Schulthess (*pro Rabirio*, p. 64), 'Die Kriminaljurisdiction behielt nach Einführung der Konsularverfassung der Consul bloss in Prinzip bei.'

[2] I agree with Mommsen that the 'quaestores parricidii' are not a separate board but identical with the urban quaestors of historical times.

on occasional emergencies. Most scholars, including Mommsen,[1] believe that a special law was required to bring them into existence on each occasion (a supposition difficult to reconcile with Cicero's expression 'hic popularis a duumviris injussu vestro', &c.),[2] and Mommsen[3] further maintains that after the expulsion of the kings they were elected by the people. He does not quote any authority for the last statement, and I know of none save that of Dio Cassius,[4] who says that the *duumvirs* in Rabirius' case were appointed by the praetor *οὐ κατὰ τὰ πάτρια*. I think, however, that Dio is a better authority for what certainly took place on this occasion than for an antiquarian objection to the practice recorded. It is very improbable that Caesar and Labienus, when furbishing up the rusty machinery of an antiquated procedure, should have introduced an innovation, especially one so contrary to democratic principles. Dio's statement may very likely be a mere inference[5] on his part from the rhetorical blame conveyed by Cicero in the words quoted above, *injussu vestro*, which he may have taken to refer to the method of their selection and not (as I should prefer to interpret it) of their want of any but an antiquated and obsolete commission to act. In any case, the appointment of *duumviri perduellionis* fell into desuetude, and their functions were adopted by the tribunes of the *plebs*.

[1] *Strafrecht*, p. 527.

[2] Cicero, *pro Rabirio*, 4. 12. See above, p. 139, and below, p. 196.

[3] *Strafrecht*, pp. 154 and 587.

[4] Dio Cassius, XXXVII. 27. 2.

[5] See above, p. 139, note 1. Strange to say, Zumpt (*Criminalrecht*, I. i. p. 93) does actually argue from the words of Cicero in the very way in which I conjecture that Dio may have argued. 'Auch Cicero wirft diesen Zwiemännern ihre Ernennung durch den Praetor vor, und doch wäre dasselbe gesetzlich gewesen, wenn in Horatius' Processe der König sie selbst erwählt hätte.'

I will now attempt to detail the course of proceeding in the comitial trials, illustrating from the more important cases actually reported to us in the course of the history. The most interesting are the trials of Horatius for *perduellio*,[1] of the fraudulent contractor Postumius and his associates[2] (212 B.C.), of Cn. Fulvius for misconduct in the field[3] (211 B.C.), of Claudius and Gracchus the Censors of 169 B.C. for contempt of a tribune,[4] of T. Quinctius Rocus recorded by Varro,[5] and finally of C. Rabirius in Cicero's consulship for having killed the tribune Saturninus.

The best summary of the rules of procedure is to be found in Cicero's speech *de Domo*[6]: *ne improdicta*[7] *die quis accusetur, ut ter ante magistratus accuset intermissa die quam multam irroget aut judicet, quarta sit accusatio trinum nundinum prodicta die, qua die judicium sit futurum.* The first step is for the magistrate to summon the suspected person to appear before him on a specified day (*diei dictio*). On that day begins the *anquisitio*—etymologically a strengthened form of *quaestio*. This is conducted publicly, the citizens being summoned to a *concio* to listen 'evidently', as Mommsen says,[8] 'with regard to the final decision by them which is anticipated.' The magistrate must not conclude the hearing in a single day, but is bound to adjourn it twice, and that not

[1] Livy, I. 26.
[2] Livy, XXV. 4.
[3] Livy, XXVI. 3.
[4] Livy, XLIII. 16.
[5] Varro, *de Lingua Latina*, VI. 90–92; Bruns, *Fontes*[7], App. p. 59.
[6] Cicero, *de Domo*, 17. 45.
[7] Mommsen (Review of Geib in *Juristische Schriften*, Vol. III, pp. 478, 479) maintains that *prodicere* cannot refer to the *diei dictio*, but must necessarily mean 'to adjourn'. In that case we must suppose that the principle laid down concisely in *ne improdicta die* is repeated and expanded in *ter ante*, &c. I am rather inclined to think that 'ne improdicta die' merely means 'without notice given of the day beforehand'.
[8] *Strafrecht*, p. 164. If Mommsen be right (see last note), Cicero takes this stage for granted.

to the day immediately following. At these sittings any Roman may, with the permission of the magistrate, make himself heard, and the magistrate cannot decently refuse leave, though he may limit the speeches; thus in Rabirius' trial in 63 B.C., Hortensius and Cicero were permitted to play the part of advocates—probably on different days;[1] but Cicero was allowed only half an hour in which to speak. At the third sitting the magistrate pronounces, and it is not till then that he is bound finally to decide what his sentence is to be.[2] If he acquits there is an end to the matter; if he pronounces for death the appeal will be to the centuries, if for a fine to one of the two tribal assemblies (*populus* for quaestors, *plebs* for tribunes). In either case the usual twenty-four days' notice must be given to the assembly for this 'fourth accusation' at which the citizens appear for the first time, not as mere listeners, but in their sovereign capacity to decide the issue.

The same passage of Cicero's speech *de Domo* brings out another curious point, namely that if on account of the auspices or for any other reason the assembly separates without coming to a decision, the meeting cannot be adjourned to another day, and so 'tota causa judiciumque sublatum est'.[3] P. Claudius Pulcher, who lost the battle of Drepana in 249 B.C., escaped by a sudden rainstorm at his trial; the tribunes would not allow the capital trial to be

[1] I should draw this conclusion from the use of the word *antea*, Cicero, *pro Rabirio*, 6. 18.
[2] Mommsen (*Strafrecht*, p. 165) quotes several instances. The best are the trials of Cn. Fulvius (Livy, XXVI. 3. 7), when the tribune 'cum bis pecunia anquisisset, tertio capitis se anquirere diceret', and of Menenius (Livy, II. 52. 5), 'quum capitis anquisissent, duo millia aeris damnato multam dixerunt.'
[3] See also Schol. Bob., *In Clodium et Curionem*, Frag. XXV (Hildebrandt): 'ne iidem homines in eodem magistratu perduellionis bis eundem accusarent.'

renewed, but Claudius was heavily fined. Mommsen is probably right in his comment[1]: 'This can have been nothing but custom supported by tribunician intercession, for example no notice is taken of it in the trial of M. Manlius.'[2]

In most cases we are left to pick out pieces of information on points of law and procedure, which are to be found accidentally embedded in the narrative. There are, however, two exceptions to this rule, that of the trial of Horatius, where the legal formula is quoted at length by Livy,[3] and that of the capital trial recorded by Varro in his book *de Lingua Latina*.[4] Passages are there quoted from a certain 'handbook of instructions', 'Commentarium vetus anquisitionis M' Sergii M' f. quaestoris qui capitis accusavit Rocum.' The fragments tell us nothing of the preliminary stages of the accusation, nor of the actual voting and its consequences, but they preserve an invaluable picture of the assembly of the comitia on the day of trial. The rest of this chapter will be mainly concerned with points arising out of this *Commentarium* of Manius Sergius, which I will endeavour to supplement by a comparison of the other authorities. I will first quote the most important passages which are to serve as the text for discussion.

'Auspicio operam des et in templo auspices. Dum aut ad praetorem aut ad consulem mittas auspicium petitum, comitiatum populum Romanum praeco vocet ad te, et eum de muris vocet praeco: id imperare opportet. Cornicinem ad privati januam et in arcem mittas, ubi canat. Collegam roges ut comitia edicat de rostris, et argentarii tabernas occludant. Patres censeant exquaeras, et adesse jubeas; magistratus censeant exquaeras, consules praetores tribunos-

[1] *Strafrecht*, p. 170, note 5.
[2] Livy, VI. 20. 11.
[3] See above, p. 129, note 4.
[4] Varro, *de Lingua Latina*, VI. 90 seq. Bruns, *Fontes*[7], App. p. 59.

que plebis collegasque tuos in templo adesse jubeas omnes; †ac cum mittas †contionem advoces.'[1]

The first matter is the person of the judge or prosecutor. The Laws of the Twelve Tables provide that the question of the life or death of a citizen can be dealt with only by the 'maximus comitiatus', the *comitia centuriata*.[2] But this assembly can be convoked only by one invested with the *imperium*, and the *imperium* is not possessed by any of the officers (tribunes, aediles, quaestors or duumviri perduellionis) who are known to have initiated criminal proceedings before the People. Manius Sergius is therefore instructed by the expert adviser who wrote these notes for his guidance—'to send and ask for auspices from the consul or the praetor'. In the same way, when the tribune applies to the praetor urbanus for 'a day of the *comitia centuriata*',[3] it is probably to be understood that the praetor lends him auspices to enable him to summon the assembly. In the case of the quaestor it is pretty clear from the account in Varro, that he, though devoid of imperium, will himself preside in the *comitia* when assembled by virtue of the auspices, which he takes in this delegated capacity from his superior; and the same is probably true of the tribune and the other magistrates.

Girard[4] assumes a difference between the position of the quaestor and that of the tribune. To the latter the auspices were granted on each separate occasion by a separate act of the praetor, whereas to the quaestor 'they are delegated

[1] Bruns, *Fontes*[7], App. p. 59.
[2] See Cicero, *de Legibus*, III. 19. 44.
[3] The application by the tribune to the praetor for this 'day of the comitia centuriata' is frequently mentioned in the story, e.g. in Fulvius' trial, Livy, XXVI. 3. 9, in that of the censors, Livy, XLIII. 16. 11, and in one recorded in Aulus Gellius, *Noct. Att.* VI. 9. 9. See also below, p. 178.
[4] Girard, *Org. Jud.*, p. 153, and Mommsen, *Strafrecht*, p. 168.

beforehand as a standing commission for all their criminal proceedings'. Mommsen somewhat vaguely, and Girard with more detail and precision, refer to the text of Varro in support of this theory: 'it directs the quaestor', says Girard,[1] 'to take the auspices and notify the results to the consuls and praetors.' How this interpretation can come out of the text I do not know. Varro's words are: 'Auspicio operam des et in templo auspices. Dum aut ad praetorem aut ad consulem mittas auspicium petitum, comitiatum praeco populum vocet ad te, et eum de muris vocet praeco'. I can only conclude that Girard takes *petitum* to be a passive participle, agreeing with *auspicium*, which in turn is to be supposed to be an accusative governed by *mittas*,[2] whereas I should take *petitum* as an active supine governing *auspicium*. The narrative will then be quite contrary to Girard's theory. The quaestor is set down to attend to the auspices, but as he cannot take them himself he has to send to his superior to beg them[3] (*petitum*). While they are being fetched (*dum*) he is to occupy the interval in collecting the people by means of the crier. I should hold then, that in case of all the magistrates without *imperium* the auspices were delegated to them for each occasion.

This delegation of auspices was never held to constitute such a delegation of power as should enable an appeal to lie—according to the usual rule—from the delegate to the delegator, in this case from tribune or quaestor to the consul or praetor. The exception may be justified by the consideration that as the accused is accounted to have already appealed to the sovereign power, the People, it would

[1] *Org. Jud.*, p. 122, note 1.

[2] 'Mittas auspicium petitum' seems a strange expression as an equivalent for 'certiores facias de auspicio impetrato'.

[3] Or, possibly, it may be a very condensed phrase for 'to beg leave to be allowed to observe them as the consul's representative.'

have been improper to interpose any lesser authority. Festus' words to St. Paul, 'Hast thou appealed unto Caesar? unto Caesar shalt thou go,' are still more applicable to the sovereign Roman People.

Another of the instructions reads *patres censeant exquaeras, et adesse jubeas*. Mommsen's interpretation[1] is that 'this must be referred to the custom of getting together 'counsellors before taking weighty decisions, since it was open 'to the magistrate to let the case drop after the appeal had 'been entered. The magistrate then in this case has to 'betake himself to the senate as the *consilium publicum*. 'The consulting party was doubtless not legally bound by 'the advice thus given him.'

This interpretation is adopted with some hesitation by Girard.[2] If it be correct, it will supply a precedent by way of analogy for Cicero's consultation of the senate about the Catilinarian conspirators. It is strange, however, that we hear of no such consultation in any of the historical cases of a trial before the *comitia*; one would have thought that such an expression of opinion would have had great weight as a *praejudicium*, and that its effect in each case would certainly have been noticed in the story. It is a further difficulty that the *jus senatus habendi* is never known to have been delegated, and certainly did not belong to the quaestor in his own right. The senate was not 'of counsel' to him, but only to the superior magistrates. Still more difficult is it to fit in with any formal consultation the summons to the magistrates which is recorded in the next sentence of Varro —'magistratus censeant exquaeras, consules praetores tribunosque plebis collegasque tuos in templo adesse jubeas omnes.' Now even the lawful president of the senate never puts the question to his fellows the actual magistrates. During their

[1] *Strafrecht*, p. 169.

[2] *Org. Jud.*, p. 121.

year of office their senatorial *munus*, the obligation *suo loco sententiam dicere*, is in suspense.[1] Probably then the instruction merely means that the quaestor was politely to express[2] his anxiety for the presence of the leading men of the state, whether magistrates or senators, at the trial, and his hopes for the benefit of their advice during the debate.

The machinery of appeal brings about one most important historical result—the practical abolition of the punishment of death. We read in the early story how Kaeso Quinctius and Coriolanus and eight of the decemvirs were allowed to escape death by going into exile. The practice rapidly gained ground, so that by the time of Polybius it was the settled custom that in a capital trial the accused was free, until the last vote had been cast,[3] to 'depart openly, sentencing himself to voluntary exile; and the banished man will be safe if he retires to Tibur, Praeneste, or Neapolis, or any other state with which Rome has a sworn treaty.'[4]

It is obvious that such a departure could take place only when the criminal was at the moment in physical liberty, whether or not bail had been given for his appearance; and in the case of Kaeso Quinctius we find that his previous arrest is urged[5] on the ground that only so will the people

[1] For the difference in this respect between the custom of the Republic and that of the Principate, see Tacitus, *Annales*, III. 17. 8.

[2] As did the censors before their *sortitio*: 'Ubi praetores tribunique plebi quique in consilium vocati sunt venerunt, censores inter se sortiuntor, uter lustrum faciat,' Varro, *de Lingua Latina*, VI. 87; Bruns, *Fontes*[7], App. p. 58. In any case I cannot think that Mommsen (*Strafrecht*, p. 169, note 1) is right in explaining by reference to such consultation the difficult passage of Polybius (VI. 16. 2), with which I shall deal later (below, p. 239).

[3] This limitation cannot have been generally enforced in practice. Any tribune could help the man to escape. See below, Vol. II, p. 62.

[4] Polybius, VI. 14. 7.

[5] Livy, III. 13. 5 'Ut qui hominem necaverit de eo supplicii sumendi copia populo Romano fiat.' See also above, p. 145, note 3.

have the opportunity of exacting the penalty from him. On one occasion, that of the accomplices of the fraudulent contractor Postumius in the Second Punic War, the circumstance that the tribunes are disposed to arrest the accused beforehand leads many to go straight away into exile without standing their trial[1]; probably here likewise something worse than exile might have happened to them if they had been found guilty while under arrest; Polybius too seems to imply that death might possibly be in store for the accused who had waited too long and against whom the decision of the assembly had been actually given.

I shall have occasion further on to refer to some fanciful explanations of the disappearance of the death penalty at Rome.[2] The true solution is to be found, I am convinced, simply in the reason alleged for the arrest of Kaeso Quinctius, namely that, unless he were arrested, there was nothing to prevent the accused from running away; and that previous arrest became by the abuse of the tribunician *auxilium* so difficult, that the obstacle to departure was practically never interposed. With a people like the Romans, it is only a step from this practice to the doctrine that the criminal has a right to the evasion, and so the result of the *Leges Porciae* and other laws allowing *provocatio* or substituting trial by a jury for the more direct action of magistrate and people is, as Sallust says, 'condemnatis civibus non animam eripi sed exilium permitti.'[3]

So far as I know there are only two cases in the story of the Roman Republic in which the law is distinctly asserted to have run its full course—that is to say, in which it is said *totidem verbis* that the criminal was allowed to appeal, that the *comitia* decided against him, and that the punishment

[1] Livy, XXV. 4. 11.

[2] See below, Vol. II, p. 18 seq.

[3] Sallust, *Catilina*, 51. 22, also verse 40. See below, Vol. II, p. 61 seq.

of death was publicly inflicted. The two cases are those of Sp. Cassius and M. Manlius, both executed for treason. The two most guilty decemvirs, Appius Claudius and Sp. Oppius, were doubtless saved by suicide from a like fate.

Pleminius, the lieutenant of Scipio Africanus, who had been guilty of the grossest outrages on the inhabitants of the Italian Locri, was seized as he was retiring to Naples for exile, and thrown into the prison of Rome, which he certainly never quitted alive. Contradictory accounts[1] are given of his end, and it is impossible to make out whether he was really tried or executed. Suicide in prison is recorded[2] of a certain C. Cornelius, accused of rape; he probably anticipated by his death a trial before the centuries. The condemnation is mentioned[3] of three parricides, Hostius (*circ.* 200 B.C.), Q. Fabius (*circ.* 100 B.C.), and Malleolus, of the same date. Of the last named it is expressly said[4] that he perished in the sack, and Mommsen[5] is probably right in arguing from his fate that, though at that time ordinary murder was already the subject of a jury trial, which did not admit of previous arrest, or consequently of actual execution, cases of parricide must have been reserved for the *comitia* almost[6] down to the legislation of Sulla. These three cases may, I think, fairly be added to those of Cassius and Manlius, as instances of public execution following a vote of the people.

[1] Livy, XXIX. 22. 9; XXXIV. 44. 6.
[2] Valerius Maximus, VI. 1. 10.
[3] See Mommsen, *Strafrecht*, p. 614, note 1.
[4] Cicero, *ad Herennium*, I. 13. 23.
[5] *Strafrecht*, pp. 174 and 644. See above, p. 23.
[6] *Almost*, not *quite*; for Mommsen points out (*Strafrecht*, p. 644, note 1) that a reference to the *judices* in a case described by Cicero (*pro Roscio Amerino*, 23. 64) in 80 B.C. as 'non ita multis ante annis' shows that the reservation of all such cases cannot have lasted quite down to Sulla. Of course all this is matter of practice. It was still legally possible to bring *any* offender before the *comitia*, through the medium of previous magisterial condemnation. See above, p. 141, note 1.

In all the other cases of a trial before the centuries which are recorded in our annals the person found guilty escapes death by exile. The explanation is doubtless to be found in the activity of the tribunes, which caused the seizure of the person, the condition precedent for actual execution, to fall into desuetude.[1] It was in the power of any one of the tribunes to interpose his *auxilium* and let the accused man out of prison; and the constant presence of this power of release seems to have led to the habit of not attempting to arrest. In the *Commentarium vetus anquisitionis*[2] there is not a word about any such proceeding in a capital trial. The house of the accused is still his castle; the instructions are that M' Sergius is to send the trumpeter to 'blow his horn before the door of this wicked T. Quinctius Rocus, the same being a private person, and bid him to appear on the Campus Martius at daybreak'. No obstacle, therefore, is opposed to the retirement from Rome. It is probable, as Mommsen suggests,[3] that the tribunician *auxilium*, though freely granted to state offenders or men of rank, would often be refused to the common criminal, and that for such persons previous arrest, with the consequent possibility of death being ultimately inflicted, was not uncommon in the middle period of the Republic. By the time of Polybius it must have almost disappeared, for he speaks of the custom of allowing exile as universal. The clumsiness of the comitial machinery may have contributed to this; it no doubt saved a great deal of trouble if accused persons, as in the case of Postumius's[4] associates, were content to save their skins in exile; but still more effective was the growing feeling that every such evasion was an assertion of the rights of the private

[1] See *Strafrecht*, p. 327.
[2] Varro, *de Lingua Latina*, VI. 92. See above, p. 156.
[3] *Strafrecht*, p. 328.
[4] See above, p. 161.

burgess against the magistrate, whose power of punishment was thus curtailed, and the difference, so proclaimed, between the Roman, though a criminal, and the outlander flattered the pride of citizenship. It seems a strange privilege that every Roman, just once in his life, should be allowed to commit a crime deserving death, without death being inflicted; but a privilege it was esteemed.

Another difficult question remains to be considered. Was prolonged or perpetual imprisonment a recognized punishment at Rome during the Republican period?

We find[1] that there were certain persons 'capitalem fraudem ausi' in prison at the time of the battle of Cannae, and that these were released on the condition of enlisting in the army at that moment of supreme danger. How came they to be in prison? As a general rule the *carcer* in case of condemned persons is considered only as a place of execution. When Opimius, for instance, is accused of having put the associates of C. Gracchus to death the indictment is euphemistically described[2] 'quod indemnatos cives in carcerem conjecisset.' Mommsen[3] thinks that the criminals to whom Cannae brought release were partly untried prisoners, who had failed to find bail or to obtain the tribunician *auxilium*, partly persons already condemned to death by the *comitia* in whose case the magistrates had thought proper indefinitely to postpone execution, thus practically commuting the death sentence to one of perpetual imprisonment. In the same way he believes that Pleminius,[4] whose case has been mentioned above,[5] had been

[1] Livy, XXIII. 14. 3.
[2] Livy, *Epitome*, LXI.
[3] *Strafrecht*, p. 328.
[4] *Strafrecht*, p. 961, note 6, a passage difficult, however, to reconcile with *Staatsrecht*, III, p. 1069, note 3.
[5] See above, p. 162.

already tried before the centuries and condemned to death. There is no hint of such a thing in our authorities, and my own conclusion would be that none of these persons had actually stood their trial.[1] If the people had condemned them it is difficult to believe that it lay in the discretion of the magistrates to carry out the sentence or not as they pleased, whereas if the magistrate chose to prolong indefinitely the interval between arrest and trial, there was nothing to prevent him, so long as the prisoner refrained from invoking the help of the tribunes or the tribunes refused his application.

Still more emphatically should I disagree with Mommsen's attempt[2] to interpret Caesar's *sententia* on the Catilinarians as a sentence of death whose execution was to be indefinitely postponed. If this were true, the difference between Caesar's *sententia* and Cato's would have been merely one of convention and arrangement. As a matter of legal right, the import of the two (both aimed at the *caput* of a citizen) would have been precisely the same. I cannot believe that Caesar so completely justified Cicero. It would have been impossible for him with any show of consistency afterwards to maintain[3] that Cicero's action was illegal, if he had himself proposed a capital sentence. I believe, on the contrary, that Caesar 'kept o' the windy side of the law', because imprisonment down to that time had been known not as a punishment but only as a rough method of detention.[4]

[1] So of Pleminius, Zumpt, *Criminalrecht*, I. ii. p. 343.
[2] Compare *Staatsrecht*, III, p. 1069, and p. 1250, note 1, with p. 1243, note 4 ('erkennt Caesar das Recht des Senats an, räth aber ab von der capitalen Handhabung desselben'); also *Strafrecht*, p. 961, note 6. On p. 259, note 1, of the *Strafrecht* we find another explanation more akin to mine.
[3] Dio Cassius, XXXVIII. 17. 1 and 2. Plutarch, *Cicero*, 30. 4.
[4] Even under the principate, despite the legality of penal servitude in the mines, simple imprisonment is not recognized as a punishment—

It was therefore not forbidden in any of the laws relating to *provocatio*, and Caesar's sentence, though a final one and accompanied by confiscation of goods, only stretched out into life-long imprisonment proceedings properly applicable to persons awaiting their trial whose *caput* was formally intact. In the epoch of the great jurists, of course, all this was altered; and criminals were condemned to be *servi poenae* in the mines, or to loss of citizenship by *deportatio in insulam*, both of which were capital sentences, 'per has enim poenas eximitur caput de civitate'.[1] But all these regulations were innovations of the principate. In the year 63 B.C. Caesar's proposal might still have been carried out by senate and magistrates without transgressing the bounds of any positive law. Whether it would really have been carried out, is another question.[2] It seems strange for me to be arguing for Caesar against his great advocate and the great disparager of Cicero. Still I think that my explanation is the more probable; at any rate it exhibits Caesar's action as more logical and consistent.

In conclusion, let us revert to Zumpt's contention, mentioned at the beginning of the last chapter, that *provocatio* was allowed only occasionally where the evidence seemed doubtful, or where the criminal for some reason or other contrived to enlist the sympathies of the mob or of the tribunes. Zumpt lays great stress on the practical inconvenience which would result from the extension of so cumbrous a procedure as *provocatio* to all cases, and maintains that the Romans cannot possibly have put up with these inconveniences. The question—What was done with the

'hujusmodi poenae interdictae sunt: carcer enim ad continendos homines non ad puniendos haberi debet', Ulpian, *Digest*, XLVIII. 19. 8, § 9.

[1] Paulus, *Digest*, XLVIII. 1. 2.

[2] See my *Life of Cicero*, pp. 142 and 147.

'common malefactor'? is, it must be allowed, surrounded with difficulty.

What happened to the street ruffian who knocked down a peaceful citizen and took his purse? Zumpt thinks that the criminal whose guilt was evident or confessed was dealt with summarily, and never allowed the chance of *provocatio* or of a jury trial, or of any of the other contrivances for evading the death penalty. This is repeated on page after page by Zumpt,[1] whose final conclusion is that *provocatio* 'was very seldom allowed'. This is going much further than Mommsen, who holds[2] that liability to previous arrest, not denial of *provocatio*, befell the 'common criminal'. The whole superstructure of Zumpt seems to rest on no better foundation than a single case, by which it appears that in Augustus's time parricides were sewn in the sack only if they confessed,[3] and on a remark of Cicero[4] that the *quaestio peculatus* was a dreary business, *plena catenarum*. Mommsen[5] disposes of this last by referring it to the public slaves employed as clerks. Mommsen himself,[6] in the year 1887, when the third volume of the *Staatsrecht* was published, was inclined to think that under the constitution of Sulla

[1] Zumpt, *Criminalrecht*, II. i. 289. [2] See above, p. 163.

[3] Suetonius, *Augustus*, 33. That this was not the general rule about parricides is shown by the case of Malleolus (Cicero, *ad Herennium*, I. 13. 23) who certainly did not confess, and the passage of Suetonius may be otherwise explained. In the case which he records, the alternatives before Augustus were, if the parricide did not confess, to let him out for trial before a jury, like Roscius of Ameria; or if he did confess, to arrest him. In the latter case the fate of Malleolus would have been in store for him, with whatever modifications of procedure may have been introduced since Malleolus's time. Augustus of course would have been less dependent on *provocatio* than the Republican magistrate. Cf. also below, Vol. II, p. 28, note 2.

[4] Cicero, *pro Murena*, 20. 42.

[5] *Strafrecht*, p. 328, note 5.

[6] See *Staatsrecht*, III, p. 1242. There is a hint of the 'public enemy' in Niebuhr, *Rom. Hist.* (Eng. Trans.), Vol. III, p. 411.

the 'common offender', caught red-handed, was thrown into prison and strangled (just like Lentulus and his companions in the Catilinarian conspiracy) as a public enemy. In the *Strafrecht*[1] he hints at the same thing but only in a very hesitating manner.

Against all this must be set the broad statement of Polybius that in his time all condemned persons could escape death by exile. To bring about this result there must have existed not only the universal practice of *provocatio* but the almost universal prohibition by the tribunes of previous arrest.[2]

But can the tribunes have been so foolish as to let loose on society persons proved to be thieves and assassins? The answer, I think, is that there is no folly which men will not habitually commit, when once they surrender their actions to the control of a sentiment, and that the sentiment that it is the bounden duty of the tribune to stand up for the private man against the magistrate (even against his fellow-tribune) had laid very tight hold of the Roman mind. In the year 58 B.C. a certain Damio, a freedman of Clodius, guilty of all sorts of violence, was arrested by the praetor, but was let out again by the tribune L. Novius, who prefaced his intervention by the following remarks:[3] 'Although I have been wounded by this hanger-on of Clodius and driven from my official duties by armed men distributed in garrisons, and Cn. Pompeius has been besieged by them, yet when appeal is made to me I will not follow the example of him with whom I find fault, and I will quash this sentence—and so on with the usual form of *intercessio*.' The force of sentimentality can

[1] *Strafrecht*, p. 979.

[2] Polybius might, however, have easily failed to notice occasional exceptions, such as that of the parricide.

[3] Asconius, *in Milonianam*, 41. See the comments of A. C. Clark in his edition of Cicero, *pro Milone*, Introduction, p. xv.

no further go, and men who could applaud such absurdities deserved to have the criminal class continually flourishing in their midst. But the statements of our authorities seem to give us no alternative, and we must accept the proposition that at any rate from the time of Caius Gracchus on,[1] the Roman citizen, like the dog in English law, has 'a right to his first bite'.

[1] See below, p. 240.

CHAPTER X

JURISDICTION IN CASE OF PECUNIARY PENALTIES

THE power to fine was undoubtedly from the earliest time part of the prerogative of the magistrate. But the limitation of the power of life and death with the institution of the consulate in 509 B.C. was followed, whether immediately[1] or after some interval,[2] by a similar restriction on the power of fining. We hear of a *multa maxima* or *multa suprema*,[3] originally fixed, according to Plutarch, at two sheep and five oxen, afterwards extended to two sheep and thirty oxen, and finally commuted into money to the amount of 3020 asses.

Now there is no question that in historical times fines greatly exceeding this amount were inflicted by pontiffs, tribunes, and aediles, but always subject to the appeal to the people. The difficulty is to reconcile this practice with the theory of Mommsen and Girard that the limit fixed was originally an absolute one which no magistrate might under any conditions exceed. The reconciliation is effected in

[1] Plutarch, *Poplicola*, 11. 3, confirmed by Aulus Gellius, *Noct. Att.* XI. i. 2, who makes the limit of number prior to the money commutation which he attributes to the *lex Aternia Tarpeia* of 454 B.C.

[2] By the *lex Aternia Tarpeia* of 454 B.C.; so Cicero, *de Republica*, II. 35, 60: Cicero says that the commutation into money was introduced by Julius and Papirius, the consuls of 430 B.C., and Livy (IV. 30) confirms this. Festus, on the other hand (s.v. *peculatus*), ascribes the limit of two sheep and thirty oxen to a *lex Menenia Sestia* of 452 B.C. and the commutation to a subsequent *lex Tarpeia*.

[3] 'Maxima' (Festus, *ad voc.*), 'suprema' (*Lex Acilia*, verse 45).

a somewhat arbitrary manner, first by discarding all the earlier cases of tribunician fines as unhistorical,[1] and secondly by attributing the later ones to powers conferred by definite legislation, of which (it is needless to say) no record has been preserved by any ancient writer. 'The new conception,' says Girard,[2] 'which had been admitted of the *multa maxima*, which is now treated, no longer as the highest possible fine, but as the highest allowed without recourse to the assemblies, translated, as it was, into practice in the heavy fines pronounced and defended by the tribunes, by the aediles, and in certain cases by the chief pontiffs, counts among the gains of jurisdiction by the people.' The epoch of the change is further defined as that of the Licinian Rogations and the establishment of the curule aedileship (367 B.C.). 'The probability is,' Girard continues,[3] 'that this right was then accorded to the curule aediles only,' and[4] 'that the rule was afterwards applied to fines by the chief pontiffs and by the tribunes in consequence of an extension, legislative or customary, of the circumstances of which we have no information, and which may have been either simultaneous or subsequent'; or, as he puts it elsewhere[5]—'perhaps this right was at the time of the Licinian Rogations implicitly conferred on the tribune by a provision made directly in favour of the aediles.'

All this elaborate hypothetical machinery has to be introduced in order to preserve intact the theory that the *multa maxima*, as laid down in the earlier laws, was something absolutely fixed. But why is it so necessary to preserve it? I know no reason except the use of the word itself; 'the

[1] Mommsen, *Strafrecht*, p. 158, note 1; Girard, *Org. Jud.*, p. 154, note 2.

[2] *Org. Jud.*, p. 234.

[3] Ibid., p. 111 note.

[4] Ibid., p. 250.

[5] Ibid., p. 240.

very name,' says Girard,[1] 'of the *multa maxima* is sufficient evidence that it must have been at first not only the highest fine which escaped *provocatio*, but the highest which could be pronounced at all.' For my own part I see no reason why the expression *multa maxima* should not always have meant, as it did in historical times, the highest fine valid on the mere *fiat* of the magistrate. It is in itself very improbable that the Romans should have been so much more tender for their purses than for their necks, and that while they did not bar the sentence of death, but only made it subject to appeal, they should have absolutely prohibited sentences of heavy fine, whether with or without appeal. If, on the contrary, they put the two penalties on the same footing, what could be more natural than to mark the sum at which the simple magisterial power failed in its effect as *maxima* or *suprema*? The record of the custom certainly points to this explanation of the word. The Roman tradition[2] as to the continuity of the practice of heavy fining from early times may not be worth much, but at least it carries with it greater weight than the purely hypothetical transactions which modern scholars (however great the authority of these two) have set up instead of it. I should hold then, as I have held in case of capital sentences, that from the passing of these restrictive laws the heavier fines were subject to appeal; and that the superior magistrates, though they did not

[1] *Org. Jud.*, p. 110, note 4. Mommsen in his *Staatsrecht* (I³, p. 159), clearly commits himself to the same doctrine. It is doubtful, however, whether he retained it to the end of his life. In his article on 'Popularklagen', published in 1903 (see *Juristische Schriften*, Vol. III, p. 379, note 1), we have a presentation of the case which, if I understand it aright, does not substantially differ from that for which I am contending.

[2] e.g. of T. Romilius and C. Veturius in 454 B.C. (Livy, III. 31. 6), M. Postumius in 423 B.C. (Livy, IV. 41. 10), L. Verginius and M' Sergius in 401 B.C. (Livy, V. 12. 1).

formally lose their competence, in practice refrained from overstepping the pecuniary limits assigned, and left such cases to the aediles and tribunes who did not feel their dignity infringed by appeal. The pontiff has no minor officials to whom he can commit the charge, so that he is obliged, whether he will or no, to range himself under the humbler category.

If my theory be correct, it supplies a simple and obvious interpretation of the phrase 'irrogare multam'. The expression has been caught hold of, as is natural, by those who believe with Rein, Maine and the majority of modern scholars that in a criminal trial we have a legislative action; for there is no question that in proposing legislative decrees or in conducting elections the presiding magistrate utters the words *rogo vos Quirites*,[1] and that *irrogare*[2] is used of proposing *privilegia*, that is to say, laws directed against a person. It will be remembered that in the famous passage from the *de Legibus*[3] the phrase *irrogare* is used by Cicero in the closest parallelism with *judicare*, 'Quum magistratus judicassit irrogassitve, per populum mulctae poenae certatio esto'; and it must be allowed, I think, that the relation of both words to the *certatio* and the popular decision is the same. Zumpt[4] uses the parallelism to explain away the sense of *judicare*, which he reduces to mean *actionem perduellionis intendere*.[5] I have attempted in the eighth

[1] We may compare such phrases as 'in legibus magistratibusque rogandis', Livy, I. 17. 9.

[2] Referring apparently to the words of the Twelve Tables, e.g. Cicero, *pro Sestio*, 30. 65, and *de Domo*, 17. 43.

[3] Cicero, *de Legibus*, III. 3. 6. See above, p. 135. The same connexion between the two phrases is found in the passage quoted above (p. 154) from Cicero, *de Domo*, 17. 45, as to the interval before the magistrate 'multam irroget aut judicet'.

[4] Zumpt, *Criminalrecht*, I. ii. pp. 188–192.

[5] Zumpt, ibid., I. ii. p. 332.

chapter to show from the history of the word that the solution is impossible and that *judicare* in the passage of Cicero must necessarily mean 'to pass a capital sentence on a man'. What then are we to make of *irrogare*?

The answer is certainly not made any easier by the elaborate disquisitions of Huschke, who allots some 150 closely printed pages to the *multae dictio*, followed by 100 more on the *multae irrogatio*. He appears to consider[1] the *multa dicta* as springing from the *coercitio* of the magistrate, and its aim to be the enforcement of obedience; on the other hand the *multa irrogata* is essentially punitive and in its origin is always an atonement and redemption from capital punishment. The archetype of the *multae irrogatio* seems to be found in the expiatory sacrifices[2] after the acquittal of Horatius. Next follow strange metaphysical distinctions between offences against the activities of a corporation and offences against the corporation itself. The *multa dicta* is again connected with the praetor's interdict. Huschke builds up this last theory by elaborate deductions from the Oscan Law of the Bantine Tables; and when he finds that there is no trace of any such thing at Rome, he explains that our Roman authorities belong to a time when the 'proceeding by way of fine of the interdict had been long forgotten.'[3] *Multae dictio*, according to this theory, must, even when the subject of *provocatio*, be separated from *irrogatio*; and though it be admitted that the procedure is exactly the same, this is accounted for by the hypothesis

[1] Huschke, *Multa und Sacramentum*, p. 10.

[2] Huschke, ibid., p. 279. These expiatory ceremonies, than which one would think nothing could be more simple and obvious (see above, p. 49), seem fated to serve as the buttress of fanciful theories. We have seen them quoted in support of one of Zumpt's (see above, p. 130, note 1).

[3] Huschke, *Multa und Sacramentum*, p. 85.

that 'when appeal against the *multae dictio* once came into fashion this was expressly referred on the model of the *multae irrogatio* to the assembly of the tribes'.[1] I confess that all these distinctions seem to me very fanciful.[2]

For the purpose of our present discussion, the first thing to notice is that *irrogare* seems to be used only in its various moods as a verb, and that the words *dicta* and *irrogata*, as participial adjectives agreeing with *multa*, are an invention of modern scholars to indicate two distinct species of fine, which are likewise the product of their imagination. Not only is *dicere* repeatedly used of a fine which ultimately comes before the people,[3] but *irrogare* is the commonest phrase to describe the infliction of fines and penalties which never come before the people in any manner, legislative or other. It may be granted that in its original sense the word *irrogare* when used of the imposition of a fine had a reference forward to the circumstance that it was a fine as to which sooner or later the magistrate would be obliged to 'ask'[4] the people to confirm his infliction. This would occur, if my presentation be correct, whenever the fine pronounced by the magistrate exceeded the limit beyond which *provocatio*

[1] Huschke, *Multa und Sacramentum*, p. 98.

[2] Almost as much so as Huschke's derivation (p. 13) of *censere* from κεντεῖν, as if the misdemeanant were a lazy ox urged to his duty by the censor's goad, or his notion that in legal proceedings assessments in oxen (p. 16) are 'Ramnian' and assessments in money 'Quiritarian'. Huschke (p. 17) is much exercised to find a reason why fines are counted in sheep and oxen and not in swine. He finds it in connexion with the boar as the standard of the triarii, but the argument is beyond my comprehension.

[3] e.g. Livy, XXV. 3. 13; XL. 42. 9; XLIII. 8. 9; Cicero, *Philippics*, XI. 8. 18. We find that in the later *municipia*, the person 'cui multa dicta erit' is allowed an appeal to the decurions, who under the principate usurped the judicial office of the people, as the senate did at Rome (*Lex Malacitana*, chap. LXVI; Bruns, *Fontes*[7], p. 155).

[4] Just as he does in capital appeals; see above, p. 133.

was allowed.[1] Thus the magistrate when he inflicted a large fine might either be said in a general sense *multam dicere* or more specifically *multam irrogare*. But soon this implication of the possibility of appeal is forgotten, and *irrogare* comes to mean purely and simply 'to inflict', and its application is extended from a fine to any sort of punishment.[2]

There is no kind of question about this as regards later Latin. The 'terribiles Libri' (Books XLVII and XLVIII) of the *Digest* are filled with extracts[3] from Ulpian and other 'classical' jurists (in whose time of course anything like a trial before the People had long been obsolete), which nevertheless habitually contain the word *irrogare* in the sense of 'to inflict' or 'to pronounce', if it be spoken of the judicial or executive authority, and of 'to impose' or 'ordain' if it be spoken of the legislature. Tacitus[4] unquestionably uses the word in the same manner. The only doubtful point is to determine how early the usage came in. When we compare the *lex Silia de ponderibus*, as quoted in Festus,[5] with the Latin Law of the Bantine Table,[6] both

[1] In English police-courts we sometimes find a defendant inviting the magistrate to increase his fine, so as to give the opportunity for appeal.

[2] For instance, Papinian (*Digest*, XLVIII. 19. 41), 'Sanctio legum quae novissime (i.e. in a concluding clause) certam poenam irrogat iis qui praeceptis legis non obtemperaverint,' etc. Occasionally *adrogare* is used in the same sense, e.g. by Marcianus, *Digest*, XLVIII. 19. 4.

[3] Huschke (*Multa und Sacramentum*, p. 93, note 233) notices one case (Ulpian, *Digest*, I. 18. 6, § 9): 'Praeses provinciae si multam quam irrogavit,' with the criticism 'ungenau statt *dixit*'. Huschke would have had to cover many pages if he had subjected the jurists to his censure in every case when they are 'inexact' according to his canon.

[4] Tacitus, *Annales*, XIII. 28. 4 'quantum [aediles] pignoris caperent vel poenae irrogarent'.

[5] s.v. *Publica pondera* (Bruns, *Fontes*[7], p. 46).

[6] Verse 12 (Bruns, *Fontes*[7], p. 54).

of them probably belonging to the later part of the second century B.C., and find in the one 'eum quis volet magistratus multare dum minore parte familias taxsat liceto', and in the other 'Sei quis magistratus multam irrogare volet quei volet dum minoris partis familias taxsat liceto', it is difficult to avoid the conclusion that these are merely different forms of an equivalent clause, and that *multare* and *multam irrogare* have by this time become the same thing. Again, we find in Verrius Flaccus, as handed down by Festus,[1] 'Censionem facere dicebatur censor quum multam equiti irrogabat'. This can only mean 'inflict': the censor has not the 'jus agendi cum populo' and so could not be said *rogare* in the sense of 'to propose', and we have no certain[2] record of his fines being even the subject of an appeal to the people; probably they are always, like the consular and praetorian fines, within the limit allowed before the opportunity for *provocatio* commenced.[3] In just the same way in the *lex Acilia* of 123 B.C. we have *De irroganda multa* as the heading of a clause[4] which undoubtedly refers to disciplinary fines inflicted by the president of a Court of Justice.

[1] Festus, s.v. *censionem*.

[2] The only one I know is in a story by Valerius Maximus (VIII. 1. *Damn.* 7), 'admodum severae notae et illud populi judicium, cum M. Aemilium Porcinam a L. Cassio accusatum crimine nimis sublime extructae villae in Alsiensi agro gravi multa affecit.' Valerius, however, does not seem to recognize that Cassius was censor, and Velleius (II. 10. 1) gives quite a different account of the matter: 'prosequamur notam severitatem (*severam* Ruhnken) censorum Cassii Longini Caepionisque qui abhinc annos CLVII (125 B.C.) Lepidum Aemilium augurem quod sex millibus aedes conduxisset adesse jusserunt. At nunc si quis tanti habitet, vix ut senator agnoscitur.'

[3] Girard, *Org. Jud.*, p. 242, note 2. I may perhaps appeal, as a confirmation of my own interpretation of *irrogare*, to the circumstance that Girard who thinks (p. 241, note 2) that it necessarily 'implies a *rogatio*', finds the application of the word to the censor 'surprising'.

[4] *Lex Acilia*, verse 34; Bruns, *Fontes*[7], p. 65.

To go back to the passage of Cicero from which we started —'quum magistratus judicassit irrogassitve per populum poenae mulctae certatio esto'—I hope that I have said enough to show that there is no difficulty in taking both *judicassit* and *irrogassit* of the preliminary sentence of the magistrate, in the one case capital, in the other pecuniary, against which the appeal is laid, and in translating 'When the magistrate has pronounced sentence, whether of death or fine, let the question be tried out before the people.'

The opposition between the capital and the pecuniary sentence is sometimes put in another form. When the college of tribunes allow Sempronius, who has begun the inquiry against Cn. Fulvius, with the avowed intention of inflicting a fine, to change his mind and 'perduellionem judicare' against him, their decree is worded[1]—'negarunt se in mora esse, quo minus, quod ei more majorum permissum esset, seu legibus seu moribus mallet, anquireret, quoad vel capitis vel pecuniae judicasset privato.' It is not easy at first sight to discern why *legibus* should be equivalent to *capitis* and *moribus* to *pecuniae*. I think that Mommsen[2] has solved the difficulty by pointing out that the power of the tribune 'to demand a day of the praetor' must have been conferred by that Law of the Twelve Tables which forbade any capital trial to take place except before the *comitia centuriata*,[3] and so had the express sanction of the law, whereas the right to fine being part of the ordinary magisterial power required no such sanction, but was established by unvarying and unquestioned usage (*moribus*).

A more important contrast than that between *multa dicta* and *multa irrogata* may be found in the distinction between *multa* and *poena*. Here we have the direct

[1] Livy, XXVI. 3. 8.

[2] *Strafrecht*, p. 1015, note 2.

[3] See above, p. 157.

authority of the jurists of the School of Papinian asserting a difference. 'Multa quidem', says Ulpian,[1] 'ex arbitrio ejus venit qui multam dixit, poena non irrogatur, nisi quae lege vel quo alio jure specialiter huic delicto imposita est,' and Paulus[2] adds that *poena* being appointed by law admits of no appeal and 'statim debetur'. The examples do not bear out the distinction in the use of the words,[3] but the underlying difference between two methods of procedure is valid. The penalty, whether it be called *poena* or *multa*,[4] defined by law (generally a fixed sum, but sometimes 'quanti ea res erit'),[5] may be recovered by a civil action in the praetor's court or in the corresponding tribunals in the *municipia*, whereas for the penalty imposed by the sole will of the magistrate, he must rely on his own powers of *coercitio*, if it be for a petty sum, or on the confirmation of his sentence by the people if it be for a large one.

[1] Ulpian, *Digest*, L. 16. 131.

[2] Paulus, *Digest*, L. 16. 244.

[3] Paulus (loc. cit.) tells us that Labeo, the chief of the rival school, wrongly asserted their identity. According to Varro *multa* is a species of *poena*: 'poenam esse sed pecuniariam' (Festus, *ad voc.*).

[4] We find such a penalty under the name of *multa* in the *Fragmentum Tudertinum* (verse 5, Bruns, *Fontes*[7], p. 158) in the *lex Luci Spolentini* (verse 16, Bruns, *Fontes*[7], p. 283), and in three cases cited by Cicero (below, p. 181, notes 6, 7, 8) of persons sued for a penalty before the *praetor urbanus* 'multa' and not 'poena' is the word used. In one chapter (LXXXI) of the *lex Ursonensis* 'multa' is named; in the other chapters 'dare damnas esto' is substituted; the procedure in each case is the same: 'ejusque pecuniae cui volet petitio, duumviro qui jure dicundo praeerit exactio judicatioque esto.' Mommsen is, I believe, right in maintaining ('Populärklagen' in *Juristische Schriften*, Vol. III, p. 375) that the phrases 'poena esto', 'multa esto', 'dare damnas esto', which all come together in a speech of the elder Cato (Aulus Gellius, *Noct. Att.*, VI. 3. 37), are merely different ways of saying the same thing. Thus the contention of Labeo and the Proculeians (above, note 3) is practically justified.

[5] So in *lex Ursonensis*, chap. LXXV, of damage accruing to the community by the pulling down of a house.

The person empowered to sue for a *multa*[1] in the civil court is the representative and agent of the people whose interests are involved.[2] This capacity is granted sometimes to a magistrate, sometimes to any citizen.[3] The latter seems to be the universal rule in the Spanish municipal laws,[4] and we find it in the *lex Luci Lucerini* (verse 5), with the addition of the permission 'pro judicato manum injectio estod', as for a debt already due, which reminds us of the 'statim debetur' of Paulus.

In the Law of Tarentum,[5] the clause about the demolition of houses grants a like extensive right of prosecution; in the

[1] The money will go to the Public Treasury (see Roman Law of Bantine Table, verses 9–11; Bruns, *Fontes*[7], p. 54). An apparent exception may be noted. Action under the *lex Aquilia* was granted only to a person having some vested interest in the property injured (see *Digest*, IX. 2 *passim*). Yet Cicero in one place (*Brutus*, 34. 131) uses 'multam petivit' for damages sued for under this law (see Huschke, *Multa und Sacramentum*, p. 259). This, however, must be taken as a literary rather than a legal expression, like 'multam depellere', 'to avert loss,' in Cicero, *ad Familiares*, V. 20. 4.

[2] Mommsen (*Juristische Schriften*, Vol. III, p. 380) lays it down that a 'publicum judicium' properly . . . 'denjenigen Privatprozess bezeichnet, der im Interesse der Gemeinde geführt und darum geschärft wird, und dass die Geschwornengerichte des Quästionenverfahrens aus diesem geschärften Privatprozess hervorgegangen sind.' The puzzling phrase 'judicium publicum rei privatae', which Cicero uses (*de Natura Deorum*, III. 30. 74) about the *lex Plaetoria* (framed to prevent the cheating of minors), is explained (*Strafrecht*, p. 181, note 6) in a similar way. See also below, vol. II, p. 17, note 2.

[3] In this last case the suit is called 'actio popularis'; Paulus, *Digest*, XLVII. 23. 4.

[4] *Lex Salpensana*, ch. XXVI; *lex Malacitana*, chaps. LVIII, LXII, LXVII; and repeatedly in the *lex Ursonensis*.

[5] This recently discovered fragment finds its place in the seventh edition of Bruns' *Fontes*, p. 120. The text is printed likewise in Mommsen, *Juristische Schriften*, Vol. I, p. 146, and in Girard, *Textes de Droit Romain*, p. 62. The date is probably soon after the Social War. The clause in question (verse 35) runs: 'quanti id aedificium erit tantam pecuniam municipio dare damnas esto, ejusque pecuniae quei volet petitio esto. Magistratus qui exegerit dimidium in publicum referto, dimidium in ludo consumito.'

praetor's edict also we find *actionem dabo*[1] for fixed amounts in favour of whosoever chooses to sue in case of violation of sepulchres, and the same freedom is allowed by Caesar's Agrarian Law against those who remove the boundary stones.[2] On the other hand the right to sue is limited to magistrates in another clause of the Tarentine Law, that concerning *peculatus*,[3] in the Roman Law of the Bantine Tables,[4] and probably, though the text is defective, in the rules for preserving sepulchres, known as the *Fragmentum Tudertinum*.[5] Actions for recovery of fines for infringing a Law of Sulla's about tribunician *intercessio* were tried before the *praetor urbanus*, and must therefore have been of the nature of civil suits, but as in the only known case[6] no mention is made of the plaintiff we cannot tell whether or no he were necessarily a magistrate. In another case,[7] that of Junius, sued likewise before the praetor for irregularities committed when he presided in a *quaestio*, the plaintiff was tribune at the time; but Cicero represents this as a scandal, and says that he could still have sued, if he had waited till he was a private man, as he was apparently when Fidiculanius Falcula was accused and acquitted 'paullo sedatiore tempore'.[8]

Parallel to the civil suit, whether instituted by magistrate or private citizen, we have surviving the more obvious, but probably more cumbrous and uncertain method of direct

[1] Ulpian, *Digest*, XLVII. 12. 3.

[2] Callistratus, *Digest*, XLVII. 21. 3.

[3] In verse 4: 'Quei faxit, quanti ea res erit, quadruplum multae esto, eamque pecuniam municipio dare damnas esto ejusque pecuniae magistratus, quei quomque in municipio erit, petitio exactioque esto.'

[4] Verse 9, Bruns, *Fontes*[7], p. 54.

[5] Verse 5, Bruns, *Fontes*[7], p. 158.

[6] That of Opimius, Cicero, *in Verrem*, I. 60. 155 'mulcta petita est apud istum praetorem'.

[7] Cicero, *pro Cluentio*, 33. 91 'Multam petivit; qua lege? quod in legem non jurasset'.

[8] Cicero, ibid., 37. 103.

magisterial action, followed, if the fine be beyond the limits, by condemnation or acquittal before the People. In the extant documents sometimes the entire proceeding is indicated, as in the Law dedicating a temple in the Sabine town of Furfo;[1] sometimes we find expressly authorized the initial stage 'multare' or 'multam irrogare',[2] sometimes the final stage 'populi judicio petere';[3] there can be no doubt that in each case the one follows on the other. The magistrate is not always free to make the fine, even subject to the appeal, as large as he pleases. We find the maximum sometimes specially limited, whether to half of an offender's property,[4] or to the fixed sum named in the particular law as recoverable either by the civil or the criminal action.[5]

In the wording of certain of the laws to which reference has been made we find as an alternative proceeding to the fine that the magistrate is allowed 'in sacrum judicare'. In the *lex Silia de ponderibus*,[6] for instance, we have 'eum quis volet magistratus multare . . . liceto, sive quis in sacrum

[1] Bruns, *Fontes*[7], p. 284, in verse 15 we have 'si quis heic sacrum surupuerit, aedilis multatio esto, quanti volet; idque veicus Furfensis major pars fifeltares, sei apsolvere volunt sive condemnare, liceto'. 'Fifeltares' probably means 'burgesses'; but see below, Vol. II, p. 145.

[2] So *lex Luci Lucerini*, verse 8 (Bruns, *Fontes*[7], p. 283) 'Seive macisteratus volet multare licetod', and in the Bantine Table quoted above, p. 177, in both cases as alternative to the civil suit, and in the *lex Silia de ponderibus* quoted on the same page.

[3] In the *Fragmentum Tudertinum*, verse 6 (Bruns, *Fontes*[7], p. 158). The word 'petere' is here used in a wide sense; it is more commonly confined to the civil suit. See Mommsen, *Juristische Schriften*, Vol. III, p. 380, note 1, and *Strafrecht*, p. 1015, note 4.

[4] In *lex Silia* and in the Bantine Table (Bruns, *Fontes*[7], pp. 46 and 54).

[5] In the *Fragmentum Tudertinum* and the *lex Luci Lucerini* (Bruns, *Fontes*[7], pp. 158 and 283).

[6] Verse 13, Bruns, *Fontes*[7], p. 46; and the same choice is given in the *Fragmentum Tudertinum*, verse 6, ibid., p. 158.

judicare voluerit, liceto'. It is probable that the distinction relates only to the ultimate destination of the money recovered[1]—the *multa* will go to the public treasury, the *in sacrum judicatum* to the service of some god or temple, just as we have seen the legal wager become a *sacramentum* when expended on victims for sacrifice.[2] The powers of the magistrate and the limits within which he is free to exercise them without the concurrence of the people are not affected by the choice of one or the other alternative.

The secular destination of the *multa* and the religious destination of the *in sacrum judicatum* both affect only a specified portion of a man's goods; but it is likewise possible for a forfeiture to be incurred either for secular or religious purposes of the whole of his possessions. From the earliest times we find the doctrine that the goods of the traitor who has made himself a public enemy became the property of the State (*publicatio*); and side by side with this we find that the goods of the *homo sacer* are forfeited to the gods. It will be remembered that Terminus[3] claims not only the life but the oxen of the man who has ploughed up the boundary stone. The short title of the Valerian Law of 509 B. C. is 'de sacrando *cum bonis* capite ejus qui regni occupandi consilia inisset';[4] and Festus[5] in his definition of *sacratae leges* lays it down that the offender 'sacer alicui deorum sit cum familia pecuniaque'. In the case of an offender who violates the sanctity of a tribune, the Law of Valerius and Horatius (449 B. C.) prescribes that 'ejus caput Jovi sacrum esset, familia ad aedem Cereris, Liberi Liberaeque venum iret'.[6] Here the procedure answers exactly to that of the

[1] So Mommsen, *Strafrecht*, p. 1015.
[2] See above, pp. 55 and 59.
[3] See above, p. 5.
[4] Livy, II. 8. 2.
[5] Bruns, *Fontes*[7], App., p. 34.
[6] Livy, III. 55. 7.

secular confiscation, where the quaestor enters into possession of the universality of the goods of the criminal or the public debtor, which are then sold for the benefit of the State. The practice as regards the debtor is described in the *lex Acilia*.[1] As regards the criminal convicted, by failing to answer [2] or otherwise, on a capital charge we find that confiscation existed in the time of the Second Punic War.[3] It is almost certain that it was not put in force in the next century against C. Gracchus.[4] It seems at any rate, in the period immediately before Sulla, to have affected (if any one) the *perduellis* only. The Will of the parricide Malleolus, who died in the sack,[5] was contested indeed, but only by his heirs at law ; there was no claim on the part of the State.[6] Under the system of trials before the standing jury-courts confiscation must have entirely dropped out, for Suetonius [7] tells us on the authority of Cicero that till Caesar's dictatorship convicts *integris patrimoniis exulabant*. If we suppose that the *venum iret* of the Law of Valerius and Horatius is typical, as is probable, of all proceedings under *consecratio*,

[1] Verse 57. See below, Vol. II, p. 7.
[2] This is held to be equivalent to confession.
[3] As in the case of Postumius (Livy, XXV. 4. 9).
[4] Plutarch, *Caius Gracchus*, 17. 5, says that his widow Licinia was deprived even of her dowry. This must be a mistake on his part; for the jurist Javolenus (in *Digest*, XXIV. 3. 66) informs us, on the authority of Labeo, that P. Mucius Scaevola gave sentence for Licinia in an action brought by her against her husband's estate for damage done in the course of his insurrection. 'Quod res dotales in ea seditione, qua Gracchus occisus erat, perissent, ait, quia Gracchi culpa ea seditio facta esset, Liciniae praestari oportere.' Mommsen, *Strafrecht*, p. 1010, note 3, allows himself to be misled by Plutarch.
[5] Cicero, *ad Herennium*, I. 13. 23.
[6] Mommsen, *Strafrecht*, p. 650, note 2 ; and 1008, note 2. Under the principate he would have been incapable of owning or bequeathing property : 'qui ultimo supplicio damnantur, statim et civitatem et libertatem perdunt.' Gaius, *Digest*, XLVIII. 19. 29.
[7] Suetonius, *Julius*, 42.

it will not be the actual chattels which fall into the possession of the temple, but the money realized by their sale.

The *consecratio bonorum*, originally a corollary and concomitant of the *sacratio capitis*, survives with a fitful and disputed attempt at an independent existence. Dionysius tells us how in the year 455 B. C. certain persons of the Cloelian, Postumian, and Sempronian *gentes* were accused of coercing the tribunes, and that as a mild measure [1] the sentence against them was not for death or exile but for the consecration of their property to Ceres. Their goods were sold accordingly, but bought in by their friends and supporters. There is no reason to attribute historical accuracy to this narrative ; but in one way or another it found its place in the current version of Roman history, and it is instructive if viewed as an attempt to furnish a precedent for later pretensions. We have seen [2] how the tribune who considered himself outraged claimed the right of immediate physical vengeance, even to the infliction of death, on the offender against the Sacred Laws. It would have been very convenient for the demagogue who had succeeded in getting himself elected tribune, if he could have established the right of seizure against the property of his political opponent parallel to that against his person, and such action was in fact more than once attempted, but in no single instance with practical effect.

The reason probably is, that there was no Tarpeian rock available for the more profitable execution against the goods of the victim, nothing answering to the grip of the sacrosanct hand [3] by which Atinius Capito hurried Metellus, the censor of 130 B. C., to execution, or Flavius cast another Metellus, the consul of 60 B. C., into prison. In the case of

[1] Dionysius Halicarnasensis, X. 42.
[2] See above, p. 16.
[3] See above, p. 15.

the goods, if the tribune wished to proceed by the rough methods of self-help, there would be ample time in the long process of seizure and sale by auction for the interposition of a colleague and his *veto*; and the assailant would be bidden to proceed by methods under which *provocatio* was admissible. In the case of the Cloelii in Dionysius[1] the question is represented as brought before the people for ultimate decision though the accused attempt no defence, and in the later instances the practical necessity for allowing *provocatio* is clearly seen. Either the validity of the *consecratio* proved dependent on the result of a trial for *perduellio*, or the necessity for a popular vote prevented the matter from being carried further. In none of these attempts can the tribune have seriously hoped to carry any heavy or arbitrary pecuniary penalty through the obstacles of the *intercessio* and the assembly. Rutilius in 169 B.C. commenced his operations against the censors by consecrating the goods of Tiberius Gracchus;[2] had his colleague Claudius been condemned, and had Gracchus, as he threatened, shared his exile, his goods would doubtless have fallen, as a consequence of the *consecratio*, to the temple of Ceres instead of to the Treasury. But as both censors were acquitted by the people on the charge of *perduellio*, the *consecratio* went for absolutely nothing. In like manner Atinius vainly consecrated the goods of Metellus,[3] after being stopped from killing him, and the same thing happened in case of Lentulus, the censor of 70 B.C. Again, when Clodius consecrated the goods of Gabinius, and Ninnius in turn those of Clodius,[4] though each tribune set up an altar and employed a flute-

[1] Dionysius Halicarnasensis, X. 42. See above, p. 185.
[2] Livy, XLIII. 16. 10.
[3] Pliny, *Hist. Nat.* VII. 44. 143. See above, p. 14, note 4.
[4] Cicero, *de Domo*, 47. 124.

player to pipe an accompaniment to the words of banning, yet, as the people were not summoned to confirm or quash the action of their officer, that action remained, as Cicero expressly tells us, in every case[1] without effect. The *consecratio* is not, like the action of the tribune against the person, a vague terror[2] hanging over the head of every one who dares to rebel, but a bolt often discharged and always harmless.

Cicero quotes these cases, though they are not absolutely parallel, in his defence of the site of his house, which had been consecrated by Clodius. If Clodius' decree of outlawry against Cicero had been valid, and if it had not been subsequently repealed, all Cicero's goods would have become the property of the State, not by *consecratio* but by *publicatio*. But even after Cicero's rights were fully restored in this respect, there was still some doubt whether the consecration of a particular site, though a robbery demanding compensation, were not effective so far as concerned the sanctity of that plot of ground. Fortunately Cicero[3] was able to show a definite law (the *lex Papiria*) which forbade the consecration of a site, even by wish of the owner, without an express decree of the People, and this Clodius had neglected to obtain.

[1] These cases are discussed in detail by Cicero, *de Domo*, ch. 47 and 48.
[2] 'Tribuniciique sanguinis ultores esse praesentes,' Cicero, *post Reditum in Senatu*, 13. 33. See above, p. 15.
[3] Cicero, *de Domo*, 49. 127 seq.

CHAPTER XI

THE TRIAL OF CAIUS RABIRIUS

THE most dubious and interesting case of a pecuniary penalty is that connected with the trial of Caius Rabirius in Cicero's consulship for the killing of the tribune Saturninus thirty-seven years before. A new light was shed on this State trial when Niebuhr[1] discovered in a palimpsest the peroration of Cicero's speech for the accused, of which the earlier portion alone had previously been known. The questions arising out of this discovery have been eagerly debated by a host of modern scholars, amongst whom Huschke,[2] Schneider,[3] Schulthess,[4] Wirz,[5] and Heitland,[6] may be mentioned. The whole problem is so complicated that it will be worth while to devote a chapter to its elucidation.

Rabirius was undoubtedly condemned, as Horatius had been five hundred years before, by *duumviri perduellionis*, in this case by Caesar and his cousin Lucius; he was likewise undoubtedly on his trial before the people in its *comitia centuriata*, when the praetor Metellus Celer struck the flag

[1] B. G. Niebuhr, *Ciceronis pro Fonteio, C. Rabirio, &c., Fragmenta*, Romae, 1820.

[2] Huschke, *Multa und Sacramentum*, Appendix II.

[3] A. Schneider, *Der Prozess des C. Rabirius*, in Festschrift, Zürich, 1889.

[4] O. Schulthess, *Der Prozess des C. Rabirius*, Frauenfeld, 1891.

[5] H. Wirz, *Perduellionsprocess des C. Rabirius*, in Fleckersen's *Neue Jahrbücher*, 1879, p. 177 seq.

[6] W. E. Heitland, *Pro Rabirio*, 1882.

on the Janiculum and so broke up the assembly.[1] Further, a *multae irrogatio* entered in some form or other into the proceedings, for Cicero distinctly recounts its heads.[2] This *multae irrogatio* is the work of Caesar's tool, the tribune Labienus. It is certain likewise that at the moment when Cicero delivered the peroration contained in Niebuhr's palimpsest, Rabirius was not in danger of his life, but was in danger of being compelled to go into exile. Finally, no one doubts that Rabirius escaped scot-free in the end.

Here end the matters on which modern scholars are agreed. As to the order and the nature of the various stages of the proceedings, I was inclined to think that every possible combination of the circumstances had been exhausted, until I found myself carried away by the universal tendency, and driven to devise yet another version of the story, founded on the supposition that the accusations of Caesar and of Labienus were parallel and simultaneous. Here are some of the solutions of my predecessors.

First Hypothesis.

The *multae irrogatio* named by Cicero was a preliminary to the whole business, and dropped when the capital proceedings came on; or perhaps it was not aimed directly against Rabirius at all, but against a third party,[3] and involved Rabirius only by implication. The only trial was

[1] Dio Cassius, XXXVII. 27 and 28. Niebuhr (loc. cit.), however, is inclined, with many apologies to Dio, to reject the story of this incident altogether. I am not aware that any other scholar has expressed agreement. That so great a critic should be driven to this desperate method of extrication shows the difficulty of the problem. As a second string, Niebuhr would accept the second of the three hypotheses detailed below.

[2] Perhaps I ought not to include this amongst the certainties, for Schneider (loc. cit., p. 25) is inclined to take the words *multae irrogatio* as in this passage only metaphorical; but this seems very improbable.

[3] So Zumpt, *Criminalrecht*, I. ii, p. 472.

the duumviral condemnation followed by appeal to the people assembled in *comitia centuriata* under the presidency either of Metellus or of the duumvirs, on which occasion Cicero delivered the extant speech, and Metellus struck the flag. This action ends the whole matter.[1]

Second Hypothesis.

The proceedings begin with a *plebiscitum* proposed by Labienus, which orders the appointment of duumvirs to try the case on the model of the trial of Horatius as recorded in Livy.[2] After this is passed, Cicero and the senate contrive to modify the procedure so as to substitute[3] the penalty of exile and confiscation for that of actual crucifixion ('perduellionis judicium a me sublatum').[4] Next comes the sentence of the duumvirs, the appeal to the *comitia centuriata*, and Metellus' stratagem of the flag, to which, by the way, rather than to any modification of procedure, Lange[5] would refer the collapse of the *judicium perduellionis*. The disruption of the assembly does not, however, end the matter. After the capital sentence has miscarried, Labienus makes a fresh start and proposes a fine[6] of sufficiently large amount to drive Rabirius into exile. This has to be tried out before the tribal assembly of the *plebs*. At some stage of the latter process, Schulthess thinks necessarily[7] at the last stage, the

[1] Drumann, Vol. III, pp. 162–164.
[2] See above, p. 129, note 4.
[3] Heitland, loc. cit., p. 32.
[4] Cicero, *pro Rabirio*, 3. 10.
[5] Lange, *Römische Alterthümer*[2] (1867), Vol. II, p. 525.
[6] Having as a precedent in this order of proceeding the case of the misconduct of P. Claudius Pulcher at Drepana; see above, p. 155.
[7] Schulthess, *Der Prozess des C. Rabirius*, p. 33. I must admit that the phrase, which he quotes, 'hodiernus dies' (Cicero, *pro Rabirio*, 2. 5), would be more appropriate if the voting were to follow immediately after the speech. I confess that this is the only passage which

extant speech of Cicero is delivered. Then follows either the withdrawal of the charge, or the acquittal of the prisoner by the vote of the People.

Third Hypothesis.

The duumvirs condemn Rabirius to crucifixion and appeal is laid against their sentence: at this stage the senate intervenes and quashes the sentence of the duumvirs as illegal (possibly by a re-enactment of the *lex Porcia*[1]), so that the appeal never took place;[2] or, as a variant, the appeal does take place and after a speech (not preserved) from Cicero the People votes acquittal[3] (*perduellionis judicium a me sublatum*). In any case the triumviral trial has collapsed, and that by some instrumentality other than Metellus and his flag, which is still in the future. Next Labienus proceeds as tribune to bring a fresh charge of *perduellio*, as many a tribune had done before him.[4] As this is a 'capital' charge he must, of course, 'ask for a day of the *comitia centuriata*'. The *multae irrogatio*, which must come before the *comitia tributa*, is concomitant with this, but relates only to the minor charges. At one of the *conciones* in the Forum, prior to the actual 'perduellionem tibi judico' of the tribune, which will finally commit him to a centuriate trial,[5] Cicero delivers his extant speech. After this the proceedings follow the normal course[6] of a capital trial through the *trinum nundinum* till the day of decision on the Campus, the tribune presiding over the *comitia* with borrowed auspices.[7] On

makes me uneasy about my own theory; but I hope that my explanation of it (below, p. 202, note 1) may serve.
[1] See Wirz, *Perduellionsprocess des C. Rabirius*, p. 178.
[2] So Rubino, *Römische Verfassung*, p. 315, note; Wirz, loc. cit., p. 200.
[3] So Schneider, *Der Prozess des C. Rabirius*, p. 38.
[4] Above, p. 107.
[5] Above, p. 155, note 2.
[6] Above, p. 154.
[7] Above, p. 157.

this occasion, Metellus in command on the Janiculum strikes the flag and all further proceedings are dropped.

The most interesting and crucial question to decide, and the one most significant for the appreciation of Cicero's extant speech, is whether that speech was delivered before or after the intervention of Metellus and the incident of the lowering of the flag. The supporters of the second of the three hypotheses are, of course, obliged to say 'after'; the supporters of the first and third would unite in saying 'before', and I believe that so far they would be right.

The provoking thing about these hypotheses is, that of no one of them can it be said that it is absolutely proved to be wrong. Against each one of them in turn serious objections can be brought, but every objection may be parried by a more or less admissible though somewhat forced interpretation of the passages involved. It might, for instance, be most simple and obvious to take the words *perduellionis judicium a me sublatum* to imply that all trial for *perduellio* was already past and over, when Cicero spoke these words; still the reproach of the tribune, which Cicero accepts as a compliment, would be justified if, in whatever manner, Cicero had frustrated the intention of Labienus and his ally to carry through the whole procedure of the Horatian formula, culminating in case of a verdict of guilty with the actual crucifixion of Rabirius.[1] Again, when Cicero seven years later says,[2] 'ego in Rabirio perduellionis reo XL annis ante me consulem interpositam senatus auctoritatem sustinui contra invidiam atque defendi', it would be most satisfactory to refer the phrase *perduellionis reo* to the

[1] It is to the honour of Schulthess (*Der Prozess des C. Rabirius*, pp. 18, 47, 50) that he frankly accepts this interpretation of Cicero's words, though his own theory leads him to believe that when they were spoken all proceedings for *perduellio* were, as a matter of fact, over and done with.

[2] Cicero, *in Pisonem*, 2. 4.

vigorous defence of the Senate's right in the published speech, but it is possible to refer it to Cicero's whole proceedings in opposition to Caesar and Labienus from the moment when the charge was first mooted, through the great scene on the Campus, down to the last flickering of the revived accusation, if revived accusation there were, in the Forum. Then again Cicero's denunciation of the cross, the *flagellum*, and the *carnifex* would be much more effective if these horrors had actually been exhibited, as he seems to imply, by the prosecutors; but it is not impossible that he refers merely to what would have been done, could they have carried out their original proposal. On the other side, from the words 'hanc tu, Labiene, imaginem quam habes' and 'nunquam istam imaginem in rostra atque in concionem attulisses', it is natural to conclude with Huschke that the portrait of Saturninus was actually displayed at the moment and that Cicero pointed to it as he spoke, in which case the speech must have been delivered at a *concio* and in the Forum. But the conclusion is not rigidly necessary; Cicero may be merely referring to what had occurred on a previous occasion.

The absence of any reference in the speech to Metellus' action, if it had already taken place, in which case it would certainly have had a prominent place in Labienus' attack, is very strange in itself; but it may possibly be accounted for as due to Cicero's unwillingness to dwell on what the people might feel as a frustration of their right to vote.[1] On the other hand, if (as is postulated in the third hypothesis) the duumviral trial had been already frustrated, but without the intervention of Metellus, this would imply an almost incredible clumsiness of expression on the part of Dio

[1] Huschke, on the other hand (*Multa und Sacramentum*, p. 525), thinks that the 'energische That' of Metellus carried the favour of the people.

Cassius,[1] in whose narrative we must then suppose a huge gap from the moment of the appeal from the duumvirs, to the moment of the trial of a second appeal from the tribune on a second charge concocted after the first had failed.

The counting up of the several items of the *multae irrogatio* in the first part of the speech would be more natural if the said *multae irrogatio* were actually being tried before the people at the moment, but there would be no great difficulty in supposing that the reference is to a fine by the tribunes, with its motives set forth, previous to the proceedings before the duumvirs, like Rutilius' *consecratio*[2] of the goods of the censor whom he was on the point of summoning for *perduellio*. Finally the statement of Dio that after the action of Metellus the prosecutor might have renewed proceedings on another day, but declined to do so, is best explained in the natural sense that the striking of the flag was the closing scene of the whole drama; but it might possibly be explained, as the supporters of hypothesis number two are bound to explain it, in the sense that there was no more of the duumviral proceedings for *perduellio*.

These arguments on either side do not seem to help us much to a conclusion. But apart from the *minutiae* which we have been discussing there are one or two broader considerations. On the one hand, is it probable that Cicero should have allowed the supreme moment of the sensational duumviral trial to pass over without a word? That he should have left the rôle of protagonist to the praetor, and have reserved his great consular speech for the less interesting

[1] Dio Cassius, XXXVII. 27. 3: 'The duumviri condemned him . . . and Rabirius appealed, but he would nevertheless have been condemned, had not Metellus,' &c. I should agree with Schulthess (*Der Prozess des C. Rabirius*, p. 56) in his criticism of Wirz, that it is almost necessary to take the two parts of the last sentence as continuous.

[2] Above, p. 186.

and less striking occasion of a commonplace accusation for a fine introduced as an afterthought by the enemy? But, on the other hand, if the speech, as we have it, were a part of the duumviral trial for *perduellio*, how are we to account for the entire absence of any reference to the duumvirs as presiding or even as present on the occasion? Not they, but the tribune appears in the character of accuser, and the proceedings are so completely under his control that he has confined Cicero within a half-hour's limit for his speech. How could the tribune introduce himself in this overwhelming manner into a judicial procedure in which he had, so far as form went, no *locus standi*, and whose machinery was borrowed from a time prior to the institution of the tribunate?

Zumpt[1] attempts to parry this argument by the conjecture that the speech was altered when Cicero published it in 60 B.C., and that as originally delivered it contained references to Caesar and his brother duumvir, which Cicero afterwards found it prudent to omit. It is certainly noticeable that the very same letter[2] which announces the publication in the year 60 B.C. of his 'Consular Orations' records Cicero's hopes of being able to influence Caesar in a friendly way and to bring him round to a sound policy. I am inclined to believe that Zumpt is right *totidem verbis*, but I should by no means accept his conjecture as supplying an adequate solution of the difficulty. We may well suppose that the original speech was not so completely dumb about Caesar as it appears in the published form, but the omissions can only relate to some side hits which Cicero would hardly have failed to aim at him on such an occasion. It is a very different thing to assume that the whole speech was recast,

[1] Zumpt, *Criminalrecht*, I. ii. 396. His argument meets with the approval of Wirz (*Perduellionsprocess des C. Rabirius*, p. 197, note 17).

[2] Cicero, *ad Atticum*, II. 1.

and the whole circumstances misrepresented, as they must have been if the speech were really addressed to the duumvirs. I cannot believe that with the facts fresh in the recollection of all men Cicero would have ventured on any such thing. Every line in the speech is stamped with the mark of an assembly in which the tribune was the prominent and controlling person.

I will now venture to add one more to the numerous theories as to the order of events. In the first place I would renounce any attempt at precision regarding the preliminary proceedings vaguely described by Dio[1] as taking place, whether in the senate or elsewhere. It is, I think, generally assumed by modern scholars[2] that a *plebiscitum* was passed authorizing the proceeding by way of *duumviri perduellionis*. It seems to me, however, that there is a difficulty here, because Cicero's words,[3] 'hic popularis a duumviris injussu vestro... civem Romanum capitis condemnari coegit', would have little sting if the people had expressly authorized their appointment. On the other hand, we know from Dio that Caesar had played a part in preliminary controversies, and that Labienus too had his share in them is clear from Cicero's reproach that it was he who compelled the duumvirs to condemn Rabirius. The evidence before us is insufficient to enable us to say what acts on the part of Caesar or of Labienus preceded the nomination of the duumvirs by the praetor. I have hinted my doubts in an earlier chapter as to Dio's statement that this method of appointment was unprecedented.[4] Anyhow we know that the duumvirs were

[1] Dio Cassius, XXXVII. 27.

[2] Except Schneider (*Der Prozess des C. Rabirius*, p. 9 seq.).

[3] Cicero, *pro Rabirio*, 4. 12. See above, p. 139 and p. 153.

[4] Οὐ κατὰ τὰ πάτρια. I do not think that we can follow Schneider (loc. cit., p. 9) in taking these words to mean merely that this method was an anomaly in a state which habitually elected its judicial magistrates. My own method of dealing with Dio's statement would be more drastic. See above, p. 153.

actually appointed. From this point it will be convenient that I should drop the argumentative style, and simply tell the story as it presents itself to my imagination—a story in which, though the framework is of necessity conjectural, every known fact will, as I hope, be found in its proper place.

The arrangements for the trial for *perduellio* on the strict model of that of Horatius were now in full progress. The fatal words *perduellionem tibi judico* had been uttered by Caesar, and the cross, the *flagellum*, and the *carnifex* were displayed on the Campus Martius for the actual execution of the culprit. At this point Cicero intervened. The possibility of a capital sentence being executed depends on the circumstance whether or not the criminal is actually arrested beforehand. The power on the part of the judge to say '*I, lictor, colliga manus*' is the necessary condition of the *perduellionis judicium* in the sense in which Caesar and Labienus proposed to exercise it. If the accused be at large, it is always open to him to evade any sentence by withdrawing into exile, so that it matters comparatively little what the sentence may be: in any case he saves the remnant of his life, but deprives himself, as Cicero says on this occasion, of his right to be buried with his fathers. Cicero then, as I believe, whether by virtue of his *major potestas* as consul over the duumvirs as lesser magistrates of the Roman people, or else by the instrumentality of a tribune, simply prevents or terminates the arrest of Rabirius.[1]

[1] The whole discussion is simplified, if the vital importance of the preliminary arrest is recognized (see above, p. 160, note 5), and if it be remembered that, where there is no such arrest, the only practical question is, whether the punishment ordained is such as will induce the condemned man to evade it by exile. Most of the commentators seem to have forgotten that Cicero (*pro Caecina*, 34. 100) expressly

From that moment all the precedents of Horatius and all the gruesome implements of punishment have lost their use, and serve only as signs and tokens of the cruel intentions of the prosecutors; exile is now the worst that can happen to Rabirius. Thus is the *perduellionis judicium per me sublatum.*

Meanwhile, parallel to the proceedings for *perduellio*, another attack was opened. The tribune Labienus had piled up a long and miscellaneous list of charges against Rabirius; official abuses, secret assassination, disgraceful offences against morals are heaped together as counts in his *multae irrogatio.* For these misdemeanours he announced the infliction of a fine so heavy that it could not be carried through without the consent of the people. There is no reason to suppose that the death of Saturninus was included among the charges in the *multae irrogatio*:[1] Cicero certainly never says that it was,[2] but undoubtedly it was included in

says that 'in no law of ours will it be found that any crime has ever been punished by exile'. Schulthess (*Der Prozess des C. Rabirius*, p. 71, note 3) does not forget; but he follows the unfortunate lead of Mommsen (*Staatsrecht*, III. 361, note 1) in setting aside the great passage from the *pro Caecina* as mere special pleading, 'eine für die Corona bestimmte Advokatendiatribe.' Mommsen, as I shall try to show in Chapter XV (below, Vol. II, p. 25), is rather inconsistent than erroneous, but (as usual) it is his least happy presentment which is adopted by his disciple.

[1] It is certain that a 'capital' and a 'pecuniary' penalty for any offence could not be included in the same action (Cicero, *de Domo*, 17. 45), and that probably because the one would have to come before a centuriate, the other before a tribal assembly (Mommsen, *Strafrecht*, p. 167, note 1). I know no reason why the two penalties should not be claimed simultaneously, as the case of the Claudius defeated at Drepana shows that they could be successively (see above, p. 155) for the same offence in different courts. Still there appears to be no example of such a proceeding, and it is not necessary to assume it here.

[2] Indeed he rather implies the contrary when he remarks as to the other charges, that half an hour was more than enough for his task as advocate. When he comes to the death of Saturninus he claims to speak not as advocate but as consul.

the *accusatio*, that is to say in the harangues delivered by the tribune, of which, as Cicero says, it formed the second part. When once the tribune was on his legs no power in Rome could prevent his *speaking* about whatever he chose. Whatever might be legally before the court, this was the charge in which every one was interested.

Probably it was no part of Labienus' intention ever to follow out his own line of proceeding to its end, but meanwhile it was very convenient to him to have a series of *conciones* on three several days[1] at which he could introduce any topic at will, and have every opportunity of working on the feelings of the people who were to judge in the impending capital trial. The picture of the murdered tribune could be displayed on the Rostra from which he had once spoken. The 'probabile ex vita',[2] without which the brief of no Roman advocate was complete, would be supplied against Rabirius by the various counts in the *multae irrogatio.* Above all, from Labienus' point of view it was an important consideration that in all these *conciones* he would be the pre-eminent person with consul and nobles pleading before him, and would be able to pose as the defender of the majesty of the people and the sanctity of the tribune. If Caesar as duumvir could play in this popular rôle—and in view of the coming elections to the pontificate and the praetorship it was doubtless a desirable opportunity—should not Labienus be allowed to employ his tribunate, in what was now its main use, as a means for self-advertisement?[3]

[1] Above, p. 154.

[2] Wirz, *Perduellionsprocess des C. Rabirius*, p. 194.

[3] Compare *pro Plancio*, 5. 13. Cicero tells Laterensis that he had put himself at a disadvantage as regards future office by not serving the tribunate.

At such *conciones* the tribune was undoubted master; and though he could hardly with decency forbid Cicero and Hortensius from speaking, he was quite within his right in playing the bully by announcing that he did not want long-winded orations and would confine the consul to half an hour. On the other hand, the advocates for Rabirius could not allow the debate to be all on one side. We hear nothing of any speeches by Caesar or of any preliminary discussion on the Campus before the final day. It is possible that the duumviral procedure did not afford facilities for these. At any rate Cicero and Hortensius lost nothing by appearing at the tribune's bar, because any part they might take in these discussions would not exhaust their right to speak before the duumviral *comitia centuriata*, should it hereafter seem desirable so to do. Cicero seems to indicate in his speech that he will have another opportunity[1] for developing this part of his case at greater length. I believe then that it was at one of the three tribunician meetings which were to introduce the *multae irrogatio* that Cicero spoke, and that he spoke in the Forum. Rabirius was still, as the traditional heading of the speech entitles him, and as Cicero describes him in his speech against Piso,[2] *perduellionis reus*. The great trial before the duumvirs and the centuries was still in the future, probably in the near future. Its importance overshadowed all minor issues; the People had come together to hear the consul speak of Saturninus and they were not disappointed. The main topic of Cicero's speech is the

[1] This appears the most natural meaning of the words 'tamen a me haec in hoc tam exiguo meo tempore non audies; liberum tempus nobis dabitur ad istam disceptationem' (Cicero, *pro Rabirio*, 5. 17); though I should agree with Schulthess (*Der Prozess des C. Rabirius*, p. 32), that it would be possible to explain them as merely a threat of political attacks on Labienus in the future.

[2] Cicero, *in Pisonem*, 2. 4. See above, p. 192.

rebellion of Saturninus and the odious methods by which it had been attempted to avenge his death. Though the *multae irrogatio* of the tribune is the business presently on hand, Cicero brushes it aside as merely subsidiary to the great attack, and it is Labienus' part in that attack which gives him the best opportunity for scorn and invective. If we consider the speech from this point of view, as a preliminary to the main issue on the Campus Martius, it appears a very effective piece of rhetoric.

If at the moment when Cicero delivered the extant speech he intended to follow it up with a second and more elaborate one, the intention was certainly never carried into effect, as we know from the list of his 'Consular Orations', which Cicero sent to Atticus three years later,[1] that there was only one speech *pro Rabirio*. Before Cicero had opened his lips on the day of trial, the meeting of the *comitia centuriata* was broken up by the agency of Metellus Celer and his flag. The democrats must have acquiesced in the somewhat lame conclusion to their demonstration, for it is certain that the *multae irrogatio* was not pressed and that Rabirius remained unmolested.

But, it may be asked, why did the prosecutors accept as final so clumsy a legal fiction as the pretence that the Gauls or Etruscans were at the gates and had stormed the Janiculum? If we are to guess, my guess would be that Dio's account of the business, though doubtless correct enough as to the bare facts, conveys a wrong impression by the too serious tone in which the whole incident is treated by him.[2]

[1] Cicero, *ad Atticum*, II. 1, 3.

[2] Modern writers have generally adopted Dio's attitude. Lallier (*Revue Historique*, 1880, p. 276) and Schulthess, indeed, hit the point when they speak of the whole proceedings as a comedy, but in their discussion of the political question both of them treat the trial as something very grave and important, a great and successful stroke of policy on Caesar's part.

I cannot but think that those who saw the events with their own eyes must have recognized that the expedients extracted by both parties from musty annals had something ludicrous about them, and were considered part of a solemn farce rather than practical politics. I believe then that the case was really decided by Cicero's speech[1] and by the odium which he succeeded in exciting against the ghastly antiquarianism of the prosecutors. Caesar had accomplished his main object in flaunting his protest and gaining notoriety for himself and his cause. He had, however, made some mistakes. The display which he had intended as a sensational object-lesson to show what might befall the man who should dare to touch a hair of the tribune's sacred head, had merely enabled Cicero to turn the tables on him by his equally sensational but very damaging invective against Caesar's methods. Caesar must have been thankful that Labienus had acted as lightning-conductor and had diverted the brunt of the storm on to himself. Again, the unseemly haste with which Caesar had uttered his sentence of condemnation had excited, as Suetonius[2] tells us, a prejudice in favour of the accused, so that there was every chance of a verdict of acquittal[3] which would have been an unpleasant rebuff to the democrats.

It remained for Caesar to escape as best he could from the somewhat awkward position into which he had drifted. The ponderous device of Celer, a worthy but very stupid

[1] This effect was anticipated in his prayer that Heaven would grant 'hodiernum diem et ad hujus salutem conservandam et ad rempublicam constituendam illuxisse'; and I believe that the hope, which Cicero entertained that this would be so, is a sufficient justification of the expression 'hodiernus dies'. See above, p. 190, note 7.

[2] Suetonius, *Julius*, 12.

[3] As in the case of Opimius' trial for killing Caius Gracchus and his associates. See below, p. 241.

man,[1] must have been a perfect godsend to Caesar as enabling him to withdraw with dignity, leaving to the optimates the responsibility of having cheated the people of their right of voting. I think that there can be no doubt that Caesar, as president of the assembly, made only a perfunctory protest,[2] and that he really assisted in the work of breaking up the *comitia*. Probably there was a secret understanding between him and Metellus, and Caesar may well have stipulated that Cicero should not speak a second time. We know that the proceedings were not as a matter of fact renewed in any form, and there is every reason to suppose that this was the result of a compromise by which Caesar undertook beforehand that they should be dropped. On the other hand it is not unnatural that the leaders of the senatorial party should have been willing to meet Caesar half-way and to refrain from pressing the matter to the bitter end in the hope of a complete triumph. The popular vote was in any case too whimsical and unsteady to be trusted,[3] and the continuance of the agitation might have led to painful surprises. Both parties then were sick of the business and acquiesced in a termination which allowed the champions on either side[4]

[1] Cicero has sketched in his portrait for us in two rapid strokes: 'Quid quaeris? Est consul φιλόπατρις et, ut semper judicavi, natura bonus' (*ad Atticum*, II. 1. 4), and 'Metellus non homo, sed litus et aer et solitudo mera' (*ad Atticum*, I. 18. 1). Metellus has perhaps more effectively than any person in history succeeded in 'writing himself down an ass' in the short letter to Cicero which is his sole contribution to literature (*ad Familiares*, V. 1).

[2] Just as he did, when praetor a year later, in presence of the sentence of suspension passed against him by the Senate (Suetonius, *Julius*, 16). On both occasions Caesar had started a hare which he did not really wish to run down.

[3] Cicero, *pro Murena*, 17. 35 'Saepe etiam sine ulla aperta causa fit aliud atque existimaris, ut nonnunquam ita factum esse etiam populus admiretur quasi vero non ipse fecerit.'

[4] Dio seems to have adopted the assumption of the democrats, while Suetonius' version of the story(see p. 202) reflects that of the optimates.

Meanwhile we must keep it in mind that all this does not apply to the *judex* under the *legis actio* or under the formulary system. His function is quite apart from that of a counsellor. As had been already seen,[1] he is there not to advise or to support the magistrate in the responsibility of coming to a decision, but to give a decision on oath under his own responsibility respecting a particular question which the magistrate has referred to him for an answer. How completely the responsibility is that of the *judex* may be seen from the circumstance that in bearing its weight he in turn is entitled to ask for the advice and assistance of assessors. Cicero's speech *pro Quinctio* is addressed to the *judex* C. Aquilius and the advisers whom he has invited 'in consilium'. When Verres wished to decide a criminal case without being hampered by the presence of certain respectable Roman citizens resident in Syracuse, whose opinion he could hardly avoid asking in the particular circumstances, he ordered one of them, a Roman knight, Marcus Petilius, to retire and proceed forthwith in the hearing of a private suit which had been referred to him, and then packed off the rest to act, as they had been previously asked to do by Petilius, as his counsellors in this trial.[2]

The subject of this chapter is not the functions of such counsellors, but the cases in which a bench of jurors take the place of the *unus judex* to whom the praetor more usually puts his question. In such cases the actual and effective responsibility for decision rests not with a single person but with a plurality, in which the majority of votes will carry a positive and final sentence. Here we have for the first time what may be properly called 'trial by jury' as distinguished from 'trial by a juror'.

[1] Above, pp. 61 and 74.
[2] Cicero, *in Verrem*, II. 29. 71.

It will be most convenient to take as a starting-point a curious distinction which leads Gaius to divide *judicia* into two classes, those which 'imperio continentur'[1] and those which are 'legitima'. It is unnecessary to detail the various consequences which flow from this distinction. We have here to do only with the definition and the boundary line between the two categories. The word *legitimum* is here used in a special and technical sense, which, as Gaius[2] expressly informs us, is not the obvious and natural sense, namely *ex lege*. The distinguishing marks of the *legitimum judicium* are that the parties are all citizens, that the suit takes place in Rome and that it is tried by a single *judex*. There can be little doubt that the *legitima judicia*, so defined, constitute the oldest class and that they have survived from antiquity. Mommsen[3] conjectures with much probability that the three defining characteristics mentioned above impressed the name of *legitimum* on a suit because these three were prescribed for ordinary procedure in the Law of the Twelve Tables, which the Romans seem to have had in mind in certain other phrases, such as *heres legitimus* and *tutor legitimus*. We may safely conclude then that reference to a single *judex* is the rule in the earlier procedure. This conclusion is confirmed by a notice respecting ancient times

[1] This phrase, according to Gaius (*Inst.* IV. 105), has reference primarily to the length of time during which the action is kept alive: 'ideo autem imperio contineri judicia dicuntur, quia tamdiu valent quamdiu is qui ea praecepit imperium habebit.'

[2] Gaius, *Inst.* IV. 109 'Ceterum potest ex lege quidem esse judicium, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse'. While following Wlassak (*Processgesetze*, Vol. I, p. 28) in his conclusions about the *unus judex*, I cannot in the least agree with him that 'it would be a gross misunderstanding if we tried to extract from the passage an opposition between *ex lege* and *legitimum*'; the opposition is there in the very words of our authority, and Wlassak's attempts to escape from it are quite unsuccessful.

[3] 'Judicium legitimum,' in *Juristische Schriften*, Vol. III, p. 364.

from Gaius[1]—'ut autem die xxx. judex daretur per legem Pinariam factum est, ante eam autem legem statim dabatur judex'; and in the same section we have—'ut ad judicem veniant denuntiabant . . . deinde cum ad judicem venerant,' etc.

In what manner of cases, we next ask, are the conditions of a *legitimum judicium* departed from, and a jury substituted for a single juror? We may leave on one side as not forming part of ordinary procedure two instances from the Law of the Twelve Tables (that 'de finibus regundis'[2] and that respecting 'vindiciae falsae'[3]), in which certain controversies as to details may be referred to three *arbitri*. Apart from these, the jury of early times is that of the *centumviri* or that of the *decemviri litibus judicandis*, or that of the *recuperatores*. The jury system afterwards attained so important a place in the administration of the Roman criminal law, that I can hardly avoid entering into some discussion of its first appearances.

It is certain that in some cases during the last two centuries of the Republic, after issue had been joined on a legal wager, the question whether the *sacramentum* was *justum* or *injustum* was referred not to a single *judex*, but to a body.

[1] Gaius, *Inst.* IV. 15. See above, p. 63.

[2] Bruns, *Fontes*[7], p. 27, with reference to Cicero, *de Legibus*, I. 21. 55. The *arbitri* were probably at first ambulatory commissioners sent out by the praetor to investigate and decide matters on the spot. See Girard, *Org. Jud.*, p. 82, n. 2.

[3] Festus, s.v. *vindiciae*: 'Si vindiciam falsam tulit, si velit is praetor arbitros tres dato; eorum arbitrio, rei et fructus duplione damnum decidito.' There is a parallel passage in the *lex Ursonensis*, chap. LXI: 'Si quis in eo vim faciet (=vindicabit), ast (=si) ejus vincitur, dupli damnas esto,' &c. When the *vindex* who has rescued a debtor and denied his liability, fails to maintain this contention at the trial, he must pay double the amount of the loss threatened to the creditor; this amount is what Festus says must be assessed by arbiters.

Decemvirs are mentioned as judges in a case in which Cicero[1] during the lifetime of Sulla defended the liberty of a woman of Arretium. Centumviri appear frequently in Cicero's Dialogue *de Oratore* (the dramatic date of which is 91 B. C.) as trying cases of easements (such as *stillicidium*),[2] guardianship,[3] inheritance,[4] and status, for instance[5] whether a certain 'applicant' foreigner was or was not a client, and whether the right of the Claudii Marcelli to inherit the goods of a son of their freedman was or was not overridden by the gentile claim of their patrician namesakes.

The *decemviri litibus judicandis* were by Augustus[6] set to preside over the centumviral courts and formed part of the group of lesser magistrates known as the *vigintivirate*. Even when they constituted a court of their own, they are reckoned by Cicero[7] as minor magistrates of the Roman People, and this ascription is confirmed when the office appears among those recounted on the gravestone of Scipio Hispanus.[8] This seems the unique case[9] of a body of magistrates being called upon to find a verdict for their superior. It is quite uncertain whether they were, as Mommsen[10] thinks, identical with the *decemviri* of the Horatian Law of 449 B. C.,[11] or indeed at what date they came into existence. The same may be said of the origin of the *centumviri*: the facts that the *legis actio sacramenti* survived

[1] See Cicero, *pro Caecina*, 33. 97.

[2] Cicero, *de Oratore*, I. 38. 173.

[3] Cicero, ibid.

[4] Cicero, ibid., and *pro Caecina*, 18. 53.

[5] See above, p. 77.

[6] Suetonius, *Augustus*, 36.

[7] Cicero, *de Legibus*, III. 3. 6.

[8] Dessau, *Inscriptiones Latinae*, 6. He was praetor in 139 B.C.

[9] The supposed exception of the *triumviri capitales* has been dealt with above, p. 53, note 3.

[10] *Strafrecht*, p. 581, note 5.

[11] Livy, III. 55. 7. Wlassak answers the question strongly in the negative (*Processgesetze*, Vol. I, p. 147). I do not think that there is sufficient evidence to settle the controversy.

for them alone under the principate, and that the symbol of their court was the spear, the sign of primitive ownership,[1] seem to point to a respectable antiquity: on the other hand the considerations adduced above[2] seem to place the *centumviri* after the legislation of the Twelve Tables, and their number one hundred and five and their selection three from each tribe[3] postulate, for this arrangement at least, a date after the completion of the list of thirty-five tribes in the year 241 B. C.

The researches of Wlassak[4] have made it clear that in most of the matters named in the *de Oratore*[5] as coming through a *legis actio* under the decision of the *centumviri*, we have in other passages of Cicero indications of similar cases tried under a formula by the *unus judex*. This seems to point to the conclusion that in the latter days of the Republic alternative methods of proceeding were open in such cases. At this period the alternative of *centumviri* or *unus judex* comes to be practically equivalent to the alternative of *legis actio* and written formula. We do not know which of the parties had the last word in choosing the method, or whether, as seems most probable, the praetor decided between the two procedures.[6]

The important point for our present purpose is to note that, long before the employment of jurors for criminal

[1] See Gaius, *Inst.* IV. 16; Greenidge, *Proc.*, p. 42.

[2] Above, p. 207.

[3] Festus, s.v. *centumviralia*. Bruns, *Fontes*[7], App. p. 5.

[4] Wlassak, *Processgesetze*, Vol. I, p. 112. Wlassak's references for alternatives in the several cases are for 'stillicidia', *Orator*, 21. 72; for inheritance, *in Verrem*, I. 45. 115; for ownership of land, *in Verrem*, II. 12. 31. This last is a burlesque formula (see above, p. 68), but doubtless a parody on a real one.

[5] See above, p. 209.

[6] As the provincial magistrate certainly did in the analogous question whether a case should be sent to a *judex* or *recuperatores*: Cicero, *in Verrem*, III. 58. 135 (Mommsen, *Strafrecht*, p. 178, note 5).

trials the Romans in their civil procedure were familiar with the practice of referring some disputed question to the verdict of a jury deciding by a majority of votes.

Of much greater interest, from the point of view of the criminal law, is the third species of jury, the 'recuperatorium judicium'. Some method of determining controversies between members of friendly states is a natural and almost necessary condition of commercial intercourse on any but the most meagre scale. The earliest and simplest device seems to have been that the alien, who has no standing as such in the law courts, should sue or be sued through a citizen, his *hospes* or *patronus*, who acts as his guarantor and representative in all his dealings. Such a necessity might, however, be avoided by the foreigner, as a consequence of special treaty. Aristotle speaks[1] of such privileges as being ἀπὸ συμβόλων, that is to say 'provided for by virtue of a contract between states'; and we have in the record of actual treaties some evidence to show how this might be accomplished. In the First Carthaginian treaty cited by Polybius[2] no bargain between Carthaginians and Romans trafficking in Africa or Sardinia was to be valid unless it were contracted in the presence of a public officer; and such agreements were guaranteed by the government of the country. Sometimes, again, by the special privilege which the Romans called *commercium*, each of the contracting states allows to the favoured foreigner the same power of purchase and sale and the same standing in the law courts as its own citizens enjoy.[3] This was accorded by the Second Treaty

[1] Aristotle, *Politics*, III. 1. 4, where he further defines the position —ὥστε καὶ δίκην ὑπέχειν καὶ δικάζεσθαι, 'to be sued and to sue' (see W. L. Newman *ad loc.*). Cf. III. 9. 6 σύμβολα περὶ τοῦ μὴ ἀδικεῖν.

[2] Polybius, III. 22. 8.

[3] Polybius, III. 24. 12 πάντα καὶ ποιείτω καὶ πωλείτω ὅσα καὶ τῷ πολίτῃ ἔξεστιν.

to Romans trading in Carthaginian Sicily, and at Rome by reciprocity to the Carthaginians. The same privilege was allowed to the members of the Latin League and the citizens of some other favoured states. A difficulty, however, arises in Dionysius'[1] account of the Treaty of Sp. Cassius (493 B. C.) with the Latins. There the method is apparently something else than the admission of the strangers on an equal footing to the ordinary courts of the country. A rapid settlement of all disputes within ten days is stipulated, which would seem to imply a special tribunal with summary procedure. The Romans called this process 'recuperatio': the word is defined by Aelius Gallus[2] as follows: 'quum inter populum et reges nationesque et civitates peregrinas lex convenit quomodo per reciperatores reddentur res reciperenturque, resque privatas inter se persequantur'. An example may be found in the *Lex Antonia de Termessibus*[3] respecting the persons, whether free or slave, carried off from them during the Mithridatic War—'judicia recuperatores danto uti ei eos recuperare possint'.

We find several traces of special indulgence granted to foreigners who take advantage of such provisions to transact business in Roman Law Courts. By the Law of the Twelve Tables an appointment with a foreign litigant[4] is a sufficient excuse for failure to answer the summons of a fellow citizen. Girard[5] suggests with much probability that the power to *subpoenâ* witnesses (*testimonium denuntiare*) which we find

[1] Dionysius Halicarnasensis, VI. 95.

[2] Festus, *ad voc.* [3] Bruns, *Fontes*[7], p. 94.

[4] Bruns, *Fontes*[7], p. 20 'status dies cum hoste'. *Hostis* is not an enemy, but, as defined by Varro, *de Lingua Latina*, V. 3 'peregrinus qui suis legibus uteretur', i.e. the stranger who has not the full *commercium*, and therefore cannot be a party to a suit under Roman law. His own law, which is all he has, does not of course run in Rome.

[5] Girard, *Org. Jud.*, p. 103.

in certain recuperatorial actions in civil matters,[1] though it is generally allowed only in criminal trials, may be a feature peculiar to *recuperatio*, a survival of 'a measure first introduced in favour of foreign suitors, who could be much more exposed than the Romans to find a lack of witnesses willing to testify voluntarily in their favour', while at the same time 'the denial of justice might give rise to diplomatic complications'. Mommsen,[2] on the other hand, believes that the power of summons is granted in private suits only in case of the 'populares actiones' in which the State itself has an interest. The evidence is very scanty.[3] We find in Probus[4] a quotation from a praetor's edict—'Quanti ea res erit, tantae pecuniae judicium recuperatorium dabo; testibusque publice dumtaxat decem denuntiandi potestatem faciam', but there is nothing to show what is the nature of the suit to which the passage refers. I know of only two specific cases in which 'testimonii denuntiatio' is enjoined in a civil suit—against those who remove the boundary stones set up by virtue of the Agrarian Law of Caesar's first consulship,[5] and against those who steal water from

[1] The instances are given lower down on this page.

[2] Mommsen, *Juristische Schriften*, Vol. III, p. 508.

[3] A passage quoted by Mommsen (*Juristische Schriften*, Vol. I, p. 233) in which Quintilian (*Inst.* V. 7. 9) speaks of witnesses 'quibus in judiciis lege denuntiari solet' tells us nothing; for it may refer to the *quaestiones*, which are the most notable class of *publica judicia* (see above, p. 180, n. 2, and below, Vol. II, p. 17, n. 2), and no one doubts that witnesses were compulsorily summoned by the accuser in these courts.

[4] Probus, *de Notis Juris*, in Krüger, *Jus Antejustinianum*, Vol. II, p. 145.

[5] *Lex Julia Agraria*, Cap. 5 Gromatici Veteres, Lachmann, I, p. 265, lines 4 and 9 (Bruns, *Fontes*[7], p. 96). Wlassak points out (*Processgesetze*, Vol. II, p. 319) that it is impossible to suppose that the 'recuperatorum datio' and the 'judicis datio', which occur in two successive sentences, can really imply that the proceeding was different when set on foot before the 'curator' and the local magis-

the Aqueduct of Venafrum.[1] Both of these misdeeds are manifestly directed against the interests of the community in general and in one of these a *recuperatorium judicium* is prescribed, and in the other allowed. So far there is nothing to enable us to decide which of the two circumstances is the reason for granting 'testimonii denuntiatio'. If, however, we turn to the ninety-fifth chapter of the *lex Ursonensis*, we find that it is dealing not with any particular offence but with regulations for the conduct of recuperatorial trials generally. Amongst these regulations is one which empowers the magistrate who orders such a trial to enforce the attendance of not more than twenty witnesses. It is not safe to argue directly from the colony to the metropolis; still the probability is that the municipal law only follows the Roman, and thus the weight of evidence is in favour of Girard's contention.

But the most important boon which this system assures to the foreigner is protection against the Law's delays. We have seen that this is the essential matter in the Latin Treaty. When under the later Republic citizens as well as foreigners may have their cases tried before *recuperatores* the rapidity of the process is frequently mentioned. The praetor Lucullus, in composing the interdict 'vi hominibus armatis', is said[2] 'recuperatores dare ut quam primum res judicaretur'. In the colonial *lex Ursonensis*, we find[3] the *recuperatores* strictly charged to give their decision on the appointed day, which must be not more than twenty days after the trial was granted. The swiftness and straightforwardness of the recuperatorial proceedings is even

trate. The choice must have been left in both cases, and the *Gromaticus* must have abbreviated without much discretion.

[1] *Edictum Venafranum*, verse 66 (Bruns, *Fontes*[7], p. 251).

[2] Cicero, *pro Tullio*, 1. 10.

[3] Chap. 95 (Bruns, *Fontes*[7], p. 130).

transferred by simile to corresponding action in political matters.[1]

Perhaps we may find here the solution of the problem noticed above, that 'recuperatio' is found to occur in the relations with Rome of just those privileged foreigners who seem least to require it, because they have had granted to them the same standing in the Roman law courts as the Romans themselves. To a Tiburtine or a Praenestine it might often be a convenience to be able to purchase land in Roman territory, to defend its ownership by Roman methods, and to enjoy inheritance or legacies from Roman citizens. All this was accorded to him by the full *commercium* which constituted him an independent *persona* of the civil law. It is no less true that the stranger might be involved in a legal controversy at Rome just at the moment when his commercial interests were summoning him homeward. 'Dispatch in his business before the courts was what was wanted by the busy trader at Rome, and this could not be gained through the *legis actio*.'[2] Thus it would be a boon even to the most privileged foreigner to get his case settled by the swift recuperatorial court; and it ceases to be surprising that we should find the two methods offered by Rome to a Latin as alternatives, so that he might take advantage of either at choice. For those foreigners, who were not privileged to use the *legis actio* at Rome,[3] some such resort was still more necessary.

Business of this kind increased so much by the middle of

[1] Pliny, *Epistolae*, III. 20. 9, of a sudden introduction of the ballot in an election—'nam ut in reciperatoriis judiciis sic nos in his comitiis quasi repente adprehensi sinceri judices fuimus.'

[2] Greenidge, *Proc.*, p. 29.

[3] See above, p. 212, n. 4. The *utilis actio* sometimes granted by the praetor in such cases (see Gaius, *Inst.* IV. 37 and 38) is probably of later times.

the third century that a new praetor had to be created (243 B. C.) in order to deal with cases in which foreigners were involved. The *judicia* which arose in the new court, not being between two citizens,[1] necessarily belonged to Gaius' category *imperio continentia*, as opposed to *legitima*. They were founded solely on the authority of the newly instituted praetor, and they called for the intervention of a *formula*; this particular magistrate seems commonly to have sent the point at issue in his formula to the decision of *recuperatores* rather than to a single *judex*. For instance, suits arising out of the use of water from the Aqueduct of Venafrum, which, as we have seen, are *recuperatoria judicia*,[2] are to be brought before the *praetor peregrinus*. Though probably originating in the court of the *praetor peregrinus*, this method is likewise ascribed to other magistrates, as to those charged with the carrying out of agrarian laws.[3]

Recuperatores appear likewise very frequently in cases which require settlement in the camp or in the province. Verres is found constantly requiring suitors to submit to the decision of *recuperatores* taken from his own *cohors*,[4] and Scipio refers to *recuperatores* the disputed question of whether the mural crown at the taking of Cartagena has been earned by a legionary or a sailor.[5]

In Rome itself the habit of sending cases, even from the court of the *praetor urbanus*, to *recuperatores* instead of to the *unus judex* is widely extended under the later Republic.

[1] See above, p. 207. [2] See above, p. 214.

[3] We find such provisions in the *lex Agraria* of 111 B.C., verses 34–38 (Bruns, *Fontes*[7], p. 80), and in the fragment attributed to Caesar's Law of 59 B.C. See above, p. 213, note 5.

[4] e.g. Cicero, *in Verrem*, III. ch. 60. When Verres lays down in cases between the landholder and the tax-farmer, 'si uter volet recuperatores dabo' (Cicero, *in Verrem*, III. 14. 35), I do not hold with Wlassak (*Processgesetze*, Vol. II, p. 322) that the clause was borrowed from a Roman Edict. [5] Livy, XXVI. 48. 8.

Of the four speeches in private suits which survive to us among Cicero's works, two, the *pro Tullio* and the *pro Caecina*, are addressed to *recuperatores*, for whose decision in the latter case the way has been paved by a *sponsio* or legal wager into which the parties have entered by the direction of the praetor.

In the earliest case which we know, that of the Bantine Table of the second century B. C., the law itself requires[1] the praetor to give *recuperatores*, if desired by the prosecutor, for the trial of a magistrate charged with infringing its provisions, and the same appears to be the case in one clause[2] of the *lex Agraria* of 111 B. C., whereas in the other similar clauses the option of *judex* or *recuperatores* is left open. Sometimes the magistrate promises recuperatorial procedure in his edict, as indicated by the initial letters,[3] quoted above from Probus. The standing order for *recuperatores* in cases of *injuria* will be dealt with below;[4] Gaius records[5] a like promise for certain suits respecting *vadimonia*, and Cicero for the enforcement of the interdict 'de vi hominibus armatis', which is the subject of his speech *pro Tullio*.[6] In the great majority of cases, however, the praetor uses the words 'judicium dabo',[7] which promise nothing on this point and

[1] Verse 9 (Bruns, *Fontes*[7], p. 54) 'Sei postulabit quei petet, praetor recuperatores, quod quotque dari oporteat, dato'.

[2] Verses 36–38, of cases where *publicani* were concerned (Bruns, *Fontes*[7], p. 81). In this case the praetor names eleven *recuperatores*, and each of the parties may strike off four by way of challenge.

[3] See above, p. 213.

[4] See below, p. 218. [5] Gaius, *Inst.* IV. 185.

[6] While holding with Wlassak in the main, I should agree with Eisele (*Beiträge*, p. 59) as against Wlassak (*Processgesetze*, Vol. II, p. 317) that Cicero's words, 'nec recuperatores potius darent quam judices' (*pro Tullio*, 4. 41, Nobbe), refer to the prescription of this method by the framers of the interdict, and not of a choice reserved to the individual praetor on each occasion.

[7] Lenel's presentation seems hardly consistent. He argues (*Edictum*

reserve to himself the choice of methods. I believe that Wlassak's contention [1] is sound on the whole, and that while the procedure by the *unus judex* was the normal one in the court of the *praetor urbanus*, it was open to that praetor to substitute *recuperatores* in any case in which he considered a quick decision to be essential. Thus the recuperatorial method will be used more often than promised. Gaius's pattern formulae [2] do not preclude a deviation at the will of the praetor from the model, but show what was supposed to be in each case the most regular method. They generally begin with the words *L. Titius judex esto*; but in one instance, that of the recovery by a patron of the sum of 10,000 sesterces from his freedman, who has summoned him contrary to the prohibition of the praetor's edict, the heading *Recuperatores sunto* [3] is substituted. We are not told the reason for this distinction.

The most interesting case, however, is that of the Civil action for *injuria* or outrage.[4] Into this *recuperatores* were introduced by the edict. In the period immediately preceding Sulla, there is no question that the praetor's edict, correcting the law of the Twelve Tables and its fixed

Perpetuum, p. 26) that the structure of the Edict was largely determined by the grouping together of all the Titles (xxxi to xxxv) in which *recuperatores* are promised, and yet when he comes to the reconstruction of these very Titles (pp. 365–389), silently omits (except in the case of 'hominibus coactis' and of *injuria*) anything about *recuperatores* and gives in each case the neutral, 'judicium dabo.' As the Edict appears in Bruns, *Fontes*[7], p. 227 (though revised by Lenel 'perpaucis immutatis'), the reference to a *recuperatorium judicium* has dropped out of the text, even in the two excepted cases.

[1] *Processgesetze*, Vol. II, p. 309.

[2] Gaius, *Inst.* IV. 34 seq. [3] Gaius, *Inst.* IV. 46.

[4] This question is discussed by Mommsen in his *Strafrecht* (p. 801 seq.), and also in monographs by Hitzig (*Geschichte der Injuria*, &c., 1899), and by Girard (*Action d'Injures*, in *Mélanges Gérardin*, 1907 p. 255 seq.).

penalties, gave an *aestimatorium judicium* for bodily assault and sent the case to *recuperatores*.[1] But in the same period we find cases for insulting language (*convicium*) tried before a single *judex*.[2] After Sulla, there are frequent references to an *aestimatio* for outrage, but while the *judex* is repeatedly mentioned, we hear nothing of *recuperatores*.[3] Further, the *lex Cornelia* certainly instituted a public *quaestio*, of which Ulpian [4] says, 'omnem injuriam quae manu fiat lege Cornelia contineri.' In the same paragraph we have regulations as to the exclusion of jurors evidently following those for the *quaestiones perpetuae*, as exemplified in the *lex Acilia repetundarum*. We must suppose, then, that the court was assimilated to these *quaestiones*.[5] Unfortunately we know of no actual case under this *lex Cornelia*, and it is impossible to say what was the penalty originally prescribed.[6] My conclusion would be that Sulla, when he established the criminal *quaestio*, likewise consolidated the civil actions under the praetorian edict, and allowed them all to go, as those for bad language had always gone, to a single *judex*. Hence the disappearance of *recuperatores*. Girard [7] goes

[1] Labeo, *apud* Gellium, *Noct. Att.* XX. 1. 13. The passage has been quoted above (p. 44). Labeo's statement is confirmed by the case mentioned in Cicero, *de Inventione*, II. 20. 59 and 60; a Roman knight, who has lost a hand in course of an armed attack on him, sues for damages 'recuperatorio judicio'.

[2] Cicero, *ad Herennium*, II. 13. 19. See above, p. 78.

[3] Girard, loc. cit., p. 262.

[4] Ulpian, *Digest*, XLVII. 10. 5. Lower down in the same paragraph (verse 6) we have the 'praetoria actio injuriarum' opposed to that 'legis Corneliae'. [5] See Mommsen, *Strafrecht*, p. 803, note 6.

[6] The only specifications are of a later period. The jurisconsult Macer states that Septimius Severus laid down 'Atrocis injuriae damnatus in ordine decurionum esse non potest' (*Digest*, XLVII. 10. 40). Paulus (writing probably in the time of Alexander Severus) names various 'capital' punishments as inflicted *extra ordinem* in grosser cases, and *infamia* as a consequence even of the civil suit. Paulus, *Sententiae*, V. 4. [7] Girard, *Action d'Injures*, p. 279.

further, and thinks that Sulla abolished the civil action except for insulting words, spoken or written,[1] and left his criminal court as the sole arbiter in cases of bodily injury. He founds this hypothesis mainly on Ulpian's words,[2] 'Posse hodie de omni injuria, sed et de atroci, civiliter agi Imperator noster (Caracalla) rescripsit,' as if this implied the restoration, after more than two centuries, of the civil action which Sulla had abolished. I do not see how this doctrine can be made to agree with the utterances of Labeo and Gaius, both living in the interval between Sulla and Caracalla. Labeo clearly indicates the existence of a civil action for bodily injury in the time of Augustus, for he discusses[3] the same point which is raised in the passage of Cicero quoted above,[4] the question, namely, whether the private *actio injuriarum* can be brought in cases where it might prejudice the verdict in a capital charge, such as 'quod gladio caput ejus percussum est'. Gaius, who wrote under Antoninus Pius, is no less explicit: after speaking of the fixed penalties for assault of the Twelve Tables he continues[5]—'Sed nunc alio jure utimur, permittitur enim nobis a praetore ipsis injuriam aestimare, et *judex* vel tanti condemnat quanti nos aestimaverimus vel minoris

[1] Marcianus (*Digest*, XLVII. 10. 37), speaking of matters 'quae infamandi causa in monumento publico posita sunt', says 'Etiam ex lege Cornelia injuriarum actio civiliter moveri potest, condemnatione aestimatione judicis facienda'.

[2] Ulpian, *Digest*, XLVII. 10. 7, § 6. Probably Caracalla only confirmed the opinion of Labeo mentioned in the next note, which Ulpian and his school (the Sabinians) were disinclined to accept.

[3] *Digest*, XLVII. 10. 7, § 1 'Labeo ait non esse prohibendum'. We may draw the same conclusion from the opinion of Neratius, a jurist of Trajan's time, that if a man is struck, and abused at the same time, he has not two separate actions open to him (*Digest*, XLVII. 10. 7, § 5), but must conjoin the two pleas. This would hardly have obtained, if the *convicium* did and the *verberatio* did not give occasion to a civil action.

[4] See above, p. 219, note 1.

[5] Gaius, *Inst.* III. 224.

prout ei visum fuerit. Sed cum atrocem injuriam praetor aestimare soleat,' etc. He thus manifestly anticipates the rule which Ulpian records as confirmed in the next century.

The municipal laws, which may, or may not, follow the lines of Roman law, are full of instances of *recuperatoria judicia*. The ninety-fifth chapter of the *lex Ursonensis* is, as we have seen above,[1] occupied in regulating the procedure of *recuperatores*, and their services are invoked in case of breaches of the *leges theatrales* (chaps. 125, 126), of neglect of sacred rites (chap. 128), of disobedience by magistrates to the decrees of the local senate (chap. 129), of irregularities in the appointment of a *patronus* (chap. 130) or a *hospes* (chap. 131), and finally in prosecution for treating at elections (chap. 132). The *formula* is the same in all cases, 'dare damnas esto, ejusque pecuniae cui volet reciperatorio judicio apud duumvirum . . . actio petitio . . . esto.'[2]

Mommsen, as it seems to me, builds too large an hypothesis on the basis of these instances and others quoted above.[3] He maintains that 'every suit for a fine, so far as it is treated as a *judicium privatum* at all, is decided by *recuperatores*'. It is difficult to accept this conclusion in face of the consideration that even in the *lex Ursonensis* there are many instances[4] of such suits for penalties without any provision for *Recuperatores*, and that there is no mention of them whatsoever in the five cases of civil suits for fines[5] recorded

[1] See above, p. 214.

[2] *Lex Ursonensis*, in Bruns, *Fontes*[7], pp. 136–140.

[3] Above, p. 216. See Mommsen, *Juristische Schriften*, Vol. III, p. 96. Those which he adduces in support of his conclusions are the patron in Gaius (*Inst.* IV. 46) and the clauses in the Bantine Tables and the *lex Julia Agraria*.

[4] These are in chaps. 61, 73, 74, 81, 92, 93, 97, 104. In some of these the suit is for a fixed sum, in others 'quanti ea res erit'. See Bruns, *Fontes*[7], pp. 127–134.

[5] Mommsen, *Juristische Schriften*, Vol. I, p. 352.

in the laws of Salpensa and Malaga, or the two cases in the law of Tarentum.

In another passage[1] Mommsen assumes that all the *publica judicia* in the *municipia* of Italy, referred to in the *lex Julia*,[2] are not only of the nature of the private suits in which public interests are concerned[3] (this is probably true), but that they involve a 'trial before *recuperatores* with a magistrate for accuser'. This seems improbable; only two specific Italian instances are known, those of the *lex Tarentina*;[4] one deals with a petty matter, the demolition of buildings; the other is the more serious charge of the embezzlement of public moneys with its fourfold penalty (the same as for a *fur manifestus*); but in neither is there anything said about a *recuperatorium judicium*.

Still less should I agree with Mommsen when he says[5] that the 'starting-point of the later *quaestiones* is the common prosecution for theft which the praetor orders and the *recuperatores* appointed by him decide'. I know of no cases where *recuperatores* occur in the common *actio furti*, and there are passages which tell strongly against the supposition that such actions were sent before them. By the *lex Rubria*,[6] in all the actions which entail *infamia* as their consequence (*furti, injuriarum, mandati, tutelae*, etc.), the municipal magistrate, so far as jurisdiction is allowed him, is instructed to refer the question to a *judex arbiterve*; the employment of *recuperatores*, though they are mentioned elsewhere, is not one of the alternatives named here. In the formula

[1] Mommsen, *Strafrecht*, p. 227.
[2] *Julia Municipalis*, verse 119 (Bruns, *Fontes*[7], p. 108).
[3] See above, p. 180, and below, Vol. II, p. 147. Also Mommsen, *Juristische Schriften*, Vol. I, p. 354, note 19.
[4] In verse 34 and verse 5 respectively. See Bruns, *Fontes*[7], p. 120.
[5] Mommsen, *Staatsrecht*, I[3], p. 313, note 5.
[6] *Fragmentum Atestinum*, verses 1–4 (Bruns, *Fontes*[7], p. 101).

in Gaius,[1] in like manner, which extends the Roman procedure to the foreign thief, the heading reads *Judex esto*. Such a provision would be most unlikely, if the Roman thief were tried before *recuperatores* and not before the *unus judex*. In all these cases[2] I think that Mommsen has stretched too far the range of recuperatorial judgements.

There is no place for *recuperatores* in a *legis actio*, and the definition of Gaius[3] necessarily excludes them from the *legitima judicia*. They are, in all probability, a device of the court for foreigners extended at a comparatively late period to cases between citizens. It may be a consequence of this, that, while the *legitimum judicium in personam* is absolutely final, the decision of *recuperatores* does not in itself completely bar a renewal of the suit; such a renewal can be guarded against only if the praetor thinks it proper to allow the defendant to insert in the formula for the new trial the *exceptio rei judicatae, vel in judicium deductae*.[4]

It has been worth while to dwell at length on these *recuperatoria judicia*, because this is the point at which the procedure of the private law and that of the criminal law

[1] Gaius, *Inst.* IV. 37 'Judex esto. Si paret L. Titio, ope consiliove Dionis Hermaei filii furtum factum esse paterae aureae, quam ob rem, si civis Romanus esset, pro fure damnum decidere opporteat,' etc.
[2] I have not ventured to handle in the text yet another passage (*Juristische Schriften*, Vol. I, p. 173) from his comment on the *lex Rubria*, in which Mommsen contrasts the power of the Roman magistrate to order arrest and seizure of goods with that of the municipal magistrate who, in like circumstances, could only set on foot a 'Recuperatorengericht'. There is nothing of the sort in the chapter (xxii) with which he is dealing. The only passage like it is at the end of chapter xxi, 'ob eam rem judicium, *recuperationem* is qui ibi (i.e. Romae), jure dicundo praeerit ex hac lege det,' and this is a clause merely saving the rights of the Roman magistrate. In chapter xx, where the situation is more or less parallel to that in chapter xxii, the *unus judex* is expressly provided.
[3] See above, p. 207.
[4] Gaius, *Inst.* IV. 106, 107.

approach each other most nearly. The connecting link between them, so far as trial by jury is concerned, is to be found in the arraignment of Roman officials by aliens on the charge of *repetundae*. On the one hand these trials for extortion furnish the earliest criminal jury-courts, which serve as the pattern on which the system was subsequently extended to cover the whole field of crime; on the other hand, the earliest prosecution for *repetundae*,[1] that by the Spanish provincials against their governors in 171 B.C., is evidently framed on the analogy of the civil suits already allowed to foreigners, and the jurors in that case are styled *recuperatores*.[2]

[1] Livy, XLIII. 2. 3 (see below, Vol. II, p. 2).

[2] We have a reversion to this style, again in a case where foreigners are concerned, in the time of Tiberius. After the Senate has acquitted Granius Marcellus of the charge of *majestas*, 'de pecuniis repetundis ad recuperatores itum est.' Tacitus, *Annales*, I. 74. 7.

CHAPTER XIII

TRIALS BY SPECIAL COMMISSION, AND THE SENATUS CONSULTUM ULTIMUM

I HAVE traced in chapters VIII and IX the normal course of procedure in a criminal trial. I have mentioned[1] some exceptions, chiefly religious and military, to the rule that no Roman can be scourged or put to death without the consent of the People. It is now time to enter into the very difficult questions which arise in connexion with certain other notable cases, in which the magistrate in the city is found inflicting capital punishment on Roman citizens. The difficulty is increased by the circumstance that Mommsen, to whom we naturally turn for light on the obscure places of Roman law, has greatly changed his opinion on this subject since the publication of the first edition of his *Staatsrecht*. To my mind, more guidance may be found from the earlier pronouncement of the great German scholar than from the solutions set forth in his later work, the *Strafrecht*. The problems will demand careful and detailed consideration; but it may be well to anticipate my own conclusion so far as this, that I believe that the instances which Mommsen includes under a single head really fall into several distinct categories, and more especially that the law of Caius Gracchus, 'ne de capite civis injussu populi judicaretur,' marks an important dividing point in the history.

During the middle period of the Republic we find a number of instances in which the magistrate by special commission

[1] See above, pp. 16, 20, 30, 111.

holds a criminal court (*quaestio*), and condemns offenders to death without allowing them the opportunity of appeal to the People. At the risk of tediousness it will be necessary to mention these cases individually. The earliest[1] of them is ascribed in the annals to the year 413 B. C. M. Postumius, a military tribune with consular power, had been murdered by his soldiers, and the consuls of the next year were empowered by decree of the plebs to hold a criminal court (*quaerere*) on the matter. Some guilty persons perished, whether by suicide or execution Livy is uncertain.[2] Mommsen[3] rejects this story as an invention of later times. Our accounts of events in the fifth century B. C. are always to be received with some scepticism. But even if the facts be invented, the story is evidence of the beliefs of a comparatively early period. There are at least three cases (in 331,[4] 180, and 152 B. C.) when an epidemic of poisoning appears among Roman matrons, and each is dealt with by a special *quaestio*. The *quaestio* of 180 B. C. is said by Livy[5] to be *ex senatus consulto*. Many women seem to have been put to death.[6] If, as I believe,[7] the protection of the Valerian law extended to women, these cases have a claim to their place on our list. In the next case, that of a Capuan conspiracy in 314 B. C., the difficulty as to appeal does not arise ; for on this occasion

[1] The dealing with a Tarquinian conspiracy in 500 B. C. by the consul Sulpicius (Dionysius Halicarnasensis, V. 53–57) is rightly dismissed by Rubino (*Römische Verfassung*, p. 445) as not really a *judicium*.

[2] Livy, IV. 51. 3 'Per paucorum supplicium, quos sibimet ipsos conscisse mortem satis creditum est, transacta re'. The Romans would have been the better for a provision similar to that of the English law, which ordains a coroner's inquest on the body of every criminal executed in prison.

[3] *Strafrecht*, p. 172, note 1.

[4] See Livy VIII. 18.

[5] Livy, XL. 37. 4.

[6] Valerius Maximus (II. 5. 3) says 170 on one occasion.

[7] See above, p. 142 seq.

a dictator, C. Maenius, was appointed ; and, if Mommsen[1] be correct in the date which he conjecturally assigns to the limitation placed in later times on the dictator's powers,[2] a dictator in 314 B. C. was still free from *provocatio*.

After an interval of more than a century we find the famous case of the Bacchanalian conspiracy of the year 186 B. C., which was dealt with in this and the following year. This must be treated more at length hereafter. Meanwhile we pass to the year 172 B. C., the first occasion on which Mommsen[3] allows the existence of a special criminal court. This was held by the urban praetor, C. Licinius, nominated by the senate under a decree of the plebs (*lex Marcia*), to compensate and punish the wrongs which some Ligurian tribes had suffered at the hands of the late consul, Popillius. The proceedings were rendered ineffectual by the collusive action of Licinius.[4] A somewhat similar case in 150 B. C. against Ser. Galba for his treatment of the Lusitanians collapsed at an earlier stage. A legislative proposal of the tribune Scribonius (analogous to the *lex Marcia*) was brought before the People, and supported by Cato, but thrown out by Galba's influence.[5] More effective was a commission in the year 141 B. C. against L. Hostilius Tubulus, who as praetor[6] had been bribed to effect the condemnation

[1] *Staatsrecht*, II[3], p. 165.

[2] See Festus, s.v. *optima lex*.

[3] *Strafrecht*, p. 172, note 2.

[4] Livy, XLII. 21 and 22.

[5] I adopt Mommsen's interpretation (*Strafrecht*, p. 172, note 2) with slight variation; but as we have no longer Livy to guide us, the details are very doubtful. Cicero (*Brutus*, 23. 89) speaks of a 'rogationem privilegii similem'. Livy, in a casual notice (XXXIX. 40. 12), says, that 'Cato nonagesimo anno Galbam adduxit ad populi judicium'.

[6] Tubulus is said by Cicero (*de Finibus*, II. 16. 54) to have exercised a 'quaestionem inter sicarios'. It is doubtful whether he, too, was acting in the previous year as special commissioner (so Zumpt, *Criminalrecht*, II. ii. 141), or whether, as Mommsen thinks (*Strafrecht*, p. 615), his case is evidence of a standing jury court for murder half

of innocent persons. The consul Servilius Caepio was commissioned under a plebiscitum proposed by P. Mucius Scaevola to proceed against him, and Tubulus retired into exile without awaiting his trial.[1] According to Asconius he was afterwards arrested[2] ('de exilio arcessitus ut in carcere necaretur'), and committed suicide. In the year 138 B. C. we find the consuls holding a *quaestio* under decree of the senate on the members of a certain company of Roman publicans, who were accused of organizing brigandage in South Italy. After a protracted trial they were acquitted.[3] Finally we have the proceedings against the adherents of Tib. Gracchus, carried out by P. Popillius Laenas, the consul of 132 B. C.[4]

In all these cases there are certain common features which

a century before Sulla. I am inclined to think that the story of L. Cassius (consul in 127 B.C.), which is the origin of the proverbial *Cui bono?*, points to a relation between the *quaesitor* and his assistants in murder trials of this period more proper to a commissioner with his *consilium* of advisers, chosen by himself, than to the standing jury courts, in which the president never commented on the evidence: 'quotiens quaesitor judicii alicujus esset in quo quaerebatur de homine occiso, suadebat atque etiam praeibat judicibus . . . ut quaereretur, cui bono fuisset perire eum, de cuius morte quaerebatur' (Asconius, *in Milonianam*, 40).

[1] Cicero, *de Finibus*, II. 16. 54.

[2] Asconius, *in Scaurianam*, 20. Mommsen (*Strafrecht*, p. 71, note 1, and p. 197, note 2) thinks that this was on account of some fresh crime; but surely such a crime would be dealt with, not by the Roman magistrates, but by those of the new *civitas*. I should be inclined to believe that Tubulus, like Pleminius (see above, p. 162), was seized when he was on his way to his intended refuge. Cicero (*de Finibus*, II. 16. 54) mentions his hurried retirement, not in connexion with his ultimate fate, but only as illustrating the point that he was a clumsy villain who had left himself no plea for defence, 'res enim aperta erat.' It is possible, of course, as Mommsen suggests elsewhere (*Staatsrecht*, III, p. 52, note 1), that the Roman government on this occasion encroached on the rights of a foreign state, as Sulla did in his proscription. See below, Vol. II, p. 33, note 2.

[3] Cicero, *Brutus*, 22. 85.

[4] This is the last case before the law of Caius Gracchus, which constitutes, as I believe, a fresh departure.

distinguish them from the regular criminal trials, of which that of T. Quinctius Rocus[1] is a typical instance. In the first place the superior magistrates, the consuls and praetors, play an active part; secondly, there is no mention of appeal to the People after the magistrate has condemned; thirdly, the accused are not always allowed to go into exile, but are thrown into prison, suicide being the usual result; fourthly, in three cases, that of the female poisoners, that of the Bacchanalian conspirators, and that of the adherents of Tib. Gracchus, wholesale executions take place. There is, further, a distinction to be noticed that in the three last named cases, and in that of the *publicani* in 138 B. C., there is no previous decree of the People, whereas in the others we hear of a special law regularly passed.

So far as I know, Mommsen is the only modern writer who has attempted any searching analysis of the legal basis of such proceedings, and my observations must largely take the form of criticisms on his presentation. Mommsen treats as belonging to a single class all the cases in which a decree of the People has ordained any sort of special trial, whether by a magistrate or *quaesitor* deciding on his own responsibility, or by a jury court of which the magistrate is merely the president. Such trials are commonly known to modern scholars as *quaestiones extra ordinem*. Mommsen, though he would not deny, of course, that the phrase *extra ordinem quaerere* is frequently found in the commission to the magistrate, seems to hold[2] that the words refer merely to the assignment of this special *prcvincia* to him without the intervention of the lot, or to the precedence which such cases would have over ordinary trials. As a general designation of this sort of trial he prefers the word *privilegium*.[3]

[1] See above, p. 156.

[2] Mommsen, *Strafrecht*, p. 193, note 3.

[3] Mommsen, ibid., p. 196.

This word is used, as we shall see later on,[1] in connexion with the trial of Clodius for sacrilege, and again with that of Milo for Clodius's murder;[2] but I am not aware of any other instances. The phrase is very inappropriate to the Bacchanalian trials of 186 B. C. or those under the *lex Varia* of 91 B. C., neither of them directed against individuals by name;[3] and, on the whole, I think that *quaestio extraordinaria* is the more satisfactory term.

Mommsen[4] considers all such trials even when based on the express order of the People to be 'unconstitutional'. 'The *comitia*,' he says, 'were not, strictly speaking, qualified to erect such a tribunal, since the institution of a magistracy without appeal was forbidden in a general law.' It is, however, obviously one thing to set up a magistrate, such as was Sulla or Caesar, all of whose sentences are to be free from the possibility of an appeal, and quite another thing that the People in the plenitude of its power should put aside appeal in a particular case or set of cases, and should order a magistrate, whether assisted or not by a jury, to deal once for all with those cases. Mommsen justly remarks that in neither category is the legal validity of such decrees disputed. When he adds that they are 'blamed' he is undoubtedly right as regards the general powers granted to Sulla[5] and Caesar, but as regards a particular *quaestio*

[1] See below, Vol. II, p. 41.

[2] Asconius, *in Milonianam*, 31 (see below, p. 231, note 1). See also Aulus Gellius, *Noct. Att.* X. 20. 3. It is not much to the point that Cicero (*Brutus*, 23. 89) speaks of the proposals of Scribonius about Galba and the Lusitanians (above, p. 227) as a *rogatio privilegii similis*.

[3] Compare Cicero, *de Legibus*, III. 19. 44 'In privos homines leges ferri noluerunt; id enim est privilegium' with 'privos privasque antiqui dicebant pro singulis' (Festus, *ad voc.*).

[4] *Strafrecht*, p. 199.

[5] 'Omnium legum iniquissimam dissimillimamque legis,' etc. Cicero, *de Lege Agraria*, III. 2. 5, also *de Legibus*, I. 15. 42.

duly ordered by the People, there seems to be commonly no blame more specific than the obvious remark that where the ordinary procedure is sufficient to deal with given circumstances it is unnecessary to invent a new one.[1]

The wide extension which Mommsen gives to the category of such *quaestiones*, whether we call them *extraordinariae* or *privilegia*, includes not only the list which I have already given,[2] but a number of later cases: the Peducaean[3] plebiscite against the defaulting Vestals in 114 B. C., the Mamilian of 110 B. C. against the accomplices of Jugurtha; the action taken against Caepio, after his defeat by the Cimbri in 105 B. C., for plundering the temple of Tolosa,[4] possibly likewise the proceeding against Caepio's enemy Norbanus ten years later[5] for *majestas* and that against Marius for bribery,[6] the Varian law of 91 B. C. against the associates of Drusus, the Fufian of 61 B. C. against the sacrilege of Clodius, the Pompeian of 52 B. C. under which Milo was tried for killing Clodius, and the Pedian of 43 B. C. against the assassins of Caesar.

[1] This was the opinion of Hortensius in Milo's case (Asconius, *in Milonianam*, 39), to which Cicero (*pro Milone*, 6. 14) and the senate generally seem to have assented. Only the headstrong Caelius goes further in his opposition to Pompey's legislation, so that 'et privilegium diceret in Milonem ferri et judicia praecipitari' (Asconius, *in Milonianam*, 31).

[2] See above, p. 226 seq.

[3] See above, p. 30.

[4] So Mommsen (*Strafrecht*, p. 198). Zumpt suggests (*Criminalprocess*, p. 477) that there may have been more than one prosecution, and he places one trial in 95 B. C. The nature of the proceedings is in any case very obscure. If Valerius Maximus (IV. 7. 3) is to be trusted, Caepio was actually thrown into prison, but released by a friendly tribune, L. Reginus, who accompanied him into exile. In another passage (VI. 9. 13) Valerius says that he was strangled in prison. This may possibly be true of his second trial, if there were two, but at one time he escaped by exile, for Cicero (*pro Balbo*, 11. 28) says that he became a citizen of Smyrna.

[5] See below, Vol. II, p. 21.

[6] In 115 B. C. Plutarch, *Marius*, 5. 3. See below, p. 239, note 1.

I think that the system which groups all these under a single head ignores certain essential differences. My own belief is that we ought to distinguish very clearly between two different classes of tribunal set up by the People; according as the *quaesitor* is or is not bound by the votes of his jury;[1] and likewise (which is even a more important matter) to separate[2] the whole of the state trials mentioned at the beginning of this chapter[3] (including those conducted by Popillius in 132 B. C.) from the action of the later consuls, Opimius (122 B. C.), Marius (100 B. C.), Cicero (63 B. C.) and Dolabella (44 B. C.). Unless this is done we get confused in the attempt to analyse the legal nature of the several proceedings.[4]

The central point in the whole discussion is the interpretation to be placed on our records of the great case of the Bacchanalian conspiracy of the year 186 B. C. Here all the main difficulties present themselves under their clearest aspect. There is no place in the story, as told by Livy,[5] where a decree of the People can come in. The consuls having got wind of the conspiracy bring their information before the senate. The senate directs the consuls *extra ordinem quaerere*; in all probability this *senatus consultum* contained the clause which is found in the supplementary one whose text has been preserved to us—'seiques esent quei avorsum ead fecissent, quam suprad scriptum est, eeis rem caputalem faciendam censuere'.[6] The consul next assembles the people in a *concio*, explains to them the

[1] This distinction is explained below (pp. 237, 238).
[2] See below, p. 240 seq. [3] See above, p. 226 seq.
[4] I shall give my own classification later on. Mommsen's attempts at grouping are to be found in *Strafrecht*, pp. 197–199 and p. 258.
[5] Livy, XXXIX. 14 seq.
[6] *Senatus consultum de Bacchanalibus*, verse 24. See Bruns, *Fontes*[7], p. 165, and Livy, XXXIX. 18. 8.

circumstances of the case, and reads to them the *senatus consultum*. Then without further delay he proceeds to act upon the strength of it. There is no time for the intervention of the *trinum nundinum*, which was necessary in order to elicit the popular vote. The proceedings under the *senatus consultum* commence in Rome itself. The consul arrests Bacchanalians wholesale. They include both Romans and aliens, the names of the ringleaders are given—'Marcum et Caium Atinios de plebe Romana et Faliscum Lucium Opiternium et Minium Cerrinium Campanum.' Next comes their fate[1]—'adducti ad consules fassique de se nullam moram indicio fecerunt. . . . plures necati quam in vincula conjecti sunt; magna vis in utraque causa virorum mulierumque fuit.'

To Zumpt the narrative presents no difficulty. He takes it merely as a confirmation of his theory that the reference by the magistrate to the People acting as *judex* was not admissible where *manifesti et confessi* were concerned, because there was no disputed question to go to the jury. I have given in Chapter VIII my reasons for disagreeing with this theory of Roman trials before the People and will only say here that I cannot accept the theory as an answer to the difficulties which beset the Bacchanalian trials.

The solution propounded by Mommsen in his latest work, the *Strafrecht*, demands fuller consideration. In the third edition of his *Staatsrecht* (published in 1887) Mommsen had given indications that his later theory was already floating before his mind, though he had not yet brought himself to accept it. 'The decree,' he writes,[2] 'of the senate *eeis rem caputalem faciendam*, so the original document runs, does 'not, it is true, exclude *provocatio* in cases where the same 'is otherwise applicable; still it appears astonishing in the

[1] Livy, XXXIX. 17. 7 and 18. 5.
[2] *Staatsrecht*, II[3], p. 112, note 2.

'highest degree that in no one of these cases is there so 'much as a hint that *provocatio* took place.'

The objection, which seemed sufficiently staggering in 1887, had lost its force for Mommsen in 1899. His final conclusion is that the procedure of the consuls as described by Livy was only a preliminary inquiry. 'To the "question" 'of the consul[1] every one must needs answer, in case a tribune 'does not come to his assistance; any distinction according 'to the condition or sex of the accused is quite inconceivable 'on the occasion of the inquiry. But when once this has come 'to an end, and the magistrate is convinced that a capital 'crime has been committed, the guilty persons are not all 'treated in the same way; the consul himself condemns to 'death the women, foreigners, and slaves, and executes the 'sentence; against the citizens the formal process which we 'shall describe just now (i. e. the trial before the *comitia*) is 'instituted. This is in itself the main procedure; but, as is 'shown by the committal of it to officers mostly of inferior 'station, and by other indications,[2] it is as a general rule 'a formal process directed against accused persons who have 'practically already been found guilty.'

I think it is difficult to read with an open mind Livy's account of the Bacchanalian conspiracy without being convinced that this explanation[3] will not serve. The obvious meaning of Livy is that the more guilty Bacchanalians, whether Romans or not, were put to death at once by the

[1] *Strafrecht*, p. 152.

[2] The 'other indications' are explained in the note by a not very relevant quotation from Plautus, *Captivi*, 475:

De foro tam aperto capite ad lenones eunt
Quam in tribu aperto capite sontes condemnant reos.

[3] It is fair to observe that later on in the book (*Strafrecht*, p. 258, note) Mommsen speaks of the maintenance of *provocatio* under the Bacchanalian commission as only a possible supposition.

consuls on the strength of the powers which had been stirred up in them by the decree of the senate, and that the culprits were not allowed to appeal to the People.

We are thus left face to face with the difficulty—Under what forms and with what justification were these Roman citizens put to death in spite of the Valerian laws on *provocatio*? My conclusion would be, on the whole, that set forth in the first edition of Mommsen's *Staatsrecht*,[1] in a passage which has disappeared from the last edition. 'In 'the city likewise the criminal jurisdiction of the consuls under 'certain circumstances revives. The criminal procedure of 'the republic in its development brought about the practical 'abolition of the death penalty for Roman citizens; but it 'was never forgotten that the full *imperium* included the 'unlimited right of life and death over the citizen, and that 'the magistracy, fettered by one law, may be reinstated in 'its old omnipotence by another law or by what is equivalent 'to law. This is undoubtedly the case when the chief magis-'trates were commissioned by special decree of the People to 'exercise their suspended power for a particular category of 'crimes. But even when only a *senatus consultum* to this 'effect is issued there is frequently ascribed to it the force of 'a *privilegium*, especially where delay would be dangerous. 'Such suspensions of the right of appeal are by no means rare[2] 'in the last times of the republic and under the early princi-'pate, and, though the strict law was thereby infringed, and 'the consul was even sometimes held responsible for the in-

[1] *Staatsrecht*, I[1], p. 124.

[2] Among the cases referred to in the note comes that of the Bacchanalians, of which he remarks that 'the proceedings took place in the first instance in Rome, and therefore must have had the suspension of the right of *provocatio* as their necessary condition'. He includes under the same head the execution of the Catilinarians, which I should set elsewhere.

'fringement, yet in practice prescription pronounced rather in 'favour of the legality of the action.' After reference to the case of Antony's action against the pretended Marius in 44 B. C. (which ought, as I believe, to fall under another category) he concludes—'One common feature is observable 'in all these cases—that is, that the consular criminal juris-'diction appears only when *provocatio* is rightly or wrongly 'set aside, and never as a preliminary to appeal.'

The proceedings then of the magistrates against the Bacchanalians and in other similar cases are essentially judicial. The consul or praetor assembles a *consilium* of advisers to assist him. We are told by Cicero[1] that Caius Laelius was summoned to the bench on the occasion of the trial of Blossius of Cumae as an accomplice of Tiberius Gracchus; and from Plutarch's narrative of the same trial[2] we gather that the accused was allowed to speak for himself, and might be cross-examined as to his statements either by the *quaesitor* or by any of his assessors. The powers exercised by the judge are precisely the same, whether he has been appointed by the People or by the senate. The former was the proper and regular method; the latter a practice gradually introduced from motives of convenience and continued until peremptorily forbidden by the law of Caius Gracchus.

[1] Cicero, *de Amicitia*, 11. 37.

[2] Plutarch (*Tiberius Gracchus*, 20. 3) makes Scipio Nasica the questioner in presence of the consuls. Cicero's (*de Amicitia*, 11. 37) version of the same well-known tale places the scene at a private conference between Laelius (who tells the story) and Blossius. It is very improbable that Blossius should have been at large. It must be remembered that the *de Amicitia* is an imaginary dialogue, in which Cicero may well have taken some liberties with tradition for the sake of presenting a famous illustration of his theme in the more dramatic setting of a personal recollection of the speaker. Valerius Maximus (IV. 7. 1) obviously copies Cicero.

Mommsen seems to me at no time to have sufficiently appreciated the difference between the cases before and after the law of C. Gracchus—*ne de capite civium Romanorum injussu populi judicaretur*.[1] Otherwise his analysis of the proceedings of these special commissions, as presented in his earlier work, is clear and convincing, and it is to be regretted that he should have abandoned the position which he there took up.

I will now attempt to sum up, for the sake of clearness, the various principles which govern the several proceedings, and to give to each case what appears to me to be its proper place in the system. The order will be as follows:

1. First we have the category represented by the proceedings against the murderers of Postumius, against Tubulus, against the Vestal Virgins in 113 B. C.,[2] and against Servilius Caepio.[3] Here everything seems to be regular; the People by a legislative act restores to the magistrate his full right to punish, or sets up a temporary commissioner with similar rights, that he may act in specified cases on his own judgement, or with such assessors as he may please, with full power of life and death, and with facilities for previous arrest which will enable the sentence to be carried out.

2. Next follow cases in which the People seeks its remedy against the offender, not by reverting to the ancient and arbitrary powers of the magistracy, but by calling into temporary existence a tribunal similar to the standing jury courts. These cases all belong to the last age of the

[1] As quoted in Cicero, *pro Rabirio*, 4. 12.

[2] I should place this trial in this rather than in the next category, because Cassius was blamed by public opinion for the severity of his decision (Asconius, *in Milonianam*, 40), whereas otherwise the responsibility would have lain with the *judices* rather than with the *quaesitor*.

[3] In Caepio's case there was evidently the vote of the People, for we hear that some tribunes were prevented by force from coming to veto the *rogatio*. Cicero, *de Oratore*, II. 47. 197.

Republic, when these *quaestiones perpetuae* were beginning to be recognized as the proper machinery for ordinary criminal justice. In the cases in question this machinery is specially directed against a particular offender or group of offenders. Though in form it is still recognized that the function of judgement belongs to the magistrate, in practice his power is here reduced within very narrow limits. The people itself prescribes the punishment which it chooses to visit on the offenders, but makes that punishment conditional on the result of the *quaestio* of the magistrate as to the facts, and in his decision of the issue he is bound by the advice of his jury. The magistrate has in reality only to announce the verdict of the jury, and straightway after that announcement the punishment thereupon becomes due. The most important practical difference between this class of trials and the first is that there is here no provision for previous arrest and so the condemned can always[1] escape by *exilium*. The procedure must be examined more at length in connexion with that of the *quaestiones perpetuae*. Here I will only say that I should place in this category[2]

[1] Mommsen (*Strafrecht*, p. 198, note 2) believes that death was actually inflicted on Q. Varius when he was condemned under his own law in 89 B.C.; but the word; 'excesserat' (Cicero, *Brutus*, 89. 305) more commonly indicates exile. Cicero indeed (*de Natura Deorum*, III. 33. 81) cites it as an instance of providential justice that Varius 'summo cruciatu supplicioque periit', but this may well have been one of the deeds of the subsequent civil strife.

[2] That in the Mamilian commission the *judices* and not the *quaesitor* had the last word; and that these *judices* were not chosen by him at will, but prescribed for him by the law, which merely repeated the qualifications of the *lex Acilia*, is shown by Cicero's remark (*Brutus*, 34. 128): 'Opimium . . . Gracchani judices sustulerunt.' The same must have been the case with the Varian commission, for it continued in force during the year 89 B.C. (see Asconius, *in Cornelianam*, 70), but its practical effect was entirely altered by the substitution of a special set of jurors, who condemned the author of the Law. See below, Vol. II, p. 96.

the Mamilian (110 B.C.) and Varian (90 B.C.) commissions, the trial of Clodius (61 B.C.), and that of Milo (52 B.C.), and that of the assassins of Caesar (43 B.C.).[1]

3. The cases of the Bacchanalians, of the *publicani* of 138 B.C., of the women accused of poisoning, and of the adherents of Tib. Gracchus—of whom Valerius Maximus (IV. 17. 1) expressly says, *quum senatus consulibus mandasset ut in eos more maiorum animadverteret*—seem to me to find a sufficient explanation in the passages which I have quoted from the first edition of the *Staatsrecht*. The functions exercised by the magistrate are those of a judge, and his powers are precisely the same as those granted to him in the instances which I have placed in my first category, only here they have not been conferred by the People but stirred up by the action of the senate. I should agree that such action was a usurpation on the part of the senate, just as was its practice of granting dispensations.[2] Polybius[3] clearly thought that if the senate wished any such powers to be exercised it ought to go to the People to get them. Nevertheless, the practice was no doubt convenient in the presence of widespread and dangerous crime, and it was acquiesced

[1] Possibly we should add a special commission for the trial of Marius for bribery in 115 B.C. (see above, p. 231), and another for the trial of Norbanus in 94 B.C. for an offence against the *lex Apuleia majestatis* (103 B.C.); see below, Vol. II, p. 21.

[2] Explained by Asconius, *in Cornelianam*, 51.

[3] So at least I should interpret Polybius' words (VI. 16. 2): *τὰς δ' ὁλοσχερεστάτας καὶ μεγίστας ζητήσεις καὶ διορθώσεις τῶν ἁμαρτανομένων κατὰ τῆς πολιτείας, οἷς θάνατος ἀκολουθεῖ τὸ πρόστιμον, οὐ δύναται συντελεῖν ἂν μὴ συνεπικυρώσῃ τὸ προβεβουλευμένον ὁ δῆμος.* An instance in point would be the authorization by the People which the senate obtained in the case of the Campanians (Livy, XXVI. 33. 10).

Mommsen has another explanation (see above, p. 160, note 2), taking Polybius to refer not to the appointment of a commission, but to the trial of an individual case on appeal to the People. I do not believe that the senate has anything to do with appeal cases.

in so long as only ordinary criminals were involved. The attempt to apply the procedure to political offenders led the Romans to protest and to quash the precedents. They did this by the law of C. Gracchus *ne de capite civium iniussu populi judicaretur*. This law appears to have been declaratory and retrospective; for Popillius, the consul who had acted against the Gracchans in 132 B. C., is said to have been the person aimed at, and he was in fact condemned and went into exile.[1] The law must then have clearly prohibited such judicial proceedings as those in which Popillius had engaged: and as a matter of fact none such seem to have been attempted thenceforth except by express decree of the People.

4. Cicero[2] acknowledges the obligation of Caius Gracchus's law, and claims that it will not be traversed by the execution of death or of perpetual imprisonment on the Catilinarians. This seems to indicate a clear distinction between the action of Cicero and that of Popillius, against which the law of Caius Gracchus was directed. In what did the distinction consist? Cicero himself in the next sentence supplies the answer. His action was not a judicial execution of citizens, but an act of war against enemies.[3] Mommsen, in a passage to be quoted below,[4] has clearly explained that the *perduellis* has by his own act placed himself in the position of a foreign enemy, and so has ceased to be a citizen. The senate fell back upon the doctrine

[1] See Plutarch, *Caius Gracchus*, 4. 2, and Cicero, *de Domo*, 31. 82, *Brutus*, 34. 128.

[2] Cicero, *in Catilinam*, IV. 5. 10. See below, p. 244.

[3] Clodius's 'general law' in 58 B.C. likewise related to those who had put 'citizens' to death without trial. It was avowedly aimed at Cicero, but Cicero afterwards regretted that he had not ignored it or even praised it, as having nothing to do with the execution of the Catilinarians (*ad Atticum*, III. 15. 5).

[4] See below, p. 243, and also above, p. 104.

when they were deprived of the power of erecting a judicial tribunal. They simply passed a decree 'that the consuls were to see to it that the state took no harm', and the consuls thereupon put in exercise their full power against those who had constituted themselves *hostes*. The first person[1] against whom the new method was employed was Caius Gracchus himself, and Opimius, the consul who put him to death, was acquitted by the people when brought to trial for his act. Saturninus and the Catilinarians[2] fell in the same way; and on similar grounds the consuls of 44 B. C., Antony and Dolabella, put to death the false Marius and other rioters after Caesar's death without even waiting to be reminded of their duty by the senate.[3] In the concluding volume of the *Staatsrecht*[4] published as lately as 1888, Mommsen sums up the matter admirably:

'The quasi-dictatorship instituted by the senate is treated, 'broadly speaking, as a portion of constitutional order, 'introduced in the time of the Gracchi; not only did the '*populares* occasionally make use of it when they had the

[1] Though Appian is indecisive, Plutarch's account (*Tiberius Gracchus*, 19. 3) makes it clear that the *ultimum senatus consultum* was not passed against Tiberius Gracchus in 133 B.C. The action of Nasica against Tiberius himself (as distinguished from that of Popillius against his adherents) was what Mommsen (*Staatsrecht*, III, p. 1241) calls 'unmittelbares Nothwehrsrecht', undertaken by one who constituted himself for the occasion a 'tumultuarius miles'. See also Mommsen, *Röm. Forsch.*, Vol. II, p. 247. Livy's statement in the course of his story (III. 4. 9 and VI. 19. 3) that such decrees were issued two or three hundred years earlier (in 464 and 384 B.C.) cannot be considered historical.

[2] That before executing the Catilinarians Cicero thought fit to take the advice of the senate, did not alter the legal situation. See my *Life of Cicero*, p. 155.

[3] In this case the slaves were crucified, the citizens thrown from the Tarpeian rock. See Cicero, *ad Atticum*, XIV. 15. 2 'de saxo! in crucem! columnam tollere!' cf. Appian, *Bellum Civile*, III. 3.

[4] *Staatsrecht*, III, p. 1243.

'upper hand in the senate,[1] but Caesar and the Caesarians[2] 'themselves treat it as valid in law, even where they blame the 'application of it. During the last century of the Republic 'the prerogative of the senate to exercise over the citizens the 'rights of war, in the old unlimited sense of the period of the 'kings, was never seriously disputed.'

These doctrines require restating in order to complete the picture of the various forms in which the state takes action against offenders. Mommsen, in his later work, if he does not expressly retract the doctrine set forth in the *Staatsrecht*, at any rate expresses it with more hesitation and less clearness. The only point, however, in which he seems to me directly open to correction is that he expressly identifies[3] the action of Popillius in 132 B. C. with that of Opimius, Marius, and Cicero. Mommsen is debarred, by the theory which he has now adopted of the Bacchanalian trials of 186 B. C., from explaining Popillius's executions by the precedent of that year. On the contrary Popillius (who certainly did not allow *provocatio*) has to be made a precedent for Opimius and the rest. Popillius's action is made a fresh start for the future instead of being the final instance, as I believe it to be, of proceedings founded on precedents from the past.[4] Mommsen does not seem sufficiently to appreciate the difficulty that the law of Caius Gracchus is thus represented as so badly drawn that, though expressly directed against the proceedings of Popillius, it failed to

[1] As in 83 B.C. against Sulla when 'timens Senatus . . . statuit ut curarent consules (Scipio et Norbanus) ne respublica acciperet detrimentum'; (Exuperantius, *Opusculum*, ch. 7.) Exuperantius certainly drew from Sallust; see Preface to Bursian's edition, Zürich 1868.

[2] Caesar, *Bellum Civile*, I. 7. 5; Sallust, *Catilina*, 29. 3.

[3] *Strafrecht*, p. 258.

[4] See Valerius Maximus, IV. 7. 1 'cum senatus Rupilio et Laenati consulibus mandasset ut in eos qui cum Graccho consenserant more majorum animadverterent'.

prohibit an exact repetition of those proceedings in future. It is surely much more natural to suppose that Caius Gracchus effectually barred one path, but that the Optimates found out another[1]—that what he forbade was a judicial trial, and that what they substituted was administrative action.

The difference between these two views of the Sempronian law may be illustrated by an incidental reference to Caius Gracchus's measure in a discussion of *perduellio* later on in the *Strafrecht*.[2] The passage is worth quoting for its own sake:

'The more heinous species of this crime is essentially 'distinguished from all other crimes by the circumstance 'that in *perduellio* the perpetrator by the very act passes out 'of the citizen ranks into the category of public enemies. 'When from this premise the consequence is drawn that all 'judicial proceeding is therefore unnecessary, and that the 'rights of war may be put in force, this is a party doctrine 'and contravenes law. But even under the observance of 'the Sempronian law, *which expressly prescribed the necessity 'for the trial for treason*, the effect of the verdict therein pro-'nounced is not condemnatory, but declaratory, and when 'judgement is given the consequences of the crime are ante-'dated to the moment of its commission. This is manifest 'from the circumstance that those consequences[2] which can

[1] Plutarch, *Caius Gracchus*, 18. 1, speaks of the dictatorial power as being *first* used by Opimius.

[2] *Strafrecht*, p. 590. On p. 592 Mommsen further explains that not only the testament of the *perduellis*, but all his dealings with his property from the moment of his crime are null and void. This doctrine is extended in later days to the person guilty of *repetundae*, who is treated as a state-debtor from the first. See Modestinus (circ. A.D. 250), *Digest*, XLVIII. 2. 20 'excepto majestatis et repetundarum judicio quae etiam mortuis reis', etc. . . . 'ex quo quis aliquod ex his causis crimen contraxit, nihil ex bonis suis alienare aut manumittere eum posse.'

'take effect after the death of the criminal are not here, as in 'all other crimes, barred by his death between the crime and 'the trial.'

If the Sempronian law really did, as Mommsen here assumes, 'expressly prescribe the necessity of a trial for treason,'[1] I cannot see how Cicero could, with any plausibility, have argued as he does—that Caius Caesar has not hesitated to pronounce on these men in spite of the law of Gracchus, 'because he knows well that the Sempronian law relates to Roman citizens, and that the man who is an enemy cannot by any possibility be a citizen,'[2] nor again can I imagine why Sallust the Caesarian should have refrained from introducing a refutation of this published statement, if it really admitted of refutation, into his master's speech.

My conclusion then would be that the *lex Sempronia* of C. Gracchus caused notable changes both in law and practice. From that time forward we have in the first place no more criminal *quaestiones* resting only on a decree of the senate; next those hereafter founded by decree of the People are with one exception (that of Cassius and the Vestal Virgins) real jury courts in which the magistrate is absolutely bound by the vote of a majority of his *consilium*; and finally from this time forward the senate invents a new procedure, by which

[1] I do not agree with Mommsen (*Strafrecht*, p. 633, note 2, and p. 258, note 1) that this law of Gracchus is to be identified with his law, 'ne quis judicio circumveniretur,' which was afterwards taken up into the legislation of Sulla (see Cicero, *pro Cluentio*, 54 seq.); but that identification, if accepted, surely raises another fatal objection to Mommsen's present interpretation. The crime which Cluentius was said to have committed was undoubtedly that of corrupting a *judicium*; and a law directed against that particular crime must assume that a *judicium* of some sort has taken place. If, as Mommsen now claims, the point of Gracchus's law was to prevent a trial being dispensed with, its short title ought rather to have been 'ne quis *sine* judicio circumveniretur'.

[2] Cicero, *in Catilinam*, IV. 5. 10.

without any pretence at a judicial trial it points out to the consul, by the *ultimum senatus consultum*, that a state of civil war has begun, that there are 'enemies' about, and that he is advised to deal with them accordingly.[1] The older proceedings of the senate were founded on a quasi-legislative power usurped by them, the more recent were a deduction from the legal doctrine of *perduellio*.

[1] There is a striking analogy between this doctrine and that of the proclamation of 'Martial Law' in England as explained by Professor Dicey, *Law of the Constitution*, Lecture VII, and by Mr. Justice Stephen, *History of the Criminal Law*, Vol. I, p. 214.

END OF VOLUME I

OXFORD: HORACE HART, M.A.
PRINTER TO THE UNIVERSITY

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