PROBLEMS OF THE ROMAN CRIMINAL LAW

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CHAPTER XIV

JURY TRIALS FOR EXTORTION

CRIMINAL charges in Cicero's time were tried almost exclusively by courts which consisted of a bench of jurymen presided over by a magistrate. This jury system, in which the criminal justice of the Roman Republic culminates, was gradually built up, borrowing certain elements from each of the forms of procedure which had gone before it. This proposition will be illustrated in detail in the following pages, and I hope to be able at the end of the next chapter to place it in a sufficiently clear light.

Though destined to revolutionize the administration of the Roman criminal law, the new system takes its rise in what was 'in its inception merely a private suit vested with special privilege on account of its overwhelming public interest';[1] it was directed in the first instance, as were private suits in general, to the recovery of money, and was invented to meet the difficulty, which beset Rome as her empire extended, of preventing her magistrates from making a profit of their official position at the cost of the subject peoples; the recovery at law of moneys so exacted is known as 'pecuniae repetundae'.

We first hear of a trial for *repetundae* in the year 171 B. C.[2] The people of both the Spanish provinces had complained to the senate of the exactions of their governors, and the senate directed[3] them to sue for recovery before one of the

[1] Mommsen, *Strafrecht*, p. 202. See also above, Vol. I, p. 180, note 2.
[2] Livy, XLIII. 2.
[3] There is no ground for Zumpt's supposition (*Criminalrecht*, II. i.

praetors, who was to nominate in each several case five private senators as *recuperatores*. No decree of the People seems to have been thought necessary; the senate merely allotted the duty of investigating the matter to a particular praetor, with instructions as to his procedure. To carry out these instructions must have been held to be within the power of the magistrates and senate.

We now come face to face with the main difficulty of such cases, which presents itself in all its fullness in this the most primitive instance. The recovery of money is the sole object with which the court has to deal, and one would have thought that with the recovery of the money the case was at an end: but no; we are distinctly told by Livy that the condemned men, Furius and Matienus, went into exile (precisely as Polybius[1] describes contemporary criminals doing in the comitial trial), the one to Praeneste, the other to Tibur. In the comitial trial their reason for thus renouncing the Roman citizenship is obvious; they go to escape death. But why should failure in a civil suit lead to the same result?[2] 'The separation,' says Mommsen,[3] 'in form voluntary, from the citizenship of the ruling community, and therewith the loss of political existence, already occurs as the result of the sentence of the *recuperatores*, which paved the way to the Calpurnian law, and after this it is the regular end of a condemnation for *repetundae*'. It is easier to state the fact than to account for it. Mommsen suggests that the exactions

15), that the senate found these men guilty, and merely referred the assessment of damages to *recuperatores*.

[1] See above, Vol. I, p. 160.

[2] It seems the stranger, because M. Livius Salinator, consul of 219 B.C., though condemned to a fine by the People for embezzlement, remained a Roman, and was re-elected to the consulship in 210 B.C. (Livy, XXVII. 34).

[3] *Strafrecht*, p. 730.

of Furius and Matienus were probably on a colossal scale, and that even simple restitution may have been enough to bring about bankruptcy and its consequences. What these consequences were in the year 171 B. C. is uncertain. The milder process, directed against the debtor's legal personality rather than against his body,[1] was invented by a *lex Rutilia*,[2] and its authorship is generally ascribed to P. Rutilius Rufus, the consul of 105 B. C. and afterwards legate of Scaevola in Asia. If this identification be correct, bankrupts in 171 B. C. would still be liable to the *addictio* of the old law. In that case they would have abundant reason for going into exile. The same explanation will not serve for the later cases. It is true that imprisonment for debt existed side by side with the newer procedure. The manifesto of Manlius, Catiline's lieutenant, in 63 B. C. complains that 'debtors are not allowed to claim the benefit of the law and by the surrender of their goods to keep their persons from arrest, such is the cruelty of the praetor and the creditors'; [3] but there is no likelihood that such severity would be pressed against the Roman magistrates and nobles, who alone could be prosecuted for extortion.

I do not believe, with Zumpt,[4] that the proconsuls of 171 B. C. escaped paying altogether. The *lex Acilia*[5] of 123 B. C. expressly provides for the seizure and sale of the goods of those who had died or gone into exile; and all analogy leads us to the conclusion that the property of these exiles, so far as the courts could lay hands on it in Rome, would be liable for their Roman debts. On the other hand, if they succeeded in smuggling any valuables with them to

[1] See Poste, *Gaius*, pp. 278–282, and Ortolan, *Instituts de Justinien*, Vol. III, p. 581.

[2] Gaius, *Inst.* IV. 35.

[3] Sallust, *Catilina*, 33. 1.

[4] Zumpt, *Criminalrecht*, II. i, p. 18.

[5] Verse 29 (Bruns, *Fontes*[7], p. 64).

their new home,[1] they would probably retain them unmolested. Even the sale of Roman property may perhaps, as Mommsen[2] suggests, have been effected in some less disgraceful way if it belonged to one whose name had been blotted out by death or exile than if the owner were a living Roman citizen.[3]

It is likewise possible that the trial of Furius and Matienus may have shown that there was evidence to go to the People on a charge of *perduellio*. If so the danger lay at the door that some tribune might seek to advertise himself by taking up the case, and if once it came on appeal before the People the verdict of the *recuperatores* on the pecuniary question would act as a *praejudicium* likely to influence the minds of the voters in the *judicium capitis*. The disgrace of condemnation on a capital charge was avoided by the timely exile of the parties, though that exile anticipated, so far as material consequences were concerned, the worst that was likely to happen to them even had the People voted against them.

The trial of the Spanish governors was followed[4] by a succession of similar cases, in which the guilty persons were condemned under arrangements made by the senate for each occasion. At length, in the year 149 B. C., a tribunician law of L. Calpurnius Piso Frugi instituted the first standing

[1] As Domitian permitted Licinianus to do. See below, p. 59. Verres' throat was cut in the triumviral proscription because Antony coveted some bowls out of his Sicilian plunder, to which the exile had clung to the very last (Pliny, *Hist. Nat.* XXXIV. 2. 6).

[2] *Strafrecht*, p. 727, and *Staatsrecht*, III, p. 51, note 5.

[3] Compare the anxiety of the suicide Licinius Macer to die *reus* rather than *damnatus* (Valerius Maximus, IX. 12. 7), and the sensitiveness which led a man dying insolvent to set up a *necessarius heres* in the person of a slave (*cum libertate heres iustitutus*), in order that the bankruptcy might take place in the name of the latter. See Gaius, *Inst.* II. 154. Compare also the device to screen a bankrupt noble in *Digest*, XXVII. 10. 5.

[4] See Mommsen, *Strafrecht*, p. 708, note 2.

court for such trials. We know from a reference[1] in the fragments of the *lex Acilia* that the procedure under the Calpurnian law was by the forms of the civil *actio sacramenti*.

In connexion with this Calpurnian law we may notice a conjecture of Mommsen,[2] who supposes that it is identical with a *lex Calpurnia*, which is said[3] to have extended the scope of *condictio*, an *actio in personam*, whereby surrender could be compelled of money or other goods, or of their equivalent in value, although the plaintiff was not at present vested[4] with the legal property in them. He argues that Piso applied this system to cover the claims of the allies and subjects of Rome. Certainly the method was peculiarly applicable to the matter in hand; for (as Mommsen points out in another place[5]) the *leges repetundarum* avoid throwing on the accuser the burden of proof as to extortion by forbidding all gifts, whether freely offered or not. This would make *condictio* a proper instrument for their restitution, whereas if the *actio repetundarum* had been assimilated to the *actio furti*, which from a moral point of view would not be unnatural, the accuser would have been obliged to prove a corrupt intention. On the other hand, it is difficult to see why, if these cases are of the nature of *condictio*, the *lex Calpurnia* should have been administered under the *actio sacramenti*; for *condictio* is set down by Gaius[6] as a fresh form of action parallel to and apparently

[1] *Lex Acilia*, verse 23, Bruns, *Fontes*[7], p. 63.

[2] *Strafrecht*, p. 708. See also ibid., p. 343, note 1, and p. 721.

[3] Gaius, *Inst.* IV. 19.

[4] He is not of course so vested, if he has given them away, as had the prosecutor in a suit for *repetundae*. The contrast between such an action *in personam* and an *actio in rem* is well brought out by Ortolan (*Instituts de Justinien*, Vol. III, p. 547), 'dans l'une nous soutenons que telle chose est à nous, et dans l'autre que notre adversaire est obligé de nous en transférer la propriété.' The sense, though not so clearly put, is to be found in Gaius, *Inst.* IV. 4.

[5] *Strafrecht*, p. 716.

[6] Gaius, *Inst.* IV. 12 and 19.

exclusive of the *actio sacramenti*. Further, no ancient writer seems to couple *repetundae* and *condictio*. On the whole; then, I think that Mommsen hardly proves his point.

Passing over the *lex Junia*, of which we know nothing but the name, we next come to the law of 123 B. C., of which large portions are preserved to us on the fragments of a bronze tablet, of which I have given some[1] account in a former chapter. Mommsen calls it, as do most modern writers, the *lex Acilia repetundarum*, on the ground that in the mention of such laws which we find in Cicero the Acilian immediately precedes the Servilian law. Mommsen[2] admits that this is slight evidence; and he sees quite clearly that, though the name of Acilius may have been in the preamble, the law is really part of the legislation of Caius Gracchus[3] (just as the *lex Aurelia* of 70 B. C. is really part of the legislation of Pompey). It is in fact the very law, or the most typical and important of the series of laws[4] ascribed to Gracchus by the historians, by which the jury courts were transferred from the senate to the equites. If this be conceded it matters little by what name we call it.[5]

This law has been admirably reconstructed from the fragments (though of course with many gaps) by the labour of Mommsen and others; and it constitutes our chief authority for the jury trials for *repetundae*. It is directed exclusively against magistrates, senators and their families.

[1] See above, Vol. I, p. 147. Most of the extant portions are now in the Naples Museum. [2] *Strafrecht*, p. 708, note 6.

[3] Mommsen, *Juristische Schriften*, Vol. I, pp. 20, 21.

[4] Mommsen would not go so far as this. I have discussed the question between us below, pp. 82–84.

[5] Zumpt (*Criminalrecht*, II. i, p. 114) puts our fragments some years later than Gracchus, on the ground of Plutarch's statement (*Caius Gracchus*, 6. 1) that Gracchus himself had the selection of the jurors, which is quite inconsistent with the text of the law. I should reject Plutarch's statement altogether; see below, p. 77.

It allows any one, whether a Roman citizen[1] or an alien, to delate such a person and sue him for double[2] the value of whatever has been *ablatum, captum, coactum, conciliatum, aversum*. The private man is not only, as in purely civil suits, the accuser, but he relieves the magistrate from the task, which under the older type of *quaestio* had fallen on him, of collecting the evidence and establishing the proof.[3] Neither magistrate nor jurors may question witnesses or make any remarks on the evidence.[4] The magistrate has now only to summon the jury, under methods carefully prescribed in the law, to receive their votes, and, if the majority condemn, to pronounce the verdict *fecisse videri*. The condemned man is then required to find sureties for the payment of the damages; if he fail to do so, the magistrate is at once to enter into possession of his whole estate, and sell it in the name of the Roman People, which will hold the proceeds in trust for the aggrieved parties, amongst whom they are eventually apportioned. Next is to follow the *litis aestimatio*, or assessment by the jury of the value of the object in dispute under each count. When the object is money the question is simply its quantity; when it is anything else, the value in money must be calculated. The

[1] Mommsen, in his sixth edition of Bruns, *Fontes*, omitted from the gap in the first verse the words *quoi civei Romano*, which had stood there in earlier editions; and Gradenwitz in his seventh edition of the *Fontes* follows Mommsen. The omission cannot be justified in face of verses 76 and 87, as Mommsen himself points out in *Strafrecht*, p. 721, note 4.

[2] That this is an innovation is proved by verse 59, where only single damages are allowed for acts committed before the passing of this law. Mommsen says (*Strafrecht*, p. 728) that 'it can be as little doubted as it can be little proved' that Sulla reverted to single damages. The absence in Cicero's speech against Verres of any reference to doubling makes Mommsen's conjecture appear probable.

[3] Mommsen, *Strafrecht*, p. 393.

[4] Mommsen, ibid., p. 422; see below, p. 125.

whole is thus brought [1] under the rule of private actions, that every condemnation must be for a specific sum of money. On the other hand, it is possible in these actions for *repetundae* (though this is not allowed in strictly private suits) to combine a number of charges in a single accusation ; [2] in this respect the jury trials follow the analogy of the *multae irrogatio* of the tribune in which, as we have seen from the case of Rabirius,[3] the charges may be a most miscellaneous collection. Thus the *litis aestimatio* becomes a complicated and serious matter. Under subsequent laws, if not under that of Gracchus, we find that numerous offences, not strictly bearing the character of extortion, may come to be taken account of in the *litis aestimatio*, and so swell the amount of damages.[4] If, for instance, a governor trades in his province, if he buys slaves,[5] if he appropriates state property (which is really *peculatus*), or if he transgresses the bounds of his province (which is *majestas*), he is frequently described [6] as contravening various *leges repetundarum*, and any such acts may be alleged against him when the assessment is under consideration.

Though primarily directed against misdemeanours in the provinces, there was no local limitation in the law. We find cases where corruption as a juror at Rome is allowed to be reckoned amongst the offences for which a person condemned

[1] Mommsen, *Strafrecht*, p. 724.

[2] Mommsen, ibid., p. 723. [3] See above, Vol. I, p. 198.

[4] Mommsen, *Strafrecht*, p. 720. It is a very different thing when Zumpt (*Criminalrecht*, II. ii. 333) exaggerates this into the statement that ' after the condemnation of the accused there followed at the *litis aestimatio* the question whether a heavier punishment or only a pecuniary penalty was to be exacted '. This notion, that it was the business of a Roman jury to decide what punishment should be inflicted, vitiates all Zumpt's theories. Mommsen treats the hypothesis with silence, which is perhaps all that it deserves.

[5] Cicero, *in Verrem*, IV. 5. 9.

[6] See Cicero, *in Pisonem*, 21. 50.

for *repetundae* has to pay damages. Cicero[1] tells us that in one such case great efforts were made by the accuser to bring this capital charge into the assessment (*ut lis haec capitis aestimaretur*), and he observes further that such charges are often included so carelessly that the same jurors have been known to acquit a man when the very acts which they had ascribed to him in the *litis aestimatio* were alleged as a substantive charge on a subsequent trial under the clause *quo ea pecunia pervenisset* ; and that acquittals for *majestas* are frequent, though the acts which constituted it had been certified in a *litis aestimatio*. It is evident that a fresh trial was necessary before any extra penalties attaching to *majestas* could be inflicted. Another curious case mentioned in the same portion of Cicero's speech *pro Cluentio* illustrates forcibly the overlapping of charges for which different penalties were prescribed. Fidiculanius Falcula was asserted to have received money from Cluentius, and as he voted ' Guilty ' at the trial of Oppianicus this would undoubtedly constitute a ' capital ' offence under the law ' ne quis judicio circumveniretur '. Nevertheless Falcula is accused and acquitted on the charge of *repetundae*, ' qua lege,' says Cicero [2] ' in eo genere a senatore ratio repeti solet de pecuniis repetundis '.

Subsequent *leges repetundarum*, that of Servilius Caepio, of Servilius Glaucia, and of Sulla will be most conveniently treated in the chapter (xvii) which is to deal with the qualifications of jurymen. Some minor matters may be mentioned here. Caesar as consul in 59 B. C. limited the requisitions of

[1] Cicero, *pro Cluentio*, 41. 116. Mommsen, by the way (*Strafrecht*, p. 725, note 4), makes sense of an otherwise quite inexplicable passage by reading here ' si quae in eum lis capitis illata est, non inviti admittunt ' instead of ' non admittunt '. The MS. reading is against the argument of the whole paragraph.

[2] Cicero, *pro Cluentio*, 37. 104.

magistrates on their progresses, and provided for a registration of accounts. Servilius Glaucia is noted as having introduced a compulsory adjournment (*comperendinatio*), and having added a clause *quo ea pecunia pervenisset*, allowing the unjust gains to be tracked and recovered even when they had passed out of the hands of the original culprit.[1] It will be best, however, to leave these details on one side and to pursue the really difficult question raised above—namely, what happened to persons condemned for this crime, and how are the practical consequences of condemnation to be reconciled with the record of the penalties prescribed by law?

There is no statement in the fragment preserved to us of the *lex Acilia* of any penalty other than the pecuniary one attached to condemnation for *repetundae*. We see, however, provision made for the case of the accused going into exile[2] before the trial is over, and among the rewards for the accuser is, under certain circumstances, the attainment of the Roman citizenship in the tribe of the condemned man.

It is a most plausible conjecture of Zumpt,[3] that if the full text had remained to us, we should find that this reward was limited to cases where the guilty person had actually gone into exile, and so left a gap in the ranks of the Romans. In other instances, at any rate, where a new status is given to a successful accuser it is apparently always by substitution of him for the person whose condemnation he has effected.[4]

[1] For reference see below, p. 81, note 4.

[2] Verse 29. There appears (Cicero, *pro Quinctio*, 19. 60) a similar provision in the praetor's edict for the seizure of the goods of a man who *exilii causa solum verterit*, in order to avoid the consequences of bankruptcy. See *Strafrecht*, p. 70, note 1. See below, p. 60, note 5.

[3] *Criminalrecht*, II. i. 175.

[4] Mommsen (*Strafrecht*, p. 509) gives instances. We may add the reward proposed for the slave who betrayed his master in the proscriptions—καὶ τῇ τοῦ δεσπότου πολιτείᾳ (Appian, *Bellum Civile*, IV. 11).

If, however, we look at the text of the law,[1] we find that the reward promised follows close on the general condition 'et is eo judicio hac lege condemnatus erit' and that there is no room[2] to insert the special condition suggested. The most that we can say is that the knowledge that exile was in fact likely to be the eventual result of condemnation made the legislator the more ready to find room for a fresh citizen. In any case, as has been pointed out in the passage of Mommsen quoted above,[3] most of those condemned did actually go into exile.

In the list in Cicero's speech for Balbus[4] there occurs as having become a citizen of Smyrna Rutilius Rufus, who was certainly prosecuted (92 B. C.) for *repetundae*.[5] T. Albucius, who 'animo aequissimo Athenis exul philosophabatur',[6] was accused by the Sardinians,[7] and this can hardly have been for anything but extortion. The same is probably true of L. Lucullus,[8] father of the famous general, in 102 B.C.; he seems to have lived at Heraclea,[9] though it is not expressly said that he became a citizen of that state. The condemnation of Cn. Dolabella, Verres' chief, must have been for *repetundae*, for a *litis aestimatio* is mentioned, and exile seems to be implied by the reference to his children, *quos tu miseros in egestate atque in solitudine reliquisti*, and by the words *condemnato et ejecto*.[10] Verres himself, as is well known,

[1] Verse 77. Bruns, *Fontes*[7], p. 72.

[2] The double writing of this part of the law (whatever may be its reason) enables us to be more sure of the sequence of the sentences than we could otherwise have been. See above, Vol. I, p. 147.

[3] See above, p. 2.

[4] Cicero, *pro Balbo*, 11. 28.

[5] Dio Cassius, *Fragm.* 97. 1, ὡς δωροδοκήσας.

[6] Cicero, *Tusc.*, V. 37. 108.

[7] Cicero, *in Verrem*, *Div.* 19. 63.

[8] See Zumpt, *Criminalprocess*, p. 475.

[9] Cicero, *pro Archia*, 4. 8.

[10] Cicero, *in Verrem*, I. 30. 77 and 39. 98. The same word *ejectus* is used of 'capital' condemnation; see below, p. 33, note 1.

went into exile to Massilia. The load of misdeeds which would be proved against him in the *litis aestimatio* would doubtless have led to 'capital' actions for *majestas* and *peculatus*, if he had not thus forestalled them. C. Antonius, Cicero's colleague in the consulship, after his condemnation for his extortions in Macedonia retired to Cephallenia,[1] where as an exile he proceeded to found a new city, but gave it up when he was recalled home. Cephallenia was a *libera civitas*,[2] whose franchise Antonius could conveniently take up. Besides these we have two cases of suicide of persons accused of *repetundae*, Silanus Manlianus (about 140 B. C.)[3] and Licinius Macer,[4] who was tried before Cicero as praetor in 66 B. C. Of the fate of others, probably of most of those condemned for *repetundae*, we have no information; but these instances[5] are sufficient to justify Mommsen's statement as to the general effect of condemnation. An adverse verdict for an offence would doubtless stir up accusers[6] on other charges, all which would be avoided by exile. The inducement[7] to retire from the Roman state was likewise sharpened by the *infamia* forbidding the appearance of the

[1] Strabo, X. 2. 13. I agree on the whole with Rein's conclusion (*Criminalrecht*, p. 660–3) that Antonius was formally condemned for *repetundae*, though the Catilinarian conspiracy ('nocuit opinio maleficii cogitati,' Cicero, *pro Caelio*, 31. 74) was what really ruined him. It seems impossible to disentangle the confusion of Dio's statement (XXXVIII. 10. 3), but in the *pro Flacco* Cicero assimilates Antonius' case to that of Flaccus, who, though accused of extortion, was really attacked for his action in 63 B. C.

[2] Pliny, *Hist. Nat.* IV. 12. 54.

[3] Valerius Maximus, V. 8. 3. This was from shame at his repudiation by his father.

[4] Valerius Maximus, IX. 12. 7.

[5] I must express my obligations throughout this work to Zumpt's and Rein's catalogues of trials.

[6] See Asconius, *in Milonianam*, 48.

[7] Cicero, *pro Caecina*, 34. 100, mentions the *ignominiae* among these inducements.

convict at a *concio*[1] or in the senate, which was afterwards[2] added to the pecuniary penalty of the *lex Acilia*.

To set against all these we have two cases which point the other way. 'L. Lentulus, a consular,' says Valerius Maximus,[3] 'after being overwhelmed by a charge of *repetundae* under the Caecilian law, was created censor along with L. Censorinus.' The censorship of this Lentulus was in the year 147 B. C., and his consulship had been nine years earlier. The commentators alter *Caecilia* (no *lex Caecilia* being known) into *Calpurnia*, and suppose that Lentulus was condemned by a jury court immediately after the passing of Piso's law in 149 B. C. This is possible, but by no means certain; it seems more probable that the conviction of Lentulus followed close on his consulship, and was the result of a special commission proposed by some Caecilius. In any case the instance shows that at one time it was possible to be condemned for *repetundae* without damage to a political career.

The case of the consular C. Porcius Cato[4] in 113 B. C. is famous for the petty sum at which the damages were assessed—about £40. Evidently he had no fear of bankruptcy to drive him to abandon his Roman citizenship, and

[1] Cicero, *ad Herennium*, I. 12. 20. It is a case of contradictory laws. An augur has been convicted for *repetundae*; one law requires him to make a nomination *in concione*, the other forbids him to show his face there. Is he liable to a fine?

[2] Though the evidence is somewhat complicated, I am inclined on the whole to agree with Mommsen, that these disabilities must have been inflicted by the *lex Servilia* of Glaucia, abolished by Sulla, and renewed by the *lex Julia* of Caesar's first consulship. See the passages quoted by Mommsen, *Strafrecht*, p. 729. These penalties certainly survived in the law as administered under the principate. Pliny, *Epistolae*, II. 11. 12 and VI. 29. 10.

[3] Valerius Maximus, VI. 9. 10, confirmed by Festus (Müller, p. 285) s.v. 'Religionis praecipuae habetur censoria majestas', &c.

[4] Cicero, *in Verrem*, III. 80. 184; Velleius, II. 8.

in fact he remained in Rome, and was still a person of sufficient political importance[1] to be involved in the intrigues with Jugurtha and to be condemned in 110 B. C. under the *lex Mamilia*[2] on the capital charge of *majestas*. Then indeed he betook himself to exile and became a citizen of Tarraco.[3]

It is thus clear that the man condemned for *repetundae* did not *ipso facto* incur *ignis et aquae interdictio*, and so might remain a Roman,[4] if the charges proved against him were trifling. It is equally clear, however, that the incidental consequences of his condemnation were generally sufficient to drive him into voluntary exile,[5] just as the persons mentioned in the praetor's edict[6] were driven by the danger of bankruptcy. Lucius Crassus pleading for the *lex Servilia*, which in all probability was especially concerned with the *quaestio de repetundis*,[7] speaks as if the very existence of himself and his brother senators was at stake[8] in the domination of the equestrian juries. Cicero[9] uses 'blood' and 'life' quite as freely when defending Flaccus against a charge of extortion, as he does on behalf of any of his clients who are accused on 'capital' charges. His pathos would hardly have been effective, unless Flaccus' existence as a Roman had been known to be at stake. We should draw the same

[1] As his condemnation for *repetundae* falls in 113 B. C., and Glaucia's law was not passed at earliest till 111 B. C., he would not, if Mommsen is right (see above, p. 13, note 2), lose his seat in the senate.

[2] Cicero, *Brutus*, 34. 128. [3] Cicero, *pro Balbo*, 11. 28.

[4] Dio Cassius, *Fragm.* 97. 3 says of Rutilius Rufus, *ἐξεχώρησε μηδενὸς ἀναγκάζοντος.*

[5] It is an illustration of this that Cicero (*in Verrem*, II. 31. 76) speaks of Verres remaining in the senate, as if that depended on his acquittal for *repetundae*. As expulsion from the senate was not a definite penalty under Sulla's law (see above, p. 13, note 2) Cicero can only have meant that it would be an incident of the exile which he assumes will result in Verres' case as a matter of course from condemnation.

[6] See above, p. 10, note 2. [7] See below, p. 82.

[8] See below, p. 80. [9] Cicero, *pro Flacco*, 38. 95.

conclusion from the expressions used concerning a famous trial of the previous generation, when Cicero tells us[1] that Manius Aquilius was 'multis avaritiae criminibus testimoniisque convictus'; this certainly points to a trial for *repetundae*; nevertheless his advocate Antonius is represented[2] as speaking of the responsibility of his own task, 'quum mihi M'. Aquilius in civitate retinendus esset', so that exile is clearly contemplated as the result of a conviction.

When all is said and done, the disproportion between the ostensible penalties and the practical result of conviction for extortion must remain a problem very imperfectly solved.

[1] Cicero, *pro Flacco*, 39. 98. [2] Cicero, *de Oratore*, II. 47. 194.

according to all principles of Roman jurisprudence that there should have been an appeal from the delegate to the delegator. Again, there is absolutely nothing in the procedure of the standing *quaestiones* which can suggest that they were armed, as the People's deputies, with the People's powers,[1] legislative or otherwise. Most certainly they do not, as Maine says that the magistrate and People do, 'strike directly at the offender.' The praetor and his *judices* make no inquisition on their own account; on the contrary, they have to wait till a private prosecutor brings the name of the accused and the proofs of his guilt before them. As we have seen, the earliest of these *quaestiones perpetuae*, that under the law of Piso Frugi, proceeded by the forms of a private action, the *actio sacramenti*, just as if the Court had been a bench of *recuperatores* to whom a question had been referred by the praetor in a civil suit.[2] Like them, too, the *quaestiones* never sentenced to death or, apart from assessment of damages, to any other penalty, the penalty being laid down for them beforehand in the law.[3]

This last consideration brings us again into collision with

[1] Cicero's words in *pro Flacco*, 2. 4 'An populum Romanum (implorem)? At is quidem omnem suam de nobis potestatem tradidit vobis', merely depict with rhetorical embellishment the practical effect of the institution in rendering obsolete the old comitial trials. It is as little to be taken literally as the passage in *pro Murena*, 1. 2 'Quae quum ita sint, judices, et quum omnis deorum immortalium potestas aut tralata sit ad vos aut certe communicata vobiscum'.

[2] I may be allowed, without quite endorsing the vigour of the language, to quote Mommsen's emphatic words (*Strafrecht*, p. 202, note): 'It requires a special juristic beam in the eye not to be able to see that the suit for *repetundae* with the right of the injured alien to accuse, the court of the *praetor peregrinus*, the preliminaries *sacramento*, the word *petere* to describe the standing of the plaintiff (*is qui petit* is the accuser in the *lex Acilia*, *is unde petitur* the accused), the condemnation at most to a double restitution, is just a private suit with a sharpened process.'

[3] Cicero, *pro Sulla*, 22. 63. See below, p. 45.

that consuls rather than tribunes were called upon to propose the decree about Clodius' sacrilege in 61 B. C. has for its explanation the intention of the optimates physically to shed the blood of Clodius. He holds that a court established by the *comitia centuriata* (which is to him the same thing as one established by a consular law)[1] would have the power of actually inflicting death. The argument is quite a logical conclusion from the 'Committee' theory of Maine. It leads, however, to an obvious *reductio ad absurdum*. Almost all the standing *quaestiones* at this time rested on the *leges Corneliae* of Sulla, who was a patrician magistrate and could not assemble the plebs.[2] At this rate all criminals condemned on capital charges in the courts ought to have been put to death, whereas it is notorious that no one of them ever suffered. The fact is, as I have noticed in a former chapter,[3] that the disappearance of the punishment of death is due solely to the facilities for flight allowed to the criminal. We have seen from Polybius[4] that by his time the infliction

indifference whether a law was passed by the *populus* or the *plebs*, and in Cicero's time the one was about as frequent as the other.

[1] When Maine and Beesly wrote, half a century ago, the existence of *populi comitia tributa* side by side with the tribal assembly of the *plebs*, though already clearly established by Mommsen in his *Römische Forschungen*, had not yet won its way to general acknowledgement.

[2] Whether the *populus* assembled by centuries or by tribes to hear Sulla's *rogationes*, no ancient writer has thought it worth while to tell us except in one instance, that of his disfranchising law. This was passed (Cicero, *de Domo*, 30. 79) *comitiis centuriatis*. On the other hand, the fragmentary preamble of Sulla's Law *de Quaestoribus* (Bruns, *Fontes*[7], p. 89) reads, *principium fuit, pro tribu*, and must have been passed in the *comitia populi tributa*. It made no sort of difference except perhaps to the dignity of the Dictator, who, as Caesar did when holding the same office (Cicero, *Philippics*, I. 8. 19), may have generally preferred the *maximus comitiatus*.

[3] See above, Vol. I, p. 161.

[4] See above, Vol. I, p. 160.

the legislation of C. Gracchus. Marius was tried for bribery before a jury court[1] after his election to the praetorship (about 115 B. C.), and Norbanus[2] for *majestas*[3] in 94 B. C., but it is not certain whether these were standing tribunals or special commissions. Mommsen[4] seems to decide in favour of the latter alternative for the trial of Norbanus under the *lex Apuleia*, though the law had been passed ten years before. The *lex Varia* of 90 B. C. certainly set up only a temporary court.

All existing *quaestiones* were taken up into Sulla's legislative system. Some of his *leges Corneliae* survived under their old name, embedded in the jurisprudence of the principate;[5] others were remodelled into *leges Juliae* either by the dictator Caesar or by Augustus.

In the last generation of the republic, under the Cornelian system, theft, wilful damage (as *arbores furtim caesae*[6]), gross offences against morals (*lex Scantinia*[7]), and injury or insult, directed against person or reputation, are still 'private crimes', and are dealt with by the urban praetor under the forms of a private suit, in which, however, we must include the *popularis actio*, brought by a common informer for the recovery of a fine prescribed by law.[8] On the other hand

a still earlier period. His argument seems to me insufficient. See above, Vol. I, p. 227, note 6.

[1] Plutarch, *Marius*, 5. 3. For this case and the next see above, Vol. I, p. 231 and p. 239, n. 1.

[2] Cicero, *de Oratore*, II. 49. 201 ('petebam a judicibus').

[3] Cicero, ibid., II. 25. 107 'ab illo majestatem minutam negabam, ex quo verbo lege Apuleia tota illa causa pendebat'.

[4] *Strafrecht*, p. 198, note 1. If we suppose that the law of Saturninus did not institute a standing *quaestio*, a special court might nevertheless be set up from time to time to try an alleged breach of that law.

[5] See below, p. 22.

[6] See *Edictum perpetuum*, Bruns, *Fontes*[7], p. 224.

[7] See Mommsen, *Strafrecht*, p. 704.

[8] See above, Vol. I, p. 180, note 3.

continued activity of Sulla's legislation; but in two instances, *de sicariis et veneficis* and *de falsis*, the original name is preserved, and *legis Corneliae poena*, or similar words, occur in almost every paragraph relating to those crimes. What then was the *poena legis Corneliae* in such cases? The jurists of the principate generally take it for granted that it is known to every one, and do not define;[1] but in one or two instances we can trace it more closely. We know in the first place that it was a 'capital' penalty. We find Ulpian[2] quoting the 'lex Cornelia de Sicariis', *ut praetor* QUAERAT DE CAPITE *ejus qui eum telo ambulaverit hominis necandi causa*, and Cicero[3] quoting the law against conspiracy which Sulla borrowed from Gracchus (*quae tunc erat Sempronia, nunc est Cornelia*), DE CAPITE EJUS QUAERITO.

But how was the 'capital' sentence to be carried into effect? We are answered again by Ulpian, who says,[4] 'incendiariis lex quidem Cornelia aqua et igni interdici jussit'; Marcian gives[5] the same account, 'legis Corneliae de sicariis et veneficis poena insulae deportatio est,' which means, as we shall see hereafter,[6] that Sulla ordered *aquae et ignis interdictio*, which the Emperor Tiberius altered to *deportatio*; and in the same way, in a case included under *de falsis*, Modestinus[7] states, 'lege Cornelia aqua et igni interdicitur'.

Aquae et ignis interdictio is thus the form of the death penalty which the laws of Sulla invoke. It does not follow,

[1] e.g. Venuleius Saturninus, *Digest*, XLVIII. 19. 15 'Divus Hadrianus eos, qui in numero decurionum essent, capite puniri prohibuit . . . verum poena legis Corneliae puniendos mandatis plenissime cautum est'. So too Trajan about false steelyards: 'poenam legis Corneliae in eos statuit.' *Digest*, XLVII. 11. 6, § 1.

[2] See *Collatio Legum Mosaicarum et Romanarum*, I. 3. 1.

[3] Cicero, *pro Cluentio*, 54. 148.

[4] *Collatio*, XII. 5. 1.

[5] Marcian, *Digest*, XLVIII. 8. 3, § 5.

[6] See below, p. 55 seq.

[7] Modestinus, *Digest*, XLVIII. 10. 33.

who persist, despite Cicero's authority, in speaking of *exilium* and loss of citizenship as a substantive punishment parallel to that of death. In this respect they may perhaps claim to be following Mommsen's earlier opinion, for in the *Staatsrecht*[1] he characterizes as a transparent sophism Cicero's doctrine that no man can be deprived of citizenship without his own consent. As we read on, however,[2] we find that Mommsen really accepts Cicero's main thesis 'that in no law of ours has any crime been punished by exile'. In his latest work, too, he formally supports Cicero's contention, for he defines *exilium*, quite correctly as it seems to me, to be 'the withdrawal of the citizen from the community of Rome coupled with a change of domicile';[3] but he proceeds to take the force out of his concession by the supposition that, though true of an earlier epoch, Cicero's words have no practical reference to Cicero's own time. Mommsen holds that since Sulla's legislation banishment, though often loosely called *exilium*, is not the *exilium* of which Cicero speaks in the *pro Caecina*, because it does not imply the loss of citizenship, but consists in a mere *relegatio*. I propose to discuss this matter at length in the next chapter, but I may be allowed to anticipate by saying that my own belief is that Sulla made no such change, that the doctrine of Cicero remains true down to the reign of Tiberius, and that the passages which I am about to quote lie at the foundation of all right understanding of the criminal law of the later Roman Republic.

'I wish' (Cicero says),[4] 'as they are fond of precedents 'from the civil law, that they would adduce any instance of

[1] Mommsen, *Staatsrecht*, III, p. 43, note 2, and p. 361, note 1.

[2] Mommsen, ibid., p. 51, note 3. See also below, p. 27, note 2.

[3] *Strafrecht*, p. 964. He continues—'this is not an act of the State, far less a punishment, but an act of the individual'.

[4] Cicero, *pro Caecina*, 34. 100.

'until they were received into that State to which they had 'come for the purpose of "shifting"—that is, changing 'their ground. And the authors of our laws made[1] them do 'this not by taking away their citizenship, but by forbidding 'them shelter, fire, and water.'

These statements of Cicero are in absolute agreement with that of Polybius regarding the voluntariness of the act, the reasons which a criminal has for performing this act,[2] and the refuge afforded him in a fresh State. The only difference is that Cicero can no longer name Tibur or Neapolis, because they are, since the Social War, no longer independent States, and that he supplements Polybius by explaining that 'the voluntary exile is pronounced' by means of the renunciation of one citizenship in the act of accepting another. If I have understood Mommsen aright, he would frankly accept this account as correct for the period before Sulla. Curiously enough he adopts this view of *exilium* even under the Cornelian laws in one case—that of the parricide—but treats it as an exception ;[3] 'the *quaestio*, the reference by a general or special law of what is by public penal law a capital crime

added, 'but all this is ancient history, and, as things are now, men do not lose their citizenship, even when condemned.' That he does not use so tempting a plea is pretty good evidence of facts within the knowledge of his hearers, which prevented his doing so with any plausibility. In the same way, though I do not think that it is pure accident that the Romans mentioned in the *pro Balbo* (11. 28) as having become citizens of other states all belong to a past generation, still less do I believe that Cicero could find no cases in his own time. The silence is due, I think, to the circumstance that living men could not with politeness be reminded of the *calamitas exilii sui.*

[1] The phrase 'id ut esset faciundum . . . faciebant' is so awkward that one is tempted by Halm's amendment 'adigebantur' (for 'faciebant'), which is adopted by Zumpt (*Criminalprocess*, p. 456).

[2] Mommsen (*Strafrecht*, p. 966) styles it very happily 'die freiwillige, wenn auch widerwillige Auswanderung'. The man finds that 'the climate of Italy does not suit him'.

[3] Mommsen, *Strafrecht*, p. 942.

Of the physical withdrawal I have already said enough :[1] it was a matter of fact, as to which in each case there can have been little doubt. But it is otherwise as to the intention of the *exul*. This could only be presumed from his situation or inferred from his words or actions, and he might afterwards say that the inference was wrong, and that he had never really meant to naturalize himself abroad. Cicero himself practically does this in his speeches after his return from banishment. The Romans had, therefore, to take precautions against such tergiversation. It is said that a member of the Duke of Wellington's cabinet, who had thrown up office in a pet, wished to withdraw his resignation on the ground that 'there had been a mistake'. 'It is no mistake,' replied the Prime Minister; 'it can be no mistake; it *shall* be no mistake.' The Romans retorted in much the same way. They could not deprive a man of his citizenship, but they could (much as in the case of the *perduellis* described above[2]) authoritatively take notice in case of doubt that he had duly deprived himself—'Cn. Fulvius exulatum Tarquinios abiit; id ei justum exilium esse scivit plebs.'[3] They could decree in like manner that if he did not appear on a certain day 'videri eum in exilio esse'.[4] Further, the case was to be provided against that the man might claim to return, clothed in a new nationality, as a foreigner merely sojourning in Rome; and again it was at least a tenable

civitates, which Polybius recognizes, seems to have been relaxed, perhaps by special decree of the foreign community in each case. See below, p. 38.

[1] See above, p. 26, note 1 and p. 28, note 2. For the local limits see below, p. 35 seq.

[2] See above, Vol. I, p. 243, especially Mommsen's words, 'The effect of the verdict therein pronounced is not condemnatory but declaratory.'

[3] Livy, XXVI. 3. 12.

[4] In Postumius' case, Livy, XXV. 4. 9.

ipsi aqua et igni placere interdici.' In the same way Cicero in the passage quoted above[1] from the *de Domo* indicates the *aquae et ignis interdictio* as the threat by which the Roman People drove a citizen to join a new State. We find the same thing in the account of the trial of Caesar's assassins under the *lex Pedia* in 43 B.C. Augustus himself[2] describes the proceedings in the words 'qui parentem meum interfecerant, eos in exilium expuli, judiciis legitimis[3] ultus eorum facinus', whereas Dio Cassius says of the sentence πυρὸς καὶ ὕδατος εἴρχθησαν, and Velleius gives the same in Latin.[4] The punishment ordained then was *aquae et ignis interdictio*; it is assumed in Augustus' autobiography that this was sufficient to make Brutus and Cassius betake themselves to exile, and that they would have been legally safe if they had retired to Rhodes; it is only when they rebel[5] that they are put down by force of arms.

The legal effect of *aquae et ignis interdictio* is the same as that of *sacratio*[6] or *proscriptio*. We should hesitate which expression to use if we wished to paraphrase in technical Latin Polybius' account[7] of the man who chanced to survive the military *fustuarium* or 'running the gauntlet'—'He must needs perish, for he is not allowed to return to his country, and none even of his kindred would dare to receive him into their houses.' It is probable that a Roman of

[1] Above, p. 26.

[2] Augustus, *Monumentum Ancyranum*, chap. II.

[3] It must be remembered that at the moment the reconciliation of Antony and Lepidus with Octavian and the establishment of the arbitrary powers of the triumvirate were still in the future. The law was still supposed to be supreme.

[4] Dio Cassius, XLVI. 48. 4; Velleius, II. 69. 5.

[5] Augustus, *Monumentum Ancyranum*, chap. II.

[6] See above, Vol. I, p. 13. Cato seems to associate *exilium* and *sacratio* when he writes (as quoted by Priscian, *Inst. Gramm.*, book VIII, ch. 4, § 16), 'duo exules lege publica execrari (or *execrati*).'

[7] Polybius, VI. 37. 4.

may in the last century of the Republic be directed against citizens, whether with the intention of actually cutting short their lives or in expectation of driving them to renounce their citizenship in exile.[1] Many modifications, however, and these of great practical importance, are possible, especially in the extent of territory within which the outlawry is to run, and in the penalties threatened against those who harbour the victims. Sulla's outlawry of the Marians extended over the whole world, leaving no door of escape,[2] and involved all who succoured the fugitives in the same peril. Clodius, whose cruelty Cicero associates with that of Sulla, while threatening like penalties, limited the application of them locally; a local limitation is likewise found in case of the *aquae et ignis interdictio* which results from condemnation in one of the standing jury courts.

The State, as in the case of the *homo sacer*,[3] lays the first duty indeed on the magistrate, but further 'makes an open appeal to popular execution of the death sentence'[4] as the means of enforcing its will; but in the latter case it makes a great difference whether the permission is stimulated by rewards and penalties, or whether it is merely left open, so that 'what is everybody's business is nobody's'. Mommsen remarks[5] that 'the killing without judicial proceeding of the banished man caught on Roman ground must have been treated as permitted with impunity

[1] Hence the phrase 'ejicere', e.g. Cicero, *pro Roscio Amerino*, 2. 6 'damnato et ejecto,' and *pro Cluentio*, 61. 170 'ejectum ex civitate.' See also Mommsen, *Strafrecht*, p. 972, note 1.

[2] He used his practical power even to demand the extradition of a man who had taken refuge in Rhodes, where, of course, Roman Law did not run. Appian, *Bellum Civile*, I. 91. Verres too found Massilia no safe asylum. See above, p. 4, note 1.

[3] Above, Vol. I, p. 9. [4] Mommsen, *Strafrecht*, p. 623.

[5] *Strafrecht*, p. 936. See, however, case of Roscius above, p. 28, note 2.

In the matter of practical danger perhaps a distinction may be drawn between an inner and an outer circle of territory. We find [1] that the tribunes each year passed a special edict forbidding the presence in Rome of any person condemned on a capital charge. It is quite possible that they would take active measures against any one who disregarded their own express prohibition, though the wider prohibition of the law affecting the whole of Italy might sometimes be more of a dead letter. That the prohibition did extend to the whole of Italy is certain. Not only does the *lex Julia Municipalis* describe the exile [2] as *judicio publico damnatus quocirca eum in Italia esse non liceret*—this might possibly be explained as an innovation of the dictator [3]—but Cicero, speaking for Milo in 52 B.C., says 'corporis in Italia nullum sepulcrum esse patiemini?' [4] In the speech for Rabirius likewise in 63 B.C., and in that for Sulla in 62 B.C.,[5] Cicero's pathos about depriving the defendant of the right to be buried with his fathers would have fallen very flat if the limit of his exile had only been the boundary of the city of Rome, within which the bodies of none but Vestal Virgins were allowed to rest.

When we come to instances, there are two which present considerable difficulty. This same Oppianicus and one less obscure person, Quintus Pompeius, brother of Caesar's divorced wife Pompeia, and on the mother's side a grandson of Sulla, seem to have stayed on in Italy unmolested. Pompeius, after his

'cum in venatione filium suum quidam necaverit . . . latronis magis quam patris jure.'

[1] Cicero, *in Verrem*, II. 41. 100. Case of Sthenius; see above, Vol. I, p. 111, note 1.

[2] Verse 118; Bruns, *Fontes*[7], p. 108.

[3] Caesar certainly sharpened the penalty in other respects, see below, p. 55.

[4] Cicero, *pro Milone*, 38. 104.

[5] Cicero, *pro Sulla*, 31. 89 and *pro Rabirio*, 13. 37.

on the 21st of May,[1] whereas Cicero was far away from Pompeius' lair; he had arrived at Brundisium on the 19th, having spent the previous days since the 15th at Tarentum.[2] Caelius, though he had acted as his accuser, now protected Q. Pompeius and compelled fraudulent trustees to do their duty by him.[3] Under such circumstances we may imagine that the trespasser on forbidden ground, and those who succoured him, perhaps ran no great risk. With the great majority of banished men in Cicero's time the result is otherwise. They are to be found in Gaul, in Greece, and in Asia, but not in Italy.

I believe that the historical development was something as follows. It seems most probable that the *exules* had always been warned away from the territory of Rome, and that, as this gradually extended with the creation of fresh tribes, such persons found themselves shut out from a correspondingly increasing area. Still, the larger portion of Italy was open to them. The Social War made a great difference: not only did Tibur, Praeneste, and the other states of Italy cease to have a separate citizenship to bestow on Roman criminals, but their territory came under the direct control of Rome; and the Romans did not fail to take the opportunity of removing unpleasant neighbours further from the capital. From this period, then, I should date the commencement of the state of things which Caesar's words imply—'judicio publico damnatus quocirca eum in Italia esse non liceret.'[4] Unless this had been the case, it is most unlikely that the exiles generally would not have taken up their sojourn in the pleasant places of Italy.[5] In spite, then, of the

[1] Cicero, *ad Familiares*, VIII. 1. 5.
[2] Cicero, *ad Familiares*, III. 3. 1, and *ad Atticum*, V. 6. 1.
[3] Valerius Maximus, IV. 2. 7.
[4] *Lex Julia Municipalis*, verse 118 (Bruns, *Fontes*[7], p. 108).
[5] As Publius Sulla, who was condemned for bribery in 66 B. C., but

is named by Cicero[1] along with *tabulae novae* among the extreme of horrors to be apprehended from the Revolution. The jurist Servius Sulpicius, who had appeared in Caesar's senate in 49 B.C., and whose son had fought in Caesar's army, found in the restoration of exiles the last straw which must break down his endurance. He declared, Cicero tells us,[2] that if this came to pass he could not remain in Rome. It is not certain whether he carried out his intention.

I should maintain, then, that the effect of the 'aquae et ignis interdictio', which was the result of capital condemnation in the standing *quaestiones*, was twofold, according as the fugitive has or has not yet been received into another State. In the first place it pronounces sentence of death against the convict Roman citizen; it will be the duty of magistrates and the right of private men to execute that sentence on him wherever found. Of course they may not[3] pursue him into the territory of Massilia or of Rhodes, where Roman law does not run, but he cannot with safety overstep the bounds of his asylum. Meanwhile he is a Roman, but a Roman *capite damnatus*. It is different when he has renounced his Roman citizenship and become a Rhodian or a Massiliot; he then commences a new life in which the liability for his former misdeeds is blotted out, except for the second effect of the *aquae et ignis interdictio* which now directs itself against him in his new capacity as a foreigner warned away from Italy. Henceforth he may travel as a member of his new state with perfect safety all over the Roman world[4] excepting to his old home. From Italy he will find himself barred by an alien act which repels all non-

[1] Cicero, *ad Atticum*, X. 8. 2.

[2] Cicero, ibid., X. 14. 3.

[3] Unless like Sulla they use tyrannous power to overbear the rights of the legally independent State. See above, p. 33, note 2.

[4] Augustus altered this. See below, p. 55, note 3.

Bona Dea in 62 B.C. it was found that none of the standing *quaestiones* were competent to deal with the matter, and that, if it were to be brought before a jury court at all, it must be in virtue of a law passed for the occasion. Two bills were drafted for the purpose, which, however, were precisely the same[1] except in one detail as to the method of selection of a jury, and the bill of the tribune Fufius, Clodius' friend, was accepted. This is how Cicero describes the procedure:[2] 'Familiarissimus tuus de te privilegium tulit, ut, si in opertum Bonae Deae accessisses, exulares.' The *exulares* I have already explained—it is a mere short cut anticipating the practical result—there can be no doubt that what the law really said was *aqua et igni interdicatur*. There was then a sentence of death, though of death easily avoidable, pronounced against Clodius by name.

Two objections might be raised against such a form of procedure. In the first place, was not a *privilegium* expressly forbidden by the Twelve Tables? And secondly, did not the tribunician bill of Fufius and the *plebs* necessarily traverse the law (likewise of the Twelve Tables) that capital sentences could be pronounced only in the *comitia centuriata*. The solution of both these difficulties is to be found in the circumstance that the law promulgated against Clodius imposed, not an absolute sentence of death, but one conditional on the finding of a jury. Sentences with a condition attached, whether that condition was or was not dependent on the will of the person concerned, were never held, though directed against individuals, to be *privilegia* in the sense in which these were forbidden. There are several precedents. We have seen one in the case of Postumius; he was to be 'aqua et igni interdictus', *if* he did not appear;[3] and

[1] Cicero, *ad Atticum*, I. 16. 2. See below, p. 47.
[2] Cicero, *Paradoxa*, IV. 32. [3] Livy, XXV. 4. 9.

such in their legislative functions;[1] as Pomponius[2] says, 'inter plebiscita et leges, modus constituendi interest, potestas autem eadem est.'

It is now time to attempt to analyse the part taken by the several actors in the drama of Clodius' trial, which is to serve as our pattern for the criminal procedure of the later Republic. The analogy of *judicia ordinaria* in private suits rises at once to the mind, and I believe that this analogy, seriously as it has misled Zumpt in his account of trials before the People, will give the true solution of trials before jury courts. Both in the private and in the public suits the machinery is one not of delegation of powers but of devolution of certain tasks. In both cases an authority vested with the right of command issues its *fiat*, which supplies the motive force at the back of the whole proceedings, but this *fiat* is made conditional on the occurrence of a certain event which the authority defines beforehand. In a former chapter[3] I have, with the aid of Mommsen, fully explained the relation of the praetor to the *judex* or the *recuperatores*. They are the creatures of the praetor's will set up to answer any question which he may think it fit to put to them. But it pleases him to make the effect of his own sentence conditional on the answer which the power thus created may give—'SI PARET'. . . . Within the four corners of his *formula* the *judex* is absolute; he has to find 'yes' or 'no' on whatever questions the praetor has asked

[1] Nor even in declaratory resolutions in criminal matters. We have seen above (p. 29) that it is the *plebs* which authoritatively points out that Cn. Fulvius has exiled himself—'id ei justum exilium scivit esse plebs,' and Clodius attempted, and, as many thought, successfully, to put himself in order by wording his plebiscite against Cicero in the past tense—'ut ei aqua et igni interdictum sit,' not 'ut interdicatur'. See Cicero, *de Domo*, 18. 47 and *de Provinciis Consularibus*, 19. 45.

[2] Pomponius, *Digest*, I. 2. 2. § 8.

[3] See above, Vol. I, chap. iv.

the culprit. The punishment is the work of the law and not of the magistrate or the jury, so much so that Cicero argues [1] with logical consistency that the penalty may afterwards be alleviated by the People which imposed it without in any way infringing the sanctity of the *res judicata*. This stops short with the verdict itself, which nothing can reverse.

But, it may be asked, where are we to find an analogy for the bench of *judices*, who sit in criminal trials under the presidency of the praetor? I think we must look for their prototype in the *consilium* of advisers whom the *judex* of the formulary system, if he will, may call around him to assist him in arriving at his decision.[2] We find the same assistance craved by the *quaesitor* in the old special commissions.[3] What was a matter of almost unvarying usage in their case becomes an obligation under the newer system. I feel no doubt that the legal position of the jurors in the standing *quaestiones* is that they are always [4] the *consilium* of the praetor. They are expressly so called over and over again [5] in Cicero, as, for instance, by the tribune Fufius when he publicly asked Pompey 'placeretne ei judices a praetore legi, quo consilio idem praetor uteretur',[6] and when the

[1] Cicero, *pro Sulla*, 22. 63.

[2] See above, Vol. I, p. 206. [3] See above, Vol. I, p. 236.

[4] Zumpt's notion (*Criminalrecht*, II. i. 161), that in the *lex Acilia* they are *judices* until the verdict has been delivered, and then drop down into being mere advisers for the purpose of the *litis aestimatio*, is not worth refuting.

[5] Cicero, *in Verrem*, Actio Prima, 6. 17 and 18. 53, and *pro Caecina*, 10. 29, may serve as good specimens.

[6] Cicero, *ad Atticum*, I. 14. 1. It makes no difference in the legal aspect of the case if we admit with Mommsen (*Strafrecht*, p. 213) that 'the retention of the phrase "council" is merely a reminiscence and a respectful presentment of the new position of the magistrate'. I think, however, that on p. 443 he finds a better antitype for the praetor in the *unus judex* than, as here, in the *paterfamilias* and his domestic court.

is a matter of supreme importance, but in form a mere question of detail, whether the person who asks advice is free to reject the opinion of his counsellors, as is the general at the head of his army, or is practically bound to abide by it, as is the consul in the presence of the senate, or finally is compelled by law to conform, as is the municipal magistrate to the decree of the decurions,[1] or the praetor, in the case we are considering, when he sits as judge in the criminal courts.

Just as the People attaches what condition it pleases to the fulfilment of its order for *aquae et ignis interdictio*, so it regulates all the details for that condition; especially it prescribes how the *quaesitor* is to constitute his *consilium*. The most notable case, besides this of Clodius, is to be found in the elaborate regulations laid down for the trial of Milo in 52 B. C.[2] In the Clodian trial the Bill proposed by the consuls and that proposed by the tribune ran side by side in that both condemned Clodius to death by *aquae et ignis interdictio*, and both made the falling of the sentence depend on the verdict of a praetor and his *consilium*; they parted company only in the clause which regulated the structure of that *consilium*, but it so happened that the chance of getting an honest verdict depended on that clause; as Cicero says[3]—'in eo autem erant omnia.'

The practical result of the introduction of the juror in very early times into civil suits, and the introduction of the jury system at a later period into criminal jurisdiction, is in each case to shift the main responsibility for the decisions arrived at. It is really a devolution of power, a burden taken from the shoulders of the magistrate in civil and of the magistrate and People in criminal trials. But in form the original power and responsibility are always there, and the

[1] *Lex Ursonensis*, chap. cxxxix; Bruns, *Fontes*[7], p. 138.
[2] See below, p. 111.
[3] Cicero, *ad Atticum*, I. 16. 2.

stead, there would under the Roman system have been an appeal from the delegate to the delegator, as was actually the case with the *judex extra ordinem datus* of the principate.[1] But under the formulary system it is otherwise ; the *judex* does not act instead of the praetor, but merely supplies information which the praetor happens to want.[2] Thus there can be no appeal ; not on the question of fact, for it has pleased the praetor to say that he will take the fact as the *judex* finds it ; nor yet on the question of the consequence, for the praetor has already prescribed what is to follow, and must not be asked to eat his own words. The same principles apply, *mutatis mutandis*, to these criminal trials. The law is the utterance of the People, just as the *formula* is the utterance of the praetor. On the strictest analogy, appeal to the People is barred by the existence of a law in which the People's answer is already embodied.

We have now traced in detail the principal features of the Roman jury trials under the later republic, and are in a position to see from what source each of these is borrowed and how each is modified in the borrowing. The system resembles above all things the trials in private suits, limited by the terms of the *sacramentum* or the *formula* ; in its origin it is the adaptation to capital cases of a machinery developed out of the *actio sacramenti*, and to the last it retains the feature of the private prosecutor on whom rests the responsibility of stirring in the case ; but the all-important resemblance between the two procedures is that in both there is a division of labour between the power which fulminates the sentence and the power which pronounces whether or not that sentence is to fall on the head of the defendant. I have already quoted[3] Mommsen's happy interpretation

[1] See Mommsen, *Staatsrecht*, II[3], p. 984, note 1.
[2] See above, Vol. I, p. 61.
[3] See Vol. I, p. 68.

CHAPTER XVI

MOMMSEN'S THEORY OF EXILIUM UNDER SULLA'S LAWS

I HAVE attempted in the last chapter to show that the *aquae et ignis interdictio*, as ordained in Sulla's laws, was a death sentence, though one which might be evaded with great ease,[1] and hence the words of his law, *de ejus capite quaerito*,[2] are fully justified. Mommsen is fairly puzzled, as well he may be, how to reconcile these words with his own theory that the Sullan *interdictio* is mere *relegatio*.

'We must refer them,' he says, 'to the consideration that 'the "breach of ban"[3] was in fact punished with death, 'and that so *interdictio* might be described as a qualified 'death penalty; and it is further worth while to notice that 'the punishment of treason and murder by simple banish-'ment seemed objectionable, and that on that account choice 'may have been made of this form of expression, which is at 'best an astonishing one, and only occurs in this connexion.'[4] This appears but a lame account of the matter, and Mommsen seems irritated at having to admit so much as that *interdictio* is a qualified death sentence. He speaks elsewhere[5] of *interdictio*, 'if we are to call that a capital proceeding,'

[1] See above, p. 31 seq. [2] Cicero, *pro Cluentio*, 54. 148.

[3] There is no English and no Latin equivalent for the German 'Bannbruch' and 'bannbrüchig', which occur in almost every sentence of Mommsen's discussion of this topic. The paraphrase must, of course, be so framed as to include both the man who has gone into banishment and come back and the man who has neglected to go at all.

[4] *Strafrecht*, p. 907. [5] Ibid., p. 334, note 2.

'other hand attaches himself to some State whose inde-'pendence is formally recognized by Rome, as a citizen or 'in such other way that his reception into it annihilates his 'Roman citizenship.'[1]

I believe, here parting company with Mommsen, that the doctrine which he has so admirably expressed remains true to the end of the republic. If so, the consequences as to the retention of his Roman citizenship, which I have explained in the last chapter,[2] must befall the convict under Sulla's laws. He can enjoy real safety and freedom of travel only by 'casting his old slough' and commencing a new life as a foreigner. This is never stated *totidem verbis* in our authorities, but it is implied in the universal presumption that the condemned man *must* have taken the course, so necessary to him,[3] of changing his citizenship. We see, in the passage from the *pro Caecina*,[4] that *exilium* in the sense of *deponere civitatem*, not merely of removing beyond the bounds, is the sanctuary—the *ara*, the *portus*, the *perfugium supplicii* which gives security. We find that it is a *justum exilium*, of which the People takes note, that it has been performed by Cn. Fulvius.[5] We see Clodius insulting Cicero after his return,[6] by asking him, *Cujus civitatis es?* implying that, as he sees him in a whole skin, Cicero must have saved it by ceasing to be a Roman, and Cicero[7] in turn flaunting in the face of his enemy the decree of the senate, in which he is described as *CIVEM optume*

[1] *Strafrecht*, p. 68.

[2] See above, p. 39.

[3] We find much the same sort of presumption in the old comitial trials; it is so obviously the interest of the condemned man to appeal that it is always taken for granted that he has done so (see above, Vol. I, p. 140).

[4] See above, p. 26.

[5] Livy, XXVI. 3. 12.

[6] Cicero, *de Haruspicum Responsis*, 8. 17.

[7] Cicero, *de Domo*, 32. 85.

date,[1] and died in exile. Cicero writes,[2] in the year 46 B. C., recommending to the governor of Achaia a young man, Lyso, 'quem Memmius, quum in calamitate exilii sui Patrensis civis factus esset, Patrensium legibus adoptavit, ut ejus ipsius hereditatis jus causamque tueare.' There can be no kind of doubt that Memmius had ceased to be a Roman.

The system, as established by Sulla, underwent no alteration at the hands of Caesar, except that on his proposal the Roman People chose to attach a fresh consequence to condemnation by a jury court—namely, the confiscation of half the goods of the convict. This makes no difference in principle. The People is omnipotent in the matter, and may ordain what consequences it pleases. Under Augustus we find that *exules* are in the first place restricted in their choice of an asylum, and in the second place are forbidden to travel and subjected to some other limitations.[3] With Tiberius we come to an important change, the results of which are clearly visible in the jurists, though we have only the most meagre account in the history of how they came about. Dio Cassius[4] tells us under the year A. D. 23 that 'Tiberius denied to those who were interdicted from fire and water the right to make a Will, and this regulation still holds good'. The capacity to make a Roman Will is, as Mommsen points out,[5] 'the most tangible test of Roman citizenship.' When, therefore, we find in a jurist of the third century, first,[6] that

[1] The question is discussed on p. xiii of the Introduction to A. C. Clark's edition of the *pro Milone*.

[2] Cicero, *ad Familiares*, XIII. 19. 2.

[3] In the year 12 B. C. Dio Cassius, LVI. 27. 3 τὸ μήτε περαιοῦσθαί ποι ἄλλοσε . . . μήτε δούλοις ἢ καὶ ἀπελευθέροις ὑπὲρ εἴκοσι χρῆσθαι.

[4] Dio Cassius, LVII. 22. 5.

[5] *Strafrecht*, p. 957, note 2.

[6] Ulpian, *Digest*, XLVIII. 19. 2. The phrases *aqua et igni interdicere* and *exilium* remain, however, and are used indifferently with *deportare*; see Tacitus, *Annales*, XII. 42. 5 and XVI. 9. 1.

Cicero had alleged, of depriving any Roman against his will of citizenship or liberty.

The practice of the republic had indeed reduced both impossibilities to little more than legal fictions. It could hand over a thief in chains to work for the man who had caught him, or an insolvent debtor for his creditor; but these men were *pro servis*, not *servi*, their technical *libertas* and *civitas* being untouched, as is shown by their capacity to acquire property by the Roman method of *usucapio*.[1] It could in the same way practically deprive a man of citizenship by putting him in such a position that he was obliged to give it up, if he wished to save his throat.[2] The legislation of the principate made short work of these niceties. It sent criminals to hard labour for life in the mines, and decreed that they were slaves, and (as a slave must have a master) that they were 'slaves of their punishment', *servi poenae*;[3] and in like manner, as a less severe penalty, deported men of rank to an island, and sent mean persons, who were convicted, to 'public works', in both cases under the loss of citizenship, but with the retention of technical 'freedom'. All who underwent this penalty were reduced[4] to the condition of the *peregrinus dediticius*,

[1] Ulpian, *Digest*, IV. 6. 23. See Ortolan, *Instituts de Justinien*, Vol. III, p. 580, note 2.

[2] Rome got rid of an unwelcome citizen somewhat as Donald M'Aulay in the *Legend of Montrose* counselled his chief: 'I advised him to put the twa Saxon gentlemen and their servants cannily into the pit o' the tower till they gae up the bargain o' free gude-will; but the Laird winna hear reason.'

[3] Marcian, *Digest*, XLVIII. 19. 17 'non Caesaris servo sed poenae'. This doctrine is carried to the logical conclusion, that in case the convict had been a slave before his condemnation, if the new master, the *poena*, be extinguished by an imperial pardon the rights of his old master do not revive (Ulpian, *Digest*, XLVIII. 19. 8, § 12).

[4] Ulpian, *Regulae*, X. 3 'peregrinus fit is, cui aqua et igni interdictum est'.

the *poena legis Corneliae* as a substitute for death.[1] If one of the condemned dies (otherwise than by suicide) before deportation, his Will is valid, as that of a Roman citizen.[2] In any case we never again hear of a condemned Roman becoming the citizen of another state.[3]

The universal practice of *deportatio* is pretty clearly shown by an instructive case mentioned by the younger Pliny.[4] A certain Licinianus was accused as an accomplice in the incest of a Vestal whom Domitian buried alive. In terror at the fate in store for him 'ad confessionem confugit quasi ad veniam'; his counsel announced the plea in words which Hortensius might have used of Verres going to Massilia, *ex advocato nuntius factus sum : Licinianus recessit.* Evidently, however, this retirement into voluntary exile is no longer the end of the matter. Though Domitian exclaims in delight, 'Absolvit nos Licinianus,' and declares that he will not press hardly on him, he is no longer allowed to find refuge on neutral ground. The most the emperor can do for him is to let him plunder his own goods before they are confiscated, and to assign him a pleasant island: 'exilium molle velut praemium dedit, ex quo tamen postea clementia D. Nervae

[1] As in case of decurions; see Venuleius Saturninus, *Digest*, XLVIII. 19. 15.

[2] Ulpian, *Digest*, XXVIII. 3. 6, § 7 'Ejus qui deportatur non statim irritum fiet testamentum, sed cum princeps factum comprobaverit'.

[3] When Horace remarks (*Epistles*, I. 11. 17) that while a man remains 'incolumis' Rhodes and Mytilene are of no more use to him than a great coat in the dog-days, he implies that in his time the Roman might still select one of these free states as a shelter if the icy breath of the law overtook him. Hartmann (*de Exilio apud Romanos*, p. 15) knows of only one case, that of Volcatius Moschus, who died in A.D. 25, leaving his goods to Massilia *ut patriae* (Tacitus, *Annales*, IV. 43. 8). He had been condemned many years before, for Horace (*Epistles*, I. 5. 9) refers to his trial.

[4] Pliny, *Epistles*, IV. 11.

substituted for the voluntary putting of it away in a new home.

I have laid stress on what I believe to have been the continuity of the various developments of 'capital' punishment at Rome, because this is one of the few really important points as to which I find myself obliged, with much hesitation and much against my will, to disagree with Mommsen on a matter of legal antiquities. Mommsen believes that there is a great breach of continuity in the history of *exilium*, and he places this breach at the legislation of Sulla. In the introductory book of the *Strafrecht* he anticipates this conclusion. It will be convenient to quote this passage first, and then to develope his theory by means of extracts from the latter part of the work. The first-named passage[1] is as follows:—

'The interdiction of the later law, the relegation out of 'Italy under penalty for breaking the bounds, which was 'introduced by Sulla amongst the penalties for citizens, and 'is wholly distinct in theory and practice from the ancient '*exilium*, will be treated of in the fifth book.'

He considers, then, that while the earlier *exilium* was a privilege of retirement allowed to the citizen, who, though on the brink of condemnation, was not yet actually condemned, the *exilium* of Sulla was a definite, though very mild punishment inflicted as a consequence of condemnation.[2] In the same passage he expressly calls attention to the difference between Polybius' statement,[3] 'before the last tribe had voted,' with that of Sallust, 'aliae leges' (which Mommsen takes to be those of Sulla) 'condemnatis civibus

[1] Mommsen, *Strafrecht*, p. 73.

[2] Ibid., p. 966. He draws a hard line between 'die Verbannung vor dem Rechtspruch' and 'die Verbannung durch den Rechtspruch'.

[3] Above, Vol. I, p. 160.

us that Milo retired to Massilia 'intra paucissimos dies' after his conviction; and it seems to be implied that he might have stayed in Rome a little longer if he had chosen. Perhaps a certain warning from the magistrates was considered proper before they put the *aquae et ignis interdictio* into force. This was certainly the case with Metellus Numidicus in 100 B.C. The law of Saturninus fulminated *aquae et ignis interdictio* against him.[1] But, if Appian is to be trusted, the consuls were furthermore instructed to issue a decree of proscription which would explicitly warn him of his danger.[2] It is possible that this proceeding was normal, though it would be unnecessary if the *interdictus*, like Milo, went away briskly. At any rate I think that there can be no question that a respite of some days was practically allowed in republican times, as it certainly was under the principate. Marcianus tells us,[3] that an additional penalty was incurred, 'si quis non excesserit in exilium intra tempus intra quod debuit.'

This slight modification in the procedure would amply justify the change of tense from the future to the past, if indeed such a change is proved; it would assure to the *condemnatus civis* and to him who was only expecting condemnation equal opportunity for retreat, and it is against all sound reasoning to invent the supposition of a radical change of the law in order to account for a circumstance which can be explained so simply and so easily.

The passage from Sallust's *Catilina*[4] on which Mommsen

[1] Cicero, *de Domo*, 31. 82.

[2] Appian, *Bellum Civile*, I. 31.

[3] Marcianus, *Digest*, XLVIII. 19. 4. We find likewise that a respite of thirty days was sometimes allowed to the accused before his arrest, 'ad componendos maestos Penates' (Theodosius I in 380 A.D.) *Cod. Theod.* IX. 2. 3.

[4] Sallust, *Catilina*, 51. 22.

'for treason and murder, and in subsequent penal statutes it 'was employed in like manner for *vis*, for *ambitus*, and for 'other offences. . . . In its essence [1] Sulla's innovation is not 'so much that the penalty for transgressing the bounds, 'which follows of course on all relegation, is raised to the 'punishment of death, as that in this manner relegation, 'which had hitherto been a merely administrative act, is 'provided with legally defined local limits, and attached to 'specific offences, and is thus introduced into the criminal 'law. . . . The interdiction [2] for a term of years or for life '(generally unaccompanied by confinement to one place), as 'Sulla ordained it, and as it was practised until the time of 'Tiberius, does not alter the man's personal standing; the '*interdictus* retains the citizenship and all the rights that 'accrue to it.'

Finally, a little lower down [3] Mommsen continues:

'We must not disguise the astounding fact that a law-'giver such as Sulla fixed expulsion from Italy, without 'further legal consequences either for person or for property, 'as sufficient atonement for the most heinous crimes, even 'for treason and murder, and treated it as practically the 'severest criminal penalty. It is possible, however, that 'supplementary regulations or customs, especially concern-'ing common crimes and offenders of the lower class,[4] have 'remained unknown to us; at least it is obvious that the 'order of proceedings with which we are acquainted has 'regard especially to offenders belonging to the higher social 'circles.'

Such is the theory: in discussing it the best order will be

[1] Mommsen, *Strafrecht*, p. 973.
[2] Mommsen, ibid., p. 978. [3] Mommsen, ibid. p. 979.
[4] On this matter see above, Vol. I, p. 167.

frequent, and we are better able to measure the gulf which separates it from *exilium* or *interdictio*. The most famous instance of a *relegatus* is the poet Ovid, who repeatedly lays stress on the distinction. The following lines[1] may serve as an example:

Fallitur iste tamen quo judice nominor exul;
Mollior est culpam poena secuta meam.

. . . . . .

(Caesar) Nec vitam nec opes nec jus mihi civis ademit;
Nil nisi me patriis jussit abesse focis.
Ipse relegati non exulis utitur in me
Nomine.

It is clearly implied here that in the reign of Augustus the *exul* does lose the rights of a citizen, and that the *relegatus* does not lose them. When, under Tiberius, 'deportation took the place of interdiction from fire and water,' relegation was left just where it was before; it was a comparatively light punishment, which could be inflicted in its original form of simple expulsion from a province, or of internment within its limits by the authority of any governor. The *relegatus* retains his citizenship and his right to make a Will, whereas the *deportatus* loses them.[2] Since, then, the opposition between *exul* and *relegatus* which we see in Ovid is continued in the opposition between *deportatus* and *relegatus*, it seems only reasonable to conclude that *aquae et*

exilium in a very general sense (e. g. *Annales*, III. 24. 5), sometimes (e. g. *Annales*, IV. 42. 3) more strictly for *aquae et ignis interdictio* as opposed to the penalty of the *lex Julia de Adulteriis*, which Paulus tells us (*Sententiae*, II. 26. 14) was *relegatio*. In the third century *exilium* is used even by jurists for *relegatio*, e. g. by Marcianus, *Digest*, XLVIII. 22. 5, though his contemporary, Paulus (see below, p. 69, note 1), more correctly contrasts the two words.

[1] Ovid, *Tristia*, V. 11. 9 seq. [2] See below, p. 69, note 1.

pute that before Sulla and after Tiberius the *exul* ceases to be a citizen,[1] the burden of proof lies heavy on the interpreter who maintains, in spite of the complete silence of our authorities as to any change, that a different theory and practice obtained in the intervening period. It seems to me an almost overwhelming objection to Mommsen's contention, that he should be unable to quote from all Cicero's works a single hint of what, if true, would have been the most momentous change in the criminal law during the period covered by Cicero's manhood.

What, then, is the proof of the proposition that in the interval between Sulla and Tiberius a Roman condemned on a 'capital' charge retained his Roman citizenship? I know of only two pieces of purely circumstantial evidence. The first is[2] that the young Oppianicus, upon the death of his father, a man convicted of poisoning, is found to be owner of Nicostratus, one of his father's slaves.[3] The elder Oppianicus must therefore, Mommsen argues, have been capable of bequeathing property, and therefore of making a Will as a Roman citizen. It is possible that Oppianicus, after his condemnation, may have slipped across the Straits of Messana and obtained a domicile as a citizen of one of the *foederatae civitates* of Sicily. In that case he would make his Will according to the laws of Messana or Tauromenium; a legacy under such an instrument would pass the slave to his son, just as well as a legacy under a Roman Will. But it is more probable that Oppianicus did not become an *exul*,

[1] The point is perhaps best brought out in Paulus's definition (*Digest*, XLVIII. 1. 2), 'Capitalia sunt judicia ex quibus poena mors aut exilium est, hoc est aquae et ignis interdictio: per has enim poenas eximitur caput de civitate. Nam cetera non exilia sed relegationes proprie dicuntur; tunc enim civitas retinetur.'

[2] Mommsen, *Strafrecht*, p. 978, note 2.

[3] Cicero, *pro Cluentio*, 63. 176.

grinus dediticius confined to his island should appear to conduct some one else's case in a law-court. Yet Ulpian lays it down,[1] 'Et, qui capitali crimine damnatus est, non debet pro alio postulare.' If such superfluity is permitted to a scientific jurist, we need not be astonished to find it in the work of a scribe employed to draft a law. These officials were inordinately given to legal verbiage and to heap up precautions, sometimes against what was already sufficiently barred.[2]

I do not, however, feel sure that the provision was unnecessary. The clause is a repetition, as applied to the municipal senates, of what Cicero tells us[3] was the rule at Rome, 'Ubi cavisti ne meo me loco censor in senatum legeret? quod de omnibus, etiam quibus damnatis interdictum est, scriptum est in legibus.'[4] Now, as we have seen,[5] it was very difficult to prove the *animus exulandi* which was essential to the *mutatio*

[1] Quoted in *Digest*, III. 1. 1. § 6.

[2] There is an instance in the *lex Acilia*. Verse 22 prescribes that the accuser, in naming his hundred *judices* out of the *album*, is not to choose any magistrate or senator, whereas such choice is already abundantly provided against by the circumstance that senators are by verse 16 already excluded from the list out of which the choice is to be made. Zumpt (*Criminalrecht*, II. i. 125), rather than admit such a superfluity, takes refuge in the absurd supposition that these *judices* were not selected from the *album*, but from outside. He supplies us with a useful object-lesson as to the danger of arguing in this way. For other instances of the vagaries of Roman draftsmen, see above, Vol. I, p. 151.

[3] Cicero, *de Domo*, 31. 82.

[4] Exclusion is mentioned as the result of conviction in certain cases in the *lex Acilia*, verse 13: 'queive quaestione ioudiciove puplico condemnatus siet quod circa eum in senatum legei non liceat.' Yet persons condemned in Gracchus' time for murder or conspiracy, whether they were tried by special commissions or by standing jury courts, must certainly have ceased to be Romans. We find the same disability specially imposed by a *lex Cassia* of 104 B.C. on persons condemned by the People (see Mommsen, *Strafrecht*, p. 1000, note 1).

[5] See above, p. 29.

needful for him to change his State, and that the law assumed that he had done so.

Thus the evidence for Mommsen's theory seems to crumble away, while the objections to it remain unanswered. Mommsen is obliged to ignore Cicero's elaborate exposition of the true doctrine of *exilium* in the *pro Caecina*. How could Cicero have dared to proclaim in open court that 'in no law of ours is any crime punished by exile, as it is in other States', unless he had been sure that his hearers recognized that the banishment, which, when he spoke, was notoriously the result of conviction, was not inflicted by direct sentence of the law (as it must have been if it were *relegatio*), but was brought about indirectly by the effect which the fear of consequences produced on the will and the choice of the convict? Where, again, if we accept Mommsen's hypothesis, are we to find the point of Clodius' taunt when he asked Cicero to what State he belonged? or how shall we account for Memmius adopting an heir under the laws of Patrae? or what sense are we to make of Ovid's insistence that he, unlike a real *exul*, has never lost the rights of a citizen? Above all, how are we to explain the *de capite ejus quaerito* of Sulla's law, which Mommsen finds 'astonishing',[1] but which appears to me to be absolutely crushing to his theory? For it is impossible to escape from this by the plea of rhetorical exaggeration. Advocates from Lucius Crassus[2] downwards play so freely not only with *caput*, but with *vita* and *sanguis*, that there is no difficulty in conceding Mommsen's assertion[3] that 'the Roman who is not allowed to tread the soil of Italy is, in the language of the orators, no Roman at all'. But all this is beside the mark;

[1] See above, p. 51.
[2] See below, p. 80, and compare above, p. 14.
[3] *Strafrecht*, p. 978, note 2.

CHAPTER XVII

THE JURORS

THE right or duty of sitting on juries was a bone of contention between the various orders of the State during the last century of the Republic. Tacitus[1] speaks of Leges Semproniae, Serviliae, Corneliae, which transferred the coveted privilege from one order to another. It is a matter worth discussing under what forms these various transferences were accomplished.

There can be little doubt regarding the last generation of the Free State when the jury courts were multiplied. Sulla, by a general *lex Cornelia judiciaria*, gave them collectively to the Senate, and Aurelius Cotta by a similar law in 70 B. C. transferred them to a mixed body of Senators, Equites, and Tribuni aerarii. Sulla had no occasion to make out a general list of jurors, for such a list lay ready to his hand in the roll of the Senate, but he divided that list into 'decuries' for the convenience of empanelling juries. Cotta imposed on the *praetor urbanus*[2] the task of making out a general *album judicum*, drawn from the three orders, and every *quaestio* had to be manned out of the album. The number of names on Cotta's list is uncertain. If we can trust the MSS. of Cicero (*ad Familiares*, VIII. 8. 5), it should be 900, for the senatorial jurors who are liable to be fetched away from their courts to attend a call of the Senate are given as CCC. When we consider that 450 were

[1] Tacitus, *Annales*, XII. 60. 4.
[2] Cicero, *pro Cluentio*, 43. 121.

later on ; meanwhile I must deal with a preliminary problem which has been set to us by Mommsen in another place.[1]

Mommsen believes that his general *lex judiciaria* was only Gracchus' second attempt to deal with the matter in 122 B. C., the first being a scheme in 123 B. C. to increase the numbers of the Senate and leave the jury courts with this enlarged body. What is the evidence for this ? The Epitomator of Livy,[2] who knows nothing about Gracchus' equestrian courts, declares that amongst the laws carried by Caius Gracchus was one for adding 600 new members to the Senate, and Plutarch[3] speaks of his sharing the jury courts between the two orders—a statement which Mommsen takes to be a confused rendering of the more correct presentation of Livy.[4] When we consider that the supposed reforms certainly never took effect, either because Gracchus ' by his second law destroyed his first ',[5] or because the first, notwithstanding Livy and Plutarch, was never carried at all,[6] I think that we may be justified in rejecting the stories of these late writers altogether.

My view would be that when we find, as here, our miserable authorities (Appian, Plutarch, the Epitomator) all professing to tell us what was written in certain laws, and flatly contradicting one another respecting them, it is of no use to hunt about for possible reconciliations ; we only get deeper and

[1] Mommsen, *Juristische Schriften*, Vol. III, p. 344 seq.

[2] Livy, *Epitome*, LX. [3] Plutarch, *Caius Gracchus*, 5. 2.

[4] From whom, however, Mommsen refuses to accept the 600, but, thinking himself at liberty to pick and choose, substitutes as the number of the new senators the 300 mentioned by Plutarch as that of the new judges. It is another illustration of the hopeless entanglements into which this line of argument leads that, when Plutarch says (*Caius Gracchus*, 6. 1) that the People gave Gracchus the right to select the jurors, Mommsen is obliged to interpret this to mean that he was to nominate the new members of the Senate.

[5] Mommsen, *Juristische Schriften*, Vol. III, p. 346.

[6] Mommsen, ibid. in note on same page.

Appian,[1] that the Senate was to be increased by 300 members and the juries to be selected from the Senate so reinforced. The last version, as reconciling in some sort the other two, has been commonly accepted by modern scholars. My own opinion is that Appian does not on this occasion win the crown promised to the one-eyed in the country of the blind, but that it must fall to Velleius. Far the most circumstantial and trustworthy account of the situation in the tribunate of Drusus comes from Cicero's Introduction to the Third Book of his *de Oratore*. There we find the consul Philippus, Drusus' great opponent, publicly protesting that he must look out for himself another *consilium*, that he cannot carry on the government with the Senate as it now is.[2] Drusus thereupon takes up the challenge and summons the Senate to discuss the consul's words. Lucius Crassus delivers a splendid invective, and the House censures Philippus and declares that the Senate never has proved and never will prove wanting to the State. Now it seems to me that all this attack and defence of the Senate 'as it now is' would have been absurd, if the very point of Drusus' proposal had been to revolutionize the Senate, as Appian states, by doubling its numbers. Cicero was nearly sixteen years of age when the scenes which he describes occurred, and Crassus is his ideal among the orators of the past generation; he would have ample opportunity for learning the facts from his master, Scaevola, and other senators. I have no doubt therefore that his picture is true, and should accordingly reject Appian's story as a mere antedating of what Sulla afterwards accomplished.

[1] Velleius, II. 13. 2; Livy, *Epitome*, LXXI; Appian, *Bell. Civ.* I. 35.

[2] Cicero, *de Oratore*, III. 1. 2 'Videndum sibi esse aliud consilium, illo senatu se rempublicam gerere non posse.'

made up of Roman knights 'cupidos judicandi'; and Antonius[1] procured the acquittal of his client by skilfully playing on this known antipathy in addressing an equestrian jury on behalf of Norbanus in B. C. 94. Caepio gained the title of 'patron of the Senate',[2] but his law was repealed shortly afterwards, so shortly that Cicero does not think it necessary to take any notice of this gap in counting up the years of the equestrian domination. All this seems quite easy and satisfactory; but Mommsen cannot get free from the notion that Obsequens and Cassiodorus must have had some foundation for their statements. He finds this justification in the supposition that Caepio (like Gracchus before him and Drusus and Sulla after him) provided for the addition to the Senate of 300 members of the equestrian order. I think that it is impossible to suppose that if this had really been done, some trace of the increase would not have been found in ancient writers. For my own part I believe that no such increase was ever attempted till the time of Sulla.

It is time to leave this digression and to return to the main question of the *leges judiciariae*. Mommsen would distinguish very sharply between these and the various laws which instituted and regulated the individual criminal courts. For instance, when the question is raised—By whom was the law of Caepio reversed? he rejects absolutely the supposition of most modern scholars that it was by Servilius Glaucia (although Cicero[3] speaks of him as being a favourite with the knights whom 'beneficio legis devinxerat'), on the ground that Glaucia's Law was undoubtedly a *lex repetundarum*,[4] 'and that a change in the

[1] Cicero, *de Oratore*, II. 48. 199.

[2] Valerius Maximus, VI. 9. 13. [3] Cicero, *Brutus*, 62. 224.

[4] So far Mommsen is certainly in the right; see Asconius, *in Scaurianam*, 19 'Caepio Scaurum reum fecit repetundarum lege quam

(a very appropriate officer for cases in which aliens were mainly involved), and in all future years to the special praetor named to administer this particular law. There is no hint that senators were already excluded by any general law; on the contrary, stringent regulations have to be laid down in the law itself to prevent any senator from finding a place in this *album*. My conclusion would be, that the law preserved to us broke fresh ground, and was the first step in substituting knights for senators as jurors.

Now it must be remembered that C. Gracchus found only one *quaestio perpetua* in existence, this very one for extortion, and that he himself invented, so far as we know, only one other—the 'ne quis judicio circumveniretur'.[1] It is possible that the *quaestio inter sicarios* may be his,[2] but there is no authority for the assumption. At any rate the first two named would be the only ones of political importance. We may suppose that the Gracchan law framing the *quaestio* 'ne quis judicio circumveniretur' followed the lines of the *lex Acilia*, and either referred the parties empanelling a jury to the album established by the extant law, or more probably instituted a similar *album* of its own;[3] the whole ground would then be practically covered. If as a possibility we add to these a law regulating the appointment of a judex in a private suit,[4] the three laws

[1] Cicero, *pro Cluentio*, 55. 151.

[2] See above, Vol. I, p. 227, note 6, and Vol. II, p. 20.

[3] It is an incidental advantage of this last hypothesis that, if it be true, it serves as the clue to the interpretation of a very difficult passage in Cicero's speech *pro Plancio*, see below, p. 109.

[4] I am thankful that the vexed question, whether the right to serve as the *unus judex* in a civil suit was shifted to and fro with the changing regulations about the *quaestiones perpetuae*, does not strictly speaking belong to the criminal law, so that I am not bound to find an answer to this probably insoluble problem. To the authorities mentioned by Mommsen (*Juristische Schriften*, Vol. III, p. 355) may be added Zumpt (*Criminalrecht*, II. ii. 133), who has a theory all his own.

Gracchani judices? What was the qualification for jurors during the interval between Gracchus and Sulla? The historians who profess to tell the story of the time generally call the new jurors ἱππεῖς or *equites*, and what is far more important, Cicero continually refers to them under the style of *equites Romani* or *equester ordo*. The same title is given to the second of the three bodies amongst whom Aurelius Cotta divided his *album judicum* in 70 B.C. I think that we may safely assume that the word, as used to indicate a certain class of jurors, bears the same sense throughout, and that, whatever definition we may adopt for Gracchus' reform, it must be one which will fit equally for the *lex Aurelia*. If we turn to the original institution of equestrian juries in the *lex Acilia repetundarum*, we find to our disappointment that whereas the negative qualifications, that a man must not be a senator, a youth, a bankrupt, and so forth, are set out with the utmost clearness, there is an unfortunate break in the bronze tablet at each place [1] where the positive qualification is being named, and this gap has to be filled up by conjecture in accordance with the opinion which each editor has formed on other grounds as to the nature of that qualification. Thus documentary evidence fails us, and we are driven back on the descriptive phrases of the ancient writers.

The difficulty is, that in the last century of the Republic the words *equites* and *equester ordo* are employed in at least two different senses. In the first place, they are used, and most properly, so far as antiquarian correctness goes, to indicate the persons who are actually serving and voting in the Eighteen Equestrian centuries, which survived in the *comitia centuriata* as a relic of the military arrange-

[1] *Lex Acilia*, verses 12 and 16 (Bruns, *Fontes*[7], p. 61). See below, p. 90 and p. 94.

of them had been liable to serve as an *eques equo privato*.[1] We know that in the *lex theatralis* of Roscius Otho the criterion for sitting on the front benches was one of wealth ; Horace and Juvenal are unimpeachable witnesses for this.

> Sed quadringentis sex septem millia desunt ;
> Plebs eris.[2]

and

> Sic libitum vano qui nos distinxit Othoni.[3]

Those who had lost their qualifying property lost their place, though some comparatively desirable seats[4] seem to have been reserved for them. Augustus made an exception in favour of those who had been ruined in the civil wars.[5] When, therefore, Cicero[6] says that his 'friend Otho had restored not only dignity but pleasure to the equestrian order', he must be taken to use the words in the wider sense.[7] This undoubtedly is likewise the sense in which they are used, whenever the *equites* are spoken of as a body in the State with distinct public interests and political activities and sympathies. It is they who traffic and lend money in the provinces, and from their ranks come the

[1] Livy, XXVII. 11. 15.

[2] Horace, *Epistles*, I. i. 58. [3] Juvenal, *Satires*, III. 159.

[4] Cicero, *Philippics*, II. 18. 44 'Quum esset lege Roscia decoctoribus certus locus constitutus.'

[5] Suetonius, *Augustus*, 40 'Quum autem plerique equitum attrito bellis civilibus patrimonio spectare ludos e quattuordecim non auderent metu poenae theatralis, pronuntiavit non teneri ea, quibus ipsis parentibusve equester census unquam fuisset.'

[6] Cicero, *pro Murena*, 19. 40.

[7] Probably the qualification for the gold ring was the same; for when Caesar harangued his troops after crossing the Rubicon and drew off his ring (which he would sell rather than not redeem his word), the soldiers thought that to each of them 'promissum jus anulorum cum milibus quadragenis' (Suetonius, *Julius*, 33). They could not possibly have thought that they were all to be put among the 1,800 of the equestrian centuries.

Purser, in their great edition of Cicero's letters, come to the opposite conclusion. I do not feel qualified to enter into the controversy over the linguistic details, but the historical evidence seems to me overwhelming in favour of the document. I feel very confident that a forger of later times, when detailing a list of Catiline's enormities, would never have omitted, as this writer does, the so-called First Conspiracy of the year 66 B.C., which won its way, thanks partly to Cicero and Hortensius,[1] but mainly to the elder Curio and Bibulus,[2] to a place in the authorized version of Roman History, where it has served to accredit wild stories invented by his enemies against Caesar. If the treatise *de Petitione Consulatus* were really written, as it professes to be, at the end of the year 65 B.C. or quite early in the next year, the omission may easily, as I think, be explained by the supposition that at that time the myth had not, as yet, taken shape. This silence appears to me almost proof positive that this *commentariolum* cannot have been written at any later period. I think, then, that we may safely accept the sentence about the *equester ordo* as a genuine utterance of Quintus Cicero; after all, it only confirms the commonest use of the words in his brother's writings.

Now comes the question—Can we accept this conception of a non-Senatorial *ordo*, based on a purely monetary qualification, as a sufficient account of the *equites* whom we find monopolizing the juries from the time of Gracchus to that of Sulla, and later occupying a place in them under the *lex Aurelia*? This was the dominant opinion before Mommsen; and the unhappy gap in the text of the *lex Acilia* was filled up in the earlier editions of Bruns, *Fontes*

[1] Cicero, *pro Sulla*, 4. 12, and *in Toga Candida*, 20.
[2] Suetonius, *Julius*, 9.

is rendered probable by a comment of the *Scholiasta Bobiensis*[1] on a passage in Cicero's speech *in Clodium et Curionem*. The fragment of Cicero reads—'ut posthac lege Aurelia judex esse non possit,' and the scholiast says that this relates to the impossibility that a bribed juryman should disgorge, because 'amissis trecenis vel quadragenis millibus quae a reo acceperant in egestatem revolverentur ac propterea in judicum [numero non essent]'. It does not follow, however, as Madvig's theory demands, that the possession of the 400,000 or 300,000 was the *only* qualification for the respective decuries.

The notion of classes of jurors marked off from one another solely by their property qualification, and borrowing a name in each case from another class of persons with the same pecuniary standard, is attractive in its simplicity, but it seems to me untenable in face of the only detailed account which we possess of the method of selection. This account comes from Asconius' comment on Cicero's speech against Piso. After mentioning the senators, *equites*, and *tribuni aerarii* called to serve under the Aurelian Law, he proceeds to tell us[2] that Pompey, in his second consulship (55 B.C.), ordained 'ut amplissimo ex censu ex centuriis aliter atque antea[3] lecti judices, aeque tamen ex illis tribus ordinibus res judicarent'. Now, if Pompey could raise the property qualification without disturbing the balance of the orders,[4] it seems clear that there must have been some criterion,

[1] Scholiasta Bobiensis, *In Clodium et Curionem*, Fragm. XXXI.

[2] Asconius, *in Pisonianam*, 15.

[3] Apparently the freedom of choice of the praetor was restrained; see Cicero (*in Pisonem*, 39. 94) 'non aeque (*neque*, Madvig) legetur quisquis voluerit nec quisquis noluerit non legetur . . . judices judicabunt ii, quos lex ipsa, non quos hominum libido delegerit.'

[4] If with Mommsen (*Staatsrecht*, III, p. 192, note 4) we take 'amplissimo ex censu' to mean the equestrian census of 400,000 sesterces the distinction would disappear altogether.

aerarii. Manifestly he does not intend to offend a third of the jury by ignoring them, but means the *equites Romani* and the *hunc ordinem* to include them.

If, then, wealth will not serve as the distinction for the purpose of the jury courts between *equites* and *tribuni aerarii*, how are we to differentiate them? I think that it can only be by dwelling on the original signification of the phrases.[1] We have seen that the name *equites* was derived from the centuries of cavalry; if we turn to Varro[2] we find that the *tribuni aerarii* were in early times collectors of the *tributum* of Roman citizens, and that it was their duty, from the fund so amassed, to distribute pay to the soldiers. Now the payment of this *tributum* had ceased from the time when Aemilius Paulus brought back the spoils of Perseus in 167 B.C., and the troops were thenceforward paid directly out of the treasury by the quaestor. From that time onward the original function of the *tribuni aerarii* was in abeyance; but there is much probability in Mommsen's suggestion that the same persons reappear discharging some slight duties under the title of *curatores tribuum*.[3] However this may be, there was nothing in law to prevent a revival of the *tributum*,[4] and so these tribunes may well have continued to be elected to what was in the meantime an insignificant office; which, however (like the Stewardship of the Chiltern Hundreds amongst ourselves), might afterwards come in useful for another purpose.

[1] Against Zumpt (*Criminalrecht*, II. ii. 192), who maintains that the *tribuni aerarii* of the jury courts have nothing to do with the office of the same name.

[2] Varro, *de Lingua Latina*, V. 181 (Bruns, *Fontes*[7], App., p. 54).

[3] These are occasionally mentioned in literature and in inscriptions (Mommsen, *Staatsrecht*, III, pp. 189–196).

[4] Such a revival was in fact contemplated in the last days of the Republic (Cicero, *Philippics*, II. 37. 93).

that annual office.[1] Any one of these might find a place in the third decury provided that he had not sunk below the standard of wealth which originally qualified him for the post. The *tribuni aerarii* were evidently as a rule persons of property and position, and those of them who served on the juries would be more notably so after Pompey had excluded the less opulent members of the order.

I have mentioned[2] two occasions on which the ordinary practice of the period as to the selection of jurors is set aside under stress of peculiar difficulty or danger, and it is now time to describe the substituted methods. The case of Pompey's sole consulship presents no great difficulties as to the formation of the special *album*;[3] Pompey is said by Asconius[4] to have fulfilled his duty of selecting his 360 (presumably 120 from each order) so conscientiously 'ut nunquam neque clariores viros neque sanctiores propositos esse constaret'. These 360 persons were to judge in all cases *de vi*[5] within the year; probably Pompey was commissioned to make out a similar *album* for the *quaestio de ambitu*, which was likewise called into special activity by the circumstances of the time.[6] The other instance,

[1] So Lange (*Römische Alterthümer*, Vol. III, p. 193), 'such Citizens of the First Class (i. e. according to him, of 300,000 sesterces) qualified by their property to serve as *tribuni aerarii*, as had actually served that office.'

[2] See above, p. 76 and p. 84.

[3] The more interesting question as to the procedure at each individual trial will be discussed later (p. 110).

[4] Asconius, *in Milonianam*, 33; for the number see below, p. 111, note 1.

[5] Certainly not for all cases for whatever crime. The whole 360 were wanted for the earlier stages of Milo's trial (see below, p. 111), so that none would be available for service elsewhere.

[6] It was those condemned *de ambitu* whom Caesar, according to his own account, restored at the end of 49 B. C. (Caesar, *Bellum Civile*, III. 1. 4). The special exception, however, of Milo, recorded by Dio (XLI. 36. 2) and by Appian (*Bellum Civile*, II. 48), shows that,

qualification for all *quaestiones* which obtained as a matter of fact before Sulla, nor the common list which Cotta introduced as a matter of law, prevented wide differences in the methods adopted for choosing, out of the body indicated as *judices*, those who were to sit on a particular case. Such courts present great variations in the number of the jurors. In Clodius' trial for sacrilege 56 votes were recorded,[1] 70 in that of Gabinius for *majestas*,[2] 50 in that of Procilius for murder,[3] 51 in that of Milo and other defendants in Pompey's sole consulship,[4] 70 in that of Scaurus ;[5] Flaccus was tried before 50 non-senatorial jurors[6] with presumably 25 senators besides, and Cicero threatens Piso with a bench of 75 jurors.[7] Under the Sullan laws, when only senators were available, the juries were, as we should expect, smaller ; 32 voted at the trial of Oppianicus,[8] and Cicero implies a small number for the trial of Verres when he describes the substitution of fresh members for eight jurors, who will be withdrawn if the trial be stretched over the New Year, in the words 'prope toto consilio commutato'.[9] There is evidence of so many different methods of putting a jury into the box that it will be necessary to go through them one by one. For the convenience of reference I will indicate them in numbered paragraphs, in which, however, strict chronological order cannot always be maintained.

1. In the trial of the Spanish Governors in 171 B. C. the praetor received as part of his commission the instruction

[1] Cicero, *ad Atticum*, I. 16. 10.
[2] Cicero, *ad Quintum Fratrem*, III. 4. 1.
[3] Cicero, *ad Atticum*, IV. 15. 4.
[4] Those named are M. Saufeius (two trials) and Sex. Clodius (Asconius, *in Milonianam*, 47–49).
[5] Asconius, *in Scaurianam*, 25.
[6] Cicero, *pro Flacco*, 2. 4.
[7] Cicero, *in Pisonem*, 40. 96.
[8] Cicero, *pro Cluentio*, 27. 74.
[9] Cicero, *in Verrem*, Actio Prima, 10. 30.

the analogy of the method described in the last paragraph, the word *fortuna* would still be justified if by ignorance, clumsiness,[1] or want of sufficient material from which to draw[2] the accuser had not actually presented a body of jurors, who, after the accused had struck off the most obnoxious names, would be too eager to convict. We know that the jury in this case was, for some reason, very hurriedly constituted. Cicero wishes to complain of the method while at the same time congratulating himself, as he[3] and other advocates are in the habit of doing, on 'the men whom I see before me in the jury-box'; *fortuna* serves him conveniently to bridge over the inconsistency between the two insinuations.

4. The arrangements for empanelling a jury *de repetundis* under the régime of the Cornelian Laws of Sulla, when every juror must be a senator, are extremely difficult to trace. In the first place the Senate was split into divisions called *decuriae*; the number of senators in each decury cannot be determined. If Verres be acquitted, says Cicero, nothing can prevent his having his place in the 'Second decury'. The 'fortuna populi Romani' is said to have manifested itself in the falling of the lot at the trial of Verres.[4] Whether the drawing merely decided which decury

[1] Cf. Cicero, *pro Plancio*, 16. 41 'tu ita errasti ut eos ederes imprudens, ut nos invito te tamen ad judices non ad carnifices veniremus.' The Bobiensian Scholiast (ad loc.) paraphrases this passage—'sed *fortunam* multo prosperius secundasse.'

[2] As under the *lex Aurelia* the same *album* had to supply jurors for all the courts, it would be largely a matter of chance what jurors happened to be free for choice at any one moment. The explanation of the passage from the *pro Sulla* by the *Scholiasta Bobiensis* need not be regarded, as it manifestly does not elucidate the text, though we may agree with his remark—'sensus quidem multae obscuritatis est.'

[3] e.g. *in Verrem*, Actio Prima, 6. 17; and 16. 49; *pro Roscio Amerino*, 48. 141; *pro Flacco*, 38. 95.

[4] Cicero, *in Verrem*, Actio Prima, 6. 16 'et in sortitione istius

follows: '(Verres) quum P. Galbam judicem rejecisset, M. Lucretium retinuit, et quum ejus patronus ex eo quaereret, cur suos familiarissimos Sex. Peducaeum, Q. Considium, Q. Junium rejici passus esset, respondit quod eos in judicando nimium sui juris sententiaeque cognosset.' Mommsen takes *rejici* to mean 'cut out by the accuser', and his comment is 'so that the accused could nominate a certain number of jurors without the accuser being able to stop him'. I do not think that the Latin sentence will bear the weight of Mommsen's superstructure. The words 'rejici passus esset' need not, and the *rejecisset* earlier in the sentence cannot, refer to the action of the accuser; nor need the *retinuit* imply that Cicero was debarred from challenging Lucretius.[1] The whole sentence may be much more simply explained, if we suppose that Hortensius, the *patronus*, was not himself present at the *rejectio*, but left the task to one of the *advocati*, who, as he thought, had been insufficiently posted up by Verres as to the probable leanings of the several jurors, so that Verres had allowed his agent to object to his best friends. On the whole, I think that there is nothing to show that either accuser or accused had any right of nomination, nor any power of retention except negatively, so far as they refrained from objecting.

5. Cicero tells in his speech *pro Plancio*, which is a mine of information about the jury courts, that in cases of *ambitus* the method pursued was the *rejectio alternorum judicum*.[2] This is doubtless the same system as that in

[1] I agree with Zumpt (*Criminalrecht*, II. ii. 119) that Lucretius was rejected. If he had actually had him for judge, Cicero would never have referred to him as a man whose retention by the defendant was a slur on Verres' conduct of his case. Cicero must have effectually got rid of Lucretius from the bench before he could venture so to insult him.

[2] Cicero, *pro Plancio*, 15. 36.

that they could be supposed to have recommended themselves to Chrysogonus by the quality of *severitas*. That would have been the last thing which his guilty conscience could desire in such a quarrel. I believe, then, that a praetor (probably the *praetor urbanus*) is the person who designates the jurors to try the case of Roscius,[1] subject, doubtless, to some challenge of individual names which might be started by either of the parties to the suit.[2]

7. We have next to deal with a very difficult passage from the *pro Plancio*,[3] 'Nuper clarissimi cives nomen edititii judicis non tulerunt, quum ex CXXV judicibus principibus equestris ordinis quinque et LXX reus rejiceret, L referret, omniaque potius permiscuerunt quam ei legi conditionique parerent; nos neque ex delectis judicibus sed ex omni populo, neque editos ad rejiciendum sed ab accusatore constitutos judices ita feremus[4] ut neminem rejiciamus.' On this the commentator of the *Scholia Bobiensia* remarks, 'Hac in parte commemorationem videtur facere Tullius ejus temporis quo Se . . .' To what date are we to refer the circumstances here described?

Mommsen in his monograph *de Collegiis*[5] interprets the broken word *Se* of the Scholiast as indicating Servius Sulpicius Rufus, who, as we know,[6] proposed in the year of Cicero's consulship various severe measures against bribery,

[1] This is confirmed by another passage later on (52. 151): 'ad eamne rem delecti estis, ut eos condemnaretis quos sectores ac sicarii jugulare non potuissent?' Evidently the choice is one assumed to be made by some impartial and approved person.

[2] We find a method precisely similar to this in the appointment of *recuperatores* in the Agrarian Law of 111 B.C. See above, Vol. I, p. 217, note 2.

[3] Cicero, *pro Plancio*, 17. 41.

[4] i.e. in Plancius' trial under the *lex Licinia de Sodaliciis*; see below, paragraph 8.

[5] Mommsen, *de Collegiis*, p. 63.

[6] Cicero, *pro Murena*, 23. 47.

are to be selected? Mommsen[1] thinks that amongst the proposals of Servius Sulpicius was one that the senatorial decury should be omitted in trials for bribery. I cannot believe for a moment that Servius Sulpicius, an optimate, though a moderate one, should have contemplated such an upsetting of the compromise of the Aurelian Law. If he had done anything so extreme, it is surely one of the first things with which Cicero would have reproached him, when he criticized his abortive schemes in the *pro Murena*.

Still less do I concur in Mommsen's interpretation (founded on his last hypothesis about Servius Sulpicius) of the concluding sentence of the passage from the *pro Plancio* with which we started. Cicero is contrasting the system which he describes with that under which Plancius was being tried. Jurors, he says, are presented to us 'non ex delectis judicibus sed ex omni populo'. Mommsen[2] will have it that when the senatorial decury is included in the *album*, as it was under the Licinian Law, the choice of the accuser is *ex omni populo*, when the senators are excluded and the other two decuries remain, this makes the jury to consist *ex delectis judicibus*, which, as Cicero clearly implies, is a more proper and trustworthy tribunal, and one in which the subsequent challenge is less imperatively necessary. Can we believe that addressing a bench, one-third of which consisted of senators, Cicero should have depicted their presence as an injury and a grievance, as impairing the selectness of the body, and making it a collection of everybody and anybody? I shall give my own explanation of 'ex delectis judicibus' in the next section; but I think that in the meantime we may summarily reject this one.

strange indeed that the number presented to him (75) should not be equally divisible between the two.

[1] Mommsen, *de Collegiis*, p. 64. [2] Mommsen, ibid., p. 67.

that the Romans could not bear the *edititius judex* even under the mildest aspect, and *permiscuerunt* means that rather than have him they 'plunged the country in confusion', 'gave the signal for civil war.' We find it suggested elsewhere, that the jury courts were really the issue upon which the Civil War was fought. Tacitus[1] distinctly says so: 'Mariusque et Sulla olim de eo vel praecipue bellaverunt.' Cicero seems to hint at it when he says,[2] 'quum adventu L. Sullae in Italiam maximi exercitus civium dissiderent de judiciis ac legibus,' and possibly when speaking under Sulla's dictatorship he says[3] that the nobles 'equestrem splendorem pati non potuerunt'. The question for us is, of course, not whether this opinion was really justified, but only whether it was sufficiently prevalent to make such an assertion plausible. It may be objected that, even so, it was not the nomination by the prosecutor, but the equestrian monopoly of the courts which was the real grievance to Sulla's party. We may reply that, if it were so, Cicero speaking in the year 54 B.C. could not lay stress on the point without setting the various sections of his jury by the ears and stirring questions which he hoped were buried by the compromise of the Aurelian Law: on the other hand, the *edititius judex*, who had existed contemporaneously with the equestrian juries, had no friends, and it was safe to lay all the blame upon him. I do not pretend to decide between the two interpretations of the Latin words, and will only insist on the main contention

to the *turbae Sullanae*, though I cannot feel quite confident that this is what Geib meant to convey.

[1] Tacitus, *Annales*, XII. 60. 4.

[2] Cicero, *pro Fonteio*, I. 6. There is a passage apparently to the same effect in *de Officiis*, II. 21. 75 'tantum Italicum bellum propter judiciorum metum excitatum'; but its meaning is very doubtful.

[3] Cicero, *pro Roscio Amerino*, 48. 140.

populo.' I have already expressed my reason for rejecting Mommsen's own interpretation, but I should heartily agree with his criticisms on that which he attributes to Wunder and Ferratius. According to these writers, the 'Tribes' under the *lex Licinia* were not those written up on the *album*, but included the whole population, so that any member of a selected tribe might be picked out to serve on the jury, whether his name was on the *album* or not. This Mommsen[1] justly characterizes as absurd: 'nam si is qui nomen detulit, primum tribus quas velit, deinde ex iis quos velit judices designat, reus, ut Ciceronis verbis utar, non ad judices venit, sed ad carnifices.' What, then, is the meaning of *ex omni populo*? I believe it to be simply this, that under the *lex Aurelia* the whole of what the State had to show in the way of jurors for the year was published by the *praetor urbanus* in a single announcement. A section of this document (such as was each tribal list) might well be described as a haphazard slice of the Roman People, an unsifted and miscellaneous body liable to be used for various purposes, and not selected with any special view to the particular requirements of the individual *quaestio*. In the period before Sulla, to which I attribute the system with which the Licinian method is here contrasted, each several *quaestio* had, as I believe,[2] its own small *album* to which the accuser was confined in picking out his jurors. There seems little difficulty in styling each of these smaller bodies a group of *delecti judices*, that is of men specially nominated by the presiding magistrate as fitted for the purpose of that very class of trials. The 450 to whom the choice of the accuser was confined by the *lex Acilia* would obviously give him less scope than would the 1,200 of Cotta's list. In the large general *album*, it might be argued, the accuser

[1] Mommsen, *de Collegiis*, p. 67.

[2] See above, pp. 83, 84.

the whole of the jurors whose names were on the *album* for that particular court—360[1] in the case of Milo's trial *de vi*. The whole 360 sat, or were supposed to sit, and heard the evidence on several days. Then, on the last day of the trial, the whole body being specially summoned to be present, 81 of them were chosen by lot and the rest were dismissed. The 81 next listened to the speeches of counsel on either side; then each party struck off 15 by way of challenge, and the remaining 51 gave the verdict. The method was an ingenious one to prevent bribery; for the 81 once chosen were kept in court the whole day, and so screened from temptation, and it would not be worth while to bribe any one of the 360 beforehand, because the odds were that his name would not be drawn. On the other hand, the scheme lies open to Caesar's charge,[2] that 'one jury heard the evidence and another gave the verdict'. In these words there is of course exaggeration, even perhaps to those who did not know the facts an *insinuatio falsi*. At the same time it would be very difficult to secure the constant presence of so large a body over many days, and still more difficult to make them pay serious attention to evidence, as to which each one would feel that very probably he would not be called upon to judge of it after all. We cannot but suspect that a good many of the 51 who eventually voted would find themselves in this plight, and would prove to have only a very imperfect knowledge of the evidence. Caesar's ill-natured criticism may be excused, though not justified.

[1] Asconius does not mention the number, but there can be no doubt that Velleius refers to the occasion when he says (II. 76. 1) that his grandfather was 'honoratissimo inter illos CCCLX judices loco a Gn. Pompeio lectus', and I believe the same to be the case with the 'judices de CCCLX qui praecipue Gnaeo nostro delectabantur', of whom Cicero writes three years later (*ad Att.* VIII. 16. 2).

[2] Caesar, *Bellum Civile*, III. 1. 4.

The weapons in the legal duel are the speeches of the advocates and the evidence of the witnesses. It is not quite clear how the two were fitted in with one another. Some of Cicero's speeches for the defence were certainly delivered after witnesses had been examined. He comments on the behaviour in the witness-box of the Gauls who bore testimony against Fonteius,[1] and of the Greeks who appeared against Flaccus.[2] In the last-named case, however, a witness[3] is named as having still to be called for the prosecution, and on one point, the presence of pirates in the Aegean, Cicero seems to promise for the defence evidence which has not yet been laid before the court.[4] On the other hand, in the speeches *pro Rabirio Postumo*,[5] *pro Sulla*,[6] and *pro Caelio*,[7] the hearing of the witnesses for the prosecution is distinctly mentioned as still in the future. In the *pro Cluentio* the sole evidence cited is the confession of tortured slaves, one of whom has been put to death, and the other is not produced. In the *pro Roscio Amerino*, *pro Murena*, *pro Sestio*, and *pro Plancio*, there does not appear to be any comment on evidence previously given. The difficulty is that the perorations, especially those for Plancius and Sulla, with their passionate appeals to the feelings of the jury,[8] seem better

clearly that the English procedure was not borrowed from Rome, and that the analogies are due to similarity of circumstances. The Belgian advocate seems to me to have laid insufficient stress on the difference between the Roman and English jury-trials (see below, p. 124, note 2).

[1] Cicero, *pro Fonteio*, 9. 29. [2] Cicero, *pro Flacco*, 4. 10.

[3] Apollonides, Cicero, ibid., 21. 51.

[4] 'Quid si L. Oppii . . . testimonio doceo,' etc., Cicero, ibid. 13. 31.

[5] Cicero, *pro Rabirio Postumo*, 11. 31. The references to the past (ibid. 12. 34 and 13. 36) are to evidence produced at the trial of Gabinius.

[6] Cicero, *pro Sulla*, 28. 79. [7] Cicero, *pro Caelio*, 26. 63 seq.

[8] Cicero (*Orator*, 37. 130) says that this was his strong point, and that therefore his fellow pleaders 'perorationem mihi relinquebant'.

Vatinium, to extraordinary lengths. In a private letter[1] Cicero describes Vatinius as quite crushed by his attack, but it is a method which no modern judge could have permitted.

It is strange to find, side by side with the extreme licence of oral cross-examination, that evidence was often admitted without being sifted at all. The prosecutor in a criminal trial could compel the attendance of a certain number of witnesses,[2] but the defendant had no such power. It was almost necessary, then, for some witnesses to give their evidence in absence, and the practice was carried far beyond the limits of necessity. In England such a procedure is sometimes admitted; but in this case the Court issues a Commission,[3] generally in the form of a requisition to the local judge, to take the evidence required, with the assistance of advocates of both parties, so that full examination and cross-examination takes place, though not in the presence of the jury. The evidence certified by the Commission (however constituted) is received in the English Court and read to the jury. At Rome we find little of such precaution.[4] The

[1] Cicero, *ad Quintum Fratrem*, II. 4. 1.

[2] 'Testimonium denuntiare.' See *lex Acilia*, verse 32; Bruns, *Fontes*[7], p. 64.

[3] The system was first applied (13 Geo. III, chap. 63) to the trial in England of any 'misdemeanours or offences committed in India'. The King's Bench may require the Indian Judge to hold a court for the examination of witnesses and to summon agents or counsel of all or any of the parties respectively, the examination to be 'openly and publicly taken viva voce in the said Court'. Similar requests are now made, only, however, in civil cases, through diplomatic channels even to the courts of foreign countries, and like facilities are granted by the English to the foreign tribunals. See Hume-Williams, *Taking of Evidence on Commission* (1895).

[4] We seem to be on the track of it in the 31st verse of the *lex Acilia*, which lays down rules for the collection of evidence by the prosecutor; we find there a fragmentary sentence: '. . . conquaeri in

one case we find read in court a written testimony from a witness who is actually present and is called upon to stand up in acknowledgement of its truth.[1] The witness in this case is an old and probably infirm man, called to testify to the circumstances of his son's death, and the method was doubtless intended to spare his feelings.[2] Quintilian tells us[3] that it is open to the advocate to impugn the statement of the absent, because it was always given voluntarily, and so the witness might be supposed to be the enemy of him against whom it is given, and likewise because a man will lie more easily before his seven witnesses than before a full court, and his absence may be imputed to his not daring to stand the test of cross-examination.

The testimony of townships or states is conveyed in a written document, vouched for by envoys sent for the purpose. Cicero disparages those which tell against his client Flaccus, partly by comments on the mean estate and bad character of the envoys, partly by protesting against the tumultuary popular assemblies which had sanctioned the decrees.[4] He contrasts the evidence which he had himself brought from Sicily against Verres, which, he says, were the 'testimonies not of a turbulent mass-meeting, but of a senate on its oath'.[5]

to be in collision; the oath, whether given in presence or absence, may support the credibility of these assertions, the 'seven seals' do not vouch for it.

[1] Cicero, *pro Cluentio*, 60. 168 'Tu autem, nisi molestum est, paulisper exsurge; perfer hunc dolorem,' etc. That in the same case (69. 196) the envoys from Larinum should be asked to stand up, while the decree of the decurions, which they have brought, is read, is quite in order.

[2] So Mommsen, *Juristische Schriften*, Vol. III, p. 503.

[3] Quintilian, *Inst.* V. 7. 1 and 2.

[4] Cicero, *pro Flacco*, 8. 19 'Non audire vos testimonia; audire temeritatem vulgi, audire vocem levissimi cujusque,' etc.

[5] Cicero, ibid., 7. 17.

The English law forbids the character and former misdeeds of the defendant to be brought up as evidence of his guilt, unless the issue of his character has been first raised by the defendant himself.[1] The Romans acknowledged no such rule; had they done so, almost every case would have been covered by the exception, for the advocate seems never to have failed to plead his client's character as an argument for his innocence; there is no occasion, however, for the accuser to wait for any such initiative before he begins his attack on reputation. The Romans of whom we read as appearing before a jury court belong, like their judges, almost exclusively to a small ruling society, inside which it would be comparatively easy (as in the case of our own ancient 'juries from the neighbourhood') for the juror to have a pretty clear impression as to what character the accused really bore; as Cicero says,[2] 'Quibus igitur testibus ego hosce possum refutare, nisi vobis?' So completely was the character of the accused considered to be a direct and relevant issue, that in the trial of Piso before the Senate for the murder of Germanicus, Fulcinius Trio, who has failed to establish his claim to prosecute on the main charge, is allowed as a consolation 'to bring charges against Piso's former life'.[3] Nay, so far is the advocate for the defence from objecting, as an English barrister would do, to the introduction of any such prejudicial matter into the case, that Cicero seems to name it as one of the first things which the jury has a right to expect from the prosecutor in opening his case, and he comments severely on its omission. Fonteius[4]

[1] Stephen, *Digest of the Law of Evidence*, p. 66. If a person tried for any felony gives evidence of good character, a previous conviction of felony may be proved against the prisoner. See Criminal Evidence Act, 61 & 62 Victoria, ch. 36. § 1 f.

[2] Cicero, *pro Flacco*, 3. 7.

[3] Tacitus, *Annales*, III. 10. 3.

[4] Cicero, *pro Fonteio*, 13. 40

cannot fail to acquit his client; Cicero's assumption, often a large one, is that his client bears so good a character that he must needs be acquitted, whatever the evidence; and indeed he treats all evidence in a somewhat cavalier fashion. 'I desire,' he says in pleading for Caelius,[1] 'to lead you away from the witnesses: I will not allow the immutable verity of your sentence to depend on what the witnesses may choose to say, utterances which it costs no trouble to invent, to warp and to distort;' and lower down [2] he throws it in the teeth of the accusers, that 'they shift the case away from the reasons, the probabilities, and the indications by which the truth is wont to come to light, and transfer it bodily to the witnesses'.

That the Roman advocate was not expected to do even lip-service to the testimony before the court is perhaps not unconnected with the absence from the Roman procedure of anything like a 'Law of Evidence' in our sense of the words. The 'four great exclusive rules of Evidence' recognized in English law, are treated by Justice Stephen in four successive chapters (III to VI) of his *Digest of the Law of Evidence*. They admit, indeed, of certain exceptions, but the rule 'is of much greater importance and more frequent application than the exceptions'.[3] These rules exclude [4]

(1) facts irrelevant to the fact in issue, as being connected with it only by resemblance,[5]

(2) hearsay,

(3) opinion,

(4) character.

[1] Cicero, *pro Caelio*, 9. 22. [2] Cicero, ibid., 28. 66.

[3] Stephen, *Digest of the Law of Evidence*, p. 171.

[4] Stephen, ibid., p. 172.

[5] Stephen, ibid., p. 15. 'The question is whether *A* committed a crime. The fact that he formerly committed another crime of the same sort and had a tendency to commit such crimes is deemed to be irrelevant.' This is said to have been decided by all the judges in 1810.

'a witness will not attack your client, or will attack him less fiercely, if he is not stirred up to do so,' so it is often best to let him alone. 'You may do your own side infinite damage, if you provoke a hostile witness who has a temper, and who is no fool, and whose character carries weight. For his anger makes him desire to injure, while his ability gives force to his words, and his reputation gives them credit.'[1] In England a witness who revealed his 'desire to injure' would only discredit the evidence which he might have given as to facts.

The contrast is even stronger in the matter of hearsay. In the Roman treatises on pleading, where the duty of a witness is expounded, we are astonished to find him instructed to set forth 'what he knows, *and what he has heard*'.[2] We have an amusing instance of a cross-examination of such a hearsay witness by Lucius Crassus.[3] Silus has been damaging Crassus' client Piso by alleging 'what he said that he had heard against him'. '"It is possible, Silus, that the man from whom you heard this spoke under the influence of anger;" Silus assented. "It is possible, too, that you did not understand him rightly;" he nodded emphatically, and so gave himself away. "Possibly, likewise, you never heard at all." This unexpected sally overwhelmed the witness in general laughter.' It does not seem to have occurred to any of the parties that it ought not to have been left to the cleverness of Crassus or the stupidity of Silus to reveal the rotten foundation on which such evidence rests; according to our notions of justice it should have been peremptorily banished from the witness-box. After this it is not surprising to find that Cicero, on one

[1] Cicero, *de Oratore*, II. 74. 302.
[2] Cicero, *ad Herennium*, IV. 35. 47.
[3] Cicero, *de Oratore*, II. 70. 285.

How are we to account for the difference of practice in England and Rome? It may, I think, be largely explained if we consider the different conceptions in the two nations of the powers and duties of the President of the Court. The English judge holds the position of an impartial but very powerful regulator of the whole procedure. It is for him to decide whether this or that evidence is to be allowed to come before the jury, and he exercises this power under a grave responsibility; for if he admits anything as evidence which may improperly influence the minds of the jurors against the prisoner, or if he excludes any evidence which might properly be urged in his favour, the Court of Criminal Appeal will set aside the conviction.[1] Accordingly the negative prescriptions derived from the practice of the Courts as to what evidence may be received admit of immediate and effective enforcement. But in Rome the jury listen to whatever the advocate chooses to bring before them. His opponent never thinks of objecting, for there is no one to enforce the objection. The jurymen were expressly excluded from interfering, as we learn from a heading (the only part remaining of the clause) in the *lex Acilia*[2]—'Judex ne quis disputet.' This would not of itself exclude the intervention of the *quaesitor*; but Mommsen[3] is, I think, justified in concluding from the absolute silence of our authorities that even the President of the Court had no such power. The praetor was but an annual magistrate, and generally not a trained lawyer; he would have found it difficult to interfere with effect, even if he were legally entitled to do so. Under such circumstances no 'Law of Evidence' could practically grow up. In the system which under the Principate superseded the

[1] Stephen, *Digest of the Law of Evidence*, Art. 143. (Since strengthened by the Criminal Appeal Act, 1907.)

[2] Verse 39 (Bruns, *Fontes*[7], p. 65).

[3] *Strafrecht*, p. 422.

who bore negative testimony to his innocence, and if they could not be shaken in their denial of his guilt by the pains to which they were subjected, their evidence was admissible in favour of the accused. In the case of Libo, Tiberius, by an inversion of the true doctrine, tortured the slaves 'although they had confessed'.[1] We must suppose that he wished to use the admissions which they had already made, if they would stand to them, against the accused. It is to be hoped that in this case they were not much hurt.

In the accounts of Milo's trial for the murder of Clodius we are in face of a curious difficulty. Asconius tells us[2] that Appius Claudius, the nephew and heir of the deceased, demanded certain of Milo's slaves for the question; when Milo replied that he had manumitted them, the Court ordered 'ut ex servorum eorum numero accusator quot vellet ederet'. Mommsen[3] adduces this as evidence for the 'nullity of such manumissions',[4] and rejects the emendation—*suorum* for *eorum*—suggested by Wagener. When we turn, however, from the Commentator to the text of Cicero's speech, it is quite clear that Milo's slaves were not tortured. 'If,' says Cicero,[5] 'he had not manumitted them, he must have surrendered to torture the preservers of their master, who revenged his injuries and stood between him and death. Now it is the redeeming feature in his calamity that, happen what may to himself, he has at least secured to them the reward which they have so justly earned.' It is equally clear from the next section that Clodius' slaves were examined

[1] Tacitus, *Annales*, II. 30. 3.

[2] Asconius, *in Milonianam*, 34.

[3] *Strafrecht*, p. 416, note 4.

[4] Mommsen seems to antedate the doctrine of the principate. See Antoninus Pius, *Digest*, XLVIII. 18. 1. § 13 'Si servus ad hoc erit manumissus, ne torqueatur, dummodo in caput domini non torqueatur, posse eum torqueri divus Pius rescripsit'.

[5] Cicero, *pro Milone*, 22. 58.

own vote or that of any of his fellows. The voting was always by secret ballot under the Gracchan and the Aurelian systems. Under the Laws of Sulla, which ruled in the intermediate period (81–70 B.C.), the defendant might demand secret or open voting at his choice.[1]

There is some difficulty in ascertaining the number of votes requisite for a final sentence, whether of condemnation or acquittal. The detailed instructions given in the *lex Acilia* do not tally with the practice as gathered from the writings of Cicero and his very judicious commentator Asconius, and it is clear that the order of proceeding must have been considerably altered in the course of time. We will begin with the Gracchan system, and the chapter of the *lex Acilia*[2] with the heading 'Judices in consilium quomodo eant'. The first task imposed on the praetor is to ascertain whether a sufficient number of jurors profess themselves ready to decide. A juror may say *non liquet* if he pleases, thus voting that the Court do adjourn and that the case be further argued; but if he does so more than twice, the President of the Court may fine him up to 10,000 sesterces. When two-thirds of the jurors present have declared *sibi liquere*, those who have not so declared are removed from the Court and the remainder proceed to vote. Each juror now receives a four-inch tablet of box-wood plastered on both sides with wax. On the one side the wax has written in it the letter C, on the other the letter A. The juror is next directed secretly to rub out one or other of the letters, but there is nothing to prevent his obliterating both. He then bares his arm and drops his ballot into the urn in sight of the whole court, holding it so as to cover over with his finger the place

[1] Cicero, *pro Cluentio*, 20. 55.

[2] *Lex Acilia*, verses 46–56; Bruns, *Fontes*[7], pp. 66, 67.

but that in this case there was no such bar to renewed proceedings as was provided (in verse 56) in case an actual verdict had been delivered. We cannot rise above conjecture in the matter, but I think that the most probable interpretation of the 'si eae sententiae ibei plurumae erunt "condemno"',[1] is that a verdict of 'Guilty' was not recorded unless the votes for condemnation were in a majority against the whole of the rest of the tablets handed in. Whether it made any difference if the escape of the accused were due to blank tablets rather than to votes of acquittal, it is impossible to say.

The questions of the 'non liquet' and of spoiled voting tablets reappear in two later cases, one that of Oppianicus under Sulla's jury laws, the other that of Clodius under the system of Aurelius Cotta. In the first case the votes are (on demand of the accused) given openly, but here the 'non-liquets' are not, as in the Acilian Law, first set aside from voting, but all the jurors vote, and the *non liquet* forms a separate category, side by side with *condemno* and *absolvo*, and thus takes exactly the place of the *sine suffragio* of the older system. In this trial we are told[2] that 32 jurors gave their votes, that some said *non liquere*, and that five said 'Not Guilty'; but from another passage[3] we learn that if Fidiculanius Falcula, a juror newly introduced who voted 'Guilty', had said *non liquere*,

[1] In the *lex Julia repetundarum* of Caesar's First Consulship, the corresponding clause reads 'quod eorum judicum major pars judicarit, id jus ratumque esto' (Cicero, *ad Familiares*, VIII. 8. 3). I do not think that any substantial difference is indicated by the variation in the wording. That Caesar did not accept the phraseology of the *lex Acilia* as *tralaticium* may possibly show that he shared the low opinion of Gracchus' draftsman which I have ventured to express above, Vol. I, p. 151.

[2] Cicero, *pro Cluentio*, 27. 74 and 28. 76.

[3] Cicero, *pro Caecina*, 10. 29.

vote would have prevented condemnation just because the *condemno* votes would thus have been reduced to 16, not a clear majority, and that this result would have followed, whether he said *absolvo* or *non liquet*. We must conclude that both these taken together counted against the votes of 'Guilty'. On the other hand, the same passages to which I have just referred indicate pretty clearly that those who voted *non liquet* hoped for another opportunity[1] of investigating and deciding the matter. What number of such votes would have secured the jurors against a verdict either of acquittal or of condemnation, and enabled them to reserve their judgement, I cannot pretend to determine.

The verdict in the case of Clodius, unlike that discussed in the last paragraph, was given by secret voting. Plutarch says that most of the votes were given on tablets 'with the letters confused'.[2] I think that this can only mean that the operative letter, on the side of the tablet which had been hidden by the juror's finger, proved to be partially erased, so as to leave a doubt whether that tablet was or was not reduced to the *sine suffragio* state described in the *lex Acilia*. Cicero, in his graphic account to Atticus written immediately after the occurrence, mentions the numbers on each side (25 for conviction and 31 for acquittal), and in his subsequent taunt to Clodius he adds, 'quattuor tibi sententias solas ad perniciem defuisse,'[3] but in neither passage does he say a word about the spoiled votes. In

[1] Cicero's words are 'neque eum . . . re incognita, primo condemnare vellent', and 'condemnare . . . paullo posterius, patefacta re, maluerunt', *pro Cluentio*, 28. 76 and 38. 106.

[2] Plutarch, *Cicero*, 29. 5 *τὰς δέλτους οἱ πλεῖστοι συγκεχυμένας τοῖς γράμμασιν ἤνεγκον*, and *Caesar*, 10. 7 *συγκεχυμένοις τοῖς γράμμασι τὰς γνώμας ἀποδόντων*.

[3] Cicero, *in Clodium et Curionem*, chap. 7 (Nobbe). uoted by Scholiasta Bobiensis Fragm. XXIX.

we find voting 22 *senators*, 23 *equites*, and 25 *tribuni aerarii*. Here, perhaps, we might account for the inequality by supposing the accidental absence[1] of some jurors belonging to the first two orders, but this explanation will not serve in case of the trials in Pompey's sole consulship. In every one of those recorded in Asconius[2] the whole of the 51 prescribed in the law are present, but instead of there being 17 from each order, as we should expect, the *senators* are always 18, the *equites* 17, and the *tribuni aerarii* 16. Mommsen[3] thinks that in these trials the *quaesitor* himself voted along with the jurors and made the number of senators up to 18, and that a place was found for him by subtracting one name from the tale of those drawn by lot from among the *tribuni aerarii*. This is really no explanation; for why should not the *quaesitor*, if he really voted, count as one of the 17 senators, instead of disturbing the balance of the orders by taking the place of a non-senatorial juryman? The fact remains that the balance was so disturbed in the year 52 B. C., and we do not know the reason.

Mommsen[4] further expresses the opinion that the rule which he here invents is probably universal, so that the *quaesitor*, be he praetor or *judex quaestionis*, always voted with the rest. His chief argument, derived from the even number of jurors in the *lex Acilia*, falls to the ground when we consider that the law provides no security that the whole 50 shall vote; after the exclusion of those who had said *sibi non liquere*,[5] it would be purely a matter

[1] At the trial of Oppianicus, Staienus was absent attending to a private suit elsewhere, and had to be haled into court by the tribune Quinctius, who was counsel for the defence (Cicero, *pro Cluentio*, 27.74).

[2] Asconius, *in Milonianam*, 47–49.

[3] Mommsen, *Strafrecht*, p. 208, note 3.

[4] Mommsen, ibid., in text and note.

[5] See above, p. 129.

collusion, was putting into the jury-box[1] the very same jurors who had condemned his father, C. Claudius, since deceased. The principal offences so treated were *praevaricatio*, that is to say, collusion on the part of the prosecutor, and *calumnia* or malicious prosecution. The jury after their verdict had to consider whether there was sufficient evidence to authorize such charges or not ;[2] a negative resolution did not, however, as we saw in the case last quoted, prevent the charges being brought up later on. This possibility is noticed in the *lex Acilia*[3] by an exception introduced to the rule that the verdict bars any fresh action on the same matter.

The penalty for these offences is described in our authorities as consisting for private suits in damages standing in some proportion to the amount originally sued for,[4] and for public suits in *infamia* in the sense that the culprit was excluded from municipal magistracies,[5] and doubtless from any office at Rome as well, and from appearing as accuser[6] (except in case of wrongs personal to himself), or as advocate or representative of any party in the law courts. He was likewise probably incapable of voting or of service in the army.[7]

It will be seen from the note at the foot of this page

[1] ' Mittit in consilium.' [2] Asconius, *in Scaurianam*, 25.

[3] Verse 56 ; Bruns, *Fontes*[7], p. 67.

[4] Gaius, *Inst.* IV. 175. The Title, ' de Calumniatoribus ' (*Digest*, III. 6), is taken up with comments on the Praetor's Edict, by which, in case a bribe has been the inducement to the *calumniator* or *praevaricator*, it may be recovered from him fourfold as from a thief.

[5] *Lex Julia Municipalis*, verse 120 ; Bruns, *Fontes*[7], p. 108.

[6] ' Sed et calumnia notatis jus accusandi ademptum est,' Ulpian, *Digest*, XLVIII. 2. 4, and ' hi tamen omnes si suam injuriam exequantur mortemve propinquorum defendant, ab accusatione non excluduntur,' Macer, *Digest*, XLVIII. 2. 11.

[7] See Mommsen, *Strafrecht*, p. 495, and Greenidge, *Infamia*, p. 157. When Mommsen adds (ibid. 403) that the calumniator is disqualified

'where the proceedings for malicious prosecutions have 'shaken themselves loose from their proper connexion as 'immediate countercharges, their treatment becomes the 'very seat of arbitrary justice, which, ever under plea of 'correcting itself, grows still more arbitrary. The criminal 'charges which under one government were permitted and 'often encouraged, were counted under the next as maliciously 'set on foot, and as constituting a crime.' The younger Pliny[1] says of Trajan's action against Domitian's informers, that such men henceforth will know that they will receive punishment commensurate with the rewards they have enjoyed, and he gives a graphic picture of the shiploads of them sent off under the delighted eyes of the people, many destined to be driven on to those desert shores to which they had banished their victims.[2] Such passages, however, give us little indication that the *lex talionis* was legally acknowledged. Mommsen is probably right when he says that for such a recognition we have to wait for Constantine.[3] It is not unlikely that the first Christian emperor may have extended to the false accuser the equivalent punishment threatened in the Mosaic Law against the false witness.[4]

The chief difficulty in connexion with the subject relates to the *lex Remmia*, which probably remained in force until superseded by Constantine, and to which Cicero refers as already the determining statute in case of such misde-

[1] Pliny, *Panegyricus*, 34.

[2] The emperor Titus likewise, whose example Pliny praises, had caused the *delatores* 'in asperrimas insularum avehi,' Suetonius, *Titus*, 8.

[3] Decree of A.D. 319 (*Cod. Theod.* IX. 10. 3). See *Strafrecht*, p. 496, note 3. Hitzig (Pauly, *Real-Encyclopädie*, s.v. *calumnia*) puts the *talio* as early as Septimius Severus. I do not think that his references prove this.

[4] Deut. xix. 19. See *Collatio Legum Mosaicarum et Romanarum*, VIII. 1. 4.

Staël, when she said that 'the men in France, like the milestones, had the number of kilometres from Paris written on their foreheads'.

I think that it is not impossible that Cicero may have been misunderstood in ancient times as in modern, and that this passage, occurring in a speech so well known as that for Roscius of Ameria, may have led to the growth of a myth about the branding. The myth is perhaps reflected in such phrases as 'integrae frontis homo'[1] for a witness of unblemished character. When Pliny[2] says that the *delatores* have been taught a lesson by Trajan, 'neque ut antea exsanguem[3] illam atque ferream frontem nequiquam convulnerandam praebeant punctis et notas suas rideant,' it is possible that he may have had Cicero's words in his mind, and even that he may have misinterpreted him. But when we remember that branding was a penalty, which, if once inflicted on slaves, assigned them, even if afterwards emancipated, to a specially degraded class of freedmen, I think that it is quite impossible that Pliny can have meant to say that such an indignity was regarded with indifference by Roman citizens of his own time.[4] As regards past times, Pliny's words may possibly indicate that he believed the branding to have been once physically inflicted. I can only say that if he thought so he must have been

[1] Papinian, *Digest*, XXII. 5. 13 (see above, p. 137, note 7). He says that the judge should not give easy credence to the word of a *calumniator*, since it is his duty to weigh the utterances even of men *integrae frontis*. In much the same way an Englishman of the lower classes might remark that 'none can say that black is the white of his eye'.

[2] Pliny, *Panegyricus*, 35. See above, p. 139.

[3] I take *exsanguem* to mean 'incapable of blushing'.

[4] Constantine (*Cod. Theod.* IX. 40. 2) forbids branding on the face, even for criminals condemned to penal servitude in the mines, though he allows it on the hand or on the calf of the leg.

'mille passus factum sit, uti quaerat cum judicibus qui lege 'sorte obvenerint de capite ejus, qui cum telo ambulaverit 'hominis necandi furtive faciendi causa, hominemve occiderit, 'cujusve id dolo malo factum erit : et reliqua.'

It is certain that this cannot be taken to mean that the action of the court was always confined within the narrow limits here laid down. After the death of Germanicus in Syria, Piso is summoned to Rome by Germanicus' legates, and he replies that he will come so soon as the *praetor qui de veneficiis quaereret* has appointed a day for accuser and accused.[1] Piso is eventually tried before the senate, but it is clear from Tiberius' statement that the death of a private man under the same circumstances would have been investigated by the praetor under Sulla's Law.[2] Mommsen says[3] that this is 'no instance', because the death occurred outside the territory of any competing Roman jurisdiction. It is difficult to see how this circumstance could justify any court in overstepping limits supposed to be set to its jurisdiction by positive ordinance of the *lex Cornelia*. It may be well, however, to consider for a moment what are the possible rival jurisdictions.

To deal with murders committed in the Federate or Free States of the East, the jurisdiction of the local courts was in theory sufficient. In the Senatus consultum, which guaranteed the freedom of Chios,[4] we read, 'let the Roman

sicarios'. In the *Digest*, on the other hand (XLVIII. 8), the two are brought into line by dropping the *veneficium* (neuter), and reading 'de sicariis et veneficis' (masculine), and in the text above we have *quaestio de sicariis*, not *inter sicarios*.

[1] Tacitus, *Annales*, II. 79. 2,

[2] 'Id solum Germanico super leges praestiterimus quod in curia potius quam in foro, apud senatum quam apud judices de morte ejus anquiritur' (Tacitus, *Annales*, III. 12. 10).

[3] Mommsen, *Strafrecht*, p. 226, note 2.

[4] *Corp. Inscr. Graec.* 2222. See Mommsen, *Strafrecht*, p. 111, note 1.

'vated outrage (*atrox injuria*), adultery and usury; and it 'probably was in force at any rate for some of these offences.'[1]

Mommsen's answer, then, to the question with which we started is that poisoning or stabbing in Arpinum would be tried in some sort of Arpinate court. This is the conclusion which we have to examine; and we must at the same time enter into the question of the procedure in such courts. There is distinct reference to local *publica judicia* in the *lex Julia municipalis*; among the disqualifications for office, side by side with the criminal condemnation in Rome, we find[2] 'queive in eo municipio, colonia, praefectura, foro, conciliabulo, quoius erit, judicio publico condemnatus est erit'. That cases of fine could be dealt with by the magistrates of a country-town community of Roman citizens is clear from the dedication formula of a temple at Furfo in the Sabine country, dated 58 B.C. There we find[3] 'Sei qui heic sacrum surupuerit, aedilis multatio esto quanti volet; idque veicus Furfensis, major pars fifeltares si apsolvere volent sive condemnare, liceto'. Unhappily we do not know positively what is the meaning of *fifeltares*. Mommsen,[4] with whom I should agree, takes it as equivalent to 'burgesses', and infers a procedure before the People

and the senate wished it to be left, to the ordinary law ('vel de caede, vel de vi') without any special *privilegium* (*pro Milone*, ch. 5 and 6).

[1] Mommsen, *Strafrecht*, p. 226. The more casual reference in the third book (p. 356) seems inconsistent with this full presentation in the second book, and approaches nearer to the explanation which I offer below.

[2] *Lex Julia municipalis*, verse 119 (Bruns, *Fontes*[7], p. 108)

[3] *Lex Templi Furfensis*, verse 15 (Bruns, *Fontes*[7], p. 284). See above, Vol. I, p. 182, note 1.

[4] *Strafrecht*, p. 225, note 3. Mommsen points out (ibid., note 2) that the Oscan Law of the Bantine Table contains clear evidence of comitial trials in an allied state, before it was absorbed in Rome by the *lex Julia* of 90 B.C.

All this, however, relates to money penalties, and we have still to consider whether the municipal authorities could decide on a capital charge.

I do not think that any conclusion can be drawn from the horrible story[1] that the Emperor Claudius kept some poor wretches tied to the stake for hours at Tibur while an executioner was sent for from Rome, that he might not miss the opportunity of seeing them scourged to death *more majorum*. There is nothing to show that these persons were condemned by the Tiburtine magistrates, who apparently did not possess a *carnifex* of their own: it is much more likely that Claudius had himself passed sentence on them. At any rate no such executions can be imagined as ordered by municipal magistrates under the Republic. How, then, were grave offences in the *municipia* punished? Mommsen's[2] hypothesis that the municipal authorities must have been empowered to deal finally even with the most serious crimes, leads him up to a conclusion, which, as he seems half to recognize, is little better than a *reductio ad absurdum*. 'It is hard to bring ourselves 'to acquiesce in the conclusion that the municipal court 'for murder in the last days of the Republic was nothing 'more than a private penal suit before *recuperatores*,[3] and 'that it could sentence to nothing beyond punishments in 'money and loss of honour; but we are bound to accept 'this conclusion in view of the consideration that even

(more appropriate to the procedure by appeal from a magistrate) is used in the first of the two passages to describe the penalty recoverable; but this is not a conclusive objection. See above, Vol. I, ibid.

[1] Suetonius, *Claudius*, 34. Mommsen says, 'we must gather that the old criminal jurisdiction of magistrate and *comitia* existed in Tibur even under the principate' (*Strafrecht*, p. 225, note 3).

[2] *Strafrecht*, p. 227.

[3] 'Before *recuperatores*,' but see above, Vol. I, p. 221.

had been condemned on one of the more serious charges dealt with by the *publicum judicium* at Rome.

But can the same possibly be the case with murder? Is the man, who has stabbed or poisoned his neighbour at Larinum, to be under no disability for office at Tibur?[1] I cannot believe it for a moment; and I should hold that the circumstance, that no notice is to be taken of municipal sentences outside the town where they were pronounced, is a clear indication that the sentences themselves were always about petty matters, and more especially that these courts were not competent to entertain cases of murder.

What, then, was done with the murderer? I believe that he was tried at Rome under Sulla's *lex de sicariis*, and that the solution lies in a very simple explanation of Ulpian's sentence.[2] The first chapter of Sulla's Law dealt with that class of murders (*ejus quod*) which took place in the city of Rome; some other chapter dealt, doubtless under some modifications of procedure,[3] with murders committed in the townships of Italy, and a third possibly with murders, like that of Germanicus, committed elsewhere. Either Ulpian quoted, with its full context, only so much of the Law as sufficed to define the nature of the crime, on which from the next paragraph he seems to have been commenting, or else the compiler of the *Collatio* used only so much of Ulpian as served the purpose of his comparison.

[1] The same considerations would apply to rape, arson, and forgery.

[2] Above, p. 142.

[3] When we find (Cicero, *pro Cluentio*, 53. 147) that two praetors were assigned to deal with *sicarii*, this may mean merely that the cases were so numerous as to occupy the time of more than one court; but I am inclined to think that this was not a mere matter of temporary convenience, but that the law provided two separate *quaestiones*, one (to which this passage from the *Collatio* refers) for cases inside, and the other for cases outside Rome.

was no tribune to stop them, to send the accused man under arrest to Rome. Under the principate this was the rule. Even under the Republic we have in one passage a hint that a man who was 'wanted' in Rome might be fetched thither under control of the central authority. 'Emissus aliquis e carcere,' says Cicero,[1] speaking apparently of an act of his client when tribune, 'et quidem emissus per imprudentiam . . . idem postea praemandatis requisitus.' We do not know, however, enough either of the persons or the circumstances to enable us to found any theory on this passage.[2] If the accused were arrested he would certainly be let out soon after his arrival at Rome; for we have no record of any man being under arrest at the moment of his trial before a jury.[3] In Republican times arrest would be superfluous, for, once the summons legally effected, the trial would go on whether the accused were present or not,[4] and the *aquae et ignis interdictio*, which was the extreme penalty to be incurred, would only confirm the situation which the defaulter had already accepted for himself.

If I am right, then, every one of the three authorities whose jurisdiction I have named as competing with that

[1] Cicero, *pro Plancio*, 12. 31.

[2] Nor can any conclusion be drawn from the case of the proscribed Varus (Appian, *Bellum Civile*, IV. 28), who was obliged to reveal his identity, because the magistrates of Minturnae, believing him to be a brigand, were about to put him to the torture. The presumption would be that the *latro* was not a Roman citizen but a runaway slave.

[3] Though he might have been in detention at an earlier stage; for a *triumvir capitalis* is blamed for letting a criminal go before the summons had been issued, and the man constituted *reus*. See above, p. 24, note 2.

[4] Mommsen, *Strafrecht*, p. 334, note 2 (*ad fin.*). See also Asconius, *in Milonianam*, 49 (*ad fin.*) 'Multi praeterea et praesentes et cum citati non respondissent damnati sunt'.

CHAPTER XIX

CRIMINAL COURTS UNDER THE PRINCIPATE

THE life and interest of our subject fade away with the fall of the Roman Republic and the disappearance from the scene of the great advocate who has been our guide so far in the investigation. Nevertheless, it is necessary to trace the history of the Roman Criminal Law and Procedure to its miserable end. The narrative is full of complications and difficulties, but of material there is no lack. For the first century and a half we have abundant reference to judicial proceedings in the pages of Tacitus, Suetonius, and the younger Pliny. From thence onwards our main sources of information are the *Digest* and the Codes. The first is the collection of authorized opinions of jurisconsults published in A. D. 534 by Trebonian at the command of the Emperor Justinian. The great line of jurists quoted in the *Digest* extends from Neratius and Javolenus in the time of Trajan, down to Modestinus, who probably died before the middle of the third century.[1] Aurelius Arcadius Charisius appears more than half a century afterwards as a belated participator in this goodly fellowship. He certainly lived into the reign of Constantine, who attained to sole power in A. D. 325. Far the most important excerpts in the *Digest* are those from the great Papinian, who wrote under Septimius Severus and was put to death by Caracalla, and

[1] For details as to the succession see Fitting, *Alter und Folge der römischen Juristen*, and Smith's *Dictionary of Biography*, s.v. *Modestinus*.

himself the cases in which a law contained in the Code has been repealed or modified, as is frequently the case, by a later one.[1] This Code contains the legislation of over a hundred years from about A. D. 320 to A. D. 438, that is to say, the edicts of emperors from Constantine to Theodosius II. Finally Justinian issued in A. D. 529 a revised Code, covering a wider stretch of time[2] than that of Theodosius; he excludes many of the Theodosian laws, but supplements the general edicts of the earlier Code by incorporating many decisions of the emperors in individual cases. After each Code certain *Novellae* or postscripts were issued containing more recent decrees. The edicts only occasionally take the form of proclamations to the subjects at large. More usually they are instructions addressed by the emperors to great officials, especially to the prefects of the *praetorium*. Sometimes we find embodied less formal declarations of the imperial pleasure, as for instance the interview of a deputation of veterans with Constantine,[3] in the course of which he promises them a coveted exemption from local and municipal burdens.

The Code of Theodosius is largely known to us from the *Breviarium*, a compilation issued in A.D. 506 by Alaric II, king of the Visigoths, for the governance of his Romano-Gallic subjects in Aquitania. To many of the edicts so published Alaric added an *Interpretatio*, generally shorter and more lucid than the text itself, which appears to be the work of an intelligent Roman jurist. In any passage where there is a doubt as to what an emperor

[1] The Gothic *Interpretatio*, however, sometimes notes when a particular law has lost its effect owing to subsequent legislation, as in *Cod. Theod.* VIII. 18. 2 and IX. 10. 3.

[2] If we include the recorded decisions, Justinian's Code may be said to stretch back from his own time to that of Hadrian.

[3] In A. D. 320 (*Cod. Theod.* VII. 20. 2).

swerved to the right hand or to the left, there was no machinery by which it could be easily recalled to the narrow path of official orthodoxy. Now, as always, there was no appeal and no chance of reviewing the verdict of a jury. We find that on one occasion[1] a jury acquitted a man, who, as Tiberius thought, should have been condemned. The emperor scolded the jurors indeed and brought up the prisoner again under another charge; but he could not affect the verdict already given. Such independence fitted in ill with the imperial system, as it grew more and more arbitrary and despotic; and so the rulers lost no time in providing substitutes for trial by jury.

Already under Augustus the emperor and the consuls[2] with the senate were both high courts of justice, and no appeal lay from the one to the other[3]; only, while the sentence of the senate was still in the making and not yet registered in the *aerarium*, it was liable, like any other *senatus consultum*, to the *intercessio* of a tribune[4] or of the emperor by virtue of his tribunician potestas.[5] There

[1] Tacitus, *Annales*, III. 38. 2.

[2] We find Trajan as consul presiding at a criminal trial in the senate (Pliny, *Epistolae*, II. 11. 10). How long such a jurisdiction survived is uncertain. Mommsen (*Staatsrecht*[3], II, p. 124, note 3) traces notices down to the middle of the third century, but we hear nothing of it in the Theodosian code of the fourth and fifth centuries.

[3] 'Sciendum est a senatu non posse appellari principem,' Ulpian, *Digest*, XLIX. 2. 1, § 2. So completely is this independence preserved in form that, even when the emperor has issued a rescript instructing the consuls to appoint a *judex*, this is not treated as a delegation of power, and the appeal from the *judex* so appointed is not to the city prefect, the emperor's representative, but to the consuls. See Rescript of Marcus and Verus, quoted in *Digest*, XLIX. 1. 1, § 3.

[4] Rusticus Arulenus as tribune proposed to veto the *senatus consultum* condemning Thrasea (Tacitus, *Annales*, XVI. 26. 6).

[5] This is best illustrated by the case of Clutorius Priscus. That there was no right of appeal is shown from the fact that he was actually put to death by decree of the Senate before the emperor had heard of

Instead of jury courts the magisterial *cognitio* comes to fill a more and more important place. This *cognitio* had been exercised in Republican times in the extraordinary *quaestiones* of the magistrates in Rome, and in the jurisdiction of the provincial governors over the subjects. Under the principate the words *cognitio* and *cognoscere* are used of the jurisdiction of the emperor in civil cases and likewise of that of the consuls, as opposed to the *ordinarium jus* of the praetor [1] and *judex*, and in criminal matters they occur very frequently, especially of the action of the *praesides* or governors of provinces. 'De cognitionibus' is the title of a work by the jurist Callistratus,[2] and we have phrases such as 'Est legis Fabiae (*plagii*) cognitio in tribunalibus praesidum,'[3] and 'Stellionatus accusatio ad praesidis cognitionem spectat'.[4] Very frequently the phrases 'cognitio' and 'extra ordinem' are used in conjunction. The jurist Macer [5] speaks of those 'qui hodie de judiciis publicis extra

this extraordinary action of the magistrate, the mention of the praetor side by side with the proconsul in a form of charge for adultery propounded by Paulus (*Digest*, XLVIII. 2. 3), which Hartmann (*de Exilio apud Romanos*, p. 45) thinks is evidence (in spite of Paulus' general statement) for the continuance of the procedure by praetor and jury in cases under the *lex Julia de adulteriis*. The name *publicum judicium* still survives. In the third century it seems to be confined to criminal charges, which derive their pedigree from the old jury courts (Macer, *Digest*, XLVIII. 1. 1); but later on the usage widens. In an edict of Valens and Gratian in A. D. 378 (*Cod. Theod.* IX. 20. 1), *judicium publicum* and *criminalis actio* are used as equivalents in consecutive sentences.

[1] Suetonius, *Claudius*, 15.

[2] Callistratus, circ. 200 A. D., *Digest*, XLVIII. 19. 7. Sometimes *inquirere* is used as an equivalent to *cognoscere*, e. g. by Constantine in A. D. 355 (*Cod. Theod.* II. 1. 2): 'In criminalibus etiam causis, si miles poposcerit reum, provinciae rector *inquirat*, si militaris aliquid admisisse firmetur, is *cognoscat*, cui militaris rei cura mandata est.'

[3] *Collatio Legum Mosaicarum et Romanarum*, XIV. 3. 1.

[4] Ulpian, *Digest*, XLVII. 20. 3.

[5] Macer, circ. 220 A. D., *Digest*, XLVIII. 16. 15, § 1.

crimes, murder,[1] extortion,[2] malicious prosecution,[3] can be treated in this way, and the *aquae et ignis interdictio* prescribed in the various *leges Corneliae* or *Juliae* is continually overridden. When the ordinary course of law prescribes pecuniary penalties, these may be replaced by severer punishments in grave cases. For instance, in injury ensuing from riot or insurrection, while damage to property is to be replaced twofold, 'si ex hoc corpori alicujus, vitae membrisve noceatur, extra ordinem vindicatur'.[4] The same distinction is introduced in case of *furtum*: while other offenders are left to the civil procedure (*remittendi ad forum*), the *fur nocturnus* is to be punished *extra ordinem*.[5] In the case of sacrilege, Ulpian[6] tells us that proconsuls have so far stretched their discretionary powers as to throw offenders to the beasts, to crucify them, or to burn them alive. He blames the last two, however, and would employ the first only against burglars who broke into temples at night. Under this system many circumstances, both of aggravation and alleviation, might be taken into account,[7] though ignored in the laws themselves, such as the prevalence or otherwise of the offence in a particular district,[8] or again the previous record of the offender,[9] or the question whether he acted deliberately or under the influence of passion or carelessness.[10]

[1] Marcianus, *Digest*, XLVIII. 8. 3. § 5.
[2] Marcianus, *Digest*, XLVIII. 11. 7. § 3.
[3] Paulus, *Digest*, XLVIII. 16. 3.
[4] Paulus, *Sententiae*, V. 3. 1. [5] Ulpian, *Collatio*, VII. 4. 1.
[6] Ulpian, *Digest*, XLVIII. 13. 7.
[7] See Platner, *De jure criminum*, p. 184.
[8] e. g. of *abigeatus* or cattle-driving, Hadrian, *Digest*, XLVII. 14. 1.
[9] e. g. of riotous youths, who are to be put to death 'cum saepius seditiose et turbulenter se gesserint', Callistratus, *Digest*, XLVIII. 19. 28. § 3.
[10] 'Delinquitur autem aut proposito aut impetu aut casu', Marcianus, *Digest*, XLVIII. 19. 11. § 2. Hitzig (Tötungsverbrechen seit

it has reached the height of twelve cubits.[1] The second case comes from Arabia. The custom of that province punishes with death the local offence of σκοπελισμός,[2] a form of boycotting, by which stones are set up on the prohibited fields as a notice that the confederates will put to death any one who dares to cultivate them.

Lest any offenders should slip through the meshes of the law a new and general crime was invented, that of *stellionatus*. The word seems to be derived from *stellio*, the spotted lizard which Virgil describes as the enemy of the beehive.[3] To be guilty of 'stellionate' thus means to be, like Edmund in *King Lear*, 'a most toad-spotted traitor.' Ulpian[4] describes it as a criminal charge answering to the *dolus malus* in private actions, and says that it may be adduced whenever the crime falls under no legal description.[5] The instances given all relate to the selling or pledging of a thing over which a lien already exists, or the property in which has passed to a third party;[6] but, as Ulpian says, 'there is no occasion to enumerate instances,'

[1] Honorius and Theodosius II, *Cod. Theod.* IX. 32. 1.
[2] Ulpian, *Digest*, XLVII. 11. 9.
[3] Virgil, *Georgics*, IV. 243. Cf. Pliny, *Hist. Nat.* XXX. 10. 89.
[4] Ulpian, *Digest*, XLVII. 20. 3. § 1.
[5] 'Ubicumque titulus criminis deficit,' Ulpian, loc. cit.
[6] *Cod. Just.* IX. 34. The French Code Civil (III. 16. 2059) seems to confine the word to such cases. In Scottish Law it comprehends 'all such crimes where fraud or craft is an ingredient as have no special name to distinguish them by' (Erskine, *Inst.* IV. 4. 79). 'It is chiefly applied to the conveyance of the same right granted by a proprietor to different disponees,' but not exclusively, for we find that 'this term was used in the libel against James Campbell (in 1722), which bore a charge of certain vile and shameful violations of the prosecutor's person', he having first been made drunk (Hume on Crimes, ad voc.). Erskine adds, 'the punishment of stellionate, in the large acceptation of the word, must of necessity be arbitrary.' Cf. Ulpian (*Digest*, XLVII. 20. 3. § 2): 'Poena autem stellionatus nulla legitima est, quum nec legitimum crimen sit.'

Taken as a whole, these regulations must have discouraged accusers from coming forward, and tended to leave the initiative in inquiry to the judge. The emperor Gordian points out [1] that it is well known that, when a matter is reported to the *praeses* by his officials, 'citra sollemnem accusationem posse perpendi.' Whether or not there be an accuser, the main task of inquisition falls on the court. The judge is 'to ask frequent questions to ascertain if there is anything behind', 'to search into everything, and by full inquisition to bring out clearly the array of facts.' [2] Though he is still instructed [3] to retain an impartial attitude, and not to divulge his opinion till the end, yet we are far indeed from the silent praetor who presides over the jury trials of the Republic. The judge on whom is thrown the burden of finding out the truth by his own inquiries can hardly help taking sides against the prisoner, and, wherever the law permits, will generally invoke the aid of torture.

Who are the persons entrusted with these ample powers? We have first the two High Courts of Justice, the Senate and the Princeps. Next come the great prefectures of the City and the Praetorium, and below these the governors of the several provinces, greatly increased in number by Diocletian.[4] The Senate [5] and the emperor, as we have seen, have independent jurisdictions, and no appeal lies from the one to the other. The *praefectus urbi*, on the other hand, and the *praefectus praetorio* act under powers delegated to them by the emperor.

[1] In A. D. 244 (*Cod. Just.* IX. 2. 7).

[2] Constantine in A. D. 321 (*Cod. Theod.* II. 18. 1).

[3] Constantine in A. D. 326 (*Cod. Theod.* IX. 19. 2). See above, p. 126.

[4] Geib, *Römischer Criminalprocess*, p. 474, note 6, counts up those mentioned in the *Notitia Dignitatum* (about A. D. 400) to 117 provinces.

[5] The Senatorial jurisdiction, so constantly in evidence in Tacitus and in the *Digest*, seems to be obsolete by the fourth century A. D. See above, p. 157, note 2.

indicate[1] that, from whatever source it was obtained, it had become a necessary adjunct of the proconsular office—'qui universas provincias regunt jus gladii habent, et in metallum dandi potestas eis permissum est.' It must be granted that this does not in itself bar delegation as the source of the power. In the somewhat parallel case of Trusts[2] Augustus committed the task of enforcing them by a separate act of delegation each year to the consuls, and Claudius afterwards permanently delegated this duty to several magistrates, including a special *praetor fideicommissarius*.[3] It is not impossible that a similar permanent delegation of the *jus gladii* may have taken place, but the words of Papinian quoted above (*quod lege datur*) point in another direction, to legislation rather than to delegation.

Mommsen appeals for confirmation to two passages in Dio Cassius;[4] neither of these, so far as I can see, has anything to do with the ordinary criminal law, but both relate to military discipline. The first distinguishes the power in this sphere of the consular *legatus Caesaris pro praetore* and the legate of the legion respectively. The second ascribes the right *to wear* the sword to the governors of the Caesarian provinces only, because they have the right of capital justice over soldiers, whereas this is expressly denied to the senatorial proconsul. Evidently, then, this is not the *jus gladii* attributed by Dio's contemporary, Ulpian, to all provincial governors, including the proconsuls.

[1] Ulpian, *Digest*, I. 18. 6. § 8.

[2] In Roman as in English Law a Trust originally gave rise to a moral and not to a legal obligation. When, however, the testator had said 'Rogo te per salutem Augusti', the emperor conceived himself injured by a breach of faith, and intervened as stated in the text (Justinian, *Inst.* II. 23. 1). See above, Vol. I, p. 48, note 2.

[3] Suetonius, *Claudius*, 23, and Justinian, loc. cit.

[4] Dio Cassius, LII. 22. 2 and LIII. 13, verses 6 and 7.

There is not the same doubt about the nature of the power as about its source. The Roman governor had always exercised the right of life and death over the provincials: in Augustus' time Volesus, proconsul of Asia, beheaded three hundred in one day.[1] We may infer without hesitation that the *jus gladii*, which the jurists describe as something freshly added to his competence, relates to Roman citizens. But when Caracalla extended the citizenship to the whole empire, Roman citizens remained, apart from slaves, informally emancipated *Latini Juniani*, vagabond barbarians, and perhaps some half-enfranchised native vassals,[2] the only persons on whom the governor could exercise his jurisdiction. Thus it was natural that the need of any special authorization to enable him to deal with Roman citizens should drop out of memory. In the Theodosian Code, which excerpts the decrees of emperors from Constantine onwards, we do not find the phrase *jus gladii* or *merum imperium*, though the capital jurisdiction itself is abundantly in evidence. From henceforth the interest centres, not round the competence of the governor to deal with the criminal acts of Roman citizens, but round the possibility of appeal from his decisions. This last and most difficult question will be best reserved for a separate chapter; but before entering on it it will be necessary first to explain the differences in the later criminal law according as it was applied to persons belonging to different ranks.

[1] Seneca, *de Ira*, II. 5. 5.

[2] Mommsen (*Historische Schriften*, II, p. 418) concludes from the terms of the *diplomata* given to discharged veterans that notwithstanding the generality of Ulpian's statement (*Digest*, I. 5. 17), 'in orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt,' the distinction between *cives*, *Latini*, and *peregrini* inside the empire survived in the third century. See also *Strafrecht*, p. 124. There seems no trace of it in the edicts of the fourth and fifth centuries included in the Theodosian Code.

are not to be put to the torture nor to penal servitude in the mines[1]), and finally the decurions of municipal towns. The most obvious mark of the difference between the common herd and the decurions is the liability to beating with the stick (*fustis*), apparently identical[2] with the *vitis*, which we have seen employed as a minor punishment for soldiers.[3] Callistratus tells us[4] 'honestiores fustibus non subjiciuntur, idque principalibus rescriptis specialiter exprimitur', and a few lines further down we hear that this is the privilege of the decurions, so that when exemption from the *fustis* is granted to any one it carries with it 'eandem honoris reverentiam quam decuriones habent'. The date of Callistratus is probably about A. D. 200, and a hundred and fifty years later Constantine lays it down[5] that all *primarii* and *curiales* are to observe the commands of the *judex* 'citra injuriam corporis' and 'omni corporalis contumeliae timore sublato'. In this fourth century, however, the decurions do not always fare so well. Valens decrees[6] that not only the *fustis*, but the much more dreadful instrument of the leaded scourge (*plumbata*), may be used ('but,' he adds, 'with moderation') on any decurion who has not attained to the rank of the *decemprimi*. The hopeless confusion of the imperial edicts is well illustrated if we compare three successive decrees of Theodosius I

[1] Modestinus, *Digest*, XLIX. 16. 3. They may, however, be beaten with the *fustis* for leaving the ranks, and punished with death for disobedience or mutiny or climbing the wall of their camp. Deserters, of course, forfeit all privileges, and may be crucified or thrown to the beasts.

[2] See Mommsen, *Strafrecht*, p. 983.

[3] See above, Vol. I, p. 119.

[4] *De cognitionibus*, *Digest*, XLVIII. 19. 28. § 2. In the same place we are told that the *fustis* is only for freemen; slaves are scourged with the *flagellum*.

[5] In A. D. 349 (*Cod. Theod.* XII. 1. 39).

[6] In A. D. 376 (*Cod. Theod.* IX. 35. 2).

sidio dignitatis cruciatus et tormenta non fugiet': if he will not confess, he is to be 'eculeo deditus, ungulis sulcantibus latera'.

For the privileged class, again, condemnation to the mines was not admissible.[1] The substitutes are fines, degradation from rank, *relegatio* for lesser crimes, and *deportatio in insulam* for the greater. The latter punishment, however, takes effect only on the assignment of an island by the emperor, so that practically it is beyond the power of the provincial governor.[2] The *deportatio in insulam* sometimes serves as the alternative not only for penal servitude, but for the actual infliction of death, but more frequently the distinction is between the different kinds of death. Incendiaries in a town, if they belong to the lower orders, are thrown to the beasts: 'si in aliquo gradu id fecerint, capite puniuntur aut certe in insulam deportantur.'[3] An extract from Callistratus,[4] *de cognitionibus*, informs us that poisoners 'capite puniendi sunt, aut si dignitatis respectum agi opportuerit, deportandi'. These examples are from the beginning of the third century. A hundred and fifty years later the ordinary capital punishment is more definitely prescribed for persons of quality. The elder Theodosius ordains[5] that judges and agents who get possession of the goods of litigants are to incur the same penalties, 'parem capitis ac vitae jacturam,' as is customary for those guilty of *peculatus*, and the same emperor[6] ten years later finally abolishes the old pecuniary penalty for *peculatus* and orders that it shall be capitally punished.

The practice of the age of the writers quoted in the

[1] Ulpian, *Digest*, XLVIII. 19. 9. § 11.
[2] See above, p. 58, note 3.
[3] Ulpian, *Digest*, XLVII. 9. 12.
[4] Callistratus, *Digest*, XLVIII. 19. 28. § 9.
[5] In A. D. 383 (*Cod. Theod.* IX. 27. 5).
[6] *Cod. Theod.* IX. 28. 1.

regard of classes being mentioned; it is uncertain whether or not the distinction of persons is intended to be taken for granted. In any case, nothing would prevent the emperor from inflicting any punishment, however cruel, on whomsoever he pleased, and we find[1] that Julian, after a trial before the praetorian prefect, burned alive Nigrinus, the general of some mutinous legions which had occupied the fortress of Aquileia.

As regards the ordinary death penalty, we may perhaps recognize a distinction inside the ranks of the *honestiores*. Soldiers, as we have seen above,[2] may be punished with death for military offences, and something of the same sort seems to be indicated for the decurions in case of riot. Modestinus says of those guilty of causing bloodshed: 'in aliquo honore positi deportari solent; qui secundo gradu[3] sunt, capite puniuntur; facilius hoc in decuriones fieri potest, sic tamen ut consulto prius principe et jubente id fiat; nisi forte tumultus aliter sedari non possit'.[4] As riot would fall under the crime of *majestas*,[5] from the penalties of which no one can legally claim exemption, it appears that these distinctions are matters of custom and practice rather than of law.

[1] Ammianus Marcellinus, XXI. 12. 20.

[2] Above, p. 171, note 1.

[3] Mommsen (*Strafrecht*, p. 1034, note 1), correcting his edition of the *Digest*, explains *secundo gradu* of the *Equites Romani*. Cf. Valentinian, *Cod. Theod.* VI. 37. 1 'quos secundi gradus in urbe omnium optinere volumus dignitatem'.

[4] Modestinus, *Digest*, XLVIII. 8. 16.

[5] 'Quo (crimine) tenetur is cujus opera dolo malo consilium initum erit . . . quo armati homines cum telis lapidibusve in urbe sint conveniantve adversus rempublicam, locave occupentur vel templa, quove coetus conventusve fiat hominesve ad seditionem convocentur,' Ulpian, *Digest*, XLVIII. 4. 1.

extended to cover the case, and we read that any magistrate is liable under it 'qui civem Romanum adversus provocationem necaverit',[1] and 'qui civem Romanum antea ad populum nunc imperatorem appellantem necaverit', etc.[2] Thus *appellatio* and *provocatio* come to be absolutely the same thing, and the latter word is used for appeals even in civil cases, which by Republican usage lie outside the scope of *provocatio*, though they admit of *appellatio*. The procedure indeed in civil and criminal cases seems under the empire to be identical.[3]

In the Republican process of *provocatio*, the people only confirms or negatives the sentence of the magistrate, and in *appellationes* the colleague or tribune may quash but not alter the decision of the competent court. The imperial appeal courts may not only cancel the sentence of the court below, but substitute a fresh sentence for it. In criminal trials the best proof of this is that an acquittal is no longer final and that the accuser may appeal against it.[4] Mommsen's comment[5] is too characteristic to be omitted: 'Of all the innovations of the principate, the introduction of the Reformatory appeal has been the most lasting: the consequent infringement of the principle, that the verdict of a competent court of justice is unalterable, has its effect to the present day.'

Appeals were not impossible from pecuniary penalties, but the main interest of the subject concentrates itself on cases of life and death. The important question from the prisoner's point of view is a simple one, whether he can be

[1] Ulpian, *Digest*, XLVIII. 6. 7.

[2] Paulus, *Sententiae*, V. 26. 1. [3] See below, p. 191, note 3.

[4] Modestinus, *Digest*, XLIX. 14. 9 'Soror testatoris Maeviam veneficii in Lucium Titium accusavit; cum non optinuisset, provocavit', etc.

[5] Mommsen, *Strafrecht*, p. 277.

which we find expounded by Dio Cassius[1] in his speech of Maecenas, that a senator should be tried only by his peers. The doctrine had never been strictly observed, and in the troublous period which ends the third century the practice became obsolete. Constantine directs that in cases of rape, invasion of boundaries, 'or detection in any fault or crime', the criminous senator is to be tried in the ordinary courts of the province where the offence has been committed,[2] and reference to the emperor is expressly forbidden, 'omnem enim honorem reatus excludit.'[3] Later on the old theory revives in a new shape, and the jurisdiction of the provincial governor is denied.[4] The next half-century reveals traces of a fluctuating practice. Constantius in A. D. 345

[1] Dio Cassius, LII. 31. 4.

[2] The principle of the *forum delicti* is the ruling one under the later empire. Valentinian and Valens in A. D. 373 (*Cod. Theod.* IX. 1. 10), confirmed by Theodosius I (*Cod. Theod.* IX. 1. 16), are quite explicit on this point: 'Oportet enim illuc criminum judicia agitari, ubi facinus dicatur admissum. Peregrina autem judicia praesentibus legibus coercemus.' I should follow the *Interpretatio* in taking the last words to mean 'nam alibi criminum reus prohibetur audiri'. Mommsen's comment (*Strafrecht*, p. 356, note 4) is misleading. It is hardly an exception that Celsus (writing in Hadrian's time) says (*Digest*, XLVIII. 3. 11) that though it is the duty of the governor to judge the outsider at once, yet after conviction he sometimes sends him with a report to the governor of the province of origin: 'quod ex causa faciendum est.'

The great exceptions, besides this of the senators, are that of bishops, to whom Constantius and Constans in A.D. 355 grant that they may be tried only by other bishops (*Cod. Theod.* XVI. 2. 12), and that of soldiers; their cases must be tried *in foro rei*, i. e. before their own officers, and that 'sive civiliter sive criminaliter appetuntur' (see above, p. 168), and the same privilege accrues in criminal matters to the *militia* of the *palatini* (Theodosius II and Valentinian III, *Cod. Just.* XII. 23. 12).

[3] In A. D. 316 (*Cod. Theod.* IX. 1. 1).

[4] Even in civil cases, if a senator be defendant, 'actor rei forum sequatur,' i. e. the case must go to the *praefectus urbi* (Valentinian in the first year of his reign, *Cod. Theod.* II. 1. 4).

In some cases the reference to the emperor is extended beyond the limits of the senatorial order. We have seen this already in Ulpian's instructions[1] regarding decurions guilty of acts which in meaner persons would be punished by the cross or the stake, or by hard labour in the mines—'referre ad principem debet, ut ex auctoritate ejus poena aut permutetur aut liberaretur,' and in the note of Modestinus,[2] 'consulto prius principe et jubente' of the ordinary death penalty. In the same way Callistratus says that in his time[3] the official instructions to provincial governors directed that, in case decurions or chief men of the *civitates* have committed any crime for which they deserve to be relegated to an island outside the bounds of the province, the governor must write to the emperor, and if they have been guilty of brigandage or other capital offences, 'you are to keep them in prison and write to me informing me of what each has done.'

The cases in which appeal lies after a sentence, valid in the first instance, has been passed, are much more frequent, and it is here that the greatest confusion and contradiction prevails in our authorities. There are passages, and those spreading over the centuries, which seem to indicate the right of appeal as universal in capital cases. In the first quarter of the third century Ulpian says[4] that not only the man led to execution, but any one else on his behalf, has an absolute right to appeal. Constantius in A. D. 340[5]

said. The exceptions, recognized in § 4, of an imperial rescript (*εἰ μὴ θεῖος ἡμέτερος τύπος*, &c.), of cases admitting appeal, of cases *ὅταν περὶ μεγίστου τινὸς εἴη τὸ ζητούμενον*, and in a later edict of 556 A.D. (Novella, 134. § 6) *εἰ πρὸς βλάβην ἐστὶ τοῦ δημοσίου*, would probably secure for the senator accused on any serious charge a summons to Constantinople.

[1] See above, p. 174, note 1.

[2] See above, p. 175, note 4.

[3] About A.D. 200. See *Digest*, XLVIII. 19. 27. §§ 1 and 2.

[4] Ulpian, *Digest*, XLIX. 1. 6. Ulpian was killed in A. D. 228.

[5] *Cod. Theod.* XI. 30. 20.

ties the postponement of sentence because the prisoner 'appellasse simuletur'. Constantine orders[1] that the man detected in 'manifest violence' shall no longer be punished by *relegatio* or *deportatio*, but shall suffer death, 'nec interposita provocatione sententiam quae in eum fuerit suspendat.' In the case of uttering false coin Constantine[2] denies the right of appeal to the private man, though he allows it to soldiers and *promoti*; and in like manner the ravisher 'indubitate convictus, si appellare voluerit, minime audiatur'; [3] and homicide, adultery, witchcraft, and poisoning are to be capitally punished without the opportunity for 'moratorias frustratoriasque dilationes', if the offender has confessed, or if clear proofs are forthcoming.[4] In the next reign Constantius and Constans deny appeal only to the culprit on whom his own confession and the evidence converge, but from the context it is clear that the confession may be wrung out by torture or the threat of torture.[5] Two years later they decree[6] that 'in homicidii crimine et in aliis detectis gravioribus causis ultio differenda non sit'. The case of persons adjudged to be debtors to the Treasury presented peculiar difficulties. 'To the man,' decree Arcadius and Honorius,[7] 'who is clearly a public debtor the privilege of appeal must be denied.' Constantius[8] in A. D. 354 had threatened the proconsul of Africa with a heavy fine, 'if he receive empty appeals against the

[1] In A. D. 317 (*Cod. Theod.* IX. 10. 1).

[2] *Cod. Theod.* IX. 21. 2.

[3] *Cod. Theod.* IX. 24. 1, § 3.

[4] *Cod. Theod.* IX. 40. 1. Constantine on November 3, 314, and more fully the day before (*Cod. Theod.* XI. 36. 1).

[5] 'Quod saepe vel repentinae formidinis vel impositorum tormentorum cogit immanitas,' *Cod. Theod.* XI. 36. 7 (A.D. 344).

[6] *Cod. Theod.* IX. 40. 4.

[7] *Cod. Theod.* XI. 36. 32 (A.D. 396).

[8] *Cod. Theod.* XI. 36. 10.

enter them on the official records. The emperors seem to love to advertise the fact that they are not to be trusted to know their own minds, and that they are puppets liable to have their strings pulled by evil persuasion. We read of rescripts obtained *damnabili obreptione*,[1] *callidis precibus*,[2] *suffragio*[3] (by influence), or sometimes *umbratili suffragiorum pactione*.[4] In one of these cases the grants (of goods of condemned men) are confirmed if made to officers of the imperial palace,[5] but declared void if made to private persons. Theodosius I[6] exceeds even this absurdity: the grants are to be respected if they have been made by the emperor of his own motion, but invalid if they have been asked for. Through this labyrinth the unfortunate judge must find his way. He is charged[7] to go behind the rescript, and to inquire *de veritate precum*, or as the *Interpretatio* puts it, 'quidquid falsa petitio a principe obtinuerit . . . non valebit;' but none the less he is liable to punishment if he 'despises or procrastinates over' the rescripts of the emperor,[8] while the suitor who attempts to revive *exquisito suffragio* a matter decided by rescript or consultation is heavily fined.[9]

The impression left after reading the Codes is, that what the judge might or might not be allowed to do would depend on his influence at Court. If it were desired to

[1] Theodosius I in A. D. 385 (*Cod. Theod.* XI. 1. 20).
[2] Arcadius and Honorius in A. D. 399 (*Cod. Theod.* XI. 7. 15).
[3] Valentinian and Valens in A.D. 365 (*Cod. Theod.* XI. 12. 3). The same word *suffragium* is used by Constantine (*Cod. Theod.* IX. 16. 3) of ritual to influence the weather, which is permitted when other incantations are forbidden.
[4] *Cod. Theod.* XII. 1. 36.
[5] Valentinian and Valens in A. D. 365 (*Cod. Theod.* XI. 12. 3).
[6] In A. D. 380 (*Cod. Theod.* X. 10. 15).
[7] Constantine in A. D. 333 (*Cod. Theod.* I. 2. 6).
[8] Constantius in A. D. 356 (*Cod. Theod.* I. 2. 7).
[9] Constantine in A. D. 318 (*Cod. Theod.* XI. 30. 6).

are decreed, as for instance deportation, if they delegate to soldiers their duty of collecting taxes,[1] or even death if they intercept the corn-supply for the City of Rome[2] or if they abet assaults on the shippers of the corn[3] or 'si damnabilem voluerint coniventiam commodare' to a judge who fails to put in force the law regarding appeals;[4] or if they do not check the encroachments of the clergy.[5] Any *officialis* who attempts to drag a matron from her house is to be put to death, or to be punished, says Constantine,[6] 'exquisitis potius exitii suppliciis.' These officers had doubtless sufficient power to be tyrants over the subjects, and Constantine had reason to warn the governor of Corsica to restrain their misdoings;[7] but the intermittent chastisements of a master awaited them 'to lop off the rapacious hands with swords', and, if they extort money, they are to expect an 'armata censura, quae nefariorum capita cervicesque detruncet'.[8]

It is a difficult problem to determine what was done with prisoners or litigants pending appeal. Contradictions prevail both in the opinions of the jurists of the second and third centuries, quoted in the *Digest*, and in the decrees of the later emperors which are found in the Codes.

At first we find the old rule prevailing that the accused must be sent to Rome. Maecianus, a jurist of the time of Antoninus Pius,[9] tells us that the *lex Julia de vi publica*

[1] Arcadius and Honorius in A. D. 401 (*Cod. Theod.* XI. 7. 16).
[2] Arcadius and Honorius in A. D. 399 (*Cod. Theod.* XIV. 15. 6).
[3] Theodosius I in A. D. 380 (*Cod. Theod.* XIII. 5. 16).
[4] Constantine in A. D. 319 (*Cod. Theod.* XI. 30. 8).
[5] Arcadius and Honorius in A. D. 398 (*Cod. Theod.* IX. 40. 16. § 1).
[6] *Cod. Theod.* I. 22. 1.
[7] He is to give the provincials opportunity 'adeundi tuum judicium de negligentia vel avaritia tui officii', *Cod. Theod.* I. 16. 3 (A. D. 319).
[8] Constantine in A. D. 331 (*Cod. Theod.* I. 16. 7).
[9] Maecianus, *Digest*, XLVIII. 6. 8.

injuriam,' and that he cannot even be debarred from attending the meetings of any corporation to which he may belong?

It is difficult in these cases to disentangle the rule from the exception; yet the evidence seems on the whole to confirm the opinion of Mommsen,[1] that 'the sending of prisoners to the Emperor's Court fell into desuetude in later times'. Constantine[2] indeed implies personal attendance in civil cases, when he makes it a peculiar privilege of orphans that they may compel their adversary *copiam sui facere* at the emperor's court, but are not to be compelled to put in an appearance themselves; nevertheless when he speaks[3] of certain criminal cases 'in which, though the accused may appeal, they are in the position of being detained in custody after the appeal has been laid', he is probably to be understood of detention by the provincial governor, and Valentinian and Valens say explicitly[4] 'comprehensus ex officio non recedat'.

A still more difficult and very important question remains, if we ask, from whom and to whom are appeals permitted? In the first two centuries of our era there is no question that there are only two supreme tribunals, the Senate and the personal jurisdiction of the emperor. The *praefectus urbi* exercises, as we have seen, vast powers delegated to him by the *princeps*, but the final resort is always to the Head of the State.

The imperial decision is assisted by a *consilium*, at first summoned at the discretion of the *princeps* for each occasion, afterwards permanently constituted. The younger

[1] Mommsen (*Strafrecht*, p. 469, note 2): he is commenting on an edict of Diocletian (A. D. 294; *Cod. Just.* VII. 62. 6. § 3): 'inopia idonei fidejussoris retentis in custodia reis.'

[2] In A. D. 334 (*Cod. Theod.* I. 22. 2).

[3] Constantine in A. D. 314 (*Cod. Theod.* XI. 30. 2).

[4] In A. D. 365 (*Cod. Theod.* IX. 2. 2).

a case tried by Marcus Aurelius[1] in the year A. D. 166. A testator has erased the names of those whom he had instituted his heirs; this undoubtedly bars them from benefitting from the will; but do the legacies to other parties likewise lapse? The text is too corrupt for us to say what exactly was the sentence of the jurist himself, presumably then prefect; but in any case his pronouncement is not the end of the matter. The emperor personally conducts the case and puts questions to the contending advocates. Finally, he clears the court and considers the matter by himself, and then decrees that the case 'admittere videtur humaniorem interpretationem', and that all the dispositions of the will not erased are to be held valid. He further confirms the freedom granted to a slave, although the testator had actually erased his name, thereby stretching the law, 'videlicet favore libertatis.' The jurist Paulus likewise finds himself overruled by his emperor[2] in a leading case between a warehouseman and a corn-factor, in which the question at issue is the responsibility of the master for the acts of his slave. The *praefectus annonae* has decided against the master and for the warehouseman; Paulus as *praefectus praetorio* is for reversing the judgement, on the ground that the merchant had given no authority to his slave; but the emperor holds that his habit of dealing through this man constitutes agency, and confirms the judgement of the court below. These are both civil suits, but there is no reason to suppose[3] that the procedure described will not equally apply to criminal cases.

So far the *praefectus praetorio* has appeared as an assistant

[1] *Digest*, XXVIII. 4. 3.

[2] Probably Alexander Severus (*Digest*, XIV. 5. 8).

[3] I should agree with Mommsen, *Strafrecht*, p. 469: 'Die Civil- und die Criminalappellation sind immer zusammengegangen und wesentlich gleichförmig entwickelt.'

judicatio est', adding, however, that, in cases where the Treasury is interested, the prefect is only to express his opinion and 'ad nostram scientiam referre'. This is modified by the elder Theodosius[1] in another missive addressed to the *praefectus urbi*, and in cases of sums under two hundred pounds of silver, the emperor delegates 'sublimi eminentiae tuae sacrum nostri numinis judicium'. Arcadius and Honorius[2] recognize in the *praefectus urbi* an appellate jurisdiction *sacra vice* in certain cases (by no means clearly defined) from the *vicarius* of the city of Rome, while other cases are ordered 'ad nostram clementiam referri'. As late as A. D. 423, Theodosius II seems to place the two prefects on a level as regards appeals; for the case is put[3] of a judge neglecting to make a reference ('apostolorum copiam denegavit'), when there is an appeal in which 'vel tuae (i.e. *praefecti praetorio*) amplitudinis vel urbanae praefecturae sacrum auditorium postulatur'. The prefect of the city, though he hears appeals from others, is fiercely rebuked if he refuses to allow appeals from himself. Constantine informs Maximus,[4] in A. D. 321, that 'litigants have complained that you "qui imaginem principalis disceptationis accipitis", "qui cognitionibus nostram vicem repraesentas", have denied the recourse to appeal. This must be stopped.'

I have dwelt at length on the passages relating to the *praefectus urbi*, before entering on the function of the later *praefecti praetorio*, because those passages enable us to trace

[1] In A. D. 389 (*Cod. Theod.* XI. 30. 49).
[2] In A. D. 400 (*Cod. Theod.* XI. 30. 61).
Cod. Theod. XI. 30. 67.
[4] *Cod. Theod.* XI. 30. 11. Maximus at this time was prefect of the city (see *Cod. Theod.* I. 4. 1), though later on, in A. D. 327, we find him promoted to be *praefectus praetorio* (see *Cod. Theod.* I. 4. 2 and I. 5. 2).

praetorium on our command.' Here we have clearly recognized as possible two steps in the appeal, the one to and the other from the *comes* in question. Theodosius I, half a century later, assigns a different place in the procedure to the *comes*[1] in an edict addressed to Ammianus *comes rerum privatarum*. The appeal from the *sacri aerarii praesidentes* is to the judges (unhappily not further defined) 'to whom the cases of private men are used to go on appeal': if appeal is made from them in turn, 'Mansuetudinis nostrae expectetur arbitrium': but Ammianus himself or the *comes sacrarum remunerationum*,[2] to whichever of the two the matter in question may belong, is to instruct the emperor in a full report.

The real difficulty arises when we come to the *praefectus praetorio* himself; for here we have clear statements that he is not to be appealed against. The earliest in these is from Constantine[3] in A. D. 331, who ignores the *praefectus urbi*, and while confirming the right of appeal from provincial governors, adds 'a praefectis autem praetorio,[4] qui soli vice sacra cognoscere vere dicendi sunt, provocari non licet'. Constantine is the last emperor whose epoch is overlapped by any of the jurists quoted in the *Digest*, and thus it happens that we are able to illustrate this edict by the comment of the only one of them who

[1] In A. D. 383 (*Cod. Theod.* XI. 30. 41).

[2] This is another title for the *comes sacrarum largitionum*, who, again, is identical with the *comes sacri aerarii* (compare *Cod. Theod.* XI. 30. 58 with the next edict, XI. 30. 59). He is the general finance minister, whereas the *comes rerum privatarum* has charge of the imperial domains and of confiscated property.

[3] *Cod. Theod.* XI. 30. 16.

[4] An edict of Arcadius and Honorius, more than sixty years later, repeats this, but, as reported in the Theodosian Code (XI. 30. 58), more vaguely, 'a solis tantum praefectis'; the version of Justinian (*Cod. Just.* VII. 62. 30) corrects this into *praefecto praetorio*; and this is doubtless what was meant.

changed or mutilated, but must come entire 'ad magnificentissimae sedis tuae notitiam'. The prefect is then to use his discretion as to which grievances he may redress immediately and which are 'clementiae nostrae auribus intimanda'.

Sometimes the *praefectus praetorio* appears not as the channel of communication with the emperor, but as an alternative resource. Constantine directs[1] the provincial governor who finds himself insufficient to deal with a powerful offender—'de ejus nomine aut ad nos, aut certe ad praetorianae praefecturae scientiam referre'; and Constantius[2] says of appeals from the *praefectus urbi* omitted through fear, 'aut per me cognoscam aut excellentiae tuae impertiam notionem'. Valentinian[3] gives a hint of one reason for the devolution, 'ad nos referat vel, si longius fuerimus, ad illustres viros praefectos praetorii.'

The question is somewhat complicated by the appearance of other official designations, especially that of *cognitor*. The 'sacri auditorii cognitores divinae domus', for instance, whom Honorius and Theodosius II direct[4] to hear appeals in fiscal cases, seem to be finance officers invested with judicial powers for this purpose. The same persons are doubtless indicated by Theodosius I when he directs the *praefectus urbi* that as to sums over two hundred pounds of silver the appellants must not be dealt with by himself,

[1] In A. D. 328 (*Cod. Just.* I. 40. 2).

[2] In A. D. 355 (*Cod. Theod.* XI. 34. 2). It may be noticed that Constantius is much more inclined to regard the plea of terror than his father had been. Constantine threatens deportation and confiscation against any one who urges this pretence, though he too reserves the investigation of such cases either to himself or to the *praefectus praetorio*. See above, p. 194.

[3] In A. D. 365 (*Cod. Theod.* IX. 2. 2).

[4] In A. D. 412 (*Cod. Theod.* XI. 30. 64).

the *praefectus praetorio* and other judges as well, for the emperor[1] orders that appeals shall be heard 'in auditorio sacro apud auctoritatem tuam vel eos qui de appellationibus judicent'. When, therefore, Valentinian speaks[2] of the 'occupatio ejus judicis qui est in sacro auditorio cogniturus', or Theodosius I commands[3] the urban prefect to send cases 'vel ad nos vel ad cognitorem sacri auditorii', this *cognitor* may very possibly be the praetorian prefect, as the chief person in the court.

We shall find the same conclusion indicated if we trace the uses of yet another phrase. Hardly less frequently than the *auditorium sacrum* we find in the Codes the expression *ad comitatum nostrum*. Constantine orders[4] that in appeals 'gesta ad comitatum omnia dirigantur', and this seems to be substituted for, and equivalent to, a phrase in another edict on the same matter of appeals, three years earlier,[5] 'gesta omnia ad nostram referre scientiam.' In the same manner Julian speaks[6] of *relationes* which judges have promised 'ad nostrae tranquillitatis comitatum destinare', and himself commands[7] that all *legitimae appellationes* 'ad nostrum comitatum mittantur'; and Valentinian ordains[8] that senators accused of witchcraft shall be sent with all the proofs 'ad comitatum mansuetudinis nostrae'.

The *comitatus* has from time to time a local seat, for soothsaying is more severely punished if the wizard be 'in comitatu meo vel Caesaris deprehensus';[9] and Valentinian

[1] In A. D. 342 (*Cod. Theod.* I. 5. 4).
[2] In A. D. 369 (*Cod. Theod.* XI. 31. 4).
[3] Theodosius I and Valentinian II in A. D. 384 (*Cod. Theod.* XI. 30. 44).
[4] In A. D. 316 (*Cod. Theod.* XI. 30. 5).
[5] In A. D. 313 (*Cod. Theod.* XI. 30. 1).
[6] In A. D. 363 (*Cod. Theod.* XI. 30. 31).
[7] *Cod. Theod.* XI. 30. 29.
[8] In A. D. 371 (*Cod. Theod.* IX. 16. 10).
[9] Constantius in A. D. 358 (*Cod. Theod.* IX. 16. 6).

course of the next two centuries, as lands were wrested from or restored to the imperial control, but the principle is observed throughout. The four were not, however, of equal power or dignity. The *praefectus Orientis* throughout, and the *praefectus Italiae*, whenever there is a separate emperor in the West, are generally attendant at court and thus gain a pre-eminent position. All matters referred *ad comitatum nostrum* must necessarily pass through the hands of one of these great officers to the exclusion of the prefects of Gaul and Illyria. We find casual indications of this in our authorities. We sometimes find[1] a rescript addressed not to the *praefectus praetorio* simply, but with the qualification *Galliarum* or *Illyrici*; and on the other hand Ammianus Marcellinus[2] describes Rufinus, the prefect of the East under Constantius, as *primus praefectus praetorio*.

But the most instructive definition of the chief prefect, and that which best distinguishes him from the rest, is 'praefectus praetorio qui est in comitatu nostro'. This phrase occurs in the edict[3] of Theodosius II and Valentinian III in the year 440, which in spite of its great difficulty is our main source of information for the ultimate appeal court of the empire.

It must be noted, to begin with, that in the year before (A. D. 439), the emperors,[4] writing to Thalassius prefect of Illyricum, had allowed, so far as his court is concerned, that if the suitors 'contra jus se laesos adfirment', 'non provocandi sed supplicandi licentia' is to be granted 'nostro numini contra cognitionales sedis tuae sententias'; 'for what refuge', they say, 'is left to the parties, if after a

[1] e. g. in *Cod. Theod.* XII. 1. 171 and 172.
[2] Ammianus, XVI. 8. 13. [3] *Cod. Just.* VII. 62. 32.
[4] *Novellae Theod.* XIII. This Law is repeated, though in a less full and instructive form in Justinian's Code (VII. 42. 1). The *supplicatio* may be made even after the retirement of the prefect from office.

tatus. The other members of the *sacrum judicium* will be the quaestor, and doubtless some skilled assessors assembled at the seat of government. The personal action of the emperor, though present in theory,[1] commonly drops out of practice in judicial proceedings. It survives, however, in certain cases of appeal from special delegates of the rank of *illustres*, mentioned at the end of this same decree, with regard to which 'per consultationem nostram volumus audientiam expectari', and likewise, as we have seen,[2] in Zeno's regulations respecting criminous senators.

This decree of A. D. 440 contains nothing about the sentences of the prefects of Gaul and Illyricum 'quas nefas est appellatione suspendi', but whose authors have no place in the *comitatus*. We must suppose that they might still be dealt with under the terms of the former edict (of A. D. 439), not by *provocatio* but by *supplicatio*. If once such cases came before the emperor, they would probably be referred to the new court of prefect and quaestor instituted in the second edict, whether with or without the possibility of the emperor's pleasure being taken. In that case the court will have in practice, whenever there is a single emperor and therefore only a single *comitatus*, an appellate jurisdiction over the whole Empire. However this may be, the Supreme Court, in all cases which do reach the *comitatus* of the emperor, will closely resemble that described[3] in the second and third centuries, except that the emperor is generally no longer present in person.

In attempting to determine the practical signification of appeal, the military and political situation must not be left out of account. The world was rent during these centuries

[1] See Vol. I, p. 79. Justinian in A. D. 541 (Novella, 113, § 1) speaks of cases which it pleases the emperor δι' οἰκείας ἡμῶν κρίσεως διατυπῶσαι καὶ τεμεῖν. [2] Above, p. 180. [3] See above, p. 191.

but in fact the reference of an appeal to any central authority must often have been a matter of physical impossibility. As early as the reign of Julian we hear of delay through accidents occurring to the couriers,[1] and of this serving as a pretext to the provincial governors who wished to suppress or procrastinate appeals. Gratian and Theodosius I[2] are more explicit, and allow, when an enemy has barred the road, a renewal of the case so soon as the rebels are cleared away and the *sacrae cognitionis auditor* can be safely approached. The contingencies thus hinted at would in many years be the rule rather than the exception, so that we cannot suppose that the elaborate procedure of appeal prescribed is to be taken very seriously, or that there was much real opportunity for escape from the cruelty of a rapacious tax-gatherer or an unrighteous judge.

The law courts in the fourth and fifth centuries share in the general demoralization of the age. The society of the declining Roman Empire is a gigantic network of castes, civil and military,[3] under which every man is born subject to certain tasks and burdens, which he must by no means be allowed to avoid. The decurion is bound to his township, and ever-increasing burdens are laid on him; the middle class is represented by the *corporati* or members of guilds in the cities, and men of both orders are absolutely forbidden to push their fortunes—'nullique penitus ad quemlibet honorem atque militiam aditus tribuatur'.[4] The actual cultivators of the soil were to a large extent *coloni*, fixed on the land in an almost servile condition,[5] and what

[1] 'Geruli' (*Cod. Theod.* XI. 30. 31), in A. D. 363.

[2] In A. D. 379 (*Cod. Theod.* XI. 31. 7).

[3] The duty of military service, like the rest, is hereditary. See *Cod. Theod.* VII. 1. 5 and 8.

[4] Arcadius and Honorius in A. D. 408 (*Cod. Theod.* XIV. 4. 8).

[5] They may not alienate any of their goods, and themselves 'a

State. To them was due the first great Gothic invasion, which had as its incidents the defeat at Adrianople, the death of Valens in the flames, and the devastation of the Greek peninsula. But the unarmed provincials might be oppressed without fear of vengeance, and the only variation seems to be that sometimes they are plundered by the regular officials, sometimes by the special inspectors (*palatini*) sent out in swarms from head-quarters to control the others.[1] The question *quis custodiat custodes?* was ever present. When Arcadius and Honorius sent round *comites* and *peraequatores* to attempt some adjustment of the burden of taxation, the emperors after five years' experience declare 'nihil profuisse publicis utilitatibus cognovimus'; [2] and the same verdict might certainly be given against all the special commissioners.

The inefficiency of the central control is abundantly certified in the fluctuations in the practice recorded in the imperial edicts. In A. D. 365 we find that the collection of the imperial rent is taken away [3] from the *ordinarii judices*, 'lest under pretext of the imperial interests they should oppress the tenants with the same rapacity as heretofore,' or 'lest wider opportunity of plunder should be given them'.[4] But by the next turn of the wheel the last-named decree is reversed with the note that it had been *Valentiniano juniori subreptum*, and the right of summons (*conveniendi licentia*) is restored to the *ordinarii judices*.[5] In A. D. 399

[1] For their numbers and apportionment among the different offices see *Cod. Theod.* VI. 30. 16 and VI. 35. 14.

[2] In A. D. 406 (*Cod. Theod.* XIII. 11. 11).

[3] 'Ut a rei nostrae conventione cessarent,' Valentinian and Valens (*Cod. Theod.* XI. 7. 11).

[4] Theodosius I and Valentinian II in A. D. 389 (*Cod. Theod.* V. 14. 31).

[5] In A. D. 398 by Arcadius and Honorius (*Cod. Theod.* I. 11. 2).

them to the different regions and provinces, and to various places, through which the property of the emperor is said to be smuggled away. Two years later the exactions have become intolerable, and the same emperors have to decree the removal of all the *curiosi*.[1] The Dalmatian coast and its islands had been so infested with them that under whatever stress of weather no shipman dared to run for a safe harbour.[2] In their alternate subjection to the different classes of officials the provincials seem to have been between the upper and the nether millstone.

In this machinery of cruelty and rapacity the courts of law have their due place. These courts hold no independent position; the judges are precisely those *praesides* whom we noted as competing with the *palatini* for the privilege of collecting the revenue. They are merely the nominees of the emperor and his courtiers, and form but a section of the all-pervading bureaucracy which we have seen at work in other spheres. Hence abuses are rife here as elsewhere. The imperial edicts against the various opportunities for corruption show us what was the practice of the *praesides*. They have to be warned against hearing cases in their own offices, 'so that a suitor cannot get audience of them without paying for it'.[3] When once they have left the court, they must receive no more plaints.[4] If a provincial admits the governor as a guest to his house, the estate where the scandal has occurred is to be confiscated;[5] and he must not, even with the excuse of an old acquaintance, pay an

[1] In A. D. 414 (*Cod. Theod.* VI. 29. 11).
[2] *Cod. Theod.* VI. 29. 12.
[3] Constantine in A. D. 331 (*Cod. Theod.* I. 16. 6).
[4] Valentinian and Valens in A. D. 365 (*Cod. Theod.* I. 16. 10). Libanius (*Orationes*, LI. 4) tells us that the suitors pursue the judge even into the retiring room where he takes his *siesta* during a short adjournment of the court.
[5] Valentinian and Valens in A. D. 369 (*Cod. Theod.* I. 16. 12).

themselves by looking elsewhere. Men, who had seized on lands and houses, frightened away the lawful owners by setting up a superscription that the property belonged to some powerful personage; or, if brought into court, they used his name to cover their suits.[1] Creditors, hopeless of obtaining justice themselves, sold their bonds at a loss to men of more influence with the court.[2] Another abuse was the bringing of civil suits before the military tribunals, apparently under the fiction that the defendant was a soldier;[3] Arcadius and Honorius decree deportation against the offender and a fine against his advocate.[4] Twenty-five years later we find[5] that military force is being employed to back private suits against senators and members of guilds in the City of Rome itself.

It will be seen that many of the abuses which I have mentioned cluster round the relation of advocate and client in the law courts. Already under the Republic we find traces of illicit pressure brought to bear on jurors, witnesses, and rival parties by powerful *patroni*. The gains of one of his three years of Sicilian governorship are reserved by Verres for his advocates and defenders,[6] and throughout his speech in this case Cicero clearly indicates that Hortensius is relying not so much on his eloquence as on his influence[7] to obtain a verdict. The *patrocinium malorum*,

[1] See below, pp. 215 and 216. Arcadius and Honorius in A.D. 400 threaten with the leaded scourge and with deportation those guilty of such practices (*Cod. Theod.* II. 14. 1).

[2] See decree of Honorius and Theodosius II in A. D. 422 (*Cod. Theod.* II. 13. 1).

[3] If he had really been a soldier the principle of the *forum rei* would override that of the *forum delicti*. See above, p. 179. n. 2.

[4] *Cod. Theod.* II. 1. 9.

[5] Honorius and Theodosius II in A. D. 423 (*Cod. Theod.* I. 6. 11).

[6] Cicero, *in Verrem*, Actio Prima, 14. 40.

[7] See especially Cicero, *in Verrem*, Actio Prima, 18. 53 'Non patiar rem in id tempus adduci, ut Siculi quos adhuc servi designatorum con-

in this case the military officer who stands behind them.[1] The collectors, commonly decurions of the *civitas* to which the village belongs, are *liturgi* who have had this duty imposed on them as one of the burdens of their station, and are required to pay the tax to the government, whether they have been able to get it or not. They are accordingly beaten and obliged to sell their goods, and are reduced to beggary, thereby beggaring likewise the *curia*, from which those are wiped out who have been used to take their share of the common burdens.[2]

Sometimes the *decuriones* themselves appear among the *potentes*, and oppress the poorer landowners whose taxes they collect, so that 'quot curiales fuerint, tot tyranni sunt'.[3] Under the anarchical conditions of the time, any one, soldier or civilian, imperial official[4] or local magistrate, who can acquire power, whether by his wealth or by his sword, uses it to devour the weaker, and is driven to do so for his own protection—'in hoc scelus res devoluta est, ut nisi qui malus fuerit, salvus esse non possit'.[5] Some of the oppressed take refuge with the Goths; others join armed bands of outlaws and thus become '*quasi-barbari*, because they are not allowed to be Romans, strangled and done to death by the brigandage of the judges'.[6]

[1] Libanius, *Orationes*, XLVII. 5–8, and *Cod. Theod.* I. 29. 8. This last is an edict of Theodosius I in A. D. 382 directed against brigandage: 'Removeantur patrocinia, quae favorem reis et auxilium scelerosis impertiendo maturari scelera fecerunt.'

[2] Libanius, *Orationes*, XLVII. 8–10.

[3] Salvianus, *De Gubernatione Dei*, V. 4. 18.

[4] We find a rough list of likely *patroni* in an edict of Arcadius and Honorius in A.D. 399: 'cujuslibet ille fuerit dignitatis, sive magistri utriusque militiae, sive comitis, sive ex proconsulibus vel vicariis vel Augustalibus vel tribunis, sive ex ordine curiali' (*Cod. Theod.* XI. 24. 4).

[5] Salvianus, *De Gubernatione Dei*, V. 4. 18.

[6] Salvianus, ibid., V. 6. 26.

through which their duty should flow', and decrees damages to those villagers who have had to pay extra taxes on account of the default of the seceders. Valens, in A.D. 370,[1] and Arcadius and Honorius, twenty-five years later,[2] forbid the husbandmen on pain of chastisement[3] from seeking such protection, and the *patroni* are to be fined if they grant it. The last-named emperors return to the matter in two edicts of March and May, A.D. 399. The first of these raises the fine on those 'qui rusticis patrocinium praebere temptaverint' to forty pounds of gold for each farm,[4] and threatens likewise the rustics 'qui fraudandorum tributorum causa ad patrocinia solita fraude confugerint'.[5] In the decree of May 399[6] offending *agricolae* are sentenced to forfeiture of their holdings. But a few years later, Honorius and Theodosius II, in A.D. 415,[7] are compelled to stay inquisition and to acknowledge the titles of those tenants who have by the help of their patrons kept their masters or landlords at arm's length[8] for eighteen years (from before

[1] *Cod. Theod.* XI. 24. 2.

[2] *Cod. Theod.* XI. 24. 3; in A.D. 395.

[3] 'Subjugandi supplicio' in Valens' edict probably means anything up to capital punishment (a sense which *supplicium* bears in *Dig.* XXXVII. 2. 14, § 3). Arcadius and Honorius in the next edict give unlimited discretion 'ultioni quam ipsa ratio dictabit, conveniet subjugari'.

[4] *Cod. Theod.* XI. 24. 4. This is in March: the next decree of May (*Cod. Theod.* XI. 24. 5) says 'propriis facultatibus exuatur', which seems to make the fine arbitrary and unlimited.

[5] I am not satisfied with any of the interpretations attempted of the next words, 'duplum definitae multae dispendium subituros.' It matters little, as the pecuniary penalty on the peasants, whatever it may have been, is replaced three months later by confiscation of the land in question.

[6] *Cod. Theod.* XI. 24. 5. [7] *Cod. Theod.* XI. 24. 6.

[8] So I should interpret 'qui ex Caesarii et Attici consulatu possessiones sub patrocinio possidere coeperunt'. de Zulueta (*De Patrociniis Vicorum*, in *Oxford Studies in Social and Legal History*, I. 23) understands that the title is granted not to the clients but to the patrons;

of mercy out of the hands of the nominal ruler of the world. Criminals led to justice, or what passed for such, were snatched away by clerical mobs and found sanctuary in monasteries and churches. Arcadius and Honorius[1] upbraid with stout words the presumption of the ecclesiastics which 'merits war rather than judgement', but end by plaintively calling on the bishops to restrain them. The justice administered by the decaying Empire was so corrupt and arbitrary that any sort of intervention was perhaps better than none; but the result was that, in the legal sphere, as elsewhere, despotism accomplished its perfect work by a return to anarchy. It is a dreary epilogue to the long and eventful story of the Roman Criminal Law.

[1] In A. D. 398 (*Cod. Theod.* IX. 40. 16).

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