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*', 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.

CHAPTER XV

CAPITAL TRIALS BEFORE JURY COURTS

WHEN we pass from the trials for *repetundae* to those which avowedly affected the *caput* of the citizen, we may tread, as I think, with more certainty. Nevertheless this chapter and the next must be occupied for the most part in traversing the theories of Maine and of Mommsen.

Maine's theory of the jury courts is a development of his doctrine, which I have criticized in a former chapter (VIII [1]), respecting the trials before the People. It will be remembered that Maine ignores *provocatio* altogether, and looks on each trial as an act of private legislation aimed directly at the particular offender. The next step, according to him,[2] was for the People to delegate its functions to 'a Committee of the Legislature', which 'exercised all powers which that body was itself in the habit of exercising, even to the passing sentence on the accused', first for each particular occasion (in the extraordinary Commissions) and at last (in the standing *quaestiones*) for any case which might arise.

It is a fatal objection to this theory that it does not explain the most striking feature in these trials, namely that it was impossible to appeal from the sentence of a jury to the People. If the jurors had been indeed delegates exercising the power of the People in their stead, it would have followed

[1] See above, Vol. I, p. 132.

[2] Maine, *Ancient Law*, p. 383 seq. The plan of Maine's work (as of Mommsen's) does not admit of reference to modern authorities; but his presentation in this passage seems to follow that of Geib, *Römischer Criminalprocess*, p. 175.

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.

Maine. By a most unhappy inspiration he starts with the erroneous supposition that the sentence (as opposed to the verdict) was the work of the jury, and proceeds to account in this way for the fact that condemned persons were not actually put to death. The assembly of the People, he argues, fairly enough if we grant the assumption of a delegation, could only delegate such powers as itself possessed.[1] The commissions 'were circumscribed in their attributes and capacities by the limits of the powers of the body which deposited them'. Now by the Law of the Twelve Tables only the *comitia centuriata* could pronounce *de capite civis*; but the earlier *quaestiones* were founded on laws proposed by tribunes to the plebs; therefore they could sentence only to exile. Leaving out for the moment the consideration that Cicero[2] expressly tells us that exile and deprivation of citizenship[3] was not a punishment inflicted under the laws of Rome, Maine forgets that such a punishment, if it were possible, would, equally with death, traverse the law of the Twelve Tables. You affect the *caput* of the Roman just as much by depriving him of his citizenship as by smiting him on the neck with the axe. Hence the jurists of the principate, in whose time deprivation of life, deprivation of liberty, and deprivation of citizenship did really exist side by side as punishments, classed all three together as 'capital', 'quia his poenis eximitur caput de civitate.'[4]

Perhaps the most effective argument against Maine's theory is to be found in the use made of it by Professor Beesly.[5] He infers from it, that the 'significant fact',[6]

[1] Maine, *Ancient Law*, p. 389. [2] See below, p. 26.

[3] The apparent exceptions in Livy, XXV. 4. 9, and XXVI. 3. 12 are declaratory, not condemnatory; they are passed in the assembly of the *plebs*, not in the *comitia centuriata*. See below, p. 43, note 1.

[4] Paulus, *Digest*, XLVIII. 1. 2.

[5] Beesly, *Catiline, Clodius, and Tiberius*, p. 51 seq.

[6] Of course it is not 'significant' at all. It was a matter of complete

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.

of death was obsolete even on persons tried before the centuries. When the Romans built up a new system to supersede these comitial trials, they could hardly make the escape of the accused less easy than it had become in trials before the sovereign People. As a matter of fact they made it a little more easy by securing him against any obstacle to his running away.[1]

Mommsen's doctrine of the nature of the 'capital' jury trials requires much more elaborate treatment than that of Maine and Beesly as to delegation of powers and a 'Committee'. It will be convenient that I should first attempt to sketch the history and nature of these trials, as I read them in the light of the ancient authorities, and reserve for a separate chapter the points as to which I differ from Mommsen in the interpretation of those authorities.

The system of jury courts, developing its procedure from private law and its consequences from public law, which began with trials for *repetundae*, was gradually extended to cover other crimes. The *quaestio* against judicial corruption 'ne quis judicio circumveniretur' was undoubtedly established by Caius Gracchus.[2] There was likewise a *quaestio* 'inter sicarios'. In pleading in the murder trial of Roscius of Ameria under Sulla's dictatorship, Cicero refers to his client's case as the first which had come before the court 'inter sicarios' for many years, during which its operations had been in suspense owing to the Civil Wars, and he mentions[3] that the *quaesitor* before whom he is pleading (M. Fannius) had presided in the same court before its suspension. Mommsen[4] somewhat hazardously refers this court, too, to

[1] See below, p. 24 and p. 151.

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

[3] Cicero, *pro Roscio Amerino*, 4. 11.

[4] Mommsen, *Rom. Hist.*, Book IV, chap. iii. In the *Strafrecht*, Mommsen is inclined to ascribe the standing court for murder to

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.

we have criminal jury courts for *injuria* (in this case parallel to the civil suit [1]), for murder (*lex de sicariis et veneficis*), which includes arson and perhaps barratry,[2] for conspiracy to convict the innocent (*ne quis judicio circumveniretur*), for treason (*majestas*), for organized conspiracies to influence elections (*de sodaliciis*, after 55 B. C.), for embezzlement of state money (*peculatus*), for violence, rioting, and intimidation (*de vi*),[3] for forgery and fraud (*de falsis*), for ordinary corrupt practices at elections (*de ambitu*), for extortion (*repetundarum*), for illegal assumption of the citizenship,[4] and finally for malicious or collusive prosecution (*calumnia* and *praevaricatio*), charges which were dealt with by the jurors who had tried the case out of which they arose. Each fresh *quaestio* is looked upon as bringing for the future a new range of offences under the direct cognizance of the will of the people as expressed in its laws and enforced by its courts. Mommsen happily quotes Cicero's remarks on the effect of the *lex Cornelia de falsis*, 'ut quod semper malum facinus fuerit, ejus quaestio ad populum pertineat ex certo tempore.' [5]

In most cases the references in the *Digest* to these crimes quote *leges Juliae*,[6] which by their intervention obscure the

[1] See above, Vol. I, p. 218 seq.

[2] See Mommsen, *Strafrecht*, p. 646, note 4.

[3] It is uncertain whether rape would come in here, as it certainly would under the principate, or whether it was treated merely as a form of *injuria*. See Mommsen, *Strafrecht*, pp. 664 and 792; Rein, *Criminalrecht*, pp. 365 and 393.

[4] By a *lex Papia* of 65 B. C., under which Archias was tried; see Schol. Bob. *ad Ciceronem, pro Archia*, § 3.

[5] Cicero, *in Verrem*, I. 42. 108.

[6] e. g. of the *lex Julia peculatus* Ulpian says (*Digest*, XLVIII. 13.3): 'Peculatus poena aquae et ignis interdictionem, in quam hodie successit deportatio, continet'; and of another *lex Julia* (*Digest*, XLVIII. 6. 10, confirmed by Cicero, *Philippics*, I. 9. 23): 'damnato de vi publica aqua et igni interdicitur.'

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.

however, that death was physically inflicted. There is no trace in all the voluminous evidence supplied by Cicero's writing that a single Roman was ever put to death in his time by regular course of law. Without exception the persons condemned on 'capital' charges go into exile. This, again, is no new thing; we have seen [1] that it was the fashion in Polybius' time for persons to save themselves from death 'by pronouncing voluntary exile against themselves' and finding refuge in a neighbouring state. There is this difference, however, that whereas under the régime of trials before the People it was possible, if the tribunes permitted, for the magistrate to prevent this ἑκούσιος φυγαδεία by locking up the accused beforehand, the private accuser who appears under the jury-court system has no such power [2] and is obliged to content himself with a summons, which has as little effect on impeding the flight as had the trumpet blast by which Manius Sergius was to call upon 'the wicked Titus Quinctius Rocus' [3].

What is it that happens when a man goes into exile? Cicero has given us a most precise and lucid answer to this question in two passages in his speeches *pro Caecina* and *de Domo*,[4] which are commonly ignored by modern critics,

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

[2] Mommsen, *Strafrecht*, p. 390, and p. 328: 'The praetor presiding over these courts could apply the magisterial summons, but the right to exercise preliminary arrest seems to have been wanting to him; at least, the accused seems always to have been at large, even in the murder trials.' There is, however, the curious case of Oppianicus, brought (apparently in preparation for the summons by the praetor) before the *triumviri capitales* on suspicion of the murder of Asuvius. The triumvir is blamed for letting him go; 'itaque rem cum Oppianico transigit, pecuniam ab eo accipit, causam et susceptam et manifestam relinquit' (Cicero, *pro Cluentio*, 13. 39). See above, Vol. I, p. 54, note, and below, Vol. II, p. 151, n. 3.

[3] See above, Vol. I, p. 163, and Vol. II, p. 20.

[4] Cicero, *pro Caecina*, 34. 100, and *de Domo*, 30. 78, both quoted below, p. 26.

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.

'persons who have been deprived by law of Roman citizenship 'or of liberty. For as regards exile it can be clearly shown what 'its nature is. Exile is not a punishment, but an asylum and 'harbour of refuge from punishment. For persons who wish 'to evade some punishment or some ruin on that account '"shift their ground" (*solum vertunt*)—that is to say, take up 'a new seat and habitation. And so it will be found that in 'no law of ours has any crime been punished by exile, as it is 'in other States; but forasmuch as men shrink from the 'chains, the death, the disgrace which have been ordained 'for them in the laws, they betake themselves to exile as to 'sanctuary. If they chose to remain in the State and abide 'the weight of the law, they would lose their citizenship only 'with their last breath; now, as they do not choose this, the 'citizenship is not taken away from them, but laid down and 'abandoned by themselves. For since by our law no one can 'belong to two States at the same time, our citizenship is lost 'then, and not till then, when he who has fled is received into 'exile—that is to say, into another State.'[1]

And again in the *de Domo*:[2] 'No persons condemned 'on capital charges ever[3] lost their Roman citizenship

[1] It will be remembered that Pleminius was still liable to Roman law, and was actually seized and brought back when he was on his way to Neapolis, but had not yet arrived there (see above, Vol. I, p. 162).

[2] Cicero, *de Domo*, 30. 78.

[3] The imperfect tense seems to be used because Cicero is speaking throughout this passage of what had been laid down by the wisdom of the ancients—'jus a majoribus nostris . . . ita comparatum est.' We must not infer from the tense that Cicero was describing a state of things which had passed away. Such an inference would bring this passage into contradiction with that from the *pro Caecina*, where the present tense is generally used. Mommsen apparently recognizes this, for he does not notice the use of the past tense here, though it might plausibly have been alleged to support his own view.

Both in the *pro Caecina* and in the *de Domo* it would have helped Cicero's argument if he could, without fear of contradiction, have

'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.

to the decision of a single juror or a bench of jurors by no means in itself excludes a sentence of death. . . . The standing commission for murder even under Sulla's ordinances condemned to death the murderer of near kindred.' This is explained in another passage.[1] 'Immediately after the Cornelian law against murder was passed, the accusation set on foot under it of Sex. Roscius, for parricide, led up to the punishment of death, and death in ancient fashion in the sack, though it is true that it was open to the criminal to withdraw himself from the condemnation by exile.'[2] I should entirely agree with the general statement in the first sentence, and my only objection to the remarks about the parricide is that I think that they ought to be applied to all criminals convicted on a 'capital' charge.

To return to the conception of *exilium*. It obviously consists of two parts, both equally necessary to its completion. First there must be the physical withdrawal to some safe place (*solum vertere*); secondly, the withdrawal must be *exilii causa*, with the intention of going not as a visitor but as a settler.[3] Given these two things, the *jus exulandi* works automatically; 'it realises itself by virtue of the standing treaties without the co-operation either of the community into which the man enters or that from which he retires.'[4]

[1] Mommsen, *Strafrecht*, p. 644, note 3.

[2] Cicero himself puts the alternative (*pro Roscio Amerino*, 11. 30), 'ut optet utrum malit cervices Roscio dare' (if he had to fly for his life as *aqua et igni interdictus*) 'an insutus in culeum per summum dedecus vitam amittere' (if he confessed, or if he neglected to fly after condemnation). Practically of course he would take his chance of escape and choose the first alternative, and to this result his accusers look forward—'hoc damnato et ejecto' (ibid. 2. 6). See above, Vol. I, p. 167, note 3.

[3] See below, Menander's case, p. 30, note 1.

[4] Mommsen, *Strafrecht*, p. 69, note 1. Compare the case of the foreigner in Cicero (*de Oratore*, I. 39. 177), 'cui Romae exulare jus erat.' The limitation of the *jus exulandi* of a Roman to the *foederatae*

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.

view [1] that, if he came back, he would, whether he wished it or not, recover his Roman citizenship by *postliminium*. All these contingencies were guarded against by the *aquae et ignis interdictio*.

Mommsen is probably right in believing that the edict of *aquae et ignis interdictio* was originally a magisterial act applicable at discretion against any foreigner whom it was desired to expel and keep away from Roman territory, and applicable only against foreigners. It would consist in 'his permanent exclusion from the legal protection generally accorded to strangers on Roman ground, and in case of contravention the threat to treat as an enemy him or any one who received or supported him'.[2] In other words, it is 'the decree of magistrate or people, by which the Roman community gets rid of a non-citizen once for all, and forbids him to tread Roman soil on pain of death'.[3]

But, if originally applicable against foreigners, the use of *aquae et ignis interdictio* is in historical times practically confined [4] to the case of persons who have once been citizens. Notice was thereby given them that, whether they afterwards denied the fact or not, they were held to have become aliens, and aliens who had been warned off Roman ground. Not only so, but their ceasing to be Romans was anticipated. In the case of Postumius,[5] we find in the event of his not appearing—'videri eum in exilio esse, bonaque eius venire,

[1] See the interesting case of Publicius Menander in Cicero, *pro Balbo*, 11. 28. Pomponius, however (*Digest*, XLIX. 15. 5, § 3), holds that Menander was unnecessarily anxious: 'et ideo in quodam interprete Menandro, qui, posteaquam apud nos manumissus erat, missus est ad suos, non est visa necessaria lex, quae lata est de illo, ut maneret civis Romanus; nam sive animus ei fuisset remanendi apud suos desineret esse civis, sive animus fuisset revertendi, maneret civis, et ideo esset lex supervacua.'

[2] Mommsen, *Strafrecht*, p. 72.

[3] Mommsen, ibid., p. 964.

[4] Mommsen, ibid., p. 935.

[5] 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.

Polybius' time would not have used the religious phrase 'sacer homo', but would have named the secular equivalent, 'aqua et igni interdictus.' I am inclined to think that against the victims of Sulla likewise the same form of words was used. I am not aware that they are ever precisely quoted in this connexion in Latin, for the general term *proscriptio* acquired a sort of technical sense as a short description of these horrors;[1] but we find them in the parallel case of the Marian massacres,[2] and if we turn to the Greek writers, we find that the same words ἐκκηρύσσειν or ἐπικηρύσσειν are used indifferently, whether they are describing the action of Sulla, of the triumvirs,[3] and of Popillius against the adherents of Tib. Gracchus,[4] all of which are undoubtedly *proscriptio*, or whether they refer to the proceeding of Saturninus and Marius against Metellus,[5] and to that of Clodius against Cicero,[6] which are named by Latin writers 'aquae et ignis interdictio'.[7] *Proscriptio* and *interdictio* are then in principle the same thing; both are sentences of death,[8] and either

[1] Cf. 'proscriptionis miserrimum nomen illud.' Cicero, *de Domo*, 17. 43.

[2] For instance, P. Laenas in 87 B.C. threw one of last year's tribunes from the Tarpeian rock (see above, Vol. I, p. 14, note 1): 'et cum collegae ejus, quibus diem dixerat, metu ad Sullam profugissent, aqua et igni iis interdixit.' He certainly meant them to be put to death if they could be reached (Velleius, II. 24. 2).

[3] For Sulla see Dio Cassius, XXXVII. 10. 2; for the triumvirs, ibid., XLVII. 7. 4; 11. 3; 12. 2.

[4] Plutarch, *Tiberius Gracchus* 20. 3, and *Caius Gracchus* 4. 1.

[5] Appian, *Bellum Civile*, I. 31 καὶ τοὺς ὑπάτους ἐπικηρῦξαι μηδένα Μετέλλῳ κοινωνεῖν πυρὸς ἢ ὕδατος ἢ στέγης.

[6] Dio Cassius, XXXVIII. 17. 7 προσεπεκηρύχθη, etc.

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

[8] I should cordially agree with L. M. Hartmann in his note on Appian's account (*Bellum Civile*, I. 95) of the effects of Sulla's proscriptions — 'Differentia inter θάνατος, ἐξέλασις, δήμευσις, in factis non in jure posita est' (*de Exilio apud Romanos*, p. 10, note 4). Zumpt (*Criminalprocess*, p. 451 seq.) comes to the same general conclusion, though it is difficult to follow him in detail.

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.

rather in theory than in practical application;[1] such a proceeding is irreconcilable with the rule of law, and there are no certain instances of its practical impunity'. It is noticeable that Cicero, in defending Cluentius, never attempts to plead that the death of Oppianicus cannot be the subject of a criminal charge, because he had no business to be in Italy and close to the city of Rome itself. But the wide terms of the *lex Cornelia*, 'quicunque venenum malum fecerit, vendiderit, emerit, habuerit, dederit,'[2] would probably have included Cluentius' alleged act without regard to the quality of the victim. Of the parallel *lex Cornelia de sicariis*, Ulpian[3] tells us that it 'punished him who killed a man, without adding anything about his condition, so that the law seems applicable to the killing of a slave or an alien'. Caesar appears to have held that the same law actually abrogated the immunity which Sulla's previous law had given to his agents in the proscription; for as *judex quaestionis* in 64 B. C. he admitted accusations against those who had 'received head-money from the treasury, though the Cornelian Laws exempted them'.[4] In much the same way, in spite of the *patria potestas*, a father who secretly murdered his son was liable under the *lex Pompeia de parricidiis*.[5]

[1] There was always a tendency to construe similar permission as narrowly as possible. For instance, the Twelve Tables say that the *fur nocturnus* may be killed; but Ulpian (*Digest*, XLVIII. 8. 9) interprets 'Furem nocturnum si quis occiderit, ita demum impune feret, si parcere ei sine periculo suo non potuit'.

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

[3] Quoted in the *Collatio Legum Mosaicarum et Romanarum*, I. 3. 2.

[4] Suetonius, *Julius*, 11. Hitzig, *Tötungsverbrechen*, p. 19 (reprinted from *Revue Pénale Suisse*, 1896), appears to think that the exemption was contained in a clause of the *lex Cornelia de Sicariis*, which Caesar was actually administering. I cannot believe that he would have ventured on an illegality so glaring.

[5] See the obscure case cited by Marcianus, *Digest*, XLVIII. 9. 5:

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

condemnation *de vi* in 52 B.C., is mentioned by Caelius[1] next year as living at Bauli, in the neighbourhood of Naples; Oppianicus hired a house just outside the walls of Rome. On the other hand, most of the men of mark who were condemned during this period seem not only to have retired to some foreign state, but never to have returned to Italy. Cicero himself, when *aqua et igni interdictus*, went in terror of his life until he had crossed the Adriatic, and brought the danger of punishment on all who received and comforted him.[2] The actual danger in this case may have been from Clodius' tools, the consuls, on whom doubtless would primarily lie the task of seeing that the sentence was not made null and void. As with *sacratio*, even when prescribed for the violation of the tribunician sanctity, the private man is not loudly called upon to act unless the magistrate neglects to carry out his duty;[3] but he is bound not to aid or abet the criminal.

To go back to the cases of Oppianicus and Pompeius. The first was held by public opinion to be an innocent man who had been condemned by a bribed jury; Pompeius must have been in hiding, for though Caelius knew that he was in Campania, the public believed that he had murdered Cicero

[1] Cicero, *ad Familiares*, VIII. 1. 5.

[2] See references in Zumpt's *Criminalprocess*, p. 452, especially Cicero, *ad Familiares*, XIV. 4. 2 'Nos Brundisii apud M. Laenium Flaccum dies XIII fuimus, virum optimum, qui periculum fortunarum et capitis sui prae mea salute neglexit, neque legis improbissimae poena deductus est quominus hospitii et amicitiae jus officiumque praestaret'; and *pro Plancio*, 41. 97 'cui quum omnis metus, publicatio bonorum, exsilium, mors proponeretur,' etc.

We do not know in what form this danger would have been brought home to Laenius. In later times he would have been liable under the *lex Julia de vi privata*, a clause of which included any one 'qui eum, cui aqua et igni interdictum sit, receperit celaverit tenuerit' (Paulus, *Sententiae*, V. 26. 3).

[3] See above, Vol. I, p. 8 and p. 15.

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

cases[1] of Oppianicus and Pompeius I should conclude that the whole of Italy was in Cicero's time forbidden ground.

In another respect the situation was changed by the Social Wars. The federate states, to which Polybius limits the ἀσφάλεια of the fugitive, had been for the most part situate in Italy. There remained, then, few places where the Roman would have the 'jus exulare', that is to say, where he could claim reception as a right, and where his change of citizenship would be effected automatically ;[2] but there was nothing to prevent him from suing for admission wherever he pleased, and probably he rarely sued in vain.[3] Thus we may account for the fact that *exules* become citizens of Smyrna, Mitylene, Patrae, or Dyrrachium, as well as of Messana, Rhodes, or Massilia.

Such a transfer of allegiance, however produced, is always treated as irrevocable. The only legal method of recovery of Roman citizenship is by *postliminium*, and that operates only by physical return to Rome, which, as we have seen, is forbidden to the condemned man.[4] The *exulum reditus*

not *aqua et igni interdictus*, did at Naples—'loco ad calamitosorum animos consolandos accommodato' (Cicero, *pro Sulla*, 5. 17).

[1] I may notice in passing that these cases present the same difficulty to Mommsen's theory of *exilium* (discussed in the next chapter) as to my own.

[2] See above, p. 28.

[3] Cf. Cicero, *pro Balbo*, 11. 27 'neque mutare civitatem quisquam invitus potest neque, si velit, mutare non potest, *modo asciscatur ab ea civitate* cujus esse se civitatis velit.'

[4] On the other hand, the silly man who had been merely masquerading as a citizen of Athens could return to Rome whenever he pleased, and would then automatically become a Roman again by *postliminium*. See Cicero, *pro Balbo*, 12. 30 'Quo errore ductos vidi egomet nonnullos imperitos homines, nostros cives, Athenis in numero judicum atque Areopagitarum certa tribu, certo numero ; quum ignorarent, *si illam civitatem essent adepti*, hanc se perdidisse, nisi postliminio recuperassent.' Atticus declined the Athenian citizenship 'quod nonnulli ita interpretantur, amitti civitatem Romanam alia ascita'. Cornelius Nepos, *Vita Attici*, 3. 1.

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.

citizens whose present status is the consequence of a criminal conviction.

That the practical outcome of such a sentence is in Cicero's time in all cases not death but exile (as Polybius says it was already in his own time) is admitted on all hands; and this consideration is, to my mind, sufficient to account for the fact that *exilium* is constantly used in a loose way, not only by other writers, but by Cicero himself,[1] in flat defiance of his own doctrine in the *pro Caecina*, as the name of the punishment which the law prescribes for offences. If we tried to bring Cicero to book for his inconsistency, he would be justified in retorting on the critic with Catullus—

> Sed tu insulse, male et moleste vivis
> Per quem non licet esse neglegentem—

and in pleading that in the one case he was accurately laying down the legal doctrine of what sentence could be passed on a man, in the other he was equally accurately describing what would inevitably happen to the man in consequence. The misfortune is that he has led modern scholars hopelessly to confuse the legal with the practical aspect of the problem.

The innovation introduced by Sulla, or his immediate predecessors, consists not in the death penalty nor in its evasion by *exilium*—these are an old story—but in the new arrangements necessary to connect this penalty with trial by jury, which was originally invented for a very different purpose. How was this connexion effected? Unhappily there is no answer to be found in the quotations from Sulla's laws which survive; but an answer may be supplied from elsewhere. When Clodius invaded the mysteries of the

[1] See Cicero, *de Domo*, 27. 72 'exilium est turpe, si est poena damnati', and a number of similar cases in Mommsen, *Strafrecht*, p. 966, 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.

a similar one is to be found in the decree passed by the tribunes against Camillus in 367 B.C.: 'Si M. Furius pro dictatore quid egisset, quingentum millium ei multa esset.'[1] In the same way the condition attached effectively 'keeps you from the blow of the law' in respect of the second objection. A decree which sets up a *judicium* and makes its own effect dependent on the finding of a court is not held 'de capite civis ferre', or to traverse the rule 'ne de capite civium injussu vestro judicaretur'.[2] Cicero takes account of these points in urging the illegality of Clodius' proceedings against himself; it is 'poena in cives Romanos nominatim *sine judicio* constituta',[3] which traverses the Law of the Twelve Tables, and can only be paralleled by the proscription of Sulla. The decrees which set up tribunals and pass sentences conditional on their finding (*si accessisses*) are counted as legislative[4] rather than as judicial acts, and can be passed indifferently by any of the assemblies having sovereign power. This is the complete answer to the difficulties raised by Maine[5] about the competence of the various assemblies. When they are acting as elective bodies, or deciding judicially on an appeal from a magistrate, there is a division of functions between them, but there is none

[1] Livy, VI. 38. 9. Mommsen considers this an invention; certainly Livy, though he found it in some of his authorities, was inclined to disbelieve it. Whether it be true in fact or not, it is useful as an illustration of what was considered by early historians to be constitutionally possible. See *Strafrecht*, pp. 881 note 1 and 1018 note 2.

[2] Cicero, *pro Rabirio*, 4. 12.

[3] Cicero, *de Domo*, 17. 43.

[4] This distinction is marked by the fact that these decrees are always known by the name of their proposer (*rogatio Peducaea*, *Pedia*, and so forth). Mommsen (*Strafrecht*, p. 74, note 4) points to this in the case of the *lex Flavia* of 323 B.C., which, if it had been carried, would have caused the massacre of the Tusculans. The consideration is equally applicable to the decrees in question here.

[5] Maine's *Ancient Law*, p. 389. See above, p. 18.

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.

him, and his answer is without appeal; but once he has answered, the effect which that answer is to have is prescribed to him beforehand, and for the consequences he has no responsibility.[1] It is quite obvious that the part ascribed in civil suits to the praetor and his *imperium* is played in Clodius' case by the sovereign People itself. The decree of the People is the motive force which is to drive Clodius to death or exile. But the magistrate who proposes and the People which enacts the law, in the plenitude of their power choose to make its operation conditional on the finding of another functionary which the same law sets up for the purpose of giving an authoritative answer to a question, just as the *formula* sets up the *judex*—'SI ACCESSISSES'. Now who is that functionary? Who corresponds in the Clodian trial to the *unus judex* of the formulary system? I should answer without hesitation, the *quaesitor*, whether existing magistrate or private man specially named, whom the People orders *quaerere* or '*judicium exercere*'[2] in the case. He is no longer like the *quaesitor* of the older commissions, armed by the law with extraordinary magisterial and discretionary powers to decide and to punish, but his dignity is saved in that the *quaestio* is still his,[3] and that his voice pronounces the answer which will irrevocably seal the fate of the defendant.[4] Once the praetor has uttered the decisive word *fecisse videri* or *parum cavisse videri*, the answer has been given to the question implied in the *si accessisses* and the penalty automatically falls due on

[1] See above, Vol. I, pp. 61, 74.

[2] 'Qui judicium exercet' is used by Cicero in a polite reference at the end of his speech to his brother, who was presiding as praetor at the trial of Archias.

[3] Cicero, *pro Cluentio*, 53. 147.

[4] In one highly-wrought passage (*pro Plancio*, 42. 104) Cicero passionately appeals to the *quaesitor* himself as the living embodiment of the court: 'Teque, C. Flave, oro et obtestor . . . ut mihi per hos conserves eum per quem me tibi et his conservatum vides.'

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.

jurors under this same law cried out for a guard, and the question 'refertur ad consilium';[1] and in the *lex Acilia repetundarum*, verses 57 and 60, we find the same appellation 'de consilii majoris partis sententia'. Again, the phrase 'ire in consilium',[2] so constantly applied to them, does not mean, as might be supposed at first sight, to retire to consult among themselves (for that was not the practice),[3] but to give in to the praetor, who is to be guided by it, the advice embodied by each juror singly on his ballot.[4] Here, as in so many cases, we must distinguish between the theory and the practice. The binding force of this new type of counsel is secured by the positive injunction laid by law on the praetor, that he is to pronounce what after all is his verdict according as his counsellors may advise. In fact it

[1] Cicero, *ad Atticum*, I. 16. 5. If there is any business, such as the choice between rival accusers, to settle before his legal *consilium* is regularly constituted, challenged, and sworn, the praetor has to provide himself with an *interim* court, which will be, as nearly as he can get it, but still only roughly, the same as the eventual one. The *Divinatio* in the case against Verres is settled by a bench of 'injurati judices' (Pseudo-Asconius, in Orelli's *Cicero*, Vol. V, Part ii, p. 99), thus brought together. A great transformation seems to have been made in their ranks by the challenge on either side and the consequent *subsortitio*, so that Cicero when he refers to the *Divinatio*, while addressing the tribunal as finally constituted, cannot appeal to the collective memory of the jury, and can only say (*in Verrem*, I. 6. 15) 'quo in numero e vobis complures fuerunt.' In the case mentioned in the *pro Plancio* (16. 40), where a challenge of five jurors is allowed 'de consilii sententia', the *consilium* must have consisted of the eventual tribunal *plus* those five.

[2] The heading of one of the clauses of the *lex Acilia* (verse 46) reads 'in consilium quomodo eant', and the expression is frequent in Cicero. We have also 'mittere in consilium', Cicero, *ad Familiares* VIII. 8. 3.

[3] See below, p. 128. In this respect these advisers of the magistrate differ from Verres' provincial *recuperatores*, whom we find consulting together, or pretending to consult, apart from their chief (Cicero, *in Verrem*, III. 12. 31).

[4] Cicero's account of the voting in the trial of Oppianicus (*pro Cluentio*, ch. 27) places this beyond a doubt. Asconius (*in Milonianam*, 35) uses the equivalent phrase, 'euntibus ad tabellam ferendam.'

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.

persons in whom they are vested merely choose in their own good will and pleasure to realize them in a complicated and conditional rather than in a simple and direct utterance. A conditional command is as much the expression of the will of the party commanding as a conditional legacy is the expression of the will of the testator.

Though the working of the different parts of the machinery is best seen in the case of a *privilegium* like that directed against Clodius, the same principles prevail when the people fulminates its death sentence not at an individual, but at a whole category of persons,[1] on every one in fact who has offended, *if* it can be shown to the satisfaction of a jury that he has so done. The *locus classicus* in illustration of this is from the First Philippic Oration.[2] 'Quid, quod obrogatur legibus Caesaris, quae jubent ei qui de vi itemque ei qui majestatis damnatus sit, aqua et igni interdici? Quibus quum provocatio datur, nonne acta Caesaris rescinduntur?' Now why does granting an appeal to the People in such cases traverse Caesar's Acts? Evidently because the People, on Caesar's *rogatio*, has already decided what is to be done with such persons. It has sentenced them to death by *aquae et ignis interdictio*. The condition attached to that sentence has accrued, so soon as the jury find in each case that the man is guilty, and the punishment is bound to follow, as the People has ordered. To ask the People again to decide on the particular case is to ask it to reverse a command which on Caesar's request it has uttered. The People has, in fact, exhausted its powers in the fulmination of the sentence and the creation of the jury court, just as the praetor in civil cases exhausts his activities when he issues the *formula* to a *judex*. If the *judex* under the *jus ordinarium* had been a delegate, discharging all the functions of the praetor in his

[1] See above, Vol. I, p. 238.

[2] Cicero, *Phil.* I. 9. 23.

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.

of the *formula* or 'conditional sentence', where he points out that when the praetor says to the *judex* 'Si paret, condemna', this is really equivalent to saying 'Si tibi paret, ego condemno'. This remark is applicable in its fullest force to the other 'conditional sentence', that which starts the criminal trials; only here the speaker is the Roman People and the person addressed is the magistrate charged with the *quaestio*. The same command *quaerere* had been issued by the People to the magistrate in the old special commissions, and so far we may assimilate the *quaestiones perpetuae* to them; but there are important differences in the nature of the power entrusted. In the early cases the magisterial power of the commissioner is heightened to enable him to pronounce what penalty he pleases, in the new system the penalty is laid down beforehand by his superior the People. The commissioner, again, chose his own *consilium* and gave what weight he pleased to the advice which his counsellors might offer to him. In the *quaestiones perpetuae* the framing of the *consilium* is determined by the People, and the magistrate whom the *consilium* advises is compelled to accept the opinion of the majority. Here we are reminded of the *centumviri* and the *recuperatores*; both these courts are juries deciding by the majority of votes, and the name of the latter is borrowed by the first bench that ever sat to try a case of *repetundae*. Finally the analogy to trials before the People is so far preserved that in both the sentence is nominally one of death, but the consequence, by the machinery of *exilium*, becomes one of banishment.

In the next chapter I propose to trace some further developments of the results of these 'capital' sentences, and to defend my presentation against the rival theory of Mommsen.

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.

and finally [1] says downright that 'interdiction under Sulla's legislation can be included under capital punishment only by straining the sense'. I venture to think, on the contrary, that there is no straining of the sense, and no breach of historical continuity, that a *judicium capitis*, throughout the republican period, whatever it may have meant in the mouth of an advocate, meant, in the mouth of a law-giver, a sentence of death; and that it is a subsequent question, and legally a subordinate one, whether at different epochs the death sentence might be evaded with more or less ease.

The system then of capital trials before juries under the regulations of Sulla is that the People by a *lex* sentences beforehand a certain class of criminals to death by outlawry or proscription (*aquae et ignis interdictio*), making the sentence conditional in each case on the finding of a praetor and jury that a particular man is guilty of the crime in question. When the verdict is delivered, the condition has accrued in each case, and the condemned man must hurry away [2] from punishment; he must extinguish his personality as a Roman citizen, thus putting himself under a new jurisdiction, which will not take cognizance of things done in a former state of existence. I cannot express my own view of the effect of *exilium* better than in Mommsen's words. 'Equally with the dead man there is excluded 'from Roman criminal procedure every man who is severed 'from the jurisdiction of Rome. Now since every Roman 'citizen is subject to that jurisdiction, even when he happens 'to be abroad, and every foreigner is so subject when he 'happens to be on Roman territory, it follows that the only 'persons excluded are foreigners who live abroad, and the 'Roman citizen can withdraw himself from it only if on the 'one hand he quits Roman soil (*solum vertere*), and on the

[1] *Strafrecht*, p. 909.

[2] But see below, p. 62.

'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.

de republica meritum. Cicero's claim is that the whole proceedings against him were null and void, and that he was merely driven away by physical violence;[1] but he would hardly have been so anxious to prove, as he does by pages of argument, that he had never ceased to be a Roman, unless it were notorious that a sentence of *aquae et ignis interdictio* would, as a general rule, compel a man to take the step necessary to divest himself of his old nationality.[2]

As a matter of fact it was probably no great sacrifice to the banished man to surrender his Roman citizenship. He cannot return to Italy in any case; his political career, if he had one, is ruined. Even if he becomes 'subject to the axe and the rods', no Roman magistrate is likely to use them against him, and there is some value in the possession of a domicile and a franchise by virtue of which he may claim protection at least when he travels throughout the Roman world, excepting only Italy. We know of one case at least, while the State was still ruled by the laws of Sulla, in which such a transformation actually took place. C. Memmius Gemellus, the *Memmi clara propago* of Lucretius, was condemned, it is not certain on what charge or at what

[1] Publius Sulpicius Rufus the tribune of 88 B.C. had bethought himself of the same distinction: after opposing a bill to restore those who had gone into exile under the Varian Commission of 90 B.C., he himself proposed to restore the same persons, calling them 'non exules sed vi ejectos' (Cicero, *ad Herennium*, II. 28. 45).

[2] I venture to think that this is a more legitimate inference than Mommsen's (*Strafrecht*, p. 978, note 1). 'The right of citizenship is, as Cicero often insists, not denied him by Clodius' law, but the ordinary punishment of expulsion from Italy is aggravated by confiscation,' &c. If this were correct, Cicero would have had an easy task—only to point out that his case was not worse than that of other *damnati*—whereas his whole contention is that he is not in the same boat with them. What would have been the sense of Clodius' question if the intention of his decree had not been to compel Cicero *mutare civitatem*?

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.

'deportatio in locum aquae et ignis interdictionis successit', and secondly,[1] 'media capitis diminutio dicitur, per quam sola civitate amissa libertas retinetur, quod fit in eo cui aqua et igni interdicitur,' it does not require much ingenuity to piece together the evidence into a consistent and logical story.

It appears, then, that Tiberius wished to sharpen the penalty of *aquae et ignis interdictio*, which resulted under various *leges Corneliae* or *leges Juliae* from condemnation by a jury, and which was likewise a sentence sometimes pronounced by the senate or the emperor. Sulla and the triumvirs had shown him the way in their proscriptions, when they blocked off by prompt execution of the outlaw the exit into the 'harbour and the sanctuary' of exile, and so made the 'capital' sentence effectively one of death. Tiberius did not, however, choose to go so far as this; he took away indeed the old refuge, but provided a new and much less agreeable 'sanctuary' from the executioner. He seized on the person of the convict and deported him to an island, where he was detained a prisoner. By this means *exilium* was, of course, rendered unavailable; it was no longer physically possible for the condemned man *solum vertere* to Massilia or Rhodes, where he could shuffle off his Roman citizenship in exchange for a fresh one, and make a Will, as did Memmius,[2] under the laws of his new home. So far then his Roman citizenship remains, and if he makes a Will it must be by Roman law. But Tiberius did not intend that his victim should retain the Roman citizenship, though he had debarred him from the constitutional means of getting rid of it. He was, therefore, driven to the expedient of taking it away from him by an act of power—applying the *solvitur ambulando* to the impossibility, which

[1] Ulpian, *Regulae*, XI. 12.

[2] See above, p. 55.

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'.

of whom it is written,[1] 'that he cannot make a Will, either as a Roman citizen, because he is a foreigner, or yet as a foreigner, because he is not the citizen of any particular State, according to whose laws the Will can be drawn.' If my presentation be correct, the *interdictus*, who had saved himself by *exilium*, had down to the time of Tiberius the right to make a Will, not indeed as a Roman, but as a foreigner—'the citizen of some particular State' of which he had become a member—and of this capacity he was deprived (as Dio says) by the action of Tiberius.

At this time, then, we must date the change from the doctrine of Cicero that citizenship is lost, as a consequence indeed of condemnation, but by a man's own act, to that of Gaius, 'is, cui ob maleficium ex lege Cornelia aqua et igni interdicitur, civitatem Romanam amittit.'[2] Henceforth the only discussion is as to the moment when this occurs, whether immediately, as on the sentence of the *praefectus urbi*, or only after the *princeps* has decreed him an island. This last occurs when the sentence is by the provincial governor, to whom the right of deportation is denied; it is certain that he may not deport on his own authority,[3] even in cases where the emperor's instructions prescribe for the criminal

[1] Ulpian, *Regulae*, XX. 14.

[2] Gaius, *Inst.* I. 128. There is a passage of Pomponius (*Digest*, L. 7. 18) which might seem to date back this doctrine as far as the days of Mancinus and the Pontiff P. Mucius Scaevola (136 B. C.); but I believe that the parallel of the *interdictus* to illustrate the case of the *noxae deditus* comes from Pomponius and not from Scaevola. See above, Vol. I, p. 20, note 6.

[3] Ulpian, *Digest*, XLVIII. 19. 2 'Constat, postquam deportatio in locum aquae et ignis interdictionis successit, non prius amittere quem civitatem, quam princeps deportatum (? deportandum) in insulam statuerit; praesidem enim deportare non posse nulla dubitatio est. Sed praefectus urbi jus habet deportandi, statimque post sententiam praefecti amisisse civitatem videtur'.

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.

translatus est in Siciliam.'[1] In Sicily he lives as an alien, and gives lessons in elocution,[2] dressed in the Greek *pallium*, 'carent enim togae jure, quibus igni et aqua interdictum est.'

Here, then, we have the most complete picture of the disappearance of the old *perfugium supplicii*, afforded by the emigration of a Roman to a new home of his choice. The words *exilium permitti*[3] are no longer applicable to him. It is no longer possible *solum vertere exilii causa*. The phrase has lasted continuously for many centuries. It is applied by Livy to Kaeso Quinctius, and to the decemvirs in the primitive republic;[4] it appears in the praetor's edict as quoted in Cicero's earliest speech;[5] it is the technical phrase which Cicero interprets in middle life in his general discussion on exile in the *pro Caecina*, and he uses it again in his old age, when he says[6] of Antony's convict jurymen, 'habent legitimam excusationem exilii causa solum vertisse.' I believe that not only the phrase, but its signification remained unchanged through all these ages, and that it is only with Tiberius that the word and the thing together disappear, and direct deprivation of the citizenship (called equally with physical death a 'capital' punishment)[7] is

[1] This may be the case indicated by the puzzling phrase of Ulpian (*Digest*, XXXVIII. 2. 14, § 3): 'exilium quod sit vice deportationis ubi civitas amittitur.'

[2] He is probably pointed at by Juvenal (*Sat.* VII. 198): 'Fies de consule rhetor.'

[3] From Sallust, *Catilina*, 51. 22 (see below, p. 64).

[4] Livy, III. 13. 9; III. 58. 9.

[5] Cicero, *pro Quinctio*, 19. 60. The praetor will enter into possession of the goods of the man 'qui solum verterit exilii causa', just as of the man who fails to put in a defence. Lenel (*Edictum Perpetuum*, p. 405) points out that the phraseology would no longer be appropriate in Hadrian's time, when the Edict was finally stereotyped by Julianus.

[6] Cicero, *Philippics*, V. 5. 14.

[7] Paulus, *Digest*, XLVIII. 1. 2 'per has enim poenas eximitur caput de civitate'.

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.

non animam eripi sed exilium permitti jubent.' To Mommsen the important point in the last sentence is the past tense employed in the word 'condemnatis'. But no solid argument can be founded on this. Livy repeatedly uses the past tense when describing *exilium* under the older system—as for instance,[1] 'Volscius damnatus in exilium abiit', and 'quasdam damnatas in exilium egerunt'. As for Polybius' account of the comitial trials, no doubt the punishment of death accrued from the moment that the last vote necessary to make up the majority had been given, and from that moment the retreat of the criminal would no longer be legally assured to him; but it is difficult to believe that he would really be put to death, especially if the voting had been close, and the result doubtful to the very end. This was what happened in the trial of the censors of 169 B.C., two years before Polybius was brought to Rome. Gracchus saved his colleague by swearing that, if Claudius were condemned, he himself would share his fate, which was to be only exile after all.[2] He seems to claim to await the actual condemnation of Claudius before he commits himself to the irrevocable act. With the jury system the necessity for the criminal to hurry his departure disappears altogether. An interval was now allowed by law or custom before the penalty[3] threatened in the *aquae et ignis interdictio* was physically inflicted. Asconius[4] tells

[1] Livy, III. 29. 6 and XXV. 2. 9. Compare likewise Livy, III. 58. 10.

[2] Livy, XLIII. 16. 15 'non expectato de se judicio comitem exilii ejus futurum'.

[3] This penalty, death, was the same whether it was directly incurred, as I think, or whether it was, as Mommsen believes, the penalty for being caught on forbidden ground. Under both suppositions, likewise, it is strictly speaking due from the instant that the verdict of guilty has been delivered; practically a certain respite is granted, much as in the case of Licinianus (see above, p. 59).

[4] Asconius, *in Milonianam*, 48.

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.

builds so much—'aliae leges condemnatis civibus non animam eripi sed exilium permitti jubent,' conveys to me an entirely different meaning. I have already[1] discussed the main fact which it records, that the system of the jury courts, whether courts founded by Sulla or courts previously in existence, by removing the opportunity for previous arrest made the physical infliction of death a practical impossibility. The next most important point seems to me to be the use of the word *permitti*, which indicates pretty clearly that, when Sallust wrote his version of the Catilinarian debate, exile was still an evasion conceded to the man sentenced to death, not a punishment inflicted on him. On the whole, then, I think we may say that no contrast is proved between Sallust's presentation and that of Polybius.

To return to Mommsen's theory as adumbrated in the passage from the *Strafrecht* quoted above; it will be seen that it rests on the assumption that the *exilium* of Sulla is identical with *relegatio*. This *relegatio* has been already noted above[2] as a part of magisterial *coercitio*. It is defined as 'the limitation by the authorities of the free choice of a place of residence, whether by a command to leave a certain locality and never more to enter it—that is to say, by expulsion—or by a command to go to a certain locality, and not to leave it—that is to say, by internment'.[3] Now Mommsen holds that Sulla adopted *relegatio* in this sense into his penal code, only adding to it the prohibition to return on pain of death, thus extending to citizens the machinery of the *aquae et ignis interdictio*, which had hitherto been practised only on those who were, or who were assumed to have become, foreigners.

'In the legislation of Sulla[4] it appears as the punishment

[1] See above, Vol. I, p. 161.
[2] See Vol. I, p. 109, note 2.
[3] Mommsen, *Strafrecht*, p. 965.
[4] Mommsen, *Strafrecht*, p. 972.

'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.

to begin with *relegatio*, which I did not notice in my attempt to trace the main lines of development; my reason for this omission is that I believe the simple expulsion of a citizen to be a separate procedure, a strand not inwoven into the system of capital penalties, but running parallel to it throughout the history. Leaving out of account the use of *relegatio* as a mere method of arbitrary *coercitio*,[1] there are, so far as I know, only two cases which I should acknowledge as falling under this head in republican times. The first is that of M. Fulvius Nobilior,[2] relegated in 180 B.C. for a military offence by decree of the senate to a spot beyond New Carthage, in Spain. In his case the opportunity of exiling himself and changing his state was precluded by his internment. He would, therefore, retain formally his Roman citizenship, of whatever use that might be to him. The other case is that of persons condemned under Cicero's law *de ambitu*, who were to be expelled from Italy for ten years.[3] A temporary sentence could never compel a man to renounce his State.[4] Under the Principate *relegatio* becomes more

[1] See above, Vol. I, p. 109, note 2.

[2] Livy, XL. 41. 10. I cannot agree with Hartmann (*de Exilio*, p. 27, note 9) that Fulvius was merely got out of the way under pretext of a mission, as was Cato when Clodius sent him to Cyprus in 58 B.C.

[3] Dio Cassius, XXXVII. 29. 1. It is clear from the peroration of Cicero's speech, *pro Murena*, that he would have been obliged to quit Italy. Caesar seems to have limited the prohibition to the city of Rome (Dio Cassius, XLIII. 27. 2).

[4] The rule held under the Principate, when condemnation for a term of years to the mines or to *deportatio* did not act as depriving the criminal of liberty or of citizenship respectively, as such a sentence did when inflicted for life (Hadrian, *Digest*, XLVIII. 19. 28. § 6). That Cicero sometimes calls even the temporary penalty *exilium* (e.g. *pro Murena*, 23. 47 and 41. 89) is only a loose and popular way of speaking. Ovid of course does the same in pathetic descriptions of his own fate, though the lines quoted in the text show that he knew that the expression was incorrect. Tacitus, too, sometimes uses

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.

ignis interdictio,[1] which forms the connecting link between *exilium* and *deportatio*, is at all times equally opposed to *relegatio*.

The issue between Mommsen's theory and what I understand to be the obvious interpretation of *aquae et ignis interdictio* under Sulla's ordinances may perhaps appear to be largely a question of words. It is agreed on both hands that the man is liable to be put to death if he does not leave Italy, or if, having left, he comes back again; likewise, that if he goes away and keeps away he will not in practice be put to death. It does not seem to make much difference whether we say 'he is sentenced to leave Italy on pain of death', or 'he is sentenced to be put to death if he does not retire from Italy'. Mommsen puts it in the one way for all offenders, but one, and in the other way for the parricide;[2] yet the result for all is alike, so far as the avoidance of death is concerned. The reason for preferring the second form is that it agrees with the logical order of ideas as presented by Cicero in the *pro Caecina*, and likewise with the practice of the second century B. C., as related by Polybius. In both we find that the threat of death comes first, and the evasion of it by self-banishment follows, not that a sentence of banishment comes first, with the threat of death to follow if banishment be evaded.

But the important question is whether this retirement (commanded, as Mommsen would maintain, permitted, as I should prefer to say with Sallust)[3] is a mere physical removal, or whether it further implies some act by virtue of which a man ceases to be a Roman. As it is beyond dis-

[1] Though the verb *interdicere* (not *aqua et igni interdicere*) in a general sense for 'forbidding a particular place' is frequently used in connexion with simple expulsion. See *Digest*, XLVIII. 22. 7.

[2] See above, p. 28.

[3] See above, Vol. I, p. 161 and Vol. II, p. 64.

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.

and that he never took the first step to *exilium* by 'shifting his ground'.[1] As he continued to reside in Italy, he would have gained nothing by taking the step. The risks which he ran under the *aquae et ignis interdictio* were precisely the same whether he were a Roman or a Mamertine; in either case Italy was forbidden ground to him.[2] He had elected to run these risks rather than leave the country, and so would fall under the category of those 'qui, si in civitate legis vim subire vellent, non prius civitatem quam vitam amitterent'.[3] In that case his Roman Will would have been valid. This, then, is an exceptional instance, which seems rather to confirm the rule, as to what was done by the hundreds who sought the refuge, of which Oppianicus declined to avail himself.

The second instance adduced by Mommsen in the same place requires more discussion. In the *lex Julia Municipalis*, verse 118, we find amongst those who are disqualified for municipal office, 'queive judicio publico Romae condemnatus est erit, quocirca eum in Italia esse non liceat.' This, says Mommsen, would be unnecessary if the condemned man was no longer a citizen. Supposing this to be granted, I think it by no means follows that what was unnecessary could not have found a place in the clauses of a law. We find a case almost identical with this in the work of a famous jurist of the third century after Christ. At this time a 'capital' condemnation is clearly defined as one which by depriving a man of life, of liberty, or of citizenship, took away a *caput* out of the State.[4] It was manifestly impossible that a slave labouring in the mines or a *pere-*

[1] *Solum vertere*, see above, p. 26 and p. 60.
[2] See above, p. 39.
[3] Cicero, *pro Caecina*, 34. 100. See above, p. 26.
[4] See above, p. 69, note 1.

grinus deditícius 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.

civitatis; and this might have led to awkward consequences. Suppose that Milo had written to say that he was eating mullets certainly at Massilia, where Roman law could not touch him, but that he had no intention of becoming a Massiliot; might not the next censor, by way of demonstrating his political sympathies,[1] have placed his name on the senatorial roll? Marcius Philippus felt doubt as to passing over his uncle, Appius Claudius, who was a victim of some political trial in the Marian troubles;[2] and of Cicero himself Cotta swore that if his censorship had been contemporaneous with Cicero's exile he would have 'read out his name' in his proper place notwithstanding. If it were prudent to guard against this at Rome, it would be even more necessary in a *municipium*, where the convict might well be a person of local importance and popularity. It was the policy of the Romans to avoid any such controversies by positive prohibitions under penalty, and further, by heaping *ignominia* on the heads of persons convicted, to heighten the inducement to get out of it all by renouncing their country. Yet another point may be noticed. The phrase *quocirca eum in Italia esse non liceat* would cover more cases than 'capital' ones, and would apply to those who were merely relegated for a term.[3] On the whole, then, I think that we cannot say that this clause of the *lex Julia Municipalis* proves anything decisively against the proposition that the man actually condemned under a capital charge before a jury, like the man on the point of condemnation before the *comitia*, was in a position in which it was obviously

[1] If I mistake not, it was proposed in an Irish constituency to elect as member of parliament a Fenian convict, still in jail; and his supporters only desisted when they found that votes given for the convict would be simply thrown away, and that his competitor could claim the seat on a scrutiny.

[2] Cicero, *de Domo*, 32. 84.

[3] See above, p. 66, note 4.

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.

we have here to do not with the metaphors of a pleader, but with the calm and matter-of-fact language of a law; when the *ipsissima verba* of a statute read *de capite quaerito*, surely these words must be taken to mean what they say. In presence of all these considerations not even the authority of Mommsen can convince me that Sulla introduced any new-fangled principle into 'capital' trials. On the contrary, I believe that the principle remains the same throughout, and that the successive applications of it develope regularly and logically out of one another from the time of King Tullus Hostilius to the time of the Emperor Tiberius. If we hold fast to this doctrine we are really following the spirit of what Mommsen has taught us; we remove what is only an excrescence from his general presentation of the Roman criminal law, and restore consistency to the splendid and orderly whole which his genius has evolved out of the chaos of conflicting material.

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.

enrolled under the *lex Acilia* to man the single *quaestio repetundarum*, it seems difficult to believe that in Cicero's time, when the average number on each jury had risen, 900 would have been found sufficient to supply the long list of the Sullan *quaestiones*. I am inclined to believe that a C has dropped out of the text,[1] and that the number of senators was really 400, and that of the total *album* of the Aurelian Law 1,200. The laws regulating particular *quaestiones*, such as the *Licinia de sodaliciis*, and the law respecting Clodius' sacrilege, may contain special prescriptions as to how the *judices* are to be selected out of the praetor's list, but, in ordinary times,[2] none of them go outside the *album*.

So far there is no great difference of opinion: but it is otherwise for the period before Sulla. The main doubt is whether we are to ascribe to Caius Gracchus a general *lex judiciaria* excluding the senators from juries of all sorts. Mommsen, though he admits that the *lex repetundarum* which has been preserved to us is of the time of Caius Gracchus' tribunate, and is part of his legislation, yet considers this law to be only subsequent and supplementary[3] to the main Act. I will return to this contention

[1] Cicero, *ad Familiares*, VIII. 8. 5. Orelli reads CCCLX, referring to Cicero, *ad Atticum*, VIII. 16. 2 and to Velleius, II. 76. 1; but both passages seem to me to relate to the jurors for the trial of Milo in Pompey's sole consulship, and to have nothing to do with the standing register from which the ordinary juries were supplied; see next note.

[2] The exception is that of the great crisis of Pompey's sole consulship in 52 B.C., when Pompey was empowered to make out a special *album* of his own (see below, p. 95); but this too was framed on the principle of the three orders of the Aurelian Law.

[3] Mommsen, *Juristische Schriften*, Vol. I, pp. 20, 21. This article was revised for publication shortly before the writer's death, so that it claims authority superior to that of the *Staatsrecht*, III, p. 531, note 1 (published in 1887), where he says that it is possible that the *lex Acilia* preceded by some months the Gracchan jury-law.

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.

deeper in the quicksands. I believe that the true method is to form our conclusion, wherever possible, from the indications given us by Cicero and his contemporaries; to accept from among the accounts of the second-hand authorities that one which best agrees with those indications, and summarily to reject the other accounts as due to the ignorance and confusion of ill-informed historians. If we apply this method to the present controversy, there is not the least doubt that we must give the preference to the story as told by Appian and throw overboard Plutarch and the Epitomator.[1] Appian, confirmed by Velleius, tells us that Gracchus took away the jury courts from the senators and gave them to the equites; and we know that this is true, from Cicero,[2] who says that the knights were in possession of the jury courts for nearly fifty years running before Sulla, and from Varro, who says that Gracchus 'equestri ordini judicia tradidit, ac bicipitem civitatem fecit, discordiarum civilium fontem'.[3]

In this case of Caius Gracchus, I think there can be little hesitation about the solution; but I am going to apply the same method to another reformer, as to whom I can hardly expect universal agreement. Of the proposals of the younger Livius Drusus, as of those of Gracchus, three distinct versions are given us, that of Velleius that they restored the jury courts to the Senate, that of the Epitomator that they divided them between the two orders, and finally that of

[1] I do not believe that we are throwing over Livy, but only some careless scribe who had plunged into a story concerning later times—the same scribe, be it remembered, who says of the *lex Aurelia* that it transferred the jury courts to the *equites* (*Epitome*, XCVII).

[2] Cicero, *in Verrem*, Actio Prima, 13. 38.

[3] Quoted by Nonius, s.v. *bicipitem*. Mommsen points out (*Juristische Schriften*, Vol. III, p. 343, note 14) that though Caius Gracchus is not mentioned in Nonius, Florus' (II. 5, Jahn) version of the words shows that he is the person of whom Varro spoke.

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.'

Mommsen [1] repeats his theory of the increase of the Senate on the occasion of the proposals of Servilius Caepio (of uncertain date).[2] About these our ordinary authorities, Appian and the rest, are silent. The only direct statements come from very late chroniclers, Julius Obsequens and Cassiodorus. Both these speak of the law courts being shared between the two orders. This again we know to be wrong, for Cicero tells us [3] that the first time when Senators and Knights sat together on the bench was in 89 B.C., under the regulations of the *lex Plautia*.[4] Tacitus [5] speaks of the *leges Serviliae* [6] as 'restoring the *judicia* to the Senate', and this is confirmed by the casual notices in Cicero. L. Crassus attacked the knights [7] 'in suasione legis Serviliae'; his passionate appeal has been preserved to us: 'Snatch us away from this torture; tear us out of the jaws of those whose cruelty cannot be satiated with our blood; suffer us not to be in bondage to any, saving to your commonalty, to bear whose yoke is within our endurance and within our duty.' [8] The knights, on the other hand, hated Caepio. Cicero [9] gives it as an example of want of tact, if a man should praise Caepio's law in a company

[1] Mommsen, *Juristische Schriften*, Vol. III, p. 342.

[2] Cassiodorus (*Chronicon*, ad ann.) and Obsequens (*de Prodigiis*, ch. 101) attributed the law to Caepio's consulship (106 B.C.). More probably it belongs to the year 111 B.C., for by that year the *lex Acilia* was superseded and the tablet on which it had been engraved was scrap bronze, the back of which was available for a second use; (see above, Vol. I, p. 147).

[3] Cicero, *pro Cornelio*, I. 27 (Asconius, 70). I may mention that my references for Asconius are always to the sections of A. C. Clark's edition, which answer to the pages of Kiessling and Schoell.

[4] See below, p. 96. [5] Tacitus, *Annales*, XII. 60. 4.

[6] For this use of the plural see Mommsen, *de Collegiis*, p. 43: 'ut caput legis saepe dicitur lex, ita lex universa saepe leges.'

[7] Cicero, *pro Cluentio*, 51. 140.

[8] Cicero, *de Oratore*, I. 52. 225.

[9] Cicero, *de Inventione*, I. 49. 92.

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

constitution of juries could not be made by such a law, but only by a *lex judiciaria*.'[1]

I cannot think that these arguments will hold. I believe that both Caepio and Glaucia transferred the jury court in the politically important *quaestio* by clauses in a *lex repetundarum*.[2] But the question of Caepio and Glaucia matters very little. On the other hand, the parallel one about Caius Gracchus is of vital importance for the right understanding of the surviving fragments of the *lex Acilia*. If Gracchus passed a general *lex judiciaria* excluding the senators from the jury courts, he must (unless anarchy were to ensue) have put some other jurors in their place. In other words, he must have made provision, just as Cotta did in B. C. 70, for a general *album judicum*. This is indeed what Plutarch represents him as doing, and as naming the jurors himself. But we know that the author of the *lex Acilia repetundarum* found no such general *album* in existence, but had to provide one to be renewed annually for the purpose of his own law. The task of framing it is entrusted not to Gracchus,[3] but for the first year to the *praetor peregrinus*

tulit Servilius Glaucia.' It contained the clause 'quo ea pecunia pervenisset' (Cicero, *pro Rabirio Postumo*, 4. 9), introduced the stated adjournment (*comperendinatio*) which divided each trial into two *Actiones* (Cicero, *in Verrem*, I. 9. 26), and contained provisions under which two Tiburtines gained the Roman citizenship by successful accusations (Cicero, *pro Balbo*, 24. 54).

[1] Mommsen, *Juristische Schriften*, Vol. I, p. 19, and Vol. III, p. 349.

[2] Caepio's law is called *judiciaria* (in Cicero, *de Inventione*, I. 49. 92) merely by way of describing its most important content. The phrase would be equally applicable to the *lex Acilia*.

[3] If we are forbidden under penalties to suggest that Plutarch in this matter 'says the thing that is not', we must conclude that the power given to Gracchus to appoint jurors did not include jurors in the *quaestio de repetundis*, the only one which we know to have been in existence at the moment, and the one round which, as a matter of practical politics, the controversy between the orders raged at all times. The absurdity is patent.

(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.

collectively would constitute that transfer of the *judicia* from senators to knights, which Appian, Cicero, and Varro ascribe to Gracchus. That Appian thought that this transfer was effected by a single law instead of by two or three would be (if my judgement as to the weight of his authority is correct) a matter of small moment.

As fresh *quaestiones perpetuae* came into being they would doubtless follow the precedent of those already existing, and would adopt equestrian jurors; but this would be only a practical, not a legal, consequence, since each law would contain in itself the necessary prescriptions for the jury courts which it was founding. Temporary measures, such as the *lex Mamilia* of 110 B. C., the *lex Varia* of 90 B. C. (or end of 91), and the *lex Plautia* of 89 B. C. would likewise each define the qualifications for its own jurors, and here political and party feeling would be the predominant consideration in regulating the procedure. When Mamilius brought forward his law against the accomplices of Jugurtha, the *equites* and the *populares* were equally irritated by the massacres at Cirta, and we are not surprised to hear that he manned his court with 'Gracchani judices'.[1] In 91 B. C. again democrats and *equites* were equally enemies of Drusus and his associates, and it was natural that if Varius and the democrats forced through the Bill, the knights should supply ready instruments for its working. But apart from the political convenience, there was no necessity that this should be so. A year later the tide had turned against the enemies of Drusus, and the Varian Commission was now provided with a bench of *judices* selected on a principle quite other than that of Gracchus,[2] without the other *quaestiones* being, so far as we know, in any way affected.

The next problem for consideration is, who were the

[1] Cicero, *Brutus*, 34. 128.

[2] See below, p. 96.

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.

ments of King Servius Tullius. Now in this sense we cannot identify[1] them with the Gracchan *judices*; for Quintus Cicero speaks of the equestrian centuries as mainly composed of young men,[2] and these would be excluded from the bench by the qualification mentioned in the *lex Acilia*, that every juror must be over thirty[3] years of age.

In another and more habitual sense the words *equites* and *equester ordo* are used of all persons, not senators, who are *equestri censu*,[4] that is to say, who possess property to the amount of 400,000 sesterces, which was the qualification for enrolment in the centuries of knights. The whole of those who are eligible[5] borrow the name from those actually selected, as is very natural, since in earlier times every one

[1] As Mommsen does in *Strafrecht*, pp. 209 and 211. I much prefer the solution which is implied in his restoration of the *lex Acilia*; see below, p. 94, note 1.

[2] See below, p. 88. I remember only two persons mentioned in Cicero's time as serving at the moment in the equestrian centuries. These are the youthful consul Pompey, who appears before the censors leading his horse to receive their certificate of having completed his *legitima stipendia* (Plutarch, *Pompeius*, 22. 6), and L. Natta, the step-son of Murena, 'summo loco adulescens' (Cicero, *pro Murena*, 35. 73). I should agree with Marquardt (*Hist. Equitum*, p. 23) that room was found for these recruits by the surrender of the 'public horse', not only by the senators, but by all who had served their ten years.

[3] Since Suetonius (*Augustus*, 32) says 'judices a tricesimo aetatis anno adlegit, id est quinquennio maturius quam solebant', it follows that at some time between the time of Gracchus and that of Augustus the qualification must have been altered from thirty to thirty-five years of age. Mommsen (*Strafrecht*, p. 212, note 4) attributes this change to the *lex Aurelia*.

[4] e. g. Catienus, described in Cicero, *ad Quintum Fratrem*, I. 2. 6, as 'homo levis et sordidus, sed tamen equestri censu', and Cluvius (*pro Roscio Comoedo*, 14. 42), 'Quem tu si ex censu spectas, eques Romanus est.'

[5] Mommsen (*Staatsrecht*, III. p. 483, note) has well remarked that the numbers mentioned (e. g. 2,600 equestrian victims of the proscription in Appian, *Bellum Civile*, I. 103) postulate a larger body than the 1,800 *equites equo publico*.

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.

tax-farmers who are described as the *principes equestris ordinis*,[1] *flos equitum Romanorum*.[2] These form the *equitatus* who, with Atticus for their leader and standard-bearer, occupy the slopes of the Capitol while the debate on the Catilinarians is proceeding in the Temple of Concord.[3] The same men 'declare war on the Senate'[4] when Cato tries in B. C. 60 to extend to them the liability to be tried for judicial corruption, and for whom on the same occasion Cicero thinks that a revision of the contract for taxes should be granted 'retinendi ordinis causa'. It is the *equester ordo* in this sense of which Cicero claims to be the champion—'Nunc vos, equites Romani, videte;[5] scitis me ortum e vobis, omnia semper sensisse pro vobis. . . . Alius alios homines et ordines, ego vos semper complexus sum.'

How completely this wider sense had established itself in common usage in the last days of the Republic is shown by the circumstance that in one passage the equestrian centuries are expressly distinguished from the *equester ordo*. Quintus Cicero[6] advises his brother to secure the votes of the eighteen centuries; this, he says, will be easy, first because they are young men who can be won over by friendliness and social attentions, and likewise 'quod equester ordo tuus est, sequentur illi auctoritatem ordinis'. This passage is too much for Mommsen, who is somewhat inclined to depreciate the claims of this larger body to the title, and accordingly he rejects it on the ground that the treatise *de Petitione Consulatus* is spurious.[7] Tyrrell and

[1] Cicero, *in Verrem*, II. 71. 175.
[2] Cicero, *pro Plancio*, 9. 23.
[3] Cicero, *ad Atticum*, II. 1. 7.
[4] Cicero, ibid., II. 1. 8.
[5] Cicero, *pro Rabirio Postumo*, 6. 15.
[6] Q. Cicero, *de Petitione Consulatus*, 8. 33.
[7] *Staatsrecht*, III, p. 484, note 3.

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.

Juris Romani, in accordance with this hypothesis. The restored text ran—'quei in hac civitate HS CCCC n(ummum) plurisve census siet'.[1]

The critics who adopt this view necessarily look to a property qualification as the sole criterion likewise of the Third decury of the Aurelian Law, the *tribuni aerarii*. They consider that this was a name given to a third *ordo*, defined by a *census*, considerable indeed, but inferior to the equestrian.[2] We find the two classes mentioned side by side among those which assisted the Senate against Saturninus[3] and Cicero against Catiline,[4] and again among the 'respectables' from a country town who came to the support of Plancius 'tot equites Romani, tot tribuni aerarii'.[5] Madvig[6] declines even to guess at what the qualifying census may have been. Lange[7] and Zumpt,[8] with some plausibility, notice that Augustus introduced a fourth decury of *ducenarii*, and conclude that as the *tribuni aerarii* came between these and the *equites*, their minimum census must have been of 300,000 sesterces. That a minimum census was required for eligibility to the ranks of the *tribuni aerarii* as well as to that of *equites*, and that this census was 300,000 sesterces,

[1] Mommsen himself once adopted this restoration, and in correcting his monograph on the *lex Acilia* for republication in his Collected Writings, he has forgotten to withdraw his avowal of it in the Commentary (*Juristische Schriften*, I, p. 51), though he has altered the words in the text.

[2] This view was propounded by Madvig in a monograph *de Tribunis Aerariis* (1838), now included in his *Opuscula Academica*, pp. 597–614. Madvig has been followed by most modern scholars, notably by Geib, Marquardt, Zumpt, and Greenidge, but not by Lange; see below, p. 95, note 1.

[3] Cicero, *pro Rabirio*, 9. 27.

[4] Cicero, *in Catilinam*, IV. 7. 15.

[5] Cicero, *pro Plancio*, 8. 21.

[6] Madvig, *Opuscula*, p. 612.

[7] Lange, *Römische Alterthümer*, Vol. I, p. 433.

[8] Zumpt, *Criminalrecht*, II. ii. 194.

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.

other than wealth, to distinguish between the one order and the other. In the same way, when Cicero says in the First[1] Philippic, '"census praefiniebatur", inquit: non centurioni quidem solum, sed equiti etiam Romano,' puzzling as the passage is, it seems to show at any rate that the monetary qualification was one superimposed on the members of each *ordo*, not the qualification which constituted a man *ipso facto* a member of that *ordo*.

There are other indications that the *tribuni aerarii* were often, so far as wealth was concerned, of the equestrian census, and therefore belonged to the *equester ordo* in its wider and, in common parlance, its more usual sense. The *Scholiasta Bobiensis*[2] asserts this inclusion *totidem verbis*, for he describes the effect of the Aurelian Law as being, 'ut ex parte tertia senatores judicarent, ex partibus duabus tribuni aerarii et equites Romani, ejusdem scilicet ordinis viri.' The explanation of the Scholiast is abundantly confirmed when we read the passage on which he is commenting. Cicero is addressing a jury composed of twenty-five men from each of the three orders. He lumps together the fifty non-senatorial jurors in the words—'An equites Romanos (implorem)? Judicabitis principes ejus ordinis quinquaginta.' In another passage, which immediately precedes the words which I have quoted above from the speech *pro Rabirio Postumo*,[3] Cicero, after addressing the senators separately and entreating them to keep unspotted their 'fides in hunc ordinem', turns to the non-official members of the jury with the words 'Hoc animo igitur senatus. Quid vos, equites Romani, quid tandem acturi estis?'; he says not a word about the *tribuni*

[1] Cicero, *Philippics*, I. 8. 20.
[2] *Scholiasta Bobiensis*, On Cicero, *pro Flacco*, 2. 4.
[3] Cicero, *pro Rabirio Postumo*, 6. 14. See above, p. 88.

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).

If this supposition be granted, I think that in the case of both orders we may adopt the solution which is embodied in Mommsen's restoration of the text of the *lex Acilia*, as set forth in the later (sixth and seventh) editions of the *Fontes Juris Romani*. The mutilated clauses now read—'quei in hac civitate equum publicum habebit habuerit.' The insertion of the past [1] tense in this passage shows us how to steer a middle course between Mommsen's last doctrine, which would confine the Gracchan jurors to those presently holding a public horse, and his earlier one, which extends the right of sitting on juries to the much larger body of persons who were qualified by wealth for the public horse. According to the theory which I advocate, all persons who had ever served, all past and present members [2] of the equestrian centuries, so far as they were not disqualified by age, by office, or by loss of property,[3] might be called to act as jurors. This body of persons, the beneficiaries of Gracchus' Law, who, as Pliny [4] seems to hint, were at first called *ordo judicum*, gradually won their way to the equestrian title and constituted an *equester ordo* in a sense intermediate between the widest and the narrowest interpretation of the phrase. In a similar way the *ordo* of *tribuni aerarii* is to be taken to include all who have ever held

[1] Strange to say, Mommsen does not seem to appreciate the immense difference which this insertion makes. He throws out the suggestion as if it were quite unimportant—'quei in hac civitate equum publicum habeat'—or, 'habeat habuerit, habiturusve sit' (*Staatsrecht*, III, p. 531, note 1); compare, p. 530, note 2, 'wenn auch vielleicht mit Einschluss derer, die das Staatspferd abgegeben hatten.'

[2] We may compare the *Augustales* or *Seviri Augustales* of the *municipia* under the Principate; they were annual officers, but retained the title and privileges of the *Ordo* for life.

[3] See above, p. 91.

[4] Pliny (*Nat. Hist.* XXXIII, chap. i. 30) is speaking of the time of Augustus; but his distinction between *judices* and *equites* can hardly be supposed to have first come into existence at so late a period.

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,

that of the *lex Plautia* (of 89 B. C.), has more peculiar interest. In the crisis of the Social War—probably in the very first days[1] of the year 89 B. C.—the Varian Commission for High Treason, which had been constituted with the ordinary equestrian jurors of the time, was recast by the *lex Plautia*. On this occasion, and on this occasion only in the whole history of the Roman People, the method of popular election was applied to jurors. Each of the thirty-five tribes chose freely fifteen persons out of its own number. Thus, as Cicero tells us,[2] it came about that now for the first time senators and Roman knights sat on the bench together. Asconius adds that some persons of lower rank were likewise returned. The 525 so nominated were to be the persons 'qui eo anno judicarent'; I believe that there was at this time no general *album*, and that the words include only the trials under the *lex Varia de majestate*.

We have seen how the prescriptions of the several laws establishing *quaestiones* gradually built up a common system for the selection of those who were to serve as jurors. The three *decuriae* constituted by Aurelius Cotta remained, with a brief interval under Caesar, the foundation of the jury courts, so long as they survived; Augustus added a fourth, but only for Civil suits—for, whatever may have been the case in earlier times, the jurors in these suits were under the principate drawn from the same *album* as those for criminal trials. Meanwhile, neither the uniform

notwithstanding Caesar's silence, those condemned *de vi* must likewise have been included.

[1] Asconius dates it to the Consulship of Strabo and Cato (89 B.C.). Plautius would naturally promulgate his law when he came into office on December 13, 90 B.C., but the *trinum nundinum* would push the actual passing of it into the New Year.

[2] Cicero, *pro Cornelio*, 79 (Asconius, 70).

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.

to appoint in each case five senatorial *recuperatores*. There is no hint that he was restricted in his choice either by nomination of the parties or by the employment of the lot, though of course there was nothing to prevent his resorting to either method if he chose by so doing to diminish the burden of his own responsibility.

2. In the *lex Acilia repetundarum* the prosecutor is to select and proffer (*edere*) to the accused a hundred names out of the 450 on the *album*. From this hundred the accused strikes off the names of fifty, and the remaining fifty try the case. Jurors thus constituted are known as *edititii judices*.[2]

3. In the trial of P. Sulla for *vis* in 62 B.C. Cicero says[3] that the jurors were 'ab accusatoribus delecti ad spem acerbitatis, a fortuna nobis ad praesidium innocentiae constituti'. Mommsen[4] sees in this passage evidence of some system (we know not what) of combining nomination with the lot. This may be so, but I doubt whether the word *fortuna* need necessarily imply it. If we suppose that this is merely another case of *edititii judices* on

[1] Livy, XLIII. 2. 3.

[2] Mommsen (*de Collegiis*, p. 63, notes 11 and 12) seems to deny that jurors subject to the double process 'eos quos is quei petet et unde petetur ex hac lege legerint ediderint' (*lex Acilia*, verse 26) can be properly called *edititii* on the ground that Servius (on Virgil, *Eclogues*, III. 50) defines the *edititius judex* as 'quem una pars eligit'; but the original choice by the accuser remains as the basis of the juror's right to sit, whatever subsequent process of sifting he may have undergone. When the accused has 100 names submitted to him, out of which the jury of fifty has to be formed, it is a mere matter of expression whether we say with the *lex Acilia* (verse 24) that he chooses 50 out of 100 to go into the box ('de eis judices quos volet L legat'), or with Cicero (*pro Plancio*, 17. 41) that he challenges 50 and leaves 50 behind. In any case, it is to jurors chosen on such a system that Cicero (see below, paragraph 7) applies the epithet of *edititii*.

[3] Cicero, *pro Sulla*, 33. 92.

[4] Mommsen, *Strafrecht*, p. 215, note 5.

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

was to be called, or whether it was used to select a smaller number out of the decury, must remain uncertain ; perhaps the lot operated in both these respects. The designated jurors were further subjected to a process of challenge. 'Keep your favourite, if you will, in the Senate,' says Cicero, 'have him as a judge in your own causes ; no man outside your order will submit to have Verres for a juryman, though those admirable Cornelian Laws give him no right to challenge more than three.'[1] On the other hand, in the case of Verres himself the challenge appears as a most important matter. Cicero claims[2] that his own action on the occasion of the challenging of jurors testified that he was in earnest in this prosecution, cast terror among his adversaries, and contributed powerfully to the successful issue of the trial. All this is of course inconsistent with the challenge of only three names. We must suppose, then, that a distinction was drawn between senatorial and non-senatorial defendants, and that in the case of the former a much wider right of challenge was granted on both sides.[3] Any accidental gaps were filled up from the other decuries by a process known as *subsortitio*. There is nothing to show how this process was conducted.

Mommsen[4] believes in a more elaborate arrangement, namely that the accused had the right not only to reject a certain number of jurors, but also to designate others, who were to sit undisputed in spite of any objection of the prosecutor. The passage[5] on which he rests is as

spem fortuna populi Romani, et in rejiciendis judicibus mea diligentia istorum impudentiam vicerat'.

[1] Cicero, *in Verrem*, II. 31. 77.

[2] Cicero, *in Verrem*, Actio Prima, 6. 16, and *in Verrem*, I. 7. 17.

[3] Six jurors are named as having been challenged by Verres. See Zumpt, *Criminalrecht*, II. ii. 119.

[4] Mommsen, *Strafrecht*, p. 215, note 1.

[5] Cicero, *in Verrem*, I. 7. 18.

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.

the scene described at Clodius' trial,[1] when 'the accuser, like a good censor, turned out all the worst characters, while the defendant, like a tender-hearted trainer of gladiators, put aside the most decent men to keep for another day'. But what, under the Aurelian system, was the nucleus on which the trimming process was executed? Evidently this cannot have been the whole mass of names on the *album*, but was some smaller body, and this group must have been selected, either by the praetor or by lot, from among the 1,200 available. In Clodius' case the choice of the one method or the other was the issue vital to the success of the prosecution ('in eo autem erant omnia'). The question which Fufius put publicly to Pompey[2]—whether he approved of the selection by the praetor of his own *consilium*—seems to show that the lot was the more usual method, or at any rate that the choice was not often left to the same praetor who was to preside at the trial.

6. We have an indication of a smaller body picked out from among the mass of eligible persons in the trial of Roscius of Ameria for parricide under the reign of the Cornelian Laws (80 B.C.). Cicero says[3] to the jury, 'ex civitate in senatum propter dignitatem, ex senatu in hoc consilium delecti estis propter severitatem.' It is obvious that he considers that he is paying the jury a compliment. I should therefore disagree with Mommsen's interpretation:[4] he thinks that *delecti* merely means 'left unchallenged by the accusers'. These accusers were Chrysogonus and his rascally associates, against whom Cicero is launching his deadly invective all through the speech. I cannot believe that Cicero would have reminded the jurors that they were in the box by Chrysogonus' good will; or

[1] Cicero, *ad Atticum*, I. 16. 3. [2] Cicero, *ad Atticum*, I. 14. 1.
[3] *Pro Roscio Amerino*, 3. 8. [4] Mommsen, *Strafrecht*, 215, note 4.

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.

and amongst them the institution of *edititii judices*. The alternative hypothesis is that of Geib,[1] who would complete the Scholiast's sentence by reading 'ejus temporis quo Servilia lege repetundarum . .', and refer Cicero's allusion to a period when the jury court in cases of extortion was governed by the Law of Glaucia, a period which presumably extended down to the restoration of Sulla. Now it must be confessed that it is straining the sense of the word *nuper* to make it refer to a period which had ended twenty-seven years before,[2] but the word is not emphatic, and, though I am unwilling to say that Cicero used it loosely, I prefer to do so rather than to accept the enormous difficulties which are involved in Mommsen's interpretation. He takes the words *non tulerunt* to mean that the Senate would none of the proposal, and that the scheme of the *rejectio* of 75 out of 125 was never realized in fact; as of course it never would have been, if it were indeed the abortive proposal of Servius; but surely the whole bearing of the sentence—*quum* to *referret*—indicates that Cicero is describing a system which was once in being. It seems to me that we take a far greater liberty with the Latin language if we try to make *quum* with its following verbs introduce a statement about what never actually was, than if we venture to stretch somewhat unduly the period which can be covered by *nuper*. Again, if we attribute the sketch of procedure, here laid out, to the year 63 B.C., how are we to account for the omission of any mention of the senators[3] among the jurors who

[1] Geib, *Römischer Criminalprocess*, p. 314.

[2] It is to be noticed, however, that Cicero says 'paucis his annis' of twenty-three years ago. See Asconius, *in Cornelianam*, 57.

[3] That no mention is made of the *tribuni aerarii* need not trouble us (see above, p. 92); but here, too, if the choice of the defendant was to be made from among the eligibles of only two decuries, it is

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.

My conclusion then would be that we are compelled to accept Geib's contention[1] and to place the date of the system described by Cicero in the period before Sulla. It would then appear as a variant introduced by Servilius Glaucia into the system of *edititii judices* established by the *lex Acilia*. In both fifty jurors are left to try a case, but whereas in the earlier law the accused has to strike off only 50 out of 100, in the later one a wider choice is given him, and he cancels 75 out of 125 of the prosecutor's nominations.

It remains to ask what is meant by *omnia permiscuerunt*? Mommsen does not commit himself to a translation; but his hypothesis seems to demand that we should take it to mean 'resorted to any sort of combination', or something to that effect. If the Latin will bear this, the sense will fit in well enough with the hypothesis that Cicero is speaking of the days of the equestrian jury courts. The reference will then be to the Servilian Law as contrasted with the Acilian. Men could not bear the *edititius judex* as constituted under the earlier law, so they resorted to a contrivance which diminished the value of the accuser's selection by making it less obligatory on the accused, since he was now allowed to strike out the 75 most hostile names which the accuser could pick instead of only 50.

Another interpretation of *permiscuerunt* arises out of Geib's comments.[2] According to this *non tulerunt* means

[1] Geib, however (*Römischer Criminalprocess*, p. 314), is led into an incidental error by his belief that the *lex repetundarum* preserved to us (now called *lex Acilia*) is actually the *lex Servilia*, and that when Cicero says 125 instead of 100 he makes a 'pardonable mistake'. Mommsen (*Juristische Schriften*, Vol. III, p. 492, and *de Collegiis*, p. 64, note) has some right to be scornful of this explanation. My own statement is an emended version of Geib's theory with this blemish removed.

[2] Geib, *Römischer Criminalprocess*, p. 314, note 189. I follow Mommsen (*de Collegiis*, p. 64, note 12) in assuming that Geib refers

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.

that in this passage we have a real description of a method which once actually obtained for putting a jury into the box, and that this was the method which lasted from Glaucia to Sulla.

8. We have next to consider the provisions of the *lex Licinia de sodaliciis* under which Plancius was actually tried. Here we have another, and, as Cicero maintains, a much harsher application of the principle of *edititii judices*. The names of the jurors in the *album*, as we know from the *lex Acilia*, were written out *tributim*; under the heading of each of the thirty-five tribes were written the names of the jurors belonging to that tribe. The columns were probably of very unequal length, for the selection was made on purely personal considerations, and there was no provision to secure any equal distribution of the places among the several tribes. Under the *lex Aurelia* it is probable that an equal number from each order was the rule, not only for the list taken as a whole, but inside each tribe. Now in trials under the *lex de sodaliciis*, the accuser named four tribes, the defendant struck out one, and the jury was composed of those whose names stood in the list under the headings of the remaining three tribes. Sometimes, as in Plancius' trial, the whole of these persons were required to serve, sometimes (probably in case the tribal lists happened to be unusually long) the jury was reduced in size by individual challenges.[1]

So far there is no great difficulty; but Cicero, as we have already seen, describes the selection by the accuser as being, in contrast with the one which has been discussed in the last section, 'non ex delectis judicibus sed ex omni

[1] Cicero, *pro Plancio*, 16. 40 'ne quinque quidem rejectis, quod in proximo reo de consilii sententia constitutum est.' See above, p. 46, note 1.

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.

would have a greater chance of culling out three or four tribes which happened to be manned with persons such as Cicero describes[1]—'aut amicos tuos aut inimicos meos aut denique eos quos inexorabiles, quos inhumanos, quos crudeles existimes . . . quos natura putes asperos atque omnibus iniquos,' or, as he says in another passage about certain witnesses in bribery cases, 'communes inimicos reorum omnium'.[2]

9. Yet another method is ascribed to a Law of Vatinius, tribune in 59 B.C. This is described as *alternis consiliis rejiciendis*,[3] which can only mean that the *album* was to be divided up beforehand into ready-made juries, that of these three were chosen by lot (or possibly by selection of the praetor), and that accuser and accused each struck off one of the groups. Whether or not this was to be followed, as Mommsen thinks,[4] by the challenge out of the remaining panel of a certain number of individual names on each side, it is impossible to say with certainty.

10. It may be worth while to mention the answer which the tribune Racilius, at the end of the year 57 B.C., elicited from Marcellinus, the consul elect—'ut ipse (presumably the tribune) judices per praetorem urbanum sortiretur.'[5] As Clodius succeeded in getting himself elected aedile, and so evaded prosecution, no court was ever constituted, and the notice is too slight to enable us to say what precisely was intended.

11. Finally, we have the very curious arrangements made by Pompey in his sole consulship for the political trials of that year. To each of these trials there were summoned

[1] Cicero, *pro Plancio*, 16. 40. [2] Cicero, ibid., 23. 55.

[3] Cicero, *in Vatinium*, 11. 27. The Law was probably repealed soon after. I am not aware of any other reference to it.

[4] Mommsen, *Strafrecht*, p. 216, note 1.

[5] Cicero, *ad Quintum Fratrem*, II. 1. 2.

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.

CHAPTER XVIII

PROCEDURE IN TRIALS BEFORE JURIES

In Rome, as in England, trial by jury implied the absence of any 'inquisitorial' system. The words *quaerere, quaesitor, quaestio,* though justified by the previous history of the Roman criminal law, are far away from the facts of the later Roman Republic. It is no longer the business of the Court to inquire and find out the truth, but only to listen as an impartial arbiter to the facts and arguments brought before it. Under the 'accusatorial' system there is no examination of the defendant,[1] and no attempt to extort a confession.[2] The whole burden of enlightening the Court lies on the parties, and a trial is just a duel fought out between them in the full light of day under certain rules, which the umpire is present to enforce. There are important differences between the English and the Roman system, which must be discussed later on; but both rest on the same broad principle, which distinguishes them from the procedure which the peoples of continental Europe inherited from the later Roman Empire and from the Canon Law of the Roman Church.[3]

[1] Except of course the formal *interrogatio* of the accused, as to whether he pleads 'guilty' or 'not guilty'. See instances in Mommsen, *Strafrecht*, p. 387, note 3.

[2] This does not prevent the counsel from catching up any interjectional remarks of the accused, and arguing his guilt from them, as when Verres exclaimed that he had the pirate captain in chains in his house (Cicero, *in Verrem*, V. 29. 73), or that Gavius, whom he had crucified, was a runaway slave who had attempted to obtain a respite by falsely declaring himself a Roman citizen (ibid., 64. 165).

[3] See an interesting article in *Law Quarterly Review*, October 1907, *Le Jury à Rome et en Angleterre*, H. Speyer. The writer shows

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'.

fitted for the conclusion of a trial than for a stage at which the witnesses were still to be heard. It is possible, as Zumpt suggests,[1] that in publishing his speeches Cicero may have taken some liberty with the order of delivery, and moulded into a single oration utterances which were really made on different days. Asconius[2] certainly attributes something of the sort to the published edition of the *pro Cornelio*, which, as he says, included in two Orations the work of four days. However this may be, it is clear that the proceedings opened with speeches by prosecutor and defender, and after them followed the examination of witnesses. An adjournment, whether optional (*ampliatio*) or prescribed (*comperendinatio*), gave the opportunity for additional speeches on both sides, with the possibility, though this does not seem to have been much used, for some further production of evidence.[3]

It is such a 'Second Action' that is feigned by Cicero in his published speech against Verres. In this case the accuser, to avoid delay, made his first speech very brief. It appears that when the witnesses were being examined, the advocate was allowed in the course of the examination to make comments and to deduce arguments on the several points named in the evidence. In one trial[4] under Tiberius, we find a would-be prosecutor gaining the advantage over his competitors by declaring that he would dispense with an opening speech altogether. Cross-examination of a hostile witness to show his want of credibility was carried, if we may judge from the example given us in Cicero's *Interrogatio in*

[1] Zumpt, *Criminalprocess*, p. 212.

[2] Asconius, *in Cornelianam*, 54.

[3] See Cicero, *in Verrem*, II. 65. 156 'Scitis quam multi et quam multa priore actione dixerint; nunc et illi et reliqui dicent.'

[4] That of Libo, Tacitus, *Annales*, II. 30. 1 'singillatim se crimina objecturum professus.'

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

absent witness was allowed to frame his own *affidavit*, writing down his testimony himself with what assistance he might choose to employ. No representative of the other side was present, and no questions were asked. The only similar instance in the English Criminal Law is the declaration, verbal or written, of a man who knows himself to be dying, which may be used as evidence after his decease, although not made on oath, nor in the presence of the accused, but only against a prisoner charged with having caused the death of the witness. In a Roman Criminal Court the testimony of an absent witness might be received respecting any matter at issue; it was sent to Rome under the seals of seven guarantors, who pledged themselves to the authenticity of the document as the assertion of the witness, but neither took any pains to verify nor pretended to confirm the truth of that which he asserted. The weight of the testimony depended solely on the credibility of the absent witness himself, generally confirmed by his own oath.[1] In

terra Italia in oppedeis foreis conciliaboleis ubi joure dicundo praeesse solent.' These words might seem to refer to evidence taken on commission before a local tribunal; but had this been allowed, we should certainly have found some indication of it in Cicero's speeches.

[1] In the cases which we know, the evidence was certainly on oath: 'An Manilio et Luscio juratis in alieno judicio credas?' (Cicero, *pro Roscio Comaedo*, 15. 45), and 'ipsius (Lucceii) jurati religionem auctoritatemque percipite' (*pro Caelio*, 22. 55). Mommsen (*Juristische Schriften*, Vol. III, p. 501) thinks that in such *testationes* the oath is not an essential feature. He relies on Quintilian's words (*Inst.* V. 7. 32): 'Saepe inter se collidi solent inde testatio, hinc testes; locus utrinque; haec enim se pars jurejurando, illa consensu signantium tuetur.' But Quintilian has certainly allowed himself in this passage to be confused by a false antithesis. The *signatores* can at the best be admitted in substitution, more or less adequate, for the presence of the witness in person. Even if we admit (with Mommsen, loc. cit.) a certain parallelism between the oath, which makes the man present in court a regular witness, and the seven *signatores* who cause the document to be admitted as evidence, this will not affect the truth or falsehood of the assertions themselves, which Quintilian supposes

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.

Such objections as those which I have quoted from Quintilian and from Cicero would readily occur to the mind of an advocate, but they hardly go to the root of the matter. I do not find either in Quintilian or in Cicero any protest against such unsifted testimony being laid before the jury or allowed to influence their verdict. For any such rejection we have to pass beyond the sphere of juries to the personal court of Hadrian and his Privy Council. Hadrian[1] refuses to listen to an accuser, 'because he produced neither proof nor witnesses, but wished to employ written statements, which I do not admit; for my practice is to question the witnesses themselves.'

In the cases which I have named, the written testimony is to be used against the prisoner; it is more generally employed in his favour, especially in the matter of *laudationes* or evidence to character. This was produced in overwhelming mass in the last century of the Republic. In Scaurus' trial for *repetundae* in 54 B.C. nine consulars were among the *laudatores*, and 'many of these', says Asconius,[2] 'were absent, and gave their evidence in writing.' Cicero himself, when reproached by his friend Lentulus Spinther, can only reply by a *tu quoque*—'Why I gave evidence in favour of Vatinius' character I beg you not to demand of me in this or any other case, for fear lest I put the same question to you when you come home again; though indeed I can do so without waiting, for only think of the people to whom you have sent certificates of character from the ends of the earth.'[3]

[1] Quoted in *Digest*, XXII. 5. 3. § 3.

[2] Asconius, *in Scaurianam*, 24.

[3] Cicero, *ad Familiares*, I. 9. 19. He adds, 'nec hoc pertimueris, nam a me ipso laudantur et laudabuntur iidem.' It will be remembered that Falstaff felt similar misgivings: 'I am damned in hell for swearing to gentlemen my friends, you were good soldiers and tall fellows.'

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

must be acquitted because the accuser has not alleged against him any word or deed 'quo significari vestigium libidinis, petulantiae, crudelitatis, audaciae possit'; and his counsel contrasts all the abuse which their accusers had showered even on such men as Rutilius and Piso Frugi. Flaccus was accused of extortion in his province of Asia; Cicero[1] for the defence maintains—'When you have been able to censure the behaviour of my client in his youth, when you have pointed to blots on his riper years, when you have adduced ill life and ill fame at home and in the provinces where he has served, then it will be time enough to tell us what the people of Tmolus or Dorylaeum think of him;' and in the speech *pro Sulla* he apologizes for having spent so much time on the actual charges and delayed coming to the real point, namely the character of the accused[2]—'Now that I have disposed of almost all the charges, I proceed at last, contrary to the usual order, to speak of the life and character of the man. . . . You are now to be recalled to that issue to which the case itself, though I hold my peace, bids you turn your minds and your attention.' He demands[3] that 'the life of Publius Sulla be put to the question, to see whether any lewdness, any misbehaviour, any cruelty, any violence can be detected in it.' If the integrity of his life is upheld Cicero protests that he will fear no witnesses; for the jury must remember that it is essential for the safety of every man of honour 'that the cases of such men should be decided not by the caprice or ill-will or unscrupulousness of witnesses, but by the character which is known to all men and which cannot be suddenly distorted or assumed'.

An English barrister appeals to the jurors to decide according to the evidence, and tries to show that if they do so they

[1] Cicero, *pro Flacco*, 2. 5. [2] Cicero, *pro Sulla*, 24. 69.
[3] Cicero, ibid., 28. 78.

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.

I do not remember any instance in which evidence tendered in a Roman court was withheld from the jury for these or any similar reasons, and on the other hand there are many passages which reveal a practice altogether contrary to ours. There is one very flagrant instance of statements being admitted without proper proof in the trial of L. Valerius Flaccus.[1] The defendant was charged, amongst other things, with having received a huge sum, fifty talents, from a certain Falcidius. Falcidius is not put into the witness-box, but letters are read, addressed by him to his mother and sister, in which he makes this assertion.[2] Of course statements given under such circumstances could never, in an English court, be received as evidence or allowed to come to the knowledge of the jury.

We are informed that it is the characteristic of the modest and scrupulous Roman witness not to go further than to say *arbitror*, 'I think,' when he is stating what he has seen.[3] The practice seems a dangerous one; under so elastic a word there would be every temptation to the witness to introduce his own opinion side by side with the facts to which he was to testify. It is a familiar maxim of advocates that it is hazardous to press a witness for an answer unless you know what that answer must be; otherwise a fact inconvenient for your client may emerge. But Antonius, in the *de Oratore*, gives the same advice with reference, not to the facts, but to the opinions of the witness. 'Often,' he says,

[1] Cicero, *pro Flacco*, 36. 90.

[2] There is another case apparently similar. Oppius, quaestor to M. Cotta in Bithynia, was sent home by him for misconduct (Dio Cassius, XXXVI. 40. 3). Cicero defended him in the year 69 B.C., and a note of Quintilian (*Inst.* V. 13. 20), 'Superba; ut in Oppium ex epistola Cottae reum factum,' seems to indicate that Cotta's dispatch was read to the jury, and that Cicero complained of this.

[3] Cicero, *Academica Priora*, II. 47. 146, and *pro Fonteio*, 9. 29.

'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.

occasion,[1] finds it necessary to warn a jury not to accept a statement as fact because a witness says 'that he has heard so'.[2] The great object of the English Law of Evidence is to prevent the jury from having their minds influenced by any such tittle-tattle; at Rome the juror is not shielded from the influence, and may give what weight he pleases to the scandal.[3] The commonplace-book of the pleader[4] contains arguments on either side. 'In speaking on the side of common report we shall say that such report does not commonly spring up of itself without there being some basis of fact,[5] and that there is no reason why any one should invent such stories, &c. . . . On the opposite side we shall show that many rumours are false,' &c.

[1] Cicero, *pro Plancio*, 23. 57.

[2] Quintilian, as Mommsen sees (*Strafrecht*, p. 440, note 5), refers to this passage in *Inst.* V. 7. 5 'elevata . . . ab oratoribus scimus . . . tota genera testimoniorum, ut de auditionibus.' *Elevare*, of course, means only 'to make light of', 'to disparage'; passed through Mommsen's German rendering *ablehnen* (*Strafrecht*, p. 440, text) into the French *rejeter* (see Duquesne's Trans. II, p. 121), the word is so transformed as to mislead Speyer (*Le Jury à Rome et en Angleterre*, p. 427) into assuming a resemblance between the English and the Roman practice which does not really exist. In England the court would 'reject', that is to say, 'exclude,' such evidence; at Rome it was left to the advocate to disparage it.

[3] We find a similar contrast in the care taken to protect the minds of the jurors from public discussion or manifestation of popular opinion on a pending case: 'After the court adjourned about the tenth hour, T. Munatius (a tribune) exhorted the people in a public speech to come in numbers the next day and not suffer Milo to escape, and to manifest their own judgement and indignation as the jurors went up to give their votes' (Asconius, *in Milonianam*, 35). In England the editor of a newspaper which so much as comments on a case in progress is liable to be imprisoned for contempt of court.

[4] Cicero, *ad Herennium*, II. 8. 12.

[5] This does not differ from Sir Benjamin Backbite's conclusion: 'Well, for my part I believe that there never was a scandalous tale without some foundation'—a doctrine certainly more appropriate in a séance of *The School for Scandal* than in the presence of a court of justice.

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.

publica judicia, the judge had a freer hand. He is warned,[1] indeed, to conceal his own opinion until the time comes for him formally to pronounce, but this very instruction shows that his interference in the proceedings was usual. But it was then too late for any Law of Evidence; for the accusatorial system was giving way to the inquisitorial, and this latter brooks no restraints on the arbitrary discretion of the judge as to his methods for arriving at the truth.

Two or three interesting questions arise in connexion with the evidence of slaves. This was admitted, but only after torture, administered under the direction of the court. In cases of *incestum*, especially in any matter connected, as was Clodius' sacrilege,[2] with the Vestal Virgins, the *quaesitor* or the prosecutor could seize on the slaves of the suspected persons and try to extract the truth out of them by the torture. Under the Principate the same unrestricted question was applied in cases of *majestas*.[3] In all other cases a slave could be put to the torture only with the consent of his master. If, as was usually the case, that master was likewise the accused person, the evidence could not be used against him. The master was, however, obliged, under pain of exciting the suspicion of the jurors, to 'offer his slaves'. In that case they would be slaves

[1] See Constantine's instructions as to the procedure under the *lex Cornelia de falsis* in *Cod. Theod.* IX. 19. 2. See below, p. 165.

[2] In this case Clodius had got his own slaves out of the way, but those of Aurelia, Caesar's mother, were tortured; Scholiasta Bobiensis, *in Clodium et Curionem*, Fragm. xxviii. A suspected Vestal was ordered 'familiam in sua potestate habere'. See above, Vol. I, p. 31.

[3] The earlier emperors went through the form of having the slaves sold to the *actor publicus*, himself a slave and therefore capable of acquiring for his master. By the Roman Private Law these immediately became the property of that master, i.e. of the *Populus Romanus*, and so their former master, the accused man, was no longer screened. Tacitus, *Annales*, II. 30. 3 and III. 67. 3.

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.

under torture; and I think, therefore, that there is no doubt that Clark is right in admitting the emendation *suorum* into his new edition of Asconius. How, then, are we to account for the procedure, which Cicero characterizes as ridiculous? It may perhaps be explained, if we remember that one of the pleas for the defence was that Clodius had laid an ambush for Milo. This the slaves whom the prosecutor, Clodius' nephew, had inherited (*suorum*) unanimously denied, and the court allowed their evidence, if they would abide by it under torture, as doubtless they did, to be received as rebutting this part of the defence.

When the jurors have finished hearing the speeches and the evidence they proceed to deliver their verdict. They have not, like an English jury, the assistance of a trained judge to sum up the evidence for them and direct their attention to the important issues. Nor do they retire to discuss the matter amongst themselves and attempt to arrive at a joint decision.[1] Each one is alone with his own conscience in giving the vote which constitutes the advice tendered by him to the *quaesitor*. Hence in voting he is said 'ire in consilium'.[2] For all that, it was not impossible for a sharp-eyed juryman to contrive a glance at the letter which his neighbour was rubbing out,[3] and accordingly by the *lex Acilia*[4] he is sworn not to divulge the secret of his

[1] See Mommsen, *Strafrecht*, p. 443: 'The anxiety lest the illicit influence of individuals should impair the independence of the jury-system, led to the suppression of such joint consultations, perhaps by law, certainly in practice.' Cf. Aristotle, *Politics*, II. 8. 13 *τῶν νομοθετῶν οἱ πολλοὶ παρασκευάζουσιν ὅπως οἱ δικασταὶ μὴ κοινολογῶνται πρὸς ἀλλήλους.*

[2] See above, p. 46.

[3] This was of course the easier in the informal proceedings of the *divinatio*, when the voting tablets were delivered simultaneously, so that Hortensius could give it to be understood 'certos esse in consilio quibus ostendi tabellas velit'; Cicero, *Divinatio in Verrem*, 7. 24.

[4] Verse 44; Bruns, *Fontes*[7], p. 66.

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.

where the remaining letter should be. The rest of the tablet is visible and has to show an erasure on the uncovered side so that he cannot leave both letters in. If the sides of the tablet bearing the two letters are coloured differently, the secrecy of the ballot is violated, because the bystander can see which of the two sides bears the erasure.[1] When all have voted, one of the jurors, chosen by lot, draws out the ballots one by one, and proclaims the letter found on it, whether C for *Condemno* or A for *Absolvo*, or if the writing on both sides be rubbed out so that no letter is found,[2] then *sine suffragio*.

So far the verses are easy of interpretation. The next fragment[3] contains the words 'si eae sententiae ibei plurumae erunt "condemno" praetor quei. . . .' Here it is not clear whether the damnatory votes must be more numerous than either of the other two categories taken singly, or than both taken together. Mommsen thinks that the *sine suffragio* tablets were simply set aside as null, and that A's and C's were then counted the one against each other.[4] Zumpt[5] comes to the same conclusion, except that he holds that if the *sine suffragio* tablets were actually more numerous both than the C's and the A's (taken separately), the trial collapsed,

[1] As in the case mentioned in Cicero, *in Verrem*, Actio Prima, 13. 40 'ut discoloribus signis juratorum hominum sententiae notarentur'.

[2] *Lex Acilia*, verse 54 'ubi nihil scriptum erit, "sine suffragio"'.

[3] Ibid., verse 55.

[4] *Strafrecht*, pp. 445, 446. We might suppose a case in which, out of 50 jurors—

10 said *non liquet*,
11 said *absolvo*,
12 said *condemno*, and
17 were *sine suffragio*.

According to Mommsen the vote would result in the condemnation of the accused. I find it very difficult to believe this.

[5] Zumpt, *Criminalprocess*, p. 361.

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.

Oppianicus could not have been condemned. We may conclude, then, that the votes actually given were :

absolvo, 5 ; *condemno*, 17 ; *non liquet*, 10,

which the transfer of Falcula's vote would have altered to

absolvo, 5 ; *condemno*, 16 ; *non liquet*, 11.

Now why should these latter numbers have prevented the condemnation of Oppianicus ? Evidently the *non liquet* votes are not simply ignored, for in that case there would still have been a large majority against him. Zumpt[1] finds a reason in the circumstance that, with 11 *non liquet* votes, less than two-thirds of the whole 32 would be left to give a definite decision, and that an adjournment must take place, just as if more than a third had said *sibi non liquere* under the Acilian Law.[2] But such a provision, however suitable to a preliminary inquiry as to whether the jury was ready to vote, could find no place if applied, as in this case, to the actual voting ; for then we should have the absurd conclusion that Falcula might have assured the condemnation of Oppianicus by saying either *condemno* or *absolvo* rather than *non liquet*, and further, that without stirring Falcula's vote at all, any one of the five *misericordes* might have rescued Oppianicus by saying *non liquet* instead of *absolvo*. The unfortunate prisoner might well pray 'to be delivered from his friends'. If such had been the disastrous effect of a vote for acquittal, I think that Cicero must have mentioned it in the two passages[3] in which he criticizes the action and the motives of the discordant sections of the jury. It seems to me much more reasonable to adopt the simple explanation, that the transfer of Falcula's

[1] Zumpt, *Criminalprocess*, p. 359 seq.
[2] See above, p. 129.
[3] Cicero, *pro Cluentio*, 28. 76 and 38. 106.

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.

face of this inexplicable silence, I must decline to believe Plutarch's story. Still the scandal, which he twice repeats, shows that such an occurrence was believed to be possible, and I think that we are justified in concluding that both under the Sullan and the Aurelian system, wherever the voting is by ballot, the phrase *non liquet* is used to express the answer called *sine suffragio* in the Acilian Law and effected by the juror rubbing out both the C and the A on his tablet.[1] Such a blank would constitute a third possible vote equally effective with 'Not Guilty' in preventing present condemnation, but possibly leading up to an adjournment (*ampliatio*), or at any rate to a less complete acquittal. In no instance, however, do we find a trial in Cicero's time adjourned for this reason. In none of the other cases, and there are many,[2] in which the votes for and against a man are recorded by Cicero or by Asconius, do we find any reference to *non liquet*, or, to what I take to be its equivalent, *sine suffragio*. Such votes, if they were still given, must have been counted amongst those in favour of the accused.

These numbers are often given with the addition of a statement as to the votes of the three orders. A difficulty here arises in that the instances often fail to present an equal number of votes from each of the three orders, as the Aurelian Law seems to postulate. In the trial of Scaurus[3]

[1] The alternative is to accept the frail authority of the Pseudo-Asconius in his note on the *Divinatio in Verrem*, 7. 24. He says that every juror placed in the urn a tablet marked A, C, or N.L. If this were true I think the *non liquet* must have found a separate record in the numbers given us by Cicero and Asconius in their account of trials under the Aurelian Law.

[2] Besides those mentioned in the next paragraph, we have the numbers in the case of Procilius, 28 C, 22 A (*ad Atticum*, IV. 15. 4), and of Gabinius, 38 A, 32 C (*ad Quintum Fratrem*, III. 4. 1).

[3] Asconius, *in Scaurianam*, 25.

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.

of chance whether the number of votes to be counted were odd or even. We find in a letter of Caelius the account of an actual case of equality of votes, which puzzled an unlearned praetor.[1] Mommsen's theory seems to me quite contrary to all we know of the Roman practice whenever the help of a *consilium* is craved. He who requires such help is there to ask advice and not to give it: whether he will be bound by that advice, when it is given, is of course another matter.[2] The theory likewise appears to be absolutely contradicted by the case of Metellus at the commencement of Verres' trial. At the moment he is a juror; after the first of January he will be praetor and president of the Court; Cicero says of him, 'malim . . . jurato suam quam injurato aliorum tabellas committere.'[3] The contrast between the juror who is sworn and who hands in his own voting tablet, and the presiding magistrate who is not sworn and who only receives the votes of others, is surely decisive of the question.

All matters arising directly out of a criminal trial were heard by the same jury who had sat on the main case. After a condemnation of the principal defendant for *repetundae*, suits might be brought under the clause 'quo ea pecunia pervenisset' to track his unjust gains which had passed into the hands of third parties. This is what Cicero[4] calls 'quasi quaedam appendicula causae judicatae atque damnatae'. The same description would apply to a curious case which Caelius reports to Cicero[5]—the younger Appius Claudius, by stirring up a question of money, said to have been accepted by a certain Servilius on condition of procuring

[1] 'Laterensis leges ignorans,' Cicero, *ad Familiares*, VIII. 8. 3.
[2] See above, Vol. I, p. 205, and Vol. II, pp. 45–47.
[3] Cicero, *in Verrem*, Actio Prima, 10. 32.
[4] Cicero, *pro Rabirio Postumo*, 4. 8.
[5] Cicero, *ad Familiares*, VIII. 8. 2.

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

that the *lex Remmia* is referred to by Papinian as defining the disabilities entailed on the calumniator, and a jurist of the third century, Marcianus,[1] tells us that 'calumniatoribus poena lege Remmia irrogatur'. So far as I know these are the only references to this law in the legal writings of the principate. The penalty is doubtless *infamia* as defined above. Side by side with the legal penalty we find here, as elsewhere under the principate, that arbitrary punishments were inflicted *extra ordinem*. As early as the second century we find in Gaius[2] a notice of such punishments for malicious prosecutions *de injuriis*; the offender, 'extra ordinem damnatur, id est exilium aut relegationem aut ordinis amotionem patiatur'; and in the next century Paulus[3] says, 'in privatis et in publicis judiciis omnes calumniosi extra ordinem pro qualitate admissi plectuntur.'

In such inflictions it was not unnatural that there should be an inclination to measure the deserts of the calumniator by the evil which he had tried to compass for his innocent victim.[4] This was notably the case with the informers, the objects of fear under one reign and of vengeance under the next. Mommsen[5] has finely described the evils which flow from such abuses of criminal justice. 'Above all, 'where the unbounded power of the absolute tribunals and 'the incalculable considerations of State trials enter in, and

from giving evidence, I think that he misunderstands the passage to which he there refers (*Digest*, XXII. 5. 13). Papinian says that there is nothing in the *lex Remmia* to prevent such evidence being given, only he recommends the judge to receive it with caution. See below, p. 141, n. 1.

[1] Marcianus, *Digest*, XLVIII. 16. 1, § 2.

[2] See *Digest*, XLVII. 10. 43.

[3] Paulus, *Sententiae*, I. 5. 2, and *Digest*, XLVIII. 16. 3.

[4] In the same way the *praevaricator* has to bear the punishment proper to him at whose escape he has connived. Paulus, *Digest*, XLVII. 15. 6.

[5] *Strafrecht*, p. 492.

'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.

meanours. This law can hardly be earlier than the institution of the standing jury courts, which introduced the private prosecutor in criminal charges, for under the older system the magistrate who initiated the case was supposed to be only fulfilling his official duty. In his speech *pro Roscio Amerino*,[1] Cicero threatens the accusers of his client: 'Do you suppose that the Remmian Law has no force?' And, he continues,[2] the jury will 'Literam illam, cui vos usque eo inimici estis, ut etiam Kalendas omnes oderitis, ita vehementer ad caput affigent, ut postea neminem alium nisi fortunas vestras accusare possitis'. What is the meaning of this? Most modern scholars, including Mommsen,[3] take it literally, and suppose that the punishment prescribed for false accusers was branding on the forehead with the letter K. The silence of the writers quoted in the *Digest* makes it certain that there was no such penalty under the principate, and I cannot believe that any such was ever enjoined, much less inflicted on Roman citizens, under the Republic. The passage of Cicero may be explained if we suppose that the odious K was attached to the name in the praetor's list of persons who were warned away as *infames* from his court ('ut postea neminem accusare possitis'), and that 'ad caput affigent' is merely used metaphorically of the shame which the consciousness of his degradation would imprint on the countenance of the man so disgraced, and which is compared to the real brand on the forehead of a runaway slave.[4] It is a fancy somewhat like that of Madame de

[1] Cicero, *pro Roscio Amerino*, 19. 55.

[2] Cicero, ibid., 20. 57.

[3] *Strafrecht*, p. 495.

[4] We sometimes find an emperor threatening an official that he shall not only be fined but 'perennibus inuretur notis' (*Cod. Theod.* XI. 30. 9), or again, 'perpetua infamia inustus ne speciali quidem rescripto notam eluere mereatur' (*Cod. Theod.* XII. 1. 85), but no one supposes that such phrases should be taken literally.

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.

mistaken; I do not believe that the generation which passed the *lex Porcia* and forbade a Roman to be flogged can have provided this servile treatment and allowed it to be inflicted on the sentence of a jury, and without the possibility of appeal to the People.

I will conclude this chapter by attempting to find an answer to a question, simple in itself, but which commentators have found so difficult that they generally ignore it. If Seius poisons or stabs Titius at Arpinum, both being Roman citizens, under what procedure can Seius be dealt with, and what punishment will befall him? The difficulty arises from a passage of Ulpian, which appears to limit the jurisdiction of Sulla's courts for murder to cases occurring within a mile of the city of Rome. I believe that the limitation is apparent only; but the problem deserves full discussion. It will be well to begin by quoting at length the passage in question, which is to be found[1] in the *Collatio Legum Mosaicarum et Romanarum*, a work written about A. D. 400.

'Ulpianus libro VII de officio proconsulis sub titulo de 'sicariis et veneficis: Capite primo Legis Corneliae de sicariis 'cavetur, ut is praetor judexve quaestionis, cui sorte obve- 'nerit quaestio de sicariis ejus quod[2] in urbe Roma propiusve

[1] *Collatio*, I. 3. 1 (Krüger, *Jus Antejustinianum*, Vol. III, p. 137).

[2] *Ejus quod* seems strange Latin; but 'quod ejus facere possis' has the authority of Cicero and Livy. I take *ejus* here to refer to the abstract word, wanting in Latin, which should bear the same relation to *sicarius* that *veneficium* does to *veneficus*. *Ejus quod* then will mean that the *quaestio* is about 'so much of this crime as takes place inside', &c. It is perhaps owing to the lack of such a word as *sicarietas*, if I may coin an unspeakable barbarism on the type of Cicero's *Lentulitas* and *Appietas* (*ad Familiares*, III. 7. 5), that a distinction of prepositions is made, and that though the Law is *de Sicariis* (Cicero, *pro Vareno*, Fragm. 6), we read (*pro Roscio Amerino*, 32. 90) of those 'qui inter sicarios et de veneficiis accusabant', and that the *quaestio* is, I think, invariably described in Cicero as 'inter

'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.

citizens living there be subject to the laws of Chios.' It was not safe, however, to exercise such powers in criminal matters. If the Free State took its rights too seriously it fell under the danger of political action on the part of the Roman Government. Suetonius[1] tells us that Tiberius deprived of their freedom the Cyzicenes 'in cives Romanos quaedam violentius ausis'. If the authorities of Cyzicus had been wise, they would simply have arrested the criminals and sent them to Rome, as Festus remitted St. Paul, and Pliny[2] the Roman citizens accused of Christianity; and we may be sure that whenever this occurred, the jurisdiction of the Roman courts would be stretched to meet the case.

The more serious difficulty, however, and that which we set out to solve, is the case of murders in the Italian municipalities. Let us first see how Mommsen would define the limits of Roman jurisdiction, and how he would interpret the quotation in the *Collatio*:

'Although the offences of *majestas*, *peculatus*, and *ambitus*, 'so far as they relate to the Roman community, can never 'be dealt with by a municipal court, yet there is no lack of 'proceedings for municipal *peculatus* and *ambitus*, and certain 'cases, likewise of treason,[3] imply corresponding proceedings 'under the local regulations. Further, Sulla's Law against 'murder limits the competence of the central court to offences 'committed in the city of Rome and within a mile of its 'bounds: this implies as its necessary supplement a similar 'court of justice for each municipal territory. The same 'limitation is applicable to *falsum*, *vis*,[4] kidnapping, aggra-

[1] Suetonius, *Tiberius*, 37.

[2] See above, Vol. I, p. 124.

[3] Possibly 'loca vel templa occupare', or falsification of public documents (*Digest*, XLVIII. 4. 1 and 2).

[4] Yet Cicero gives no hint that Milo would have been tried at Bovillae, or elsewhere than in Rome, had the case been left, as he

'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.

on appeal, as in the *judicium populi* at Rome. On the other hand, there is the case of Oppianicus,[1] whom 'tabulas publicas Larini censorias corrupisse decuriones universi judicaverunt'. If *judicaverunt* be taken to mean a condemnation in a regular criminal trial, it would seem to follow that the appeal from a magistrate at Larinum, as certainly in later days at Malaga,[2] was to the local senate rather than to the popular assembly. If the same were the case at Furfo, *fifeltares* must mean *decuriones* rather than *municipes*. I think, however, that the conclusion is not necessary, and that when the decurions of Larinum are said *judicavisse*, this may only imply a vote of censure[3] directed against a man who had evaded the jurisdiction of the *municipium* and could not be put on his trial.

Though a negative is hard to prove, we may well take it on Mommsen's word[4] 'that there is a want of any evidence for the transference of the procedure by way of *quaestiones* to the municipal towns'. So far as we can judge, the municipal *publicum judicium* is either an appeal from the sentence of a magistrate (such as we saw in the case of Furfo), or else an action, in the interests of the People,[5] but under the forms of private law, to recover in the ordinary civil courts the sum in which the defendant has become, by his offence, indebted to the community.[6]

[1] Cicero, *pro Cluentio*, 14. 41. See also 44. 125 'qui tabulas publicas municipii manu sua corrupisse judicatus sit'.

[2] 'De ea (multa) decurionum conscriptorumve judicium esto,' *Lex Malacitana*, chap. LXVI; Bruns, *Fontes*[7], p. 155.

[3] The same word is used of an expression of opinion by the Roman senate: 'At enim senatus universus judicavit illud corruptum esse judicium.' Cicero, *pro Cluentio*, 49. 136.

[4] *Strafrecht*, p. 227. [5] See above, Vol. I, p. 180, note 2.

[6] In the *lex Tarentina*, verses 5 and 31, we find (Bruns, *Fontes*[7], p. 120) the 'dare damnas esto', which, as we have seen above (Vol. I, p. 179, note 4), leads up to such a suit; true, the word *multa*

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.

'the court of the capital was no longer qualified to go 'beyond banishment outside of Italy. This punishment, 'itself the most important point in which the *judicium* '*publicum* exceeded under Sulla's regulations the power of 'the earlier private suit, could find its application in the 'municipal procedure at most as banishment out of the local 'territory.'

I think that if we look into the matter more closely, it will be seen that this solution must necessarily be discarded. The *lex Julia municipalis* excludes from office any one who has been 'condemned in a *publicum judicium* at Rome, which prohibits his remaining in Italy'. But when it comes to a municipal condemnation there is an important limitation. The disqualification is to take effect only if the condemnation be in the particular borough to which he belongs ('in eo municipio, quoius erit').[1] Now if, as I conjecture, the action of the municipal courts were confined to petty cases or to cases of merely local concern, to bribery, for instance, at their own elections, or transgression of their by-laws about building, such as we have seen punished in this way by the Law of Tarentum,[2] we can understand that it might make some difference whether the candidate were suing for office amongst the very people whom he had offended, or amongst those who had no special interest in his former misdemeanours. In the latter case his condemnation might be more easily ignored than if he

[1] See above, p. 145.

[2] See above, Vol. I, p. 180. The more serious case, also mentioned in the Tarentine Law, of malversation of the public funds, would hit the condemned man under another provision of the *lex Julia municipalis* (verse 110): 'quei furtei quod ipse fecerit condemnatus pactusve erit.' In the following verses of the *lex Julia* various other disgraceful condemnations, without any limit as to locality, are brought under the same ban.

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.

We may perhaps go further and hazard a reasonable conjecture as to the nature of the difference in procedure prescribed in the two chapters respectively. We should naturally look for an analogy in the relations between the Roman and the local tribunal in civil suits. In the *lex Rubria*[1] the defendant who has confessed or has failed to enter into a proper defence before the municipal magistrate is to incur the same consequences as if his default had been made before the praetor at Rome, and the said praetor and *no one else* is to proceed to the seizure of his property and person. Surely the same principle is applicable to 'capital' charges. There would be every convenience in making the first steps of the procedure take place without delay in the town where the murder had been committed. There is no evidence that the local magistrate had power to deal with them finally himself; but what was to prevent his using the same power which he exercises in civil suits, and undertaking the preliminary formalities? His reception of the accusation and summons to the defendant might well be accorded the same validity as belonged to similar proceedings at Rome, while the serious part of the trial was referred to the praetor and jury in the capital city. The magistrate would probably, like Festus[2] in the case of St. Paul, send a note of the preliminary inquiry to the Roman authorities. My conclusion would be that something like the procedure which I have sketched was enjoined in Sulla's Law *de sicariis* for the cases not covered by the first chapter.

It would always be possible either for the *duovir* of a *municipium* or for the governor of a province, since there

[1] Chap. XXII, Tab. II, verses 42–53 (Bruns, *Fontes*[7], p. 100).

[2] 'For it seemeth to me unreasonable to send a prisoner and not withal to signify the crimes laid against him' (Acts xxv. 27).

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'.

of the *quaestiones*, the provincial governors, the magistrates of the free states, and the mayors of municipal towns, will always be bound to act, when Roman citizens are accused, in the same way—that is to say, they will send or refer defendants on capital charges to Rome, and there they will always find courts competent to deal with their offences.

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*.

those from his pupils and successors, Paulus and Ulpian. Constantine[1] directed that the comments of the two latter on their predecessor should be disregarded, but their original works, especially the *Sententiae* of Paulus, receive full recognition.

When the jurists of the *Digest* end with Charisius, the succession of evidence is taken up by the Codes. These are not like the Code Napoléon or the modern German and Indian Codes, works of original composition, consolidating and throwing into a new shape the results of previous law, and substituting a single continuous ordinance, of which all parts are of equal authority, for the isolated enactments of the past. They are simply transcriptions, collected under convenient headings, of those imperial edicts and decisions which were still to have validity. They performed a modest but doubtless very useful service in weeding out the mass of decrees and setting aside the authority of all not included in the Collection. The earliest of them being the work of private men in the third century, Gregorianus and Hermogenianus, could not properly have even this effect, and only pointed out to advocates and judges what were in practice the laws to which they need pay attention; but the third Code, issued with imperial authority by Theodosius II in A. D. 438; forbids reference for precedent in the law courts to any but the selected decrees.[2] There is no pretence that the Code is self-consistent throughout. The judge is left to pick out for

[1] *Cod. Theod.* I. 4. 1 and I. 4. 3. Justinian, two centuries later, restored the authority of the comments of Ulpian and Paulus (*Cod. Just.* I. 17. 1, § 6).

[2] 'Nullaque (constitutione) extra se quam jam proferri licet, praetermissa,' *Gesta Senatus de Theodosiano publicando*, 4. King Alaric (see below, p. 155) puts the matter more clearly, instructing his minister 'Providere ergo te convenit, ut in foro tuo nulla alia lex neque juris formula proferri vel recipi praesumatur'. See Mommsen's *Prolegomena to the Theodosian Code*, Vol. I, p. xxxiv.

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).

really meant, the *Interpretatio* is our safest guide. Justinian's Code, published twenty-three years later, takes no notice of the *Interpretatio* and gives us only the text of the several decrees.

These ancient 'Codes', if more cumbrous and more puzzling to litigants than the documents which now pass by that name, are far more fruitful to the student, and contain abundant though confused information as to the history and development of the law.

Augustus swept the Republican ordinances into his own legislation and so established the nucleus of a system of law round which the subsequent emperors and the jurists of the principate built up the necessary fabric of deductions and expansions. He doubtless intended the jury courts to last on as part of his own machinery of government; in reality he pronounced their doom when he set up side by side with them courts whose powers were at once wider[1] and more completely in his own control. Such control could be exercised only imperfectly over the jury courts. The emperor now made out the *album judicum* and the task was executed, like all Augustus' practical work, with care and efficiency; but this did not suffice to secure the ideal of a despotism, that is to say, wise and consistent verdicts in all ordinary cases and complete subservience when any affairs of State were in question. The ears of jurymen could not be trusted to be always deaf to personal interests or to appeals to their prejudices or feelings, nor again to be always on the alert to catch the faintest intimations of the pleasure of the master. Intelligence and integrity as regards all but one, coupled with servility towards that one, is a combination hard to attain; and if a jury court

[1] Both senate and emperor have from the first an unlimited jurisdiction, and may inflict what punishment they please.

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

is no record of such a veto having ever been exercised after the time of Nero ; but the influence of the emperor, whether formulated by himself or by those of the senators who were supposed to be in his confidence, was practically decisive. Any important case could be taken up either by the senate or by the emperor at will. A still more effective rival to the jury courts was set up, when Augustus delegated some of his criminal jurisdiction to the *praefectus urbi*. His functions are described by Tacitus as originally those of a police magistrate with very summary powers, which were to be employed in keeping in order the slaves and the turbulent classes in the city.[1] But this jurisdiction rapidly extended, and by the time of Nero it appears as an established alternative to that of the praetor and his jury ; Valerius Ponticus was punished for having brought collusive accusations before the praetor in order to prevent criminals being arraigned by the *praefectus urbi*.[2] From this time the jury courts dwindled, though traces of their existence remain till the end of the second century after Christ. Mommsen[3] notes their final disappearance by a reference to the jurors in a *judicium publicum* in Papinian,[4] the date of whose work falls probably in the earlier years of Septimius Severus, whereas his pupil Paulus, writing some thirty years later under Caracalla or Alexander Severus, says : 'ordo exercendorum publicorum capitalium in usu esse desiit, durante tamen poena legum quum extra ordinem crimina probantur.'[5]

the case : but Tiberius complained that he had not had the opportunity of vetoing the *senatus consultum* (Tacitus, *Annales*, III. 51. 3, and Dio Cassius, LVII. 20. 4).

[1] Tacitus, *Annales*, VI. 11. 3 'qui coerceret servitia et quod civium audacia turbidum'.

[2] In A. D. 61 (Tacitus, *Annales*, XIV. 41. 2).

[3] *Strafrecht*, p. 220, note 5.

[4] Papinian, *Digest*, XLVIII. 1. 13.

[5] Paulus, *Digest*, XLVIII. 1. 8. I should be inclined to explain by

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.

ordinem cognoscant', and Ulpian[1] tells us that *generaliter placet*, that the *praefecti* or *praesides* 'qui extra ordinem cognoscunt' are to bring to bear their *extraordinaria coercitio* on those whose poverty makes a pecuniary penalty illusory. Another passage of Ulpian[2] brings out the connexion very strongly; after laying it down that 'si crimen expilatae hereditatis intendatur, praeses provinciae cognitionem suam accommodare debet', he proceeds to explain that for technical reasons this offence will not fall under the *actio furti*, and therefore claims treatment *extra ordinem*.

The power thus exercised is of a very elastic and arbitrary character. The penalty prescribed by law is indeed said to be still alive. Paulus, for instance, in the passage quoted above[3] respecting the desuetude of the jury courts, adds 'durante tamen poena legum, quum extra ordinem crimina probantur';[4] but the legal penalty may be either alleviated or aggravated at the discretion of the judge: 'hodie', says Ulpian,[5] 'licet ei, qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, vel graviorem vel leviorem, ita tamen ut in utroque moderationem non excedat.' Marcianus,[6] in like manner, instead of defining the limits of the power of the judge, gives us what is little more than a sermon on tempering justice with mercy. All ordinary

[1] Ulpian, *Digest*, XLVIII. 19. 1.

[2] Ibid., XLVII. 19. 2.

[3] See above, p. 158.

[4] Paulus, *Digest*, XLVIII. 1. 8.

[5] Ulpian, *Digest*, XLVIII. 19. 13. Mommsen (*Strafrecht*, p. 195, note 3) is inclined to attribute this extreme licence to the wording of the compiler of the *Digest* in the sixth century rather than to Ulpian himself in the third. This was undoubtedly the goal to which the criminal jurisdiction of the Empire was tending, whether it reached it sooner or later.

[6] Marcianus, circ. 220 A. D., *Digest*, XLVIII. 19. 11.

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

If charges which fall under the head of *crimina publica*, for which definite punishments are prescribed by the law, can be treated under such elastic rules, it may seem superfluous to have a separate category of *crimina extraordinaria*. Nevertheless such a category appears in the law-books, and gives its name to a Title[1] in Justinian's *Digest*. Under this head many general offences are mentioned, as defiling water-courses, procuring abortion, regrating food supplies, seduction of minors, false steelyards, and the sweating down of coins; but the most curious and interesting examples are of two local misdemeanours. The first relates to the unlawful cutting of the barriers which contained the water-basins[2] of Egypt, and the destruction of the sycamine trees, whose roots were supposed to bind these earthworks together. Ulpian[3] in the third century lays it down that offenders may be sent to 'public works' or even to the mines. Theodosius II (in A.D. 409) goes further and threatens burning alive to any one who diverts the Nile water before

Sulla, from *Revue Pénale Suisse*, 1896, p. 31 seq.) points out that by Sulla's Law intent is everything, and the intent is the same whether the slayer acts from passion or deliberation. On the other hand, even the grossest cases of carelessness or wantonness do not fall under the Cornelian Law if there were no intention to kill.

[1] *Digest*, XLVII. 11. I do not find any clear definition of *crimina extraordinaria* in the ancient text, and modern writers commonly hover round the question without meeting it. I can only give for what it is worth Rein's account (*Criminalrecht*, p. 108), that 'they got their name not from any fresh jurisdiction, penalty, or order of procedure, but are called *extraordinaria* because they were not originally regarded as offences, or at least not as criminal misdemeanours'. See Macer, *Digest*, XLVII. 14. 2 'Abigeatus crimen publici judicii non est, quia furtum magis est. Sed quia plerumque abigei et ferro utuntur, ideo graviter et puniri eorum admissum solet.'

[2] The method of irrigation by water-basins has continued in Upper Egypt to our own day, but since the British occupation has been supplanted by the more scientific system of canals, which had long been employed in the Delta.

[3] Ulpian, *Digest*, XLVII. 11. 10.

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.'

for any sort of misbehaviour may be brought under the definition.

The new system did not exclude the accusation of a private prosecutor, though this was no longer, as in the days of the *quaestiones perpetuae*, the necessary preliminary of a criminal trial. The essential part of a formal accusation is the *inscriptio*,[1] by signing which the prosecutor becomes liable to the penalties prescribed for the false accuser or for the faithless deserter of the action. It was invented, says Ulpian,[2] 'in order that men may not bring charges precipitately, when they know that the accusation may render them liable to punishment.' Anything short of *inscriptio* is the work rather of an informer than of an accuser; and in some cases a summons is to be refused to such information, until the party 'has signed with trembling pen the bond which shall pledge him to the liability of corresponding penalties'.[3] Sometimes the accuser is to be the subject of the same form of detention as the accused.[4] Honorius and Theodosius II are the authors[5] of a strange edict, directed against professional informers. On the one hand they say that no action is to be commenced without a *delator*, and on the other that though such a *delator* may safely bring one charge, his second or third victory is to involve his own punishment. In trials for *majestas*, not only the accused, but the prosecutor who fails to sustain the charge, may be put to the torture.[6]

[1] 'Subeat inscriptionis vinculum' . . . 'sciat sibi impendere congruam poenam,' etc. (*Cod. Theod.* IX. 1. 11). Mere verbal *professio*, without *inscriptio*, binds no one and is to be simply ignored (*Cod. Theod.* IX. 1. 5): 'convicium non est pro accusatione habendum,' says the *Interpretatio*.

[2] Ulpian, *Digest*, XLVIII. 2. 7.

[3] Theodosius I and Gratian in A. D. 380 (*Cod. Theod.* IX. 2. 3).

[4] Honorius and Theodosius II in A. D. 423 (*Cod. Theod.* IX. 1. 19).

[5] In A. D. 418 (*Cod. Theod.* X. 10. 28).

[6] Constantine in A. D. 314 (*Cod. Theod.* IX. 5. 1).

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.

The question is much more doubtful as regards the *praeses* or governor of the province into whose hands falls, with the absorption of the *peregrinae civitates*, the whole jurisdiction, civil and criminal, outside Italy. He is the *ordinarius judex* to whose *cognitio* belong all appeals from the lesser judges (*pedanei judices*) and from the magistrates of the municipal towns.[1] In tracing the source of his powers, we find that the greatest obscurity gathers round the phrase *jus gladii*. Papinian tells us[2] that the right of a magistrate to delegate his power to a substitute holds only in respect of powers which belong to him by virtue of his office ('quae jure magistratus competunt') in distinction from those which 'specialiter vel lege vel senatus consulto vel constitutione principum tribuuntur', and which cannot be delegated by the recipient to an inferior; lower down in the same paragraph we find this specified of the higher criminal justice 'merum imperium quod lege datur non potest transire', and so never accrues to a legate. The same doctrine is repeated by Ulpian[3] with the substitution for *merum imperium* of the phrase *gladii potestatem sibi datam*. The two are clearly identical, for in another passage of Ulpian[4] *merum imperium* is defined as 'habere gladii potestatem ad animadvertendum in facinorosos homines'. Now Mommsen[5] believes that this power was always delegated by the emperor. This doctrine appears to me very doubtful. Ulpian seems to

[1] Valentinian, *Cod. Theod.* XI. 31. 3; quoted below, p. 194, note 2. For the phrase *ordinarius judex* in this sense see also *Cod. Theod.* I. 16. 5; IX. 40. 15; XI. 30. 25. The *praefectus Augustalis* of Egypt has under his supervision several 'provinces', and each has its *ordinarius judex*, on whose conduct the prefect is to report to the emperor. *Cod. Theod.* I. 14. 2.

[2] Papinian, *Digest*, I. 21. 1. [3] Ulpian, *Digest*, I. 16. 6.

[4] Ulpian, *Digest*, II. 1. 3. See above, Vol. I, p. 102.

[5] Mommsen, *Strafrecht*, p. 243

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 fidei-commissarius*.[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.

Dio's statements enable us to trace the gradual severance of military from civil authority. In Tiberius' reign we find the senatorial proconsul of Africa[1] decimating a cohort for misbehaviour in the face of the enemy. This is, of course, in flat contradiction of the doctrine laid down by Dio Cassius. Dio, though he commits an anachronism in ascribing to Augustus what is really of later date, doubtless correctly expresses the practice of his own time. Diocletian separated the military and civil functions more completely. In the time of Constantius we find that the soldier is answerable only to his own court martial for all criminal acts,[2] and all such cases appear to fall under the ultimate control of the *magister militum*.[3]

Outside the passages which I have quoted from the *Digest* the references to the *jus gladii* are few and slight, and consist chiefly of casual descriptions of the higher provincial commands[4] or notices of equestrian officers on whom the right, properly belonging to a higher grade, had been specially conferred.[5] In such special cases the *jus gladii* was doubtless given by delegation from the Emperor. There is no evidence as to whence the *praeses* got his standing authority except Papinian's words *quod lege datur*, and his other phrase 'vel lege vel senatus consulto vel constitutione principum'. The conclusion would be that the power was attached once for all to the office of governor by definite legislative action, most likely, as Papinian is describing the situation in the second century, by a decree of the Senate.

[1] Apronius, Tacitus, *Annales*, III. 21. 1.

[2] In A. D. 355 (*Cod. Theod.* II. 1, 2, quoted above, p. 159, note 2).

[3] 'Sub te, sive civiliter sive criminaliter appetuntur, eos litigare debere' (Honorius and Theodosius II in A. D. 414, *Cod. Theod.* I. 7. 4).

[4] So I should interpret Historia Augusta, *Alexander Severus*, chap. 49 'Honores juris gladii nunquam vendi passus est, dicens necesse esse ut qui emit et vendat'.

[5] See instances in Mommsen's *Strafrecht*, p. 244, note 3.

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.

It had been one of the characteristic features of the Graeco-Roman civilization that every State, so far as its power went, divided the human race into two species, the privileged citizen and the non-privileged alien. In Republican Rome, as we have seen in a former chapter,[1] this division enters with far-reaching consequences into the administration of the criminal law. This dichotomy disappears so soon as Rome has become the one city of all civilized men. But almost immediately a new distinction comes to light. The citizens are no longer equal in the sight of the law. The difference may perhaps best be illustrated by a quotation from Paulus[2] about the law on kidnapping (*lex Fabia de plagiariis*): 'formerly the penalty under this law was pecuniary; but the jurisdiction has been transferred to the Prefect of the City, and it likewise demands extraordinary punishment administered by the provincial governor. And so mean persons are sent to the mines or crucified, persons of rank (*honestiores*) forfeit half their goods and are banished for life.' The same contrast meets us on almost every page of the later criminal law.

The *honestiores* include,[3] first, great dignitaries (*illustres*) and senators (*clarissimi*), then officials of the equestrian rank (*perfectissimi*, *eminentissimi*, and *egregii*), who are all included in general phrases such as *honorati*,[4] *in aliquo honore positi*, next soldiers and veterans (so far that they

[1] See above, Vol. I, pp. 109 and 126.

[2] See *Collatio*, XIV. 2. 2.

[3] For details and references see Mommsen, *Strafrecht*, p. 1033 seq.

[4] This word is used both in a narrower and a wider sense. The 'honorati seu civilium seu militarium dignitatum', to whom Theodosius I (*Cod. Theod.* XIV. 12. 1) gives the right of driving in two-horse chariots through the streets of Constantinople, are obviously great personages. On the other hand, the Visigothic *Interpretatio* of the Theodosian Code explains *honorati provinciarum* as 'id est ex curiae corpore' (*Cod. Theod.* I. 20. 1).

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).

on this matter. In A. D. 380 he commands[1] that the whole *ordo curialis* is to be freed *ab ictibus plumbatarum*, and in A.D. 381[2] all judges and rulers of provinces are to know that no one of the *principales* or *decuriones* is to be subjected to the *plumbata* for any fault or error whatsoever. The judge who dares to do such a thing is not only to be fined, but 'perpetua infamia inustus ne speciali quidem rescripto notam eluere mereatur'. Six years later, forgetful of all this, he writes[3] to the Prefect of the Praetorium, 'Whoever of the *principales* or decurions shall be found embezzling public funds or making fraudulent entries or exacting money immoderately, is to be subjected to lashes of the *plumbata*, and that not only by yourselves, to whom on account of your high place the State is committed, but by the *ordinarii judices*' (provincial governors). The climax of childishness is reached, however, in another edict of the same emperor,[4] which makes it their privilege that they are not to be flogged unless they deserve it—'quod caedi decuriones innoxios non liceret'.

The same wavering appears in the matter of torture. Excepting in the charge of *majestas*, which levels all distinctions, Valentinian forbids torture for the *honestiores*, but in spite of this generality, in the very same decree[5] he allows it for those who are shown to have forged imperial rescripts, partially reverting thereby to a law of Constantine,[6] which deprived the decurions of their privilege in all cases of forgery. Constantius[7] prescribes the torture of any member of the imperial household who practises magical arts, 'prae-

[1] *Cod. Theod.* XII. 1. 80. [2] *Cod. Theod.* XII. 1. 85.
[3] In A. D. 387 (*Cod. Theod.* XII. 1. 117).
[4] In A. D. 385 (*Cod. Theod.* IX. 1. 15).
[5] *Cod. Theod.* IX. 35. 1.
[6] In A. D. 316 (*Cod. Theod.* IX. 19. 1).
[7] In A. D. 358 (*Cod. Theod.* IX. 16. 6).

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.

Digest, most of whom belong to the latter part of the second and the beginning of the third century, was to reserve the more cruel forms of death for the lower orders; and decurions may not be crucified or burned alive,[1] any more than they may be condemned to the mines, but the governor is to refer such cases to the pleasure of the emperor. It is possible that this immunity continues in the period [2] covered by the Theodosian Code, and that in the numerous cases where laws of the later emperors prescribe burning, the alternative for privileged persons is simple decapitation by the sword. Such is probably the interpretation of Constantine's edict [3] against those who sell coins at rates different from their face value—' aut capite puniri, aut flammis tradi, aut alia poena mortifera.' In many of the threats of burning, which Constantine and his successors fulminate, the context shows that the offenders were mean persons.[4] In one case, however, that of the emperor's procurators, who are certainly among the *honestiores*, Constantine orders them to be publicly burned if they oppress the provincials.[5] In some other instances, those of compassing a barbarian invasion,[6] of incestuous marriage,[7] of sodomy,[8] and of uttering false coin,[9] the extreme penalty is prescribed without

[1] Ulpian, *Digest*, XLVIII. 19. 9. § 11.

[2] i. e. from Constantine to Theodosius II, A.D. 330–438.

[3] *Cod. Theod.* IX. 22. 1.

[4] As farm-bailiffs harbouring brigands (Theodosius I, *Cod. Theod.* IX. 29. 2); haruspices practising their arts in private houses (Constantine, *Cod. Theod.* IX. 16. 1); self-mutilators to avoid conscription (Valentinian, *Cod. Theod.* VII. 13. 5); Jews persecuting converts (Constantine, *Cod. Just.* I. 9. 3); slaves who aid in abductions, and nurses who corrupt their charges; these last are to have molten lead poured down their throats (Constantine, *Cod. Theod.* IX. 24. 1).

[5] Constantine, *Cod. Theod.* X. 4. 1.

[6] Constantine, *Cod. Theod.* VII. 1. 1.

[7] Constantius, *Cod. Theod.* XI. 36. 4, and Arcadius, *Cod. Theod.* III. 12. 3.

[8] Theodosius I, *Cod. Theod.* IX. 7. 6.

[9] Constantius, *Cod. Theod.* IX. 21. 5.

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.

CHAPTER XX

APPEALS UNDER THE PRINCIPATE

STRICT Republican usage distinguished between *Provocatio* and *Appellatio*. The first is the privilege assured to the burgess by the Valerian Law, that he may bring his claim for mercy to the bar of the Populus Romanus. The second is the consequence of the multiplication of magistrates, and is the process by which a colleague or a tribune is entreated to interpose his protective authority for the private man against magisterial acts. Livy[1] is absolutely correct when he makes Fabius say 'tribunos plebis appello et provoco ad populum'. The two phrases are, however, sometimes confused, as we have seen when discussing the doctrine laid down by Cicero in the *de Legibus*[2], 'Ni par majorve potestas populusve prohibessit, ad quos provocatio esto.'

As the *princeps* is a magistrate, and the *major collega* of all other magistrates, a request for intervention addressed to him would properly be called *appellatio*. But by the beginning of the third century a more absolutist theory, unknown to the principate of Augustus, had come to prevail. Ulpian tells us[3] that the Roman People 'has by a law conferred on the emperor all its own power'; and it is not unnatural that in this, as in other spheres, the emperor should come to take the place of the People as the ultimate authority. So the phrase of the *lex Julia de vi publica* is

[1] Livy, VIII. 33. 7.
[2] See above, Vol. I, p. 115, note 3.
[3] Ulpian, *Digest*, I. 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.

actually put to death without the emperor's consent. But it makes some difference, as a matter of law, whether he be entitled to decline altogether the jurisdiction of his judge, as St. Paul did that of Festus, and demand to be sent to Rome for trial, or whether, as in the case quoted at the end of the last chapter from Modestinus, the judge may try the man, but, while the case is pending, must consult the emperor before sentencing him, or again, whether a valid sentence may be pronounced by the judge, but subject to the right of the condemned man to appeal against the execution of the sentence. The two last are frequently opposed one to the other, as for instance by Ulpian,[1] 'quid si appellationem ejus praeses non recipit, sed imperatori scribendo poenam remoratus est?' and in a decree of Constantine,[2] who instructs the judge, 'ne occupationes nostras interrumpas,' not lightly to consult the emperor, 'quum litigatoribus legitimum remaneat arbitrium a sententia provocandi.' Sometimes we find judges, who feared that their dignity might be impugned by appeal, trying to forestall such appeal by previous *consultatio*;[3] sometimes *supplicatio* is attempted by a party 'qui licitam provocationem omiserit'. This is declared by Constantine[4] to be 'impudent', and is to be punished by deportation; the jurist Macer had laid it down a century before that a dilatory plea on the ground 'se libellum dedisse principi et sacrum rescriptum expectare,'[5] is not to be admitted.

We hear of the denial of lesser jurisdiction chiefly in the case of senators. Homage had long been done to the theory,

[1] Ulpian, *Digest*, XXVIII. 3. 6, § 9.

[2] *Cod. Theod.* XI. 29. 1.

[3] *Cod. Theod.* XI. 30. 13, and in civil cases, ibid. I. 5. 4 'qui provocationem vitantes sub praetextu relationis differunt causas.'

[4] In A. D. 331 (*Cod. Theod.* XI. 30. 17).

[5] Macer, *Digest*, XLIX. 5. 4.

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).

recites and repeals an ordinance of his own forbidding the appeal of a *clarissimus*[1] from the sentence of the Urban Prefect. He now decrees 'ut vetustatis auctoritas et appellandi facultas repetatur'.[2] Valentinian and Valens, in A. D. 366, directed the *praefectus urbi* that in all grave cases 'nostra potissimum explorarentur arbitria'.[3] In A. D. 376 Valens and his colleagues order that when a senator is accused the provincial governor is only to collect evidence and send a report to Rome. There the case is to be tried before one of the great prefects and five of the principal senators chosen by lot.[4] This *quinquevirale judicium* is the last relic of trial by jury. The method is still prescribed at the end of the reign of Honorius,[5] who lays special stress on the observance of the lot, 'ne de capite atque innocentia, alterius judicio electi, judicent;' after this we hear no more of it. Theodosius II directs[6] that the cases of *illustres* shall be referred to himself, whereas those *minore dignitate decorati* may be dealt with by the praetorian prefect. The last edict on the trial of senators, included in the Code of Justinian, is in A.D. 485, from the emperor Zeno,[7] who goes back to the earlier system of Valentinian, and, while assigning the trial to a duly appointed *cognitor*, reserves the final confirmation of the sentence to the emperor himself.[8]

[1] Every senator is necessarily *clarissimus*; in the fifth century the title is given to others likewise. See *Cod. Theod.* XVI. 5. 52.

[2] *Cod. Theod.* XI. 30. 23. [3] *Cod. Theod.* IX. 40. 10.

[4] *Cod. Theod.* IX. 1. 13.

[5] In A. D. 423 (*Cod. Theod.* II. 1. 12).

[6] In A. D. 442 (*Cod. Just.* XII. 1. 16). [7] *Cod. Just.* III. 24. 3.

[8] Mommsen (*Strafrecht*, p. 358, note 1) seems to think that, subsequently to the publication of his Code, Justinian in A.D. 538 (by Novella, 69. § 1) reverted after two centuries to the regulation of Constantine. In this edict the principle of the *forum delicti* is emphasized in very ample terms, sufficient perhaps to cover all private suits. The examples are chiefly cases of petty larceny, which would not be likely to affect senators, about whom nothing is expressly

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.

commands explicitly that 'both in civil cases and in criminal, in which the fate of a man's life and safety is involved, all judges must admit appeals and not refuse utterance to those under sentence'; and the same is repeated[1] three years later with the threat of heavy fine for the judge who refuses; Valentinian[2] pronounces similar penalties for 'whatsoever judge in defiance of the prescriptions of the law ignores appeals'. Thirty-five years later[3] Arcadius and Honorius establish the right in words which vainly strive to imitate the free Republic—'If any one desires by lodging an appeal to avoid the sentence of a judge whom he impugns, let him have all freedom in utterance, and not fear the rebukes of the judges'; and again—'Know all men that from capital punishment and loss of goods the right of appeal is granted.'

But soon ominous limitations come in sight. As early as Marcianus[4] we find that a simple appeal is not sufficient to compel the judge to grant the *dimissorias literas* to the emperor; the defendant must show that he has pressed his claim earnestly and often; a little later Modestinus[5] denies appeal to 'notable brigands or ringleaders in sedition', and in course of time numerous loopholes are found for evasion.[6] Arcadius and Honorius[7] forbid under penal-

[1] *Cod. Theod.* XI. 30. 22 and 25 (of *judex ordinarius*).

[2] In A. D. 364 (*Cod. Theod.* XI. 30. 33).

[3] In A. D. 399 (*Cod. Theod.* XI. 30. 58).

[4] Circ. A. D. 220 (*Digest*, XLIX. 6. 2).

[5] Circ. A. D. 240 (*Digest*, XLIX. 1. 16).

[6] At first sight we seem to have a very wide one, when appeal is granted only 'si tempora suffragantur' (*Cod. Theod.* IX. 40. 16), which would naturally mean 'if the circumstances permit'. But taking into account the phrase 'etiam tempore provocationis emenso' lower down in the same decree, and the words 'pareat appellator temporibus' in *Cod. Theod.* XI. 30. 67, it seems as if Geib's interpretation, 'if the appeal is made within the legal time', should be admitted. See Geib, *Römischer Criminalprocess*, p. 687.

[7] In A. D. 392 (*Cod. Theod.* IX. 40. 15).

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.

interests of the Treasury,' and next year [1] he forbad appeals in Treasury cases altogether.

On the whole, the judge must have had a hard task in deciding when he ought and when he ought not to allow an appeal. In the year A. D. 339 Constantius [2] rebukes a proconsul for allowing in cases of adultery or incest appeals 'intended for purposes of delay by those who wish to prolong their lives', and instructs him 'to put the law in execution on them at once'. In the last year, however, of his reign [3] he is still more severe on another judge, who has taken in its plain sense the decree of Constantine quoted above [4] in case of 'violence', and has actually put culprits to death on the strength of it; 'whereas,' says the emperor, 'my father, the merciful author of the law, explained the word *plectantur* in other decrees, and the accused ought only to have suffered confiscation of half his goods or deportation.'

Another complication arises regarding the rescripts of the emperor. One would have thought that under an absolute monarchy the judge would have been safe in obeying them; but such safety was by no means assured to him. Constantine instructs him [5] that 'contra jus rescripta non valeant', and if the grant be one of immunity from taxation, Theodosius I orders [6] that the accountants (*tabularii*) of the local states are to be burned alive if they maliciously

[1] *Cod. Theod.* XI. 36. 12. [2] *Cod. Theod.* XI. 36. 4.

[3] In A. D. 361 (*Cod. Theod.* XI. 36. 14).

[4] *Cod. Theod.* IX. 10. 1 (see above, p. 183). The language of that decree is quite explicit, and does not really turn on the sense of the word *plectantur*. It says, 'non jam relegatione aut deportatione insulae plectatur, sed supplicium capitale excipiat, nec interposita provocatione sententiam quae in eum fuerit suspendat', but it would have been of little use to 'argue with the master of so many legions'. [5] *Cod. Theod.* I. 2. 2.

[6] In A. D. 383 (*Cod. Theod.* XIII. 10. 8).

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).

ruin him, some infringement of these contradictory orders in the matter of appeals and rescripts could inevitably be alleged against him. On the other hand, he could hardly fail in finding somewhere a reasonable plea of exculpation. It is a picture of arbitrary power of the judge corrected by equally arbitrary censure of the use made of that power.

Even minor agents may be entangled in the net. The *praeses* is surrounded by a staff of persons known as his *officium*.[1] Six hundred of them are allowed to the *Comes Orientis*[2] and four hundred to the proconsul of Africa.[3] These are clerks,[4] tax-collectors, and beadles. *Apparitor* or *officialis* are the most frequent phrases when one is named in the singular. They are assumed to be mere subordinates, liable to flogging at the command of the *judex*,[5] and are specially debarred from *provocatio* against the sentences of their own chief.[6] Nevertheless great power of obstruction seems to lie with them, and they are held responsible accordingly. There are endless instances of fines to be levied on the *officium* when their chief misconducts himself 'nisi deferentibus illicita et ambientibus obviaverint',[7] 'si fortasse conticuit,'[8] 'nisi huic pertinaciter restiterit, atque actis contradixerit et quid jure sit constitutum ostenderit';[9] but sometimes severer punishments

[1] The word is used in this sense as early as Marcus Aurelius (*Digest*, XLVIII. 18. 1. § 27), but is much more frequent in the period covered by the Theodosian Code.

[2] *Cod. Theod.* I. 13. 1. [3] *Cod. Theod.* I. 12. 6.

[4] 'Breves omnium negotiorum, ab officio tuo descripti, commeent ad scrinia eminentissimae praefecturae,' *Cod. Theod.* I. 16. 3 and XI. 30. 4 'Officii cura est ut omnes omnino appellationes sollenniter curet accipere.'

[5] Honorius and Theodosius II in A. D. 408 (*Cod. Just.* I. 40. 12).

[6] Valentinian and Valens in A. D. 370 (*Cod. Theod.* XI. 36. 17).

[7] Arcadius and Honorius in A. D. 400 (*Cod. Theod.* I. 12. 8).

[8] Theodosius I in A. D. 385 (*Cod. Theod.* IX. 1. 15).

[9] Arcadius and Honorius in A. D. 399 (*Cod. Theod.* XI. 30. 58).

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.

ordered, 'ne quis reum vinciat, impediatve quominus Romae intra certum tempus adsit.' Ulpian quotes[1] from a rescript of the *Divi Fratres* (Marcus Aurelius and Lucius Verus), which ordains that, while in pecuniary cases, even where ignominy attaches to condemnation, the parties are allowed to appear by proxy, this is not admitted where death or exile is the penalty, 'sed ipsum adesse auditorio debere sciendum est.' The same emperors[2] deal with the case of the man 'qui appellationis causa peregrinatur', and some sixty years later Alexander Severus forbids any one to bar the way to his presence.[3] But the personal appearance before the emperor seems hopelessly inconsistent with a prescription of Ulpian, the contemporary of Alexander; after allowing appeal in the case of a man sentenced to deportation, although the emperor has already assigned him an island, he continues[4]: 'the same principle applies in the case of a decurion, whom the governor must not punish himself, but must put him in prison and write to the emperor about his punishment.' Ulpian has rightly remarked that there is some fear that the governor may have prejudiced the case by false assertions to the emperor, and that therefore the culprit should not be precluded from appeal. But if he be not sent to Rome (and of this there is no hint), but detained in prison by the governor, he must necessarily be allowed to appear by proxy; else how is his plea to be brought to the hearing of the Chief of the State? Again, how is the *carcer* consistent with the doctrine of the same jurist,[5] that pending appeal the accused must be treated as an innocent man, 'neque vincula patietur neque ullam aliam

[1] Ulpian, *Digest*, XLIX. 9. 1. [2] *Digest*, XLIX. 11. 1.

[3] ἀποφράττειν αὐτοῖς τὴν δεῦρο ἄνοδον. Quoted by Paulus in *Digest*, XLIX. 1. 25.

[4] *Digest*, XLIX. 4. 1. [5] Ulpian, *Digest*, XLIX. 7. 1. § 3.

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).

Pliny tells us how his presence was required for the occasion by Trajan to assist at the trial of a centurion for seducing the wife of his superior officer.[1] The change comes with Hadrian, who has a standing court consisting partly of the greatest personages in the realm, partly of jurisconsults chosen both from the senatorial and equestrian orders.[2] We never hear of the *praefectus urbi* in connexion with this court, but in it the *praefectus praetorio* soon comes to hold a prominent place.[3] Mommsen[4] conjectures with much probability that the habit of sending prisoners to Rome and keeping them *militari custodia*[5] would bring them under the control of the adjutant-general, and that the initiative in criminal trials thus gradually accrued to him. We often hear of two or more *praefecti praetorio* being in office simultaneously, and by the beginning of the third century one of the posts is generally filled by a jurist; Papinian, Paulus, and Ulpian were all *praefecti praetorio*,[6] and in later years the military duties of the office fell into the background.

The decisions of the *princeps* were undoubtedly largely influenced by the opinion of these his expert advisers, and this was especially the case when he was called upon to hear appeals from inferior judges; but there are cases in which the personal judgement of the emperor seems to be clearly indicated. Ulpius Marcellus gives us a graphic picture of

[1] Pliny, *Epistolae*, VI. 31. 4 seq.

[2] Mommsen, *Staatsrecht*, II³, p. 990.

[3] At least as early as Marcus Aurelius, 'habuit secum praefectos quorum ex auctoritate et periculo semper jura dictavit,' Historia Augusta, *Marcus*, 11.

[4] *Strafrecht*, p. 267.

[5] We find this kind of imprisonment mentioned as early as the reign of Tiberius (Tacitus, *Annales*, III. 22. 5). In Nero's time St. Paul in Rome lived with 'a soldier that kept him', Acts xxviii. 16.

[6] Historia Augusta, *Percennius Niger*, 7. Paulus and Ulpian had served in the *consilium* of Papinian.

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.'

in the emperor's court, but soon he, no less than the *praefectus urbi*, is seen with a court of his own, and the jurisdiction of the two is divided locally. In cases of kidnapping, for instance, Ulpian tells [1] us that if the wrong be committed within the hundredth milestone, the prefect of the city has sole cognizance, if beyond that limit, the prefect of the *praetorium*. More than a century later we get a hint of the same division in a decree [2] of Constantius, that the appeals from Sicily, Sardinia, and the greater part of Italy (Campania, Bruttii, Picenum, Aemilia, Venetia) are to go to the *praefecti praetorio*, and that the *praefectus urbi* has been informed by imperial ordinance that he is to refrain from receiving such appeals in future. Strangely enough, four years later we find that appeals from Bithynia, Lydia, and some other Eastern provinces are referred to the *praefectus urbi*.[3]

The continuous appellate jurisdiction of the city prefect is abundantly attested by rescripts addressed to him. Constantine forbids inferior judges to refer matters to the emperor's grace, but 'gravitatis tuae,[4] cui nostram vicem commisimus, sacrum auditorium expectari'. Constantius in almost the same words informs the prefect [5] that appeals from the decisions *inter privatos* of his *rationales* (or procurators) are to come not to the emperor's knowledge, but 'ad auditorium gravitatis tuae, cui ad vicem nostram delata

[1] *Collatio*, XIV. 3. 2.

[2] In A. D. 357 (*Cod. Theod.* XI. 30. 27).

[3] Constantius in A. D. 361 (*Cod. Theod.* I. 6. 1). It is not clear, however, whether the reference is to the governor of the elder Rome or to his colleague who rules at Constantinople.

[4] Constantine *ad Julianum praefectum urbi* in A. D. 326 (*Cod. Theod.* XI. 30. 13).

[5] In A. D. 339 (*Cod. Theod.* XI. 30. 18). It is possible that this decree is misdated and really belongs to Constantine. See Mommsen's note, ad loc.

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).

the meaning of such phrases as *auditorium sacrum, sacra vice, sacrum nostri numinis judicium.* The natural meaning of the words as they stand would be that the officer possessed of these attributes takes the place of the emperor and that the judgement thus given is unassailable. That the Romans themselves were conscious that inappellability ought properly to be bound up with the grant of such powers, is indicated by the circumstance that Constantine[1] speaks as if the terms were not properly applicable to any one except the *praefecti praetorio*, from whom he allows no appeal. They alone, he says, 'vice sacra cognoscere vere dicendi sunt.' But, generally speaking, the consequence is not drawn. The right to hear appeals from the sentence of a provincial governor[2] is looked upon as, from first to last, an imperial prerogative, a function of the *auditorium sacrum*, and the officer who bears any part in the hearings is said to decide *vice sacra*. This and the other phrases in question may thus be freely applied to the *praefectus urbi* and others, whose decisions are nevertheless subject to appeal. That a person may decide *vice nostra* and yet be appealed against appears very clearly in an edict of Constantine[3] threatening punishment against those 'who, having omitted to appeal, attempt to renew their plea against the sentences of the *comites*[4] and others, *qui vice nostra judicaverint*, affirming that they have been deterred by fear from resorting to appeal. In this matter judgement will be given either by ourselves or by the prefects of the

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

[2] As distinguished from appeals against the inferior courts. The contrast is brought out in the decree, referred to above, p. 166, note 1, which orders that in appeals from municipal magistrates and *pedanei judices* 'disceptatio non auditorii sacri sed ordinariorum judicum cognitione tractanda est' (*Cod. Theod.* XI. 31. 3).

[3] In A. D. 331 (*Cod. Theod.* XI. 34. 1). [4] See below, p. 198.

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.

belongs to the fourth century after Christ, Aurelius Arcadius Charisius.[1] 'It was formerly a moot point,' he says,[2] 'whether it was lawful to appeal from the sentence of the prefects of the *praetorium*, and the law did permit this, and there were recorded instances of those who had so appealed; but finally a decree of the emperor was published by which the power to appeal is denied.' The denial, however, to the vanquished to initiate an appeal as a matter of right does not exclude the possibility that he may be allowed to 'supplicate' as a matter of grace, nor again that the prefect may be instructed to consult the emperor privately before pronouncing. The former practice is recognized by Theodosius II[3] more than a hundred years after the decree of Constantine. The private consultation of the emperor[4] recurs not infrequently in the Code. Constantine says[5] that the complaints against a corrupt judge are to reach the emperor's ears—'praefectis praetorio . . . provincialium nostrorum voces ad nostram scientiam referentibus'; and Theodosius I[6] instructs the prefect 'ad nostrae mansuetudinis scientiam non crimina sed vindicta referatur'. Valentinian and Valens again refer[7] to another edict of Constantine conceding the right of petition to provincial assemblies, and clearly indicate the *praefectus praetorio* as the person through whom the request must come. The petition must not be

[1] See above, p. 153.

[2] Charisius, *Digest*, I. 11. 1.

[3] In A. D. 439 (*Novellae Theod.* XIII). See below, p. 201.

[4] We find it described in an edict of Theodosius II and Valentinian III of A. D. 442. The emperors, appointing a special court to try corrupt *palatini*, add 'erit inlustribus palatinorum judicibus consulendae serenitatis nostrae copia', etc. (*Novellae Valentin.* VII. 2. 3).

[5] In A. D. 331 (*Cod. Just.* I. 40. 3).

[6] Theodosius I and Valentinian II in A. D. 389 (*Cod. Theod.* I. 5. 9).

[7] In A. D. 364 (*Cod. Theod.* XII. 12. 4).

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).

but 'comitivae[1] privatarum sequantur examen'.[2] These *cognitores* then include the *comes rerum privatarum*, intrusion on whose functions by the *praefectus urbi* or by any *vir illustris*[3] among the *judices* is to be checked by a fine levied on his *officium*.[4] The *comes sacrarum largitionum* appears likewise as an appellate judge, and the matters in his court are said 'ad auditorii sacri venire judicium'.[5] If we look back to the two systems of appeal in fiscal cases, as detailed above,[6] we shall see that whereas the *praefectus praetorio* appears in the last stage of the edict of Constantine, it is very difficult to find a place for him in the procedure ordered by Theodosius. But these fiscal cases,[7] perhaps, may be held not to affect the question of purely judicial appeals in criminal matters, or to preclude in this sphere the identification of the *cognitor* with the prefect. In the time of Constantius, the phrase *sacrum auditorium* seems to be used of a court which includes

[1] The *comitiva* appears (in an edict addressed to the quaestor and the Master of the Offices in 416 by Honorius and Theodosius II, *Cod. Theod.* VI. 26. 17) as a large and important office organized in regular grades; its members were doubtless assigned as clerks and assistants to the *comites* of the various departments, as here of the *comes rerum privatarum*. See above, p. 195, note 2.

[2] Theodosius I in A.D. 389 (*Cod. Theod.* XI. 30. 49). See above, p. 193.

[3] The *illustres* were the highest rank of the *clarissimi* and included the praetorian prefect; see above, p. 197, note 3.

[4] Decreed by Honorius and Theodosius II (*Cod. Just.* I. 33. 3). This decree is dated A.D. 414, i.e. two years after the edict of the same emperors (*Cod. Theod.* XI. 30. 64) mentioned at the beginning of this paragraph (p. 197, note 4).

[5] Theodosius I in A. D. 383 (*Cod. Theod.* XI. 30. 40).

[6] Above, pp. 194, 195.

[7] The same may be said of the military cases dealt with (to the exclusion of the praetorian prefect) in a decree of Justinian in A. D. 529 (*Cod. Just.* VII. 62. 38): 'appellationem ex quocunque duce venientem . . . apud magistrum officiorum necnon nostri palatii quaestorem . . . in sacro auditorio . . . ventilari.'

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).

in the first year of his reign[1] threatens with a heavy fine suitors who are caught hanging about, 'circa limina palatii nostri comitatumve,' a prohibition which Theodosius I, twenty-two years later,[2] relaxes in favour of those who, after the lapse of one year, have received no answer to an appeal. Such persons 'veniendi ad comitatum nostrae serenitatis liberam habeant facultatem'. Arcadius and Honorius in like manner[3] will not prohibit the suitor 'quominus a clementia nostra repetat oraculum', in case the *scrinia sacra* have given no answer within the year; and Theodosius II,[4] while directing suitors 'consultationes quantocius nostris auribus intimare', forbids them before the lapse of a year 'ad sacrum comitatum nostrae majestatis accedere'. The utterances quoted show clearly enough that the *comitatus* follows about the person of the emperor, and this is abundantly confirmed when we consider a passage in the *Interpretatio* which the *Breviarium*[5] of Alaric appends to an edict of Constantine[6] of the year A. D. 331. The text in this case has *ad comitatum destinetur*; the official commentator paraphrases 'ubi rerum domini fuerint', 'wheresoever the sovereign may be.'

In disentangling the question of the *comitatus*, we have perhaps lighted on the answer to the problems which have perplexed us regarding the *praefecti praetorio*. In the first place we must not forget the plurality of these officers under the later empire. Constantine had established their number as four, and assigned them locally to each of the great subdivisions of the Roman world, Italy, the East, Gaul, and Illyria. Some rearrangements took place in the

[1] In A. D. 364 (*Cod. Theod.* XI. 30. 34).
[2] In A. D. 386 (*Cod. Theod.* XI. 30. 47).
[3] In A. D. 395 (*Cod. Theod.* XI. 30. 54).
[4] In A. D. 419 (*Cod. Theod.* XI. 30. 66).
[5] See above, p. 155. [6] *Cod. Theod.* XII. 1. 20.

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.

sentence which it is forbidden to suspend by appeal, they are not to be allowed to implore our serene assistance?'

If we now turn to the edict of A. D. 440, which is addressed to Cyrus the praetorian prefect of the East, we find[1] in the first place that *consultatio* is forbidden in case of appeals from 'spectabiles judices', a class described as including proconsuls, the *Augustalis* of Egypt and the *comes Orientis*, to none of whom do the words of the former edict apply 'sententiam, quam nefas est appellatione suspendi'. In these cases the emperors now decree 'non nostram ulterius audientiam expectari', 'lest other people's interests should seem to be prejudiced owing to our occupations for the good of the world, by which we are sometimes prevented from attending to individual cases'. Instead of an appeal under the form of *consultatio*, the appeal is now to be made directly by the party to the suit, and 'vir illustris praefectus praetorio qui est in nostro comitatu' and the quaestor of the palace, 'sacris judiciis praesidentes,' are to decide the matter.

It seems, then, that this pre-eminent 'praefectus praetorio qui est in nostro comitatu', who lives in the light of the imperial presence, is the principal person in the judicial *comitatus*, and so far as this prefect is concerned the *sedes praetorianae praefecturae* practically coalesces with the *comi-*

[1] It is difficult to disentangle the phrase 'ex appellationibus spectabilium judicum, quae per consultationes nostri numinis disceptationem implorant'. We have seen above (p. 178, note 3) that *provocatio* and *consultatio* were in Constantine's time diametrically opposed to one another. We can only suppose that by the middle of the fifth century it had been found desirable to humour the dislike of the judges for appeals—which had obliged Constantine to admonish them (*Cod. Theod.* XI. 30. 11) that such appeals were not *in contumeliam judicis*—and to allow the appeal of the suitor to be presented under the fiction that the decision of the emperor was craved by the judge for his own guidance.

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.

with civil war and barbarian invasion. The inflated style and the assumption of unlimited power never varies in the imperial edicts. Yet even the strongest emperors, Constantine, Valentinian, and Theodosius I, had their hands full of war, and the military bases of their operations were more important for them than the Courts in which points of law were to be settled. What attention could be spared from the defence of their thrones and of the empire was occupied with the urgent needs of the exchequer or with the clamour of theologians pressing for the persecution of their religious rivals. And what of the years when Rome was taken and the fairest portions of the empire were overrun by Goths, Huns, and Vandals? Can we believe that the arm of a prince, who cowered behind the walls of Ravenna or of Constantinople, was long enough to enforce obedience to his commands in the provinces? The decrees always bear the names of the Eastern and the Western rulers jointly, and affect to speak to an united civilized world; but in practice we find not only that Honorius[1] can set aside an Eastern law 'quam constat meis partibus esse damnosam', but that the severance may become so absolute that Theodosius II[2] in A. D. 410 can prohibit intercourse with the West and forbid entrance into his dominions to any one coming from the other side of the Adriatic, 'unless he be the bearer of imperial communications from our uncle Honorius.' The 'occupations of the judge who is to deal with the matter in the sacred audience', 'public business, and other necessities', form a decent excuse for delay;[3]

[1] In A. D. 398 (*Cod. Theod.* XII. 1. 158). The question is of the exemption of Jews from municipal burdens.

[2] *Cod. Theod.* VII. 16. 2. In a decree of Honorius two years earlier (*Cod. Theod.* VII. 16. 1) we are told that 'hostis publicus Stilicho' had issued a similar prohibition in Italy against the East.

[3] *Cod. Theod.* XI. 31. 4 and 9.

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

free villagers remained were ground down by a crushing weight of taxation.

The ruin of all classes is reflected in the edicts of the Theodosian Code. Already in A. D. 326 Constantine complains that the *curiae* or local senates are desolate and empty,[1] and a hundred years later the emperors confess to the proconsul of Africa that 'nullus paene curialis idoneus in ordine cujusquam urbis valeat inveniri'.[2] Early in the reign of Valentinian,[3] before the great wave of barbarian invasion swept over Southern Europe, whoever is willing to accept waste lands is to have three years' freedom from all dues upon them. Thirty years later, 330,000 acres[4] in Campania, the garden of Italy, are derelict and proclaimed open to squatters, and the maps certifying the former ownership are to be burned. The crimes of brigandage and cattle-driving are so rife, that riding on horseback has to be prohibited throughout the greater part of Italy,[5] except to the upper classes; and no one on pain of being accounted an accomplice in brigandage is to put his children out to nurse with shepherds.[6]

The rapacity and bad faith of the officials sometimes brought down swift punishment on themselves and on the

dominis una cum possessionibus distrahi posse dubium non est' (Arcadius and Honorius, *Cod. Just.* XI. 50. 2). If they meditate escape they are liable to actual slavery in chains (Constantine in A.D. 332, *Cod. Theod.* V. 17. 1). The children of an escaped *colonus* may be seized for the next thirty years (Honorius and Theodosius II in A. D. 419, *Cod. Theod.* V. 18. 1).

[1] *Cod. Theod.* XII. 1. 13.

[2] Theodosius II and Valentinian III in A. D. 429 (*Cod. Theod.* XII. 1. 186).

[3] A. D. 365 (*Cod. Theod.* V. 11. 8).

[4] 528,000 jugera; Arcadius and Honorius in A. D. 395 (*Cod. Theod.* XI. 28. 2).

[5] Valentinian and Valens in A. D. 364 (*Cod. Theod.* IX. 30. 1), renewed by Arcadius and Honorius in A. D. 399 (*Cod. Theod.* IX. 30. 5).

[6] Honorius and Theodosius II in A. D. 409 (*Cod. Theod.* IX. 31. 1).

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).

orders[1] are given to remove all *palatini* from Africa, and next year the decree is extended to all the provinces, and any *palatinus* who dares to arrogate to himself the levying of the taxes is to be sent back in chains to the *comes sacri aerarii*.[2] Before long we hear of them again at their old work, and the envoys of the Achaeans *intempestiva admonitione* have succeeded in procuring a decree to avert their interposition; but this decree is cancelled[3] in A. D. 409, and their old power of exacting the taxes is restored to the *palatini*. The result appears in A. D. 424, when it is found[4] that the Macedonians and other provincials can only pay one half of their taxes and the Achaeans only a third, and the boon is held out to all, 'ut nullus de cetero ad possessiones eorum, quod maxime reformidant, inspector accedat.'

We have especially in evidence one particular class of inspectors, who, whatever may be their official title, are known to the provincials as *curagendarii* or *curiosi*.[5] Constantius, who is the first to mention them, says[6] that they have been in the habit of casting into prison suspected persons at their own goodwill and pleasure, and of requisitioning unnecessary carriages in order that the burden might be bought off by the provincials.[7] In the next century Honorius and Theodosius II order[8] a fresh dispatch of

[1] By Arcadius and Honorius (*Cod. Theod.* I. 5. 12).

[2] In A. D. 400 (*Cod. Theod.* I. 5. 13).

[3] By Honorius and Theodosius II (*Cod. Theod.* XI. 7. 18).

[4] By Theodosius II (*Cod. Theod.* XI. 1. 33).

[5] *Cod. Theod.* VI. 29. 1. *Curiosi* perhaps in its older sense of 'spies' (Suetonius, *Augustus*, 27). They are instructed 'to patrol even remote stations, and to frustrate the cunning contrivances of travellers and the tricks and deceits of those who pretend to keep watch' (*Cod. Theod.* VI. 29. 6).

[6] In A. D. 355 (*Cod. Theod.* VI. 29. 1).

[7] *Cod. Theod.* VI. 29. 2.

[8] In A. D. 412 (*Cod. Theod.* VI. 29. 10).

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).

afternoon call on the great man.[1] It is almost needless to say that these elaborate precautions and spasmodic interventions proved futile, and that corrupt influences gained the day.

The law's delays and costs eat up the substance of the suitors; sometimes judge and advocate combine to seize on the property in litigation.[2] The very right to appeal is often a snare, for the advocates claim to be paid for their interest in getting the case brought before the emperor,[3] so that the client wins his suit only to find that the costs amount to more than he can recover from his defeated adversary.

Sometimes more dreadful abuses come to light. We hear of poor wretches, condemned to exile for a term of years, who instead of being dispatched to their place of banishment have been kept in chains for a period equal to that of their whole sentence in a dark and airless dungeon. Honorius and Theodosius II[4] can only express indignation at this, and decree that the victims have expiated their punishment and are not to undergo their time of deportation in addition to that of their imprisonment. That such things were possible shows the impotence of the central government. When it authorized the leaded scourge, the torture and the stake, these were realities; but the system of appeals, designed to mitigate these tyrannies and to secure the orderly dispensation of justice, was for show rather than for use.

The subjects seem to come to the conclusion that, as the government is too weak or too corrupt, they must help

[1] Valens and Gratian in A. D. 377 (*Cod. Theod.* I. 16. 13).

[2] *Cod. Theod.* IX. 27. 5.

[3] Valentinian and Valens in A. D. 370 (*Cod. Theod.* I. 29. 5). The text is corrupt, but this is the probable meaning.

[4] In A. D. 414 (*Cod. Theod.* IX. 40. 22).

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-

which Sallust[1] notices as characteristic of Crassus, was exercised partly through the law courts, and to this Clodius owed his acquittal in 61 B.C. Since the abolition of trial by jury, eloquence mattered little, but the judge was more and more susceptible to fear and to favour. Hence the word *patrocinium*[2] comes in the fourth and fifth centuries to acquire the special sense of systematized terrorism and illicit influence. We have many notices of it in the Codes and in the writings of contemporaries, especially in Libanius, a rhetorician of the time of Theodosius I, and in St. Salvianus, a Roman clergyman in Gaul, half a century later. Sometimes we find that the serf *coloni* defy their masters and the tax-gatherers by putting themselves under the protection of military officers. These have such power over the judges that the unfortunate landlord can get no hearing, and the rents which ought to be paid him are diverted into the pockets of the *patroni*.[3] Sometimes the villagers conspire with the soldiers quartered amongst them, drive off the tax-gatherers with showers of stones, backed up if necessary by the sharper weapons of their confederates, and then use their newly-found strength to practise brigandage on the properties and persons of their neighbours; the police (*φύλακες τῆς χώρας*) shut their eyes, knowing that any attempt to bring the offenders to justice will be frustrated by the protection of the *προστάτης*, that is to say,

sulum non moverunt, quum eos novo exemplo universos arcesserent, eos tum lictores consulum vocent'.

[1] Sallust, *Catilina*, 48. 8.

[2] The matter has been discussed in a learned and interesting article by Mr. F. de Zulueta, Fellow of New College (*De Patrociniis Vicorum*, in *Oxford Studies in Social and Legal History*, edited by Professor Vinogradoff, I. ii), to which I am much indebted. It deals, however, more especially with the question of land-tenures, which lies outside the scope of the present work.

[3] Libanius, *Orationes*, XLVII. 15–17 and 34.

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.

Some, again, betake themselves to one or other of their oppressors for protection and so pass under his power. 'I would praise,' says the preacher, 'those who offer protection to the weak, if it were not that they sell their patronage,' so that their clients, before they gain the assistance, have given almost all their substance to their defenders, and 'the protection of the father is purchased by the beggary of his offspring'.[1] Nay, the poor man often finds that when he has parted with lands and goods, he has bought only a shadow, and that he is still called upon to pay taxes for what is no longer his.[2] It seems as if the victims, so far, continue to live on, though under onerous conditions of debt and mortgage, in their old habitations; but at the next stage some of them (and those the wisest, says Salvianus) 'betake themselves to the estates of the great men and become serfs of the rich'. They are thus 'exiles not only from their possessions, but from their birthright': like the swine, he says, transformed by Circe's cup 'quos constat esse ingenuos vertuntur in servos'.[3] Thus while some *coloni* have shaken themselves free from their old masters, other cultivators once free have sunk to the position of *coloni*, and others again hover between freedom and serfdom.

The confusions which resulted increased for the government the ever-present difficulty of getting in the revenue, and accordingly the emperors did their best, though with very imperfect success, to put down *patrocinium*. Constantius in A. D. 360[4] threatens those who shield recalcitrant *coloni*, and 'by guaranteeing their defence block the channels

[1] Salvianus, *De Gubernatione Dei*, V. 8. 39.
[2] Salvianus, ibid., V. 8. 42.
[3] Salvianus, ibid., V. 8. 44, and 9. 45.
[4] *Cod. Theod.* XI. 24. 1.

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;

A. D. 397), on their undertaking to pay all fiscal dues and give up recourse to *patroni* in future. Finally, the emperor Leo, in A. D. 468,[1] while extending the scope of the prescription, likewise threatens with confiscation all subsequent 'confugientes ad patrocinia', fines those who receive them under their protection, and sets aside all fictitious deeds of gift, sale, or lease, by which the substitution of a colourable defendant in the law courts had been concealed.[2] Evidently throughout these years *patrocinium* had flourished in spite of all the edicts.

The whole story reveals a despotism limited only by its own impotence, and oppression confronted with anarchical licence, so that it is difficult to say which was worse, the disease or the remedy. The mischief within took all heart out of Rome's resistance to the barbarians, and so sealed her final doom. The Romans could still sometimes win victories over their enemies in the field, but internal misery and discontent rendered a permanent deliverance impossible. 'Can we wonder,' says Salvianus,[3] 'that we cannot conquer the Goths, when our brethren had rather be with them than remain Romans with us?'

The same oppression and the same recourse to irregular methods of redress meet us in the appeal to the help of the Church.[4] The monks and the clergy took the prerogative

but this seems to me inconsistent with the next words, 'ut patroni nomen extinctum penitus judicetur. Possessiones autem adhuc in suo statu constitutae penes priores possessores residebunt.'

[1] *Cod. Just.* XI. 54. 1.

[2] See above, p. 211.

[3] Salvianus, *De Gubernatione Dei*, V. 8. 37.

[4] Esmein (*Mélanges d'Histoire du Droit*, p. 361 seq.) gives examples of a more modest claim of the bishops to supplicate for the pardon of criminals, and likewise of their influence (in the West) in assimilating the Roman Law to the barbarian by allowing 'weregild' for homicide and atonement by marriage for rape.

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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