

# THE LEX REPETUNDARUM AND THE POLITICAL IDEAS OF GAIUS GRACCHUS \*

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It may be taken as proven, so far as anything is ever finally proved in ancient history, that the Roman law contained in the fragmented bronze tablet once owned by Cardinal Bembo is the *lex repetundarum*, or recovery law, of Gaius Gracchus, or of a political associate who shared the same ideas about the so-called 'extortion court', despite the doubts of Professor Mattingly, who, revising the thesis of Carcopino and earlier scholars, sought to identify it with the later law of Servilius Glaucia.<sup>1</sup> This law, which may be conveniently called the Lex Sempronia, is probably the only law of Gaius Gracchus that was concerned with jurors. It is both a *lex repetundarum* and a *lex iudiciaria*, because at this time there was no other regular political jury court except the court of recovery.<sup>2</sup> The Lex Sempronia, which succeeds the Lex Calpurnia of 149 (and its adjunct the obscure Lex Iunia), replaces the senatorial jurors of the previous system by jurors who are not drawn from the senatorial class. But it does many other things, and it is an absolute treasure-house of information about the political and social ideas of its author. Historians have not effectively used its information for the general interpretation of the political thinking of Gaius Gracchus, because they suffer from a fixed idea. The law has been interpreted mainly as a weapon in the political warfare which, according to common opinion, Gaius waged against the senatorial class which opposed his other reforms. It is believed that by this law Gaius sought to secure the support of the equestrian class by transferring the control of the recovery court to it. Even Professor Eder in his balanced commentary says that the primary purpose of this law was to subject the magisterial class to the threat of criminal penalties, and that the role of restitution was secondary. Consequently the learned tend to direct their studies to the limited problems of the definition of the jurors and the chronological relationship of this law to the other measures of Gaius.<sup>3</sup> They neglect the rich material presented by its administrative rules, which can serve to illuminate the political methods of that intelligent and liberal statesman.

\* This article is a revised version of a lecture delivered before a learned assembly under the auspices of the Institut de Droit Romain de l'Université de Paris in March 1979, and subsequently, in translation, to the Oxford Philological Society. I am particularly indebted to the critical remarks of Professor Nicolet and others, though my memory does not allow me to distinguish all their individual contributions.

<sup>1</sup> Modern discussion has tended to centre on the charges and penalties of the Lex Repetundarum, cf. A. N. Sherwin-White, *PBSR* 17 (1949), 5 ff., M. I. Henderson, *JRS* 41 (1951), 71 ff., A. N. Sherwin-White, *JRS* 42 (1952), 43 ff., and on its possible relation to the short fragment of a law known as the Lex Tarentina (with which this paper is not concerned), first published by R. Bartoccini, *Epigraphica* 9 (1949), 3 ff. For the Gracchan date see now A. N. Sherwin-White, *JRS* 62 (1972), 83 ff., at length, against the identification with the Lex Servilia argued by H. B. Mattingly, *JRS* 60 (1970), 154 ff. (Earlier, cf. J. P. V. D. Balsdon, *PBSR* 14 (1938), 98 ff.) For the latest recension of the text see Mattingly, *JRS* 59 (1969), 129 ff., on the basis of somewhat shorter lines than in the system of Mommsen followed in *FIR*<sup>7</sup> (Bruns) 10, and *FIRA*<sup>2</sup> (Riccobono) I. 7. For the general history of the 'extortion court' see F. Pontenay de Fontette, *Leges Repetundarum* (1954), W. Eder, *Das vor-sullanische Repetundenverfahren* (1969) and his commentary on the text of the law, ib. 153 ff.

<sup>2</sup> cf. my arguments, art. cit. (1972), 85 f., adding that Gaius dealt with the problem of occasional *questiones* by another method in his *lex ne quis iudicio circumveniat* (cf. U. Ewins, *JRS* 50 (1960),

94 ff.). That he altered the qualifications of civil *iudices* is problematical, but hardly calls for discussion here: in 111 the qualification for *recuperatores* was not 'equestrian' but 'prima classis' (Bruns, *FIR*<sup>7</sup> 11. 37); *contra*, D. Stockton, *The Gracchi* (1979), 146 ff.

Lex Sempronia: despite much argumentation about the identity of the Lex Acilia cited by Cicero (*Verr.* 1. 51-2), it remains improbable that Acilius Glabrio, who was son-in-law of the jurist P. Mucius Scaevola (who helped to engineer the fall of Gaius, *de vir. ill.* 72. 9), was the formal author of this bill. If Diod. 34-5. 27 describes the passing of the *lex repetundarum* (as Appian, *B.C.* 1. 22. 93, with Diod. 37. 9, suggests), then Gaius proposed the bill in person (cf. Tac., *Ann.* 12. 60. 4, *Semproniis rogationibus*).

<sup>3</sup> Eder, op. cit., (n. 1), 126 ff. Cf. e.g. H. M. Last, *CAH* IX (1932), 75 f., characteristic for his generation. E. S. Gruen, *Roman Politics and the Criminal Courts, 149-78 B.C.* (1968), 87 ff. D. Stockton, op. cit. (n. 2), 138 ff., though concentrating on the composition of the juries, summarizes briefly the contents of the law and notes the clause about domicile (cf. below p. 22). General historians confine themselves to the political line with varying stress, cf. H. H. Scullard, *From the Gracchi to Nero*<sup>3</sup> (1970), 35-6. K. Christ, *Krise und Untergang der römischen Republik* (1979), 139. C. Nicolet, *Rome et la conquête du monde méditerranéen* (1977), I. 420 f., cf. his detailed study in *L'Ordre équestre* (1966), I. 475 ff.

Consider first the scope of the *Lex Sempronia*. Under the later laws of recovery to the end of the Republic only senators and senatorial officials were liable. Persons of equestrian standing were exempt from their controls. Seventy years later the great Pompeius tried in vain to cancel this exemption. Though few historians realize it, that was not the system of the law of Gaius.<sup>4</sup> It lists as liable all the annual magistrates down to the *tribuni militum*, the commanding officers of the four legions that formed the bulk of the annual levy. There were twenty-four military tribunes elected in the *Comitia* each year, of whom none was normally a senator at that moment of his career. Senior senators of praetorian or consular status occasionally secured a second tribunate, mostly during the great Hellenistic wars, in the justified expectation of securing distinguished military or diplomatic employment by the army commanders. But these were rare birds, noted as such by Livy, who hardly affect the statistical situation. Hence a large proportion of the military tribunes could never hold the major magistracies and become senators, because there were not enough places in the senatorial system at that period. The House then consisted of some three hundred persons, mainly recruited by the censors in effect from the eight or later twelve annual quaestors, the most numerous of the upper magistrates. Barely half of the annual crop of military tribunes could normally hope to secure the quaestorship, even with twelve places available. The others, coming largely from obscure families, as the names of some of them indicate, remained part of what was eventually called the equestrian order, which earlier was separated from the mass of the People only by its military duty of cavalry service.<sup>5</sup> The law goes on to add as liable the sons and fathers of senators, a proportion of whom were also not senators, doubtless because such persons accompanied their magisterial relatives in the provinces or with the armies as assistants. So the law defines as liable to its recovery procedures all those who formed part of the magisterial apparatus, whether they were senators or not. It grants no favours to the equestrian class in this respect. Yet it is an assumption of modern interpretations of the judicial reforms of Gaius that his law applied only to senators.

### *Beneficiaries and prosecutors*

In the accounts of known recovery cases the accusations always originate outside Italy, in the territorial provinces of the empire, Asia, Africa, Transalpine Gaul, etc.<sup>6</sup> But the law of Gaius did not mention provinces. It lists as possible plaintiffs, first, the citizens of the allied and Latin states of Italy, and then the citizens of external peoples, 'exterae nationes'. After that it extends its privileges to all those who were under the influence and power or in the friendship of the Roman People: 'qui in arbitrato dicione potestate amicitiae populi Romani sunt'. Here there are two categories. The first three words indicate peoples who after military defeat have surrendered to Roman generals by an act of formal surrender—

<sup>4</sup> cf. Cic., *Clu.* 104, 108, *Rab. Post.* 13, 16. Scullard, *op. cit.*, (n. 3), 35 'a crime which only senators could commit'. Last, *op. cit.* (n. 3), 69, 76-7, is ambiguous.

<sup>5</sup> Military tribunes: Pol. 6. 19. 1. Livy records seven groups of tribunes between 205 and 167, containing thirty-eight persons. Of these three or four were consulars and one a praetorian senator, serving against Perseus or Gentius in 171 and 168 (*Livy* 42. 49. 9, 44. 31. 15, 37. 5, 41. 2), while two praetorians served in Spain in 181-80 (*ib.* 40. 35. 3). In 171, to secure experienced soldiers for the Macedonian army, magisterial selection was substituted for popular election (*ib.* 42. 31. 4-5). Livy 42. 49. 9 comments on the exceptional result that two consulars and three *iuvenes illustres*, who also may have been former tribunes, were appointed among the (twelve) officers needed. C. Cassius in 168, not designated consular by Livy 44. 31. 15, may be the son of the consul of 171 rather than the man himself (*pace MRR* 1. *sub anno* 168). The remaining thirty-three tribunes include some nine persons with obscure names indicating families that were not yet senatorial—e.g. Matienus (205), Maevius (203), Ligurius (197), Atius, Caelius (178),

Pompeius (171), and C. Octavius (205, cf. Suet., *Aug.* 2. 2). The famous consuls of 195, M. Cato and L. Valerius Flaccus, also served as tribunes *his* in 191 against Antiochus, holding high positions: Livy notes them as *consulares*, but wrongly calls them *legati* (36. 17. 1, 18. 8, 21. 4-8; cf. sources cited in *MRR* 1. *sub anno* 191). For the evidence in full see *ib.*, for the years 205, 203, 197-6, 191, 182-1, 178, 171, 170-168. Later evidence is too scanty to be significant. Quaestors: the number was raised from eight a year in 267 (*Livy, Ep.* 15, Tac., *Ann.* 11. 22. 8) to twelve after the cessation of Livy's narrative in 167 (*Lydus, de mag.* 1. 27, where the date but not the number is confused, ignored by Tac., *loc. cit.*, and by F. de Martino, *St. Cost. Rom.* II. 241 f., 403-4). Senate of three hundred, Livy, *Ep.* 60; *Maccabees* 1. 8 has three hundred and twenty.

<sup>6</sup> cf. lists in de Fontette, *op. cit.* (n. 1), 85 f., 91 f., 100 f., 105 f. The sole instance from Italy was the conviction of P. Septimius Scaevola in 72 for offences in Apulia (Cic., *Clu.* 115-6, *Verr.* 1. 38), though the law was also invoked against senators for judicial bribery at Rome (*ib.*, and *Clu.* 104).

*deditio in fidem*—or by unmediated submission—and who may or may not have yet received a specific status as free or tribute paying subjects.<sup>7</sup> The second category is very different. ‘*Qui in amicitia sunt*’ indicates the free states and independent kings of the Roman world outside the territorial provinces who were formally called *socii et amici populi Romani*, a title granted to them by senatorial decree. The law refers to this group elsewhere by the phrase ‘*qui . . . regis populive . . . sui nomine . . . (sc. petit)*’, ‘whoever acts in the name of a state or king’.<sup>8</sup> At this period it was a major category covering half the Roman world: the kingdoms of Asia Minor, Syria, Numidia and Egypt. The first category—those *in ditione*, etc.—covered not only provincials but the great barbarian peoples in various degrees of submission or revolt beyond the frontiers of the European provinces of Spain, Cisalpine Gaul and Macedonia, even also of Transalpine Gaul.

So the law offers its assistance to all the inhabitants of the Roman world, whatever their status, even recently conquered peoples, and it picks out the kings and free states as a special group. At this time kings and minor dynasts ruled three-quarters of Asia Minor—Bithynia, Pontus, Cappadocia, Galatia, Paphlagonia—where they made war and intrigued against each other within the Roman orbit. These affairs offered fine opportunities for enrichment to the proconsuls and emissaries of Rome. Gaius himself denounced the intrigues and gifts of the kings of Pontus and Bithynia in a shady affair of 124. He said that the senators who kept silent in this debate were the most greedy: they hoped to take money from both kings and to deceive both. The prince Jugurtha, whose financial seductions were notorious ten years later, had been taught by his Roman friends that at Rome everything was for sale. In the year 129 Mithridates Euergetes had secured the grant of Phrygia from the Senate—so it was said—by a well placed gift.<sup>9</sup> Hence it is not surprising that the *lex repetundarum* did not confine itself to extortion in the narrow sense, to the thefts of proconsuls like Verres, who robbed the peasants and landed proprietors. It forbade absolutely all methods of acquiring things and money, including unsolicited personal gifts in excess of a modest sum. The definition of the tort is quite simple. ‘*A quo in annos singulos quod sit amplius . . . ablatum captum coactum conciliatum aversumve siet*’. Three of these words may have a criminal undertone, but *ablatum* and *captum* are neutral terms that indicate acquisition in any fashion. In later times Cicero had difficulty in defending the proconsul Flaccus against the charge that he secured an inheritance within his province.<sup>10</sup>

By this law Gracchus sought to repress the great corruptions of Roman government, whether at Rome or in Italy, in the provinces or in the independent states. One might object that the eastern kings were too busy with their own affairs to go to Rome for a suit of recovery. But there was a special proviso dealing with this difficulty. The law twice mentions (L. 6, 60) persons who act as plaintiffs in the interest of another people or king: ‘*alieno nomine*’ or ‘*quei regis populive ceivisve sui nomine (petunt)*’. These are not advocates or *patroni*. Under this law, as in the ordinary suits of civil law, on which its procedures are partly based, it is the plaintiff in person who initiates action: ‘*is eum unde petet in ious educito*’. The praetor nominates advocates to act for the plaintiff, if required by him, only after this phase, as the third section of the law shows.<sup>11</sup> The personage ‘*qui alieno nomine petit*’ is known from the usages of civil law. It is the *cognitor*, familiar from Cicero. The *cognitor* can represent a plaintiff who is sick or otherwise absent. He formally initiates the suit, and has full responsibility to conduct all proceedings, though he too may need the assistance of advocates when the pleading begins.<sup>12</sup>

<sup>7</sup> For the connection of *arbitrium* and *dictio* with *deditio* see Livy 26. 33. 13, cf. 9. 20. 4, 8. For the formula of *deditio*, Livy 1. 38. 2: cf. my *Roman Citizenship*<sup>2</sup> 60 f., 96, 383.

<sup>8</sup> *Socii et amici*, for a recent discussion cf. M. R. Cimma, *Reges socii et amici populi Romani* (1976), 37 ff. Strictly, *in amicitia* should refer to the first step of *receptio in amicitiam* by a consul on campaign that preceded the formal establishment of alliance either by *foedus* or by senatorial decree; *regis nomine*, cf. n. 11.

<sup>9</sup> Gaius’ speech, Gellius, *N.A.*, 11. 10. 2–4. Jugurtha, Sall., *B.J.* 8. 1, 35. 10. Phrygia, Appian, *Mithr.* 57, *B.C.* 1. 22.

<sup>10</sup> Cic., *Flacc.* 84–6: ‘*negavit a privato pecuniam*

*in provincia praetorem petere oportere*’. Cf. *II Verr.* 3. 71, 91; for the terms cf. de Fontette, op. cit., 55, Eder, op. cit., 156, n. 4. For specific prohibitions on buying, later, Cic., *II Verr.* 4. 9.

<sup>11</sup> L. 9–11. ‘*(quei ex h.) l. pecuniam petet nomenque detulerit . . . sei eis volet sibi patronos in eam rem darei, praetor ad quem (nomen detulerit) etc.*’. The phrase *quei . . . regis populive . . . nomine* survives in L. 60 in connection with the proving of a *lis aestimata* for payment.

<sup>12</sup> For the role of *cognitores* cf. Cic., *pro Caec.* 14, *pro Rosc. Com.* 32, *II Verr.* 2. 106. Cf. J. Declareuil, *Rome the Law-Giver* (1927), 73 f., W. W. Buckland, *Text-Book of Roman Law* (1963), 708 ff.

The *cognitor* is an institution of civil law which is not found in the criminal system of later times. Gracchus introduced the *cognitor* to help distant and busy plaintiffs. In the great extortion cases the plaintiffs were frequently very numerous. This provision allowed them to combine and organize a joint suit. A single *cognitor* can represent a whole community. He is himself one of the plaintiffs and a foreigner like the others.<sup>13</sup> He is not a Roman senator who might betray his clients. He acts *regis populeive nomine* when he begins the action, and collects the recompense for them when the defendant pays up. By this means the law sought to protect the kings against the threats and deceits of the great senators who controlled political affairs in the Roman world. One remembers how Prusias of Bithynia lost his crown to his son in 149 through Roman connivance, and how dearly Nicomedes had to pay for his restoration in 91.<sup>14</sup> In fact this provision had no apparent results. The *cognitores* of the kings did not present themselves before the tribunal of this law so far as we know. There are good reasons for that. Men like Jugurtha and Nicomedes made their gifts for political purposes, and they did not wish to embarrass their Roman patrons. All the same, Gaius gave them the means of protecting themselves.<sup>15</sup>

### *Publicity and purpose*

A special feature of this law is its insistence on publicity for all its procedures, particularly for the selection of the jurors, the management of the court, and the voting of the jury. When the praetor draws up his annual list of four hundred and fifty jurors, he must read it out in a loud voice at an assembly of the People, and publish it on a public notice-board throughout the year (L. 15, 18). Not only the plaintiffs and defendants but every citizen has the right to make copies of the list. The praetor must publish the lists of jurors chosen and advocates appointed for each case in the same way. Thus the administrative control of the jurors is regularly submitted to the eyes of the People. This attention to publicity is particularly significant at the voting of the jurors and at the counting of their votes. Every detail is regulated, the size of the voting tablets, the way the jurors must hold the tablets and put them in the urns, and just how they are to conceal with their fingers the letters A or C which signify acquittal or guilt (L. 50-2). The People surrounding the court must be able to see that the jurors vote but must not see how each individual has voted. At the counting of the votes a selected foreman shows each tablet, taken from the urn at random, to the crowd around the tribunal and declares the verdict inscribed on it (L. 53-4). The praetor as president of the court then declares the result of the total poll. The People is associated with a court in which it has no part, and in which the real power is in the hands of the limited oligarchical class of the equestrians. The function of the People is thus that of a witness to the truth or of a watch-dog. This insistence on the informal authority of the mass of the People is remarkable in the Roman State, in which the *populus* had no independent role at any period, and could only express its will when convened and consulted in a formal assembly by a magistrate who regulated all its procedures. Even in the less formal gathering of a *contio* the People only met to receive instruction, advice or information from a magistrate when duly summoned by him, and departed when he dismissed them. Here, though no power is given to the People, they exercise the passive force of public opinion.

This attention to publicity clarifies the political purpose of the law. The enemies of Gaius said later that in his quest for personal power Gaius handed over the control of the recovery court as a bribe to the Roman financial class, the bankers and taxfarmers, who exploited it to the detriment of the provincials. So says Diodorus, expressing the most reactionary view of all the sources. Appian more cautiously said that this was the ultimate effect of the law of Gracchus, i.e. in the following generation, rather than its original intention.<sup>16</sup> Modern historians differ, but even when they consider the law to be a reform

<sup>13</sup> cf. *II Verr.* 2. 106: it was normal to allow the use of a provincial *cognitor* in provincial jurisdiction.

<sup>14</sup> Prusias, cf. Appian, *Mithr.* 4-7, Pol. 36. 14, Diod. 32. 20-21. Nicomedes, Appian, *Mithr.* 11.

<sup>15</sup> Possibly the abortive prosecution of Sulla in the interest of Ariobarzanes involved a *cognitor*, Plut., *Sulla* 5. 12; but this was under the altered system

of the Lex Servilia in which a Roman *accusator* took charge, cf. my art. cit. (1972) (n. 1), 97 f.

<sup>16</sup> Diod. 35. 25, Appian, *B.C.* 1. 22, 93-7, with clear reference to the active delations of the period 110-90 and the notorious condemnation of Rutilius Rufus.

inspired by good will, they hold that it was also an instrument of political faction.<sup>17</sup> A brief condition concerning the choice of jurors at first sight supports the more cynical view. The law removed the function of juror from senators and all ex-magistrates and handed it over, evidently, to the social class which on a substantial wealth qualification served as legionary cavalry. Though the precise, positive definition is unfortunately lost from the text (L. 12, 16), it must have amounted to the equivalent of a minimum of about a hundred Roman acres.<sup>18</sup> So the majority of the four hundred and fifty selected jurors should have been decent country squires who would give reasonably honest verdicts, the leading men of their municipalities, the fathers of a Cato, a Marius or a Cicero. But the law (L. 13, 17, 22-3) excluded from jury service all those who were not domiciled at Rome itself or within its immediate neighbourhood: 'queive in urbem Romam propiusve urbem . . . (passus mille?) domicilium non habeat'.

The number of qualifying miles is not preserved on the tablet. It is possible that the Roman knights who inhabited the city neighbourhood largely consisted of the financiers whose business centred on Rome.<sup>19</sup> Instead of giving his jurors a broad social base the legislator seems to have done just what Diodorus said. He has deliberately handed over the control of the court to the organized group of the publican class who proceeded to abuse their power to their own advantage in the following period. This conclusion, however, is not inevitable. In later times the great landowners such as Cicero's friend Atticus had their town houses in Rome, though presumably not the small country squires. But there are other limiting factors of time and place. The law excludes from jury service all those persons who are outside Italy at the time of selection, and all those who are less than thirty or more than sixty years old. So it excludes from its juries all those who were actively occupied with business affairs in the provinces, and all those who were serving on or liable to active cavalry service, which ended about the age of thirty. For all these limitations there were practical reasons. The jurors must be available at Rome throughout the year: a hundred of them are selected at the first stage of each suit, of whom fifty eventually hear the case. The praetor cannot hunt out his jurors all over Italy or in the armies or provinces overseas. He needs them at Rome, on the spot, since the first list of jurors has to be selected within twenty days of the indictment (L. 21). So too municipal councillors, later, were required to live within their city. The age limits are based on Roman usage. Military service ends and effective political life begins for the upper classes at thirty, at Rome and in the municipalities, where one holds one's first magistracies at about this age. At sixty, one is an old man, technically freed from *munera publica*, and political life has long ceased even for a consular senator.<sup>20</sup>

So these rules excluded many Roman financiers from the juries for sound administrative reasons. The legislator wanted his law to be effective, and did not notice the political danger that lurked within the limitation of domicile. At this moment the financial class had not yet established the power that it came to exercise sixteen years later. Another law of Gracchus increased their economic strength, by giving them the monopoly of farming the taxes of the rich new province of Asia, as Professor Badian has demonstrated.<sup>21</sup> The political power of the equestrian jurors did not emerge suddenly. It was first felt at work in a good cause, the trials before a special court of the senatorial officials involved in the Jugurthan scandal. But the shocking condemnation of the innocent legate Rutilius Rufus on a recovery charge took place thirty years after the passing of the Lex Sempronia, and under the

<sup>17</sup> cf. n. 3 above; so too E. Badian, *Publicans and Sinners* (1972), 65-6.

<sup>18</sup> On the assumption that the later equestrian franchise of 400,000 sestertii had been upgraded with those of the other centuriate classes from *asses* to *sestertii* by Sulla, the previous qualification in terms of land would be a minimum of one rather than four hundred Roman acres, if basic land values averaged 1,000 sestertii per *jugerum* as in the first century A.D. (cf. T. Frank, *Ec. Survey* I, 125, 168, 365 for the meagre evidence).

<sup>19</sup> cf. Stockton, *op. cit.* (n. 2), 152. In L. 23 the formula is replaced by the phrase '(queive ab urbe Roma . . .) aberit queive trans mare erit'.

<sup>20</sup> For the upper classes the *decem stipendia* form the normal maximum, cf. Pol. 6. 19. 2, and the quaestorship, preceded by a military tribunate, was normally held at about the age of thirty. Exemption at sixty, cf. Festus 452L, s.v. *sexagenarios de ponte*. Professor Nicolet suggested in discussion that there was a large sector of resident landowners living at Rome other than *negotiatores*, but the distinction is not absolute: the *publicanus* was required to give security in real estate against his possible failure. Cf. the same limitations of age and local domicile in municipal rules, *Lex Urs.* 91, 98, *Tabula Heraclensis* 89, 99, for all decurions.

<sup>21</sup> Badian, *Publicans and Sinners*, 63 f.

machinery of a more malicious law, the *Lex Servilia*, by which the initiation of prosecution passed into the hands of Roman advocates.<sup>22</sup>

### *Controls and enforcement*

The legislator had no great confidence in the trustworthiness of his new jurors. He subjects them to the control of maximum publicity, and to heavy monetary fines if they neglect their duty. This appears especially in the rules about the curious procedure known as *ampliatio*, which could be used to favour the defendant. Jurors who were not ready to give their individual verdict when the case had been heard could demand a further hearing, an *ampliatio*. Under the preceding law there was no limit to the possible number of rehearings. This became a method of killing a case in the interest of the defendant by a sort of filibuster. But the *Lex Sempronia* limited the number of *ampliaciones* to two, and punished by a heavy fine the juror who refused more than twice to deliver his verdict.<sup>23</sup> Further, the law allows *ampliatio* only when a third of the jurors demands it. After the second *ampliatio* the jurors who demanded it are excluded from the final vote (L. 49). The friends of the defendant on the jury can help him by demanding two rehearings or by voting for his acquittal. But they cannot do both.

The law does not allow the jurors to discuss their verdict amongst themselves. When they prepare to deliver their votes, each juror must swear that he will not reveal his verdict to his colleagues (L. 44-5). Another regulation that is not complete orders 'iudex ne quis disputet'. The jurors are not to intervene or 'make speeches' during the hearing. These careful rules were not drafted in the interest of faction. Their purpose was to prevent it.

These rules are a small example of the great problem of Roman political life—how to compel the independent magistrates who have the absolute power of *imperium* to carry out the instructions of the People or the Senate. At this period the only regular sanction against the contumacious officer of State was an impeachment before the tribunal of the People known as the *iudicium populi*, which could impose either a fine or the capital penalty. It was an archaic and oligarchical procedure in which the People gave its vote, on capital charges, through the groupings of the centuriate assembly, in which the votes of the richest citizens controlled a majority. Gracchus was well aware of the problem of power. His solution was to control it by the multiplication of rules. This law prescribed at each stage exactly what the praetor, the jurors and the contending party were to do. But there remained the problem of enforcing the rules. The praetor was given the power to impose varying fines, either on the spot or after an interval of three days, and a special enquiry, on jurors who did not perform their duties scrupulously, and on witnesses who failed to attend the court or persons who failed to produce documents.<sup>24</sup> But there is no special provision for penalizing the misconduct or failure of the praetors who control the court, or of the quaestors who execute its sentences. After a long series of regulations the law simply instructs the praetor or the quaestor to cause no delay: 'moram ne facito' (L. 35). The legislator has a remarkable trust in the efficacy of oaths to secure the execution of the law. When the praetor publishes his annual list of jurors, he is required to take a public oath that he has selected only good men and true (L. 15, 18). When the parties make their selections of jurors from the lists, they are required to swear that they have observed the rules about disqualification (L. 23-4). The selected jurors likewise are required to swear that they will observe the rules of procedure for the proper trying of the case, though they, unlike the praetors and the contending parties, are subject to immediate penalties for breach of the duties to which they have sworn (L. 44, 45, 48).

There was also the problem of the other officers of state, the two consuls and the five praetors, who had power equal or superior to that of the praetor of the recovery court, and

<sup>22</sup> *Quaestio Mamilia*, Sall., *B.J.* 40. 5, 'exercita aspere', Cic., *Brut.* 128, 'Gracchani iudices sustulerunt', to which the speech of Crassus about the *iudicium crudelitas* (Cic., *de Or.* 1. 225) may refer. Rutilius Rufus, cf. Livy, *Ep.* 70, and the numerous sources cited in Greenidge and Clay<sup>2</sup>, 125-7. *Lex Servilia*, cf. n. 15.

<sup>23</sup> For the exegesis of L. 48 'quotiens quomque

*amplius bis in uno iu(dicio iudicare negarint)*', see my art. cit. (1972) (n. 1), 87, Eder, op. cit., 203, n. 1. Cf. the eight *ampliaciones* in the suit against L. Cotta, Val. Max. 8. 1. 11.

<sup>24</sup> L. 36, 42-44, 45-46, 48. Fines went from the *multa suprema* of 3,020 *asses* (Festus 129L, s.v. *multam maximam*) to 10,000 sesterii.

the ten tribunes, who by their right of universal veto could put a stop to any action of any magistrate. A special provision of the law, placed at the end of the chapters concerned with the management of trials, expressly forbids any magistrate of any sort to prevent the completion of trials or the declaration of verdicts (L. 70-1). Further, no-one is to prevent the praetor or the jurors from attending, or to summon them to another place or to carry them off, except at times when the Senate was in session or when a vote was actually being taken in the assembly of the People. This was a question of priorities. Otherwise all interference was forbidden. One remembers how in a *iudicium populi*, lacking this protection, an investigation into the Jugurthan scandals was summarily brought to a stop by a tribunician veto.<sup>25</sup> This proviso, which is completely preserved on the tablet, ends without imposing any sanction or penalty. Another chapter, about an entirely different problem, follows immediately—the action to be taken if a praetor dies or resigns while in office. Hence it is certain that this law prescribed no *particular* penalty against magistrates who interfered with the court. But twenty years later the laws of the radical tribunes, Saturninus and his associates, reveal a complicated system of special penalties and procedures devised to deal with contumacious magistrates who flout or fail to execute the laws of the People. For example, in the so-called ‘piracy law’ of 101-100, a provision that forbids the intervention of any persons against the law is followed immediately by the severe penalty of a fine of two hundred thousand sesterterii for each offence. Similar provisions, with exclusion from public office, are found in another document of the same period, the Latin law from Bantia. These laws reveal an elaborate technique for the enforcement of political and administrative enactments. They also impose oaths of obedience on senators and magistrates, who are liable to exactly the same penalties for failure to take the oaths as the magistrates who fail to execute these laws.<sup>26</sup>

This passion for technical control is not found in the law of Gracchus, which has a more traditional character in this respect. There is a clause ‘de eadem re ne bis agatur’, forbidding the same person to be accused twice of the same offence (L. 56). This clause is placed at the end of the chapters of the law dealing with judicial procedure. It provides that when sentence has been given and repayment made, there shall be no further action against the defendant except for charges concerning collusive behaviour during the trial (*praevaricatio*), for which a special procedure is laid down elsewhere, or else ‘under the sanction of this law’—‘de sanctione huius legis’.<sup>27</sup> These latter charges evidently concern procedural misbehaviour of some sort, which, unlike those of *praevaricatio*, are not to be handled by the praetor and the jury of the same court. There is no other trace of this *sanctio*. The word means an act or provision of enforcement, which can only have been placed at the very end of the law, on the missing border of the Tabula Bembina. It is the sole weapon of enforcement against magistrates and persons other than the jurors that the law provides. But it was certainly something very different from the immediate and precise sanctions of the laws of Saturninus. It may be tracked down by the following argument. In L. 8-9 the Lex Sempronia enacts formally that magistrates are not to be sued for recovery during the tenure of their office. In L. 28, in a clause that seems to be misplaced in the Tabula, the law forbids the censors to impose certain disabilities, including removal of his name from the tribal lists and withdrawal of his *equus publicus* and hence of a place in the privileged *duodecim centuriae*, aspects of the civil degradation known as *infamia*, upon persons who had ‘taken monies’ which did not exceed the total permitted by the law. The chapter is not complete, but it is clear that the law leaves it to the censors to impose penalties of loss of status on those guilty of serious acts of ‘extortion’. The law itself does not impose such disqualification. If it does not do so for condemned persons, then it certainly did not for magisterial personages.<sup>28</sup>

<sup>25</sup> Sall., *B.J.* 33. 2-3, 34. 1. This scene took place at the first hearing of the *anquisitio* of the *iudicium populi* initiated by the tribune Memmius (cf. ib. 31. 26, ‘quae nisi quaesita erunt’: Sallust disguises the technicalities), although the summoning of Jugurtha had been authorized by a plebiscite.

<sup>26</sup> *FIRA*<sup>2</sup> I. 6. 1-3; 9. C 15-29. The second law introduces the system of private prosecution by *qui volet* before a special *iudicium* for the infliction of its penalties, while the first relies on magisterial prosecution before a court of *recuperatores*.

<sup>27</sup> L. 56, ‘quom eo (h). 1. nisei quod post ea fecerit . . . aut (nisei de litibus) aestumandis aut nisei de sanctione huiusce legis actio nei es(to).

<sup>28</sup> The terms (*neve tribu mo*)veto *neve equom adimito* indicate action by a censor, though the word is missing. The Bantian law imposed a string of social and political disqualifications directly upon persons condemned under its provisions (*FIRA*<sup>2</sup> I. 6. 1-8), but also instructed the censors not to list them as senators.

What then is this sanction which can only be applied after a delay, when the magistrate has retired from office? In another law of Gaius, of much more central importance than the Lex Sempronia, the law of appeal, which was concerned not with the property of foreigners but with the lives and liberty of Roman citizens, Gaius left judicial control to the *iudicium populi*.<sup>29</sup> It is likely that the sanction of the Lex Sempronia was left to the same tribunal, probably in the form of the *multae inrogatio*, which was standard form in the middle Republican period for the penalization of minor political offences. The sanction had to be effective against the praetor himself—and also the quaestor concerned with the exaction of repayment after the *litium aestimatio*—who could be brought to book only after his year of office.

In the court of the People it is the tribunes who initiate and conduct the accusations before the assembly. The tribune demands either the death penalty or a heavy fine, which the People impose by their votes. The court is not dominated by curule magistrates or senators, and when the indictment is limited to a fine, the People may vote not by the centuries, but by their tribes, in which the rich do not form the majority. Gracchus was evidently satisfied by this court, which by Roman ideas was democratic enough.<sup>30</sup> He did not feel the necessity of constructing more formidable penalties or an independent tribunal, which his successors were to do. The great tribune trusts the tribunate which all his actions had strengthened. For him the tribunes are the hounds that keep watch over the malpractices of the upper magistrates, senators and advocates, who might try to frustrate the working of the recovery law. His successors learned by experience that the enforcement of radical legislation required a special tribunal. To this end they introduced the system of delation by a private accuser, not limited to wronged parties. In the 'piracy law' it is not the praetor or the tribune who prosecutes or fines the contumacious senator or magistrate, but any free-born citizen who is willing: '[is] qui volet qui in hac civitate liber natus sit'.<sup>31</sup> This method was eventually applied to all political or public crimes in the system of the *quaestiones publicae*. But it was not the method of Gaius Gracchus. He was interested in positive reforms. He created a new system of complex regulations which allowed no scope to defendants, advocates or jurors for knavish tricks. But he added provisions for enforcement against jurors alone because there was no existing method of dealing with them: he did not create superfluous machinery. The administrative penalties of the law against senatorial persons lack the precision of the laws of Saturninus, but the rules that control the management of cases in court are meticulous. They cannot be neglected without detection.

### *Techniques of management*

The abundance of detail and the precision of the clauses about the selection of jurors for particular cases are formidable. The timetable is not left to the discretion of the praetor. The plaintiff selects a preliminary list of a hundred jurors from the annual panel on the twentieth day after laying the initial indictment. Forty days later the defendant is required to select fifty persons from the hundred to form the final jury (L. 24). It is not the president of the court who selects the jury, but the contending parties. They are required jointly to produce a list of jurors who are not connected by ties of marriage, kinship, friendship, profession or religious cult to either party. The list gives a precise summary of the complex system of personal relationships at Rome: Münzer himself could not have done better.<sup>32</sup> If the defendant fails to play his part, the law leaves the choice of the fifty to the plaintiff. It does not require the praetor to compel the defendant to make his choice. Instead the law uses the vague phrase; 'per eum praetorem advorsariumve mora non erit'.<sup>33</sup> The legislator evidently feared collusion between praetors and defendants in the selection of jurors, and used these ingenious devices to prevent it, without recourse to penalties.

<sup>29</sup> For this law and its connection with that *ne quis iudicio circumveniat* see Ewins, art. cit. (n. 2).

<sup>30</sup> See A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (1901), 341 f., 344 ff. 'Democracy', cf. Cic., *de Re Pub.* 2. 39-40, Sall., *B. J.* 40. 5-42. 5, for attitudes.

<sup>31</sup> *FIRA*<sup>2</sup> 1. 9. C 23-4.

<sup>32</sup> L. 20-22, 24-5.

<sup>33</sup> L. 25, '(sei is quous no)men . . . delatum erit, L iudices ex h. l. non legerit edideritve . . . (tum ei pe)r eum praetorem advorsariumve mora non er(it quo) minus legat edatve (sc. is qui nomen detulerit) . . . Qui ita lectei erunt eis in eam rem ioudices sunt . . .'



The same finesse appears in a rule about witnesses (L. 32-3). The plaintiff is not allowed to cite as a witness someone who is acting as advocate for the defendant. This rule might seem either absurd or superfluous. But the legislator qualifies it: '[testem] qui eius causam dicit dumtaxat unum'. That is, only one person could refuse to give evidence on this ground. In recovery cases the weightiest witnesses were the great Roman personages, active in the provinces and kingdoms as landowners and men of affairs.<sup>34</sup> Without this rule the defendant could eliminate such witnesses by inviting them to speak as his advocates. There was no limit to the number of advocates assisting the defence in a Roman court. Once more, Gracchus prefers the prevention of trickery to punishment after the event.

Although he had no great trust in the unassisted honesty of praetors and jurors, he was satisfied with his precautions, and especially with the division of function between them. The judgment and its consequence, the *aestimatio litium*, or evaluation of claims, was reserved for the equestrian jurors. But the praetor or his deputy controls the conduct of the trials. He helps the plaintiffs in the summoning of witnesses and the production of documentary evidence, and he assigns advocates to them if required. He publishes the lists of jurors, exacts the judicial oath from them and fines them if they misbehave. The jurors play no part in the trial until the moment of the vote. The rule 'iudex nei quis disputet' made that clear.<sup>35</sup> It is the praetor who examines the witnesses, according to the heading of a missing chapter: 'praetor utei interroget'.<sup>36</sup> The praetor administers the court because he has *imperium*. Gracchus, still a traditionalist, does not seek to destroy the authority of the senior magistrates, but uses it for his own ends, and controls it by a division of function that is based on custom. As in courts of civil law, the praetor deals with the arrangements *in iure*, as Roman lawyers say, the setting up of the matters to be judged, though this function is much reduced by the definitions of the law itself, while the jurors decide the substantive questions of fact, *in iudicio*.

The sections of the law that deal with the evaluation and repayment of claims are remarkably detailed. The jurors who gave the general verdict make an evaluation of all the things which are proved to have been 'taken'. This is a special feature of 'recovery laws', though akin to certain forms of civil jurisdiction concerning *petitio pecuniae incertae*, where it was a function of the civil *iudex* to assess values when he found for the plaintiffs; otherwise civil jurisdiction was mainly concerned with disputes expressed in terms of fixed sums, which the judge either awarded or refused.<sup>37</sup> The usage was presumably familiar from the preceding system of the Lex Calpurnia. Hence the Lex Sempronia does not specify how the evaluation was to be decided in detail (L. 58-9). But if the legislator was brief over the *aestimatio*, which occupies less than two lines, he provided eleven complex chapters for what follows the *aestimatio*, to deal with the means by which the sums of money assessed shall be paid over to the successful plaintiffs. The praetor exacts personal securities from the convicted defendant, who must give their names to the quaestor. If he fails to pay up or to provide securities, the praetor proceeds to a public sale of the estate or goods of the convict, and the money realized is handed to the quaestor (L. 57-8).<sup>38</sup> The law explains exactly how the quaestor is to pay the individual sums to the various plaintiffs within three days (L. 60-2). If the property of the convict or his securities is not sufficient, the praetor must devise a schedule of proportional repayment, called *tributum*, between the plaintiffs, in the ten days following the public auction.<sup>39</sup> Finally the praetor fixes a date when the plaintiffs may come to receive their portions. Surprisingly this is extended to the hundredth day, and the plaintiffs are allowed to submit their claims as late as the fifth year. These long delays are doubtless intended to allow for difficulties in dealing with securities, and to meet the convenience of provincials who may have returned to distant realms. In the

<sup>34</sup> cf. e.g. Cic., *II Verr.* 1. 13-14, 2. 23-4, 3. 61, *Flacc.* 68.

<sup>35</sup> L. 39, 'discourse' rather than 'enter into argument'.

<sup>36</sup> L. 35-6. Eder, *op. cit.* (n. 1), 194 n. 1, 195 n. 2, thinks this refers to a preliminary organization of the evidence, because in the later system the *patronus* cross-examines (e.g. Cic., *Flacc.* 22). But Gaius may

well have left the initiative to the praetor in order to ensure the calling of the witnesses.

<sup>37</sup> Gaius, *Inst.* 4. 49-52, cf. Cic., *Tull.* 7. This applied in the system of *legis actio per sacramentum*, cf. Buckland, *op. cit.* (n. 12), 612.

<sup>38</sup> This section seems to be displaced; it should follow the chapter *de leitibus aestumandis*.

<sup>39</sup> L. 62-4.

latter case the law lays down exactly how the successive quaestors are to store and check the monies each year, which are to be kept in special bags, signed and sealed.<sup>40</sup>

This is a rare glimpse of Roman treasury procedure, designed to make sure that the plaintiff secures his due despite all possible impediments. He secures it through the direct assistance of the praetor. In the normal procedures of law-suits between Roman citizens the Roman magistrate does not intervene to help the plaintiff to secure execution of a successful claim. If the defendant does not pay up the plaintiff must renew his suit by a claim based on the judgement in his favour. In the last resort, if the defendant remains contumacious, the plaintiff has the right to seize his due by direct action. But the praetor gives him no active help.<sup>41</sup> The system of the Lex Sempronia is quite different. The praetor extracts the money from the defendant, and the quaestor pays it over to the plaintiff. This is direct intervention by the State to help the foreigner who cannot help himself. The length and detail of this section of the law suggest that this method of execution is an innovation, not known to the previous system. Eleven clauses and twelve long lines of the Tabula (L. 57-8, 59-69) are devoted to it out of the seventy-five lines dealing with procedure, more than is given even to the selection of jurors, while the clauses dealing with *tributum* alone take no less than five lines.

A second similar innovation is revealed by the provisions for *inquisitio*.<sup>42</sup> Though the text is incomplete, it is clear that the praetor assists the plaintiffs to undertake an investigation within the relevant area, in a fixed time, and to secure the compulsory presence in court of up to forty-eight witnesses and the delivery of whatever written documents are required (L. 30-4). The novelty of the method is suggested by the specification of details such as the enquiry 'in inhabited centres in Italy which have tribunals of jurisdiction and in those outside Italy', and in the provision of a fine for witnesses who fail to appear.<sup>43</sup> These methods were not at the disposal of prosecutors in the *iudicium populi*: when the tribune Memmius in 111 wanted to summon the king Jugurtha as a witness against the commanders in the Numidian war, an enabling law was required.<sup>44</sup> Gaius innovates, again, where the prevailing system was inadequate, not out of factional malice, but to secure the effective working of his law.

The force of these rules is revealed by their length. The law lays down exactly what the praetor and the quaestor are to do, and when they are to do it. There remained only the possibility of delay. Hence a clause is added (L. 69) with the title 'quaestor moram nei facito'. Its substance is lost, but it is followed by the chapter 'nei quis impediat', discussed above. No special penalties were attached to that, or to the whole system about repayment, but the law cites the traditional controls to which quaestors were subject. Though the quaestor acts under the orders of the praetor, and the detailed instructions of the law, he remains responsible for his outpayments at his own risk, 'fraude sua'. Even when the praetor authorizes a special payment, the quaestor must check that it is in order, 'quod sine malo peculatu fiat'. So the quaestor is subject to the normal rules of public accountancy, presumably through the system of the *iudicium populi* or whatever tribunal controlled the functioning of quaestors at the Aerarium Saturni. He cannot claim the defence of acting under superior orders. This is characteristic of the Gracchan method. He does not destroy the ancient order but transforms it where necessary or leaves it unchanged if it works well.

A final example concerns the matter of delay. The most effective collusion that a judicial praetor could arrange for any defendant was to connive at the prolongation of proceedings until the end of his year of office, when actions initiated before his tribunal automatically lapsed with the termination of his *imperium*. This still applied in certain types of civil jurisdiction in the second century A.D. A famous instance in the operation of special *quaestiones* appears in the trial of the consular M. Popilius in 172 B.C., who escaped condemnation when the presiding praetor adjourned the case until New Year's Day.<sup>45</sup> Gaius blocked this possibility, first by the detailed timetable that his law prescribed, and in the last resort by the chapter obscurely entitled 'iudex deinceps faciat principe cessante'. This

<sup>40</sup> L. 66-9.

<sup>41</sup> cf. Buckland, *op. cit.* (n. 12), 642 ff., for personal seizure and private *venditio bonorum*.

<sup>42</sup> L. 30-4.

<sup>43</sup> The mostly lost chapter *de inroganda multa*

separates the two concerning witnesses.

<sup>44</sup> Above n. 25.

<sup>45</sup> Livy 42. 22. 7-8. Gaius, *Inst.* 4. 105, for *iudicia quae imperio continentur*; cf. Greenidge, *op. cit.* (n. 30), 140.

enacted that in the event of the termination of office of a presiding praetor or quaestor through any cause, the magistrates of the succeeding year were to complete any trials initiated before their predecessors.<sup>46</sup>

### *Expectations and intentions of Gaius*

Certain general conclusions follow from this discussion. It can hardly be said that the purpose of the Lex Sempronia was narrowly political. It did not seek to increase the power of an equestrian class which did not yet exist as a political group, and the majority of whose members were excluded from the juries of the Lex Sempronia by its qualifications and limitations. The ingenious rules of procedure show that Gaius distrusted his new jurors. He did not expect them to be better than their predecessors unless they were strengthened against the temptations of ambition and avarice. So he strengthened them by the force of publicity, by the secrecy of the voting procedure, by the fear of substantial fines, and above all by the anonymity of numbers. Instead of creating a benefit for the equestrian class he imposed a duty upon it, a duty that was heavy and frequent. The senior age groups had to provide four hundred and fifty jurors each year from those who resided at Rome itself, although military service demanded only twelve or fifteen hundred cavalry recruits a year from the young knights of the whole Roman territory.<sup>47</sup> Cicero later rightly contrasted the role of senators with that of equestrian jurors in the phrase 'tu istud petisti, ego hoc cogor'. Senators were volunteers, but when the praetor summons a knight for jury service he has no option.<sup>48</sup>

Likewise one cannot say that the object of this law was to expose ambitious and refractory officials to a strict and general control. The law touches only the avaricious. It entirely neglects the principal offences against the state, and atrocious crimes against provincial subjects. It in no way tries to prevent proconsuls from massacring provincials or Italians individually or by the score. If they do not take the property of their subjects, this law does not touch them, although Gaius was well aware of the abuses of magisterial power that occurred even in Italy, about which he made a famous speech.<sup>49</sup> The whole purpose of the Lex Sempronia was to offer redress to Roman subjects and allies who had suffered material loss at the hands of officials and their staffs. Unlike later political laws that imposed the death penalty for a wide range of offences against the state, from forgery and conspiracy through to treason, this law imposed no physical or political penalty, apart from what the censors might inflict independently.<sup>50</sup> Gaius was content to leave all that to the People's Court. But he devised an appropriate financial penalty in his law by requiring the convicted defendant to repay twice what he had taken, instead of the simple restitution of the Lex Calpurnia. The punishment exactly fitted the crime. The guilty official suffered the same loss that he had inflicted on his victim: he returned what he had taken and paid as much again to the state treasury. He was not compelled to leave Rome. But if he preferred the comforts of exile to public dishonour at Rome, the law left him free to go.<sup>51</sup>

Gaius emerges from this analysis as a man of the most alert and realistic political mentality, with a penetrating understanding of how political machinery works, quick to perceive the possibilities for abuse and ingenious in devising counterchecks. He innovates boldly where there is no other way of securing his purpose, as in the composition of the jury panel, and in the assistance given by the praetor to the plaintiffs in the collection of evidence, and in the execution of the judgement. But in this law Gaius is far from appearing as a radical reformer, root and branch, in the style of Ephialtes at Athens. His law, like its predecessor, continues to treat what we call extortion as essentially a civil action for recovery:

<sup>46</sup> L. 72-3. For *magistratu abierit* cf. L. 9. It commonly refers to the ending of annual office. L. 27 likewise maintains juries 'unius rei in perpetuum'.

<sup>47</sup> The normal annual conscription consisted of four consular legions with three hundred cavalymen each, and a supplement of three thousand *pedites* and three hundred *equites* for existing legions. The establishment of eight to ten legions which were frequently in active service in the first part of the second century, revealed by Livy's annual reviews, was maintained by the retention of legions for con-

tinuous periods of two to six or more years, thus providing also for the praetorian military commands. Only a quarter of the legions between 200 and 168 served for a single season. Cf. the detailed studies of A. Afzelius, *Die römische Kriegsmacht* (1944), 34 ff., 48 ff., and his tables on pp. 47, 57, 61, 62-3.

<sup>48</sup> Cic., *Rab. Post.* 17.

<sup>49</sup> Gell., *N.A.* 10. 3. 3.

<sup>50</sup> cf. L. 28, and n. 28 above.

<sup>51</sup> Double costs, L. 59. Exile, L. 29. The law does not define the destination of the extra payment.

its only penal consequence—civil disabilities imposed by the censors—is indirect. Cicero summarized the history of the recovery laws down to his day as ‘tot leges et proximae quaeque duriores’: the law of Gaius was hardly severe to the convicted.<sup>52</sup>

Since praetors were the established judicial officers of Rome, the new court was allocated to a praetor wielding his *imperium*: the division of function between *praetor* and *iudices* is no deprivation, but a method taken straight from the existing civil law. There is to be no prosecution of Roman officials during their term of office, though earlier this was not unknown: the State’s work must come first. Hence the great tribune will not allow other tribunes to interrupt the working of the court, yet gives priority to the sessions of the Senate over his court. Perhaps the most remarkable aspect of the Lex Sempronia is the way that Gaius assumes that his law will be observed by the senatorial class in all its details without precise or immediate sanctions, and that the moral force of oaths will be effective. Paradoxically it is the equestrian jurors, generally supposed to be its political beneficiaries, for whom he pickles a rod. But for magistrates and senators his ultimate sanction remained what it had always been, that most archaic, traditional and ineffective machine, the *iudicium populi*.<sup>53</sup>

Scholars complain that the historical evidence about Gaius Gracchus, as we have it, is mostly at third or fourth hand, written two hundred years after his death. In his recovery law, as in the few fragments of his speeches, we have the detailed articulation of his practical thoughts about political machinery. They should be exploited to illuminate the rest of his legislation.

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#### APPENDIX

*The Lex Sempronia and the Roman citizenship.* The last chapters of the law illuminate the notions of Gaius about a topic of equal importance to extortion—the extension of the Roman franchise. When the law defines the plaintiffs in its first chapter it places at the head of the list the citizens of the allied states in Italy, ‘*qui socius nominisve Latini*’. In two of its last chapters (L. 76–8, 78–9) the law offers special rewards to the plaintiff who in each case has done most to secure a conviction. This reward is the grant of Roman citizenship, together with exemption from military service, or, if the plaintiff does not wish to change his citizenship, he may opt for the particular privileges of military exemption and the *ius provocationis*, which protects the Roman citizen against the absolute power of any Roman magistrate, if he does not already possess it on other grounds. The chapter *de civitate danda* begins with the words ‘*sei quis eorum qui civis Romanus non erit ex hac lege alteri nomen . . .*’, and is commonly taken to extend the offer to all foreign plaintiffs of whatever origin in the Roman world. But the following chapter *de provocatione vocationeque danda* is limited by words that have universally suggested to Roman historians that this offer is confined to citizens of the *nomen Latinum* alone. This puzzling disparity has led to suggestions that within the lengthy gaps from which these lines suffer there were further definitions that removed the anomaly, but always on the assumption that the first clause applied to all *peregrini*.<sup>54</sup>

There are grave objections to this view of the chapter *de civitate danda*. In it the new Roman citizen is also dispensed from military service by a formula that has a technical connotation, ‘*aera stipendiaque omnia ei merita sunt*’. That is, he is freed from the obligations of legionary service under the annual levy at Rome, whereas in the following chapter the beneficiary receives ‘*militiae munerisque poplici in sua (quousque civi)itate*

<sup>52</sup> Cic., *Off.* 2. 75.

<sup>53</sup> Nothing prevented a tribune from completing his *anquisitio* and pronouncing his sentence against a magistrate in office, but at the final *iudicium* before the Comitia the *reus* could plead public office as an *excusatio*: cf. Livy 43. 16. 11–12, Cic., *dom.* 45. Cf. Cicero’s summary, *ibid.*, of the difficulty of

securing convictions, and the lack of any possibility of postponement if on the *dies dicta* the hearing was legitimately cancelled.

<sup>54</sup> cf. the full discussion (and earlier bibliography) of these sections by Mattingly, *art. cit.* (1970) (n. 1), 163 ff., and myself, *art. cit.* (1972) (n. 1), 94 ff. For restorations, see n. 58 below.

(vocatio)'. The new citizen is also to be inscribed in a Roman tribe in which he will exercise the right of voting in the political assemblies and the duty of registering his property at the Roman census. These privileges make sense only if the new citizen is an inhabitant of Italy who can take advantage of them, that is, if he is a Latin or Italian ally. It follows that both of these chapters were indeed dealing with the same category of persons, but these were not the *peregrini* of the *exterae nationes*, listed in the opening lines of the law after the Italian allies.

This conclusion should not be surprising, because it was not the custom of the Roman state in this period to admit foreigners resident overseas to the Roman citizenship.<sup>55</sup> Instead external plaintiffs received a different kind of benefit. There is a third chapter about rewards, very badly preserved in L. 86, which contains the words: '... si petetur de ea re eius optio esto utrum velit vel in sua ceivitat(e . . .) habere liceto'. That is to say, the successful plaintiff has the right to choose whether he wishes to have his law suits heard in his own city or elsewhere. This phrase recalls the dispositions of the senatorial decree of about 78 B.C. about Asclepiades and his companions. That offered special rights to certain naval officers who were citizens of cities in Greece or Asia. If sued at law in their own cities they have a choice of tribunal. They can accept the local jurisdiction or have recourse to the tribunal of a Roman proconsul or to that of a free state. It is probable that L. 86 of the Lex Sempronia offered similar privileges to the principal plaintiffs from provincial and allied communities and kingdoms.<sup>56</sup> Finally in the fragmentary L. 87 the law offered unknown rewards to the rare case of a principal plaintiff who was already a Roman citizen. Hence the order of beneficiaries by status is clear, first the *socii nominisve Latini*, receiving citizenship or *provocatio*, second the members of *exterae nationes* receiving judicial priorities, and finally the Roman, presumably resident overseas and perhaps acting as *cognitor alieno nomine*.<sup>57</sup>

It is hardly an objection that some amendment or addition is required to L. 76-9, 83-6. The text of the law was faulty, and particularly in the last chapters, which were inscribed twice on the Tabula. Other scholars have had recourse to changes and additions to accommodate their interpretations of these chapters. There is, as Professor Mattingly observed, plenty of room in the wide gaps of these chapters—even when the slightly shorter line-length posited by his recension is taken into account.<sup>58</sup>

So the Lex Sempronia limited its offer of Roman political rights to the members of the Italian alliance. Such rewards were not offered to foreigners from overseas, to whom they were of no practical use, and for whom other more suitable benefits were devised. These clauses can help to clarify the great law of Gaius Gracchus that offered the Roman citizenship to the Italian and Latin allies on terms that, as reported, are somewhat obscure. The offer itself was a remarkable innovation, more remarkable than is sometimes realized by modern historians who are accustomed to the notion of a vast territorial state embracing

<sup>55</sup> See the lists of persons enfranchised *viritim* in E. Badian, *Foreign Clientelae* (1958), 302 ff., and the discussion in my *RC*<sup>2</sup>, 136 ff., 144 ff. The enfranchisement of provincial *peregrini* begins in the decade 90-80.

<sup>56</sup> Sc. de Asclepiade, *FIRA*<sup>2</sup> I. 35. 3-4, 19-20 (Sherk no. 22). The resemblance was noted by Mommsen, *GS* I. 63 f.; cf. Eder, op. cit. (n. 1), 230 n. 1.

<sup>57</sup> For prosecution of senators for offences in Italy under the later Lex Cornelia, cf. n. 6.

<sup>58</sup> J. L. Strachan-Davidson, *Problems of the Roman Criminal Law* (1912), I. 147 ff., holding that the beneficiaries of the clauses *de civitate danda* and *de provocazione* . . . *danda* should be the same categories of persons, restored L. 78 to read: 'sei quis eorum quei (in amicitia ditione potestate P.R. sient, sociumve nominisve Latini . . . quei eorum dictat)or, etc.'. This makes the two sections refer to all types of non-Romans, but it is not faithful to the definition of L. 1 on which it is based, abbreviating and inverting the order of categories—'quoi socium nominisve Latini exterarumve nationum, etc.'. His supplement cannot be added to L. 76 as it stands in

the Tabula, because that continued immediately with 'ex hac lege alteri nomen . . . detulerit'. But, as Mattingly observed, in L. 78 this latter clause is displaced to a later position. Mattingly would restore both 76 and 78 to commence with the words 'si quis eorum quei Romanus non erit quibus eorum ex h. l. alieno nomine petundi . . . ius erit'. He argued that the rewards of the law were not for plaintiffs but for *patroni*, and that these were limited to Latins and Romans. His failure to recognize that the phrase about *alio nomine* refers not to *patroni* but *cognitores* (above pp. 20-1) invalidates his thesis, but the unsatisfactory state of the texts remains clear. But difficulties disappear if the opening phrase in *de provocazione danda* is supplemented to include both *socii* and the *nomen Latinum*: the drafter in his pleonastic fashion merely allows for the special condition of former Latin magistrates to whom the options are not open since they have already exercised them (or one of them) *ex honore*. Apart from these, chief plaintiffs, whether Italian or Latin, are offered the alternatives to Roman citizenship. Cf. for another explanation of the special favour of Latini my art. cit. (1972) (n. 1), 95-97.

diverse regions and diverse races. The parallels in the Lex Sempronia suggest that Gaius offered the citizenship not merely to the Latin allies, as is widely held, who spoke the same language as the Romans, but to all the peoples of Italy, Oscans, Etruscans, Ligurians and Greeks alike, and that he reserved the alternative grant of particular privileges for any communities, whether Italian or Latin, that were unwilling to lose their local culture and autonomy. Many would prefer to safeguard local independence, as many still did even in 90, especially among the Oscan-speaking peoples of central Italy.<sup>59</sup> These chapters show that the Roman citizenship was regarded by Gracchus as unitary and exclusive, as in the doctrine later formulated by Cicero that the Roman citizen cannot be a citizen of two states. The new citizen of the Lex Sempronia is registered in a Roman tribe, votes in the Roman assemblies and in principle serves as a soldier—bar *vacatio militiae*—not in the cohorts of his native town but in a Roman legion. With such a concept of citizenship Gaius could not offer it to the inhabitants of the external world, though he took the first step on the path that led to the notion of a universal citizenship by offering it in the Lex Sempronia to individual Italians whose civic states were not immediately adjacent to Roman territory.

<sup>59</sup> Citizenship bill, cf. Appian, *B.C.* 1. 23. 99, Plut., *C. Gracchus* 5. 2, 8. 3, 9. 5, Vell. Pat., 2. 6. 2, with Iulius Victor 6. 4, Cic., *Brutus* 99; H. M. Last,

*CAH* ix, 51, 78–9, E. Badian, *op. cit.* (n. 55), 299. Oscans in 90–89, cf. my *RC*<sup>2</sup>, 136 ff., 144 ff.