THE PURPOSE OF THE LEX CALPURNIA DE REPETUNDIS*

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In 149 B.C. the tribune L. Calpurnius Piso proposed a law which was to have momentous consequences for the legal, political and administrative history of the Roman republic. It was his *lex de rebus repetundis* which first established the practice of trial before a *quaestio perpetua*, a jury, drawn from a panel of jurors who had always to be available, which became the standard procedure for criminal cases in the late republic. For over fifty years, from the first tribunate of C. Gracchus in 123 to the passing of the Lex Aurelia in 70, such courts were to provide a political storm-centre as various political figures attempted for their own ends to alter the criteria for the selection of the *iudices* who manned the juries. Moreover, from the late second century B.C. down to at least the second century A.D., the process *de repetundis* formed the most important means that was available to Rome's provincial subjects of bringing an action against a provincial governor for maladministration.[1]

The Lex Calpurnia is an important piece of legislation, but, like so much else which happened in the middle of the second century, its details remain irritatingly obscure. Apart from Cicero's mention that this was the first *lex de repetundis*, and the allusion to those prosecuted under the Lex Calpurnia and the Lex Junia in the *lex de repetundis* inscribed on the Tabula Bembina, there is nothing more in the literary or epigraphic sources.[2] Received opinion[3] has it that Piso's law was designed to curb the depredations of provincial governors on the provincials themselves, by means of a *quaestio perpetua* manned by senators and in the charge of the *praetor peregrinus*;[4] such a court could order the simple restitution of the property claimed, in the event of a condemnation of a former magistrate. It is generally held that the intention of the law was by no means as disinterested as might at first appear, since the senate was as concerned as the provincials to prevent the breakdown of law and order which might result from the flagrant misuse of a governor's *imperium*, but preferred to keep the control of such matters firmly in senatorial hands.[5]

There are two reasons for this view: firstly, various events of the previous half century might be seen as foreshadowing such a development. There had been a number of scandalous occurrences in the provinces, culminating in this very year (149) in an attempt by the tribune, L. Scribonius Libo, to set up a *quaestio* to try Ser. Sulpicius Galba, who, as proconsul in Further Spain in the year after his praetorship, had massacred a large band of Lusitani, whom he had persuaded to surrender to him, and sold the rest into slavery. The proposal to set up the *quaestio* was rejected by the *concilium plebis* after an emotional appeal by Galba.[6] More than twenty years before, in 171, complaints from Spain had led the senate to set up boards of *recuperatores*, each of five men, to investigate the activities of three governors from the two Spanish provinces, and had assigned as *patroni* four eminent senators to act on behalf of the provincials.[7] In practice the provincials seem to have gained little, as the two former magistrates who were condemned immediately went into convenient exile in Praeneste and Tibur. However, it is believed that instances of this type might well have

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[1] For the history of the *quaestio de repetundis*, see A. W. Lintott, 'The leges de repetundis and Associate Measures under the Republic', *ZSS* 98 (1981), 162–212, and bibliography cited there; to which add C. Venturini, 'La repressione degli abusi dei magistrati romani ai danni delle populazioni soggette, fino alla lex Calpurnia del 149 a.C.', *BIDR* 72 (1969), 19–87, and id., *Studi sul crimen repetundarum nell'età repubblicana* (1979).

[2] Cic., *Brut.* 27. 106, *2 Verr.* 3. 84. 195, 4. 25. 56, *de off.* 2. 21. 75; the *repetundae* law of the Tabula Bembina (*FIRA* i², no. 7; hereinafter *lex rep.*), lines 23 and 74 (=81); cf. Schol. Bob. 96 (St.), Tac., *Ann.* 15. 20.

[3] So Lintott, art. cit. (n. 1), 172–6.

[4] This is deduced from *lex rep.*, line 12. See further below, p. [20].

[5] → W. S. Ferguson, 'The Lex Calpurnia of 149 B.C.', *JRS* 11 (1921), 86–100; E. Badian, *Roman Imperialism in the Late Republic* (1968), 41; W. Eder, *Das vorsullanische Repetundenverfahren* (1969), 58 ff.; C. Venturini, *BIDR* 72 (1969), 81–7.

[6] Appian, *Ib.* 59. 247–60. 254; Livy, *per.* 49; Cic., *de or.* 1. 53. 227; Val. Max. 9. 6. 2.

[7] Livy 43. 2.

provided the motive as well as indicating the means for the establishment of a more permanent and effective legal remedy for the provincials; and hence Piso's law.

The second major support for the present view is the undoubted fact that later *leges repetundarum* were seen as being intended for the protection of provincials. The earliest evidence is the law of the Tabula Bembina, which I take to be Gaius Gracchus' law of 123 B.C., which provides a procedure against unlawful seizure by Roman officials for *socii*, Latins, and those 'exterarum nationum, quoive in arbitratu dicione potestate amicitiav[e populi Romani ... erit'.[8] Cicero, in the case against Verres, can claim that the *lex repetundarum* has been set up for the benefit of the *socii*, that it is a *lex socialis*, that it is the solitary bulwark of the *socii* and *amici* of the Roman people against oppression.[9]

Although our sources are uninformative about the Lex Calpurnia, we know enough to show that this received opinion is unsatisfactory. Firstly, if the law was prompted by the case of Sulpicius Galba, and intended to discourage any recurrence of the enormities he committed, it is astonishing that Piso should have drafted such an inappropriate measure. As its title indicates, the Lex Calpurnia was *de rebus repetundis*, that is about the recovery of property. If the charge under this law was at all like that on the Tabula Bembina, then the grounds for complaint will have related to 'pequniae ... quod ablatum captum coactum conciliatum aversumve siet'.[10] It is not clear how such a charge would apply to massacre and enslavement. Of course money and property had changed hands as a result of the outrage: Lusitanians had been sold into slavery. But it is hard to see how a recovery law could be used in such a case. Who would bring an action against the proconsul? Not the Lusitanian nomads, for their complaint was that they had been deprived of their freedom. It is possible that already at this date the purchasers of the slaves, should they subsequently be declared free, could bring an *actio ex empto* against Galba,[11] but this is in reality irrelevant. These putative financial losses on the part of the slave traders are not what provoked the outcry against Galba. The comparatively numerous sources which relate the scandal are divided about exactly what form of action or legislation was brought against him, but none suggests that the basis of the attacks was other than his disgraceful treatment of the Lusitani.[12]

Perhaps as surprising as the inappropriateness of Piso's measure to Galba's offence is the attitude of these very sources. It was no doubt the anecdotal attractiveness of the dramatic events which led to Galba's escaping scot-free which resulted in their being reported so often. Few ancient writers, given an appropriate context, could resist a scene in which the cruel ex-magistrate was confronted by the imposing figure of Cato the Censor, now in his ninetieth year, and only escaped his just deserts by bringing forward the pathetic sight of the children who were his dependants.[13] Even so, it is surprising that not one of those sources even mentions Piso's law, much less makes the Galba episode the cause of it.

It is worth emphasizing the suppositious nature of the link, which has so often been posited, between Piso's law and the failure of another tribune in the same year to bring Galba to justice, because it is in part this presumed context which has led scholars to believe that this first *lex de repetundis* was, like so many of its successors, primarily intended for use by provincials. As the sources themselves do not support that connection, it remains to see whether those remarks made, especially by Cicero, about the *leges de repetundis* in general cast any light on the purpose of the Lex Calpurnia.

[8] *lex rep.*, lines 1–2.

[9] Cic., *div. in Caec.* 5. 17, 20. 65.

[10] *lex rep.*, lines 2–3; cf. line 59.

[11] Cf. W. W. Buckland, *The Roman Law of Slavery* (1908), 47 and 667; A. Watson, *Roman Private Law around 200 BC* (1971) 134–7.

[12] On Galba's 'trial', which was almost certainly the *contio* held by the tribune L. Scribonius Libo in his attempt to pass a plebiscite to establish a *quaestio* in order to try Galba, see Cic., *Brut.* 20. 80 and 23. 89, *de or.* 1. 53. 227–8, *Mur.* 28. 59, *ad Att.* 12. 5(b); Livy 39. 40. 12, *per.* 49; Val. Max. 8. 1. 2; Quintilian 2. 15. 8; Gellius, *NA* 1. 12. 17 (quoting Cato); Appian, *Ib.* 60. 255; Fronto, *ad M. Caesarem* 3. 20. See J. S. Richardson, *Hispaniae* (1986), 137–40.

[13] So esp. Val. Max. 8. 1. 2; on the effects of such considerations on historiography, see T. P. Wiseman, *Clio's Cosmetics* (1979), esp. ch. 3.

There are two places in Cicero's works which have led scholars to believe that he held that the Lex Calpurnia was intended for the benefit of the *socii*. The first is a passage in the *de officiis*, where he is discussing the duties of those involved in the administration of the *res publica*.[14] It is essential, he declares, to avoid the slightest suspicion of greed (*avaritia*), and he laments in traditional fashion the decline of standards in recent years: less than one hundred and ten years previously L. Piso had enacted the first law *de pecuniis repetundis*, and since that time, they had come thick and fast. Men had been accused and convicted, and even a war begun, because of fear of the courts;[15] when the laws and the courts had been suspended, there had been exploitation and plundering of the allies, so that Roman power was seen in the weakness of others rather than their own courage.

There can be no doubt that Cicero is here placing the Lex Calpurnia in a tradition of laws *de repetundis*, which in the last century of the republic were intended to suppress the pillaging of the allies by those who held responsible positions in the state; but it should be noticed that he is not saying that Piso's law was passed for the benefit of those allies, but for the control of *avaritia*. Indeed the first witness that he cites, immediately before mentioning the Lex Calpurnia, is the fourth-century Samnite general, C. Pontius, who is alleged to have said that he wished he might have lived at a time when the Romans had begun to take bribes, because then he would have been able to overthrow their power. *Avaritia* can evidently take other forms than the exploitation of provincials. All that can be stated for certain about our law from this passage is that Cicero regarded it as directed against greed, and the first of a series of laws *de repetundis* similarly directed.

The other set of passages comes from the Verrines and the *divinatio in Caecilium*. As already mentioned, Cicero there describes the *quaestio* and the *lex de repetundis* as the defence and the patron of the allies.[16] One of these, from *div. in Caec.* 5. 17–18, is worth quoting in full:

> De quo quid ego plura commemorem? quasi vero dubium sit quin tota lex de pecuniis repetundis sociorum causa constituta sit; nam civibus cum sunt ereptae pecuniae, civili fere actione et privato iure repetuntur. Haec lex socialis est, hoc ius nationum exterarum est, hanc habent arcem, minus aliquanto nunc quidem munitam quam antea, verum tamen si qua reliqua spes est quae sociorum animos consolari possit, ea tota in hac lege posita est.
>
> Why need I say more about this? There is no doubt that the entire statute *de pecuniis repetundis* has been framed for the benefit of the allies, since, when citizens have money extorted from them, it is, in general terms, recovered by means of a citizen form of action and under private law. This statute is for the allies, this law is for foreign nations, this the bulwark that they have, admittedly not so heavily protected as once it was, but none the less, if any hope remains to reassure the minds of the allies, it resides entirely in this statute.

The significance of the distinction which Cicero draws here between the procedure open to citizens as opposed to that available to allies will be examined further below. As to the original intention of the Lex Calpurnia, however, neither this passage, nor those like it in the Verrines are of much assistance. Although Cicero is emphatic in insisting that the entire *lex* is for the sole benefit of *socii*, it is clear that the law to which he is referring is the law under which the trial is to be held, that is Sulla's Lex Cornelia *de repetundis*, as is clear from his remark in the last sentence quoted above, that, although their protection is less than once it was, all the hope that remains to the allies rests in *this* law.

There is of course no reason why Cicero should have referred to any other law. The point he was making was that the law under which the Sicilian case was to be

[14] *de Off.* 2. 21. 75.

[15] The Italic War of 91, as is indeed stated in the majority of the manuscripts.

[16] *div. in Caec.* 5. 17–19, 20. 65; *2 Verr.* 2. 6. 15.

tried was intended as a defence for the allies. It follows, however, that the description which he gives of the law is only of assistance in identifying the purpose of the Lex Calpurnia if, as modern scholars have assumed, there was a considerable degree of continuity between the Lex Calpurnia and the laws *de repetundis* which followed it. This is only partly justified. Both Cicero's argument in the *de officiis* and the use of the name *de repetundis* demonstrate that there was some link; but there was also a fundamental change, at least from the point of view of procedure, between the Lex Calpurnia (and the Lex Junia, which seems to have followed it) and the law of the Tabula Bembina and all the other laws from 123 to the end of the republic. The Tabula Bembina shows that the process under that law was by means of *nominis delatio*, whereas a subsequent clause of the same inscription lists as excluded from service on the juries of the new law anyone with whom '[lege Calpu]rnia aut lege Iunia sacramento actum siet', showing that the process under the Lex Calpurnia and the Lex Junia was by *legis actio sacramento*.[17]

The *legis actio sacramento* was one of the oldest of the procedures available in Roman law, and is said by Gaius to be that used when no other more specific form was appropriate.[18] It had two parts, the first (*in iure*) taking place before the praetor, and the second before a *iudex*. The *actio* could be undertaken either *in rem* (that is with respect to the ownership of a particular piece of property) or *in personam* (that is, in respect of the individual who, as the plaintiff claimed, had deprived him of the property in dispute). In an *actio in rem*, when the parties came before the praetor, the plaintiff made his claim, in a strict form of words and actions, and the other party responded with a similar claim. In the case of an *actio in personam*, the plaintiff stated the grounds for his complaint, as, for instance, that the other party had committed theft against him, or that he had some obligation towards him, and the other denied the charge. The first claimant then challenged the second in an oath (*sacramentum*) for a specific sum (500 *asses* in cases involving 1,000 *asses* or more, 50 *asses* in lesser cases), and the second responded 'et ego te'. The matter was then transferred to a *iudex*, whose responsibility it was to determine which *sacramentum* was *iustum*. In addition to the failure of his suit, the losing party forfeited his stake to the public treasury. In the case of the Lex Calpurnia, the single *iudex* would have been replaced by the *quaestio*, composed of senators, perhaps (as in Gracchus' law) fifty in number.[19]

The procedure described in the Tabula Bembina was quite different:[20] the injured party made an accusation to the praetor, naming the alleged criminal (*nominis delatio*); the praetor, probably at this point, exacted an oath that the charge was not falsely brought out of malice, and then assigned advocates (*patroni*), if the accuser required them. A *quaestio* of fifty *iudices* was then selected from the list of 450 set up by the law for the purpose. A period of investigation (*inquisitio*) was stipulated by the praetor, and on a fixed day the parties presented their cases to the praetor and the *iudices*; provided that a sufficient number of *iudices* agreed to make a decision, the voting then took place, each *iudex* indicating on a ballot either 'C' (*condemno*), 'A' (*absolvo*), or nothing at all, which was recorded as *sine suffragio*. A majority was required for condemnation. If this took place, the sum due to the accuser was fixed (*litis aestimatio*), and payment enforced.

This change of procedure is of great importance, for, as Kunkel has observed,[21] the *legis actio sacramento* stands in the tradition of early Roman private law, whereas the *nominis delatio* points towards the criminal law processes of Sulla's *quaestiones*, set

[17] *lex rep.*, lines 3 (*nominis delatio*) and 23 (Lex Calpurnia and Lex Junia). For the conjunction of the two laws, see *lex rep.*, lines 73–5.

[18] Gaius 4. 13. The *actio sacramento* is most fully described in Gaius 4. 13–17, although the section on the *in personam* form is unfortunately illegible in the Veronese palimpsest. For an account of the *legis actio sacramento*, see W. W. Buckland, *A Textbook of Roman Law*[3] (1963), 610–16; M. Kaser, *Das römische Zivilprozessrecht* (1966), 60–77; Watson, op. cit. (n. 11), 162–3.

[19] So Eder, op. cit. (n. 5), 97.

[20] See *lex rep.* lines 1–4, 9–11, 19–27, 49–56, 58–72; Th. Mommsen, *Römisches Strafrecht* (1899), 382–4; A. H. M. Jones, *Criminal Courts of the Roman Republic and Principate* (1972), 50–1.

[21] W. Kunkel, *Untersuchungen zur Entwicklung der römischen Kriminal-verfahrens in vorsullanischer Zeit* (Abh. Bayerische Akad. 56, 1962) 13–14, 102 and 132–3. Cf. E. Huschke, *Die Multa und das Sacramentum in ihren verschiedenden Anwendungen* (1874), 473.

up by the Leges Corneliae in the late 80s. This procedural change is important in the present context because Piso's choice of the old form should tell us something about his intentions in drafting this first *lex de repetundis*. It is notable, for instance, that the old form, like all other *legis actiones*, was clearly designed for use only by Roman citizens. It is uncertain which of the two forms described above (*in personam* and *in rem*) was that used under the Lex Calpurnia, though the likelihood is that the *in personam* form would suit better the circumstances of most such cases, since the actual *res* which was being sought would probably not be identifiable by the time of the trial; but in either case (and explicitly in the formal phrases used for the *actio in rem*) the two parties were asserting their rights (or, for the defendant in an *actio in personam*, denying that he had violated a right) under Roman law (*ex iure Quiritium*, in the *actio in rem*). In the normal form of the action, therefore, this remedy was not accessible to non-citizens, any more than any other part of the *ius civile*.[22] On the contrary, as we know from the Tabula Bembina, Gaius Gracchus' law was explicitly intended for use by Latins and other *peregrini*.[23] If, as is generally believed, the Lex Calpurnia was also intended for use by provincial *peregrini*, the usual pattern of the *legis actio sacramento* must have been modified by that law.

One suggestion, adopted by several scholars over the past thirty years, is that Piso deliberately chose this form *because* it could only be used by Roman citizens, thereby compelling provincials to use Roman advocates (*patroni*), a process which would help to control the attacks made on former governors by their provincial victims.[24] The difficulty with this attractive suggestion is that it does not fit easily with the *legis actio* procedure as we know it; nor is it easy to see how that procedure might have been modified in order to incorporate the use of *patroni*.

The claims made by the parties to a *legis actio sacramento* were made on their own behalf. Thus, in the case given by Gaius of the disputed possession of a slave, the plaintiff appeared before the praetor holding the slave, and recited the words, 'Hunc ego hominem ex iure Quiritium meum esse aio'.[25] While it is true that no *peregrinus* could make this claim *ex iure Quiritium*, no *patronus* could make it at all, since the slave could not under any circumstances be said to be his. This consideration applies to the formal statements required by all the *legis actiones*, and is the more significant because of the well-known insistence on the use of exactly the right words in the recitation of the forms, an insistence which Gaius believed to have been responsible for the demise of the *legis actio* procedure.[26] It is no doubt this which gave rise to the rule, quoted in the *Digest* from Ulpian, that 'nemo alieno nomine lege agere potest'. Justinian's *Institutes*, recording and giving exceptions to this same rule, say that this is no longer the case in his time, but Gaius is more specific in stating that it was during the period when the *legis actiones* were in use that this rule applied.[27] Representation of the parties by others, at least at the formal *in iure* stage of the process, was impossible within a system based on the strict observance of fixed forms, the *certa verba* of the *legis actio* as opposed to the more flexible *concepta verba* of the later praetorian formulary system.[28]

It would of course be possible for the Lex Calpurnia, for the particular instance of the *quaestio de repetundis*, to have prescribed other *certa verba* than those of the *legis actiones sacramento* known from the sources. Indeed Lintott suggests that the *patronus* of a *peregrinus* might have been required to perform 'a *sacramentum* in support of an assertion that certain offences had been committed, e.g. "aio te quadringentiens sestertium ex Sicilia contra leges abstulisse"'.[29] However, this ingenious attempt to

[22] Gaius 1. 1; id., *D.* 41. 1. 1; Justinian, *Inst.* 1. 2. 1–2; cf. Kaser, op. cit. (n. 18), 45.

[23] *lex rep.*, lines 1–3.

[24] So F. Serrao, 'Appunti sui *patroni* e sulla legittimazione attiva all' accusa nei processi *repetundarum*', *Studi Francisci* 2 (1956), 473–511, esp. 478–80; Kunkel, op. cit. (n. 21), 15; A. W. Lintott, 'The procedure under the leges Calpurnia and Iunia', *ZPE* 22 (1976), 207–14, esp. 208–9.

[25] Gaius 4. 16.

[26] Gaius 4. 30; cf. id. 4. 11 and Cic., *Mur.* 12. 26–8.

[27] Ulpian, *D.* 50. 17. 123; Justinian, *Inst.* 4. 10 *pr.*; Gaius 4. 82.

[28] So J. A. C. Thomas, *The Institutes of Justinian* (1975), 309.

[29] A. W. Lintott, loc. cit. (n. 1), 174.

introduce pleading by means of *patroni* into the *legis actio* seems to create more anomalies than it seeks to remove. Firstly, it can hardly be said to be an action *de pecuniis repetundis*, since it says nothing about the recovery of money, nor about whose the property is alleged to be; nor indeed is there any inference stated in the formal assertion about these vital matters. Of course, these problems could be overcome by recasting the assertion in the form of an action *in rem*, as opposed to the *in personam* form which Lintott has suggested; but this creates the difficulty which Lintott's formulation avoids, namely that it would require the person making the assertion to claim that the sum specified belonged not to himself, but to a third party, who was not directly involved in the making of the assertion. Indeed, the other problem with this suggestion is that, at least in the form of the procedure, it gives the right of initiating proceedings not only to the allegedly injured party, but to anyone who wishes to make the suggested assertion. This was not even available under Gracchus' law, and probably was not introduced into a *lex de repetundis* until the end of the century. The *patroni*, who can be assigned by the praetor to plaintiffs who request them under Gracchus' law, are given only after the accusation has been made.[30] It would be extraordinary if this had been present in the Lex Calpurnia, based on the old-fashioned *legis actio*, and abandoned by Gracchus twenty-six years later.

There is one other mechanism which might have allowed a non-citizen to make a claim based on a *legis actio sacramento*. Under the formulary system which was gradually replacing the *legis actio* during the latter half of the second century, the praetor could make a formula apply to a *peregrinus* by the introduction of a *fictio civitatis*, which instructed the *iudex* to make his judgement on the hypothesis that the party concerned was a Roman citizen.[31] It is difficult to see how such a fiction could have been embodied into the actual words of the assertion made in the *legis actio* procedure, since the praetor did not have the same freedom of decision about the shaping of the words used that he did with the formula, but it might have been part of the statute itself. This was, after all, a period of legal experiment, not least with the structures of litigation.[32]

If the mode by which the provincials were to take advantage of the Lex Calpurnia was indeed some form of *fictio civitatis*, embodied within the law, Piso could be seen as one of the boldest experimenters of his time, and it must be emphasized that there is no direct evidence for the existence of this mechanism. But whether or not he did employ the *fictio*, it is fairly clear that the *peregrini* were not his only, and probably not his primary concern in drafting this law. The *fictio civitatis*, when it is used in the formulary procedure, is a device designed to make Roman law applicable to non-Romans, and if it did appear in some form in the Lex Calpurnia, its effect must have been to extend a process, available for Roman citizens, to those who were not Roman citizens. This is particularly clear if the form of action, whether *in rem* or *in personam*,[33] was at all like that of the *actio sacramento in rem*, as Gaius records it.[34] In such an action both parties made their claim to ownership *ex iure Quiritium*. It might well be possible, as suggested, that, because of the special provisions of the Lex Calpurnia, this action was available to non-Romans, but it must surely have been open to Romans also. The very structure of the action requires that the claim made by

[30] *lex rep.*, lines 1–3 and 9– → A. N. Sherwin-White, *JRS* 62 (1972), 97–9. Note that the person who *can* place an accusation 'alieno nomine' under Gracchus' law (*lex rep.*, lines 6 and 60) is not a *patronus*, but a *cognitor*, who would either have, or assume for the purpose of the litigation, the status of his principal → (A.N. Sherwin-White, *JRS* 72 (1982), 20–1; Buckland, op. cit. (n. 18), 708–9). In the Verres' trial, Cicero still refers to himself, in a non-technical sense, as the *cognitor* of the Sicilians.

[31] This suggestion was made to me by Peter Brunt and Michael Crawford. The same possibility had occurred to Mommsen, who suggested it in *ZSS* 12 (1891), 278 n. 1; but he omitted these pages when preparing the article for his collected writings (cf. *Gesam. Schr.* 3 (1907), 362–3). (I am grateful to Jean-Louis Ferrary for this reference.) For the *fictio civitatis*, see Gaius 4. 37. For an instance of a *fictio* used in the early years of the following century, → *JRS* 73 (1983), 39 and 74 (1984), 52–4.

[32] Thus Kunkel, op. cit. (n. 21), *passim*.

[33] Above p. 5.

[34] Gaius 4. 16.

each party should be the same as that made by the other, and on all occasions at least one party will have been a Roman citizen. This consideration is strengthened by the undoubted fact that Piso chose the *legis actio sacramento* as the form of action for his law. It is probable that the praetorian formulary procedure was already available, and, more importantly, it is certain that the *nominis delatio*, which Gracchus was to employ for the benefit of *peregrini*, was already in existence.[35] If Piso selected a form, belonging to the earlier pattern, and one which had previously only been available to Roman citizens, it is likely that he was thinking of it primarily for use by Romans.

The identification of those who would have been the plaintiffs in the Lex Calpurnia procedure does not, however, take us far in finding its purpose. Whereas the need for a law protecting the interests of those in the provinces who are not Roman citizens seems obvious, the point of a *lex de pecuniis repetundis* to be used primarily by Romans might seem less clear. It was indeed precisely the Roman citizenry that Cicero, in the passage of the *divinatio in Caecilium* cited above, said had no need of the Lex Cornelia *de repetundis*, because, when they had money taken from them, 'civili fere actione et privato iure repetuntur'.[36]

Matters were not, of course, as simple for a Roman citizen as Cicero would have his hearers believe. He, after all, was trying to convince his audience that the provincials from Sicily were in far worse straits than any Roman would be, and that their only hope rested on the *quaestio de repetundis*. The prosecution of a magistrate or pro-magistrate holding *imperium* was impossible before a civil court, because it was not permitted to summon *in iure* anyone who himself had the power of summons.[37] Whether it was possible to bring an action in private law against such a person under the republic, once his period of office was over, is not clear; but it must be said that no such case is known.[38] Even if it were possible in theory to bring such a suit, there are many reasons why a process such as that instituted by the Lex Calpurnia might be preferable. An ex-magistrate was not merely an ordinary private citizen; he was a man of considerable weight and importance in Roman society, and the accusation being brought against him was that he had abused the trust placed in him by the people at his election, by misusing his *imperium* for his own ends. To such a man and in such a case, the publicity of a procedure which in its latter stages was conducted before a *quaestio* of some fifty men and in public would be far more of a deterrent than the comparative privacy of a hearing by a single *iudex*, which would be normal in private law.[39] Moreover, the nature of the offence was such that the state as a whole might be expected to require this additional publicity for the investigation of the behaviour of one of its ex-magistrates. For similar reasons, and despite opposition from the Crown, the impeachment of the king's ministers in seventeenth-century England by the House of Commons in the House of Lords took place, because, in the words of Sir Matthew Hale, a contemporary Lord Chief Justice, 'it is a presentment by the most solemn inquest of the whole kingdom'.[40] The fact that in theory there should have been remedies available by less spectacular means was beside the point.

Given the nature of the offence, therefore, it becomes less surprising that a law should be proposed to assist Roman citizens. Not only does it seem likely *a priori* that

[35] So Kunkel, op. cit. (n. 21), 68–70, citing Plautus, *Aulul.* 408–11.

[36] Cic., *div. in Caec.* 5. 17. See above p. 3.

[37] It is this, testified to by Varro (*apud* Gellius, *NA* 13. 2. 6), which makes legal actions against a serving magistrate impossible, rather than ➡ W. W. Buckland believed (*JRS* 27 (1937), 37–47), the unchallengeable nature of any acts of a holder of *imperium*. Lintott, art. cit. (n. 1), 174 n. 54, discussing Gellius, *NA* 13. 13. 4, misses Varrro's point by assuming that the problem about summoning a magistrate attended by lictors was a practical one. It is clear from the earlier passage that the presence of a lictor represented the right of arrest (*prensio*). See ➡ E. J. Weinrib, 'The prosecution of Roman magistrates', *Phoenix* 22 (1968), 32–56, and his subsequent discussion with D. R. Shackleton-Bailey (ibid. 24 (1970), 162–5 and 25 (1971), 145–50.

[38] For the argument, see, for instance, Buckland and Lintott, cited in the last note. The one republican case produced by Lintott in favour of his contention that ex-magistrates could be sued in private law for acts committed while holding *imperium*, that of C. Antonius and the Greeks (Asconius 84C), is of little help, since it is not clear that Antonius was holding *imperium* at the time.

[39] Cf. J. M. Kelly, *Studies in the Civil Judicature of the Roman Republic* (1976), chs. 4 and 5.

[40] Sir Matthew Hale, *Historia Placitorum Coronae* (published with notes by Sollom Emlyn, London 1736) cap. XX, sect. IV.

if the provincial *peregrini* needed protection the Romans might need it too, and indeed might be expected to receive attention earlier, but the evidence of later *leges de repetundis* also indicates that the interests of citizens were not forgotten. The law of Gracchus, in a passage about rewards to successful accusers, envisages *nominis delatio* as being carried out by *cives Romani* as well as by non-citizens, and these people, as noted above, are plaintiffs, not *patroni*.[41] The same seems to have been true of later laws. Two passages from Paulus in the *Digest* list property taken 'contra legem repetundarum' (in this case the Lex Julia) among those items which cannot be acquired by *usucapio*, unless first returned to the person from whom they had been taken.[42] As this would only make sense if the first owner was able to cede full ownership (*dominium ex iure Quiritium*), which a non-citizen could not do, it appears that the Lex Julia, at least in the form Paulus knew it, also covered cases of property taken from *cives*.[43]

The major distinction between the Lex Calpurnia and the *leges de repetundis* which followed it is, on this reconstruction, that the former was peculiarly suited to the needs of Roman citizens, whereas the latter, as is clear from the Tabula Bembina, were also intended for non-citizens, and were seen primarily as being for their protection. This would also explain the apparent continuity of the Lex Calpurnia process, even after the introduction of Gracchus' law in 123 B.C. A clause in that law, excluding from its scope all those matters which have already been the subject of a case under the Lex Calpurnia or the Lex Junia, reads: '[quibusquom ioudicium] fuit fueritve ex lege, quam L. Calpurnius L.f. tr. pl. rogavit, exve lege, quam M. Iunius D.f. tr. pl. rogavit...'.[44] The use of the future perfect in this phrase, standard in the language of the legislation of the period, indicates that the legislator envisaged that there would still be cases brought under the Calpurnian and Junian laws after the passing of his own. This is only to be expected. It was not the practice of the Romans to remove entirely access to an older form of action when a newer was introduced; and while the old *legis actio* form was still available, it might well be that it would be favoured by Roman citizens, who had a relatively uncomplicated suit to bring against an offending ex-magistrate. In such circumstances the very rigidity of the *legis actio* procedure might be advantageous to a Roman plaintiff.[45]

The survival of such a procedure might also explain Cicero's problematic remark about the method available to Roman citizens to bring an action *de pecuniis repetundis*.[46] His argument presupposes what we would otherwise not know explicitly, that there was some form of remedy available to the *civis*. The words he uses to describe this process are: 'nam civibus cum sunt ereptae pecuniae, civili fere actione et privato iure repetuntur'. This has generally been taken to mean that citizens could bring a normal private law suit in such cases,[47] but that would be a curious thing for him to be saying at this point. The distinction he is making is between methods open to provincials and those open to citizens, yet, as Buckland pointed out long ago, it is probable that by Cicero's time, the use of the *fictio civitatis* had made such private law actions as might be appropriate available to non-citizens also.[48] It might be, however, that the phrase, 'civili fere actione et privato iure', refers to the *legis actio* procedure, still available to citizens under the Calpurnian (and, no doubt, Junian) laws. This might fairly be described as 'an action belonging, in general terms, to the *ius civile* and private law', even though it was a process specifically for recovery from an ex-magistrate. It is true that the words 'pecuniae ereptae' are not part of any known *lex de repetundis*,[49] but the use of the expression 'pecuniae ... repetuntur' suggests that what Cicero had in mind was not an ordinary private law action. The deliberate

[41] *lex rep.*, line 87; cf. lines 76–8 (83–5). Above pp. 5–6. On citizens as accusers in the *lex rep.*, see Venturini, op. cit. (1979) (n. 1), 82–91, and the observations of J.-L. Ferrary, *Labeo* 29 (1983), 70–1.

[42] Paulus, *D.* 41. 1. 48 *pr.* and 48. 11. 8; cf. Gaius 2. 45.

[43] So J. van Binsbergen, *De legibus ablatae pecuniae* (1906), 22–3. On the forms of ownership, cf. Gaius 2. 40–1.

[44] *lex. rep.*, line 74 (81).

[45] For a similar position in the change from *legis actio* to formulary procedure, see P. Birks, 'From Legis Actio to Formula', *Irish Jurist* 4 (1969), 356–67.

[46] Cic., *div. in Caec.* 5. 18, quoted above, p. 3.

[47] Thus Venturini, op. cit. (1979) (n. 1), 85–7; Lintott, art. cit. (n. 1), 174.

[48] Buckland, art. cit. (n. 37), 46.

[49] So Buckland and Venturini, locc. citt.

imprecision of the word 'fere' also indicates, whatever the process was to which he was referring, it could not be described simply as an *actio civilis*.

If the Lex Calpurnia was intended primarily for Roman citizens, the question remains as to what remedy, if any, was available to those provincials, who, as recent instances in the first half of the second century had shown, were likely to suffer from extortionate misgovernment. It may be, if the law contained the statutory *fictio civitatis* outlined above,[50] that individual provincials could use it, but in any case it would be of little assistance to provincial communities, unless the law also contained explicit permission for this.[51] However, of the few cases known from the period between the Lex Calpurnia in 149 and Gracchus' law in 123 which might be prosecutions *de repetundis* (listed below in an Appendix), only one is a complaint brought explicitly by a provincial community. In 140, an embassy of Macedonians complained to the senate about D. Iunius Silanus, who had held that *provincia* while praetor, alleging that he had 'taken money'.[52] Silanus' natural father, T. Manlius Torquatus, intervened at this point, and heard the case himself. As a result of the father's conclusion that Silanus had behaved while in office in a manner unbefitting to one of such distinguished ancestry, the accused man hanged himself. This is clearly not an ordinary way of proceeding, but it is noticeable that there is no indication of a court case being brought in this instance. At the moment of Torquatus' intervention, the senate had decided to 'de querellis cognoscere'.[53] Scholars have had some difficulty in explaining why the Macedonians had gone to the senate at all, since there seems no way of incorporating this into the little we know of the Lex Calpurnia.[54] This was, however, exactly what had happened in 171 when several Spanish communities had complained to the senate about the behaviour of three of their governors. Then, because 'manifestum esset pecunias captas', the praetor, L. Canuleius, had been instructed to conduct an enquiry, five *recuperatores* being appointed for each case, and *patroni* chosen by and assigned to the provincials.[55] This sounds very like the sequence of events in 140, which were interrupted by Torquatus' request. If the case could have been heard under the Lex Calpurnia, there is no reason why the senate should have been involved at all.

It would appear, then, that in the middle of the second century there were two separate procedures for recovery from an ex-magistrate, one for Roman citizens (and possibly, by extension, for individual *peregrini*), and one for provincial (and therefore peregrine) communities. If such was the case, it is not difficult to see how unsatisfactory the position of the provincials might seem to be. There is no sign that in 171 or in 140, the provincial communities gained any advantage from the admitted guilt of those about whom they had complained. In the late 130s and through the 120s, there were three cases in which men who were apparently guilty were acquitted.[56] Our sources are not sufficiently detailed in their accounts of these events to provide any certainty as to the process under which they were tried, or even the charges brought against them. Appian, however, says that the presence of ambassadors, who had come from the provinces in connection with the two later cases, was instrumental in creating the agitation which led to the passing of Gracchus' law.[57] In at least two of these cases, Romans are named as involved in the prosecution, which might suggest either that the charge alleged was of money improperly taken from a Roman citizen, or perhaps that an individual *peregrinus* had brought a suit, under the Lex Calpurnia, by means of a *fictio civitatis*; or that a special *quaestio* had been

[50] Above p. 6.

[51] This was available in Gracchus' law (see above n. 30); for the *legis actio*, such permission might be modelled on the action *pro populo*, which was one of the exceptions to the rule that no one might act *alieno nomine* (Ulpian, *D.* 50. 17. 123; Justinian, *Inst.* 4. 10 *pr.*; Gaius 4. 82). For an instance of the *legis actio sacramento pro populo* in 144 B.C., see Frontinus, *de aqu.* 1. 7; E. Weiss, *ZSS* 45 (1925) 97 ff.

[52] Cic., *de fin.* 1. 7. 24; cf. Livy, *per.* 54, Val. Max. 5. 8. 3.

[53] Livy, *per.* 54.

[54] This was the view, however, of A.W. Zumpt, *Das Criminalrecht der römischen Republik* 2. 1 (1868), 42 ff.; on which see Lintott, art. cit. (n. 1), 173.

[55] Livy 43. 2; cf. Richardson, op. cit. (n. 12), 114–15, with further bibliography.

[56] They were L. Aurelius Cotta, an otherwise unknown Salinator, and M'. Aquillius (*cos.* 129). See Appendix below.

[57] Appian, *bell. civ.* 1. 22. 92.

established on the model of the 171 procedure. In any case, it would appear that the real complaints of the provincials were not being met, and hence the agitation for new legislation. In a passage in the *pro Fonteio*, Cicero, complaining that a defendant often has to listen to innumerable slanders against him which have no relevance to the case in hand, links together three instances: two of these are the cases of M'. Aquillius and L. Cotta, whose acquittals are both connected by Appian with the background to Gaius Gracchus' legislation.[58] In such an atmosphere, it would not be surprising if direct access to the courts by provincial communities became a major political issue.

That there should be a distinction between suits *de repetundis* by individual Roman citizens and those by provincial communities is not surprising. If a Roman citizen attempted to recover *pecunia capta* from an ex-magistrate, this might reasonably be seen as a development of the ordinary citizen law (*ius civile*),[59] and to be dealt with through a strengthened form of the *legis actio* process before a praetor. This may well have been the *praetor urbanus*. The only reason for the widely held belief that the Lex Calpurnia process went on before the *praetor peregrinus* is that Gracchus' law assigned the temporary supervision of the *quaestio* established under that law to this man, and, it is argued, this indicates that previously he must have conducted the trials under the Calpurnian and Junian laws.[60] Given the nature of Gracchus' law, however, with its emphasis on *peregrini* as accusers, the *praetor peregrinus* would be the obvious magistrate to put in charge of its operation until a specific praetor could be assigned, whoever had been responsible under the Calpurnian and Junian laws.

A complaint brought by a provincial community, however, was a very different matter, and certainly had nothing to do with *ius civile*. That does not mean that the Roman state could simply ignore it. The provincial communities, at least those who stood in some form of friendly relationship with Rome, were *de iure* distinct autonomous states.[61] The reception of a delegation from one such state with complaints about the activities of a magistrate or promagistrate of the Roman people was inevitably a serious matter. Indeed on the Roman side, the sending of an embassy to a foreign state *ad res repetundas* was the traditional ultimatum prior to a declaration of war.[62] It is hardly surprising that such complaints, coming from another foreign state, should be considered first by the senate, and handled through a commission set up by the senate.

The change in Roman practice, introduced by the use in Gaius Gracchus' law of the *nominis delatio* process, marked not only a stage in the history of Roman criminal law, but also illustrated a major development in Rome's attitude towards the rest of the Mediterranean world. The Lex Calpurnia had provided a means for the recovery of monies illegally taken by Roman officials, which was, to say the least, far more effective than any ordinary private law procedure could be, but that can have been of little help to those provincial communities which came in contact with the *imperium Romanum* in the hands of Roman commanders in the ever-widening sphere of Roman control. Gracchus' law provided such a remedy, but it did so at a cost to those provincial communities. By taking their complaints out of the immediate oversight of the senate, and incorporating the hearing of them within the compass of the Roman courts, Gracchus may have improved the chances of their receiving some recompense for the wrongs they had suffered. To do so, he had in effect made them, in a restricted sense, part of the body politic of Rome itself, no longer simply (in the classic definition of Greek *autonomia*) using their own laws, but also in this context, using Roman law. There is no reason to doubt that, on Gracchus' part, this was a genuine attempt to assist those provincials who had, over the previous years, complained

[58] Cic., *pro Font.* 17. 38.

[59] In classical law, *iniuria* committed by a magistrate was treated as a private law matter, whether he had acted in an official or a private capacity (Ulpian, *D.* 47. 10. 32).

[60] *lex rep.*, line 12; Mommsen, *Gesam. Schriften* 1 (1905), 51–2, A.H.M. Jones, op. cit. (n. 20), 48.

[61] This was still technically the case for *foederati*, *liberi* and *amici* in the first century A.D. (Proculus, *D.* 49. 15. 7, cf. Pomponius, *D.* 45. 15. 5; A. Heuss, *Die völkerrechtlichen Grundlagen der römischen Aussenpolitik in republikanischer Zeit* (Klio Beiheft 31, 1933), 6–12).

[62] So Livy 21. 18. 4–5, 36. 3. 10, 38. 45. 5–6, 45. 25. 1–13. See the comments on this practice by J. W. Rich, *Declaring War in the Roman Republic in the Period of Transmarine Expansion* (1976), ch. 3.

bitterly at their treatment, and the care taken to ensure the publicity of the trial procedure in the provisions recorded on the Tabula Bembina confirms this belief;[63] but the consequence of this paternalism was inevitably an increase in the overt dependence of the states of the ancient world upon Rome, a dependence which manifested in reality the power of the Roman empire.

The growth of that power was, both in theory and in practice, identical with the expansion of the responsibilities of the men who held *imperium*, the magistrates and promagistrates of the Roman people. It is no surprise that the first *lex de repetundis* should prove to have been designed for the protection of Roman citizens against the misuse of that *imperium*, whether in Italy or in the overseas *provinciae* where they had ever-increasing economic interests. The success of the mechanism which Piso devised to bring offending magistrates into the shaming publicity of a trial before a *quaestio* is demonstrated by its retention and extension in Gaius Gracchus' legislation on behalf of the provincials.

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APPENDIX. EXTORTION CASES BETWEEN 149 AND 123 B.C.

Date	*Defendant*	*Accuser*	*Provincia*	*Charge*
1. 141	L. Hostilius Tubulus	P. Mucius Scaevola	*quaestio de sicariis*	'pecunia capta'
2. 140	D. Iunius Silanus	Macedonians	Macedonia	'pecuniae captae'
3. 139	Q. Pompeius	?	presumably Hispania Citerior	? repetundae
4. post-133	L. Aurelius Cotta	P. Scipio Aemilianus	unknown	? repetundae
5. ?	Salinator	unknown	unknown	repetundae
6. ?125	M'. Aquillius	P. Cornelius Lentulus	Asia	repetundae

1. *L. Hostilius Tubulus*
Tubulus' case was of such immense notoriety that Cicero a century later (*nat. deor.* 1. 23. 63, *de fin.* 4. 28. 77, 5. 22. 62) and Gellius three centuries later (*NA* 2. 7. 20) could cite him as an exemplar. Having openly taken bribes while in charge of what Cicero describes as a *quaestio inter sicarios* (*nat. deor.* 3. 30. 73) while praetor in 142, he was the subject of a *quaestio* set up by a plebiscite proposed by the tribune P. Mucius Scaevola in 141. So it was *not* held under the Lex Calpurnia. The *quaestio*, under the charge of the consul Cn. Servilius Caepio, condemned him and he went into exile (Cic., *de fin.* 2. 16. 54). The notoriety of the case was probably in the first instance the reason for, and subsequently the effect of, the use of the extraordinary *quaestio*.

2. *D. Iunius Silanus*
On Silanus, see above p. 9. As argued there, this case seems to have begun with an appeal by the Macedonians to the senate, on the same model as that used in 171 by the Spanish communities.

3. *Q. Pompeius*
Pompeius is said by Cicero to have been testified against by Cn. and Q. Caepio and by L. and Q. Metellus, which testimony was disbelieved by 'sapientissimi iudices' (*pro Font.* 11. 23). Valerius Maximus (8. 5. 1, which, along with the next two sections of his collection, appears to have been based on the Cicero passage) states explicitly that Pompeius was charged with *repetundae*, and E. S. Gruen, *Roman Politics and the Criminal Courts, 149–78 B.C.* (1968), 36, suggests that this trial took place after the abrogation of Pompeius' treaty with the

[63] See recent ➞ A. N. Sherwin-White, 'The Lex Repetundarum and the Political Ideas of Gaius Gracchus', *JRS* 72 (1982), 18–31, esp. 21–3.

Numantines (see Richardson, op. cit. (n. 12), 144–7). Appian (*Ib.* 79. 344) talks of a 'trial' in the senate, though this may be a separate incident from that mentioned by Valerius Maximus. It may be that there was a hearing before the senate on the model of the procedure used in 171; or that there is a simple confusion here between what happened in Pompeius' case and the senatorial procedures of the first and second centuries A.D.

4. *L. Aurelius Cotta*

The date of L. Aurelius Cotta's trial is uncertain. The appearance of a reference to Scipio Aemilianus' prosecution of him in the Oxyrhynchus epitome of Livy book 55 has led most scholars to place it in 138 (so E. Badian, *Studies in Greek and Roman History* (1963), 105–6 and n. 4), although Cicero states that at the time Scipio had already been 'bis consul et censor' (*div. in Caec.* 21. 69; cf. *pro Mur.* 28. 58), which, if Cicero's chronology could be relied on in a passing reference of this sort, would suggest a date after 133, and Scipio's return from Numantia. There is little indication in the sources as to the nature of the charge, though the context of Cicero's remarks in the *div. in Caec.* and the mention of the unsuccessful prosecution of an Aurelius Cotta by Appian in his account of the background to Gaius Gracchus' law (*bell. civ.* 1. 22. 92) indicate *repetundae*; nor is there any reference at all to his *provincia*, if this is a *repetundae* case. This may have been a trial under the Lex Calpurnia, since Cicero (*pro Mur.* 28. 58) states that those 'qui tum rem illam iudicabant' were 'sapientissimi homines', which might refer to a senatorial *quaestio* (so Gruen, op. cit., 37 n. 66). For what it is worth, Valerius Maximus (8. 1. *absol.* 11) states that the accusation was 'apud populum', which suggests a trial in the assembly, which is most improbable. Tacitus includes the trial in a list of precedents cited by Mam. Scaurus in A.D. 22, though, as Badian has shown, Scaurus is designedly imprecise in the instances he gives (op. cit., 105–11; note further that among other instances given, he represents Cato *censorius* as prosecuting Ser. Sulpicius Galba, on which see above pp. 1–2). If this *was* a trial *de repetundis*, it is notable that the initiation of the proceedings is said to have been by a Roman, Scipio Aemilianus, and that there is no mention anywhere of provincials as plaintiffs. It may be that this case was undertaken by Aemilianus *pro populo*, on behalf of the Roman people (see above, n. 51).

5. *Salinator*

The mysterious 'Salinator' is mentioned only by Appian, *bell. civ.* 1. 22. 92, which would indicate that the trial was *de repetundis*. He was probably a Livius Salinator (C. Cichorius, *Römische Studien* (1908), 77–9), but cannot otherwise be identified. Nothing else is known about his *provincia* or his accusers. He is said to have been scandalously acquitted.

6. *M'. Aquillius*

The final case in this period is that of M'. Aquillius, accused by P. Lentulus, the *princeps senatus*, with the otherwise unknown C. Rutilius Rufus as *subscriptor* (Cic., *div. in Caec.* 21. 69). The scholiast on the passage states that this was 'de pecuniis repetundis' (Ps. Ascon., ad loc., p. 204 (St.)). This would seem to be confirmed by Appian's inclusion of the case in *bell. civ.* 1. 22. 92. Other passages of Appian (*Mithr.* 12. 39, 57. 231) suggest that the offence may have been connected with bribes received from the king of Pontus to persuade him to hand over Phrygia, in the course of the settlement of Asia, after Aristonicus' defeat. Appian mentions the presence of ambassadors (hence presumably to appear before the senate) from the provinces, who were in Rome in connection with the three cases of Cotta, Salinator and Aquillius, but there is no indication of an accusation being brought by them, and they may well have been there in an attempt to influence the outcome of the trials, rather than having any legal standing in the process. Jones has suggested that the trial of Aquillius was before a special *quaestio*, set up by the senate in the context of the overhaul of the settlement (op. cit. (n. 20), 54); but, as he himself admits, the charge is likely to have been 'pecunia capta', and this could have been heard by the ordinary *quaestio de repetundis*. In this case, P. Lentulus, the *princeps senatus*, was probably acting *pro populo* (see above n. 51).

Although the evidence gathered in this appendix is essentially negative, as is inevitable given the state of that evidence, certain trends may be observed. Firstly, there are signs of the involvement of the senate in at least one of these cases, that of D. Iunius Silanus, and possibly also that of Pompeius, which suggests a continuity of the type of process used in 171. Secondly, the presence of embassies from peregrine communities in connection with the later instances, not acting as *accusatores* but clearly interested in the outcome of the cases, provides a background (as indeed Appian notes) to the major change which, if my argument is correct, was brought about by C. Gracchus' law, that of allowing such communities to bring accusations in their own right.