LIVIUS DRUSUS AND THE COURTS

A. R. HANDS

Two recent attempts have been made to solve the old conundrum concerning the apparent incompatibility of Appian's account of Livius Drusus' reform of the criminal courts (*BCiv.* 1. 35), when this is understood (rightly, as I believe) to mean the transfer of the latter to the senate enlarged by three hundred *equites*, and his statement that the *equites* were at the same time to be made liable to charges of *dorodokia* and were highly indignant at the idea. E. S. Gruen, *Roman Politics and the Criminal Courts*, 149–78 *B.C.* (Cambridge, Mass. 1968) 209, has reasserted Mommsen's view that the latter provision was retrospective in purpose, being aimed at the jurors who had condemned Rutilius Rufus; but not simply retrospective, since he holds that it was an extension of the *lex Sempronia ne quis iudicio circumveniatur* to which Drusus was resorting, which could thus also be applied to equestrians who might in the future corrupt a jury *from outside*. E. J. Weinrib, on the other hand, *Historia* 19 (1970) 414 f., holds that the provision was neither an extension of this law nor retrospective in purpose, but that it was a rider attached to a single *lex iudiciaria* whereby *equites* were to become liable for the acceptance of bribes when serving in certain courts in which they were to continue to sit after 91 B.C.—only the court for *repetundae*, and possibly that for *maiestas* and *peculatus*, were to be completely in the hands of the enlarged senate. Weinrib's thesis is argued with much care and detail and there is much that is attractive in it. We shall suggest here that he is probably right in his interpretation of the *dorodokia* provision in Appian but indicate grounds for doubt concerning the latter part of this thesis.

In denying that the *dorodokia* provision had any connection with the *lex ne quis iudicio circumveniatur* Weinrib places great emphasis on Cicero's well-known references to it in the *pro Cluentio* and *pro Rabirio Postumo*, where it is exclusively the *receiving* of money *by* jurors, not the *giving* of money *to* jurors (such as was more particularly covered by the *lex ne quis iudicio circumveniatur*) which is explicitly mentioned as the offence which was to be penalized. Noting that Cluentius could not possibly have been guilty of the former offence, but only of the latter in 74 B.C. (cf. U. Ewins, *JRS* 50 [1960] 99), he argues that Cicero would not have failed to assert that the giving of bribes was covered by Drusus' provision, if such had really been the case. It could be felt, indeed, that *too much* emphasis is put on this point, for although Cluentius could not have received bribes in 74 there were equestrian jurors once again in the criminal courts in 66—and again in 54, when Rabirius was accused of

PHOENIX, Vol. 26 (1972) 3.

being a "receiver" in quite a different sense—who *were* in a position to receive bribes. Moreover, well before the time of the trial of Rabirius a proposal to remove their judicial immunity from prosecution for bribe-taking was being considered (Cic. *Att.* 1.18.8; 2.1.8). So Cicero may have been choosing his words to play on the fears of these jurors rather than to make them fit the precise circumstances which were relevant to Cluentius' case—which he could afford to do, in the interest of his client, if we believe that the charge of corruption on the part of Cluentius in 74 was no official part of the accusation against him in 66 but was exploited by the prosecution and the defence alike for prejudicial purposes (as recently re-argued by C. J. Classen, *RhM* 108 [1965] 104 f.).[1] Some doubt, too, must attach to the argument that Appian's προσέγραφεν implies that the *dorodokia* measure was a rider to a single *lex iudiciaria* and therefore connected with the acceptance of bribes, as was (on Weinrib's view) the main body of the law itself. Clearly this compound verb could merely reflect the attitude of an abbreviator, whether Appian or his source, who simply chose to see two measures, similar in genre, in this way.

Nevertheless, on the other side, it is fair to observe that Gruen is more categorical in his interpretation of the *dorodokia* measure than was Miss Ewins in her admirable article on the *lex ne quis iudicio circumveniatur*—note especially her recognition (100) that there is more than one possibility on this point and that the evidence of the *pro Rabirio* does not point certainly in either direction (105). There does seem, in fact, to be almost an internal contradiction in Gruen's view. He holds that this *lex* was intended to deal with any irregular condemnations in *special* courts which might still be set up, with senatorial jurors, by the people, even after the senate itself had been banned from establishing courts on its own initiative (86). Yet Rutilius Rufus, for whose benefit largely he believes that Livius Drusus introduced his *dorodokia* measure, had *not* been condemned by a special court but by the *regular* court for extortion. And although Miss Ewins was able to produce one or two references to the receiving, rather than the giving, of bribes being treated as an offence under the *lex ne quis iudicio circumveniatur*,[2] the apparent quotations from the law in Cicero's two speeches do not, as Weinrib says, give the impression that this offence was particularly or explicitly mentioned in its text. Thus her suggestion (106) that Livius Drusus in extending this law to cover equestrians used the charge of accepting bribes "as the most convenient one" to bring against their using judicial powers in a partisan way seems far from cogent. Moreover we shall argue that Livius Drusus may well

[1]My argument here only spells out the point briefly made by Ewins, 105, n. 62 (in relation to the *pro Rabirio*).

[2]Cf. Ewins, 98–99, concluding that "it seems doubtful . . . whether a clear and absolute distinction was preserved between the types of cases brought under the two laws."

have wanted to apply this provision to cases of unjust *acquittals* and not simply to the notorious case of Rutilius Rufus, to which Mommsen and his followers confined it; and for this wider application the *lex ne quis iudicio circumveniatur* was still less apt a tool and scarcely a possible one; "there is nothing directly to suggest that it covered also unjust acquittals or cases that were not capital" (Ewins, 96).

But Weinrib himself seems on less firm ground when he goes on to argue (431) that in the case of Rutilius Rufus the equestrian jurors would not need to be bribed in view of the hostility which he had aroused, together with his superior Scaevola, amongst the *publicani* of Asia. Indeed, it is because he thinks that there could have been no basis for applying this clause retrospectively to the case of Rutilius Rufus (to which he too confines it) that Weinrib is forced to conclude that there must have been some courts, even after 91 B.C., in which equestrians were to retain judicial powers. The argument as to Rutilius Rufus clearly has some force, but again probably not as much as Weinrib assigns to it. He himself notes (432, n. 6) that the equestrian class was not monolithic. The recognition deserves more weight. Diodoros 37.5.1, as emended by Dindorf, speaks of equestrian *iudices* and *publicani* being in partnership indeed, and, even if we doubt the necessity for this emendation, references in other sources to the Rutilius Rufus case make the statement apt enough. But quite apart from the possibility that some *iudices* may not have had connections with the *publicani* of the province of Asia in particular (noted by Weinrib), this is surely just the kind of association in which we should not suppose that one partner would perform a *beneficium* on behalf of another merely upon the reflection that both belonged, roughly, to the same class, without a tangible and material *beneficium* given in return. These *iudices*, after all, had received no payment from Rutilius Rufus himself (*ex hypothesi*); therefore they might well demand a compensatory payment from their "partners abroad" in return for their condemnation of him. Indeed, it seems to me not unlikely that the *iudices* received a regular payment for *any* verdict to suit the *publicani*, that they received their price both from the latter and (normally) from the defendant as well. This is only to suppose that the sort of behaviour which, according to Appian, *BCiv.* 1.22.2, prevailed among "fellow-senators" before 123, and which clearly prevailed in post-Sullan days, was also common among "fellow-equites." There has, of course, been a tendency in the former case to explain acquittals by "fellow-feeling" on the part of senators (so Ewins, 97, n. 15, referring to "other reasons why senatorial *iudices* might prefer to acquit;" these other reasons, however, and "gifts" are not mutually exclusive). M. Crawford, *JRS* 60 (1970) 42, however, has reminded us recently of how often jurors may have been in need of ready cash—a fact which was likely to overrule merely sympathetic or even calculated long-term considerations. So equestrian

jurors may have been receiving money *ob rem iudicandam* from two sources in many cases—that some senatorial jurors were willing to do so, even from *opposed parties*, is well known from the Oppianicus case. But, whatever our view as to this, the condemnation of Rutilius Rufus (followed by his reception by the provincials on his return to Asia) must have made *blatantly* clear what was fairly obvious before: namely, that most other senatorial defendants had been acquitted[3] only because they had bribed the *iudices* (at least via collusion with their confederates abroad, whose swollen profits would, of course, be the basis of any payment on *their* part to the *iudices*). By using the very general phrase *si quis ob rem iudicandam* (codd. *iudicatam*) *pecuniam accepisset* (Cic. *Rab. Post.* 7.16) Drusus may have hoped to penalize the *equites* who had cashed in on their position as jurors, whether directly or indirectly, whether by pronouncement of acquittals or of condemnations, over a number of years before 91 B.C.[4]

Rutilius Rufus could in fact be avenged in two ways. First, by a condemnation of the jurors who had condemned him—and the vindictive element in certain Roman legislation, retrospectively applied, in the late Republic, together with the reasonable, if not necessary, implication of the tenses of Cic. *Rab. Post.* 7.16 and *Clu.* 56. 153, is accepted by Weinrib (427–433); but secondly, and consistently with the sort of policy which Rutilius and Scaevola had pursued in Asia, by the condemnation of those who had, indirectly, benefited by the extortion of the *publicani* at the expense of the provincials of Asia. Indeed, Rutilius' apparently disinterested attitude in this matter, as suggested by his staying on in exile when he might have returned to Rome (Quint. *Inst.* 11. 1. 12; Dio, *fr.* 97) could make us think that he would have approved more of this latter kind of vindication. Appian, *BCiv.* 1.22.2, indicates that Gaius Gracchus had also been perturbed by unjust *acquittals* of senatorial governors, though on more recent views of his legislation he had done nothing to penalize the acceptance of bribes by jurors specifically, being content to change the composition of the court(s). It could be that Drusus now felt that this was not adequate;[5] and, although Miss Ewins opted for Servilius Glaucia, rather than Sulla, as the likely author of the idea that

[3]For another exception to the apparent general rule, cf. E. Badian, *PACA* 11 (1968) 2–3, on L. Asellio in Sicily.

[4]Such collusion between senatorial governors and *equites* will explain the tendency of the equestrian *iudices* to acquit prior to the trial of Rutilius Rufus, without need for recourse to Gruen's theory (204–206)—a theory rightly, in my estimation, rejected by Weinrib, *Phoenix* 23 (1969) 317 ff.

[5]That Drusus was concerned with unjust acquittals seems to me to be implied by the most likely interpretation of Diod. 37.10.3, though more than one interpretation of the δὲ clause is possible, as noted by Weinrib: οὗ (*sc.* Drusus' judiciary law) συντελεσθέντος τὸν μὲν ἀδωροδοκήτως βεβιωκότα μηδεμίας τεύξεσθαι κατηγορίας τοὺς δὲ τὰς ἐπαρχίας σεσυληκότας ἀχθήσεσθαι πρὸς τὰς τῆς δωροδοκίας εὐθύνας.

acceptance of bribes by jurors could be penalized (as falling clearly under the *lex Iulia repetundarum*) in the extortion court itself (100), it is not impossible that Sulla was in fact its author and that he derived it from Livius Drusus. The latter by a judicious *quicumque* . . . introductory clause and a suitable admixture of verbal tenses (as in the *lex ne quis iudicio circumveniatur* itself) could, as Glaucia knew (*Rab. Post.* 6. 14), make sure that this offence was henceforth penalized both in the case of *equites* and senators, retrospectively and prospectively. Surely, too, those who had abused their position in the court for extortion would be most appropriately condemned in that very court.

Weinrib argues indeed (432, n. 64) that the condemnation of the *iudices* would not have satisfied Drusus, since it would have penalized the minor accessories to the crime rather than the real culprits. But Scaevola himself seems to have been quite prepared to deal heavily with those who were presumably the secondary agents of the *publicani* abroad (Diod. 37.5.4); so why should not Drusus do the same at home? One only has to look, for instance, to the aftermath of the tribunate of Tiberius Gracchus or to the early history of prosecutions under the *lex Varia* in order to see that in political situations of a similar kind it did tend to be the minor accessories who suffered, if only because they were more vulnerable. If Drusus' bill was in the terms which Weinrib suggests neither accessories nor major culprits would be punished. Not many Roman politicians were so magnanimous! And a signal display of retribution might frighten off future *iudices*, whether senatorial or equestrian,[6] from further co-operation with the *publicani* in the future.

But the main point of doubt in Weinrib's thesis must centre round the question whether there is enough evidence to support the view that some mixed courts were retained under Drusus' *lex iudiciaria*. His best argument here is that since there had been no uniform structure for all the criminal courts in the period immediately before 91 B.C., and since another *patronus senatus*, Q. Servilius Caepio, had been responsible for a mixed system, so Livius Drusus may, in part, have retained it now. Even as to this, however, we must remember that Caepio had made no provision for an enlargement of the senate alongside his *lex iudiciaria*, so that an absolute transfer to the senate of the courts may have been neither politically, nor in any other way, practicable in 106. It could be that here too Sulla only did what Livius Drusus had *intended* to do. For the rest, Weinrib relies largely upon a translation of Appian, *BCiv.* 1.35.7 which seems to be of dubious accuracy.[7] Here Appian, after describing the

[6]In view of the several changes effected already in the composition of the criminal courts before 91 B.C. I do not follow Weinrib's view (433) that it is "hard to see why Livius Drusus should have conceded the possibility that *equites* might serve on future *iudicia*."

[7]The text is: οἵ τε ἱππεῖς ὑπώπτευον ὅτι τῇδε τῇ θεραπείᾳ πρὸς τὸ μέλλον ἐς

reaction of senators to Drusus' plan for an enlarged senate, goes on to describe that of the equestrians: according to Weinrib's interpretation, "the *equites* suspected that by this surgery the courts *would in the future* (my italics) be transferred from the *equites* to the senate exclusively, and having tasted great profits and power they did not bear this suspicion without pain." The word translated "surgery" here (*θεραπεία*), however, seems to refer, in fact, to the addition of 300 *equites* to the senate, and the whole sentence to be more correctly translated to the effect that "the *equites* looked askance at this because (they recognized) that by means of this (apparent) favour to them the courts *were being transferred* for the future from the *equites* to the senate . . . and it was not without pain that they received this impression." The tense of the *ὅτι* clause is *present*, and the optative mood represents only the virtual *oratio* (or *ratio*) *obliqua* of the subject of the *historic* main verb. Neither *ὑποπτεύειν* nor *ὑπόνοια* need in fact imply anticipation of a *future* action but simply a looking, visually or mentally, *ὑπό*, *beneath the surface*, with regard to a *present* (or past) action or situation.[8] It is difficult, too, to strain *τὰ δικαστήρια* to the point of meaning *τὰ ἄλλα δικαστήρια* (i.e., those courts—unspecified by Appian!—which were not immediately being handed over to the senate). As for *πρὸς τὸ μέλλον* at 35.7, this seems simply to be picking up the phrase *ἐς τὸ μέλλον* at 35.5; the point being that the *equites* felt that the disadvantages which stretched out into the indefinite future more than outweighed the immediate gain of three hundred seats in the senate. Not unreasonably, for quite apart from other considerations mentioned by Appian, their recent material gains had been large, whereas their gain in status under Drusus' legislation, even for the three hundred recruits to the senate, was likely to be no more than that of rank and file members, the real *honos* of curule office continuing to be monopolized by the traditional ruling families.

Since Cicero provides the only significant additional evidence outside that of Appian for Drusus' proposal regarding the penalization of *dorodo-*

τὴν βουλὴν μόνην τὰ δικαστήρια ἀπὸ τῶν ἱππέων περιφέροιτο, γευσάμενοί τε κερδῶν μεγάλων καὶ ἐξουσίας οὐκ ἀλύπως τὴν ὑπόνοιαν ἔφερον.

[8] *ὑποπτεύειν* followed by *ὅτι* appears a rather uncommon usage; Arist. *Phys.* 217b 33 *ὅτι μὲν οὖν ἡ ὁλῶς οὐκ ἔστιν ἡ μόλις καὶ ἀμύδρως, ἐκ τῶν δέ τις ἂν ὑποπτεύσειεν* provides one example (where the main verb is clearly to be understood in the sense of "suspect, gather that . . ."), but the verb of the subordinate clause is indicative. Nearer to the usage of *ὑποπτεύειν* in our Appian passage is that of Hdt. 6. 129. 2, *ὁ Κλεισθένης δὲ ὁρέων ὅλον τὸ πρῆγμα ὑπώπτευε* ("Cleisthenes, seeing the whole affair, looked askance at it" or "adopted an attitude of disapproval"). Instead of an accusative object with the verb or an absolute use of it we simply have in Appian an object or causal clause, in either case expressing the thought in the mind of the subject of the main verb. For *ὑπόνοια* with no reference to the future, rather the reverse, cf. Thuc. 2. 41.4: *ὅστις ἔπεσι μὲν τὸ αὐτίκα τέρψει, τῶν δὲ ἔργων τὴν ὑπόνοιαν ἡ ἀλήθεια βλάψει* "the light of the truth will damage the impression of our deeds [given by the poet], even though his song will charm us for a time."

kia, and since anything which Cicero asserts in the *pro Cluentio* in particular is open to doubt because of his own declaration that it had successfully deceived the jurors (Quint. *Inst.* 2.17.21), any firm conclusion as to the nature of the proposal ought perhaps to be considered out of reach. Where the total evidence is so limited, the lack (I believe) of any positive evidence that Drusus *did* retain some mixed courts may not be regarded as decisive against Weinrib's theory; but it does leave it scarcely stronger than other explanations.

QUEEN MARY COLLEGE,
UNIVERSITY OF LONDON