

Q. CICERO, HORTENSIUS AND THE LEX AURELIA

An incident involving Q. Cicero and Hortensius and their attitude to the lex Aurelia can provide us with a starting point for examining the attitude of the main parties involved towards this law, which was passed in the consulship of Pompey and Crassus in 70 B.C. and which provided for a re-organisation in the composition of the jury-courts. The incident is discussed by Cicero in a letter to his brother on 13th June, 58 B.C. (Q. F. i 3.8):

illud caveto (et eo puto per Pomponium fovendum tibi esse ipsum Hortensium), ne ille versus, qui in te erat collatus, cum aedilitatem petebas, de lege Aurelia, falso testimonio confirmetur.

[“You should take care – and for that reason I think you ought to cultivate Hortensius himself with the help of Pomponius – lest that epigram about the Aurelian law, which had been attributed to you when you were a candidate for the aedileship, should be confirmed as yours by some false testimony.”]

The incident occurred in the year 66 B.C., as the reference to Q. Cicero’s aedilician candidature confirms.¹⁾ McDermott rightly sounds a note of warning about the difficulty of determining what Quintus wrote and why Hortensius was annoyed,²⁾ but at least we can assume that, if Hortensius was annoyed at an epigram (whether Q. Cicero wrote it or not), which presumably criticised the lex Aurelia, then he was in favour of that particular law.³⁾ But that raises a difficulty: the law was promoted by

1) In 66 B.C. Cicero wrote to Atticus, mentioning that the latter would be back in time for Q. Cicero’s candidature (Att. i 4; cf. D. R. Shackleton Bailey, *Cicero’s Letters to Atticus* [Cambridge 1965] Vol. I p. 288). G. Rotondi, *Leges Publicae Populi Romani* (Milan 1912) pp. 369–370, and Berger, *RE* XII (1925) 2336, cite Cic. Q. F. i 3.8 to suggest the existence of a lex Aurelia *de ambitu*, but this is no more than an inference: the passage is more widely taken to refer to the law about the jury-courts.

2) *Historia* 20 (1971) 708.

3) For this interpretation, see E. S. Shuckburgh, *The Letters of Cicero* (London 1899) Vol. I p. 152. R. Y. Tyrrell & L. C. Purser, *The Correspondence of M. Tullius Cicero*, 3rd edn. (London 1904) Vol. I p. 377, are more cautious: “we may infer that [Q. Cicero’s epigram] was in some way offensive to Hortensius or some of the leading men of the time.”

Pompey, yet Hortensius belonged to the *factio* which was opposed to Pompey. Why did Hortensius approve a law which was promoted by a political opponent?

It is not the intention of this paper to become too involved in the actual details of the law, but some discussion of points of detail is necessary. It is generally accepted that the senators had abused their control of the jury-courts, which had been handed back to them by Sulla: in the speeches against Verres, Cicero constantly reminds the senatorial jury of the fact that it is their control of the courts which is really on trial. He speaks also of popular dissatisfaction with senatorial mismanagement and corruption in the courts. On the other hand, it is unlikely that the senatorial order would be willing to give up its control of the jury-courts, so the question of the composition of the jury-courts once again became a political issue. Another current issue was popular agitation for the restoration of the tribunician powers: this had been an even more insistent "popular" demand, with agitation for it going on since at least 76 B.C., led by a tribune of that year, Cn. Sicinius, and continuing under the tribunes L. Quinctius (in 74 B.C.), C. Licinius Macer (in 73 B.C.) and M. Lollius Palicanus (in 71 B.C.). Catulus thought that the two matters were linked, for he says that there would have been less pressure for the restoration of the tribunes' powers if there had not been so much dissatisfaction with the senatorial juries (v. inf. n. 18). To take advantage of this current agitation, Pompey made two promises as part of his platform for election to the consulship of 70 B.C.: the restoration of the tribunician powers, and attention to corruption in the law-courts. Cicero tells us that Pompey mentioned these two promises at a *contio* he attended as *consul designatus*.⁴) Pompey did not in the end promote the law about the jury-courts himself: it was the work of a praetor of 70 B.C., L. Aurelius Cotta.

The date of the passing of the law cannot be definitely fixed, but it was probably passed in September or October of 70

4) Verr. i 35. Schol. Gronov. 328 St. would suggest that this was a *contio* held by the pro-Pompeian tribune of 71 B.C., M. Lollius Palicanus, though the ascription to him of the final details of dividing the juries between the three *ordines* is obviously *post eventum*. Cf. M. Gelzer, Abh. Preuss. Ak. Wiss. No 1 (1943) = Kleine Schriften (Wiesbaden 1963) Vol. II p. 158, and E. Badian, Foreign Clientelae (Oxford 1958) p. 282 (hereafter abbreviated as FC).

B.C.⁵⁾ The evidence for dating it comes from Cicero's *actio secunda* against Verres; although the speeches in this action deal with a fictitious situation, and it might be felt that this would complicate the question of the date of the *lex Aurelia*, it can be assumed that Cicero tried to impart to these speeches an air of reality, and the references to the law about the jury-courts can be taken as faithful. Cicero says that the bill had not been published when Verres' trial began, and implies that it was officially promulgated in the period between the first and second *actio*.⁶⁾ The trial began on 5th August (Cic. Verr. i 31; cf. Schol. Gronov. 328 St.) and lasted nine days, while the fictitious *actio secunda* is made to take place between 19th September and 25th October, between two sets of games (Cic. Verr. i 31). It follows that the *lex Aurelia* must have been promulgated sometime between 14th August (when the *actio prima* ended) and 19th September.

There is a contradiction in what Cicero says in the passage referred to in n. 6 and what he says elsewhere: in 2 Verr. v 178 he says there was no mention of the bill until Verres (fictitiously) recovered from the first *actio*, but elsewhere he implies that discussion of the law had been going on for some time prior to Verres' trial. In the opening section of the first speech against Verres, he talks of "public meetings" and "laws" relating to the composition of the jury-courts,⁷⁾ and in the speech against Caecilius, which took place early in 70 B.C., he mentions agitation for reform of the jury-courts.⁸⁾ This agitation seems to have intensified about the time of Verres' trial.⁹⁾ It would seem best then to conclude that discussions of a bill had been taking place

5) See Gelzer, *op. cit.* pp. 169ff.; L.R. Taylor, *Party Politics in the Age of Caesar* (Berkeley 1949) pp. 108-112 (hereafter abbreviated as *Party Politics*); D. Stockton, *Cicero: a Political Biography* (Oxford 1971) p. 44.

6) 2 Verr. v 178: *itaque cum primo agere coepimus, lex non erat promulgata ... posteaquam iste recreari et confirmari visus est, lex statim promulgata est* (cf. *ibid.* ii 174).

7) Verr. i 2: *nunc in ipso discrimine ordinis iudiciorumque vestrorum, cum sint parati qui contionibus et legibus hanc invidiam senatus inflammare conentur, ...* (cf. i 49). By *legibus*, Cicero probably meant "proposals", i.e. the proposal about the composition of the jury-courts being put forward by L. Aurelius Cotta.

8) Div. in Caec. iii 8: *iudiciorum desiderio tribunicia potestas efflagitata est, iudiciorum levitate ordo quoque alius ad res indicandas postulat.*

9) Cicero's use of *cotidie* in 2 Verr. iii 223 seems to suggest that the proposer of the law was becoming more insistent at the time of Verres' trial (v. *inf.* n. 43).

for some months prior to Verres' trial, but that the final details were not formulated and the bill not passed until after the trial. The fact that discussions were becoming more intense just prior to Verres' trial (i.e. about July) is significant: for in that month the consular elections proved successful for two candidates from the faction opposed to Pompey, Q. Caecilius Metellus (later Creticus) and Q. Hortalus Hortensius.

It would seem, from Cicero's evidence in the speeches against Verres, that the initial intention of those promoting the law was to hand the jury-courts over entirely to the equites.¹⁰⁾ Something happened to that intention, for when the bill was passed, some sort of compromise seems to have taken place: the jury-courts were to be divided between senators, equites and *tribuni aerarii*.¹¹⁾ Discussion of the definition of the last two groups is extensive: suffice it here to say that in defining the two groups there must have been some point in distinguishing between them in the terms of the law. Hence it cannot be argued that both groups fall under the heading of that wider application of the term "equites", the "middle class".¹²⁾ Nor is there any clear evidence to suggest that the equites and *tribuni aerarii* had a different census qualification.¹³⁾ It would seem that the *tribuni aerarii* had the equestrian census, but were elected in some way to an obsolete military office which distinguished them as an *ordo* within the state, while the equites of the lex Aurelia were those who belonged or had belonged to the eighteen centuries of *equites equo publico* (i.e. those who had been officially designated as equites).¹⁴⁾

10) V. inf. pp. 145-147.

11) For the references, see T. R. S. Broughton, MRR Vol. II p. 127.

12) It is true that Cicero on occasion loosely refers to the juries after 70 B.C. as composed of senators and equites (e.g. Font. xvi 36, Cluent. xliii 121, xlvii 130), but elsewhere he mentions the three orders (e.g. Att. i 16. 3). Velleius Paterculus also talks of jury service being given *aequaliter* to both orders (ii 32.3). Of the modern writers, H. Hill, *The Roman Middle Class in the Republican Period* (Oxford 1952) p. 155, and Stockton, *op. cit.* (n. 5) p. 36, are examples of those who argue that the equites of the lex Aurelia were those who belonged to the wider "middle class".

13) This view is held by Taylor, *Party Politics* p. 201, and C. Nicolet, *L'Ordre équestre à l'Époque Républicaine* (Paris 1966) Vol. I pp. 598 ff. On the basis of Schol. Bob. 91 St., they argue for a census qualification of 300,000 HS for the *tribuni aerarii*. For the opposing view, that both groups had the same census qualification, see Hill, *op. cit.* pp. 156 and 212-214; M. I. Henderson, *JRS* 53 (1963) 63.

14) *Ibid.* 61-64.

In view of the difference between the two groups, it is not reasonable to argue that by this law, the equites (in the wider sense) gained a majority in the jury-courts, as they would represent two thirds of the votes in each panel.¹⁵⁾ Although both groups had the same census qualification, and might on occasion have a mutual interest, within the eighteen centuries of *equites equo publico* were included the sons of senatorial families doing their military service: their interests would be senatorial rather than equestrian, and their vote could not be counted on to go with the equites on a jury-panel. Moreover the designation of an *eques* was in the hands of the censors, who could use their office for the admission of their supporters to the eighteen centuries of *equites equo publico*: these senatorial supporters would in turn find their way into the jury-panels. Equites had also found their way into senatorial jury-panels, following the admission of 300 equites into the Senate by Sulla:¹⁶⁾ these equites would presumably continue to serve in the senatorial *decuria* of the *lex Aurelia*. Such were political connections, vertically and laterally, that the political influence of the senatorial and equestrian orders was very much complicated, and one cannot talk of consistent blocks of interest in the jury-panels.

To return to our original difficulty – why did Hortensius approve a law which was being promoted by a political opponent? There is a further puzzle – why did Hortensius approve a law which deprived the Senate of its control of the jury-courts, when he belonged to a *factio* which is made out to represent the most conservative tendencies in the Senate and which we would expect to be guarding its privileges (including control of the jury-courts) most jealously? Hortensius' membership of the *factio* is confirmed by his connection with the Metelli,¹⁷⁾ and the fact that he was a brother-in-law of Catulus, another member of the group opposed to Pompey. Catulus' membership of the *factio* is confirmed by his hostility to Pompey, manifest, for example, in his opposition to sending Pompey to Spain and to the *lex Manilia* conferring the Mithridatic command on Pompey. But with Catulus, another puzzle emerges: when Pompey

15) Hill, *op. cit.* (n. 12) p. 156; U. Laffi, *Athenaeum* 45 (1967) 197; H.H. Scullard, *From the Gracchi to Nero*, 3rd edn. (London 1970) p. 98; Stockton, *op. cit.* (n. 5) pp. 36 and 42.

16) J. R. Hawthorne, *G. & R. n.s.* 9 (1962) 56.

17) He secured a consulship with a Metellus for 69 B.C., and assisted the Metelli in the defence of Verres.

as consul asked Catulus at a meeting of the Senate for his opinion on the bill to restore the tribunician powers, Catulus gave his approval to the bill, recognising that there was a need to restore the tribunes' powers.¹⁸⁾ Why should Catulus support a bill which was being promoted by a political opponent, and which was the most important of the "popular" attacks on senatorial control?¹⁹⁾

The composition of the *factio*, who are often referred to as the *pauci*,²⁰⁾ is conveniently given in the list of those who gave testimony against Pompey's tribune of 67 B.C., C. Cornelius: they include Q. Hortensius and Q. Catulus (mentioned above), and Q. Caecilius Metellus Pius, M. Lucullus and Mam. Aemilius Lepidus (Ascon. 49 and 62 St.). An examination of the relatives and connections of these men shows that the common link binding the faction was opposition to Pompey. The Luculli were related to the Metelli, being the sons of Caecilia Metella, the sister of Numidicus. The brother of M. Lucullus, Lucius, came into conflict with Pompey mainly after 70 B.C., but his attempts to ensure that he secured the Mithridatic command in his consulship in 74 B.C., against the possibility that Pompey would return from Spain to make a bid for that command, shows the rivalry between them.²¹⁾ L. Lucullus' colleague in office was M. Aurelius Cotta, who received a naval command to work in co-operation with Lucullus: their co-operation both in office and in command helps to support the view that they belonged to the same *factio*.²²⁾

18) Cic. Verr. i 44.

19) The restoration of the tribunes' power had been the major demand of the so-called "popular" movement since at least Sicinius' tribunate in 76 B.C. For the references to tribunician activity in this matter, see Broughton, MRR Vol. II pp. 93 (Sicinius, trib. 76 B.C.), 103 (L. Quinctius, trib. 74 B.C.), 110 (Macer, trib. 73 B.C.), and 122 (M. Lollius Palicanus, trib. 71 B.C.).

20) Cic. 2 Verr. i 155, iii 145, v 126; Sall. Hist. iii 48.6 and 27. For the composition of the *factio*, see Taylor, TAPA 73 (1942) 12-13; Badian, FC pp. 279ff.; A. M. Ward, Latomus 29 (1970) esp. 63-64.

21) Pompey had sent a strong letter to the Senate in 74 B.C., threatening to return to Italy with his army if sufficient supplies and re-inforcements were not sent to him in Spain (Sall. Hist. ii 98; Plut. Pomp. xx 1, Luc. v 2). Lucullus made every effort to ensure that money was sent, and eventually secured the Mithridatic command through the intrigues of Cethegus (v. inf. n. 28).

22) On the further links of the Aurelii Cottae with the *factio*, see below.

The Metelli were probably the most influential family within the *factio*: of the sixteen consuls from 80 to 73 B.C., at least ten were related to the Metelli or can in some way be connected with the *factio*.²³) Nor did their success in the consular elections stop then, for a Metellus was consul in 69 B.C., and another in 68 B.C. (the former being an enemy of Pompey).²⁴) The conflict between the Metelli and Pompey had begun in 77 B.C. when Pompey was sent out as proconsul to assist Metellus Pius in the campaign against Sertorius: Badian suggests that Pompey's enemies succeeded in preventing adequate supplies being sent to him (which led to him sending a threatening letter to the Senate in 74 B.C.), so that Metellus could achieve more success and eclipse Pompey's fame.²⁵)

The "centre and backbone of the faction", according to Badian,²⁶) were the Aurelii Cottae: there were three brothers, Gaius (cos. 75 B.C.), Marcus (cos. 74 B.C.), and Lucius (pr. 70

23) Ward (op. cit. [n. 20] 63, with n. 2) lists the sixteen consuls, and suggests that possibly twelve can be linked with the Metellan *factio*. The two dubious cases he puts forward are D. Iunius Brutus (cos. 77 B.C.) and M. Aemilius Lepidus (cos. 78 B.C.). Brutus he dubiously includes as a Metellan supporter on the grounds that he did nothing to support Lepidus' revolution. Ward also puts Lepidus in the list because he was elected with the support of Pompey, the "ally of the Metelli", but it is very difficult to determine where Pompey's allegiance lay in that period. At least ten of the sixteen consuls can be connected with the *factio*: Q. Caecilius Metellus (cos. 80 B.C.); App. Claudius Pulcher (cos. 79 B.C.: he was married to a Caecilia Metella, and a daughter was married to L. Licinius Lucullus); P. Servilius Vatia Isauricus (cos. 79 B.C.: he was the son of another Caecilia Metella); Q. Lutatius Catulus (cos. 78 B.C.: discussed above); Mam. Aemilius Lepidus Livianus (cos. 77 B.C.: listed as a member of the *factio* in Ascon. 49 and 62 St.); C. Scribonius Curio (cos. 76 B.C.: he opposed the attempts of the tribune Sicinius to restore the tribunician powers, and supported the Metelli in the trial of Verres); C. Aurelius Cotta (cos. 75 B.C.: discussed below); L. Licinius Lucullus (cos. 74 B.C.: discussed above); M. Aurelius Cotta (cos. 74 B.C.: discussed above); and M. Terentius Varro Lucullus (cos. 73 B.C.: discussed above).

24) This continued electoral success tends to invalidate Badian's claim (FC p. 284) that the trial of Verres in 70 B.C. "marks the end of that great family's last serious bid to retain its political supremacy."

25) Ibid. p. 279. On Pompey's letter, v. sup. n. 21. For a recent examination of the relations between Pompey and the Metelli, see E. S. Gruen, AJP 92 (1971) 1-16 (who argues against the existence of a large Metellan *factio* and denies that there was opposition between the Metelli and Pompey at this time), and B. Twyman, ANRW 1.1 (1972) 816-874 (who also denies opposition between the Metelli and Pompey). Also against the existence of a large Metellan *factio*, see P. A. Brunt, JRS 58 (1968) 231.

26) FC p. 280.

B.C., cos. 65 B.C.). It was the latter who proposed the law relating to the composition of the jury-courts. The co-operation of Marcus with L. Lucullus, which indicates that the Cottae were members of the *factio*, has already been mentioned: the close association of the Aurelii Cottae with the Metelli in the preceding generation is a further argument for their membership.²⁷⁾ The activities of Cethegus provide another link: he helped to secure the Mithridatic command for L. Lucullus;²⁸⁾ he was an enemy of L. Marcius Philippus, and therefore of Philippus' protégé, Pompey;²⁹⁾ and he was an associate of the Aurelii Cottae³⁰⁾ ("which no doubt helps to account for the family's conspicuous success",³¹⁾ with successive consulships in 75 and 74 B.C.). C. Aurelius Cotta was responsible, during his consular year, for sponsoring the law restoring to the tribunes the right to proceed to further office (a right which had been taken away by Sulla in an attempt to prevent ambitious men from using the tribunate to promote their future political careers).³²⁾ This consul is described by Sallust as *ex factione media*:³³⁾ on the grounds that this is the sort of term which Sallust as a *popularis* would have used about the political opposition, Henderson and others³⁴⁾ have argued that this phrase means "the nobility". If this interpretation is correct, it confirms that C. Cotta belonged to

27) For an analysis of this close association, see Badian, *Historia* 6 (1957) 320ff., and cf. F. Münzer, *Römische Adelparteien und Adelsfamilien* (Stuttgart 1963 repr.) pp. 321ff.

28) Plut. Luc. vi 1-5. Cethegus and M. Cotta, Lucullus' colleague in the consulship, secured an extra-ordinary command for M. Antonius against the pirates in 74 B.C. also (Ps. Ascon. 259 St.; cf. Cic. 2 Verr. ii 8, iii 213; Liv. Per. 97; Vell. Pat. ii 31. 3-4; Ps. Ascon. 202 St.).

29) Sall. Hist. i 77.20 (the speech of Philippus); Badian, FC p. 280 n. 3.

30) For the references, see n. 28.

31) Badian, FC p. 281 n. 1.

32) Cic. Corn. in Ascon. 61 St.; Sall. Hist. ii 47, iii 48.8; cf. Ascon. 53 St.; Ps. Ascon. 255 St.

33) Sall. Hist. iii 48.8. That this phrase equals *nobilitas*, cf. § 3.

34) Henderson, JRS 42 (1952) 115; Taylor, Party Politics p. 20 (cf. p. 189 n. 30); F.E. Adcock, JRS 40 (1950) 139; E. Gabba, *Athenaeum* 32 (1954) 320; J. Hellegouarc'h, *Le vocabulaire latin des relations et des partis politiques sous la république* (Paris 1963) p. 102; R. Syme, Sallust (Berkeley 1964) p. 200; Brunt, PCPS n.s. 11 (1965) 1. For some general considerations of the term *factio*, see now R. Seager, JRS 62 (1972) 53-58; he agrees with Henderson on Sallust's use of the term *ex factione media* (56-57). R.F. Rossi, *La Parola del Passato* 101 (1965) 140-141, disagrees with this interpretation and holds that it means "from the moderate party" (v. inf. n. 48).

the conservative faction in the Senate (in fact to the core or heart of it). What is puzzling about Cotta's law is why a man from the heart of the nobility promoted a law which was obviously so "popular": there had been, and continued to be, popular agitation for the restoration of the tribunes' power, against the stranglehold which the nobility had over the government. Either the Cottae had "a programme of moderate concessions to win the support of the People",³⁵⁾ or the whole *factio* was prepared to compromise with what was obviously a current issue. That the latter was the case seems to be indicated in the speech of Macer, a tribune of 73 B.C., given by Sallust: for he talks of the attempts of the nobility to smoothe the people down by saying that they will have to defer changes until Pompey's return.³⁶⁾

There are some indications which could be taken to show that the Cottae were not always in agreement with the rest of the faction, but this would seem unjustified. Cicero says that the *nobiles* were *inimicissimi C. Cottae*, because he had proposed the law allowing the tribunes to seek higher office.³⁷⁾ But Cicero has probably distorted the situation: as he made this comment in his defence of the "popular" tribune, C. Cornelius, at a public hearing in 65 B.C. (at a time when he was weaving a delicate line between *optimates* and *populares*), it no doubt suited his purpose to gain popular support by suggesting that the conservative *nobiles* would have been opposed to such a popular move as re-opening the higher offices to tribunes and so would have been hostile to the person responsible for that law. Cicero also refers to a trial in which M. and L. Lucullus accused L. Cotta:³⁸⁾

35) Badian, FC p. 281.

36) Sall. Hist. iii 48. 21-22; cf. Badian, FC p. 280. This propaganda attempt to throw the blame for delay in making changes to the Sullan constitution onto Pompey shows how the members of the *factio* were trying to turn the current political climate to their own advantage. The hints of Macer that Pompey would make changes when he returned may have been ascribed to him *post eventum* (Gelzer, op. cit. [n. 4] p. 152; Taylor, TAPA 73 [1942] 11): we do not know what Pompey's attitude to the "popular" demands was in 73 B.C.

37) Cic. Corn. in Ascon. 61 St.

38) Cic. Verr. i 55; Ps. Ascon. 222 St.; J.P.V.D. Balsdon, PBSR 14 (1938) 109 n. 55. Cicero cited the case as a precedent for the procedure which he adopted in the *actio prima* against Verres, which was to dispense with the normal long *exordium*, and to begin immediately with the examination of witnesses. For comments on this earlier case, particularly the identification of the defendant, L. Cotta, see Gruen, Athenaeum 49 (1971) 54-55.

the case had occurred recently, but the details are not known. It is so notoriously difficult to use sides taken in court cases as evidence for political opposition, that it is doubtful if anything can be made of this case to suggest a serious breach in the composition of the *factio*.

It would follow from the connection of Gaius and Marcus Cotta with the *factio* that the youngest brother, Lucius, belonged to it. In fact he is described by Cicero as *homo nobilissimus*³⁹⁾ (which helps to confirm the interpretation put on Sallust's term *factio*). That brings us to a point which is even more puzzling than Hortensius' approval of the law about the jury-courts: why did L. Cotta, a man from the heart of the nobility, propose a law which would deprive senators of their control of the jury-courts, when he belonged to a faction whom we would expect to guard jealously such a control, and when the law had the support of Pompey, whom the faction regarded as an opponent?

Our earliest evidence about the proposal talks of handing the juries over entirely to the equites, and it is worth putting these passages down:

1. *iudiciorum desiderio tribunicia potestas efflagitata est, iudiciorum levitate ordo quoque alius ad res iudicandas postulatur, ...* (Cic. Div. iii 8).
2. *hic si quid erit offensum, omnes homines non iam ex eodem ordine alios magis idoneos, quod fieri non potest, sed alium omnino ordinem ad res iudicandas quaerendum arbitrabuntur.* (Cic. Verr. i 49).
3. *quos [publicanos] videlicet nunc populus indices poscit, de quibus, ut eos indices habeamus, legem ab homine non nostri generis, non ex equestri loco profecto, sed nobilissimo promulgatam videmus; ...* (Cic. 2 Verr. ii 174).
4. *quod si ita est, quid possumus contra illum praetorem dicere qui cotidie templum tenet, qui rem publicam sistere negat posse nisi ad equestrem ordinem iudicia referantur?* (Cic. 2 Verr. iii 223).
5. *nempe eo, cum populus Romanus aliud genus hominum atque alium ordinem ad res iudicandas requirit, ...* (Cic. 2 Verr. v 177).

Some of our later evidence also talks of the juries being handed over to the equestrian order.⁴⁰⁾ Although Cicero does not men-

39) Cic. 2 Verr. ii 174, assuming that the reference here is to the proposer of the lex Aurelia. Taylor (Party Politics pp. 106 and 217) is wrong in assuming, Cotta was a middle-of-the-road man.

40) Livy Per. 97; Tac. Ann. xi 22; Plut. Pomp. xxii 4; cf. Ps. Ascon. 206 St.

tion the proposer by name, it is clear from the reference to a praetor in the fourth passage that it was Cotta who was putting the proposal in this form. It is only from evidence subsequent to the passing of the law that we learn the jury-panels were to be divided between three groups.⁴¹⁾ It is interesting to note that some of the primary evidence comes from Cicero's fictitious *actio secunda* against Verres: this was no doubt written for publication after the *lex Aurelia* was passed, but Cicero does not seem to have altered the details of the proposal in the light of its final form. All this tends to confirm that Cotta's original proposal was to transfer the courts to the equites alone.

If this was so, Cotta's proposal becomes even more surprising. Why give up senatorial control entirely to the equites? Was it that the nobility thought they had enough connections with the equestrian class to be able to control it? More likely they acted like all politicians: they recognised the way things were tending – there was popular pressure for a change to the jury-courts because of dissatisfaction (Cicero speaks of a *ventus popularis* due to *iudicum culpa atque dedecus*),⁴²⁾ and the nobility “hopped on the band-waggon” to keep their standing with the people. They had already done this with the law to restore the tribunes' power: C. Cotta, the consul of 75 B.C. *ex factione media*, had succumbed to popular agitation and proposed the law allowing tribunes to go on to higher office (v. sup. n. 32); Macer, a tribune of 73 B.C., spoke of the attempts of the nobility to soothe the people by promising changes (v. sup. n. 36); and Catulus, a member of the *factio*, recognising the agitation for the restoration of the tribunes' powers, gave his approval to Pompey's bill on this matter in 70 B.C. (v. sup. n. 18). In connection with this desire by the *factio* to conciliate popular feeling, note the phrase *cotidie templum tenet* in the fourth passage above: it has been suggested that *templum* refers to the space in front of the rostra, usually set aside for observation of auguries or taking auspices. The suggestion is then that Cotta was frequently in the forum “not only trying to make people support the new measure, but keeping his eyes open to see how opinion was moving”.⁴³⁾

41) E. g. Cic. Att. i 16.3, Phil. i 20; Ascon. 21 and 54 St.; Ps. Ascon. 189 St.; Schol. Bob. 94 St.; Schol. Gronov. 328 St.

42) Cic. Cluent. xlvi 130, Div. in Caec. iii 8; cf. Ps. Ascon. 189 St. (*offensio senatorii ordinis*).

43) I. e. he was testing the *ventus popularis*. Cf. L.H.G. Greenwood, Cicero: the Verrine Orations (London 1935) Vol. II p. 272.

It would seem too that Cotta's move to secure advantage from the current situation was successful. It has already been suggested that, although discussion of a change had been going on for some time, agitation for it intensified just before the trial of Verres: that is indicated by the use of *colidae* in the fourth passage. At that time, two of the members of the *factio* were elected to the consulships of 69 B.C., Hortensius and Q. Caecilius Metellus. Is it too much to suggest that the *factio*, recognising popular pressure, put forward an even more radical proposal than could be expected, as part of their electoral platform, in order to steal a march on their opponent Pompey, who they could see had made political gains from his promotion of the popular law about the restoration of the tribunes' powers?

If there was a revival of the influence of the *factio*, manifest in the success of its consular candidates and due to its recognition of a popular demand, that revival was short-lived: the outcome of Verres' trial altered the situation. In that trial, Verres was supported by members of the *factio*: Hortensius was his defence counsel; L. Caecilius Metellus, the current governor of Sicily, had placed obstacles in Cicero's way when he was collecting evidence in Sicily; and there was a series of attempts to postpone the trial until the next year, when a Metellus would be consul, and another Metellus would be praetor (who was to be made judge of the extortion court by which Verres would be tried). The trial of Verres was a political struggle between the Metelli and Pompey;⁴⁴⁾ the involvement of the Metelli was obvious, but it is not so clear why Pompey was involved. One explanation is that Pompey was committed to the "popular" movement and wished to see the senatorial juries discredited (on the assumption that the jury, composed partly of members favourable to the Metellan faction, would try to acquit Verres), so as to clear the way for a change in the jury-courts.⁴⁵⁾ However, it is not likely that Pompey was so firmly committed to the "popular" cause: see the discussion below. It is more likely that it was a trial of political strength between Pompey and the Metelli, with a side issue being the protection of Sicilian clients.⁴⁶⁾

44) Taylor, Party Politics p. 104; Badian, FC p. 283; Ward, op. cit. (n. 20) 61.

45) Taylor, Party Politics p. 105.

46) Badian, FC pp. 282-284; Ward, op. cit. (n. 20) 61-62 and 66.

There was no real decision in Verres' trial, so it is not possible to determine whether the senatorial jury would have acquitted or condemned him:⁴⁷⁾ thus there was no opportunity created to condemn senatorial juries (despite Cicero's repeated opinion that the real body on trial was the senatorial jury). However, the outcome was a victory for Pompey, and failure for the Metellan faction. When the jury-law appeared soon after, its terms had been altered (the juries were now to be divided between three orders, and not handed over solely to the equites). It is obvious that a compromise had taken place.⁴⁸⁾ The failure of the *factio*, and the change to the terms of their original proposal makes it look as though the final terms of the law whereby senators were retained on the juries were not proposed by a senatorial group, but by Pompey. There are some who suggest that Pompey's colleague in office, Crassus, was the moving spirit behind the compromise⁴⁹⁾, but although he would have been in favour of mixed juries in view of his wide connections both in the Senate and with business interests, there are indications that Pompey too would be in favour of retaining senators on the juries.

Pompey had not pursued the jury-law as vigorously as his own law restoring the tribunes' powers, but this should not be

47) Taylor (Party Politics p. 112) claims that the senatorial jury had indicated that it meant to condemn Verres: that is not clear, for it was Verres' flight which confirmed his guilt, not the jury's vote. Following Gelzer (RE VIIA, 847; cf. op. cit. [n. 4] p. 172), she argues that it was this intention to condemn that had influenced the decision to retain senators in the jury-courts under the *lex Aurelia*.

48) Gelzer, op. cit. (n. 4) p. 172; A. Garzetti, *Athenaeum* 20 (1942) 19; Taylor, Party Politics p. 106; Ward, op. cit. (n. 20) 67ff.; cf. Brunt, *Social Conflicts in the Roman Republic* (London 1971) p. 119. Those against the view that the *lex Aurelia* was a compromise include Hill, Laffi, Scullard and Stockton (for the references, see n. 15), who say the equites controlled two-thirds of the jury-panels and imply that the equites scored a victory. Rossi (op. cit. [n. 34] 140-141) argues that *ex factione media* does not mean "from the nobility", that Cotta was therefore a moderate, and that the *lex Aurelia* was a moderate bill; if there had been revival of the *factio's* power in the middle of 70 B.C. with the election of two of its members as consuls, it would have opposed the jury-law, not agreed to a compromise (ibid. 134-135).

49) Garzetti, op. cit. p. 19; Taylor, Party Politics pp. 106 and 219. Ward (op. cit. [n. 20] 68) thinks that Crassus would have been in favour of the original proposal, in view of his connections with the equites; his interest in building up connections in all groups (Plut. Crass. vii) would argue against this.

taken to indicate that he was not interested in the lex Aurelia⁵⁰); moreover he would probably be in favour of a compromise solution to the question of the composition of the jury-courts, for in this way he would win both senatorial and equestrian support. Pompey was not committed to any "popular" movement directed against breaking senatorial control: true, he had promoted a law about the tribunes' powers, but that was the result of recognising that there was current agitation for such a law, and that the promise of a restoration of tribunician power would be a good "vote-catcher".⁵¹) Pompey probably felt the same about the compromise lex Aurelia – that it would win him support. It is too often forgotten that Pompey's colleague in the consulship was Crassus, and that he supported Pompey in the promotion of the law on the tribunes' powers; yet he is not likely to have supported any "popular" cause. His connections in the Senate were too wide for that: it should be remembered that later one of his sons was married to a Caecilia Metella, and the other to a Cornelia, the daughter of a Scipio adopted by the Metelli.

The compromise lex Aurelia probably had the approval of a great number in the Senate:⁵²) some would have approved it for no other reason than that it would cut down an irksome amount of jury service.⁵³) It is not unlikely that the Metellan *factio* agreed to the compromise. Despite their successful revival of influence at the consular elections, Pompey had beaten them over the trial of Verres and they could do little but agree to the new terms of the lex Aurelia. They were probably not enamour-

50) As argued by A.N. Sherwin-White, JRS 46 (1956) 7–8. It is true that Pompey had merely hinted at giving some attention to the problem of the law-courts in the *contio* he attended as consul-elect (Cic. Verr. i 45), without going into details, and that at the time he seemed more definitely interested in the restoration of the tribunes' powers. Not much can be made of Plutarch's statement (Pomp. xxii 4) that Pompey merely allowed (*περιεῖδεν*) the bill to go forward: that may mean no more than that Pompey did not propose the bill himself, but had it proposed in the name of another. If the above analysis is correct, Pompey was clearly interested in the final terms of the law (cf. Taylor, Party Politics pp. 104–105; Ward, op. cit. [n. 20] 68–70; Stockton, *Historia* 22 [1973] 217–218).

51) Sherwin-White, op. cit. 7.

52) Hawthorne (op. cit. [n. 16] esp. 59) makes the point that the bulk of the senators, who achieved their position by holding the quaestorship, had very little influence on deciding policy, and points out that the example of the vote on Caesar in 50 B.C. shows the majority would vote to avoid the possibility of conflict.

53) Taylor, Party Politics p. 219.

ed of their original proposal to transfer the jury-courts to the equites, and had only made it in an attempt to secure popular favour: they were no doubt glad to see at least some senators retained in the new jury-courts. Even so, there are indications that the *factio* itself was not completely opposed to "popular" demands: C. Cotta, a member of the *factio*, had proposed the law on the tribunes in 75 B.C. as consul;⁵⁴⁾ Catulus, another member, had not objected to Pompey's law restoring the tribunician powers;⁵⁵⁾ Hortensius approved the *lex Aurelia* (if the interpretation given at the beginning is correct); and Cotta obviously continued his sponsorship of the jury-law, altering it to the new terms. Pompey's law on the tribunes had been merely an extension of Cotta's earlier law: the Senate is not likely to have objected to a restoration of the tribunes' powers, since it recognised that the tribunate could be a useful tool.⁵⁶⁾ The *factio* was obviously prepared to tack in order to catch the *ventus popularis*.

If the view is right, that Pompey was prepared to compromise with the senatorial faction, then doubt is cast on the common view that Pompey led some sort of "democratic revolution" against senatorial control. Pompey wanted to work with and through the Senate, not against it.⁵⁷⁾ Pompey's consular year showed his political ability to understand and utilise current issues to get the Senate on side: there is no indication in our sources that either of the laws he promoted in 70 B.C. did not have senatorial approval. Of course, his political rivals, as just indicated, were also trying to turn current issues to their advantage: C. Cotta's law of 75 B.C. aimed to conciliate popular pressure; Macer referred to moves by the *pauci* in 73 B.C. to soothe the people;⁵⁸⁾ L. Cotta's original proposal about the jury-courts was a radical one to secure popular favour.

There are other incidents which reveal Pompey's co-operation with the Senate, or desire for it. Pompey's burning of Sertorius' correspondence after his victory in Spain shows that he was already thinking of trying to secure an understanding with the *factio* hostile to him.⁵⁹⁾ In 72 B.C. the Senate approved

54) V. sup. n. 32 and n. 33.

55) V. sup. n. 18.

56) Syme, JRS 53 (1963) 56; Adcock, *Marcus Crassus, Millionaire* (Cambridge 1966) p. 30.

57) Sherwin-White, *op. cit.* (n. 50) 8; Ward, *op. cit.* (n. 20) 68-69; Brunt, *op. cit.* (n. 48) p. 114.

58) V. sup. n. 36.

59) Plut. *Pomp.* xx 7-8; Badian, *FC* p. 283 n. 1.

grants of citizenship conferred by him (admittedly at the prompting of the consuls for that year who were supporters of Pompey).⁶⁰) In 71 B.C. the Senate gave him a dispensation from the *lex annalis* so that he could stand for the consulship, and also the right to stand *in absentia*.⁶¹) When the censorship was revived in his consulship, he secured the expulsion of 64 senators:⁶²) if these were Sullan nominees, it is likely that the well-established senatorial families, who no doubt looked upon their inclusion by Sulla as degrading, would be pleased.⁶³) At some time during his consulship, Pompey secured senatorial approval for a law granting land allotments to the Spanish veterans of himself and Metellus.⁶⁴) In subsequent years, we see some senators supporting Pompey: in the trial of Cornelius, Pompey's tribune of 67 B.C., the majority of the senatorial jurors voted for his acquittal,⁶⁵) and there were some senators who supported the *lex Manilia*.⁶⁶)

All this tends to indicate that Pompey was working with

60) Cic. Balb. viii 19 and xiv 32-33. On the connection between Pompey and the two censors, see Syme, *The Roman Revolution* (Oxford 1939) pp. 44 and 66; Badian, *FC* pp. 281-282 and 303; I. Shatzman, *Athenaeum* n.s. 46 (1968) 349.

61) Cic. de imp. Cn. Pomp. xxi 62; Livy Per. 97; App. B.C. i 121; Plut. Pomp. xxii 1; cf. Vell. Pat. ii 30.3. There is some doubt about the necessity for Pompey to seek permission to stand *in absentia*: see J. Linderski, *Mélanges offerts à Kazimierz Michalowski* (Warszawa 1966) pp. 523-526.

62) For the references, see Broughton, *MRR* Vol. II p. 127.

63) Hawthorne, *op. cit.* (n. 16) 55 ff.; he also argues that the chief cause of their expulsion was judicial corruption, seeing in the new senators who were drafted by Sulla many men who could not keep up to the financial standards of their new position and so were more open to corruption, and suggesting that it was the failure of these new senators which had led to the *lex Aurelia*. Garzetti (*op. cit.* [n. 48] 17), on the other hand, says that the censors removed *i più rigidi oligarchi* who were *più fedeli partigiani della costituzione di Silla*. There is no clear evidence that Pompey removed political opponents, and Garzetti's view is based on the assumption that Pompey was aligned with the popular movement against the Senate, a view which is being attacked here.

64) Dio xxxviii 5.1. This law is probably to be identified with a *lex Plotia agraria* mentioned in Cic. Att. i 18.6: on this law, see B. A. Marshall, *Antichthon* 6 (1972) 43-52.

65) Ascon. 50 St.

66) Four consulars supported the bill (Cic. de imp. Cn. Pomp. xxiii 68): P. Servilius Vatia Isauricus (cos. 79 B.C.), C. Scribonius Curio (cos. 76 B.C.), C. Cassius Longinus (cos. 73 B.C.), and Cn. Cornelius Lentulus Clodianus (cos. 72 B.C.). The first two at least were influential. Cicero, as praetor, spoke in favour of the bill, and Caesar, admittedly only a junior senator, also gave his support.

the Senate in 71–70 B.C. The Metellan faction was powerful enough to have two of its members elected to the consulships of 69 B.C. If it was that powerful, why did it not have more success in opposing the so-called “popular” measures being supported by Pompey? Because they were not opposing the measures? If Pompey was working with the Senate, and if his proposals had the approval, or at least no opposition, from the most powerful faction in the Senate, then Pompey’s consulship may not have been the “democratic revolution” it is made out to be.⁶⁷⁾ And if the Senate approved of the measures which Pompey was promoting, it follows that the *pauci* did not want to retain the Sullan system, and that the Sullan system was not being deliberately overthrown.⁶⁸⁾

We began this paper with a puzzle – why did Hortensius, a member of the faction opposed to Pompey, approve the *lex Aurelia* which Pompey helped to promote? An examination of the composition of the faction opposed to Pompey revealed further puzzles – why did Catulus support the law restoring the tribunes’ powers which Pompey personally sponsored? And more importantly, why did Cotta propose the law about the jury-courts, when he belonged to the faction opposed to Pompey, and what was the purpose of his original proposal to hand the juries over entirely to the equites? Why were these original terms changed to a compromise solution? If Pompey engineered the compromise, was he then trying to co-operate with the Senate? And if that was the case, was the *factio* opposed to “popular” changes and can Pompey really be credited with heading a “democratic revolution” to overthrow the Sullan constitution? These are questions meriting further examination.⁶⁹⁾

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67) E.g. by Garzetti, op. cit. (n. 48) 18; Taylor, *Party Politics* pp. 103–106. V. sup. p. 149 for comments on Pompey’s reasons for promoting the law about the restoration of the tribunes’ powers.

68) It is the almost universal comment that the Sullan constitution was overthrown in 70 B.C.: for a recent example, see Stockton, op. cit. (n. 50) 205–216, who criticises Sherwin-White’s view that the events of 71–70 B.C. were not as momentous as they are made out to be. However, Laffi, op. cit. (n. 15) esp. 202–203 and 264, and Badian, *Lucius Sulla: the Deadly Reformer* (Sydney 1970) p. 27, have sounded timely warnings about accepting this universal comment.

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