THE EXTORTION LAW OF SERVILIUS GLAUCIA

I SHOULD have known better than to revive Carcopino's heresy on the Lex Bembina Repetundarum.[1] My attempt to rob C. Gracchus of this important measure and restore it to Glaucia met with universal disbelief. Soon a powerful counter-attack followed in learned publications.[2] There may seem little left to say. Certainly it would be pointless to go over the old arguments yet again. My only excuse for perseverance is that I have new material. For my readers' convenience I group it under five main heads.

I. THE EVIDENCE ON THE *PRAETOR REPETUNDIS*

Mommsen assumed that the epigraphic Lex Repetundarum established a regular new praetorian 'province', the presidency over the whole process of extortion inquiry. Sherwin-White has emphasized that this need not have brought any increase in the number of praetors from six and that two praetorian 'provinces' could on occasion be held by one man.[3] But what is the ancient evidence? We must start from the only certainty.

C. Claudius Pulcher was *praetor repetundis* in 95 B.C. and was the third praetor present in Rome, unless the two city jurisdictions were combined for once.[4] There certainly were three praetors available in Italy in the second half of 89 B.C. The Lex Plautia Papiria required one category of resident aliens to register their claim to Roman citizenship with a praetor and such registers were kept by Appius Claudius, Q. Metellus Pius, and P. Gabinius.[5] Now this year opened violently with the murder of the urban praetor Asellio in the Forum. One of the other known praetors must have been elected to replace him, another will have been peregrine praetor, and the third presumably held C. Pulcher's 'province'. These last two would have been free to move around Italy and so to facilitate registration.[6] Three praetors were also available in the capital late in 91 B.C. The urban praetor was Q. Pompeius Rufus.[7] Q. Servilius Caepio was a praetorian legate in the first year of the Social War. He had clashed bitterly with Livius Drusus right up to the tribune's murder. In 92 B.C. Scaurus had counter-attacked Caepio by prosecuting him first. The charge is not specified, but it was probably for electoral malpractices. This implies that

[1] See *Autour des Gracques*, 205–35; H. B. Mattingly, *J.R.S.* lx (1970), 154–68.

[2] A. N. Sherwin-White, *J.R.S.* lxii (1972), 83–105; Miriam Griffin, *C.Q.* N.S. xxiii (1973), 121–6; C. Nicolet in *Aufstieg und Untergang*, i. 2 (1972), 200–2. The best text of the Lex Repetundarum (I adopt Sherwin-White's convenient title) is still *C.I.L.* i², no. 582. I use it throughout as a basis.

[3] *Gesammelte Schriften*, i. 51; Sherwin-White, op. cit. 86 f.

[4] As they were for Sisenna in 78 B.C. (*C.I.L.* i², no. 588. 2 f., Greek). For Pulcher see *C.I.L.* i². 1, p. 200 with Cic. *II in Verr.* 2. 49. 122.

[5] Cicero, *Arch.* 4. 7–5. 9.

[6] For discussion of the date and the problem of this *collegium* (Cicero) of only three praetors see Badian, *P.A.C.A.* i (1958), 3–5 (he suggested 88 B.C.). There is no problem really, since the provincial praetors will have left Italy on the 89 B.C. dating and a board of three was legally a *collegium* (*Digest* 1. 16. 85). On Asellio's murder (23 Jan.?) Badian has an excellent treatment in *Historia* xviii (1969), 475–8. An urban praetor was *not* replaced on death in 184 B.C., but the circumstances were quite exceptional: see Livy 39. 39.

[7] Cicero, *de orat.* 1, 37. 168.

Caepio was a successful candidate at the praetorian elections for 91 B.C.[1] In January 90 B.C. another Servilius was killed at Asculum with his legate C. Fonteius. He is described as proconsul and must surely have been praetor the previous year.[2] Finally there is the evidence for Marius' sixth consulate. In the crisis the consuls were authorized to call on such tribunes and praetors as they thought fit. They called on all the tribunes bar Saturninus and all the praetors except Glaucia. All praetors called on obeyed their summons. By no trick of rhetoric can one praetor steadily be treated as 'all'. There must have been at least a third praetor in Rome late in 100 B.C.[3]

In four years out of fifteen following Glaucia's law there is good evidence for a separate praetor in charge of the extortion court.[4] It is random and may justify us in assuming that there were *normally* three praetors in the capital. This would leave only three available for provincial commands, since Sherwin-White is surely correct in claiming that the board was not increased in number.[5] The assumed norm would thus create difficulties and indeed we do find unusual expedients being employed at this time. L. Licinius Lucullus was praetor in the capital in 104 B.C. He put down a minor slave rising in Campania and was then sent to Sicily in 103 B.C. to take command in the Servile War.[6] Prorogation of a city praetor's *imperium* had been extremely rare since the Hannibalic War.[7] But the case of Lucullus can be easily paralleled in the 90s. Probably in 97 B.C. Sulla was urban praetor and from office in Rome he went out to his Cilician command.[8] Both urban and peregrine praetors of 94 B.C. went on to govern overseas provinces.[9] Caesar's father was first praetor in Rome and then proconsul of Asia, presumably in 92 or 91 B.C.[10] Thus four more years of the fifteen show irregularity such as appears best explicable by a shortage of praetors for service abroad. Before Glaucia's law we have no sound evidence—either direct or indirect—for the retention of a third praetor in the capital.[11]

[1] See *R.E.* iiA, col. 1786 f. and Broughton, *M.R.R.* ii. 24 n. 5 for the sources and good discussion. For Scaurus' counter see Asconius *in Scaur.* 21C and Florus 2. 5. 5 (Caepio charged Scaurus with *ambitus*!).

[2] See Broughton, *M.R.R.* ii. 24 n. 4 for the evidence. Diodoros (37. 13) and Velleius (2. 15) make this Servilius praetor at his death (Dec. 91 B.C.?).

[3] Sherwin-White's argument in op. cit. 87 n. 21 is hard to accept. Note Cicero's language in *pro Rab. perd.* 7. 20 f.: 'fit senatus consultum ut C. Marius L. Valerius consules adhiberent tribunos pl. et praetores quos eis videretur . . . adhibent omnis tribunos pl. praeter Saturninum, praetores praeter Glauciam . . . parent omnes . . . cum omnes praetores, cuncta nobilitas ac iuventus accurreret . . . quid tandem C. Rabirium facere convenit?'

[4] Only in 89 B.C. might there be reasonable doubt on this point. The law-courts' activity was apparently suspended in 90 B.C., except for the Varian commission—and even that may have been suspended later for a while, before resuming under changed jury-arrangements (the Lex Plautia of 89 B.C.). See on this the excellent discussion by Badian in *Historia* xviii (1969), 46. Under such wartime conditions the third praetor in the capital may have had the convenient province *quo senatus censuisset*: for this see Livy 42. 31. 7 and 44. 17. 10.

[5] Op. cit. 86 f.

[6] Diodoros 36. 2. 5 f. and 8. 1.

[7] See Livy 32. 1. 6; 42. 6. 10 with 27. 4; 42. 18. 2 f. with 27. 3–8; Frontinus, *de aqued.* 1. 7 (Marcius Rex, 144 B.C.).

[8] See Badian, *Athenaeum* N.S. xxxvii (1959), 279–303.

[9] See the sources and discussion in Broughton, *M.R.R.* ii. 15 f. (with nn. 4 and 5). C. Sentius went to Macedonia, L. Gellius Poplicola to Asia or Cilicia.

[10] See *C.I.L.* i². 2, p. 198 with Broughton's discussion in *M.R.R.* ii. 17 and 19 n. 2.

[11] I follow Passerini (*Athen.* N.S. xii [1934], 17) in rejecting Marius' Spanish command after his praetorship in Rome in 115 B.C., which is reported by Plutarch (*Marius* 6. 1). The *elogium* omits it (*C.I.L.* i². 1, p. 195) and I suspect that Plutarch's source confused Marius with his brother, who certainly governed in Spain *c.* 102 B.C. (Appian, *Iber.*

Our evidence, however, for the period from C. Gracchus to Glaucia is so patchy that we must not press the argument from silence. I would only claim that, as far as the *praetor repetundis* is concerned, the Lex Repetundarum may very well be Glaucia's.

II. The Lex Servilia and the Prosecutors' Rewards

The fundamental Ciceronian passage must be the starting point and I give it fairly fully (*pro Balbo* 23. 53–24. 54):

> cognoscite nunc populi Romani iudicium multis rebus interpositum atque in maximis causis re ipsa atque usu comprobatum . . . quo modo igitur L. Cossinius Tiburs . . . damnato T. Caelio, quo modo ex eadem civitate T. Coponius . . . damnato C. Masone civis Romanus est factus? . . . an accusatori maiores nostri maiora praemia quam bellatori esse voluerunt?
>
> quod si acerbissima lege Servilia principes viri ac gravissimi et sapientissimi cives hanc Latinis, id est foederatis, viam ad civitatem populi iussu patere passi sunt neque ius est hoc reprehensum Licinia et Mucia lege, cum praesertim genus ipsum accusationis et nomen et eius modi praemium quod nemo adsequi posset nisi ex senatoris calamitate neque senatori neque bono cuiquam nimis iucundum esse potest, dubitandum fuit quin, quo in genere iudicum praemia rata essent, in eodem iudicia imperatorum valerent? num fundos igitur factos populos Latinos arbitramur aut Serviliae legi aut ceteris quibus Latinis hominibus erat propositum aliqua ex re praemium civitatis?

This passage need not be taken as meaning that the rewards under the Servilian law were limited to Latins.[1] Sherwin-White observes shrewdly that one of the two Latin prosecutors whom Cicero cites was the father of a juror at Balbus' trial. The other was the grandfather of two young men well known to the trial jury and popular in senatorial and equestrian circles. Lately they had been prominent as defence witnesses in the trial of Caelius Rufus. Cicero's choice of examples was clearly determined by his desire to win as much goodwill as possible for Balbus and not only on the jury-benches.[2]

Under which Lex Servilia did these two Latins win their Roman citizenship?[3] Scholars still dispute inconclusively. Theoretically it could be either Caepio's law or Glaucia's. There is no agreement even over grammar or idiom. How do *lege, patere, passi sunt,* and *populi iussu* construe?[4] Perhaps it is time to try

100: Broughton, *M.R.R.* i. 568). Broughton unconvincingly follows Plutarch (op. cit. 534 and n. 3).

[1] As by Mommsen (*Ges. Schr.* i. 61) and more recently by Badian (*C.R.* N.S. iv [1954], 101 f.) and myself (*J.R.S.* lx [1970], 164–8).

[2] See Sherwin-White, op. cit. 96 f., and Miriam Griffin, *C.Q.* N.S. xxiii (1973), 123–5 (independent). For L. Cossinius the juror see *R.E.* iv, col. 1671 no. 1: for the Coponii see *pro Caelio* 10. 24 and *R.E.* iv, col. 1215 no. 3. C. Coponius (*summo splendore praeditus*: Cic.) was a Pompeian supporter as praetor in 49 B.C., but survived the proscriptions and was still alive just before Actium. Cicero defended Caelius in early April 56 B.C. (see R. G. Austin's edition, App. iv), while the Balbus trial followed the speech *de provinciis consularibus* in the summer (see 27. 61).

[3] The two Latins benefited from this statute and not the old extortion law—as Sherwin-White (op. cit. 97) might seem to imply. On that supposition the argument *num fundos factos* would be irrelevant. It did not matter whether Tibur had—or had not—'become bound' to the Lex Servilia, if its two citizens became Romans before its passage.

[4] See Badian, *C.R.* N.S. iv (1954), 101 f. (Caepio); C. Nicolet, *L'ordre équestre* (1966), 535 f. (Caepio); Barbara Levick, *C.R.* N.S. xvii (1967), 266 ff. (Glaucia); E. Gruen,

an unsophisticated approach. I would start by looking at Cicero *Phil.* 1. 8. 20: 'quid? isti ordini iudicatus lege Iulia, etiam ante Pompeia Aurelia non patebat?' On this I base a simplified paraphrase of the *pro Balbo* passage: 'acerbissima lege Servilia haec Latinis via ad civitatem patebat eamque principes viri populi iussu patere passi sunt; quod ius non est reprehensum Licinia et Mucia lege.' I can see no grammatical or logical objection.[1] If I am right, though, the Lex Servilia must be Glaucia's. The epithet *acerbissima* fits perfectly. The leading men would have found his law extremely distasteful. Even so they let it stand after Glaucia's fall. Nor was the crucial clause invalidated in 95 B.C., when claims to citizenship were rigorously investigated under the Lex Licinia Mucia.[2]

The Lex Servilia Glauciae then offered citizenship as a reward to non-Latin and Latin prosecutor alike. Thus I would now, with some relief, interpret Lex Repetundarum 76–9 straightforwardly and according to the natural sense of the preserved Latin text. The epigraphic law can consistently be identified on this evidence with Glaucia's measure.[3]

III. *Ampliatio* and Lex Repetundarum 46–8

I was obviously wrong in trying to divide *amplius bis* grammatically in line 48. Sherwin-White has persuaded me to join the great majority in translating 'more than twice'.[4] But how did the sentence with *amplius bis* continue? We must first view the whole passage with minimal supplement: '. . . praetor [quei] ex h.l. quaeret ita pronon[tiato . . . *c.* 70 . . . eorum iudicu]m quei quomque aderunt iudicare i[ubeto . . . *c.* 209 . . . negare iu]dicare is HS n. ccIↃↃ quotiens quomque amplius bis in uno iu[dicio . . . *c.* 65 . . . multam deicito. tu]m quam ob rem et quantum pequ[niae dixerit publice proscribito . . . *c.* 180 . . . ∼. De] reis quomodo iudicetur ∼'.[5] Mommsen read 'quotiens

C.R. N.S. xix (1969), 8–11 (Caepio); Sherwin-White, op. cit. 96 f. (non-committal); Miriam Griffin, op. cit. 123–6 (Caepio).

[1] I take *populi iussu* as echoing *lege Servilia*. There seems no reason why in Cicero's sentence both these ablatives should not have the same construction, despite Sherwin-White (op. cit. 97 n. 86) and Griffin (op. cit. 125). Apposition of this sort can be paralleled. See for example Cicero *de harus. resp.* 132: 'si minus civili iure perscriptum est, lege tamen naturae, communi iure gentium sanctum est.' It is easier to accept in view of the long gap between *lege Servilia* and the resumptive *populi iussu*.

[2] Note Cato frg. 167 (Malcovati *O.R.F.*², 65): 'ecqua tandem lex est tam acerba quae dicat . . . ?' For useful comments on my first statement of this view see Griffin (op. cit. 123 f.).

[3] Sherwin-White (op. cit. 93–7) and Griffin (op. cit. 125) effectively refuted my honest attempt in *J.R.S.* lx (1970), 165–8 to grapple with the difficulty which I then saw in the evidence.

[4] See *J.R.S.* lx (1970), 159 (following Carcopino); Sherwin-White, op. cit. 87.

[5] I would not now follow Carcopino and Sherwin-White (87 n. 23) in inserting *amplius* after *pronontiato*. I think that this word is already implied in *ita* and that the adverb should precede the verb here anyway. I have adjusted Mommsen's lacunae length on the assumption that a–b gaps should be reduced by *c.* 35 letters and that the tablet was that much less wide than Mommsen thought. For my full case see *J.R.S.* lix (1969), 129–38; *Latomus* xxx (1971), 283; *J.R.S.* lx (1970), 159 and n. 23. Kirsten Johannsen in her 'Die *lex agraria* des Jahres III v. Chr.' (Diss. München, 1971) has recently made a concerted attack on my rearrangement, rightly insisting that it must work on both sides of the tablet (pp. 10–21). I have read her arguments very carefully twice and am not shaken. She has not fully appreciated the way in which the tiny frg. f helps to determine the correct mutual position of the e and d fragments. Nor does she face the challenge presented by DE Ṇ and REO AP (now lost) in *Lex Repetundarum* 55. Mommsen implausibly saw them as parts of two headings with *c.* 40 letter spaces between in his text. I still think that we must run them together as one heading DE Ṛ̣EO AP[SOLVENDO].

quomque amplius bis in uno iu[dicio iudicare negarint]', but this can hardly be right. There is not room in the preceding lacuna for what would have to be supplied. At its start the praetor is bidding the jury consider its verdict at the *second* session. That session will have proved abortive, the praetor will have been informed and will have arranged a third. On that third occasion the praetor must have been told yet again that more than a third of the jury was not prepared to vote.[1] I would therefore propose as an alternative 'quotiens quomque amplius bis in uno iu[dicio causam deici necesse erit]'. The fine of 10,000 sesterces would be imposed individually on those jurors whose recalcitrance had made a third hearing inevitable.[2]

Would the threat of heavy fines and adverse publicity suffice? Would this system in practice constitute that embryonic *comperendinatio* that Carcopino attributed to Glaucia?[3] Payment of the fines even once could have raised ugly suspicions of bribery against individual jurors and we happen to know from Cicero that the equestrian order was proud to have kept its record completely clean in this respect.[4] How many jurors anyway would have been prepared to resist moral pressures in court or to face the hostile talk of the town, if they persisted in forcing a second adjournment?[5]

The Lex Repetundarum, of course, allows the jury in theory to acquit or convict at the *first* hearing. But various scruples could work against this. Fear of being thought too easy-going, too hasty, or too harsh would sway many jurors' minds.[6] The last fear is brought out well in an impassioned specimen of late second-century eloquence: 'nam quid fuit, iudices, quare in sententiis ferendis dubitaveritis aut istum hominem nefarium ampliaveritis? . . . hic vos veriti estis, si primo coetu condemnassetis, ne crudeles existimaremini?' The defendant on this possibly imaginary occasion (105 B.C.?) seems to be M. Iunius Silanus and the trial would be for extortion.[7] In 106 B.C. L. Crassus lashed the equestrian juries for their excessive harshness and helped rob them of their control.[8]

[1] For two-thirds as the voting quorum see line 49.

[2] In *II in Verr.* 1. 9. 25 Cicero talks as though even the necessity for two hearings was felt as an oppressive burden: ' "adimo enim comperendinationem": quod habet lex in se molestissimum, bis ut causa dicatur.'

[3] *Autour des Gracques*, 216 f.

[4] *I in Verr.* 13. 38: 'cognoscet ex me populus Romanus quid sit, quam ob rem, cum equester ordo iudicaret annos prope quinquaginta continuos in nullo, iudices, equite Romano iudicante ne tenuissima quidem suspicio acceptae pecuniae ob rem iudicandam constituta sit.'

[5] For such pressures see Cicero, *pro Caecina* 2. 6–4. 9. He was insisting that the *recuperatores* should reach a verdict after at least two adjournments. He imagines a juror protesting 'qua re aut muta actionem aut noli mihi instare ut iudicem tamen'.

[6] See, for example, *pro Cluentio* 28. 76, where Cicero analyses the motives of various groups of jurors. Oppianicus *was*, however, condemned at the first hearing (74 B.C.): this was still possible in murder trials. Apparently Fidiculanius Falcula cast the decisive vote, though he had been substituted late and dubiously. See *pro Caecina* 10. 28 f. (hostile) and *pro Cluentio* 37. 103–41. 114.

[7] *Ad Herennium* 4. 36. 48. For the placing of this speech note 'maximis privatis et publicis calamitatibus acceptis . . . sedetis . . . aliquid cotidie acerbi atque incommodi nuntiatur; et iam eum, cuius opera nobis haec accidunt, vos remoramini . . .'. Compare Asconius, *in Cornelian.* 80c (of Silanus) 'criminabatur rem cum Cimbris iniussu populi gessisse idque principium fuisse calamitatum quas eo bello populus accepisset'. The worst *calamitas*—Arausio—came in October 105 B.C.: the next year, as Asconius tells us, Cn. Domitius Ahenobarbus launched his attack as tribune for *perduellio*.

[8] See the sources on the Lex Servilia Caepionis in Greenidge and Clay, *Sources for Roman History*[2], 78. Note especially the fragment from Crassus quoted in *de orat.* 1. 52. 225: 'eripite nos ex miseriis, eripite ex faucibus eorum quorum crudelitas ⟨nisi⟩ nostro sanguine non potest expleri.'

Glaucia restored it in 105/4 B.C. If the Lex Repetundarum really is his law, then we can well see how two hearings could become the norm. The new equestrian courts would be very ready to adjourn once. For some years they would be uncomfortably aware of being on trial themselves. They must be above suspicion and their reputation for harshness must be lost. These first years would be crucial for setting precedents that could become binding. In practice the new arrangements could lead naturally to the regular division of extortion trials into two parts, which in the Sullan system is formalized as statutory *comperendinatio*.[1] What little direct evidence we have for pre-Glaucian procedure suggests a virtually free use of adjournment and a fundamentally different spirit.[2]

IV. The Lex Servilia Glauciae and the *Iudices Editicii*

The difficult passage in Cicero's *pro Plancio* (17. 41) surely refers to the bitter struggle to repeal Glaucia's extortion arrangements in 92/1 B.C.[3] These memories were also stirred by Cicero in another speech from the same year as the Plancius defence.[4] The *pro Plancio* passage must be quoted in full:

> an vero nuper clarissimi cives nomen editicii iudicis non tulerunt, cum ex CXXV iudicibus principibus equestris ordinis V et LXX reus reiceret, L referret, omniaque potius permiscuerunt quam ei legi condicionique parerent: nos neque ex delectis iudicibus, sed ex omni populo, neque editos ad reiciendum, sed ab accusatore constitutos iudices ita feremus ut neminem reiciamus?[5]

One phrase used of Drusus' supporters is interestingly echoed by Caesar's *omnia permiscere malebant* in *bell. civ.* 1. 32. Caesar accused his enemies of preferring to precipitate a civil war rather than give up their *imperium*.

The Lex Servilia then provided that the prosecution should furnish a list of 125 jurors, from which the defence could reject 75; this would leave a trial jury of 50. Under the Lex Repetundarum (19–26) the prosecution provides a list of 100 jurors and the defence rejects 50. The result is the same numerically, but there is disturbing discrepancy in the figures. Should this prevent us from identifying the Lex Repetundarum with Glaucia's bill?[6] The consequences of that view repay study. Glaucia's law would surprisingly be milder at this point

[1] This amplifies my argument in *J.R.S.* lx (1970), 159 f.

[2] Note in *II in Verr.* 2. 9. 26 how Cicero asks the defence 'utram putas legem molliorem?' and answers for them 'opinor, illam veterem, qua vel cito absolvi vel tarde condemnari licebat.' *Tarde* should imply more than just one unpenalized adjournment. The same should be true of the *ad Herennium* passage also. The speech continues '. . . vos remoramini diutius et alitis ad rei publicae perniciem, retinetis quoad potestis in civitate?' The phrase *quoad licebit* would better fit the conditions envisaged by the Lex Repetundarum.

[3] As I argued in *J.R.S.* lx (1970), 157 f. Sherwin-White's answer (op. cit. 85) was rather non-committal: Griffin (op. cit. 122) contented herself with invoking the authority of Kunkel as well as Mommsen.

[4] See *pro Rab. Post.* 7. 16: 'potentissimo et nobilissimo tribuno plebis M. Druso novam in equestrem ordinem quaestionem ferenti "si quis ob rem iudicandam pecuniam accepisset" aperte equites Romani restiterunt.' The speech is firmly fixed in 54 B.C. (5. 11).

[5] *Nuper* can cover long intervals in Cicero. See *div. in Caec.* 20. 67 and *II in Verr.* 2. 47. 118 (104–70 B.C.); ibid. 49. 122 (95–70 B.C.); ibid. 1. 33. 85 (*c.* 92–70 B.C.) and 4. 3. 6 (90s–70 B.C.); *de officiis* 2. 17. 58 (70s?–46 B.C.) and 3. 47. (65–46 B.C.). So there can be no objection to making it span the interval 91–54 B.C. in *pro Plancio*.

[6] As Sherwin-White (op. cit. 85) and Griffin (op. cit. 122) seem to hold. Neither—perhaps rightly—will allow that Cicero's text may need amending.

than the old extortion measure.[1] Moreover we should note that in Cicero's day the very notion of *editicii iudices* was unpopular. Sulpicius Rufus evidently prejudiced his chances for the consulship of 62 B.C. by advocating a return to the system. Laterensis blundered similarly a decade later in prosecuting Plancius.[2] Now if the *editicii iudices* were of Gracchan origin, some of this prejudice should colour Cicero's many references to the courts of the period 121–104 B.C. I would take just the one example of the Mamilian commission. Cicero calls those jurors *Gracchani* on one occasion and the epithet denies their impartiality.[3] But in *pro Plancio* 29. 70 he very significantly does not employ the opprobrious term *editicii*, though after 17. 41 it would have been most effective. I can conclude only that those jurors were *not* selected on this system. Yet it would be strange if Mamilius neglected to borrow it, if it existed ready-made. It was so in tune with the tough, political justice which he wanted. The natural answer would seem to be that *editicii iudices* were not Gracchan.[4] In general Cicero uses words like *severus* for the pre-Glaucian courts and jurors; his typical epithet for the system of *iudices editicii* is *acerbus*, which is by no means synonymous.[5] It could very well, however, characterize a feature of the *acerbissima lex Servilia*.

But the numerical discrepancy remains. Perhaps we should simply charge Cicero with a forgivable slip of memory. He rightly states after all that the trial jury under the Lex Servilia was reached by a process of double selection and that its number was fifty. After a generation other details might become blurred. Or Cicero the busy advocate hastily set them down in 54 B.C. without checking. He has been held guilty of much more serious slips of memory or inaccuracy than this.[6]

V. The Clause *quo ea pecunia perveneriT*

The Lex Servilia introduced the process of reclaiming moneys from accessories, senatorial and equestrian, when the condemned's property did not realize the total *lis* assessed against him.[7] I once tried to find traces of this in Lex Repetundarum 23, 62, and 67 f. Sherwin-White criticized my view and I now believe that I was wrong on the first passage. Bu the overestimated the space needed for the *quo ea pecunia* clause, holding that there was no room for it on the

[1] See Strachan-Davidson, *Problems of Roman Criminal Law* ii. 106 f. Note especially 'According to this *non tulerunt* means that the Romans could not bear the *editicius iudex* even under the mildest aspect, and *permiscuerunt* means that rather than have him "they plunged the country in confusion", "gave the signal for civil war".' I find this admirable except for the implications of that 'even . . . aspect' phrase.

[2] See *pro Murena* 23. 47: *pro Plancio* 15. 37 and 17. 41 f.

[3] *Brutus* 34. 128 (they ruined Opimius, *Gracchi interfectorem*).

[4] On Mamilius see Sallust *Jug.* 40 and the criticisms eloquently voiced by L. Crassus (*de orat.* 1. 52. 225 and *Brut.* 44. 164). In the *Brutus* we hear of the *potentia* and *factio* of the jurors and prosecutors.

[5] For *severus* etc. see *II in Verr.* 4. 10. 22; ibid. 59. 133 and 3. 90. 210; *pro Balbo* 5. 11 (jurors *c.* 112 B.C., *gravissimi*); *I in Verr.* 17. 51 (the Lex Acilia). For uses of *acerbus* see *pro Plancio* 15. 37 and 17. 42 and *pro Sulla* 33. 92 (jurors chosen by prosecution *ad spem acerbitatis*). At Sulla's trial the jurors were not strictly *editicii*, but the prosecution resorted to dubious surprise tactics to secure a similar result. In characterizing Rufus' hard line in 63 B.C. Cicero spelt out the *acerbitas* of the *editicii iudices*: '. . . ut odia occulta civium quae tacitis nunc discordiis continentur in fortunas optimi cuiusque erumperent.'

[6] For example many think him wrong on the date of the famous trial of L. Cotta and of Scipio's eastern embassy. See A. J. Astin, *Scipio Aemilianus*, 258 and 127.

[7] See Cic. *pro Rab. Post.* 4. 8–10 and 13. 37.

bronze.[1] The logical place would be between fragment d 9 and e 18 (line 61 f.). The legislator has just laid down that, if the condemned man offered sureties or if sale of his goods realized the total *lis*, prompt restitution to the victims should follow.[2] But what if the amount realized were insufficient? Then the new process would be invoked. Delayed payment in full thus remained feasible. But, if the full sum of the *lis* were still not reached, the praetor would have eventually to apportion out fairly to all the claimants the money that had actually been received by the Treasury. Here is my dummy restoration of this scantily preserved section of the law: '. . . neive quis iudex neive quaestor facito sciens dolo m[alo quo minus setiusve fiat. sei summa litium ex bonis venditis recepta non fuerit, iudex ab eis persequito ad quos ea pequnia quam reus cepisset pervenerit quodque eius captum probabitur ad quaestorem redigito facitoque utei lites ex h.l. solvantur. sei iud]ex ex hace lege pequniam omnem ad quaestorem redigere non potuerit, tum in diebus x proxsumeis, quibus [quae potue]rit redacta erit, iudex . . .[. . . tributum indicito . . . diemque edito qua . . . quoius nomine . . . lites] aestumatae erunt . . . adessint, dum nei longius C dies edat ~.'[3] The new clause requires *c.* 185 letters and there are 29 letters of irreducible supplement. Mommsen allowed 246 letters for the lacuna, but it should be reduced by at least 30. It is tight, but it *does* fit—whereas the orthodox arrangement leaves an awkwardly long gap unfilled.[4] On this ground also the Lex Repetundarum may be ascribed to Glaucia.

VI. The *lis aestimata* against C. Cato *c.* 112 B.C.

Both the Lex Calpurnia and the Lex Iunia provided for simple restitution of moneys proved to have been illegally taken. It was the Lex Repetundarum that ordained double assessment.[5] We know of just one *lis aestimata* from the period 121–104 B.C. In *II in Verr.* 3. 80. 184 Cicero exclaims: 'hoc quemquam ferre posse, hoc quemquam denique tuorum advocatorum nunc animo aequo audire arbitrare, qua in civitate C. Catoni consulari homini clarissimo viro HS $\overline{\text{VIII}}$ lis aestimata sit, in eadem civitate apparitori tuo esse concessum ut terdeciens uno nomine auferret?' Against C. Cato's total *lis* the jury was to set the takings of Verres' underling in one group of transactions only. For *uno nomine* as technical language from the *litis aestimatio* we need adduce only *II in Verr.* 1. 38. 95.[6] Now

[1] See *J.R.S.* lx (1970), 162 f.: Sherwin-White, op. cit. 87–91; Griffin, op. cit. 122 f. Sherwin-White reckoned on a minimum of 300 letters. But his dummy clause contains at least two unnecessary inserts (90 n. 39): *exve praedibus qui dati sunt* and *sive praedes non dederit reus*. The *quo ea pecunia* clause did not come into operation *si praedes dati sunt* (*pro Rab. Post.* 13. 37), and, if the condemned man had *not* given sureties, then his goods would have been automatically seized and sold (see Lex Repetundarum 57 f.). The fact of his failure would not be noted here.

[2] This seems to be the general meaning of the passage, though I doubt some of Mommsen's restorations.

[3] Mommsen organized the first lacuna very differently. He began with '. . . dolo m[alo quo minus ita satis fiat itaque solvatur . . .]' and ended with '[~ De tributo indicendo ~ Quanti iudex quei eam rem quaesierit, leites aestumaverit, sei is iud]ex ex hace lege . . .'. I see no need for the new paragraph. Logically the clause looking to proportional repayment rounds off the section on how the victims are to recover their claims from the Treasury.

[4] For the adjustment in lacuna length see above, p. 258 n. 5. Even with Mommsen's too long restorations and the new paragraph (see last n.) there would be *c.* 95 letter-spaces spare, for which no plausible content can be provided.

[5] See Lex Repetundarum 58 f. with 23 and 74 (81).

[6] 'hoc scitote . . . his nominibus solis Cn. Dolabellae HS ad triciens litem esse aestimatam.'

only if the *lis aestimata* equalled the total proved taken would direct and telling comparison be possible. Otherwise we should expect Cicero to express himself differently.[1] Cicero's other allusion to Cato reinforces this point. In *II in Verr.* 4. 10. 22 he says that the Mamertine state often spent more on a single banquet for Timarchides than the total amount of Cato's *lis*. The tool of a rapacious governor now commanded that kind of price. If the assessment was already double, Cicero muffed a chance of damning the Mamertines still further. He could after all have declared that 'they often spent more than *twice* as much on the one agent Timarchides than Cato was convicted of taking from a whole province'.[2]

This evidence can best be satisfied by identifying the Lex Repetundarum with the Lex Servilia. But if it is thought too subjective, the other five points of this paper remain. The case is in fact cumulative and it should be disturbing. The onus of proof ought now very much to lie on those who want to keep Mommsen's date for the Lex Repetundarum, which has been axiomatic for too long. Meanwhile, for those who can not feel happy without a Gracchan extortion measure, I have some small comfort. I can offer them the mysterious Lex Iunia.[3]

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[1] He could have written 'qua in civitate C. Cato . . . condemnatus sit, quod HS $\overline{\text{IV}}$ contra leges a sociis cepisset . . .'.

[2] He does not spare them when he calls their town in this passage 'that pirate's safe refuge' (10. 25), where all Verres' loot was stored. He mentions their hostility to Cato only to put their present sympathies in an even worse light.

[3] See Sherwin-White (op. cit. 86), who suggests in passing that I might consider this possibility. The author of the law was surely M. Iunius Silanus (*cos.* 109 B.C.) and 123 B.C. would seem a perfectly feasible date. See Broughton, op. cit. i. 513. The Lex Acilia could follow in 122 B.C. and change the jury-panel for the extortion court (and any future *quaestiones*?). I do not think that Griffin's subtle arguments (op. cit. 100 ff. and 122) rule out my present position. For my earlier view see *J.R.S.* lx (1970), 160–2.