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THE LEX CALPURNIA OF 149 B.C.

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There is no shortage of literature on this subject. Almost every treatise on Roman law, public or private, contains a discussion of the Lex Calpurnia. In the development of Roman criminal law this bit of legislation occupies a central position, and it has accordingly been the starting point of many works of learning and insight.¹ In fact so inevitably has the topic entered into all investigations as to the origin and procedure of criminal trials by jury in Rome, that it has seemed to some 'almost flogged to death.'² Why, then, persecute the subject further?

Because what is considered almost exclusively in these many writings is the question as to the organization of the court created in 149 B.C., or the question as to the source in earlier Roman procedure of the civil law element and the criminal law element whose combination produced that organization. The problem which is examined in this article is the policy of which the Lex Calpurnia is the expression and the historical considerations which led to its adoption. On this subject the literature is curiously meagre and opinions widely divided.³

The project of substituting knights for senators in the Court of Extortion had been broached, seemingly, by Tiberius Gracchus.⁴ but, like several other of his plans, this invasion of senatorial prerogatives (if it were real, and did not arise, as Professor J. S. Reid suggests,⁵ from a 'tendency in the later writers to assume that all the measures of Gaius were suggested to him by Tiberius')

¹ Zumpt, A. W., *Das Criminalrecht der römischen Republik*, Berlin, 1868. Vol. ii, p. 1 ff.; Mommsen, Th., *Römisches Strafrecht*, Leipzig, 1899, p. 175 ff., 705 ff.; Greenidge, A. H. J., *The Legal Procedure of Cicero's Time*, Oxford, 1901, p. 415 ff.; Strachan-Davidson, J. L., *Problems of the Roman Criminal Law*, Oxford, 1912, vol. i, p. 223 ff.; vol. ii, p. 1 ff.

² Hitzig, H. F., *Die Herkunft des Schwurgerichts im römischen Strafprozess*, Zürich, 1909, p. 6.

³ The comments of historians, always brief and often just, usually touch only on one aspect of the Lex. Pelham, H., *Outlines of Roman History*, p. 182: 'It (the court) was, until 122 B.C., composed of senators, that is, of men who either had been or were looking forward to being themselves governors of provinces, and who as Romans and nobles were more in sympathy with the accused than with the accusers'; cf. Arnold, W. T., *The Roman System of Provincial Administration*, p. 78; Drumann-Groebe, *Geschichte Roms*, ii, p. 67: 'Sein Strafgesetz zeugt von einem edlen Unwillen über die Vergehen seiner Standesgenossen,

aber er mochte auch ebensowenig Eingriffe in ihre Rechte dulden'; Heitland, W. E., *The Roman Republic*, ii, p. 215: 'It can hardly have been a move of the senatorial majority'; Botsford, G. W., *The Roman Assemblies*, p. 358: 'His motive was undoubtedly a sincere desire to protect Italy and the provinces from official rapacity'; Lécivain, Ch., Daremberg et Saglio, s.v. *iudicium publicum*, p. 650: 'Ce sont les abus de pouvoir et les exactions des gouverneurs de provinces qui amenèrent la création des tribunaux criminels permanents, des *quaestiones perpetuae*'; Niebuhr, B. G., *Lectures on Roman History*, ii, p. 302: The judges 'were always senators and this was a powerful means of strengthening the authority of the Senate.' See also Reid, J. S., p. 96 *infra*, and Boak, A. E. R., *History of Rome*, p. 114.

⁴ Plut., *Tib. Gracch.* 16.

⁵ In marginal notes to this article. I owe it to his kindness that I am permitted to quote from them here and elsewhere.

was left for his brother Gaius, to put into effect. The chief consequence of the substitution is properly emphasized in our ancient authorities: 'It cut off from the Senate most of its power,' says Plutarch,¹ whose sources, as is well known, were, like those of Diodorus and Appian, contemporary histories with all the vices of prejudice and all the virtues of detail and actuality characteristic of their type.² 'It made the worst element in the state the master of the better,' says Diodorus,³ reflecting Posidonius and indirectly, perhaps, the circle of Aemilius Africanus. 'For this power of sitting in judgment on all Romans and Italians, including the senators themselves, in all matters as to property, civil rights, and banishment,' says Appian,⁴ who generally reveals to us better than any one else the intent of the Gracchi, 'exalted the knights to be rulers over them, and put senators on the level of subjects So it shortly came about that the political mastery was turned upside down, the power being in the hands of the knights, and the honor only remaining with the Senate. The knights indeed went so far that they not only held power over the senators, but they openly flouted them beyond their right.' And if the statements of these writers, whose agreement is enhanced in value through its being exceptional, suffer from exaggeration due to themselves or their sources, the affirmation of Varro,⁵ that by transferring the courts to the equestrian order, Gaius Gracchus '*bicipitem civitatem fecit discordiarum civilium fontem*,' is a just appreciation of the outcome.

For whilst the Senate, thereafter as theretofore, controlled domestic government, however precariously and intermittently, the organ to which senators and magistrates were responsible in Italy and the Empire was thenceforth the equestrian court. There

¹ C. Gracch., 5.

² Meyer, Eduard, *Kleine Schriften*, Halle, 1910, p. 381 ff.; Kornemann, E., 'Zur Geschichte der Gracchenzeit,' *Klio*, Beibef. i. 1903; Pöhlmann, R., *Sitzungsber. der bayr. Akademie, phil. hist. Cl.*, 1907, p. 443 ff.; von Stern, E., *Hermes*, lvi, 1921, p. 229 ff.

³ xxxvii. 9.

⁴ *Civil War*, i, 22 (Loeb Class. Libr. Trans.). Into the question as to whether or not senators were eligible for some kinds of jury service after 123-22 B.C. we do not need to go, since it is undisputed that thenceforward they were ineligible for service on the Court of Extortion. Appian clearly thought that they were eliminated from all the courts; yet he motives their removal in dissatisfaction with decisions rendered by them in cases that had come before the Court of Extortion alone. The specific ground for dissatisfaction alleged is that in these cases the senatorial jurors had been bribed to acquit their peers. But this was merely a pretext, as is shown by the fact that the equestrian jurors were legally exempted, under the Gracchan system, from the jurisdiction of the

court dealing with bribery. Charges of bribery were at that time the cover for all kinds of opposition.

The Lex Acilia (Girard, F., *Textes de droit romain*³, 6; Bruns, C. G., *Fontes Iuris Romani Antiqui*⁷, Tübingen, 1909, 10; Hardy, E. G., *Roman Laws and Charters*, Oxford, 1912, p. 10 ff.) discloses the fact that it was class sympathy, based on office-holding, kinship, and association in clubs or by clientage, from which the legislator sought to keep magistrates from profiting when they were accused of extortion.

Obviously the contemporary advocacy of the *lex judicaria* had to centre in its avowed object of protecting *peregrini* against extortion, and any jurors may honestly have been thought better than senators, while *equites*, whose knowledge of conditions abroad was unrivalled, were specially designated by their very knowledge for this purpose. See p. 88, n. 2. The best treatment of this whole subject is to be found in Greenidge, A. H. J., *History of Rome*, New York, 1905, p. 210 ff.

⁵ Apud Nonium s.v. *bicipitem*, 454. For the proof that it is C. Gracchus that Varro had in mind here, see Florus, ii, 5 (iii, 17); Mommsen, *Juristische Schriften*, iii, p. 343, n. 14; Strachan-Davidson, *op. cit.*, ii, p. 78, n. 3.

was, of course, no alteration of the practice according to which the officials put in charge of civil, judicial, and military administration abroad were senators, upon whom in consequence oversight over publicans devolved; but, when the judges of these officials at the end of their term of service were, to use the expressive language of Cicero,¹ '*principes et quasi senatores publicanorum*,' '*principes equestris ordinis*,' '*flos equitum Romanorum*,' it is clear that the tax-gatherers in the provinces and their principals in Rome had the whip-hand in foreign government. Moreover, if we take a non-committal view as to the *equites* and content ourselves with describing them as an 'upper middle class,' or the extreme view of Professor Frank and regard them as a second agricultural interest, we eliminate indeed the clash in the provinces as the main motive for the animus with which the court pursued the senators. We do not eliminate the animus. We must simply motivate it differently, and in my judgment inadequately²—in compassion for the provincials, in jealousy of the nobility, in the relentlessness of newly acquired power. That the *equites* did use their advantage mercilessly we may infer, if from nothing else, from the impassioned words used by L. Licinius Crassus in his plea on behalf of the law (Lex Servilia) by which in 111 or 106 B.C. the courts were restored momentarily to the senators: 'Snatch us away from this torture; tear us out of the jaws of those whose cruelty cannot be satiated with our blood; suffer us not to be in bondage to any saving to your commonalty, to bear whose yoke is within our endurance and within our duty.'³ In any event, it suffices for the purposes of our argument that C. Gracchus calculated on the *equites* using the court to destroy the power of the Senate in the sphere of its jurisdiction, i.e., in the provinces; and of the reality of this calculation we have proof in his own words: that he 'had broken the power of the Senate once for all'⁴; that he 'had planted a dagger in the flank of the Senate

¹ Verr. ii, 71, 175; *pro Plancio*, 9, 23.

² The *publicani* were important in government circles much earlier than the *negotiatores*; and when, after 149 B.C., and especially after 123 B.C., the latter multiplied in numbers, wealth, and influence, the former retained their leadership among them, shared in their profits, and gained correspondingly in political power. They were the heads of the non-senatorial *equites* at the time of the Gracchi. The land owners registered for cavalry service prior to 129-123 B.C. were either senators' sons and senators, or upper middle class farmers too widely scattered and either too indifferent politically or too little conscious of separate interests to play a part in public life commensurate with their numbers and the aggregate value of their property. So far as these farmers came individually to the knowledge of the censors and were thought by them to be fit candidates for a public horse and registration in the 18 centuries, they seem, after 123 B.C., at least, to have played

publican rather than senatorial politics. Of course there were always 'good' knights (Appian, *Civil War*, i, 100; 59). But that the Court of Extortion after 123 B.C. was manned by jurors ordinarily hostile to defendants is clear from many utterances of Cicero: Verr. i, 9, 26: *qua lege [Acilia] multi semel accusati, semel dicta causa, semel auditis testibus condemnati sunt; lex atrox; pro Plancio*, 15, 36; 37: *acerbum genus iudicii*; Verr. *Actio Prima*, i, 17, 51: *severissimi iudices*. See Hitzig, *op. cit.* p. 16.

'That there was a certain sympathy with the provincials spread abroad among the mass of the *cives* seems indicated by the ease with which every fresh *lex repetundarum* after Gracchus was passed. Enmity for the Senate will not account for this': Professor Reid. Granted; but the animus of the *equites* was something special.

³ Cic. *de Oratore*, i, 52, 225, translated by Strachan-Davidson, *op. cit.* ii, p. 80.

⁴ Appian, *Civil War*, i, 22.

which even after his death would remain to rend it.'¹ 'The sword,' he exclaimed, 'hangs suspended over the head of our enemies: in other matters let fortune favor us or fail, we shall be content.'²

The confidence with which C. Gracchus forecast the discomfiture of the Senate through the transfer of the court to the knights suggests that theretofore also the court had been an instrument of power as well as of justice. And indeed if the idea of paralyzing the power of the Senate in the sphere of the court's jurisdiction was uppermost in the mind of Gaius Gracchus while planning the *coup*, and if its result was indeed the freeing of provincial governors from senatorial control, we may presume that the idea of enlarging the power of the Senate in this sphere and of strengthening its control over imperial officials entered decisively into the calculations which led to the reservation of the Court of Extortion to senators when it was first organized.³ Let us see if this presumption can be confirmed.

The Court of Extortion owes its origin to a law of L. Calpurnius Piso, introduced when he was tribune of the plebs in 149 B.C. The name of its author and its (so far as we know) uncontested adoption lead us to suppose it had the approval of the Senate. The name of the court—*quaestio de pecuniis repetundis*—expresses its avowed purpose, and its subsequent history gives us some hints as to its procedure, organization, and jurisdiction. But as to the circumstances in which the law was conceived and enacted we are left completely in the dark by our ancient authorities.⁴ To what extent can we remedy this defect?

It is commonly noted that the Lex Calpurnia had as its fore-

¹ *Diod.* xxxvii, 9.

² *Diod.* xxxiv, 27.

³ For the fact that it was so reserved see *Plut. Tib. Gracch.* 16; Cassius Dio, xxiv, *frg.* 83; Appian, *Civil War*, i, 22; cf. Mommsen, *Juristische Schriften*, iii, p. 340; *Staatsrecht*, iii, p. 530, n. 1.

⁴ The passages relating to the Lex Calpurnia come mostly from the works of Cicero. They are collected by Orelli in the *Index legum* to his edition of this author as follows: *Brutus*, 27, 106: quaestiones perpetuae—constitutae sunt, quae antea nullae fuerunt; L. enim Piso tr. pl. legem primus de pecuniis repetundis Censorino et Manilio cos. tulit; *de Off.* 2, 21, 75 (44 B.C.): nondum centum et decem anni sunt cum de pecuniis a L. Pisone lata lex est, nulla antea cum fuisset; at vero postea tot leges et proxima quaeque duriores, tot rei, tot damnati; *Verr.* iii, 84, 195: Si, quod L. Piso ille Frugi, qui legem de pecuniis repetundis primus tulit, cum emisisset quanti esset, quod superaret pecuniae retulisses; *ibid.* iv, 25, 56: filius enim L. Pisonis erat, eius qui primus de pecuniis repetundis legem tulit; *Schol. Bob. in orat. pro Flacco*, p. 233: primus hoc (cognomentum frugalitatis) meruit L. Piso qui legem de pecuniis repetundis tulit et fuit C. Graccho capitalis inimicus; *Divinat.* 5, 17: quasi vero dubium sit, quin tota lex de pecuniis repetundis sociorum causa constituta sit; *ibid.* 20, 65: lex ipsa de pecuniis repetundis

sociorum atque amicorum populi Romani patrona; *Verr.* ii, 6, 15: vos in hac quaestione de pecuniis repetundis, quae sociorum causa constituta est, lege iudicioque sociali sociorum quaerimonias audire oportet.

The passages relating to the Law derived from other sources than Cicero are: Tac. *Ann.* xv, 20: usu probatum est, patres conscripti, leges egregias, exempla honesta apud bonos ex delictis aliorum gigni. Sic oratorum licentia Cinciam rogationem, candidatorum ambitus Iulias leges, magistratuum avaritia Calpurnia scita pepererunt; *Val. Max.* vi, 9, 10: L. Lentulus consularis lege Caecilia (*sic*!) repetundarum crimine oppressus, censor cum L. Censorino creatus est; *Lucilius*, xx: Calpurni saeva lege in Pisonis rependi Eduxique animam in primoribus faucibus naris; *Polybius*, vi, 17: τὸ δὲ μέγιστον ἐκ ταύτης ἀποδίδονται κριταὶ τῶν πλείστων καὶ τῶν δημοσίων καὶ τῶν ἰδιωτικῶν συναλλαγμάτων, ὅσα μέγεθος ἔχει τῶν ἐγκλημάτων. (That Polybius had in mind chiefly cases of extortion in making service as jurors the greatest of senatorial prerogatives is a shrewd observation of Mommsen, *Staatsrecht*, iii, p. 529, n. 3); *Lex Acilia*, 23: [aut quod cum eo lege Calpurnia aut lege Iunia sacramento actum siet; *ibid.* 74 (81): [quibusquom ioud]icium fuit fueritve ex lege quam L. Calpurnius L.f. tribunus plebei rogavit, exve lege quam M. Iunius D.f. tr. pl. rogavit.

runner three distinct series of happenings : (1) criminal trials before the Roman comitia in which public officials, mostly tribunes acting directly or through the intermediary of praetors,¹ indicted ex-magistrates for oppression or 'graft'; (2) extraordinary criminal trials under the conduct of a praetor, inaugurated in each case by a law of the comitia requiring this officer to impose capital punishment without appeal if his *consilium* found the facts to be as charged ; and (3) prosecutions of official malefactors at the instigation of the Senate by civil-law procedure before a jury of 'recoverers' presided over by a praetor.

The first of these methods of calling magistrates to account was of old standing and reflected an inalienable right of the tribunate, and it was to endure to the end of the Republic. But it was open to several objections from the Senate's point of view, which we may presume was the dominating point of view at this time.² The least of these in the period from 175 to 150 B.C. was that it left the initiation of the action within the discretion of some one of the tribunes and made its prosecution dependent upon the good-will of all the rest ; for the Senate had by then established a satisfactory *modus vivendi* with the tribunes. It was a more serious matter that it lodged the decision as to guilt or innocence with the popular assembly, which was subject to emotional appeals and political influence and which, whatever may have been its regard for just-dealing with subject peoples, had no particular desire to maintain the authority of the Senate.

Trials of the second and third kind were alternatives for the first, and they date alike from the period 172-171 B.C. They represent different attempts of the Senate to solve the same problem.³ This

¹ The tribunes could approach the comitia tributa directly, the comitia centuriata only through the intermediary of a praetor ; Mommsen, *Röm. Strafrecht*, p. 168, n. 5. Political cases were taken up by the tribunes as a matter of course.

² Zumpt (*op. cit.* ii, p. 6 ff.) goes too far in this direction when he gives to the Senate prior to 149 B.C. the legal rights which the Court of Extortion exercised later. The records he has brought together are satisfied by the view taken in the text, that the Senate intervened not as a court but to have a court appointed, and that, in order to have a case handled judicially, it was obliged to resort to one of the three methods enumerated above. Naturally there was nothing to prevent the Senate from intervening after 149 B.C. to ensure that a case was brought to trial. Hence the inferences made by Zumpt from the Senate's activity in the case of D. Silanus (ca. 141 B.C. Livy, *Epit.* liv. ; Val. Max. v, 8, 3), that a court of extortion did not then exist and that Piso defined by his law the *crimen repetundarum* and did not establish a *quaestio perpetua*, are without value.

Moreover, after 149 B.C. nothing could prevent tribunes, at any rate if they acted at the behest of the Senate, from creating further *quaestiones extraordinariae* by *rogationes privilegii similes*,

though as a matter of fact we know of only one such creation prior to the time of the Gracchi, that dealing with the notorious case of L. Hostilius Tubulus in 141 B.C. (Pauly-Wissowa, s.v. in vol. viii, 2, p. 2514 f. ; Mommsen, *Strafrecht*, p. 197). Mommsen holds the opinion that all these special laws were unconstitutional ; Strachan-Davidson (*op. cit.* i, p. 230) rightly dissents.

³ The question whence Piso got his procedure is a thorny one. The view taken in the text does not accord precisely with that of Zumpt, Mommsen, Hitzig, Lécivain (Daremberg et Saglio, s.v. *iudicium publicum*), or Strachan-Davidson, though it has benefited by the discussions of all these scholars. It differs least from that of Mommsen (*Strafrecht*, p. 190, n. 4 : Das Hauptmoment, eben die Combination der magistratischen Leitung mit dem Geschwornenverfahren, ist zweifellos das Werk Pisos), from which it varies chiefly in the importance it attaches to the cases of Popilius and Galba, the novel character of which Mommsen however was himself the first to perceive (*Strafrecht*, p. 172, n. 2 ; 197, n. 1), though it was left to Strachan-Davidson really to disengage them (by silence mainly, cf. i, pages 227 and 237) from the miscellany of cases brought by Mommsen, Lécivain and others under the heading *iudicium*

was the period when insubordination to the Senate and oppression of the provincials, in the broadest sense of this term, became so frequent, flagrant, and intolerable that sharper remedies were imperative. The long record of magisterial misbehaviour¹, spread over the early sections of Livy, Books XLII and XLIII, opens with the insolence of L. Postumius Albinus (consul in 173 B.C.) toward Praeneste² and closes with the condemnation of C. Lucretius (praetor in 171 B.C.) by the comitia tributa to pay a fine of 1,000,000 asses for pillaging and enslaving the Greeks of Chalcis, when he had quartered his seamen there during the naval war against Perseus.³ It contains a somewhat detailed account of the scandalous way in which two consuls, M. Popilius Laenas (172 B.C.) and C. Cassius (171 B.C.) flouted the Senate and maltreated those in their power. Cassius not only left Gallia, the province allotted to him, and set out with his army *via* Aquileia through Illyricum to the scene of military operations in Macedonia, without even informing the Senate of his intention, but he also plundered the country and enslaved the population of several inoffensive Gallic tribes by way of preparation for his *vanum inceptum*. The Senate let him off with a reprimand and an order that he make retribution to his victims.⁴

It had done the same the preceding year in the case of Popilius, who had begun war on his own responsibility against the Statellates, a Ligurian tribe, and, after victory, had auctioned off the survivors and their goods.⁵ But Popilius paid no heed to the Senate's order, and repeated his offence. His brother, as it happened, succeeded him in the consulship, and by the use of his *par maiorve potestas* he prevented the matter from being brought up again in the Senate. The Senate refused to take up anything else, and a deadlock ensued. Thereupon two tribunes intervened and laid before the Senate the text of a law which they subsequently had enacted by the Assembly to the effect that 'in case any of the Statelli who had submitted were not restored to liberty by the first of August next, the Senate should proceed under oath to designate some one to try and punish the man by whose wrongful act they had been enslaved.'⁶ Then, 'when C. Licinius, the praetor, consulted the Senate as to whom it wished to designate in accordance with the law (*quem quaerere ex rogatione vellet*), it designated Licinius himself.' Popilius evaded the inquiry by staying away from Rome, whereupon the tribunes

publicum. When Strachan-Davidson, in dealing with his second category of cases (i, p. 237 f.), which apparently includes those of Popilius and Galba, says: 'These cases all belong to the last age of the Republic, when these *quaestiones perpetuae* were beginning to be recognized as the proper machinery for ordinary criminal justice,' he implicitly makes the Popilius-Galba cases anticipations of trials under the Lex Calpurnia. Their political importance for the policy expressed in the law of 149 B.C. he fails to note.

¹ The activity of the Senate is attested in all these cases, and that they had a sequel in the *quaestiones perpetuae* has been frequently observed. Cf. e.g., Leonhard in Pauly-Wissowa, xviii, s.v. *iudicium publicum*, p. 2502.

² Livy, xlii, 1, 7.

³ Livy, xliii, 7, 5.

⁴ Livy, xliii, 1, 5.

⁵ Livy, xlii, 8.

⁶ Livy, xlii, 21.

passed another law permitting the trial to proceed in his absence. Twice the case was heard without a verdict being reached, and then the praetor allowed the culprit to escape *gratia consulis absentis et Popiliae familiae precibus* by setting the date for the third hearing on the day after he himself went out of office.¹

The first attempt to solve the problem by what Mommsen calls a *privilegium*,² Strachan-Davidson a *quaestio extraordinaria*,³ was accordingly a failure. It was in these circumstances that the Senate came to try the third method enumerated above—prosecutions under civil procedure.

Spain gave the occasion thereto. In 171 B.C. envoys from both provinces appeared in Rome to demand the protection of the Senate against 'the avarice and insolence' of recent governors.⁴ The Senate took action on the complaints of extortion, in which it seems to have decided that a *prima facie* case existed, and 'L. Canuleius, the praetor to whom Spain had been allotted, was commissioned to nominate five "recoverers" from the senatorial order for the trial of each officer from whom the Spaniards sought damages, and to afford them the opportunity to choose whom they pleased as *patroni*.' Three governors were hauled before these tribunals, of whom one (praetor in 178 B.C.) was acquitted and two (praetors in 174 and 173 B.C.) exiled, and only the hurried departure of Canuleius to his province stayed the lodging of suits against others. There was a suspicion that the *patroni* had called the inquiry off.

This method of dealing with what legally were wrongs of an international character was new chiefly, it seems, in the role played by the Senate. For the 'recoverers' who tried the suits were an ancient institution, devised apparently to facilitate the peaceful settlement of disputes as to property between Romans and Latins or Romans and aliens generally.⁵ The most striking feature of the entire incident is that here already, as in so many cases of conviction subsequently before the *quaestio de repetundis*, the actual punishment inflicted was exile—a fact as yet without a satisfactory explanation.⁶

¹ Livy, xlii, 22.

² *Strafrecht*, p. 193, n. 3; 196, n. 2.

³ *Op. cit.* i, p. 229. In an ordinary *quaestio* the findings of the magistrate were subject to appeal and a comitial trial ensued: in an extraordinary, the people registered its judgment, in advance of the verdict, in the *lex* itself by which the *quaestio* was instituted. There are several cases recorded prior to 172 B.C. where a *senatus consultum* evoked a *quaestio*, and those of 186 B.C., when the Bacchanalian conspiracy was discovered, and of 180 B.C., when an epidemic of poisoning appeared among Roman matrons, may be regarded as well authenticated; but while the result was the same—magisterial trials without appeal—a different principle of law was involved, and neither these cases nor others less well attested can be connected in any way on the score either of political

motive or legal form with the Lex Calpurnia. They fall accordingly into groups 1 or 3 of Strachan-Davidson's classification, whereas *privilegia* belong to group 2.

⁴ Livy, xliii, 2.

⁵ Mommsen, *Staatsrecht*, iii, p. 601; Greenidge, *Legal Procedure*, p. 47; Phillipson, C., *The International Law and Custom of Ancient Greece and Rome*, London, 1911, Vol. ii, p. 83 ff.; Strachan-Davidson, *op. cit.* i, p. 211 ff.; Pauly-Wissowa, 2te Reihe, i, s.v. *Reciperatio*.

⁶ The question has been raised and pretty thoroughly examined by Strachan-Davidson (ii, p. 1 ff.). In the *litis aestimatio* many different things, some of them purely political or administrative, and better suited to a Court of High Treason than to a Court of Extortion, were taken into account. See also Mommsen, *Strafrecht*,

In the course of this acute crisis in provincial affairs the Senate took the opportunity to lay down certain rules for the guidance of magistrates abroad: *à propos* of the Spanish complaints it forbade governors for the future 'to fix the price of grain, to force the Spaniards to sell their *vicesumae*, or to station prefects in towns for the purpose of collecting money,'¹ and *à propos* of the complaints from Greece it forbade officials to quarter seamen in private houses² and cities to honor requisitions made of them by Roman officials beyond the amounts fixed by the Senate.³

Thenceforward to oppress the provincials in any of these ways was to disobey the Senate. This was a positive result of considerable value; for it laid a basis for calling magistrates to account, at least politically, in the future. But the new devices for enforcing the accounting, contributory though they were perhaps to the issue that it is only in 154 B.C. that we again hear of suits against governors, had displayed at least one common weakness and several defects peculiar to each. The weakness they had in common consisted in the ease with which the praetor in charge could put the court out of existence by procrastinating till the expiry of his natural term of office, or his departure from Rome on his own public business. Clearly the duty of holding the trials needed to be attached to an office and not to a particular office-holder. It is perhaps another weakness common to both that, in view of the exceptional character of the *senatus consultum* or the *lex*, which created the court, a serious crisis had to arise before the remedy could be applied. Such a crisis may have occurred in 154 B.C. when, to use the words of our only source—an epitome of Livy,⁴ *aliquot praetores a provinciiis avaritiae nomine accusati damnati sunt*; but we cannot be sure of this, since these condemnations may have been effected by tribunes before the comitia.⁵

A defect peculiar to the more drastic remedy—the extraordinary *quaestio*—was that it required a special vote of the comitia before it could be set in motion; and on the second occasion when to our certain knowledge this expedient was resorted to, the *cause célèbre* of Servius Sulpicius Galba in 149 B.C.,⁶ the *rogatio* of the tribune, L. Scribonius Libo, which precluded by a motion for the restitution of liberty to the Lusitanians the trial of Galba, their oppressor, was contested, on its presentation to the assembly, by Galba and his friends; and after a great forensic battle, in which Q. Fulvius

p. 719 ff. The *quaestio de repetundis* was after all the perpetuation of *privilegia* as well as of *actiones* before *recuperatores*.

¹ Livy, xliii, 2.

² Livy, xliii, 8.

³ Livy, xliii, 17; Cic. *pro Flacco*, 12.

⁴ *Epit.* xlvii.

⁵ Mommsen (*Strafrecht*, p. 708, n. 2) remarks: Hätte der Senat nicht auch diese Prozesse veran-

lasst, so wären sie nicht in die Annalen gekommen. True, but the Senate may have instigated them even if the comitia tried them. Cf. the case of C. Lucretius *above*, p. 5; where the intervention of the Senate is shown by Livy, xliii, 8.

⁶ Livy, *Epit.* xlix; Heitland, ii, p. 176 f.; Mommsen, *Strafrecht*, p. 172, n. 2; Strachan-Davidson, i, p. 227.

Nobilior opposed the motion and Cato in his ninetieth year supported it, the people were so affected by the tears of Galba's little sons and his own piteous appeals that they stopped proceedings at their very inception.¹ It was also alleged that wholesale bribery had been practised.² Certainly a gross miscarriage of justice had occurred, and such was the view taken of it at the time.

The Lex Calpurnia was, I believe, the answer of the Senate³ to this grave challenge.

The initiative in trials before 'recoverers' lay entirely within the discretion of the Senate, but doubtless a tribune could veto the *senatus consultum* from which suits started, and this was perhaps the reason why they may have been resorted to so seldom. They followed, however, a procedure which possessed great advantages from the senatorial point of view: it placed the final decision in the hands of a number of senators; it permitted the imposition of damages commensurate with the injury sustained, and it admitted of the finding for or against the defendant in the name of justice, and after a calm hearing, according to the policy of the governing corporation. This procedure was accordingly adhered to in the Court of Extortion.

In fact what the Lex Calpurnia established was a *quaestio*, not for a single occasion but for ever, not *extraordinaria* but *perpetua*, with a standing judicial officer, the *praetor peregrinus*, at its head; a *quaestio* in which the magistrate did not, however, in fact *quaerit*, but left that function to the plaintiff and his *patroni*, in which, rather, he simply determined, according to the majority vote of a body (*de consilii sententia*)⁴ constituted by the Lex Calpurnia—a body which from one point of view was his *consilium* and from another a jury of 'recoverers'⁵—whether or not a penalty fixed by the law

¹ Cicero (*Brutus*, 23, 89) speaks of a *rogationem privilegii similem*. With this accords the view taken in the text. In Livy, *Epit.* xlix. Cato addresses the people in *suasione rogationis Scriboniae*. The *rogatio* failed to pass. It required the making of restitution to the Lusitanians. In another place (xxxix, 40, 12) Livy speaks as if Cato had himself brought Galba for trial before the comitia: nonagesimo anno Ser. Galbam ad populi adduxerit iudicium. This seems to have been a misunderstanding on Livy's part. Cf. also Plut. *Cato*, 15, 4.

² Appian, *Iber.* 60.

³ As concerns Piso himself, 'from all that is recorded of him one may guess that one of his motives was moral reform, and the mending of a breach in the ideal ancient morals of the Roman. This idea may receive confirmation from the fact that, apart from his own lex, he was much interested in legislation and the administration of justice: ipse etiam Piso et causas egit et multarum legum aut auctor aut dissuasor fuit (Cic. *Brut.* 106). These words of Cicero remind us a good deal of old Cato's career. Compare fragment 40 in Peter's collection': Professor Reid.

⁴ Mommsen, *Staatsrecht*, i, p. 319; Hitzig, *op. cit.* p. 16.

⁵ The questions whether between 149 and 123 B.C. the Senate was an *album iudicum* whence *iudices* (Cic. *pro Font.* 11, 23: *sapientissimi iudices*), to the number possibly of 50, as later, were drawn by some process or other analogous to that prescribed in the Lex Acilia, or whether senators to the number of perhaps five, like the *recuperatores* of 171 B.C., were designated by the *praetor peregrinus* when authorized so to do by the Senate on a suitable case arising; and whether the praetor's task consisted in presiding over a court as under the Lex Acilia, or ended when the *recuperatores* were designated, or involved his participation in the deliberations as if in the presence of his *consilium* (Asconius, in *Milonianam*, 40, as interpreted by Strachan-Davidson, *op. cit.* i, p. 227, n. 6), cannot be settled definitely with our existing records; cf. Girard, P., *Mélanges de droit romain*, Paris, 1912, p. 104, n. 3. Hitzig argues that the jury in the later, and any ordinary, sense of the term was transplanted from Greece by C. Gracchus. Whether a jury, or a *consilium*, or a board of 'recoverers,' was involved does not affect our argument: its members were admittedly senators and their verdict was final.

at damages (*simplum*) should be imposed. Technically, he simply held court under a *legis actio sacramento* in which the plaintiff was entitled to recover all moneys, over and above 4,000 sesterces perhaps, accepted on any ground whatsoever¹ by the senator or magistrate sued while acting in an official capacity.

In other words, the Lex Calpurnia combined the two methods devised to meet the crisis of 172–171 B.C., the criminal *quaestio* and the civil action before *recuperatores*. As disclosing the intent of the legislator in making this unnatural but easily intelligible conjunction, we wish to emphasize the following points: (1) that *recuperatores* in other courts were not taken exclusively from the senators²; (2) that the courts to which *peregrini* had access in the provinces were manned by jurors chosen freely from Roman citizens available in the *conventus*³; (3) that whereas the magistrate holding *quaestiones* hitherto had been free to choose his *consilium* as he saw fit, under the Lex Calpurnia his *consilium* consisted of a definite number of specified senators⁴; (4) that in the alternative procedure, trials entered by tribunes, the people collectively were the jurors. In view of the dominating fact that it was in Rome itself, at the elbow, so to speak, of the Senate, that the body holding the *quaestio perpetua* sat, the essential thing in the legislation of 149 B.C. is indeed this, that the Court of Extortion thereby created was substantially a committee of the Senate acting as a court of justice.

It has been suggested that the Senate acquiesced in legislation which demanded a systematic accounting from its members for their official actions abroad on the calculation that 'so long as the court consisted of senators the law would be no great blow to the nobility.'⁵ There cannot fail to be some truth in the suggestion, and it explains sufficiently the seemingly uncontested adoption of the measure. Senators interested in extortion may indeed have welcomed the prospect of having to do with a senatorial rather than a popular tribunal. But we cannot concede the point that such senators were then in a majority. Theretofore, as we have seen, even minorities had succeeded in frustrating trials by collusion with a tribune or a praetor. Under the Lex Calpurnia the veto

¹ 'The law was really suggested by the civil process for regaining money of which a plaintiff had been improperly deprived. In strictness, as passed by Piso, it was not a criminal statute at all. It only became so by subsequent developments': Professor Reid. I cannot help feeling, however, that the magisterial *Leitung* was original and that this belongs to the sphere of criminal procedure. See p. 92, n. 6.

The Lex Acilia (line 59) uses the words *captum coactum ablatum avorsum conciliatumve*. See *Dig.* i, 18, 18: *plebi scito continetur uti nequis praesidium munus domum caperet nisi esculentum potulentumve quod intra dies proximos prodigatur*. Which *plebiscitum* is here meant is unknown. In 112 B.C. a suit could not be entertained where the damages

alleged were 4,000 sesterces or less. Later the minimum was 10,000 sesterces (Mommson, *Stratrecht*, p. 709, n. 4; p. 715, n. 3).

² Zumpt, *op. cit.* ii, p. 15; Mommsen, *Stratrecht*, p. 178; Greenidge, *Legal Procedure*, p. 266; Girard, F., *Manuel élémentaire de droit romain*, Paris, 1911, p. 1009, n. 4; Pauly-Wissowa, 2te Reihe, i, p. 430.

³ Mommsen, *Stratrecht*, p. 235; *Staatsrecht*, iii, p. 528, n. 3.

⁴ Strachan-Davidson, *op. cit.* ii, p. 50. Zumpt, however, thinks that in early days the choice of any but senators is unthinkable (*Der Criminalprocess der römischen Republik*, Leipzig, 1871, p. 14).

⁵ Heitland, *Roman Republic*, ii, p. 215.

of the tribune was completely eliminated. A corrupt majority would not have discarded a protection so complete. There is no escaping the fact that the Senate as a corporation had shown of late a genuine desire to protect the Italians and provincials from the rapacity of corrupt officials. And, as we shall see presently,¹ the years immediately preceding this legislation were like 173–171 B.C. fertile in presenting instances where one of the fundamental principles of republican government, ‘subordination of the power of the magistrates to the senatorial college,’ was set at naught, in that holders of an *imperium* abroad took advantage of their distance from home, not only to act with fiendish cruelty towards the dependents and allies of Rome, but also to ignore and even defy the Senate’s wishes. Hence we can readily understand that the Senate should have wanted to devise a more serviceable instrument for asserting its authority over foreign magistrates—for safeguarding the interests of the corporation, which it naturally held to be those of the state, against the selfish ambitions of its individual members. Offences against subjects were one thing—that the 150,000 Epirotes whom Aemilius Paulus enslaved in 167 B.C. knew; but offences against the Senate were another and entirely different thing. They presented in that world of such immense distances² a problem of the utmost seriousness to all centralized government. Nor was it without a background at this time. ‘The aversion of the government to the acquisition of new provinces and to the whole provincial system,’ says Mommsen³; ‘the institution of the provincial quaestorships, which were intended to take at least the financial power out of the hands of the governors; and the abolition of the arrangement—in itself so judicious—for lengthening the tenure of such offices very clearly evince the anxiety felt by the more far-seeing of the Roman statesmen’ on this point. That this anxiety was also evinced in the creation of the Court of Extortion Mommsen failed to perceive; but the connexion has not gone unnoticed. ‘The difficulty of controlling magistrates who served in distant lands,’ writes J. S. Reid, in language which we would gladly make our own,⁴ ‘and of protecting subject peoples from oppression led to the passing in 149 B.C. of the famous *Lex Calpurnia repetundarum*, which established the first permanent court, or *quaestio*.’⁵

¹ *Infra*, p. 98.

² The real size of the world at that time may be gauged by the fact that it took a fortnight for envoys despatched post haste to cover the distance from Pydna to Rome (Livy, xlv, 1, 11; 2, 2). A whole army could be lost to the Senate in the environs of Aquileia (Livy, xliii, 1, 5). A praetor thought by the Senate to be absent in Greece as admiral of the fleet was actually at Antium on his estates, *tum adeo vicina inexplorata erant* (Livy, xliii, 4, 6).

³ *History of Rome (Eng. Trans.)*, ii, p. 403.

⁴ ‘The Roman Constitution’ in *A Companion*

to Latin Studies edited by J. E. Sandys, Cambridge, 1913, p. 265.

⁵ Other devices employed at this time by the Senate to keep the higher magistrates in hand have been noted by G. de Sanctis in Book iv, part 1, pp. 503 ff., of his *Storia dei Romani*, which has appeared since this article was set up. I am glad to note that the distinguished Italian historian agrees with me as to the real nature of the problem to which the Senate addressed itself when it sanctioned the proposal of Calpurnius; and that he too emphasizes the reservation of the court of 149 B.C., to senators as the essential part of the legislation (pp. 524 f.).

For nearly fifty years prior to 149 B.C. the Senate had created no new provinces. This was not due to want of opportunity. In 188 B.C. it might have followed the course pursued in Sicily after the First Punic War and left the kingdom of Pergamum embedded, like the kingdom of Hieron, in the area of a permanent Roman command. Twenty years later, too, in 168 B.C., when it had created an executive vacancy in Macedon by deposing Perseus and his heirs, it had failed to use simultaneously the natural means of filling it. Rome's refusal at this time to station a Roman praetor permanently in Pella followed undoubtedly a deliberate rejection of the provincial idea. The Senate did not wish to run the risk of having matters in the Balkans settled by an official on the spot. How explain its subsequent reversal of its Macedonian policy?

But we must first determine the time of the change. It must have preceded the organization of Macedon as a province. This, however, has been dated in two different years. The war which brought it about ended in 148 B.C.¹ and it is in that year that we should have placed the creation of the province if the starting point of the so-called Macedonian Era had not seemed to demand 146 B.C. instead.² Now, however, we have had to revise our conclusions as to the beginning of this era. As early as 1890 Kubitschek³ and Kaestner⁴ presented independently of one another a case for starting it in 148 B.C. which seemed conclusive to most scholars who studied the question until in 1909 Wilhelm⁵ proved the existence of an Achaean Era which began in 146 B.C. Then a re-examination of the whole matter was demanded by Holleaux and others.⁶

This has finally been made. In the *Annual of the British School at Athens* for 1918-1919 M. N. Tod has collected and sifted all the evidence.⁷ There can be no doubt as to the result. The conclusion is imperative that the Macedonian Era began in 148 B.C. We have thus fixed definitely the *terminus ante quem* for the Senate's change of policy on the Macedonian question. And we have at the same time brought the decision to proceed once more with the creation of provinces into the same epoch with the creation of the Court of Extortion.⁸

¹ Niese, B., *Gesch. d. griech. u. maked. Staaten*, iii, p. 331 ff.; Kornemann, E., 'Die neue Livius-Epitome aus Oxyrhynchus,' *Klio, Beiheft*, 2, p. 23; Frank, *Roman Imperialism*, p. 224.

² Böckh, A., in *C.I.G.* 1970; Marquardt, J., *Röm. Staatsverw.* 2 i, p. 318.

³ *Arch. epigr. Mitt.* xlii, p. 120 ff.; cf. Pauly-Wissowa, i, s.v. *Aera*, p. 636.

⁴ *De aeris quae ab imperio Caesaris Octaviani constituto initium duxerunt*, Leipzig, 1890, p. 43 ff.

⁵ *Beitr. z. griech. Inschriftenkunde*, Wien, 1909, pp. 114, 312.

⁶ *Hermes*, xlix, p. 589; cf. Klaffenbach, G., *Hermes*, li, p. 476, and Pomtow, H., in Dittenberger, *Sylloge*, 3 704, n. 44.

⁷ 'The Macedonian Era,' pp. 206-217. Cuntz,

O. (*Hermes*, liii, p. 102 ff.) on the basis of a less complete review of the facts reached the same conclusion as Tod.

⁸ In Books xlix, and xl, of the *Epitome* of Livy, in which the career of Andiscus is sketched and the reconquest of Macedon is noted, there is no mention of the Lex Calpurnia. If, however, the scanty remains of line 109 of the new epitome, first published in the *Oxyrhynchus Papyri*, iv, n. 668, have been correctly guessed at by Kornemann (see *supra*, n. 1), there was an entry there devoted to the establishment of the court. A better reading of this fragment, however, is that made by Lütcherbach, according to which the reference is to a Lex Atinia *de tribunis*. See de Sanctis, *loc. cit.*, p. 514, n. 63.

As it happened, the first praetor sent out to Macedon in 148 B.C., Publius Juventus, was routed and slain by the impostor, Andriscus, and it was accordingly left to the second, Q. Caecilius Metellus, to organize the province; but there can be no doubt that it was in the preceding year, when the problem raised by the occupation of Macedon by Andriscus presented itself first, that the decision of the Senate was taken to end the régime of the four Macedonian republics, and to unite Epirus, Illyricum, and Macedonia in a single new standing command.

The general situation in that year called for far-reaching action. Hither and Further Spain, the only permanent provinces then existing outside of Italy and the Italian islands (Sicily, and Sardinia and Corsica), were the scene of a formidable war, which had been extended, if not provoked, by the unauthorized attack of L. Licinius Lucullus on the Vaccae in 151 B.C.¹ and the treacherous massacre of the Lusitanians by S. Sulpicius Galba in 150 B.C.² There was little in the past history of Roman officials in Spain to encourage, and much in the present situation to discourage, the Senate from stationing magistrates or pro-magistrates in other regions similarly remote and bounded by peoples equally tempting to the triumph hunter and the slave raider. But in Spain at least there was no alternative, and it could be argued with some plausibility that it was not the permanency of the province but the irresponsibility of the commander that was at fault.

In Africa, too, matters came to a head in this year; and it was the same Senate which chafed at the immunity of Lucullus and the escape of Galba, and which came face to face with the Macedonian problem, that decided to end the Punic peril once for all. Was it in 149 B.C. that the Roman government resolved to install a governor of its own in the territory of Carthage? This question we must answer in the affirmative. It seems clear that, when making demands of the Carthaginians which, whether accepted or rejected, meant the disappearance of their city, the Senate had reached a decision previously as to how the land belonging to Carthage was to be protected. Protected it certainly had to be, since Rome, even if it did not intervene with war in Africa for the express purpose of preventing the old Carthaginian empire from reappearing in a new form under the headship of Numidia,³ could not, as the issue proved, allow the whole of the territory of Carthage to go to augment the dominions of Masinissa, which were sufficiently extensive already. And, in fact, in her final settlement with Carthage Rome neither used him as her agent nor took him into her confidence as she had done in her former wars in Africa. Masinissa was peeved

¹ Appian, *Iber.* 51; 59.

² Appian, *Iber.* 59.

³ Appian, *Lib.* 94; cf. Kahrstedt, U. (Meltzer),

Gesch. d. Karthager, iii, p. 610, 615 ff., 642;

Gsell, S., *Histoire ancienne de l'Afrique du no d.*, iii. Paris, 1918, p. 313, 329, 353.

in consequence. He saw no reason why Rome, and not he, should be in at the killing. Perhaps nothing short of the stationing of a Roman army in Africa could have prevented the old Numidian chieftain from incorporating in his territory the Carthaginian *enclave*. Yet, even if old Carthage was to disappear, the possibility must be recognized that a new Carthage, located inland, sustained wholly by agriculture, and incapable of *revanche*, may have been contemplated as the centre of government for Africa. In this case the Carthaginians would have received back the arms of which they were to be deprived by Rome, once they had evacuated the fortifications and arsenals which only a disarmed people would surrender. The only report, however, which has reached us regarding the new city to which they were to move, apart from the general statement that it was to be ten miles from the sea, is to the effect that it was to be 'unwalled.'¹ This being the case, we must conclude that the Romans, when they planned for its foundation, determined to provide for its defence themselves; or in other words, to keep a governor on the spot. Hence the resolve to create a province in Africa dates from 149 B.C.

It was in the year of these provincial perplexities that L. Calpurnius Piso presented his law to the comitia tributa subjecting future governors to the menace of a judicial inquiry before a senatorial court in case they were charged with extortion. As has been frequently pointed out, the bringing of suits under this law was attended with so great risks and expenses, and had so small prospects of success when indictments were not instigated by the Senate, and afforded so slight a deterrent against a repetition of abuses even when they had the best of issues, that *peregrini* profited little from their access to the court. But, as has been shown above, this was only one object of the law. Its other object was to arm the Senate with a new weapon against rebellious governors—a new weapon and at the same time one which, since it could not be thrust aside by the veto of a tribune, the Senate could drive home according to its own judgment. And, in fact, so efficacious did this weapon seem that the Senate, thus equipped, abandoned the policy to which it had adhered for half a century, and, acknowledging the weight of other reasons which had long since demanded the extension of the areas of Roman government, proceeded to lay down the general conditions under which, after the capture of Andruscus, Q. Caecilius Metellus organized the province of Macedonia.

There was accordingly a causal as well as a temporary connexion between the *Lex Calpurnia de pecuniis repetundis* and the *Lex Caecilia*

¹ Zonaras, 9, 26.

by which Macedonia was organized as a province; so that when Valerius Maximus applied to the former the name of the latter his memory indeed played him a trick, but it had none the less something with which to start.¹

The Senate's hope of safeguarding its authority by this device was undiminished at the time when it set up the province in Africa (146 B.C.); and nothing occurred in the meantime to cause it to hesitate to accept the legacy of Attalus in 133 B.C., or indeed, after the war with Andronicus, to organize a province in Asia in 129 B.C.,² or to install a governor in southern Gaul in 125 B.C.³ But when Gaius Gracchus wrested the weapon from the hands of the Senate and put it in the hands of the knights, at the same time sharpening it by doubling the penalty for conviction and by having the jury in each case made up from a list of such *equites* as the accuser thought friendly to himself or unfriendly to the defendant, the antipathy of the Senate to the provincial system revived and the only provinces created thereafter, prior to the reforms of Sulla, owed their origin to the activity of the *populares* and knights. When therefore a second kingdom was willed to Rome—that of Cyrene—by Ptolemy Apion in 97 B.C., the legacy was refused.

¹ vi, 9, 10; cf. *supra*, p. 89, n. 3. It is commonly supposed that Valerius Maximus simply made a mistake and wrote *Caecilia* in place of *Calpurnia*. Strachan-Davidson, however (*op. cit.* ii, p. 13), suggests that there may have been a Lex *Caecilia*, of which we have otherwise no knowledge, passed to institute proceedings against Lentulus shortly after he had been consul in 156 B.C. But the re-election of Lentulus is odd, whether it was before a *quaestio extraordinaria* or a *quaestio perpetua* that he was condemned. Hence nothing is gained by inventing a *lex Caecilia*, and it is simpler to assume a slip on the part of Valerius Maximus.

² The controversy that occurred on the arrival of Eudemos in Rome with word that Attalos III

had made the Romans his heir was not whether the legacy should be accepted or no, but whether the matter should be handled by the Senate or, as Tib. Gracchus desired, by the comitia. After the death of Gracchus, or, to be more precise, between Sept. and Dec. 133 B.C., the *senatus consultum*, published in Dittenberger, *O.G.I.S.* ii, no. 435, was passed, in which the *acta* of the dynasty were validated. See for the chronology Cardinali, G., in *Saggi di Storia Antica e di Archeologia offerti a Giulio Beloch*, Roma, 1910, p. 293. The province, doubtless contemplated in 133, was not organized till 129-127 B.C.

³ Frank, *Roman Imperialism*, p. 254 ff.