*Mommsen's Roman Criminal Law*¹

JURISTS and historians are alike agreed that we have no such thing as a science of Roman criminal law. That this work may fill the gap, so often recognised, is my wish, and to a certain extent my hope.

So writes Professor Mommsen in the first lines of this great work, extending over a thousand pages, and dealing with a subject which bristles with problems and difficulties. The hope is expressed with a modest pride, justified by a lifetime of scholarly labour, and I believe that the verdict of the world of letters, which is without appeal except to posterity, will decide that this hope has been fulfilled. Future labourers will take Mommsen's work as a basis and starting point for their own, and though the superstructure may be modified the foundation is destined, if prophecy be permissible, to remain.

It is difficult to say whether the work is rendered more or less useful for its purpose by the circumstance that this book is purely constructive and not critical. Mommsen's justification for his method must be given in his own stately and pathetic words.

I have attempted to deal, so far as may be, exhaustively with the ancient authorities: to do the same with the modern writers on the subject was beyond my power. Impossibility is a good plea at law. If controversial matters had been discussed, the book would doubtless have avoided many errors and have escaped many omissions: it would often have proved more satisfying on particular points. But for one thing it must have been at least doubled in length, whereas, even as it is, it may well be considered too long by the reader, as it is by the writer. Still more decisive is the consideration that it would certainly never have been finished. Everything has its time, and man among the rest. The writer must be permitted to reckon with the span of life that remains for him, which may well be a limited one.

We may be thankful for a resolution which has prevented this book from being relegated to the limbo of unfinished works, and accept without a murmur the limitations which the conditions of the task have imposed on the author. These limitations, however, seriously increase the difficulties of the reviewer, whose work is

¹ *Römisches Strafrecht*, von Theodor Mommsen. Leipzig, 1899.

necessarily critical. When one finds deductions from the evidence, propounded in contradiction of those which have been commonly regarded as part of the stock in trade of a teacher of Roman history, it would be a great help to be able to refer to the arguments of modern scholars who have upheld the opposite side. I can only follow in this respect the author whom I am reviewing, and support any doctrines as to which I venture to differ from him by arguments drawn from the evidence, careless, except where memory happens to supply the source, if these arguments were originally suggested to me by the works of other modern authors, or, as I believe is frequently the case, by the earlier writings of Mommsen himself.

It will not be necessary to dwell on Mommsen's definition of the nature and sphere of the criminal law. Suffice it to say that he rejects for the purposes of this work the division, suggested to the jurists by the differences of procedure, between 'crimes,' which the state punishes on its own account, and 'torts,' which it leaves the injured person to prosecute or not, as he pleases.

The fundamental characteristic (he says) of a moral law broken, and a reparation prescribed therefor by the state, unites the two spheres in an essential identity, and the difference, whether this reparation is realised in a suit at public or at private law, appears in comparison superficial and accidental.²

The general distinction between *Recht* and *Prozess*, or, as English jurists say, of 'substantive' and 'adjective' law, is in like manner rejected, as giving no suitable basis for the order of this book.

Such a division of the subject (says Mommsen), besides being questionable in itself from a scientific point of view, is utterly unsuited to criminal jurisprudence, and has contributed not a little to the poverty of the literary work on that subject.³

The details of procedure occupy one book (the third) of the five into which this volume is divided; but the procedure itself forms in fact an element in the discussion of the nature and origin of the Roman criminal law, of the officers of justice, of the several crimes, and of the punishments, which form the subjects of the other books. Without attempting to enter into the question of scientific order I will only say here that the arrangement which Mommsen has adopted justifies itself in practice, and makes it comparatively easy to find one's way through a thousand pages on a subject of great complexity.

In tracing the origins of the Roman criminal law Mommsen recognises five main sources—religious obligation, the power of the head of a household over his children and dependents, the self-help practised by each householder in defence of himself and his, the

² *Strafrecht*, p. 4.

³ *Ibid.* p. 7.

power of a commander-in-chief to punish offences against military discipline, and finally the right of *coercitio*, by which the magistrate at home compels the obedience of the citizens. It will be convenient to take these in order.

Religion was prevented from becoming a very fruitful source of law among the Romans by the severance, which they fortunately at an early date effected, between the secular functions of the magistrate and the spiritual judgments of the priesthood. In Clodius's case, for instance, when the pontiffs have pronounced that the invasion of the mysteries of the Bona Dea was *nefas*, the consuls and senate are practically bound to take further notice of it; but the pontiffs themselves have nothing to do with trial or punishment, nor the consuls with religion. The religious obligation to purge sin from the community by treating the guilty person as a scape-goat⁴ is rather a motive underlying the action of the state in the matter of criminal law than a source of any power to punish. Nevertheless the motive has left its traces on the forms of punishment which it has pleased the state to prescribe. We may hesitate indeed to agree with Mommsen's hypothesis (see below, p. 245) about the connexion of the primitive form of execution with the ritual of sacrifice, but there is no question that *sanctio*, the most general expression for the penalty by which any law is enforced, had originally the same meaning as *sacratio*,⁵ the devotion of the offender's life and goods to some god; and specific instances⁶ of this, as the punishment for certain offences, are to be found in the Twelve Tables and in other early laws.

The discussion of household discipline begins with what may seem an exaggerated appreciation of its importance in the development of the criminal law. We read⁷ that

Roman theory at least starts with an original unqualified power of punishment on the part of the magistrate, completely similar to that of the master of the household, and all laws are, just what the master's regulations are in the house, rules laid down for itself by the state, which the community has made and can unmake, and which bind the members of the body unconditionally, but bind the state itself only till further notice. As he who wishes to know the stream must never forget its source, so the Roman criminal law can be understood only on the basis of household discipline.

I am inclined to think that as a matter of fact this is a case of

⁴ It was doubtless for this reason that the consular M. Claudius, surrendered in 236 B.C. to the Corsicans to atone for a breach of international law, was brought back to Rome, when the enemy refused to accept him, and strangled in the prison (Val. Max. vi. 3, 3), apparently without being allowed the right of appeal (see *Strafrecht*, p. 46).

⁵ *Strafrecht*, p. 901. See also below, p. 227.

⁶ *Strafrecht*, pp. 822, 903.

⁷ *Ibid.* p. 16.

resemblance, not of origin. No Roman writer,⁸ so far as I know, has ever attributed the *patria potestas* either to the magistrate, whether king or consul, or to the sovereign people itself, and there is no trace of the powers exercised by the state authorities developing out of those exercised by the head of a family. The connexion which he assumes between the two does not lead Mommsen far astray, for he adds shortly afterwards—

Jurisdiction rests on the power of the community over the individual, and this power differs, as the tree differs from the seed, from that of the owner over his property, not absolute and unlimited, like the latter, but defined and limited by the rules of law. Further the individual, who is subject to the household power, if he offends, can be called to account either by the master of the house in virtue of his ownership or by the state in virtue of its supreme power; and this household procedure not only does not itself belong to the criminal law, but can never have been transferred to it, both because the contrary nature of the two must be clearly maintained and because the law of the master of the house partly overlaps and partly supplements the criminal law of the state.⁹

We may object to the metaphor of the seed and the tree, but in other respects the account given of the two authorities could not be more true or more forcible.

There are, however, two cases in which household law comes into interesting relations with the state. The first is the jurisdiction exercised by the *pontifex maximus* over the daughters of the community, the vestal virgins. This is in all respects a case of *patria potestas*, with its consequent right of personal chastisement and its fullest powers of life and death. Here, in strictest conformity with the principles laid down in the paragraph just quoted, the state as a political power claims a jurisdiction concurrent with that of the head of the household.¹⁰ In the year 114 B.C. two vestals who had been already acquitted by the pontiff were again arraigned before a tribunal instituted by a special law of the people, and both were condemned. It is probable, though not certain, that the full penalty was exacted; at any rate the vestals were not allowed to play off the one jurisdiction against the other. Another very curious point is that not only the vestals themselves but their paramours were subject to the pontifical jurisdiction. If condemned of incest by the pontiff they were scourged to death without being allowed the right of *provocatio*. Mommsen was formerly¹¹ of opinion that this is a survival of the right of avenging his honour possessed by a householder against the seducer of his daughter. He is now disposed to consider that this jurisdiction over the man

⁸ In a passage quoted below (p. 224) Mommsen seems to imply the contrary, but he does not support his thesis by any references. The very basis of the '*domestica disciplina*,' the right of ownership, is wanting to the state.

⁹ *Strafrecht*, p. 17.

¹⁰ *Ibid.* p. 197.

¹¹ See *Staatsrecht*, ii³. p. 56, n. 5.

is of comparatively late origin and depends on a definite law of the people.¹²

The second case in which household discipline appears in connexion with the ordinary law is that of women convicted of criminal acts. Over and over again we find the actual execution of punishment, capital or otherwise, committed to the relatives of the culprits instead of being carried out by the servants of the state. The important point is that this occurs not only with those who are under the *potestas* of father or husband (in such a case the persons *quorum in manu essent* have a clear right to deal with them), but with women who are *sui iuris*, and are nevertheless put to death or banished by *cognati* or *propinqui*.¹³ Mommsen considers this to be a survival from a supposed 'original order of things,' according to which a woman always and necessarily remained under *patria potestas*. If there were neither father nor husband to claim it, the absolute rights over person and property passed (such is the hypothesis) to the *gens*, and the primitive *tutela gentilium* is set down as probably equivalent to the *manus*, with the consequence that a woman under this system could never be *sui iuris*. This is a hard saying, and is certainly not to be justified by straining (as Mommsen does)¹⁴ the words of so easy-going a writer as Livy (xxxiv. 2, 11): *Maiores nostri feminas voluerunt in manu esse parentum, fratrum virorum*. In Roman law, as we know it, *tutela* is possible only in case of persons *sui iuris*; its intention is to give to persons otherwise capable of legal acts, but of weak age or sex, protection from the consequences of acts by which they would, but for such protection, be bound; such acts are to be valid if, and only if, they have been confirmed by the consent of a guardian. A person *alieni iuris*, a slave, a son, or a daughter, is essentially incapable of legal acts, and the notion of protection in their exercise becomes absurd. Thus the two conditions are mutually exclusive; and that *tutela* is in any case equivalent to *manus* is a proposition which could only be accepted on the strongest evidence. In this case the evidence is not forthcoming. We know that as early as the law of the Twelve Tables a woman was capable of holding property, and that on the death of a father the daughters who were at the time under his *patria potestas* inherited their share of the property equally with their brothers; it seems to follow that they became persons *sui iuris* and consequently calling for guardianship. Mommsen's hypothesis relates, of course, solely to a primitive, pre-historic era. As he himself says in a later passage,

¹² He rests this belief on Festus's statement (*s.v.* Probrum): 'Probrum virginis Vestalis ut capite puniretur, vir, qui eam incestavisset, verberibus necaretur; lex fixa in atrio Libertatis cum multis aliis legibus incendio consumpta est, ut ait Cato' (*Strafrecht*, p. 20).

¹³ The two categories are distinguished in the case of the Bacchanalian women (Livy, xxxix. 18, 6).

¹⁴ *Strafrecht*, p. 18.

the woman under *potestas* enjoys the protection of a free-woman as against third parties, but, like a slave, is treated by her master as his property. If he kills her the act does not in itself fall under the category of murder. It has been shown that in historical times this holds only in case of the paternal or marital power. It may have held in the earliest times in case of the gentile guardianship over the unmarried fatherless woman. But the universal servitude of women has disappeared from the legal system by the time when we have any knowledge of it.¹⁵

The hypothesis as to the primitive state of things is required then only to explain the custom as regards the execution of female criminals, with which we started. It seems a simpler explanation if we suppose that the officers of the state, from motives of decency, preferred that women should not be put to public execution or thrown into the common gaol, and that accordingly they not only called on the father or husband, where there was one, to exercise his power in their stead, but that even in case of women *sui iuris* they selected an *idoneus auctor supplicii* (to use Livy's description) from among the relatives, and delegated to him a power of execution which he did not possess in his own right.

Early in the discussion of military law, which forms the subject of the chapter following that on household discipline, we find one of the most interesting and suggestive passages¹⁶ in the whole work. I propose to quote this at length. Mommsen first points out that tradition accepted the unrestricted power, civil and military, exercised by the magistrate of historical times outside the walls (*imperium militiæ*) as the type of magisterial power in its essence, and represented that power as having been gradually limited inside the walls by various restrictions (mainly those of time, of collegiality, of fixed rules of procedure, and of appeal to the people), which constitute the conditions under which the *imperium domi* is exercised, and on which the later order of the state, and especially the criminal law, depends. He proceeds—

It is obvious that this constructive theory of law cannot be regarded as historical. It originated partly from the transference of household discipline to the ordering of the state, since the relations of king and citizens were assimilated to those of the house master and his subjects,¹⁷ partly from ascribing universality to the later military law. It scarcely realises the full and true picture of the facts. We may rather suppose that the severance between the magisterial power inside and outside the walls is as old as the walls themselves, and that the original power of the ruler was essentially limited to the external sphere, while inside the walls anarchical independence held the first place, and each householder had to look mainly to himself and his followers—that is to say, to self-

¹⁵ *Strafrecht*, p. 617.

¹⁶ *Ibid.* pp. 27, 28.

¹⁷ This is very questionable. See above, p. 222.

help. It is nevertheless true that, carried out to the uttermost, such anarchical independence is not consistent with the continuance of the community, and that we should not ascribe to the Roman king the character of merely a captain of the host. The members of the community found themselves assembled to repel a foreign aggressor with their united strength, and helped one another in like manner in case of fire. For such defence and such help they set a foreman at their head. It is a long way from this primitive commonwealth, wherein the lord of the community leads the citizens outside the walls to ward off raiders or to raid themselves, and inside the walls, on danger of fire, appears at the burning, down to the present development of the state, with the public training of each citizen to the trade of arms and the mighty conception of the common participation in every suffering and sorrow that affects the individual—a long way, just as it is a long way from the twelve beadles who cleared the street before the Roman chief magistrate to the standing armies of to-day. But on this long way the development of the state has trodden in the footsteps of the Roman commonwealth.

The historical contrast between the self-help of the citizen and the discipline of the magistrate is admirably put, and no less sound is the conclusion that it is necessary to pay most attention to the latter. It is a more fruitful procedure, when we are analysing the institutions of historical times, to keep before our eyes the traditions in which the Romans themselves believed, and which therefore determined their action, than to lay too much stress on primitive facts, which had ceased to influence later generations. Mommsen is therefore justified in his method, which bases the criminal law, as the Romans would have based it, on the initial power of the magistrate, limited indeed by successive enactments, but subsisting throughout as the mainspring of action. Still there are certain cases in which self-help remained a living tradition, and its survivals are traceable to an extent which gives it a fair title to a place among the sources of the criminal law. It will be more convenient in this place to treat self-help first and then to come back to the magisterial authority at home and abroad.

The law of the Twelve Tables stereotypes procedure at the moment of transition from the rule of private vengeance to that of state adjudication, and hence it comes that theft and some other offences, which in modern systems fall under the domain of public law, remain the subject of private suits in Rome.

The magistrate¹⁸ here interposes between the contending parties as a mediator: on the one hand he settles or causes to be settled the question of fact; on the other hand, when a wrong has been proved, he either gives self-help its course or enjoins the injured party to renounce it on consideration of receiving compensation. . . . The execution, again, in such cases differs from that against public crimes,

¹⁸ *Strafrecht*, p. 305.

inasmuch as against the crime prosecuted by private suit, when self-help is permitted, the aggrieved party himself becomes the executioner.

In the rare cases where the penalty of death follows condemnation in such private suits—the most notable are those of false witness and of theft committed by a slave caught red-handed—death was inflicted by the primitive method of Lynch law, and the offender was flung from the Tarpeian Rock, 'the usual form of legal execution where infliction by a magistrate is excluded.'¹⁹ In the case of personal injuries, again, we find²⁰—

When the injured person demands it, just as the so-called courts of honour, in the rebarbarising of our nation which is now beginning, license the duel, so the Roman courts of justice granted leave on the part of the state for the aggrieved to proceed against the aggressor by way of self-help on the principle of 'Be done by as you did'—*Si membrum rupsit, ni cum eo pacit, talio esto*.

Thus the criminal law still to a great extent 'rested on the blood revenge.'²¹ But such practice did not long survive the legislation of the decemvirs. Either the state itself undertakes the punishment of crimes (there are notable instances even in the Twelve Tables), or in the development of the private criminal suit 'self-help'²² is completely set aside, and every wrong is subject to the compulsory compensation prescribed by the state for the outraged person.' Mommsen points out²³ that such composition must needs have become universal, as the fulfilment of the *lex talionis* by private individuals became not only more at variance with the social order of a civilised state, but likewise more difficult for the private person to secure. The older law seems to have been *si quis membrum rupit aut os fregit, talione proximus cognatus ulciscitur*; but this was laying a hard task on the injured man's kin, and we soon find the case arising that the offender may refuse to offer suitable compensation and yet be strong enough to save his own limbs; in that case the law again steps in and fines him a definite sum: *si reus qui depecisci noluerat iudici talionem imperanti non parebat aestimata lite iudex hominem pecuniae damnabat*.²⁴ After this, if he does not pay, he is, of course, liable to arrest and *addictio*, like any other debtor. There seems to be no tradition of any punishment of maiming being carried out in republican times by the judicial authorities themselves,²⁵ or even of assistance given by them to the private man in carrying out his authorised vengeance. The result of these changes in judicial practice is well summed up by Mommsen.²⁶

¹⁹ *Strafrecht*, p. 931.

²⁰ *Ibid.* p. 62.

²¹ *Ibid.* p. 940.

²² *Ibid.* p. 905.

²³ *Ibid.* p. 802.

²⁴ See *ibid.* p. 802, notes 2 and 4 (referring to Gellius, xx. 1, 38).

²⁵ *Strafrecht*, p. 982.

²⁶ *Ibid.* p. 941.

From that time forward capital punishment by private suit is set aside and never reappears. The conception of the ransom money, which has from the first entered with effect into the procedure for crimes against individuals, henceforth reigns supreme in this sphere.

Those crimes which the Romans desired to punish otherwise than by pecuniary damages were removed by them to the sphere of public justice (see below, p. 238). As Mommsen says in another sentence,²⁷ 'this practically comes to the abolition of the blood feud.'

We shall find appeal made to self-help later on in the *ignis et aquae interdictio* of the final period of the republic, and especially in the proscriptions in which private men were stimulated by the offer of blood money to wreak the vengeance of a party on its opponents. But, apart from such abnormal developments of the doctrine of outlawry, the self-help of private members of the community is from very early times sometimes invoked in redress not only of private but of public wrongs. The most notable instances of wrongs to be so punished are the attempt, whether successful or not, to restore the kingship, and the violation of the sanctity of a tribune. The two instances can hardly be treated apart,²⁸ though they differ in some incidental points. In both cases we find the obligation which lies on the people to prevent these crimes confirmed by an oath, 'which gives the stamp of unalterableness to the decree,'²⁹ and in both cases the penalty is threatened in the form of a *sacratio* of the life and goods of the offender. Mommsen rightly protests³⁰ against the doctrine that *sacratio* necessarily excludes the trial and sentence of the offender. This is absolutely disproved by Festus's definition, *Homo sacer is est quem populus iudicavit ob maleficium*. Indeed, as we have already seen, *sacratio* includes the *sanctio* which prescribes the death of an offender found guilty after a trial in due course of law. But we learn from Livy (iii. 55, 7) that the Roman jurists recognised that the *sacrosanctitas* of the tribune rested on something more specific than the *sacratio*³¹ by law of any offender against his person. At the first institution of the office the decrees of the *plebs* had not the force of law, and some basis of inviolability outside the law had to be found for the tribunes. The consular law of Valerius and Horatius, passed after the fall of the decemvirs, gave to the tribunate the legal defence which it had at first wanted. Logically, perhaps,

²⁷ *Strafrecht*, p. 941. ²⁸ *Ibid.* p. 552. ²⁹ *Ibid.* p. 553. ³⁰ *Ibid.* p. 901, n. 3.

³¹ *Ibid.* p. 901, n. 5. Mommsen refers us to his *Staatsrecht*, ii². 303, n. 2, for his brilliant explanation on the same lines of a difficult and corrupt passage of Cicero (*Pro Balbo*, 14, 33). Whatever may be the precise emendation required for the text, I think that there can be little doubt that he is right as to the sense—namely, that 'sacrosanctitas' may be predicated *either* from the nature of the penalty attached *or* from the confirmation of that, which is decreed, by an oath binding on the people.

this tardy recognition ought to have sufficed for all purposes,³² but in fact the *plebs* did not on that account renounce its older method of enforcing respect. This method is the primitive self-help.

'The *sacrosancta potestas* of the tribune,' says Mommsen, 'is originally a euphemism for revolutionary self-help;'³³ and again—

In place of the death penalty prescribed by law for the violation of the magistrate³⁴ we find the political self-help, confirmed by oath, which intervenes whenever the law is exhausted, especially in case of the ban laid on the kingship or any equivalent power.³⁵

In his latest work Mommsen has presented the same doctrine in sufficiently clear, if not in equally striking, form. 'The plebeian constitution,' he says,³⁶ 'is nothing more than formularised revolution, and revolution protects itself even when the protection is not formulated; ' and again—

With respect to legal protection of the tribune and of plebeian privilege generally, the confirmation of the law by the permission of popular execution is asserted with especial emphasis; and this is natural enough, since legal magisterial execution was not applicable to these essentially revolutionary ordinances, and these same private tribunician ordinances, without such a revolutionary appeal to the self-help of the plebeians, would have been a dead letter.³⁷

In the few cases in which the punishment of death is stated to have been actually inflicted or attempted by a tribune the method is that of popular execution; the tribune has no lictors or axes and can only throw the offender from the Tarpeian Rock.³⁸ As a general rule his sentences allow an appeal to the *comitia*: in case of fines he himself convokes the *plebs* to hear the appeal, and in case of capital sentences 'he asks the *practor urbanus* for a day of the *comitia centuriata*.' Such is the procedure against the censors, Claudius and Gracchus, who were adjudged guilty of *perduellio* by a tribune for supposed contempt of his office in the year 169 B.C. The censors were finally acquitted by the people, but if they had been condemned they would, like other criminals of that period, have escaped death by exile.³⁹ Sometimes, however, we hear of a far sharper and shorter method. In the year 131 B.C. a tribune, Atinius Labeo, actually laid hold on the censor Metellus (again for contempt) and dragged him to the top of the Tarpeian Rock.

³² *Staatsrecht*, ii³. 302.

³³ *Ibid.* ii³. 287.

³⁴ I.e. the 'patricius magistratus,' the 'magistratus populi Romani.'

³⁵ 'Or any equivalent power.' Mommsen's words are justified by the passage which he quotes (*Strafrecht*, p. 551, n. 1) from Cicero, *De Rep.* ii. 27, 49: 'Nostri omnes reges vocitaverunt qui soli in populo perpetuam potestatem haberent.'

³⁶ *Strafrecht*, p. 553, n. 4.

³⁷ *Ibid.* p. 937.

³⁸ *Ibid.* p. 933.

³⁹ Gracchus saved his fellow censor by swearing that 'si collega damnatus esset, non expectato de se iudicio, comitem exilii eius futurum' (Livy, xliii. 16, 15).

The execution was prevented by the *auxilium* of another tribune,⁴⁰ the right of Labeo being thus, as Mommsen remarks,⁴¹ 'at once acknowledged and frustrated by intercession.' In the reported cases the self-help is always the work of the aggrieved tribune himself, or of his colleague. There is no recorded instance of the private plebeian having ever been called upon, in obedience to his oath, to avenge an outrage on a tribune;⁴² but the knowledge that such vengeance would be forthcoming, if necessary, was sufficient to enable the tribune to act, as Mommsen says,⁴³ 'without instruments by the grip of his own hand, to which, in case of any opposition, the inviolability of his person gave the necessary power.' Cicero has this ultimate sanction in mind when he illustrates⁴⁴ the unfairness of the contest between Clodius and himself, *tribunicisque sanguinis ultores esse praesentes, meae mortis poenas iudicio et posteritati reservari*.

The passage last quoted indicates pretty clearly that condemnation before a legal tribunal is not a necessary preliminary to the self-help of the *plebs*. On this point the utterances of Mommsen are somewhat wavering. In one passage⁴⁵ he seems to suggest a negative answer to the question 'whether the tribune is legally entitled to proceed without further ado to such executions, a doctrine which, for the matter of that, was never fully acknowledged, and only appears as the party claim of the advanced democracy;' and to give the preference to the other alternative—'or whether, as after the conclusion of the struggle of the orders was the recognised right, he required confirmation by the people before he executed capital punishment;' and in the '*Staatsrecht*'⁴⁶ we read—

In its better times the democracy certainly treated every attack on the tribunate as a crime worthy of death, but did not sacrifice to it the dearest right of the commons, the right of appeal; and the usurpation obviously never became recognised law. According to the theory of the later democracy the slaying of him who violated a tribune was permitted to every citizen without judgment and without law, just as the slaying of him who aspired to kingly power. Whoever acted on this doctrine—and no instance is recorded—could call his deed an execution of the law only in the sense in which Brutus and his fellows claimed to have executed the law on the dictator Caesar.

We get a somewhat different impression from a passage in the first book of the work now under review.

The tribunician right over life and death rests not on the same ground as that of the patrician magistrate, but on the constituent

⁴⁰ Pliny, *Nat. Hist.* vii. 44, 143: 'Quum resistendi sacroquesanctum repellendi ius non esset, virtutis opera et censurae periturus, aegre tribuno qui intercederet reperto, ipso a limine mortis revocatus.'

⁴¹ *Strafrecht*, p. 47.

⁴² *Ibid.* p. 932.

⁴³ *Strafrecht*, p. 932.

⁴⁴ *Ibid.* p. 937.

⁴⁵ *Post Red. in Sen.* 13, 33.

⁴⁶ *Staatsrecht*, ii². 305.

ordinances of the *plebs*, on the power, namely, similar to that of the patrician *imperium*, thereby guaranteed to its leaders and afterwards recognised by the law. Now, since the right of the patrician consuls over the life and death of the citizens was by the Valerian law bound up with the assent of the *populus*, it was only proper for the representative of the *plebs* to connect their similar power with the consent whether of the *plebs* or, later on, of the whole people. But strictly speaking it might be said that the tribunes possessed a right, similar to the original right of the consuls, and that they were not limited, like the latter, by the Valerian law. In fact we know of one fully accredited historical instance of tribunician action, clearly justified by the letter of the law, wherein trial and appeal were excluded, and the tribune treated the Roman citizen as if he were a foreign criminal.⁴⁷

The instance, of course, is that of Labeo and Metellus, and in reference to the same case Mommsen says later on,⁴⁸ 'The tribune just punishes the *perduellis* as such.'

On the whole the judgment indicated in the passages last quoted may be taken as the sounder of the two. We have seen that the Romans of Cicero's time allowed the doctrine, even in its extreme form, as justifying the action of private men; we have seen that its maintenance was necessary for the tribunate in its inception; and this being so, the facts that the doctrine was very liable to abuse, and that the practice of the middle republic allowed it to fall into desuetude, do not justify us in ascribing the doctrine itself to a party theory of the extreme democrats in the last age of the free state.

The case of the violator of the tribunician sanctity and that of the usurper of monarchical power are, as Mommsen clearly sees, precisely parallel; only with the latter the necessity of the case shows us more distinctly what was the intention of the legislator. Mommsen ascribes the current and obvious interpretation in this case too to 'the party doctrine of the republican legitimists.' In his discussion of it⁴⁹ he seems to me to carry too far the distinction between the oath—

in which might be found, not indeed the legal, but the moral and political obligation to treat such a king as equivalent without more ado to a public enemy—

and the *sacratio*, of which he says

that it is nothing more than a threat of capital punishment, the execution of which must be preceded, even in this case, by a legal conviction.

It seems more correct to say that the *sacratio* 'legally' permitted that to which the oath 'morally or politically obliged.' When the Romans laid down concerning the monarch, *cum ius fasque esset occidi, neve ea caedes capitalis noxae haberetur*,⁵⁰ they cannot possibly

⁴⁷ *Strafrecht*, p. 46.

⁴⁸ *Ibid.* p. 553, n. 5.

⁴⁹ *Ibid.* p. 552.

⁵⁰ Livy, iii. 55.

have intended the futility of granting the slayer immunity only on a condition so impossible as that of the formal trial of the usurper. How could he be brought to trial? 'When, it succeeds no man dare call it treason.' This is so obvious that I think that the proposition that the Roman law authorised tyrannicide would never have been disputed, if this law had not unhappily served to supply a doctrinaire motive to the assassins of Caesar. Mommsen scorns to take refuge in the subterfuge that Caesar was not a king. For the rest it would have been better if he had been contented to take up the impregnable position that assassination as a political weapon is never to be justified, and that a law or oath which prescribed it to all future generations ought never to have weighed in the minds of persons professing to be serious statesmen. Discussions as to its binding character should have been left to Roman antiquarians and Greek philosophers.

It is time to return to the discussion of the *imperium* of the magistrate, by means of which the collective force of the community is brought to bear upon the individual, in antithesis to the self-help which brings the force of one citizen to bear on another. It is manifest that such a gathering up of force in the hand of a leader is necessary for the command of soldiers on a warlike expedition, and accordingly the absolutism of the commander is accepted by the Romans as the type of the original and unfettered power of the magistrate. This unfettered power extends in historical times far beyond the narrow limits which an Englishman is used to place on the phrase 'military law,' and it represents the rule under which, at one time, all the inhabitants of the western world, excepting a small privileged class, lived and suffered. For the Romans *militiae* 'on service' is a locative opposed to *domi*, and includes the whole world less the city of Rome. The *imperium militiae* is exercised not only on the soldiers, legionary or auxiliary, but on the whole population (except so far as a definite treaty may give to this or that allied territory a precarious exemption), and not only on the subjects but on the Roman citizens who venture outside the charmed circle of the walls of Rome. In this sphere there exists, no doubt, the concurrent jurisdiction of the native authorities of subject states, but the Roman magistrate is, like the English crown, 'over all persons and in all causes supreme,' and in his supremacy the distinction, so far at any rate as criminal law is concerned, between military and civil jurisdiction, though in practice it can never have been wholly disregarded, is legally non-existent. The *imperium militiae* explains⁵¹ not only exactions from a peaceful town, such as Livy⁵² ascribes to the consul of 173 B.C. at Praeneste,

⁵¹ *Strafrecht*, p. 29, n. 2.

⁵² Livy, xlii. 1. 'That Roman citizens,' Mommsen adds, were not treated in

but the intervention of the senate (that is to say, of the consuls on the advice of the senate), described by Polybius,⁵³ 'in cases of crime demanding public supervision, as treason, conspiracy, poisoning, and assassination throughout Italy.' Mommsen sums up the matter as follows :—

Outside the walls the state of war is legally permanent. . . . Liability to military jurisdiction falls in the first place on every man serving in the Roman armies, but furthermore in point of law on every man whomsoever, without distinction of his personal rights. The extension of the discipline of the camp to Italians and provincials not on military service is the legal source of that abuse of the powers of magistracy of which the last two centuries of the republic more especially present us with instances unparalleled in atrocity.⁵⁴

As regards the provincials this subjection to unlimited power lasted to the end ; but as regards Roman citizens towards the end of the republic some legal limits were placed on the *imperium* of the magistrate even outside the walls. A *lex Porcia* of uncertain date is described⁵⁵ as having 'forbidden to scourge or slay a Roman citizen.' A coin of the Porcian family,⁵⁶ representing a man in armour stretching forth his hand, with the legend *Provoco*, shows that the law must have extended the right of appeal to the camp, and justifies Mommsen in refusing to accept literally Cicero's statement⁵⁷ that the only innovation in the *leges Porciae* was in the *sanctio* ; it likewise serves to correct the modern conjecture, otherwise plausible, that the alteration in military discipline for Roman citizens, which certainly took place in the latter part of the second century B.C., is to be attributed to Caius Gracchus. Mommsen further points out⁵⁸ that the effect of *provocatio* in this case was

like manner was due not so much to any legal prohibition as to a wholesome respect for the tribune and the *comitia* which awaited them in Rome.'

⁵³ Polyb. vi. 13, 4. See *Strafrecht*, p. 146.

⁵⁴ *Ibid.* p. 29.

⁵⁵ Livy, x. 9, 4.

⁵⁶ *Strafrecht*, p. 31, n. 3.

⁵⁷ *De Rep.* ii. 31, 54.

⁵⁸ *Strafrecht*, pp. 32, 478. He shows that the same effect is produced on the provincial governor under the principate by the 'appeal unto Caesar.' That such an appeal is really a denial of jurisdiction is sufficiently clear from the case of St. Paul and Festus. Mommsen does not notice the serious difficulty of cases of decimation (as Plut. *Crass.* 10) and of Q. Cicero's threats against Roman citizens in Asia (Cic. *Ad Quint. Frat.* i. 2, 6). Perhaps these last were mere bluster ; and as to Crassus, he may have held that soldiers abdicated their citizenship by leaving the post in which their country had placed them (see below, n. 69). It certainly seems strange that the action of Crassus was never questioned, whereas that of Cicero against the Catilinarians was so fiercely attacked. Mr. Greenidge (*Class. Review*, 1896, x. 226) has attempted to solve the problem by a most interesting and ingenious hypothesis. He believes that there never was any legal limitation of the 'imperium' outside the walls, though he admits, of course, that there was a moral and customary limitation. The action of Verres when he crucified Gavius would be, according to Mr. Greenidge, cruel, wicked, and shocking, but not unlawful. This theory, however, obliges him to explain Sallust's remark about the scourging and beheading of Turpilius (*Jug.* 69), 'Nam is civis e Latio erat,' in connexion with the proposal ascribed to the elder

doubtless not, as in the case of the quaestors or duumvirs in the city, to submit a sentence definitely passed by the magistrate for confirmation or rejection by the *comitia*, but to lead the commander to refrain from passing a sentence which he could not carry out, and to content himself with arresting the offender and sending him to Rome for trial by the city magistrates, with the subsequent appeal to the people. From that time forward 'to be subject to the axe and the rods' was the description of an alien as opposed to a Roman citizen. Diodorus⁵⁹ tells of an actor pleading for his life to an enraged mob of Italians at the outbreak of the Social War. 'I am no Roman, but subject, like you, to the rods. I go hither and thither through Italy, trading in pleasantries and in chase of good cheer and laughter; do not kill the swallow who is at home everywhere, to whom heaven has granted to nest unharmed about every man's house.' In the same way Pliny's well-known account⁶⁰ of Balbus of Gades, *sed accusatus et de iure virgarum in eum iudicium in consilium missus*, which might at first sight seem to point to a court martial hesitating whether or not to flog him, is interpreted by Mommsen,⁶¹ and I think rightly, as referring merely to the suit in which his Roman citizenship was questioned, and in which Cicero delivered the extant speech for the defence.

The unlimited jurisdiction is not confined to the region of *militiae*, but is exercised even inside the walls over all subjects and foreigners, and possibly over all women,⁶² even though citizens. The magistrate decides on his own authority, or with the assistance of such advisers as it may please him to consult, on every allegation of crime against any but the members of the privileged class of citizens of Rome. If he finds the accusation proven he scourges or puts to death according to his discretion without any possibility of appeal. Marcus Marcellus, consul in 51 B.C., scourged in this manner a misdemeanant Transpadane, simply to show that he did not agree with Caesar's contention that the colonists of the land between the Alps and the Po were Roman citizens.

The manner of death, whether outside the walls, in the camp,⁶³ or in the subject territory, or as inflicted on the unprivileged male freeman within the city, is apparently always beheading with the axe. Beheading likewise appears as the regular method of public

Livius Drusus (Plutarch, *C. Gracch.* 9, 3), as meaning that Turpilius had become a Roman citizen, and therefore he was executed, which could not have been done if he had remained a Latin. I think that this interpretation is impossible in itself, and that it drags down with it the whole hypothesis to which it coheres.

⁵⁹ Lib. xxxvii. 12, 3.

⁶⁰ *Hist. Nat.* vii. 43, 136.

⁶¹ *Strafrecht*, p. 47, n. 4.

⁶² This is Mommsen's theory, but it is difficult to establish (see below, p. 252).

⁶³ The 'running the gauntlet,' 'fustuarium' (the *ἐνλοκομία* of Polybius), is, as Mommsen points out (*Strafrecht*, p. 32, n. 2), not necessarily a death sentence, though death generally results.

execution under the principate, but the sword gradually supplants the axe as the instrument.⁶⁴

It remains to consider a few cases in which the unlimited power of the magistrate is exercised, even inside the walls and on Roman citizens, without the permission to appeal which commonly frustrates it. Mention has been already made of the tribunician self-help and of the execution of the seducer of a vestal; the disputed cases of criminal commissions, like that against the Bacchanalians, and of the powers exercised under the *senatus consultum ultimum* must be reserved for the present. Besides these we find two undoubted instances of great importance. In the first place the appointment of a dictator, before the epoch when the powers of the office were curtailed,⁶⁵ suspended the right of *provocatio*, and in the last days again of the free state the dictators *reipublicae constituendae*, Sulla and Caesar, and the triumvirs who succeeded to their power were similarly unfettered. Secondly, the chief magistrate always possesses unlimited power in dealing with military offences even within the city. Mommsen gives a number of instances, such as that of Matienus,⁶⁶ who was scourged and sold as a slave for deserting the army in Spain in 138 B.C., and of the Campanian deserters⁶⁷ (*cives Romani sine suffragio*), who seized Rhegium after the war with Pyrrhus, and on their capture were beheaded in the Roman Forum. Some objection was raised by the tribunes as to the legality of this proceeding, but they did not insist so far as to interpose their *auxilium*. Persons who tried to evade military duty were subject to the same summary process.⁶⁸ Augustus sold as a slave a Roman knight who had maimed his sons with this object; a like punishment fell on all who neglected at the census to inscribe their names on the list of those liable to service, and M' Curius, consul in 275 B.C., treated in the same way the first man who failed to answer to his name at a sudden levy. Cicero justifies such exceptions to the rule that no Roman can be deprived of citizenship or liberty, on the ground that by neglecting the duties of citizens and freemen such persons have of their own action abdicated their *status* and renounced the corresponding rights.⁶⁹

⁶⁴ *Strafrecht*, p. 924.

⁶⁵ See Festus, s.v. 'optima lex.'

⁶⁶ *Strafrecht*, p. 43, n. 2. This case presents an incidental difficulty which has doubtless puzzled many, but which Mommsen has admirably solved. The Epitomator of Livy (book 55), our authority for the case, says 'accusatus est apud tribunos plebis.' It is obvious that it must be the consul, and not the tribune, who acts in a case of military discipline; but appeal can always be made to the tribunician 'auxilium,' and in this case the tribunes assembled in an administrative council, which Livy treats as a kind of court, and heard the plea of the accused before deciding not to interfere on his behalf. We may compare the case of Sthenius (Cic. *in Verr.* ii. 41, 100), which is so far parallel that here too the tribunes hold a quasi-judicial inquiry in order to decide how to exercise their administrative functions.

⁶⁷ Val. Max. ii. 7, 15.

⁶⁸ *Strafrecht*, p. 44.

⁶⁹ *Pro Caccina*, 34, 99. Mommsen (*Strafrecht*, p. 945, n.) finds this doctrine 'sophistic,' but it is difficult to see what other theory will cover the facts; the doctrine

Yet one more preliminary question remains. What is the connexion of the criminal law of Rome with the power of *coercitio* appertaining to the magistrate? 'Disobedience and *coercitio*,' says Mommsen,⁷⁰ 'may be looked on as correlative ideas, just like crime and punishment.' Thus *coercitio* in its widest sense is coincident with the whole original power of the magistrate as conceived by the Roman jurists.

The guiding idea⁷¹ is that the magistrate must retain the right of command, and that a command cannot be conceived without some means of compulsion. It is true that the magistrate ought not to use *coercitio* against any action which displeases him, as if he were called upon to administer censorial rebuke, but should enforce it only for the purpose of securing the necessary play for his official acts, but we cannot by any means find herein a positive limitation. *Coercitio* can be legally employed against every action without distinction, and, supposing that it does not overstep any limits imposed by positive legislation, it may be improper but cannot be illegal.

Outside the walls such positive limits hardly existed, and Mommsen is justified in writing, 'The governor has within his province *coercitio* to the fullest extent, even the capital *coercitio*, over non-citizens for all times, over citizens likewise down to the age of the Gracchi;' and again,⁷² 'In the *coercitio* of the governor is united the military and civil power of the magistracy.'⁷³

But even as against citizens inside the wall, the magistrate has a certain field for the exercise of arbitrary power, narrowed down, but not reduced to nothing, by legislative enactments. He can fine the citizen a sum⁷⁴ not exceeding 30*l.* in one day; he can seize any of his chattels and publicly destroy them (*concidere pignus*);⁷⁵ he can throw him into prison;⁷⁶ he can order him to quit Rome (*relegatio*⁷⁷); down to the time of the Porcian law he can even flog him.⁷⁸ In all cases the arbitrary power is

is really the same as that of the renunciation of citizenship by the 'perduellis' (see below, p. 238). He is, no doubt, right in attributing such proceedings to *coercitio* rather than to criminal law.

⁷⁰ *Strafrecht*, p. 40. ⁷¹ *Ibid.* p. 38. ⁷² *Ibid.* p. 235. ⁷³ *Ibid.* p. 39, n. 4.

⁷⁴ *Ibid.* p. 51. In another passage (p. 901, n. 2) Mommsen adds the confiscation of a man's property by the 'consecratio' of a tribune; but this seems to have been of doubtful validity unless ordered beforehand by the people (see Cic. *De Domo*, 40, 106). ⁷⁵ *Strafrecht*, p. 53.

⁷⁶ *Ibid.* p. 48. The 'Lex Julia de vi publica,' which forbids the imprisonment of Roman citizens, expressly excepts the case of arrest for contempt of court (*ibid.* p. 49, n. 2).

⁷⁷ *Strafrecht*, p. 48, n. 1. To the instances given by Mommsen may be added that of Gabinius, consul of 58 B.C., who thus expelled a Roman knight, Aelius Lamia, for upholding with too great fervour the cause of Cicero (*Pro Sest.* 12, 29), and that of Cicero himself, who professes to humour Catiline and give him an opportunity of joining his confederates in arms by ordering him to quit the city (Cic. *Cat.* i. 8, 20).

⁷⁸ This is not generally recognised, but I think on the whole that Mommsen has made out his case that the 'necare et verberare' forbidden by the Valerian law must

subject to the equally arbitrary prohibition of a colleague or a tribune.

Originally, no doubt, *coercitio* was everything: it formed, as Mommsen says, 'the germ cell of the criminal law.'⁷⁹ 'The *imperium*,⁸⁰ limited by law, has developed out of the original unlimited *imperium*; in other words, criminal law has been evolved out of *coercitio*;' and again, 'We may define the original criminal *iudicatio* as *coercitio* limited by *provocatio*.'⁸¹ Henceforward it is the limits and not the original power which demand most attention, and it is to them that Mommsen traces most of the machinery of the later criminal law.

The transition from the inchoate forms of justice, which we have been considering, to a regular system of criminal procedure is described by Mommsen⁸² in the following words:—

In the household discipline, in martial law, and in *coercitio* there is to be found a wrong, an investigation, an expiation of this wrong, and finally a power legally extending over the perpetrator, and exacting the expiation; in these spheres we may speak of a punishment, but not yet of a penal law. . . . If the household lord, the war lord, the bearer of the civic *imperium* punish, yet this is always and necessarily an arbitrary act—not that what is arbitrary is always unjust. . . . The conceptions of guilt and punishment are as old as mankind, and do not first come to birth with the criminal law. . . . The criminal law begins where the arbitrary will of him who wields the power to punish and the right of judgment has limits placed on it by the law of the state, or by custom strong as law. The law indicates objectively those immoral acts against which proceedings are to be taken on behalf of the community, and forbids similar proceedings against any other acts; the law orders the process of investigation in positive forms; the law establishes a corresponding satisfaction for each crime. The Roman public criminal law begins with the Valerian law, which submitted the death sentence of the magistrate on the Roman citizen to confirmation by the corporation, Roman private criminal law with that system which took the definite sentence of punishment out of the praetor's hands, and for the conditional sentence referred the fulfilment of the condition to the juror. From that time forth there is in Rome no crime without a criminal law, no criminal procedure without a law of procedure, no punishment without a law of punishment.

The presentation as a whole is admirable; but we must be careful not to let Mommsen's eloquence mislead us into exaggerating the effect of the first introduction of a rule of law as opposed to the rule of arbitrary command. When Mommsen says that 'hence-

refer to scourging preliminary to death (*Strafrecht*, p. 42, n. 1), and that stripes alone were not recognised as a substantive punishment in any regular criminal trial, but were left as a means of 'coercitio' in the hands of the magistrate until forbidden by the elder Cato (*ibid.* p. 47, n. 3).

⁷⁹ *Strafrecht*, p. 543. ⁸⁰ *Ibid.* p. 599. ⁸¹ *Ibid.* p. 475, n. 5. ⁸² *Ibid.* p. 55.

forth there is no punishment without a law of punishment,' and when in another passage⁸³ he adds in the same strain, 'The Romans were conscious that a power in the magistrate to punish, not founded on positive statute, overthrows the rule of law, and that even the permission of appeal to the people does not alter this fact,' these statements must be qualified by stretching the sense of 'positive statute' to include the highly elastic conception of *perduellio*, and by limiting the sense of the word 'punishment' to an extent which makes the statements almost identical propositions. These points come out more clearly later in the work. On p. 475, for instance, we find, 'The entire magisterial *coercitio* in the proper sense of the word . . . is not subject to appeal to the people;' and again, 'Appeal can be laid only against the public judgments, whose conception and sphere as opposed to that of magisterial arbitrary power, *coercitio*, is defined by that very test.' Surely this is an argument in a circle, and one which further suggests a paradox. If a fresh criminal law does not create a fresh liability to punishment for the offender, but only removes another offence from the category of those which the magistrate may punish as he pleases to the category of those which he can only punish in a certain way, and under restrictions which provide every chance for escape, it seems as if that which the criminal has to fear is the absence rather than the presence in his case of this 'law of punishment without which there is no punishment.' It would have been small consolation to Matienus, for instance (above, p. 234), to be told that he was not being punished but only coerced.

Perhaps a practical solution of the paradox may be found if we consider the working of the tribunician power. Unless Matienus's case had been a very bad one indeed, so bad that no possible sympathy could be aroused for him, the tribunes would have forbidden the severe action taken against him. In delineating the respective spheres of the comitial procedure and of magisterial *coercitio* we must remember that the magistrate who elects to take the first method is pretty safe, so long as he confines himself to traditional practice, from the interference of the tribunician veto, whereas if the more arbitrary course is preferred it has to be taken under the scrutiny of ten pairs of watchful eyes. The tribune was always eager to pounce on any opportunity of justifying his existence and of vindicating the rights of the private man against any use of the magistrate's power which could be considered tyrannical or excessive. The practical result was that, except in a few specified cases, *coercitio* within the walls was limited to petty matters, and that if the magistrate wished to punish severely he would not be allowed to do so unless he put his sentence in such a form as to make it liable to appeal. It is evidence then of the

⁸³ *Strafrecht*, p. 53, n. 1.

growing frequency and importance of an offence when we find that it becomes worth while for the community to interfere by passing a law against it. Though the result of this interference is in form to limit the magistrate in his power of punishing the offence in question, yet practically the law thus marks it out as deserving severe punishment, and provides a way in which the magistrate, without incurring the liability to blame or hindrance, may more effectively though more mildly deal with it. If on the other hand an offence becomes *very* prevalent or *very* dangerous, the remedy is a step backwards to magisterial power, sometimes exercised independently, if the tribunes acquiesce, as on Matienus, sometimes stirred up (as we shall see later on, p. 252) by a charge from senate or people requiring the magistrate to hold a special *quaestio* without appeal on the matter specified.

The invention, then, of the comitial procedure is the important point; the cases which shall be brought under it, by removal either from the sphere of *coercitio* or from that of private suits, are determined from time to time—'*seu legibus, seu moribus*'⁸⁴—custom standing on an equality with the written law.'⁸⁵ MommSEN is probably right in holding that 'public jurisdiction' first begins in the case of the Roman citizen who, by his own act, has placed himself in the position of an enemy (*perduellis*). The guilt, from a Roman point of view, of the foreign enemy is notorious, and the fate which awaits him is death. *In numero hostium habere* is the Latin euphemism for a general massacre. But the question whether a man who was once a citizen falls under this category is one which may sometimes demand inquiry.⁸⁶

The magistrate proceeds to inquire, and here we have the beginnings of a criminal trial, no matter whether he decides on his own authority or whether, as from the first he is justified in doing though not bound to do, he submits to the people the question whether to remit the death penalty on the man guilty of injuring the community or to let that penalty have its course.

The conception of the 'injury to the community' which calls for public intervention soon spreads from the deserter and the conspirator to the man who 'appropriates the goods of a temple (*sacrilegium*), steals the public cattle (*peculatus*), or injures the public buildings or roads.' Further, as early as the Twelve Tables we find certain acts, which are primarily offences against individuals, held nevertheless to be so dangerous to the public that the community directly interests itself in their punishment. This is the case with murder of a freeman (extended to cover false witness in a capital case⁸⁷), arson,⁸⁸ theft of growing corn, and the public utterance of scandalous verses against an individual. These are all⁸⁹

⁸⁴ Livy, xxvi. 3, 8.

⁸⁵ *Strafrecht*, p. 151, n. 1.

⁸⁶ *Ibid.* p. 59.

⁸⁷ *Ibid.* p. 155, n. 3.

⁸⁸ *Ibid.* p. 646, n. 2.

⁸⁹ *Ibid.* p. 60.

treated as public crimes, and every trace of a co-operation of the person immediately injured or of his *gentiles* thereby disappears; so that the subordination of the *gentes* to the collective body of citizens must be taken as an accomplished fact, when the law is issued. The offender under these categories is not considered as a public enemy, and his citizenship is not regarded as annihilated by the criminal act itself; but the procedure on the part of the magistrate is identical, except that in case of these crimes the inquiry is indispensable, whereas in those directly aimed at the state the notoriety of the fact may often make investigation unnecessary.

The distinction between the two categories is further kept up by the circumstance that the ordinary crime is commonly dealt with by the standing *quaestores*, *perduellio* by specially appointed *duoviri*,⁹⁰ or later by the tribunes. But the sphere of activity of the latter is constantly increasing, and any action which they hold to be an injury to the community may be treated by them as *perduellio*. The trial of the censors of 169 B.C.⁹¹ for contempt of tribunician authority, and that of fraudulent contractors in the second Punic war,⁹² may be cited as instances. It was certainly never laid down beforehand that these particular actions should be the objects of a trial, whether for a capital or for a pecuniary penalty, but the tribunes in each case were able to make them so. 'The tribunician criminal procedure,' as Mommsen says,⁹³ 'extended itself over the whole sphere of state trials.' The question is more difficult with crimes belonging to the *parricidium* class. What became of the first forger?⁹⁴ Was his neck wrung in the prison by the consul's *coercitio*? or did a quaestor condemn him for a new crime and leave him to appeal to the people? or did the injured party bring a private suit against him for damages before the praetor? These are questions which it is easier to ask than to answer.

Mommsen has done good service by clearly establishing the nature of the comitial trial, as in all cases an appeal for pardon against the sentence of a magistrate; and a good deal that is to be found in modern text-books is thereby set aside. A. W. Zumpt, for instance,⁹⁵ misled by the phrase *iudicium populi*, which he takes

⁹⁰ *Strafrecht*, p. 155, n. 3, and p. 528, n. 1. The Horatius case, undoubtedly one of 'parricidium,' has to be treated in the story as 'perduellio,' because quaestors having, according to the traditional chronology, not yet been invented, the creation of 'duoviri' is necessary for the procedure.

⁹¹ See above, p. 228.

⁹² Livy, xxv. 3.

⁹³ *Strafrecht*, p. 156.

⁹⁴ There is a curious story in Cic. *De Off.* iii. 20, 80, referred to by Mommsen (*Strafrecht*, p. 672), how Marius Gratidianus as praetor entered into agreement with his colleagues and the tribunes to issue a joint edict about the coining of false money ('conscripterunt communiter edictum cum poena atque iudicio') and then took all the credit himself; but this does not help us much.

⁹⁵ Zumpt, *Criminalrecht*, vol. i. ii. pp. 141, 142.

in a technical sense, whereas it is really⁹⁶ a loose literary expression, attempts to assimilate the functions of the magistrate in such trials to those of the praetor in the proceedings *in iure* in civil suits, and the functions of the people to those of the *unus iudex* appointed under the formulary system by the praetor. He even⁹⁷ represents the people in the trial of Horatius as exercising an authority delegated to it by the king, and believes that the king could ignore or modify the people's decision—a theory running counter to all the principles of Roman constitutional law. Much more excusable is another error which Zumpt shares with Sir Henry Maine, founded on the frequent use in literature of the words *accusare* and *accusator*, as applied to the magistrate in a criminal trial. Maine believes that the magistrate is in the position of the proposer of a law, and that it is the people which, in these cases, strikes directly at the offender by a legislative act, as we should say by a 'bill of pains and penalties.'⁹⁸ This belief, however natural, proves a fruitful source of error, and leads incidentally to a total misconception on Maine's part of the nature of the *quaestiones*, which he takes to be committees of the popular assemblies.⁹⁹ This misconception has been logically worked out to what proves to be a *reductio ad absurdum* by Professor Beesly¹⁰⁰ in his analysis of the proceedings against Clodius for sacrilege.

In discussing the so-called *iudicium populi* I have nothing to do but to quote and analyse MommSEN's account and to express the fullest concurrence. The whole structure is based on the power of the magistrate.

Criminal jurisdiction—that is to say, the bringing about of the punishment of a public or private offence which infringes on the rights of the Roman commonwealth—belongs, as does judgment generally, to the rights and duties of the magistrature, and further exclusively to the officers endued with the full magisterial power, the *imperium* or an equivalent power.¹⁰¹ Whether the magistrate pronounces at his own discretion, and whether this pronouncement is final, or whether it can be cancelled by the people, or whether again the magistrate gives decisions conditional on the finding of jurors, or even makes his pronouncement in accordance with the discretion left by him to the jurors, in a legal sense every sentence is a magisterial pronouncement.¹⁰²

This idea lies at the root of the whole matter, and it has important historical consequences. It is because every sentence

⁹⁶ See *Strafrecht*, p. 116. ⁹⁷ Zumpt, *Criminalrecht*, vol. i. i. pp. 87, 94, 98.

⁹⁸ Maine's *Ancient Law*, p. 381. So too Zumpt, *Crim.-Prozess*, p. 6, note: 'The jurisdiction of the tribunes and aediles, assisted by the assembly of the people, is to be regarded rather as a kind of legislative action.'

⁹⁹ Maine, pp. 381-9.

¹⁰⁰ *Catiline, Clodius, and Tiberius*, pp. 51-4.

¹⁰¹ I.e. the 'sacrosancta potestas' of the plebeian magistrates.

¹⁰² *Strafrecht*, p. 135.

was held to be the work of the magistrate, and not of the people, that the liberty of the citizen came to be measured by the extent to which he was allowed to brave the magistrate by evading or alleviating the effect of sentences.

Where, then, does the part of the people come in? Here again the answer is best expressed in Mommsen's words.¹⁰³

Upon the execution of the sentence the condemned man can demand the final decision of the sovereign commonalty, appeal from the magistrate to the *comitia*. To quash the sentence of punishment, as is craved by the condemned, is an act of sovereign power. The magistrate has answered the question of guilty or not guilty in the affirmative, and although the progress of the inquiry takes up this question again, and an acquittal by the *comitia* may possibly be the result of a conviction on the part of the majority of the citizens that the accused is innocent, yet the idea that forms the base of the proceedings is not that of innocence but of remission. This comes out with overwhelming force in the Horatius legend. The offence is the most serious conceivable, the perpetrator notorious and avowing the fact; but there is ground for absolution in the patriotism which atones for everything. It is quite obvious that the proceedings before the *comitia* must be conceived as a petition for grace. In the oldest category, that as to the forms of which we have the fullest tradition, the trial for *perduellio* before the *duoviri*, it appears expressly as a cancelling of the sentence pronounced by the magistrate. It is true that in the scenes portrayed to us from later times the punishment appears not as a judgment of the magistrate who conducts the business, but as a proposal which he brings before the *comitia*; but the magistrate, by the very fact of defending his own sentence before the people against the petition for pardon, cannot help making a proposal to them, and so this conception does not really exclude a previous judgment on his part. The decisive consideration is that the *comitia* is never under any circumstances assembled to judge, but always to confirm or to overthrow a judgment, whereby any alteration or aggravation of punishment is excluded. This is nothing else than a legal expression for pardon.

Mommsen perhaps a little understates his own case. It is obvious that practically the possibility of appeal reduces the magistrate from the position of a judge to that of an accuser; he becomes a party in the subsequent proceedings, so that if the accused is finally condemned it is held to be a victory for the magistrate; *si vincent, caput obnubito*, &c., says the old formula in the Horatius case. This is quite sufficient to account for the words *accusare* and *accusator* being habitually used to describe him. But not only in the capital trials for *perduellio*, but in those where the punishment is only a fine, the true legal conception is that of appeal from a sentence already passed. If, as Maine supposed, each trial was a direct act of legislation, it would be a *privilegium* of the very kind which the Twelve Tables forbade. The true legal relations of the

¹⁰³ *Strafrecht*, pp. 167 and 477.

parties are thus expressed in Cicero's words: ¹⁰⁴ *quum magistratus indicasset irrogassitve, per populum multae poenae certatio esto*. It may be true, as Mommsen thinks, ¹⁰⁵ that the word *irrogare* etymologically contains a reference forward to what the magistrate will have to do when the matter comes before the people (that is, to ask them to consent to his sentence), and it is certainly true that the appeal in later times is always taken for granted from the beginning of the proceedings, so that the magistrate seems to invite the co-operation of the people, without waiting for their intervention to be claimed; but nevertheless *irrogare* in this passage of Cicero is used in strict parallelism to *iudicare*, and the proceedings that are to follow are the same in both cases, and so *irrogare* must, in law if not in etymology, mean at the moment of pronouncement 'to impose' a fine, not 'to propose' one. ¹⁰⁶ About *iudicare* ¹⁰⁷ there is no question that it means to 'condemn,' and strictly to 'condemn to death;' and the use of the phrase in this sense is not confined to primitive times or to the duoviral trial. The *perduellionem tibi iudico* of the duovir to Horatius is expressly repeated by the tribune of 211 B.C., *perduellionis se iudicare Cn. Fulvio*, and by the tribune of 169 B.C., *utrique censori perduellionem se iudicare pronuntiavit*, ¹⁰⁸ and Caesar in 63 B.C. doubtless used the same words to Rabirius, when—*sorte iudex in reum ductus tam cupide condemnavit, ut ad populum provocanti nihil aequae ac iudicis acerbitas profuerit*. ¹⁰⁹

The moral and political aspect of *provocatio* is summed up in a passage ¹¹⁰ of singular force and eloquence.

This mighty act of fettering the *imperium* still bears upon it the marks of its original germ. That power by virtue of which the magistrate in the comitial criminal trial pronounces the first sentence is the same by virtue of which he judges without restraint women and strangers. In so far as that power is bound to justify its sentence before the community and ceases to have the last word its arbitrary character is limited but not removed. Furthermore the arbitrariness of the final decision is not altered but only transferred. This form of trial is not subject to the law in the same way as that power of punishment which has its organ in the jury trial. . . . It is a magnificent act of political self-restraint that the omnipotence of the assembly is brought to a stand if the magistrate acquits, that no citizen can be condemned to

¹⁰⁴ *De Leg.* iii. 3, 6.

¹⁰⁵ *Strafrecht*, p. 166, n. 3.

¹⁰⁶ In the early inscriptions respecting sacred enclosures quoted by Mommsen (*Strafrecht*, p. 158, n. 3) 'multare' and 'multam irrogare' seem to be used differently in the several versions of the same formula. The jurists of the principate, to say nothing of laymen, constantly use 'poenam irrogare' in the sense of 'to inflict.'

¹⁰⁷ See *Strafrecht*, p. 3, n. 2, and p. 769, n. 4. Zumpt, who thinks that there was an appeal in case of the *duoviri*, but in case of all other magistrates a sentence in first and last instance by the people, has to draw just the opposite conclusion from the parallelism of 'iudicare' with 'multam irrogare,' and to explain away the sense of 'iudicare' in all cases except that of the *duoviri* (*Criminalrecht*, i. ii. 185-92). I need hardly say that I think him wrong.

¹⁰⁸ Livy, xxvi. 3, 9, and xliii. 16, 11.

¹⁰⁹ Suet. *Jul.* 12.

¹¹⁰ *Strafrecht*, p. 171.

heavy public punishment except by the agreement of the magistrate and the community; but pardon is no less arbitrary; and unrighteous acquittal is no less a wrong. The Roman criminal law is certainly the most powerful manifestation of civic freedom and the most majestic tribute to that freedom; but it has the defects of its qualities, the coarse egotism which asks no questions about women and foreigners, the weak clemency towards offending citizens, the arbitrary power which is shackled, but not abolished.

The introduction of compulsory *provocatio* is universally attributed to the *lex Valeria* of the first year of the republic, and is thus brought into the closest connexion with the abolition of kingship.

This may be a legend (says Mommsen), but even so there is all the more reflected therein the necessary connexion of the democratical principle with the exclusive right of the community over the life and death of a citizen.¹¹¹

The earlier laws on *provocatio* are said to have had for their sanction only the phrase *improbe factum videri*. Mommsen explains this to mean that

if a magistrate ignores the appeal, and carries out the death sentence in spite of it, his office will no longer cover his action, and the action will be regarded as that of a private man, and so punished as murder.¹¹²

This very plausible interpretation can hardly have been known to Livy, who evidently regarded¹¹³ the mere expression of moral censure as having been a *vinculum satis validum legis* in that golden age. Mommsen's explanation seems undoubtedly right.

With *provocatio* comes a change in the insignia of the city magistrate, by the removal of the executioner's axe from the fasces of his lictors.

This (writes Mommsen) is the symbol not of the abolition of the punishment of death for citizens, which only changed its form, but the exclusion from the city ring-wall of the rules of war, by virtue of which the wielder of the *imperium* could down to this time order the head of the disobedient citizen, as of the disobedient soldier, to be laid at his feet (p. 917).

It is a curious paradox that the forms of punishment still publicly inflicted on citizens were all more cruel than beheading. According to the Twelve Tables the incendiary is to be burned alive; if Mommsen's interpretation¹¹⁴ be right, the death in the sack was anciently inflicted on all murderers, the reservation of it as a special penalty for slayers of their own kindred being an innovation; and crucifixion is really meant by the punishment

¹¹¹ *Strafrecht*, p. 162.

¹¹² *Ibid.* p. 167.

¹¹³ Livy, x. 9, 6.

¹¹⁴ *Strafrecht*, pp. 643, 918-922. Mommsen points out that 'parri-cidium' has nothing to do with 'patricidium,' but that the prefix has the same meaning of 'bad' as the 'per-' in 'per-duellio' and 'per-iurus.'

prepared for Horatius,¹¹⁵ the *suspensum Cereri necari* for the harvest thief in the Twelve Tables, and the punishment *more maiorum* threatened for Nero on his deposition. I think that Mommsen has gone far to establish these points, though he admits that they were commonly slurred over by the writers of the classical period, who regarded with horror the infliction on citizens of what was later a servile punishment. In practice these public executions were doubtless confined to very heinous cases,¹¹⁶ and private executions by strangling in the prison supplemented them at the discretion of the magistrate for ordinary malefactors. It may well be that the magistrate soon found it necessary to pledge himself beforehand not to inflict the more cruel punishment, lest he should give the accused the opportunity of *miserabiliores epilogos*,¹¹⁷ which might induce the people to acquit him altogether.

It somewhat upsets our preconceived notions to find that death by smiting off the head, which we are accustomed to regard, and which was regarded under the principate, as a comparatively dignified form of public execution, was under the early republic reserved in the city for strangers, enemies, and deserters. This can only be explained by the close connexion of that form of punishment with the arbitrary proceedings of military justice; and I am strongly inclined to think that this connexion, which Mommsen justly emphasises, dates from the earliest times, and that there is no occasion for his other somewhat fanciful explanation¹¹⁸ of beheading by the axe as 'answering to the ritual of sacrifice, and originally, doubtless, conceived as the offering up of a human victim.' Only two passages are quoted by Mommsen in support of this contention. The first¹¹⁹ is a strange story in Dio Cassius (xliii. 24) of how in the year 46 B.C., under Caesar's dictatorship,

two men were slain as victims with a kind of ritual; and the reason for this I cannot tell, for it was not prescribed by the Sibyl or any other oracle; anyhow they were sacrificed in the Campus Martius by the pontiffs and the priest of Mars, and their heads were set on the Regia.

I can offer no explanation of this, but Mommsen's solution 'that this is without doubt a recurrence to an antique form of execution' does not seem very convincing.¹²⁰ In the other instance

¹¹⁵ This comes out clearly in Cic. *Pro Rab. perd.* 4, 11, and 5, 16. For Nero's case see Suet. *Ner.* 49.

¹¹⁶ This may explain why Cicero and the jury to which he spoke in the case of Roscius of Ameria evidently believed that the sack had never been used except for murderers of near kinsfolk, and why crucifixion came to be practically confined to slaves and subjects.

¹¹⁷ See Cic. *Pro Planc.* 34, 83. Dio (xxxvi. 39) notices that in bribery cases the lighter the penalty the easier it was to get convictions.

¹¹⁸ *Strafrecht*, p. 902.

¹¹⁹ *Ibid.* p. 913.

¹²⁰ I do not even feel sure that Dio means us to understand that these two persons

Mommsen's theory certainly seems to have led him into an erroneous interpretation of his Latin authority. In the words of Festus—

Homo sacer est quem populus iudicavit ob maleficium, neque fas est eum immolari, sed qui occidit parricidii non damnatur—

he sees ¹²¹ an

antithesis between the magisterial execution by way of *immolatio*, carried out according to *fas*, and the private and plebeian execution carried out by way of self-help without magisterial action.

That *sacratio* leads to this popular execution is undoubted, but the proper magisterial *immolatio*, supposed to be the antithesis to this, is read into the passage and not found there. By *neque fas est* Festus obviously meant nothing of the sort, but merely wished to negative the shocking supposition which might seem to be conveyed by the word *sacer*, that a human sacrifice was actually contemplated.¹²² Festus does not say that the criminal is called *sacer* because it is under certain accidental circumstances (the absence of a patrician magistrate) improper to sacrifice him, but notices (as is perfectly natural) that he is called *sacer* although it is always *nefas* to think of such a thing as human sacrifice. The Latin and the sense alike require us to take the words *neque fas est*, &c., not as part of the relative sentence but as continuing the principal sentence, and to translate—'not that it is lawful to sacrifice him, but &c.'

Another consequence of *provocatio* is that the superior magistrate withdraws from administering ordinary criminal justice. When King Tullus Hostilius resolves that an appeal shall be granted to Horatius he omits himself to judge and condemn, but appoints special officers for the purpose. So under the republic ¹²³ the chief magistrate thinks it beneath his dignity to utter a sentence which may possibly be reversed, and designates for this function less eminent persons, quaestors or duumvirs, who 'cannot plead their estimation ;' and the same task is undertaken by the tribunes, who, for all their power, are modest folk when compared with the splendour of the curule magistrate. Of the quaestors I need only say that Mommsen holds ¹²⁴—and he is probably right—that the *quaestores parricidii* are not a separate board, but are identical with the urban quaestors of historical times. For the *duoviri*, he believes ¹²⁵ that a special law was required to bring them into existence on each

were (like the one mentioned by him in the previous sentence) mutinous soldiers, as Mommsen assumes (*Strafrecht*, p. 913, n. 6).

¹²¹ *Ibid.* p. 902, n. 1.

¹²² Dionysius (ii. 10) gives substantially the same definition of 'sacer,' ἐν ᾧ τοι γὰρ ῥωμαίοις, θεοὺς ἐβούλοντο νηποῖν τεθνάναι, τὰ τούτων σάματα θεῶν ὅτφ δὴ τινι . . . κοτονομάζειν.

¹²³ *Strafrecht*, p. 154.

¹²⁴ *Ibid.* p. 155.

¹²⁵ *Ibid.* p. 527.

occasion (a supposition difficult to reconcile with Cicero's expression *hic popularis a duumviris iniussu vestro*¹²⁶), and further¹²⁷ that, after the expulsion of the kings, they were elected by the people. Mommsen does not quote any authority for the last statement, and I know of none save that of Dio Cassius, who says (xxxvii. 27, 2) that the *duoviri* in Rabirius's case were appointed by the praetor οὐ κατὰ τὰ πάτρια. I venture to think that Dio is a better authority for what certainly took place on this occasion than for an antiquarian objection to the practice recorded. It is very improbable that Caesar and Labienus, when furbishing up the rusty machinery of antiquated procedure in this case, should have introduced an innovation, especially one so contrary to democratic principles. Dio's statement may very likely be a mere inference¹²⁸ on his part from the rhetorical blame conveyed by Cicero in the words quoted above (*iniussu vestro*).

Several interesting points are dealt with in Mommsen's lucid account of the procedure in comitial trials. The first step is for the magistrate to summon the suspected person to appear before him on a specified day (*dici dictio*). On that day begins¹²⁹ the *anquisitio*—etymologically a strengthened form of *quaestio*. This is conducted publicly, the citizens being summoned to a *concio* to listen, 'evidently with regard to the final decision by them, which is anticipated.' The magistrate must not conclude this hearing in a single day, but is bound to adjourn it twice (*diem prodicere*). At these sittings any citizen may with the permission of the magistrate make himself heard, and the magistrate cannot decently refuse leave, though he may limit the speeches: thus in Rabirius's trial in 63 B.C. Hortensius and Cicero were permitted to play the part of advocates, but were allowed only half an hour apiece to speak in, and that probably on different days (*antea*, Pro Rab. 6, 18). At the third sitting the magistrate pronounces, and it is not till then that he is bound finally to decide what his sentence is to be.¹³⁰ If he acquits there is an end of the matter; if he pronounces for death (*iudicium*) the appeal will be to the *comitia centuriata*, if for a fine (*multae irrogatio*) to one of the two tribal assemblies (*populus* for quaestors, *plebs* for tribunes). It is the difference of the assemblies (so Mommsen thinks¹³¹) which determines the rule that a

¹²⁶ *Pro Rab. perd.* 4, 12.

¹²⁷ *Strafrecht*, pp. 154, 587.

¹²⁸ Strange to say, Zumpt (*Criminalrecht*, i. i. p. 93) does actually argue from the words of Cicero in the very way in which I conjecture that Dio may have argued: 'Auch Cicero wirft diesen Zweimännern ihre Ernennung durch den Praetor vor, und doch wäre dasselbe gesetzlich gewesen, wenn in Horatius' Prozesse der König sie selbst erwählt hätte.'

¹²⁹ *Strafrecht*, p. 164.

¹³⁰ Mommsen (p. 165) quotes several instances. The best are the trials of Cn. Fulvius (Livy, xxvi. 3), when the tribune 'cum his pecunia anquisisset, tertio capitis se anquirere diceret,' and of Menenius (Livy, ii. 52, 5) 'quum capitis anquisissent, duo millia aeris damnato multam dixerunt.'

¹³¹ *Strafrecht*, p. 167, n. 1.

capital and a pecuniary penalty cannot be conjoined.¹³² In either case the usual twenty-four days' notice must be given for this 'fourth accusation,'¹³³ at which the citizens appear for the first time, not as mere listeners, but in their sovereign capacity to decide the issue. Cicero's summing up of the regular procedure¹³⁴ now comes out quite clearly: *ne inprodicta die quis accusetur, ut ter ante magistratus accuset intermissa die quam multam irroget aut iudicet, quarta sit accusatio trinum nundinum prodicta die, qua die iudicium sit futurum.*

Another point is brought out by Cicero in the same passage—namely, that if on account of the auspices or for any other reason the *comitia* separates without coming to a decision, the meeting cannot be adjourned to another day, and so *tota causa iudiciumque sublatum est*. C. Claudius Pulcher, who lost the battle of Drepana in 259 B.C., escaped by a sudden rainstorm at his trial: the tribunes would not allow the capital trial to be renewed, but Claudius was heavily fined.¹³⁵ Mommsen is certainly right in his remark¹³⁶—'This can have been nothing but custom supported by tribunician intercession; for example, no notice is taken of it in the trial of M. Manlius.'¹³⁷

One of the most interesting of our authorities for this procedure before the *comitia* is the 'Commentarium vetus anquisitionis M' Sergii M' f. quaestoris qui capitis accusavit Rocum,' fragments of which are preserved in Varro's book 'De Lingua Latina.' Amongst the instructions we find *patres censeant exquiras et adesse iubeas*. Mommsen's interpretation is¹³⁸ that

this must be referred to the custom of getting together counsellors before taking weighty decisions, since it was open to the magistrate to let the case drop after the appeal had been entered. The magistrate then in this case has to betake himself to the senate as the *consilium publicum*. The consulting party was doubtless not legally bound by the advice thus given him.

This interpretation is possibly right, and it would supply a precedent by way of analogy for Cicero's consultation of the senate about the Catilinarian conspirators. It is strange, however, that we hear of no such consultation in any of the historical cases of a trial before the *comitia*; one would have thought that such an expression of opinion would have had great weight as a *prae-iudicium*, and that its effect in each case would certainly have been noticed in the

¹³² Though Cicero lays some stress on this last point in his arraignment of Clodius's procedure, it loses much of its practical importance when we remember that the goods of the man convicted of 'perduellio' fell as those of a natural enemy to the state (*Strafrecht*, pp. 72, 1006 seq.)

¹³³ *Ibid.* p. 169.

¹³⁴ *De Domo*, 17, 45.

¹³⁵ Zumpt, *Criminalrecht*, i. ii. p. 311.

¹³⁶ *Strafrecht*, p. 170, n. 5.

¹³⁷ Livy, vi. 20, 11.

¹³⁸ *Strafrecht*, p. 169.

story. It is a further difficulty that the *ius senatus habendi* is never known to have been delegated, and certainly did not belong to the quaestor in his own right. The senate was not 'of counsel' to him but only to the superior magistrates. Perhaps the instruction merely means that the quaestor was politely to express his anxiety for the presence of the leading men of the state at the trial, and his hopes for the benefit of their advice during the debate. In any case I cannot think that Mommsen is right in explaining by reference to such consultation the difficult passage of Polybius (vi. 16) with which I shall deal later (below, p. 258).

Another interesting question arises in connexion with the case of Rocus.

In such a summons (says Mommsen) there arises the complication that the *comitia centuriata* could be called together only by one vested with the *imperium*, and that the three magistrates qualified to initiate such proceedings, the *duoviri perduellionis*, the quaestors, and the tribunes of the *plebs*, did not possess the necessary *imperium*.¹³⁹

M' Sergius is therefore instructed 'to send and ask for auspices from the consul or the praetor.' In the same way, when the tribune applies to the praetor urbanus for 'a day of the *comitia centuriata*' it is probably to be understood that the praetor lends him auspices to enable him to summon the assembly. In the case of the quaestor it is pretty clear from the account in Varro that he, though devoid of *imperium*, will himself preside in the *comitia* when assembled by virtue of his auspices, which he takes in this delegated capacity from his superior; and the same is probably true of the tribune. It is not altogether easy to gather from Mommsen's statement (p. 168) whether he adopts this view, but on the whole I think this is his meaning. By parity of reasoning we should suppose that not the king but the *duoviri* presided at the trial of Horatius. Livy in his story does not definitely commit himself as to the presidency, but, as the king is not mentioned after the *duoviri* are appointed, the silence of the narrator points the same way.

The same question, as to who presides, arises in the trial of Rabirius in 63 B.C., and it is further complicated by a doubt as to whether Rabirius was tried once or twice. Mommsen believes¹⁴⁰ that after his escape on the charge of *perduellio* Rabirius was fined by the tribune, and that it was on his appeal against the *multae irrogatio* that Cicero delivered the speech in his favour which is still extant. I am inclined to think that the *multae irrogatio* mentioned in the speech refers to some earlier proceeding, and that the *perduellionis iudicium a me sublatum* does not imply that

¹³⁹ *Strafrecht*, p. 168.

¹⁴⁰ This seems at least to be stated on p. 582. I do not see how this is to be reconciled with p. 888, n. 1, where he says 'Rabirius could not be put on his trial twice over.'

the accusation for *perduellio* was passed and done with, but only that Cicero had prevented Labienus from carrying through the trial according to the traditional forms of the Horatius case, with arrest of the prisoner beforehand and the actual infliction of death in case he were found guilty. That the accused, at the moment when the speech was delivered, was not in danger of actual execution is quite clear from the whole tenor of Cicero's language, and this much is admitted on all hands. If Mommsen's view be correct the second trial would undoubtedly be before the *plebs*, with the tribune presiding. On the other hand, if the occasion be the trial for *perduellio*, a puzzling question is left as to the presidency. It is certainly strange that in Cicero's speech¹⁴¹ only the tribune is mentioned as controlling the proceedings. Perhaps the speech was delivered at one of the preliminary meetings in *concione* (described above on p. 246), at which the tribune might well claim to restrict the length of the speeches. Anyhow it is not clear who presided on the final day. Analogy would lead us to expect the *duoviri*; yet it is Metellus, the praetor, who appears in Dio's account as the controller, and who breaks up the *comitia centuriata* by striking the flag.¹⁴²

The consideration of the trial of Rabirius leads us to the most important historical result brought about by the machinery of appeal—the practical abolition of the punishment of death. We read in the early story how Kaeso Quinctius and Coriolanus and eight of the decemvirs were allowed to escape death by going into exile. The practice rapidly gained ground, so that by the time of Polybius it was the settled custom that in a capital trial the accused was free, until the last vote had been cast, to 'depart openly, sentencing himself to voluntary exile; and the banished man will be safe if he retires to Tibur, Praeneste, or Neapolis, or any other state with which Rome has a sworn treaty.'¹⁴³

It is obvious that such a departure could take place only when the criminal was at the moment in physical liberty, whether or not bail had been given for his appearance;¹⁴⁴ and in the case of Kaeso Quinctius we find that his previous arrest is urged¹⁴⁵ on the

¹⁴¹ Zumpt (*Criminalrecht*, i. ii. p. 396) ingeniously suggests that the speech, as delivered, may have contained many references to Caesar and his brother duumvir which were omitted on its publication in 60 B.C. It is certainly noticeable that the same letter (*Ad Att.* ii. 1) which announces the publication of his *Consular Orations* records Cicero's hopes of being able to influence Caesar in a friendly way and bring him round to a sound policy.

¹⁴² Mommsen (see above, p. 245), and others believe (though Dio does not seem to me to say so much) that a special law was required on each occasion before 'duoviri perduellionis' could be created. If so, the question who was to preside at the assembly might, of course, be settled differently in each case by a clause of the special law. ¹⁴³ Polyb. vi. 14, 7. ¹⁴⁴ *Strafrecht*, pp. 70, 71.

¹⁴⁵ Livy, iii. 13, 5. 'Ut qui hominem necaverit de eo supplicii sumendi copia populo Romano fiat.'

ground that only so will the people have the opportunity of exacting the penalty from him. On one occasion, that of the accomplices of the fraudulent contractor Postumius in the second Punic war, the circumstance that the tribunes are disposed to arrest the accused beforehand leads many to go straight away into exile without standing their trial; ¹⁴⁶ probably here likewise something worse than exile might have happened to them if they had been found guilty while under arrest; Polybius too seems to imply that death is in store for the accused who has waited too long and against whom the decision of the assembly has been actually given.

So far as I know there are only two cases in the story of the Roman republic in which the law is distinctly said to have run its full course—that is to say, in which the criminal was allowed to appeal, the *comitia* decided against him, and the punishment of death was publicly inflicted. The two cases are those of Sp. Cassius and M. Manlius, both executed for treason. The two most guilty decemvirs, Appius Claudius and Sp. Oppius, were doubtless saved by suicide from a like fate.

Pleminius, the lieutenant of Scipio Africanus, who had been guilty of the grossest outrages on the inhabitants of the Italian Locri, was seized as he was retiring to Naples for exile, and thrown into the prison of Rome, which he certainly never left alive. Contradictory accounts ¹⁴⁷ are given of his end, and it is impossible to make out whether he was really tried or executed. Suicide in prison is recorded ¹⁴⁸ of a certain C. Cornelius, accused of rape; he probably anticipated by his death a trial before the centuries. ¹⁴⁹ The condemnation is mentioned ¹⁵⁰ of three parricides, Hostius (*circ.* 200 B.C.), Q. Fabius (*circ.* 100 B.C.) and Malleolus, of the same date. Of the last named it is expressly said ¹⁵¹ that he perished in the sack, and Mommsen ¹⁵² is probably right in arguing from his fate that, though at that time ordinary murder was already the subject of a jury trial, which did not admit of

¹⁴⁶ *Livy*, xxv. 4, 11.

¹⁴⁷ *Ibid.* xxix. 22, 9; xxxiv. 44, 6.

¹⁴⁸ *Val. Max.* vi. 1, 10.

¹⁴⁹ Mommsen (*Strafrecht*, p. 961, n. 6; *Staatsrecht*, iii. p. 1069, n. 3, and p. 1250, n. 1) takes a different view. He considers both Pleminius and Cornelius to be men already condemned to death (apparently by the centuries), whose execution was put off indefinitely by the magistrates, so as to make their sentence practically one of imprisonment for life. He considers that this was likewise the meaning of Caesar's 'sententia' on the Catilinarians. I find it difficult to believe that Caesar so completely justified the legality of Cicero's act as to join in the sentence of death, or that the only difference in point of law between Cato and Caesar was that the one wished the death sentence to be carried out at once, and that the other wished the same sentence to be indefinitely suspended. It seems strange for me to be arguing for Caesar against his great advocate and the great disparager of Cicero; still, as a matter of history, I think that the explanation which I have offered elsewhere (*Life of Cicero*, p. 142) is the more probable. At any rate it exhibits Caesar's action as more logical and consistent.

¹⁵⁰ See *Strafrecht*, p. 614, n. 1.

¹⁵¹ *Ad Her.* i. 13, 23.

¹⁵² *Strafrecht*, pp. 174, 644.

previous arrest, or consequently of actual execution, cases of parricide must have been reserved for the *comitia* almost¹⁵³ down to the legislation of Sulla. These three cases may, I think, fairly be added to those of Cassius and Manlius, as instances of public execution following a vote of the people.

In all the other cases of a trial before the centuries which are recorded in our annals the person found guilty escapes death by exile. The explanation is doubtless to be found in the activity of the tribunes, which caused the seizure of the person, the condition precedent for actual execution, to fall into desuetude.¹⁵⁴ It was in the power of any one of the tribunes to interpose his *auxilium* and let the accused man out of prison; and the constant presence of this power of release seems to have led to the habit of not attempting to arrest. In the 'Commentarium vetus anquisitionis'¹⁵⁵ there is not a word about any such proceeding in a capital trial. The house of the accused is still his castle; the instructions are that M' Sergius is to send the trumpeter to 'blow his horn before the door of this wicked T. Quinctius Rocus, the same being a private person, and bid him to appear on the Campus Martius at daybreak.' No obstacle, therefore, is opposed to the retirement from Rome. On the other hand we find that there were certain persons *capitalem fraudem ausi*¹⁵⁶ in prison at the time of the battle of Cannae, who were released on condition of enlisting in the army in that moment of supreme danger. It is possible, as Mommsen suggests,¹⁵⁷ that the tribunician *auxilium*, though freely granted to state offenders or men of rank, would often be refused to the common criminal, and that for such persons previous arrest, with the possibility of death being actually inflicted, was not uncommon in the middle period of the republic. By the time of Polybius it must have almost disappeared, for he speaks of the custom of allowing exile as universal. The clumsiness of the comitial machinery may have contributed to this; it no doubt saved a great deal of trouble if accused persons, as in the case of Postumius's associates, were content to save their skins in exile; but still more effective was the growing feeling that every such evasion was an assertion of the rights of the private burgess against the magistrate, whose power of punishment was thus curtailed, and the difference, thus proclaimed, between the Roman, though a criminal, and the outlander flattered the pride of citizenship. It seems a strange privilege that every Roman, just once in

¹⁵³ Not quite; for Mommsen points out (p. 644, n. 1) that a reference to the 'iudices' in a case described by Cicero (*Pro Rosc. Amer.* 23, 64) in B.C. 80 as 'non ita multis ante annis' shows that the reservation cannot have lasted quite down to Sulla.

¹⁵⁴ See *Strafrecht*, p. 327.

¹⁵⁵ Varro, *De L. L.* vi. 92.

¹⁵⁶ Livy, xxiii. 14, 3. Mommsen thinks that these would include both prisoners awaiting trial and condemned persons in whose case execution had been suspended.

¹⁵⁷ *Strafrecht*, p. 328.

his life, should be allowed to commit a crime deserving death, without death being inflicted; but a privilege it was esteemed. I believe (though the point is open to dispute) that the privilege was extended even to the common criminal,¹⁵⁸ the housebreaker or assassin caught red-handed, if only he were a Roman citizen; once he has renounced his citizenship by exile, he must be careful not to offend again, or he will be treated as a mere foreigner; the habitual criminal is not tolerated.

We now come to far more difficult problems, to which I have already referred in passing (above, p. 238). They relate to cases in which the magistrate is specially commissioned to try cases *without appeal*. At the risk of tediousness it will be necessary to mention these cases individually. The earliest of them is ascribed in the annals to the year 413 B.C. M. Postumius, a military tribune with consular power, had been murdered by his soldiers, and the consuls of the next year were empowered by decree of the plebs to hold a criminal court (*quaerere*) on the matter. Some guilty persons perished, whether by suicide or execution Livy is uncertain.¹⁵⁹ Mommsen (p. 172, n. 1) rejects this story as an invention of later times; it is difficult to follow his reasons, but the matter need not be pressed. There are at least three cases¹⁶⁰ (in B.C. 331, 180, and 152) when an epidemic of poisoning appears among Roman matrons, and each is dealt with by a special *quaestio*. The *quaestio* of 180 B.C.¹⁶¹ is said to be *ex senatus consulto*. Many women seem to have been put to death;¹⁶² but in their case Mommsen does not allow that the difficulty as to *provocatio*¹⁶³ arises. The next case, that of a Capuan conspiracy in 314 B.C. which had ramifications in Rome, may likewise be passed over; for on this occasion a dictator, C. Maenius, was appointed, and if Mommsen be correct in the date which he conjecturally assigns¹⁶⁴ to the limitation placed on the dictator's powers in later times¹⁶⁵ a dictator in 314 B.C.

¹⁵⁸ See below, p. 272.

¹⁵⁹ Livy, iv. 51, 3: 'Per paucorum supplicium, quos sibimet ipsos conscisse mortem satis creditum est, transacta re.' The Romans would have been the better for a provision similar to that which ordains a coroner's inquest on the body of every criminal executed in prison in England.

¹⁶⁰ *Strafrecht*, p. 143.

¹⁶¹ Livy, xl. 37, 4.

¹⁶² Val. Max. (ii. 5, 3) says 170 on one occasion.

¹⁶³ I have not attempted to traverse in this article the doctrine, propounded with much confidence by Mommsen, that women lacked the right of 'provocatio.' As a matter of fact it seems to me very doubtful. It makes it difficult to explain the trial of Claudia (Suet. *Tib.* 2; see discussion in *Strafrecht*, p. 53, n. 1), that of Manilia (Aulus Gellius, iv. 14), and the cases mentioned in Livy, xxv. 2, 9, where the women go into exile just like men. Of course women were not members (Gell. v. 19, 10) of the *comitia*, but no more were the Campanian 'cives sine suffragio;' yet in 210 B.C. the senate (Livy, xxvi. 33) had to get special leave of the people before dealing with them. In the *Lex Acilia*, verse 78, the successful accuser who refuses the citizenship nevertheless gets 'provocatio,' so that the right to vote cannot have been a condition precedent of the right to appeal.

¹⁶⁴ *Staatsrecht*, ii². 165.

¹⁶⁵ See Festus, s.v. 'optima lex.'

was still free from *provocatio*. After an interval of more than a century we find the famous case of the Bacchanalian conspiracy of the year 186 B.C., which was dealt with in this and the following year. This must be treated more at length hereafter. Meanwhile we pass to the year 172 B.C., the first occasion on which Mommsen¹⁶⁶ allows the existence of a special criminal court. This was held by the urban praetor, C. Licinius, acting on a decree of the plebs (*Lex Marcia*), to compensate and punish the wrongs which some Ligurian tribes had suffered at the hands of the late consul, Popillius. The proceedings were rendered ineffectual by the collusive action of Licinius.¹⁶⁷ A somewhat similar case in B.C. 150 against Ser. Galba for his treatment of the Lusitanians collapsed at an earlier stage. A legislative proposal (analogous to the *Lex Marcia*) was brought before the people, and supported by Cato, but thrown out by Galba's influence.¹⁶⁸ More effective was a commission in the year 141 B.C.¹⁶⁹ against L. Hostilius Tubulus, who as praetor¹⁷⁰ had been bribed to effect the condemnation of innocent persons. The consul Servilius Caepio was commissioned under a plebiscitum proposed by P. Mucius Scaevola to proceed against him, and Tubulus retired into exile without awaiting his trial.¹⁷¹ According to Asconius he was afterwards arrested (probably, as Mommsen supposes,¹⁷² for some fresh crime) and committed suicide *ne in carcere necaretur*. In the year 138 B.C. we find the consuls holding a *quaestio* under decree of the senate on the members of a certain company of Roman publicans, who were accused of organising brigandage in South Italy. After a protracted trial they were acquitted.¹⁷³ Finally we have the proceedings against the adherents of Tib. Gracchus, carried out by P. Popillius Laenas, the consul of 132 B.C.

In all these cases there are certain common features which

¹⁶⁶ *Strafrecht*, p. 172, n. 2.

¹⁶⁷ Livy, xlii. 22.

¹⁶⁸ I adopt Mommsen's interpretation (*Strafrecht*, p. 172, n. 2) with slight variation; but, as we have no longer Livy to guide us, the details are very doubtful. This *may* have been an ordinary trial on appeal before the 'comitia.'

¹⁶⁹ Mommsen has the date and name right on p. 197, but on p. 173, by misprint or slip of the pen, he gives 132 B.C. as the date, and calls the law 'Sempronia' instead of 'Mucia.'

¹⁷⁰ Tubulus is said by Cicero (*De Fin.* ii. 16, 54) to have exercised a 'quaestionem inter sicarios.' It is doubtful whether he too was acting in the previous year as special commissioner (so Zumpt, *Crim. Recht*, i. ii. 141), or whether, as Mommsen thinks (*Strafrecht*, p. 615), his case is evidence of a standing jury court for murder half a century before Sulla. I am inclined to think that the story of L. Cassius (consul in 127 B.C.), which is the origin of the proverbial 'Cui bono?' points to a relation between the 'quaesitor' and his assistants in murder trials of this period more proper to a commissioner with his 'consilium' of advisers, chosen by himself, than to the standing jury-courts, in which the president never commented on the evidence: 'quotiens quaesitor iudicii alicuius esset in quo quaerebatur de homine occiso, suadebat atque etiam praeibat iudicibus . . . ut, quaereretur, cui bono fuisset perire eum, de cuius morte quaerebatur' (Asconius, in *Milon.* p. 46).

¹⁷¹ Cic. *De Fin.* ii. 16, 54.

¹⁷² *Strafrecht*, p. 71, n. 1, and p. 197, n. 2. See Asconius in *Scaur.* p. 23.

¹⁷³ Cic. *Erutus*, 22, 85.

distinguish them from the regular criminal trials, of which that of T. Quinctius Rocus is a typical instance. In the first place the superior magistrates, the consuls and praetors, play an active part; secondly, there is no mention of appeal to the people after the magistrate has condemned; thirdly, the accused are not always allowed to go into exile, but are thrown into prison, suicide being the usual result; fourthly, in two cases, that of the Bacchanalian conspirators and that of the adherents of Tib. Gracchus, wholesale executions take place. There is, further, a distinction to be noticed that in the two last named cases, and in that of the *publicani* in 138 B.C., there is no previous decree of the people, whereas in the others we hear of a special law regularly passed.

Mommsen's opinion on the legal character of these trials has undergone a startling alteration since the publication of the first edition of the '*Staatsrecht*,' and it is questionable indeed whether in this case second thoughts can be allowed to be best. He now¹⁷⁴ treats as of one class—to which, by the way, he denies the current appellation of *quaestio extraordinaria*, preferring the term *privilegium*—all the cases in which a decree of the people has ordained any sort of special trial, whether by a magistrate or *quaesitor* deciding on his own responsibility, or by a jury court of which the magistrate is merely the president. This category is made to include (by no means to the furthering of clearness of classification) a long list of later cases—the Peducaean¹⁷⁵ plebiscite against the defaulting vestals in 114 B.C., the Mamilian of 110 B.C. against the accomplices of Jugurtha; the action taken in 103 B.C. against Caepio after his defeat by the Cimbri for plundering the temple of Tolosa;¹⁷⁶ the Varian law of 91 B.C. against the associates of Drusus, the Fufian of 61 B.C. against the sacrilege of Clodius, the Pompeian of 52 B.C. under which Milo was tried for killing Clodius, and the Pedian of 43 B.C. against the assassins of Caesar.

All these decrees of the people (says Mommsen¹⁷⁷) are unconstitutional; nevertheless the omnipotence of the law overrides the prescriptions of the constitution, and accordingly they are blamed, but their legal validity is not disputed.

The word 'unconstitutional,' as applied by Mommsen in this passage, may perhaps be explained by a sentence in the third

¹⁷⁴ *Strafrecht*, p. 196 *seq.*

¹⁷⁵ See above, p. 222.

¹⁷⁶ So Mommsen (*Strafrecht*, p. 198). Zumpt seems to believe (*Crim.-Proc.* p. 476) that there was more than one prosecution, and he places one trial in 95 B.C. The nature of the proceedings is in any case very obscure. If Valerius Maximus (iv. 7, 3) is to be trusted, Caepio was actually thrown into prison, but released by a friendly tribune, L. Reginus, who accompanied him into exile. In another passage (vi. 9, 13) Valerius says that he was strangled in prison. This may possibly be true of his second trial, if there were two, but at one time he escaped by exile, for Cicero (*Pro Balbo*, 11, 28) says that he became a citizen of Smyrna. ¹⁷⁷ *Strafrecht*, p. 199.

edition of the 'Staatsrecht' (ii. i. 110). After the cessation of the dictatorship, he says,

such a *cognitio* could be called into life only by a decree of the people, and further the *comitia* were not, strictly speaking, qualified to erect such a tribunal, since the institution of a magistracy without appeal was forbidden in a general law.

The objection seems somewhat forced; for it is obviously one thing to set up a magistrate, such as Sulla or Caesar, whose decisions generally are to be free from the possibility of appeal, and another for the people in the plenitude of its power to set aside appeal in a particular case, and to order a magistrate to deal with that case.

A somewhat different classification of the cases enumerated will be suggested later on; but in the meanwhile the great case of the Bacchanalian conspirators remains unexplained. It is perfectly clear from Livy's very circumstantial account that no special law was proposed to the people. The magistrates act on the strength of a *senatus consultum*, which is merely read out to the people in a *concio*. Nevertheless multitudes are put to death—*adducti ad consules fassique de se nullam moram iudicio fecerunt*—and *plures necati quam in vincula coniecti sunt*.¹⁷⁸ Mommsen now believes that what the consuls are here described as carrying through was only a preliminary inquiry.¹⁷⁹

To the 'question' of the consul every one must needs answer, in case a tribune does not come to his assistance; any distinction according to the condition or sex of the accused is quite inconceivable on the occasion of the inquiry. But when once this has come to an end, and the magistrate is convinced that a capital crime has been committed, the guilty persons are not all treated in the same way; the consul himself condemns to death the women, foreigners, and slaves, and executes the sentence; against the citizens the formal process which we shall describe just now (*i.e.* the trial before the *comitia*) is instituted.

Mommsen had already hinted at this extraordinary solution in the third edition of the 'Staatsrecht' (ii. p. 112).

The decree of the senate *eis rem capitalem faciendam*, so the original document runs, does not, it is true, exclude *provocatio* in cases where the same is otherwise applicable; still it appears astonishing in the highest degree that in no one of these cases is there so much as a hint that *provocatio* took place.

The objection, which seemed sufficiently staggering in 1887, has lost its force for Mommsen in 1899. He now says¹⁸⁰ of the supposed trial before the people—

This is in itself the main procedure; but, as is shown by the committal of it to officers mostly of inferior station, and by other

¹⁷⁸ Livy, xxxix. 18, 5.

¹⁷⁹ *Strafrecht*, p. 152.

¹⁸⁰ *Ibid.* p. 153.

indications,¹⁸¹ it is as a general rule a formal process directed against accused persons who have practically already been found guilty.

I think that it is difficult to read with an open mind Livy's account of the Bacchanalian conspiracy without being convinced that this explanation¹⁸² will not serve. The obvious meaning of Livy is that the more guilty Bacchanalians, whether Romans or not, were put to death by the consuls on the strength of the powers which had been stirred up in them by the decree of the senate, and that the culprits were not allowed to appeal to the people. One turns with relief to Mommsen's masterly exposition of the matter in the first edition of the 'Staatsrecht' (i. p. 124), a passage which has entirely disappeared from the last edition.

In the city likewise the criminal jurisdiction of the consuls under certain circumstances revives. The criminal procedure of the republic in its development brought about the practical abolition of the death penalty for Roman citizens; but it was never forgotten that the full *imperium* included the unlimited right of life and death over the citizen, and that the magistracy, fettered by one law, may be reinstated in its old omnipotence by another law or by what is equivalent to law. This is undoubtedly the case when the chief magistrates were commissioned by special decree of the people to exercise their suspended power for a particular category of crimes. But even when only a *senatus consultum* to this effect is issued there is frequently ascribed to it the force of a *privilegium*, especially where delay would be dangerous. Such suspensions of the right of appeal are by no means rare¹⁸³ in the last times of the republic and under the early principate, and though the strict law was thereby infringed, and the consul was even sometimes held responsible for the infringement, yet in practice prescription pronounced rather in favour of the legality of the action.

After reference to the case of Antony's action against the pretended Marius in 44 B.C. (which ought, as I believe, to fall under another category) he concludes—

One common feature is observable in all these cases—that is, that the consular criminal jurisdiction appears only when *provocatio* is rightly or wrongly set aside, and never as a preliminary to appeal.

Mommsen seems to me at no time to have sufficiently appre-

¹⁸¹ The 'other indications' are explained in the note by a somewhat irrelevant quotation from Plautus, *Capl.* 475:

'De foro tam aperto capite ad lenones eunt,
Quam in tribu aperto capite sotes condemnant reos.'

¹⁸² It is fair to observe that later on in the book (*Strafrecht*, p. 258, note) Mommsen speaks of the maintenance of *provocatio* under the Bacchanalian commission as only a possible supposition.

¹⁸³ Among the cases referred to in the note comes that of the Bacchanalians, of which he remarks that 'the proceedings took place in the first instance in Rome, and therefore must have had the suspension of the right of *provocatio* as their necessary condition.' He includes under the same head the execution of the Catilinarians, which I should set elsewhere.

ciated the difference between the cases before and after the law of C. Gracchus—*ne de capite civium Romanorum iniussu populi iudicaretur*.¹⁸⁴ Otherwise his analysis of the proceedings of these special commissions, as presented in his earlier work, is clear and convincing, and it is to be regretted that he should have abandoned the position which he there took up.

I will now attempt to sum up, for the sake of clearness, the various principles which govern the several proceedings, and to give to each case what appears to me to be its proper place in the system; the order will be as follows:—

1. First we have the category represented by the proceedings against the murderers of Postumius, against Tubulus, against the vestal virgins in 114 B.C., and against Servilius Caepio. Here everything seems to be regular; the people by a legislative act restores to the magistrate his full right to punish, or sets up a temporary commissioner with similar rights, that he may act in specified cases on his own judgment, or with such assessors as he may please, with full power of life and death, and with facilities for previous arrest, which will enable the sentence to be carried out.

2. Next follow cases in which the people seeks its remedy against the offender, not by reverting to the ancient and arbitrary powers of the magistracy, but by calling into temporary existence a tribunal similar to the standing jury-courts, the recognised machinery for ordinary justice in the later republic. In the cases in question this machinery is specially directed against a particular offender or group of offenders. Though in form it is still recognised that the function of judgment belongs to the magistrate, in practice his power is here reduced within very narrow limits. The people itself prescribes the punishment which it chooses to visit on the offenders, but makes that punishment conditional on the result of the *quaestio* of the magistrate as to the facts, and in his decision of the issue he is bound by the advice of his jury. The magistrate has in reality only to announce the verdict of the jury, and thereupon the punishment becomes due. The most important practical difference between this class of trials and the first is that there is here no provision for previous arrest, and so the condemned can always¹⁸⁵ escape by *exilium*. The procedure must be examined more at length in connexion with that of the *quaestiones perpetuae*. Here I will only say that I should place in this category the Mamilian (110 B.C.) and Varian (90 B.C.) com-

¹⁸⁴ As quoted in Cic. *Pro Rab. perd.* 4, 12.

¹⁸⁵ Mommsen (*Strafrecht*, p. 193, n. 2) believes that death was actually inflicted on Q. Varius when he was condemned under his own law in 89 B.C.; but I do not think that this is proved. Cicero indeed says (*De Nat. Deorum*, iii. 33, 81) that Varius 'summo cruciatu supplicioque periit,' but this may well have been one of the deeds of Sulla's first restoration in the following year.

missions, the trial of Clodius (61 B.C.), that of Milo (52 B.C.), and that of the assassins of Caesar (43 B.C.)

3. The cases of the Bacchanalians, of the *publicani* of 138 B.C., of the women accused of poisoning,¹⁸⁶ and of the adherents of Tib. Gracchus—of whom Valerius Maximus (iv. 17, 1) expressly says, *quum senatus consulibus mandasset ut in eos more maiorum animadverteret*—seem to me to find a sufficient explanation in the passages which I have quoted from the first edition of the 'Staatsrecht.' The functions exercised by the magistrate are those of a judge, and his powers are precisely the same as those granted to him in the instances which I have placed in my first category, only here they have not been conferred by the people but stirred up by the action of the senate. I should agree that such action was a usurpation on the part of the senate, just as was its practice of granting dispensations.¹⁸⁷ Polybius¹⁸⁸ clearly thought that if the senate wished any such powers to be exercised it ought to go to the people to get them. Nevertheless, the practice was no doubt convenient in the presence of wide-spread and dangerous crime, and it was acquiesced in so long as only ordinary criminals were involved. The attempt to apply the procedure to political offenders led the Romans to protest and to quash the precedents. They did this by the law of C. Gracchus *ne de capite civium iniussu populi iudicaretur*. This law appears to have been declaratory and retrospective; for Popillius, the consul who had acted against the Gracchans in 132 B.C., is said to have been the person aimed at, and he was in fact condemned and sentenced.¹⁸⁹ It must then have clearly prohibited such judicial proceedings as those in which Popillius had engaged; and as a matter of fact none such seem to have been attempted thenceforth except by express decree of the people.

4. Cicero¹⁹⁰ acknowledges the obligation of Caius Gracchus's law, and claims that it will not be traversed by the execution of death or of perpetual imprisonment on the Catilinarians. This seems to indicate a clear distinction between the action of Cicero and that of Popillius, against which the law of Caius Gracchus was directed. In what did the distinction consist? Cicero himself in the next sentence supplies the answer. His action was not a judicial execu-

¹⁸⁶ If these be admitted into the list at all (see above, p. 252).

¹⁸⁷ Explained by Asconius in *Cornelianam*, 57.

¹⁸⁸ So at least I should interpret Polybius's words (vi. 16): τὰς δ' ὀλοχερεστάτας καὶ μεγίστας ζητήσεις καὶ διορθώσεις τῶν ἁμαρτομένων, οἷς θάνατος ἀκολουθεῖ τὸ πρόστιμον, οὐ δύναται συντελεῖν, ἂν μὴ συνεπικυρώσῃ τὸ προβουλευμένον ὁ δῆμος. An instance in point would be the authorisation by the people which the senate obtained in the case of the Campanians (Livy, xxvi. 33).

Mommsen has another explanation (see above, p. 248), taking Polybius to refer not to the appointment of a commission, but to the trial of an individual case on appeal. I do not believe that the senate has anything to do with appeal cases.

¹⁸⁹ See Plutarch, *C. Gracch.* 4, and Cic. *De Domo*, 31, 82.

¹⁹⁰ *Cat.* iv. 5, 10.

tion of citizens, but an act of war against enemies. Mommsen in a passage already noticed (above, p. 238) has clearly explained that the *perduellis* has by his own act placed himself in the position of a foreign enemy, and so has ceased to be a citizen. The senate fell back upon the doctrine, when they were deprived of the power of erecting a judicial tribunal. They simply passed a decree 'that the consuls were to see to it that the state took no harm,' and the consuls thereupon put in exercise their full power against those who had constituted themselves *hostes*. The first person¹⁹¹ against whom the new method was employed was Caius Gracchus himself, and Opimius, the consul who put him to death, was acquitted by the people when brought to trial for his act. Saturninus and the Catilinarians fell in the same way; and on similar grounds the consuls of 44 B.C., Antony and Dolabella, put to death the false Marius and other rioters after Caesar's death without even waiting to be reminded of their duty by the senate. In the concluding volume of the '*Staatsrecht*' (iii. ii. 1243), published as lately as 1888, Mommsen sums up the matter admirably.

The quasi-dictatorship instituted by the senate is treated, broadly speaking, as a portion of constitutional order, introduced in the time of the Gracchi; not only did the *populares* occasionally make use of it when they had the upper hand in the senate, but Caesar and the Caesarians themselves treat it as valid in law, even where they blame the application of it. During the last century of the republic the prerogative of the senate to exercise over the citizens the rights of war, in the old unlimited sense of the period of the kings, was never seriously disputed.

These doctrines require restating in order to complete the picture of the various forms in which the state takes action against offenders. Mommsen in his present work, if he does not expressly retract the doctrine set forth in the '*Staatsrecht*,' at any rate expresses it with more hesitation and less clearness. The only point, however, in which he seems to me directly open to correction is that he expressly identifies (p. 258) the action of Popillius in 132 B.C. with that of Opimius, Marius, and Cicero. Mommsen is debarred, by the theory which he has now adopted of the Bacchanalian trials of 186 B.C., from explaining Popillius's executions by the precedent of that year. On the contrary Popillius (who certainly did not

¹⁹¹ Though Appian is indecisive, Plutarch's account makes it clear that the '*ultimum senatus consultum*' was not passed against Tiberius Gracchus in 133 B.C. The action of Nasicus against Tiberius himself (as distinguished from that of Popillius against his adherents) was what Mommsen elsewhere (*Staatsrecht*, iii. p. 1241) calls '*unmittelbar nothwehrsrecht*,' undertaken by one who constituted himself for the occasion a '*tumultuarius miles*.' See also Mommsen, *Röm. Forsch.* ii. p. 247. Livy's statement in the course of his story (iii. 4, 9, and vi. 19, 3) that such decrees were issued two or three hundred years earlier (in 464 and 384 B.C.) cannot be considered historical.

allow *provocatio*) has to be made a precedent for Opimius and the rest. Mommsen does not seem sufficiently to appreciate the difficulty that the law of Caius Gracchus is thus represented as so badly drawn that, though expressly directed against certain proceedings, it failed to prohibit an exact repetition of those proceedings in future. It is surely much more natural to suppose that Caius Gracchus effectually barred one path, but that the Optimates found out another—that what he forbade was a judicial trial, and that what they substituted was administrative action.

The difference between these two views of the Sempronian law may be illustrated by an incidental reference to Caius Gracchus's measure in a discussion of *perduellio* later on (p. 590) in the 'Strafrecht.' The passage is worth quoting for its own sake.

The more heinous species of this crime is essentially distinguished from all other crimes by the circumstance that in *perduellio* the perpetrator by the very act passes out of the citizen ranks into the category of public enemies. When from this premise the consequence is drawn that all judicial proceeding is therefore unnecessary, and that the rights of war may be put in force, this is a party doctrine and contravenes law. But even under the observance of the Sempronian law, which expressly prescribed the necessity for the trial for treason, the effect of the verdict therein pronounced is not condemnatory, but declaratory, and when judgment is given the consequences of the crime are antedated to the moment of its commission. This is manifest from the circumstance that those consequences¹⁹² which can take effect after the death of the criminal are not here, as in all other crimes, barred by his death between the crime and the trial.

If the Sempronian law really did, as Mommsen here assumes, 'expressly prescribe the necessity of a trial for treason,'¹⁹³ I cannot see how Cicero could, with any plausibility, have argued as he does—that C. Caesar has not hesitated to pronounce on these men in spite of the law of Gracchus, 'because he knows well that the Sempronian law relates to Roman citizens, and that the man who is an enemy cannot by any possibility be a citizen,'¹⁹⁴ nor again can I imagine why Sallust the Caesarian should have refrained

¹⁹² On p. 592 Mommsen further explains that not only the testament of the 'perduellis,' but all his dealings with his property from the moment of his crime are null and void.

¹⁹³ I do not agree with Mommsen (*Strafrecht*, p. 633, n. 2, and p. 258, n. 1) that this law of Gracchus is to be identified with his law 'ne quis iudicio circumveniretur,' which was afterwards taken up into the legislation of Sulla (see Cic. *Pro Clu.* 54, *seq.*); but that identification, if accepted, surely raises another objection to his present interpretation. The crime for which Cluentius was tried was undoubtedly that of corrupting a *iudicium*; and a law directed against that particular crime must assume that a *iudicium* of some sort has taken place. If, as Mommsen now believes, the point of Gracchus's law was to prevent a trial being dispensed with, its short title ought rather to have been 'ne quis sine iudicio circumveniretur.'

¹⁹⁴ Cic. *Cat.* iv. 5, 10.

from introducing a refutation of this published statement, if it really admitted of refutation, into his master's speech.

It is now time to consider the introduction of a fresh element which revolutionised the administration of the Roman criminal law; this is the adaptation¹⁹⁵ to public needs of the forms of the private lawsuit, with its reference of disputed questions to the decision of a juror or jurors; in other words, it is the growth of a system of standing jury courts for criminal charges. The new system¹⁹⁶

is not originally invented as a substitute for the public penal procedure—it does not even take its rise from any notion of crime—but is rather in its inception merely a private suit, vested with special privileges on account of its overwhelming public interest, and differs from numerous other similar ones¹⁹⁷ only in that the presidency of a magistrate is extended to the whole proceedings.

The innovation has its origin in the difficulty which beset Rome, as her empire extended, of preventing her magistrates from making a profit of their official position at the cost of the subject peoples. The recovery at law of moneys so exacted is known as *res repetundae*.

The repressive measures (says Mommsen) directed against such practices were not only of the deepest significance politically during the last two centuries of the republic, but likewise, not so much indeed in their intention as in their development, proved the starting-point for the transformation of the penal law generally.¹⁹⁸

We first hear of a trial for *repetundae* in the year 171 B.C. The people of both the Spanish provinces had complained to the senate of the exactions of their governors, and the senate directed them to sue for recovery before one of the praetors, who was to nominate in each several case five private senators as *recuperatores*. No decree of the people seems to have been thought necessary; the senate merely allotted the duty of investigating the matter to a particular praetor, with instructions as to his procedure. To carry out these instructions must have been within the power of the magistrates as such.

We now come face to face with the main difficulty of such cases, which presents itself in all its fulness in this the most primitive instance. The recovery of money is the sole object with which the court has to deal, and one would have thought that with the

¹⁹⁵ See *Strafrecht*, p. 343.

¹⁹⁶ *Ibid.* p. 202.

¹⁹⁷ I have taken the liberty of altering Mommsen's expression. He says '*iudicia publica*.' This is quite correct if '*publicus*' be taken in its original sense (which he has explained on p. 192) as equivalent to '*popularis*'—i.e. a case in which a common informer may sue ('*cui libet ex populo experiri licet*'). It is, however, unfortunate to use the word here, as it at once recalls to the mind the later sense (e.g. *Lex Iulia Municipalis*, verse 118) of a trial before a jury court.

¹⁹⁸ *Strafrecht*, p. 705.

recovery of the money the case was at an end: but no—we are distinctly told¹⁹⁹ that the condemned went into exile (precisely as Polybius²⁰⁰ describes contemporary criminals doing in the comitial trial), the one to Praeneste, the other to Tibur. In the comitial trial their reason for thus renouncing the Roman citizenship is obvious; they go to escape death. But why should failure in a civil suit lead to the same result?

The separation,²⁰¹ in form voluntary, from the citizenship of the ruling community, and therewith the loss of political existence, already occurs as the result of the sentence of the *recuperatores*, which paved the way to the Calpurnian law, and after this it is the regular end of a condemnation for *repetundae*.

It is easier to state the fact than to account for it. Mommsen suggests that the exactions were probably on a colossal scale, and that even simple restitution may have been enough to bring about bankruptcy and its consequences.²⁰² The goods of the condemned would of course be seized in any case,²⁰³ but possibly this may have been effected in some less disgraceful way on the man whose name had been blotted out by death or exile than on the living Roman citizen.²⁰⁴ Possibly, likewise, the trial may have shown that there was evidence to go to the people on a charge of *perduellio*. If so the danger lay at the door that some tribune might seek to advertise himself by taking up the case, and if once it came on appeal before the people the verdict of the *recuperatores* on the pecuniary question would act as a *praeiudicium* likely to influence the minds of the voters in the *iudicium capitis*. The disgrace of condemnation on a capital charge was avoided by the timely exile of the parties, though that exile anticipated, so far as material consequences were concerned, the worst that was likely to happen to them even had the people voted against them.

The case of the Spanish governors was followed²⁰⁵ by a succession of similar ones, in which the guilty persons were condemned under arrangements made by the senate for each occasion. At length, in the year 149 B.C., a tribunician law of L. Calpurnius Piso Frugi instituted the first standing court for such trials. We know from a reference in the fragments of the 'Lex Acilia' (verse 23) that the procedure under the Calpurnian law was by the forms of the civil *actio sacramenti*. This Piso is

¹⁹⁹ Livy, xliii. 2.

²⁰⁰ See above, p. 249.

²⁰¹ *Strafrecht*, p. 730.

²⁰² It is doubtful whether at this late date these would include the old 'addictio.' Mommsen (*ibid.* p. 727) thinks that they would not.

²⁰³ Zumpt (*Criminalrecht*, ii. i. p. 18) has a strange notion that they escaped payment altogether; but this is quite unfounded. The most we can say is that if they succeeded in smuggling away any valuables into their new homes they would probably retain them unmolested; compare the advice given by the emperor Domitian to Licinianus; see below, p. 284.

²⁰⁴ See *Strafrecht*, p. 727.

²⁰⁵ *Ibid.* p. 708.

supposed to be the author of another 'Lex Calpurnia,' which extended the scope of *condictio*, an *actio in personam*, whereby restitution could be compelled of money or other goods the property in which had actually passed,²⁰⁶ and Mommsen²⁰⁷ argues with some probability that he applied this system²⁰⁸ to cover the claims of the allies and subjects of Rome. Mommsen further points out²⁰⁹ that the law avoided throwing on the accuser the burden of proof as to extortion by forbidding all gifts, whether freely offered or not. This would make *condictio* a proper instrument for their restitution, whereas if the *actio repetundarum* had been assimilated to the *actio furti*, which from a moral point of view would not be unnatural, the accuser would have been obliged to prove a corrupt intention.

Passing over the 'Lex Iunia,' of which we know nothing but the name, we next come to the law of 123 B.C., of which large fragments are preserved to us on a bronze tablet, now in the Naples Museum. Mommsen²¹⁰ calls it, as do most modern writers, the 'Lex Acilia Repetundarum,' on the ground that in the mention of such laws which we find in Cicero the Acilian immediately precedes the Servilian law. Mommsen admits that this is slight evidence; and he sees quite clearly that, though the name of Acilius may have been in the preamble, the law is really part of the legislation of Caius Gracchus²¹¹ (just as the 'Lex Aurelia' of 70 B.C. is really part of the legislation of Pompey). It is in fact the very law, ascribed to Gracchus by the historians, by which the jury courts were trans-

²⁰⁶ If I deposit my plate or railway stock at my banker's the property in them remains with me; under Roman law I could recover them by 'vindicatio,' an 'actio in rem.' If I deposit my money with the same banker the 'ius in re' passes to him; its restitution, if refused, gives rise to an 'actio in personam.' At Rome I could have got it back by 'condictio.' For an ingenious explanation of the apparent inconsistency that there can be a 'condictio rei furtivae,' though in that case, under Roman law (which knows nothing of 'market overt'), the property never passes, see *Strafrecht*, pp. 716, 757.

²⁰⁷ *Ibid.* p. 708. See also p. 202, n. 1, and p. 343, n. 1.

²⁰⁸ There is, however, the difficulty, which Mommsen does not notice, that Gaius (*Inst.* iv. 20) seems to set down 'condictio' as a fresh 'legis actio' parallel to and exclusive of the 'actio sacramenti.' We should expect, then, to find in the *Lex Acilia* 'quod cum eo Lege Calpurnia condictione actum siet,' whereas the text has 'sacramento.' Gaius perhaps did not mean to imply so much innovation in the procedure by way of 'condictio' as his words seem to suggest. The whole question is very obscure.

²⁰⁹ *Strafrecht*, p. 716.

²¹⁰ *Ibid.* p. 708, n. 6.

²¹¹ *Ibid.* pp. 708, 728. It would seem from the completeness of the regulations about the 'album iudicum' that, when this law was passed, the 'quaestio repetundarum' was the only standing jury court for which it was necessary to provide. In that case we must suppose that the 'quaestio' for conspiracy ('ne quis iudicio circumveniretur') and that for murder ('de sicariis'), if this too be rightly attributed to Gracchus, must have been subsequent to the present law, and in their regulations as to the constitution of the juries must have followed the lines here laid down.

ferred from the senate to the equites. If this be conceded it matters little by what name we call it.²¹²

This law has been admirably reconstructed from the fragments (though of course with many gaps) by the labour of Mommsen and others; and it constitutes our chief authority for the jury trials for *repetundae*. It is directed exclusively against magistrates, senators, and their families. It allows any one, not being a Roman citizen, to delate such a person and sue him for double²¹³ the value of whatever has been *ablatum*, *captum*, *coactum*, *conciliatum*, *aversum*. The private man is not only, as in purely civil suits, the accuser, but he relieves the magistrate from the task, which under the older style of *quaestio* had fallen on him, of collecting the evidence and establishing the proof.²¹⁴ Neither magistrate nor jurors may question witnesses or make any remarks on the evidence.²¹⁵ The magistrate has now only to summon the jury, under methods carefully prescribed in the law, to receive their votes, and, if the majority condemn, to pronounce the verdict *fecisse videri*. He is then to require the condemned man to find sureties for the payment of the damages, or, if he fail to do so, he is at once to enter into possession of his whole estate, and sell it in the name of the Roman people, which will hold the proceeds in trust for the aggrieved parties, amongst whom they are eventually apportioned. Next is to follow the *litis aestimatio*, or assessment by the jury of the value of the object in dispute under each count. When the object is money the question is simply its quantity; when it is anything else the value in money must be calculated. The whole is thus brought²¹⁶ under the rule of private actions, that every condemnation must be for a specific sum of money. On the other hand it is possible in these actions for *repetundae* (though this is not allowed in strictly private suits) to combine a number of charges into a single accusation; ²¹⁷ in this respect the jury trials follow the analogy of the *multae irrogatio* of the tribune, in which, as we gather from Cicero,²¹⁸ the charges may be a most miscellaneous collection.

²¹² Mommsen's view, of the justice of which I am fully convinced, implies the rejection of Plutarch's statement (*C. Gracch.* 6, 1) that Gracchus himself had the selection of the jurors, which is quite inconsistent with the text of the law. If we consider the hopeless confusion of the second-hand historians as to what was in the law, and the still greater errors in their account of the *Lex Aurelia* of 70 B.C., it does not seem too bold to say that Plutarch made a mistake. Zumpt, of course, will not hear of such a thing, and accordingly puts our fragments some years later than Gracchus. Mommsen does not think it worth while even to mention the discrepancy with Plutarch; I do not know that he is to be blamed.

²¹³ That this is an innovation is proved by verse 59, where only single damages are allowed for acts committed before the passing of this law. Mommsen says (*Strafrecht*, p. 728) that 'it can be as little doubted as it can be little proved' that Sulla reverted to single damages, and that the *Lex Iulia* of Caesar's first consulship again doubled them. I own that I can see no reason for this conjecture.

²¹⁴ *Strafrecht*, p. 393.

²¹⁵ *Ibid.* p. 422.

²¹⁶ *Ibid.* p. 724.

²¹⁷ *Ibid.* p. 723.

²¹⁸ *Pro Rab. perd.* 2, 7.

Thus the *litis aestimatio* becomes a complicated and serious matter. Under subsequent laws, if not under that of Gracchus, we find that numerous offences, not strictly bearing the character of extortion, may come to be taken account of in the *litis aestimatio*, and so swell the amount of damages.²¹⁹ If, for instance, a governor trades in his province, if he buys slaves, if he appropriates state property (which is really *peculatus*), or if he transgresses the bounds of his province (which is *maiestas*), he is frequently described as contravening various 'Leges Repetundarum,' and any such acts may be alleged against him when the assessment is under consideration. We even find a case where corruption as a juror at Rome is allowed to be reckoned amongst the offences for which a person condemned for *repetundae* has to pay damages. Cicero²²⁰ tells us that in this case great efforts were made by the accuser to bring this capital charge into the assessment (*ut lis haec capitis aestimaretur*), and he observes further that such charges are often included, so carelessly that the same jurors have been known to acquit a man when the very same acts which they had ascribed to him in the *litis aestimatio* were alleged against him as a substantive charge on a subsequent trial for *maiestas*. It is evident that such a fresh trial was necessary before the extra penalties attaching to *maiestas* could be inflicted.

The subsequent 'Leges Repetundarum,' that of Servilius Glaucia, of Sulla, and of Caesar, as consul in 59 B.C., can be sufficiently dealt with in incidental references, and it will be best to pursue the really difficult question raised above (p. 262)—namely, what happened to persons condemned for this crime, and how are the practical consequences of condemnation to be reconciled with the record of the penalties prescribed by law? There is no statement in the fragments preserved to us of the 'Lex Acilia' of any penalty other than the pecuniary one attached to condemnation for *repetundae*. We see, however, provision made (verse 29) for the case of the accused going into exile²²¹ before the trial is over, and among the rewards for the accuser is, under certain circumstances,

²¹⁹ *Strafrecht*, p. 720. It is a very different thing when Zumpt (*Criminalrecht*, II. ii. 333) exaggerates this into the statement that 'after the condemnation of the accused there followed at the *litis aestimatio* the question whether a heavier punishment or only a pecuniary penalty was to be exacted.' He thinks that the *Lex Iulia* instituted for the first time a separate court for 'repetundae,' whereas before that a single court took cognisance of all official misdemeanours (*ibid.* pp. 322-44). This notion, that it was the business of a Roman jury to decide what punishment should be inflicted, vitiates all Zumpt's theories. Mommsen treats the hypothesis with silence, which is perhaps all that it deserves.

²²⁰ Cic. *Pro Clu.* 41, 116. Mommsen, by the way, makes sense of an otherwise quite inexplicable passage by reading here 'si quae in eum lis capitis illata est, non inviti admittunt' instead of 'non admittunt,' which is absurd.

²²¹ There appears (Cic. *Pro Quinctio*, 19, 60) a similar provision in the praetor's edict for the seizure of the goods of a man who 'solum verterit exilii causa,' in order to avoid the consequences of bankruptcy. See *Strafrecht* p. 70, n. 1.

the attainment of the Roman citizenship in the tribe of the condemned man (verse 77). If the full text had remained to us, we should expect to find that this reward was limited to cases where the guilty person had actually gone into exile, and so left a gap in the ranks of the Romans. In other instances, at any rate, where a new status is given to a successful accuser it is apparently always by substitution of him for the person whose condemnation he has effected.²²² In any case, as has been pointed out in the passage of Mommsen quoted above (p. 262), most of those condemned did actually go into exile. In the list in Cicero's speech 'pro Balbo' (11, 28) there occurs as having become a citizen of Smyrna Rutilius Rufus, who was certainly condemned (92 B.C.) for *repetundae*. T. Albucius, who *animo aequissimo Athenis exul philosophabatur*,²²³ was accused by the Sardinians,²²⁴ and this can hardly have been for anything but extortion. The same is probably the case²²⁵ with L. Lucullus, father of the famous general, in 102 B.C.; he retired to Heraclea,²²⁶ though it is not expressly said that he became a citizen of that state. In the case of Cn. Dolabella, Verres's chief, exile seems to be implied by the reference to his children, *quos tu miseros in egestate et solitudine reliquisti*, and by the words *condemnato et eiecto*.²²⁷ Verres himself, as is well known, went into exile to Massilia. The load of misdeeds which would be proved against him in the *litis aestimatio* would doubtless have led to 'capital' actions for *maiestas* and *peculatus*, if he had not thus forestalled them. C. Antonius, Cicero's colleague in the consulship, after his condemnation for his extortions in Macedonia retired to Cephallenia,²²⁸ where as an exile he proceeded to found a new city, but gave it up when he was recalled home. Cephallenia was a *libera civitas*,²²⁹ whose franchise Antonius could conveniently take up. Besides these we have two cases of suicide of persons accused of *repetundae*, Silanus Manlianus (about 140 B.C.)²³⁰ and Licinius Macer,²³¹ who was tried before Cicero as *praetor repetundarum* in B.C. 66. Of the fate of others, probably of most of those condemned for *repetundae*, we have no information; but these instances²³² are sufficient to justify Mommsen's statement as to the general effect of condemnation, though the circumstance that it was worth while later on²³³ especially to add *infamia* and expulsion from the senate

²²² Mommsen (*ibid.* p. 509) gives instances to the point. We may perhaps add the reward proposed for the slave who betrayed his master in the proscriptions—*καὶ τοῦ τοῦ δεσπότου πολιτεία* (Appian, *Bell. Civ.* iv. 11).

²²³ Cic. *Tusc.* v. 37, 108.

²²⁴ Cic. *in Verr. Div.* 19, 63.

²²⁵ See Zumpt, *Criminal-Prozess*, p. 475.

²²⁶ Cic. *Pro Arch.* 4, 8.

²²⁷ Cic. *in Verr.* i. 30, 77, and 39, 98.

²²⁸ Strabo, x. 456.

²²⁹ Pliny, iv. § 54.

²³⁰ Val. Max. v. 8, 3.

²³¹ *Ibid.* ix. 12, 7.

²³² I must express my obligations throughout this article to Zumpt's catalogues of trials, in the present instance to that given in the *Criminal-Prozess*, pp. 468-558.

²³³ Mommsen says (*Strafrecht*, p. 709) by the *Lex Servilia* of Glaucia. He

to the pecuniary penalty seems to show a wish to sharpen the inducements to retire from the Roman state.

To set against all these we have one case which points the other way. 'L. Lentulus, a consular,' says Valerius Maximus (vi. 9, 10), 'after being overwhelmed by a charge of *repetundae* under the Caecilian law, was created censor along with L. Censorinus.' The censorship of this Lentulus was in the year 147 B.C., and his consulship had been nine years earlier. The commentators alter 'Caecilia' (no 'Lex Caecilia' being known) into 'Calpurnia,' and suppose that Lentulus was condemned by a jury court immediately after the passing of Piso's law in 149 B.C. This is possible, but by no means certain; it seems more probable that the conviction of Lentulus followed close on his consulship, and was the result of a special commission. The passage, if trustworthy, seems, however, to show that at one time it was possible to be condemned for *repetundae* without damage to a political career. The case of C. Porcius Cato in 113 B.C. is famous for the petty sum at which the damages were assessed—about 80*l*. It seems strange that he should have become an exile for so trifling a matter. Yet Cicero mentions him in his list in the 'Pro Balbo' as having become a citizen of Tarracena. The case has been used to support two opposite conclusions. On the one hand it has been argued that the fact that Cato did go into exile for so small an infraction of the law shows that 'capital' penalties must have attached to condemnation. Zumpt, on the other hand, believes that Cato must have been exiled as the result of some subsequent misdeeds, punishable as *maiestas*, and thinks that the circumstance that he held a position giving opportunity for such acts shows that no *infamia* or disqualification for office resulted from his conviction for *repetundae*. The whole matter is very obscure, and we should never have heard of it if C. Cato had not served as a favourite illustration²³⁴ of the scrupulous severity of equestrian juries, even where the wrong done was slight.

On the whole it appears that there is no certain case of a person condemned for *repetundae* remaining in Rome since the standing jury court was first instituted by Piso Frugi in 149 B.C., and gives no evidence, and I know of none save, possibly, the apparent connexion of the *Lex Servilia* with the 'calamitas senatoris' in Cic. *Pro Balbo*, 24, 54. Momm- sen believes that here too Sulla abolished and Caesar renewed this penalty. Yet Cicero (*in Verr.* ii. 31) seems to assume that in 70 B.C. the question whether Verres will remain in the senate and serve on juries depends on whether he is found guilty for *repetundae* or not. The only thing we know for certain is that this penalty survived in the *Lex Iulia*, as administered under the principate (*Strafrecht*, p. 729). Cicero uses 'blood' and 'life' quite as freely when defending Flaccus against a charge of extortion as he does on behalf of any of his clients who are accused on 'capital' charges.

²³⁴ Cic. *in Verr.* iii. 80, 184, and elsewhere. For Zumpt's opinion on the case see *Criminal-Prozess*, p. 471.

only one, and that resting on the frail authority of Valerius Maximus, after the first occasional trial before *recuperatores* in 171 B.C. What it was that drove all these offenders into banishment, must remain an unanswered question; and the same difficulty occurs with the self-exile of persons in danger of bankruptcy (see above, p. 265 n. 221). I do not wholly despair that some long-lost text or inscription may hereafter be discovered, which shall show that consequences, now unknown to us, but extending far beyond the seizure and sale of goods, were connected in some indirect way with these convictions; and that somewhere in these consequences is to be found the missing motive for the renunciation by the convicts of their Roman citizenship. All that can be said at present is that there is no evidence in support of so satisfactory a solution, and that the puzzle must be left where it stands.

I pass with less feeling of uncertainty to the subject of capital trials before jury courts, though it is here, more than anywhere else, that I feel myself unable to follow in the track of my guide. I will first attempt to sketch the history and nature of these trials, as I read them in the light of the ancient authorities, and will then state as clearly as I can the points in which I differ from Mommsen in the interpretation of those authorities.

The system of jury courts, developing its procedure from private law and its consequences from public law, which began with trials for *repetundae*, was gradually extended to cover other crimes. It is a doubtful point how many standing courts existed before the time of Sulla, but all were taken up in his legislation. In some cases the 'Leges Corneliae' of Sulla remained the nucleus of statute law, round which the lawyers of the principate built up their system of jurisprudence;²³⁵ in other cases the 'Leges Corneliae' were remodelled into 'Leges Iuliae' either by the dictator Caesar or by Augustus. The period from Tiberius to Diocletian was, as Mommsen points out,²³⁶ barren of fresh legislation. 'On the century of active legislation extending from Sulla's dictatorship to Augustus's death there follow, introduced by the paralysation of all free movement under the rule of his stern successor,

²³⁵ Mommsen has an interesting passage (*Strafrecht*, p. 531) in which he points out the defects of this system, compared with the work of the same men in the field of civil jurisprudence. Especially, he says, there is nothing in the Roman criminal law which will bear comparison with the treatment of 'iniuria' as a civil wrong, 'a masterpiece not only of jurisprudence but above all of legal practice, and to this day a humiliating proof that the progress of humanity is always just as much a retrogression.' It is a difficult question whether Sulla treated 'iniuria' as merely a civil wrong. In the next paragraph I have assumed this to be so. There is no contemporary evidence for a criminal 'quaestio de iniuriis,' and the references in the later jurists to the *Lex Cornelia de Iniuriis* are by no means decisive. See *Strafrecht*, p. 785.

²³⁶ *Strafrecht*, pp. 130, 529.

three centuries of stiff and senseless retention of the established order, the evil results of which will be brought out when we come to the apportionment of penalties in the fifth book.' These evil results ('Strafrecht,' p. 1038) are found to consist mainly in the disappearance of the rule of law from the penal jurisdiction and the reference of everything to the arbitrary discretion of the judge or of the head of the state.

In the last generation of the republic under the Cornelian system theft, adultery, with probably other gross offences against morals ('Lex Scantinia'), and injury or insult, directed against person or property, are still 'private crimes,' and are dealt with by the urban praetor under the forms of a private suit, in which, however, we must include the *popularis actio*, brought by a common informer for the recovery of the fine prescribed. On the other hand we have criminal jury courts for murder (*quaestio de sicariis et veneficis*), which includes arson and perhaps barratry,²³⁷ for conspiracy to convict the innocent (*ne quis iudicio circumveniretur*), for treason (*maiestas*), for organised conspiracies to influence elections (*de sodaliciis*, after 55 B.C.), for embezzlement of state money (*peculatus*), for violence, rioting, and intimidation (*de vi*), for forgery and fraud (*de falsis*), for ordinary corrupt practices at elections (*de ambitu*), for extortion (*repetundarum*), and finally for malicious or collusive prosecution (*calumnia* and *praevaricatio*), charges which were dealt with by the jurors who had tried the case out of which they arose. Each fresh *quaestio* is looked upon as bringing for the future a new range of offences under the direct cognisance of the will of the people as expressed in its laws and enforced by its courts. Mommsen happily quotes²³⁸ Cicero's remarks on the effect of the 'Lex Cornelia de falsis,' *ut quod semper malum facinus fuerit, eius quaestio ad populum pertineat ex certo tempore*.

Except in the last three cases mentioned (*ambitus*, *repetundae*, and abusive prosecution) all²³⁹ the charges included in the list are described in our authorities as 'capital,' and of many of them we find it recorded in the later jurists, *Lex Cornelia aqua et igni interdicti iussit*. That capital consequences should be attached to condemnation in that which is by origin and tradition a private suit between citizen and citizen had nothing in itself shocking to the Romans. In the old days of self-help such result would often ensue from a 'private crime,' and there is nothing to prevent the people from attaching what consequences it pleases to condemnation by this or that set of jurors. Accordingly we find Ulpian²⁴⁰ quoting the 'Lex Cornelia de Sicariis,' *ut praetor quaerat de capite eius qui cum telo*

²³⁷ *Strafrecht*, p. 646.

²³⁸ *Ibid.* p. 670; Cic. *in Verr.* i. 42, 108.

²³⁹ It is possible that 'peculatus' should also be included among the exceptions, but I think not. See *Strafrecht*, pp. 769-771.

²⁴⁰ See *Strafrecht*, p. 629.

ambulaverit hominis necandi causa, and Cicero ²⁴¹ quoting the law against conspiracy which Sulla borrowed from Gracchus (*quae tunc erat Sempronia, nunc est Cornelia*), DE CAPIT EIU QUAERITO.

On the other hand there is no trace in all the voluminous evidence supplied by Cicero's speeches that a single Roman was ever put to death in his time by regular course of law. Without exception the persons condemned on 'capital' charges go into exile. This again is no new thing; we have seen (above, p. 249) that it was the fashion in Polybius's time for persons to save themselves from death 'by pronouncing voluntary exile against themselves and finding refuge in a neighbouring state.' There is this difference, however, that whereas under the *régime* of trials before the people it was possible, if the tribunes permitted, for the magistrate to prevent this *ἐκούσιος φυγαδεία* by locking the accused up beforehand, the private accuser who appears under the jury-court system has no such power,²⁴² and is obliged to content himself with a summons, which has as little effect on impeding the flight as had the trumpet blast by which M' Sergius was to summon 'the wicked Titus Quinctius Rocus' (see above, p. 251).

What is it that happens when a man goes into exile? Here we get a most complete and logical account from Cicero in his speeches 'Pro Caecina' and 'De Domo.'

I wish (he says),²⁴³ as they are fond of precedents from the civil law, that they would adduce any instance of persons who are deprived by law of Roman citizenship or of liberty. For as regards exile it can be clearly shown what its nature is. Exile is not a punishment, but an asylum and harbour of refuge from punishment. For persons who wish to evade some punishment or some ruin on that account 'shift their ground' (*solum vertunt*)—that is to say, take up a new seat and habitation. And so it will be found that in no law of ours has any crime been punished by exile, as it is in other states; but forasmuch as men shrink from the chains, the death, the disgrace which have been ordained for them in the laws, they betake themselves to exile as to sanctuary. If they chose to remain in the state and abide the weight of the law, they would lose their citizenship only with their last breath; now, as they do not choose this, the citizenship is not taken away from them, but laid down and abandoned by themselves. For since by our law no one can belong to two states at the same time our citizenship is lost then, and not till then, when he who has fled is received into exile—that is to say, into another state.²⁴⁴

²⁴¹ *Pro Clu.* 54, 148.

²⁴² *Strafrecht*, p. 390. See also *ibid.* p. 328. 'The praetor presiding over these courts could apply the magisterial summons, but the right to exercise preliminary arrest seems to have been wanting to him; at least the accused seems always to have been at large, even in the murder trials.'

²⁴³ *Cic. Pro Caec.* 34, 100.

²⁴⁴ It will be remembered that Pleminius was still liable to Roman law, and was actually seized and brought back when he was on his way to Neapolis, but had not yet arrived there (see above, p. 250).

And again in the 'De Domo,' 30, 78—

No persons condemned on capital charges ever ²⁴⁵ lost their Roman citizenship until they were received into that state to which they had come for the purpose of 'shifting'—that is, changing their ground. And the authors of our laws compelled ²⁴⁶ them to do this not by taking away their citizenship, but by forbidding them shelter, fire, and water.

These statements of Cicero are in absolute agreement with that of Polybius regarding the voluntariness of the act, the reasons which a criminal has for performing this act,²⁴⁷ and the refuge afforded to him in a fresh state. The only difference is that Cicero can no longer name Tibur or Neapolis, because they have become, since the Social War, a part of Rome, and that he supplements Polybius by explaining that 'the voluntary exile is pronounced' by means of the renunciation of one citizenship in the act of accepting another. Curiously enough Mommsen adopts this view of *exilium* under the Cornelian laws in one case—that of the parricide—but treats it as an exception;²⁴⁸ 'the *quaestio*, the reference by a general or special law of what is by public penal law a capital crime to the decision of a single juror or a bench of jurors by no means in itself excludes a sentence of death . . . The standing commission for murder even under Sulla's ordinances condemned to death the murderer of near kindred.' This is explained in another passage (p. 644, n. 3).

Immediately after the Cornelian law against murder was passed, the accusation set on foot under it of Sex. Roscius for parricide led up to the punishment of death, and death in ancient fashion in the sack, though it is true that it was open to the criminal to withdraw himself from the condemnation by exile.

I should entirely agree with the general statement in the first sentence, and my only objection to the remarks about the parricide

²⁴⁵ The imperfect tense seems to be used because Cicero is speaking throughout this passage of what had been laid down by the wisdom of the ancients—'ius a maioribus nostris . . . ita comparatum est.' We must not infer from the tense that Cicero was describing a state of things which had passed away. Such an inference would bring this passage into contradiction with that from the *Pro Caecina*, where the present tense is used throughout. Mommsen evidently recognises this, for he does not found any conclusion on the use of the past tense here, though it might plausibly have been alleged to support his own view. Both in the *Pro Caecina* and in the *De Domo* it would have helped Cicero's argument if he could, without fear of contradiction, have added, 'but all this is ancient history, and, as things are now, men do not lose their citizenship, even when condemned.' That he does not use so tempting a plea is pretty good evidence of facts within the knowledge of his hearers, which prevented his doing so with any plausibility.

²⁴⁶ The phrase 'id ut esset faciundum . . . faciebant' is so awkward that one is tempted by the amendment 'adigebantur' (for 'faciebant'), adopted by Zumpt (*Crim.-Proc.* p. 456).

²⁴⁷ Mommsen (*Strafrecht*, p. 966) styles it very happily 'die freiwillige, wenn auch widerwillige Auswanderung.' The man finds that 'the climate of Italy does not suit him.'

²⁴⁸ *Strafrecht*, p. 942.

is that I think that they ought to be applied to *all* criminals convicted on a 'capital' charge.²⁴⁹

To return to the conception of *exilium*. It obviously consists of two parts, both equally necessary to its completion. First, there must be the physical withdrawal to some safe place (*solum vertere*) ; secondly, the withdrawal must be *exilii causa*, with the intention of going not as a visitor but as a settler. Given these two things, the *ius exulandi* works automatically ; ' it realises itself by virtue of the standing treaties without the co-operation either of the community into which the man enters or that from which he retires.' ²⁵⁰

Of the physical withdrawal I have already said enough : it was a matter of fact, as to which in each case there can have been little doubt. But it is otherwise as to the intention of the *exul*. This could only be presumed from his situation or inferred from his words or actions, and he might afterwards say that the inference was wrong, and that he had never really meant to naturalise himself abroad. Cicero practically does this in his speeches after his return from banishment. The Romans had, therefore, to take precautions against such tergiversation. It is said that a member of the duke of Wellington's cabinet, who had resigned office in a pet, wished to withdraw his resignation on the ground that 'there had been a mistake.' 'It is no mistake,' replied the prime minister ; 'it can be no mistake ; it *shall* be no mistake.' The Romans retorted in much the same way. They could not deprive a man of

²⁴⁹ The question of what was done with the 'common malefactor' has greatly exercised the critics. What happened to the street ruffian who knocked down a peaceful citizen and took his purse ? Zumpt thinks that the criminal whose guilt was evident or confessed was dealt with summarily, and never allowed the chance of *provocatio* or of a jury trial, or of any of the other contrivances for evading the death penalty. This is repeated *ad nauseam* on page after page in Zumpt ; but see especially *Criminalrecht*, II. i. 289, where he says that *provocatio* 'was very seldom allowed.' This is going much further than Mommsen (see above, p. 251), who holds that liability to previous arrest, not denial of *provocatio*, befell the 'common criminal.' The whole superstructure of Zumpt seems to rest on no better foundation than a single case (Suet. *Aug.* 33), by which it appears that in Augustus's time parricides were sewn in the sack only if they confessed, and on a remark of Cicero (*Pro Murena*, 20, 42) that the 'quaestio peculatus' was a dreary business, 'plena catenarum.' Mommsen (*Strafrecht*, p. 328, n. 5) disposes of this last by referring it to the public slaves employed as clerks. Mommsen himself in the *Staatsrecht* (iii. 1242) was inclined to think that under the constitution of Sulla the 'common offender,' caught red-handed, was thrown into prison and strangled (just like Lentulus and his companions in the Catilinarian conspiracy) as a public enemy. In the present work (p. 799) he hints at the same thing in a very hesitating manner (see below, p. 286). I have expressed my own opinion (above, p. 252) that the Roman citizen, like the dog in English law, 'has a right to his first bite.' See A. C. Clark, Introduction to Cic. *Pro Milone*, p. xvi.

²⁵⁰ *Strafrecht*, p. 69, n. 1. Compare the case of the foreigner in Cicero (*De Orat.* i. 39, 177) 'cui Romae exulare ius erat.' The point has some interest as refuting Zumpt's supposition that admission to a strange state is in each case a special privilege, for which the Roman noble who has failed to 'keep on the windy side o' the law' would not sue in vain, whereas it would be denied to the vulgar offender.

his citizenship, but they could (much as in the case of the *perduellis* described above ²⁵¹) authoritatively take notice in case of doubt that he had duly deprived himself. *Cn. Fulvius exulatum Tarquinius abiit; id ei iustum exilium civit esse plebs.* ²⁵² They could decree in like manner that if he did not appear on a certain day *videri eum in exilio esse.* ²⁵³ Further the case was to be provided against that the man might claim to return, clothed in a new nationality, as a foreigner merely sojourning in Rome; and again it was at least a tenable view ²⁵⁴ that, if he came back, he would, whether he wished it or not, recover his Roman citizenship by *postliminium*. All these contingencies were guarded against by the *ignis et aquae interdictio*. Mommsen is possibly right in believing that this edict was originally a magisterial act applicable at discretion against any foreigner whom it was desired to expel and keep away from Roman territory, and applicable only against foreigners. It would consist in 'his permanent exclusion from the legal protection generally accorded to strangers on Roman ground, and in case of contravention the threat to treat as an enemy him or any one who received or supported him.' ²⁵⁵ In other words it is 'the decree of magistrate or people, by which the Roman community gets rid of a non-citizen once for all, and forbids him to tread Roman soil on pain of death.' ²⁵⁶

But, if originally applicable against foreigners, the use of *ignis et aquae interdictio* is in historical times practically confined ²⁵⁷ to the case of persons who have once been citizens. Notice was thereby given them that, whether they afterwards denied the fact or not, they were held to have become aliens, and aliens who had been warned off Roman ground. Not only so, but their ceasing to be Romans was anticipated. In the case of Postumius, referred to above, ²⁵⁸ we find in the event of his not appearing—*videri eum in exilio esse, bonaque eius venire, ipsi aqua et igni placere interdicti*. This is conditional, but the sentence soon comes to be fulminated directly against persons who are not yet foreigners, sometimes even against those who have no chance of becoming foreigners. It is certainly prescribed for the man who chances to survive the military 'fustuarium' (see above, p. 233 n. 63), of whom Polybius (vi. 37, 4) says, 'He is not allowed to return to his country, and none even of his kindred would dare to receive him into their houses.' In all probability the same form of words was used against the victims of the Sullan proscriptions. I am not aware that they

²⁵¹ See above, p. 260, especially the words, 'The effect of the verdict therein pronounced is not condemnatory but declaratory.'

²⁵² Livy, xxvi. 3, 12.

²⁵⁴ See the interesting case of Publicius Menander in Cicero, *Pro Balbo*, 11, 28.

²⁵³ *Strafrecht*, p. 72.

²⁵⁷ *Ibid.* p. 935.

²⁵² *Ibid.* xxv. 4, 9.

²⁵⁶ *Ibid.* p. 964.

²⁵⁸ Livy, xxv. 4, 9.

are ever precisely quoted, for the general term *proscriptio* acquired a sort of technical sense as a short description of these horrors; but the Greek writers use *ἐκκηρύσσειν* or *ἐπικηρύσσειν* indifferently for the action of Sulla or of the triumvirs (43 B.C.),²⁵⁹ for that of Popillius²⁶⁰ against the adherents of Tiberius Gracchus, for that of Saturninus²⁶¹ against Metellus, and for that of Clodius against Cicero.²⁶² As regards the more regular action of the law courts Cicero tells us generally (see above, p. 271) that Romans were driven to join a new state *ignis et aquae ademptione*. Augustus describes his action under the 'Lex Pedia' in the words, *qui parentem meum interfecerunt, eos in exilium expuli, iudiciis legitimis ultus eorum facinus*,²⁶³ whereas Dio Cassius (xlii. 48) says of their sentence, *πυρὸς καὶ ὕδατος εἰρχθησαν*. *Proscriptio* and *interdictio* are in principle the same thing, and may be equally directed against citizens; many modifications, however, and these of great practical importance, are possible, especially in the extent of territory within which the outlawry is to run, and in the penalties threatened against those who harbour the victims. Sulla's outlawry of the Marians extended over the whole world, leaving no door of escape, and involved all who succoured the fugitives in the same peril. Clodius, whose cruelty Cicero associates with that of Sulla, while threatening like penalties, limited the application of them locally; a local limitation is likewise found in case of the *ignis et aquae interdictio* which results from condemnation in one of the standing jury courts.

In all cases the state 'makes an open appeal to popular execution of the death sentence'²⁶⁴ as the means of enforcing its will; but it makes a great difference whether the permission to kill is stimulated by reward, as in Sulla's proscriptions, and aided by penalties against those who obstruct it, or whether it is merely left open, so that 'what is everybody's business is nobody's.' Two cases occur in which the 'prohibition of fire and water' seems to be without practical consequences; Oppianicus, condemned for attempt to murder, nevertheless²⁶⁵ wanders about in Italy and finally dies in the neighbourhood of Rome, where he has hired lodgings just outside the gate, and Q. Pompeius after a condemnation *de vi* is found living at Bauli,²⁶⁶ in the neighbourhood of Naples. It may be noticed that in the first case public opinion held Oppianicus to be an innocent man, who had been condemned by a bribed jury, and in the second that Pompeius had some

²⁵⁹ For Sulla see Dio Cassius, xxxvii. 10, 2; for the triumvirs *ibid.* xlvii. 7, 4; 11, 3; 12, 2; Appian, *Bell. Civ.* iv. 14.

²⁶⁰ Plutarch, *Tib. Gracch.* 20, and *C. Gracch.* 4.

²⁶¹ Appian, *Bell. Civ.* i. 31: καὶ τοὺς ὑπάτους ἐπικηρύξαι, μηδὲνα Μετέλλω κοινωνεῖν πυρὸς ἢ ὕδατος ἢ στέγης.

²⁶² Dio, xxxviii. 17, 7 (προσεπεκηρύχθη, &c.)

²⁶³ *Mon. Ancyr.* 2.

²⁶⁴ *Strafrecht*, p. 623.

²⁶⁵ Cic. *Pro Clu.* 62, 175.

²⁶⁶ Cic. *Ad Fam.* viii. 1, 5.

powerful friends, for Caelius Rufus was able to compel certain fraudulent trustees to do their duty by him.²⁶⁷ Under any such favourable circumstances the trespasser on forbidden ground probably ran no great risk. Mommsen remarks ²⁶⁸—

The killing without judicial proceeding of the banished man caught on Roman ground ²⁶⁹ must have been treated as permitted with impunity rather in theory than in practical application; such a proceeding is irreconcilable with the rule of law, and there are no certain instances of its practical impunity.²⁷⁰

Perhaps a practical distinction may be drawn between an inner and an outer circle of territory. The 'Lex Julia Municipalis' describes the exile as *iudicio publico damnatus, quocirca eum in Italia esse non liceret*. We find, however, that the tribunes ²⁷¹ each year passed a special edict forbidding any person condemned on a capital charge to be in the city of Rome. It is quite possible that they would take active measures against any one who disregarded their own express prohibition, though the wider prohibition of the law, affecting the whole of Italy, might be more of a dead letter.

On the whole, then; we are entitled to say that the *ignis et aquae interdictio*, as ordained in Sulla's laws, was a death sentence, though one which might be evaded with great ease, and hence the words of his law *de capite eius quaerito* are fully justified. Mommsen is fairly puzzled with these words, as well he may be.

We must refer them (he says) to the consideration that the 'breach of ban' was in fact punished with death, and that so *interdictio* might be described as a qualified death penalty; and it is further worth while to notice that the punishment of treason and murder by simple banishment seemed objectionable, and that on that account choice may have been made of this form of expression, which is at best an astonishing one, and only occurs in this connexion.²⁷²

This appears but a lame account of the matter, and Mommsen seems irritated at having to admit so much as that *interdictio* is a qualified death sentence. He speaks elsewhere ²⁷³ of *interdictio*, 'if

²⁶⁷ Val. Max. iv. 2, 7.

²⁶⁸ *Strafrecht*, p. 936.

²⁶⁹ There is no English and no Latin equivalent for the German 'Bannbruch' and 'bannbrüchig,' which occur in almost every sentence of Mommsen's discussion of this topic. The paraphrase must, of course, be so framed as to include both the man who has gone into banishment and come back and the man who has neglected to go at all.

²⁷⁰ Cicero never attempts to plead that the death of Oppianicus cannot be the subject of a criminal charge, because he had no business to be in Italy. But the wide terms of the *Lex Cornelia*, 'quicumque venenum malum fecerit, vendiderit, emerit, habuerit, dederit' (*Pro Clu.* 54, 158), would probably have included Cluentius's alleged act, without regard to the quality of the victim, just as (in spite of the 'patria potestas') a father who secretly murdered his son was liable (see the obscure case of Q. Fabius Maximus, *Strafrecht*, pp. 174, 614, 618). There is no occasion, therefore, to suppose, with Zumpt (*Crim.-Proc.* p. 466), that the circumstance that Cluentius was stepson to Oppianicus made the difference.

²⁷¹ Cic. in *Verr.* ii. 41, 100.

²⁷² *Strafrecht*, p. 907.

²⁷³ *Ibid.* p. 334, n. 2.

we are to call that a capital proceeding,' and finally ²⁷⁴ says downright that 'interdiction under Sulla's legislation can be included under capital punishment only by straining the sense.' I venture to think, on the contrary, that there is no straining of the sense, and no breach of historical continuity, that a *iudicium capitis*, throughout the republican period, meant, in the mouth of a law-giver (whatever it may have meant in the mouth of an advocate), a sentence of death; and that it is a subsequent question, and legally a subordinate one, whether at different epochs the death sentence might be evaded with more or less ease.

That the practical outcome of such a sentence is in Cicero's time in all cases not death but exile (as Polybius says it was already in his own time) is freely admitted; and this consideration is, to my mind, sufficient to account for the fact that *exilium* is constantly used in a loose way, not only by other writers, but by Cicero himself, ²⁷⁵ in flat defiance of his own doctrine in the 'Pro Caecina,' as the name of the punishment which the law prescribes for offences. If we tried to bring Cicero to book for his inconsistency he would probably retort on the critics—

Per quos non licet esse neglegentem—

and plead that in the one case he was accurately laying down the legal doctrine of what sentence could be passed on a man, in the other he was equally accurately describing what was likely to happen to the man in consequence.

The innovation introduced by Sulla, or his immediate predecessors, consists not in the death penalty nor in its evasion by *exilium*—these are an old story—but in the new arrangements necessary to connect this penalty with trial by jury, which was originally invented for a very different purpose. How was this connexion effected? Unhappily there is no answer to be found in the quotations from Sulla's laws which survive; but an answer may be supplied from elsewhere. When Clodius invaded the mysteries of the Bona Dea in 62 B.C. it was found that none of the standing *quaestiones* were competent to deal with the matter, and that, if it were to be brought before a jury court at all, it must be in virtue of a law passed for the occasion. Two bills were drafted for the purpose, which, however, were precisely the same ²⁷⁶ except in one detail as to the method of selection of a jury, and the bill of the tribune Fufius, Clodius's friend, was accepted. This is how Cicero describes the procedure: ²⁷⁷ *Familiarissimus tuus de te privilegium tulit, ut, si in opertum Bonae Deae accessisses, exulares*. The *exulares* I have already explained—it is a mere short cut anticipating the practical result—there can be no doubt

²⁷⁴ *Strafrecht*, p. 909.

²⁷⁵ See a number of cases in *Strafrecht*, p. 966, n. 3.

²⁷⁶ Cic. *Ad Att.* i. 16, 2.

²⁷⁷ *Paradoxa*, iv. 32.

that what the law really said was *igni et aqua interdicatur*. There was then a sentence of death, though of death easily avoidable, pronounced against Clodius by name. The law was thus a *privilegium* in that it was directed against an individual, but not a *privilegium* of the kind forbidden by the Twelve Tables, because it was not an absolute sentence, but one conditional on the finding of a jury.²⁷⁸ It was of the nature of legislation, not of a *iudicium*, and as such it could be passed not only by the Comitia Centuriata, but by any of the assemblies having legislative power. Conditional sentences of the sort against individuals are not without precedent; we have an example in the sentence passed against Postumius by name *if* he did not appear,²⁷⁹ and a similar one is to be found in the decree²⁸⁰ passed by the tribunes against Camillus in 367 B.C.: *Si M. Furius pro dictatore quid egisset, quingentum millium ei multa esset*.²⁸¹

Now how are we to analyse the part taken by the various actors in the drama of Clodius? The analogy of *iudicia ordinaria* in private suits²⁸² rises at once to the mind. There the praetor in granting his *formula* utters a sentence, all the force of which comes from his magisterial *imperium*; but it pleases him to make the falling of this sentence depend on a condition—namely, the finding of a *iudex* on certain points submitted to him—*SI PARET*. Within the four corners of his *formula* the *iudex* is absolute; he has to find 'yes' or 'no' on whatever questions the praetor has asked him, and his answer is without appeal; but, once he has answered, the effect which that answer is to have is prescribed to him beforehand.²⁸³ Now in the case of Clodius a part analogous to that of the magistrate in civil suits is played by the people²⁸⁴ itself; the people alone can sentence to death; and so it does; but

²⁷⁸ Cicero (*De Domo*, 17, 43) lays stress on this point in pleading against the legality of Clodius's proceedings against himself; it is 'poena in cives Romanos nominatim *sine iudicio* constituta,' which traverses the law of the Twelve Tables, and can only be paralleled by the proscriptions of Sulla.

²⁷⁹ See above, p. 273.

²⁸⁰ Mommsen considers this an invention; certainly Livy, though he found it in some of his authorities, is inclined to disbelieve it. Whether it is true in fact or not it is useful as an illustration of what was considered by early historians to be constitutionally possible. See *Strafrecht*, pp. 882, 1018.

²⁸¹ Livy, vi. 38, 9.

²⁸² See Mommsen's reference to the procedure in private criminal cases, above, p. 240.

²⁸³ Cicero (*In Verr.* ii. 12, 31) amusingly illustrates the dependence of the 'iudex' by inventing a burlesque formula, under which the righteous juror would be obliged to be a wheel in the machinery for evolving injustice.

²⁸⁴ This may seem a hard saying, but I do not mean to ascribe magisterial power to the people, and only say that the use which the people chooses to make of its legislative power here is *analogous* to that which the magistrate makes of his *imperium*. This would not appear very strange to a contemporary of Caesar and Cicero, who lived to see the people prescribe in the *Lex Rubria* exactly what *formulae* the local magistrate was to issue in each case.

in the plenitude of its power it chooses to order that a praetor, guided to an authoritative answer by the *consilium*²⁸⁵ of a bench of *iudices*, shall supply the condition under which alone the sentence is to take effect—*SI ACCESSISSES*. Once the praetor has pronounced the verdict *Fecisse videri* the appointed condition has been fulfilled, and the penalty prescribed falls due automatically on the culprit. The dignity of the magistrate is still saved in that the *quaestio* is his,²⁸⁶ and that it is his official utterance which condemns (see above, p. 240); but the punishment is that of the law and not of the magistrate or the jury, so much so that Cicero argues²⁸⁷ with logical consistency that the penalty may afterwards be altered by the people which imposed it without in any way infringing the sanctity of the *res iudicata*. This stops short with the verdict itself, which nothing can reverse. As the people attaches what condition it pleases to the fulfilment of its order, so it regulates all the details of that condition; especially it prescribes how the praetor is to constitute his *consilium*: the most notable instance, besides this of Clodius, is to be found in the elaborate regulations laid down for the trial of Milo.

The practical result of the introduction of the juror in very early times into civil suits, and the introduction of the jury system at a later period into criminal jurisdiction, is in each case to shift the main responsibility for the decisions arrived at. It is really a devolution of power, a burden taken from the shoulders of the magistrate in civil and of the magistrate and people in criminal trials. But in form the original power and responsibility are always there, and the persons in whom they are vested merely

²⁸⁵ I feel no doubt that the legal position of the jurors always is that they are the 'consilium' of the praetor, though the binding force of their counsel is stiffened by the positive injunction laid on the praetor to pronounce what, after all, is *his* verdict according as they advise. It is formally a mere matter of detail whether the person who asks advice is free to reject the opinion of his counsellors (as is the general at the head of his army) or is practically bound to abide by it (as is the consul in presence of the senate), or is legally compelled to conform to it (as is the magistrate in a *municipium* to the decree of the decurions; see *Lex Ursonensis*, ch. 129). I cannot agree with Mommsen (*Strafrecht*, pp. 213, 443) that 'the retention of their appellation as 'counsellors' is merely a reminiscence, and a respectful presentation of the new position of the magistrate' (see *Lex Acilia*, vv. 57, 60; Cic. *Ad Att.* i. 14, 1, and i. 16, 4). Another conjecture of Mommsen (*Strafrecht*, p. 208), that the presiding magistrate voted along with the jurors as one of his own *consilium*, seems to me very improbable in itself and difficult to reconcile with the remarks of Cicero (*In Verr.* act. i. 10, 32) about Metellus as juror or as praetor: 'malim . . . iurato suam quam iniurato aliorum tabellas committere.' Mommsen's chief argument, from the even number of jurors in the *Lex Acilia*, loses its force when we consider that the law provides no security that the whole fifty shall vote. After the exclusion of those who said 'amplius' (v. 49) and those who sent in blank tablets (v. 54) it would be purely a matter of chance in each case whether the number of those who gave votes which could be counted proved to be odd or even. We find an actual case of equality of votes which puzzled the praetor in Caelius's letter (Cic. *Ad Fam.* viii. 8, 3).

²⁸⁶ *Pro Clu.* 53, 147.

²⁸⁷ *Pro Sulla*, 22, 63.

choose in their own good will and pleasure to realise them in a complicated and conditional rather than in a simple and direct utterance. A conditional command is as much the expression of the will of the party commanding as a conditional legacy is the expression of the will of the testator.

Though the working of the different parts of the machinery is best seen in the case of a *privilegium* like that directed against Clodius, the same principles prevail when the people fulminates its death sentence not at an individual, but at a whole category of persons, on every one in fact who has offended, if it can be shown to the satisfaction of a jury that he has so done. The *locus classicus* in illustration of this is from the First Philippic (9, 23). *Quid? quod obrogatur legibus Caesaris, quae iubent ei qui de vi itemque ei qui maiestatis damnatus sit, aqua et igni interdici? Quibus quum provocatio datur, nonne Cuesaris acta rescinduntur?* Now why does granting an appeal in such cases traverse Caesar's Acts? Evidently because the people, on Caesar's *rogatio*, has already decided what is to be done with such persons. It has sentenced them to death by *ignis et aquae interdictio*. The condition attached to that sentence has accrued, so soon as the jury find in each case that the man is guilty, and the punishment is bound to follow, as the people has ordered. To ask the people again to decide on the particular case is to ask it to reverse a command which on Caesar's request it has uttered. The people has, in fact, exhausted its powers in the fulmination of the sentence and the creation of the jury court, just as the praetor in civil cases exhausts his powers when he issues the *formula* to a *iudex*. If the *iudex ordinarius* had been a delegate, discharging all the functions of the praetor in his stead, there would under the Roman system have been an appeal from the delegate to the delegator, as was actually the case with the *iudex extra ordinem datus* of the principate.²⁸⁸ But under the formulary system it is otherwise; the *iudex* does not act instead of the praetor, but merely supplies information which the praetor happens to want. Thus there can be no appeal; not on the question of fact, for it has pleased the praetor to say that he will take the fact as the *iudex* finds it; nor on the question of the consequence, for the praetor has already prescribed what is to follow, and must not be asked to eat his own words. The same principles apply *mutatis mutandis* to these criminal trials. The law is the utterance of the people, just as the *formula* is the utterance of the praetor. On the strictest analogy appeal to the people is barred by the existence of a law in which the people's answer is already embodied.

To sum up, the system of capital trials before juries under the regulations of Sulla is that the people by a *lex* sentences before-

²⁸⁸ See *Staatsrecht*, ii³. 984.

hand a certain class of criminals to death by outlawry or proscription (*ignis et aquae interdictio*), making the sentence conditional in each case on the finding of a praetor and jury that a particular man is guilty of the crime in question. When the verdict is delivered the condemned man must hurry away from punishment; he must extinguish his personality as a Roman citizen, thus putting himself under a new jurisdiction, which will not take cognisance of things done in a former state of existence. I cannot express my own view of the effect of *exilium* better than in Mommsen's words.

Equally with the dead man there is excluded from Roman criminal procedure every man who is severed from the jurisdiction of Rome. Now since every Roman citizen is subject to that jurisdiction, even when he happens to be abroad, and every foreigner is so subject when he happens to be on Roman territory, it follows that the only persons excluded are foreigners who live abroad, and the Roman citizen can withdraw himself from it only if on the one hand he quits Roman soil (*solum vertere*) and on the other hand attaches himself to some state whose independence is formally recognised by Rome, as a citizen or in such other way that his reception into it annihilates his Roman citizenship.²⁸⁹

Now if, as I believe, this doctrine remains true to the end of the republic, it will follow that the man capitally condemned under Sulla's laws to *ignis et aquae interdictio* will not be quite safe while he remains a Roman, even outside the local limits assigned to the special ban. He is still a man *capite damnatus*, and the state and its officials may, if they please, and if they can get hold of him without violating neutral territory, execute the death sentence implied in the *de capite eius quaerito*, though they no longer call on the private citizen to help in the vengeance or threaten penalties on those who succour the convict. It is only by 'casting his old slough' and commencing a new life as a foreigner that he is fully secure. This is never stated *totidem verbis* in our authorities, but it is implied in the universal presumption that the condemned man *must* have taken the course, so necessary to him,²⁹⁰ of changing his citizenship. We see, in the passage from the 'Pro Caecina,' that *exilium* in the sense of *deponere civitatem*, not merely of removing beyond the bounds, is the sanctuary—the *ara*, the *portus*, the *perflugium supplicii* which gives security. We find that it is a *iustum exilium*, of which the people takes note, that it has been performed by Cn. Fulvius. We see Clodius insulting Cicero after his return,²⁹¹ by asking him, *Cuius civitatis es?* implying that, as he sees him in a whole skin, Cicero must have

²⁸⁹ *Strafrecht*, p. 68.

²⁹⁰ We find much the same sort of presumption in the old comitial trials; it is so obviously the interest of the condemned man to appeal that it is always taken for granted that he has done so (see above, p. 242).

²⁹¹ *De Har. Resp.* 8, 17.

saved it by ceasing to be a Roman, and Cicero²⁹² in turn flaunting in the face of his enemy the decree of the senate in which he is described as *CIVEM optime de republica meritum*. Cicero's claim is that the whole proceedings against him were null and void, and that he was merely driven away by physical violence; but he would hardly have been so anxious to prove, as he does by pages of argument, that he had never ceased to be a Roman, unless it were notorious that a sentence of *ignis et aquae interdictio* would, as a general rule, compel a man to take the step necessary to divest himself of his former nationality.²⁹³ Once this is done the only liability for his former misdeeds which remains is that he is obliged to avoid the soil of Italy, which he is forbidden, even as a foreigner, to tread.

As a matter of fact it was probably no great sacrifice to the banished man to surrender his Roman citizenship. He cannot return to Italy in any case; his political career, if he had one, is ruined. Even if he becomes 'subject to the axe and the rods,' no Roman magistrate is likely to use them against him, and there is some value in the possession of a domicile and a franchise by virtue of which he may claim protection at least when he travels throughout the Roman world, excepting only Italy. We know of one case at least in which such a transformation actually took place. C. Memmius Gemellus, the *Memmi clara propago* of Lucretius, was condemned in Pompey's sole consulship (52 B.C.), and died apparently before the restoration of the victims of that year by Caesar at the end of 49 B.C. Cicero writes²⁹⁴ in the year 46 B.C. recommending to the governor of Achaia a young man, Lyso, *quem Memmius, quum in calamitate exilii sui Patrensis civis factus esset, Patrensi legibus adoptavit, ut eius ipsius hereditatis ius causamque tueare*. There can be no kind of doubt that Memmius had ceased to be a Roman. There is only one obstacle to our putting his case precisely on the same footing with that of the exile to whom Polybius ascribes 'safety' 'in the city of Tibur or of Neapolis, or others with which the Romans have a treaty,' and that is that Patrae was not, till after the battle of Actium, a 'free state.' The same difficulty applies in the case of Smyrna, of which Caepio and Rutilius Rufus became citizens.²⁹⁵ It may, perhaps, be an answer that, when the Romans renounced the right

²⁹² *De Domo*, 32, 85.

²⁹³ I venture to think that this is a more legitimate inference than Mommsen's (p. 978, n. 1). 'The right of citizenship is, as Cicero often insists, not denied him by Clodius's law, but the ordinary punishment of expulsion from Italy is aggravated by confiscation, &c. If this were correct Cicero would have had an easy task—only to point out that his case was not worse than that of other 'damnati'—whereas his whole contention is that he is not in the same boat with them. What would have been the sense of Clodius's question if the intention of his decree had not been to compel Cicero 'mutare civitatem'?

²⁹⁴ *Ad Fam.* xiii. 19, 2

²⁹⁵ *Cic. Pro Balbo*, 11, 28.

of conquest, and restored to any state 'its city, its territory, and its laws' (this is said ²⁹⁶ of Therma, not a 'free state'), they so far recognised its separate existence as to enable, *seu legibus seu moribus*, a Roman to be received there with the same effect as if it were technically independent. It is curious, however, that in two out of the three cases the exile is known not to have gone in the first instance to the town which became his eventual home. Rutilius resided at one time at Mitylene, where he was to be found when Mithridates made his great massacre of Romans in 88 B.C.²⁹⁷ Memmius certainly was at one time settled at Athens, where he owned the house of Epicurus,²⁹⁸ and afterwards at Mitylene. Now if Memmius first became a citizen of Athens there would be no obstacle to his holding the citizenship of Patrae as well; for Cicero tells us ²⁹⁹ that it was quite possible for a man to be a citizen of two Greek states simultaneously, though he could not hold the citizenship of any Greek state along with that of Rome.

The system, as established by Sulla, underwent no alteration at the hands of Caesar, except that on his proposal the Roman people chose to attach a fresh consequence to condemnation by a jury court—namely, the confiscation of half the goods of the convict. This makes no difference in principle. The people is omnipotent in the matter, and may ordain what consequences it pleases. Under Augustus likewise, though the importance of the jury courts is diminished by the erection of fresh tribunals, with more wide-reaching powers, nothing is done to alter the situation of such persons as are still brought before the juries. With Tiberius we come to an important change, the results of which are clearly visible in the jurists, though we have only the most meagre account in the history of how they came about. Dio Cassius (lvii. 22) tells us under the year 23 A.D. that 'Tiberius denied to those who were interdicted from fire and water the right to make a will, and this regulation still holds good.' The capacity to make a Roman will is, as Mommsen points out,³⁰⁰ 'the most tangible test of Roman citizenship.' When, therefore, we find in a jurist of the third century first ³⁰¹ that *deportatio in locum aquae et ignis interdictionis successit*, and secondly ³⁰² *media capitis deminutio dicitur, per quam sola civitate amissa libertas retinetur, quod fit in eo cui aqua et ignis inter-*

²⁹⁶ Cic. *in Verr.* ii. 37, 90.

²⁹⁷ Cic. *Pro Rab. Post.* 10, 27. True he had not at that time renounced his citizenship, for he had to lay aside his toga by way of disguise. Still, as he was not condemned under a 'capital' sentence, but only for *repetundae*, he might choose his time, and may have become a Mitylenean or a Chian before he shifted his quarters to Smyrna.

²⁹⁸ Cic. *Ad Fam.* xiii. 1.

²⁹⁹ *Pro Balbo*, 12, 30.

³⁰⁰ *Strafrecht*, p. 957.

³⁰¹ Ulpian, *Dig.* xlviii. 19, 2. The phrases 'igni et aqua interdicere' and 'exilium' remain, however, and are used indifferently with 'deportare'; see Tac. *Ann.* xii. 42, 5, and xvi. 9, 1.

³⁰² Ulpian, *Reg.* xi. 12.

dicitur, it does not require much ingenuity to piece together the story into a consistent and logical whole.

It appears then that Tiberius wished to sharpen the penalty of *ignis et aquae interdictio*, which resulted from condemnation by a jury, and which was likewise a sentence sometimes pronounced by the senate or the emperor. Sulla and the triumvirs had shown him the way in their proscriptions when they blocked off the exit into the 'harbour and the sanctuary' of exile, and so made the 'capital' sentence effectively one of death. Tiberius did not, however, choose to go as far as this; he took away indeed the old refuge, but provided a new and much less agreeable 'sanctuary' from the executioner. He seized on the person of the convict and deported him to an island, where he was detained a prisoner. By this means *exilium* was, of course, rendered unavailable; it was no longer physically possible for the condemned man *solum vertere* to Massilia or Rhodes, where he could shuffle off his Roman citizenship in exchange for a fresh one, and make a will, if he pleased, under the laws of his new home. So far then his Roman citizenship remains, and if he makes a will it must be by Roman law. But Tiberius did not intend that his victim should retain the Roman citizenship, though he had debarred him from the constitutional means of getting rid of it. He was, therefore, driven to the expedient of taking it away from him by an act of power—applying the *solvitur ambulando* to the impossibility, which Cicero had alleged, of depriving any Roman against his will of citizenship or liberty. The practice of the republic had indeed reduced both impossibilities to little more than legal fictions. It could hand over a thief in chains to work for the man who had caught him, or an insolvent debtor for his creditor; but these men were *pro servo*, not *servi*, their technical *libertas* being untouched, as is shown by their capacity to acquire property by the Roman method of *usucapio*.³⁰³ It could in the same way practically deprive a man of citizenship by putting him in such a position that he was obliged to give it up, if he wished to save his throat.³⁰⁴ The principate made short work of these niceties. It sent criminals to hard labour for life in the mines and decreed that they were slaves, and (as a slave must have a master) that they were 'slaves of their punishment,' *servi poenae*; and in like manner, as a less severe penalty, deported men of rank to an island, and sent mean persons, who were convicted, to 'public works,' in both cases under the loss of citizenship, but with the retention of technical

³⁰³ See Ortolan, *Inst. Iustinian.* iii. § 2027.

³⁰⁴ Rome got rid of an unwelcome citizen somewhat as Donald M'Aulay in the *Legend of Montrose* counselled his chief: 'I advised him to put the twa Saxon gentlemen and their servants cannily into the pit o' the tower till they gae up the bargain o' free gude-will; but the Laird winna hear reason.'

'freedom.' All who underwent this penalty were reduced to a condition analogous to that of the *peregrinus dediticius*, of whom it is written³⁰⁵ 'that he cannot make a will, either as a Roman citizen, because he is a foreigner, or yet as a foreigner, because he is not the citizen of any particular state, according to whose laws the will can be drawn.' If my presentation be correct, the *interdictus* down to the time of Tiberius had a right to make a will, not indeed as a Roman, but as a foreigner—'the citizen of some particular state'—and of this capacity he was deprived (as Dio says) by the action of Tiberius.

It is not quite certain whether after the year 23 A.D. *ignis et aquae interdictio* is always accompanied by *deportatio*. Ulpian's words (see above, p. 282), *deportatio in locum interdictionis successit*, seem to indicate an answer in the affirmative. Mommsen³⁰⁶ knows no instance to the contrary. On the other hand, as he points out, Gaius³⁰⁷ mentions the *interdicti* and the *deportati* as two classes of persons who may not make a will. If they are separate, then Tiberius's law, which deprives the convict of Roman citizenship without allowing the possibility of taking up the citizenship of another state, though suggested by the circumstances of the *deportatus*, must have been worded so as to cover the other case as well. Probably, however, *deportatio* is meant to be the fate of every *interdictus*, and the two categories are mentioned by Gaius only to meet the case of the convict who dies before an island has been assigned for him.³⁰⁸ In any case we never again hear of a condemned Roman becoming the citizen of another state.

The universal practice of *deportatio* is pretty clearly shown by an instructive case mentioned by the younger Pliny.³⁰⁹ A certain Licinianus was accused as an accomplice in the incest of a vestal whom Domitian buried alive. In terror at the fate in store for him *ad confessionem confugit quasi ad veniam*; his counsel announced the plea in words which Hortensius might have used of Verres going to Massilia, *ex advocato nuntius factus sum: Licinianus recessit*. Evidently, however, this retirement into voluntary exile is no longer the end of the matter. Though Domitian exclaims in delight, *Absolvit nos Licinianus*, and declares that he will not press hardly on him, he is no longer allowed to find refuge on neutral ground. The most the emperor can do for him is to let him plunder his own goods before they are confiscated, and to assign him a pleasant island: *exilium molle velut praemium dedit, ex quo tamen postea clementia D. Nervae translatus est in Siciliam*. In

³⁰⁵ Ulpian, *Reg.* xx. 14.

³⁰⁶ *Strafrecht*, p. 975.

³⁰⁷ *Dig.* xxviii. 1, 8.

³⁰⁸ This could be done only by the 'princeps' or 'praefectus urbi,' whereas the sentence of 'ignis et aquae interdictio,' which led to it, might be pronounced by the senate or entailed by the verdict of a jury.

³⁰⁹ *Ep.* iv. 11.

Sicily he lives as an alien, and gives lessons in elocution, dressed in the Greek pallium, *carere enim togae iure, quibus igni et aqua interdictum est*.

Here, then, we have the most complete picture of the disappearance of the old *per fugium supplicii*, afforded by the emigration of a Roman to a new home of his choice. The words *exilium permitti*³¹⁰ are no longer applicable to him. It is no longer possible *solumvertere exilii causa*. The phrase has lasted continuously for many centuries. It is applied by Livy to Caeso Quinctius and to the decemvirs in the primitive republic;³¹¹ it appears in the praetors' edict as quoted in Cicero's earliest speech;³¹² it is the technical phrase which Cicero interprets in middle life in his general discussion on exile in the 'Pro Caecina,' and he uses it again in his old age after Caesar's death when he says³¹³ of Antony's convict jurymen *legitimam habent excusationem solum vertisse exilii causa*. I believe that not only the phrase, but its signification remained unchanged through all these ages, and that it is only with Tiberius that the word and the thing together disappear, and direct deprivation of the citizenship (called equally with physical death a 'capital' punishment)³¹⁴ is substituted for the voluntary putting of it away in a new home.³¹⁵

I have laid stress on what I believe to have been the continuity of the various developments of 'capital' punishment at Rome, because this is one of the few really important points as to which I find myself obliged, with much hesitation and much against my will, to disagree with Mommsen on a matter of legal antiquities. Mommsen believes that there is a great breach of continuity in the history of *exilium*, and he places this breach at the legislation

³¹⁰ Sallust, *Cat.* 51, 22: 'Aliae leges condemnatis civibus non animam eripi sed exilium permitti iubent.' To my mind 'permitti' is the all-important word in this sentence, showing that under Sulla's laws, as earlier, exile was an evasion conceded to the man sentenced to death, conceded by the fact that the law ordered him to be tried under a procedure not admitting of previous arrest. Mommsen, on the other hand (*Strafrecht*, p. 966), sees in the use of the past tense 'condemnatis' an important distinction between this system and that described by Polybius (above, p. 249). Surely this question of time is but a petty difference. It is difficult to see how Polybius's condition, that the man must go 'before the last tribe has voted,' could be maintained after the ballot was introduced (in 107 B.C.) into comitial trials. At any rate there were jury trials in 'capital' cases before Sulla (*Cic. Pro Rosc. Amer.* 5, 11; *Pro Clu.* 55, 151), and the condemned went into exile. Even supposing the change to come into effect only with Sulla's legislation, all that it comes to is that the man is allowed a little more insight into what the verdict is before he has to make up his mind to go; but he has often seen enough before it comes to this. Verres and probably many of the Catilinarians forestalled their sentence by departure.

³¹¹ Livy, iii. 13, 9; 58, 9.

³¹² *Pro Quinct.* 19, 60.

³¹³ *Philipp.* v. 5, 14.

³¹⁴ Paulus, *Dig.* xlviii. 1, 2: 'per has enim poenas eximitur caput de civitate.'

³¹⁵ When Horace remarks (*Ep.* i. 11, 17) that while a man remains 'incolumis' Rhodes and Mitylene are of no more use to him than a great-coat in the dog-days, he implies that in his time the Roman might still select one of these free states as a shelter if the icy breath of the law overtook him.

of Sulla. In the introductory book of the 'Strafrecht' he anticipates this conclusion. It will be convenient to quote this passage first, and then to develop his theory by means of extracts from the latter part of the work. The first-named passage (p. 73) is as follows :—

The interdiction of the later law, the relegation out of Italy under penalty for breaking the bounds, which was introduced by Sulla amongst the penalties for citizens, and is wholly distinct in theory and practice from the ancient *exilium*, will be treated of in the fifth book.

The *relegatio* with which this theory starts has already been noted above (p. 235) as a part of magisterial *coercitio*. It is defined as the limitation by the authorities of the free choice of a place of residence, whether by a command to leave a certain locality and never more to enter it—that is to say, by expulsion—or by a command to go to a certain locality and not to leave it—that is to say, by internment.³¹⁶

To expulsion in this sense Sulla added, such is the theory, the forbidding of return on pain of death by the *ignis et aquae interdictio* hitherto practised only against aliens.

In the legislation of Sulla³¹⁷ it appears as the punishment for treason and murder, and in subsequent penal statutes it was employed in like manner for *vis*, for *ambitus*, and for other offences. . . . In its essence³¹⁸ Sulla's innovation is not so much that the penalty for transgressing the bounds, which follows of course on all relegation, is raised to the punishment of death as that in this manner relegation, which had hitherto been a merely administrative act, is provided with legally defined local limits, and attached to specific offences, and is thus introduced into the criminal law. . . . The interdiction³¹⁹ for a term of years or for life (generally unaccompanied by confinement to one place), as Sulla ordained it, and as it was practised until the time of Tiberius, does not alter the man's personal standing; the *interdictus* retains the citizenship and all the rights that accrue to it.

Finally, a little lower down (p. 979) Mommsen continues—

We must not disguise the astounding fact that a lawgiver such as Sulla fixed expulsion from Italy, without further legal consequences either for person or for property, as sufficient atonement for the most heinous crimes, even for treason and murder, and treated it as practically the severest criminal penalty. It is possible, however, that supplementary regulations or customs, especially concerning common crimes and offenders of the lower class,³²⁰ have remained unknown to us; at least it is obvious that the order of proceedings with which we are acquainted has regard especially to offenders belonging to the higher social circles.

Such is the theory: in discussing it the best order will be to begin with *relegatio*, which I did not notice in my attempt to trace the main lines of development; my reason for this omission is

³¹⁶ *Strafrecht*, p. 965.

³¹⁷ *Ibid.* p. 972.

³¹⁸ *Ibid.* p. 973.

³¹⁹ *Ibid.* p. 978.

³²⁰ On this matter see above, p. 272 n. 249.

that I believe the simple expulsion of a citizen to be a separate procedure, a strand not inwoven into the system of capital penalties, but running parallel to it throughout the history. Leaving out of account the use of *relegatio* as a mere method of arbitrary *coercitio* (above, p. 235), there are, so far as I know, only two cases which I should acknowledge as falling under this head in republican times.³²¹ The first is that of M. Fulvius Nobilior, relegated in 180 B.C. for a military offence by decree of the senate to a spot beyond New Carthage, in Spain. In his case the opportunity of exiling himself and changing his state was precluded by his internment. He would, therefore, retain formally his Roman citizenship, of whatever use that might be to him. The other case is that of persons condemned under Cicero's law *de ambitu*, who were to be expelled from Italy for ten years. A temporary sentence could never compel a man to renounce his state.³²² Under the principate *relegatio* becomes more frequent, and we are better able to measure the gulf which separates it from *exilium* or *interdictio*. The most striking instance of a *relegatus* is the poet Ovid, who repeatedly lays stress on the distinction. The following lines (Trist. v. xi. 9) may serve as an example:—

Fallitur iste tamen quo iudice nominor exul.

[Caesar] Nec vitam nec opes nec ius mihi civis ademit;
Nil nisi me patriis iussit abesse focis.
Ipse relegati non exulis utitur in me
Nomine.

It is clearly implied here that in the reign of Augustus the *exul* does lose the rights of a citizen and that the *relegatus* does not lose them. When, under Tiberius, 'deportation took the place of interdiction from fire and water,' relegation was left just where it was before; it was a comparatively light punishment, which could be inflicted in its original form of simple expulsion from or of internment within the limits of a province by the authority of any governor. The *relegatus* retains his citizenship and his right to make a will, whereas the *deportatus* loses them. Since, then, the opposition between *exul* and *relegatus* which we see in Ovid is continued in the opposition between *deportatus* and *relegatus*, it seems only reasonable to conclude that *ignis et aquae interdictio*,³²³ which forms

³²¹ Livy, xl. 41, 10, and Dio Cass. xxxvii. 29, 1.

³²² The rule held under the principate, when condemnation for a term of years to the mines or to 'deportatio' did not act as depriving the criminal of liberty or of citizenship respectively, as such a sentence did when inflicted for life; *Dig.* xlviii. 19, 28, 6. That Cicero sometimes calls even the temporary penalty 'exilium' (e.g. *Pro Murena*, 23, 47, and 41, 89) is only a loose and popular way of speaking. Ovid of course does the same in pathetic descriptions of his own fate, though the lines quoted in the text show that he knew that the expression was incorrect.

³²³ Though the verb 'interdicere' (not 'igni et aqua interdicere') in a general

the connecting link between *exilium* and *deportatio*, is equally opposed to *relegatio*.

The issue between Mommsen's theory and what I understand to be the obvious interpretation of *ignis et aquae interdictio* under Sulla's ordinances may perhaps appear to be largely a question of words. It is agreed on both hands that the man is liable to be put to death if he does not leave Italy, or if, having left, he comes back again; likewise that if he goes away and keeps away he will not in practice be put to death. It does not seem to make much difference whether we say 'he is sentenced to leave Italy on pain of death' or 'he is sentenced to be put to death if he does not retire from Italy.' Mommsen puts it in the one way for all offenders but one, and in the other way for the parricide; yet the result for all is alike, so far as the avoidance of death is concerned. The reason for preferring the second form is that it agrees with the logical order of ideas as presented by Cicero in the 'Pro Caecina,' and likewise with the practice of the second century B.C. as related by Polybius. In both we find that the threat of death comes first, and the evasion of it by self-banishment follows, not that a sentence of banishment comes first, with the threat of death to follow if banishment be evaded.

But the important question is whether this retirement (commanded, as Mommsen would maintain, permitted, as I should prefer to say, with Sallust³²⁴) is a mere physical removal, or whether it further implies some act by virtue of which a man ceases to be a Roman. As it is beyond dispute that before Sulla and after Tiberius the *exul* ceases to be a citizen, the burden of proof lies heavy on the interpreter who maintains, in spite of the complete silence of our authorities as to any change, that a different theory and practice obtained in the intervening period. What, then, is the proof of the proposition that in the interval between Sulla and Tiberius a Roman condemned on a 'capital' charge retained his Roman citizenship? I know of only two pieces of purely circumstantial evidence. The first is³²⁵ that the young Oppianicus, upon the death of his father, a man convicted of poisoning, is found to be owner of Nicostratus, one of his father's slaves.³²⁶ The elder Oppianicus must therefore, Mommsen argues, have been capable of bequeathing property. Possibly; but that does not tell us under the laws of what state Oppianicus's will was made. Mommsen assumes that it was under Roman law, and that therefore Oppianicus was a Roman citizen; but he may very well, after his condemnation, have slipped across the Straits of

sense for 'forbidding a particular place' is frequently used in connexion with simple expulsion. See *Dig.* xlviii. 22, 7.

³²⁴ See above, p. 285 n. 310.

³²⁵ *Strafrecht*, p. 978.

³²⁶ *Cic. Pro Clu.* 63, 176.

Messana and obtained a domicile as a citizen of one of the *foederatae civitates* of Sicily. In that case he would make his will according to the laws of Messana or Tauromenium; a legacy under such an instrument would pass the slave to his son, just as well as a legacy under a Roman will.

The second instance adduced by Mommsen in the same place requires more discussion. In the 'Lex Iulia Municipalis,' verse 118, we find amongst those who are disqualified for municipal office *queive iudicio publico Romae condemnatus est erit, quocirca eum in Italia esse non liceat*. This, says Mommsen, would be unnecessary if the condemned man was no longer a citizen. Supposing this to be granted, I think it by no means follows that what was unnecessary could not have found a place in the clauses of a law. The Romans were fond of legal verbiage and of heaping up precautions, sometimes against what was already really barred.³²⁷

I do not, however, feel quite so sure that it was unnecessary. The clause is a repetition, as applied to the municipal senates, of what Cicero tells us³²⁸ was the rule at Rome—*Ubi cavisti ne meo loco censor in senatum legeret? quod de omnibus, etiam quibus damnatis interdictum est, scriptum est in legibus*.³²⁹ Now, as we have seen, it was very difficult to prove the *animus exulandi* which was essential to the *mutatio civitatis*; and this might have led to awkward consequences. Suppose that Milo had written to say that he was eating mullets certainly at Massilia, where Roman law could not touch him, but that he had no intention of becoming a Massiliot; might not the next censor, by way of demonstrating his political sympathies,³³⁰ have placed his name on the senatorial roll? Marcius Philippus felt doubt as to passing over his uncle, Appius Claudius, who was a victim of some political trial in the Marian troubles;³³¹

³²⁷ There is an instance in the *Lex Acilia*. Verse 22 prescribes that the accuser, in naming his hundred 'iudices' out of the 'album,' is not to choose any magistrate or senator, whereas such choice is already abundantly provided against by the circumstance that senators are by verse 16 already excluded from the list out of which the choice is to be made. Zumpt (*Crim.-Recht*, II. i. 125) rather than admit such a superfluity takes refuge in the absurd supposition that these 'iudices' were not selected from the 'album,' but from outside. He supplies us with a useful object lesson as to the danger of arguing in this way.

³²⁸ *De Domo*, §1, 82.

³²⁹ Exclusion is mentioned as the result of conviction in certain cases in the *Lex Acilia*, verse 13—'*queive quaestione iudiciove publico condemnatus siet quod circa eum in senatum legei non liceat*.' Yet persons condemned in Gracchus's time for murder or conspiracy, whether they were tried by special commissions or by standing jury courts, must certainly have ceased to be Romans. We find the same disability specially imposed by a *Lex Cassia* of 104 B.C. on persons condemned by the people (see *Strafrecht*, p. 1000).

³³⁰ If I mistake not, it was proposed in an Irish constituency to elect as member of parliament a Fenian convict, still in gaol; and his supporters only desisted when they found that votes given for the convict would be simply thrown away, and that his competitor could claim the seat on a scrutiny.

³³¹ *De Domo*, §2, 84.

and of Cicero himself Cotta swore that if his censorship had been contemporaneous with Cicero's exile he would have 'read out his name' in his proper place notwithstanding. If it were prudent to guard against this at Rome it would be even more necessary in a *municipium*, where the convict might well be a person of local importance and popularity. It was the policy of the Romans to avoid any such controversies by positive prohibitions under penalty, and further by heaping *ignominia* on the heads of persons convicted, to heighten the inducement to get out of it all by renouncing their country. Yet another point may be noticed. The phrase *quocirca eum in Italia esse non liceat* will cover more cases than 'capital' ones. A man condemned under Cicero's law *de ambitu* would be in this case³³² for the next ten years; yet no one supposes that he ceased to be a Roman, and so if Caesar wished to exclude him from a town council he would be obliged to declare him ineligible under some such clause as this. On the whole then I think that we cannot say that this clause of the 'Lex Iulia Municipalis' proves anything decisively against the proposition that the man actually condemned under a capital charge before a jury, like the man on the point of condemnation before the *comitia*, was in a position in which it was so obviously needful for him to change his state that the law assumed³³³ that he had done so.

Thus the evidence for Mommsen's theory seems to crumble away, while the objections to it remain unanswered. Mommsen is obliged to ignore Cicero's elaborate exposition of the true doctrine of *exilium* in the 'Pro Caecina.' How could Cicero have dared to proclaim in open court that 'in no law of ours is any crime punished by exile, as it is in other states,' unless he had been sure that his hearers recognised that the banishment, which, when he spoke, was notoriously the result of conviction, was not inflicted by direct sentence of the law (as it was in the case of *relegatio*), but was brought about indirectly by the effect which the fear of consequences produced on the will and the choice of the convict? Where,

³³² It is pretty clear from the peroration of Cicero's speech that Murena, if condemned, must have quitted Italy, not only Rome. I see no reason for supposing that the penalty was otherwise than a temporary one when the *Lex Iulia* was enacted, in 46 B.C. Mommsen, indeed, thinks (p. 874) that Pompey in his sole consulship made the banishment permanent. There is no evidence, however, that the 'heightened penalty' ascribed to Pompey's legislation lasted longer than trials before the special courts of the year 52 B.C.

³³³ On the other hand a man who lay under no such necessity, but who had through ignorance performed acts which properly involved renunciation of Roman citizenship, was relieved from these consequences; see Cic. *Pro Balbo*, 12, 30: 'Quo errore ductos vidi egomet nonnullos imperitos homines, nostros cives, Athenis in numero iudicum atque Areopagitarum certa tribu, certo numero; quum ignorarent, si illam civitatem essent adepti, hanc perdidisse, nisi postliminio recuperassent.' Here evidently the law argues, from the absence of need, that the man was only masquerading and had really no 'animus exulandi,' so he does not actually become an Athenian or lose his Roman franchise.

again, if we accept Mommsen's hypothesis, are we to find the point of Clodius's taunt when he asked Cicero to what state he belonged? or how shall we account for Memmius adopting an heir under the laws of Patrae? ³³⁴ or what sense are we to make of Ovid's insistence that he, unlike a real *exul*, has never lost the rights of a citizen? Above all, how are we to explain the *de capite eius quaerito* of Sulla's law, which Mommsen finds 'astonishing,' but which appears to me to be absolutely crushing to his theory? For it is impossible to escape from this by the plea of rhetorical exaggeration. Advocates from Lucius Crassus downwards ³³⁵ play so freely not only with *caput*, but with *vita* and *sanguis*, that there is no difficulty in conceding Mommsen's assertion that 'the Roman who is not allowed to tread the soil of Italy is in the language of the orators no Roman at all.' ³³⁶ But all this is beside the mark; we have here to do not with the metaphors of a pleader but with the calm and matter-of-fact language of a law; when the *ipsissima verba* of a statute read *de capite quaerito*, surely these words must be taken to mean what they say. In presence of all these considerations ³³⁷ not even the authority of Mommsen can convince me that Sulla introduced any new-fangled principle into 'capital' trials. On the contrary I believe that the principle remains the same throughout, and that the successive applications of it develop regularly and logically out of one another from the time of king Tullus Hostilius to the time of the emperor Tiberius. If we hold fast to this doctrine we are really following the spirit of what Mommsen has taught us; we remove what is only an excrescence from his general presentation of the Roman criminal law, and restore consistency to the splendid and orderly whole which his genius has evolved out of the chaos of conflicting evidence.

I have now gone through the principal questions which lie along the main lines of the history of the Roman criminal law. To enter into any by-paths of discussion, however interesting, is impossible within the limits, already most generously extended for me, of an article in this Review. I can only end, as I began, by expressing my deep sense of the thanks due by the student of Roman history to the author of this great work.

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³³⁴ I do not think that it is pure accident that the Romans mentioned in the *Pro Balbo* (11, 28) as having become citizens of other states all belong to a past generation, but still less do I think that Cicero could find no cases in his own time. The silence is due, I think, to the circumstance that living men could not with politeness be reminded of the 'calamitas exilii sui.'

³³⁵ Cic. *De Orat.* i. 52, 225.

³³⁶ *Strafrecht*, p. 978, n. 2.

³³⁷ See above, pp. 270, 275, 280, 281, 287.