

Section 8. *INIURIA*, DEFAMATION AND SELF-HELP

A. PRIMARY SOURCES

1. The *actio iniuriarum*

a. Aulus Gellius, *Noctes Atticae* 20.1.13

(CD trans., cf. XII Tables 8.4 (above, p. 292))

LABEO ... in the books that he wrote on the twelve tables: ... L. Veratius was an egregious nuisance and a frightful fool besides. He enjoyed slapping free men in the mouth. A slave followed him carrying a purse full of asses, so that whenever he slapped someone, he immediately ordered that twenty-five asses be counted out according to the XII Tables. On account of this, (Labeo) says, the praetors thought that this law was obsolete and to be abandoned, and they made an edict that they would give *recuperatores* for estimating *iniuria*.

b. Gaius, *Institutes* 3.220–5

(above, p. 180)

c. D.47.10.15

(Watson trans.)

ULPIAN, *Edict*, book 77: The question is also raised by Labeo whether, if a person derange another's mind by a drug or some other means, the action for insult lies against him; and he says that it does. **1.** If someone be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck, the wrongdoer will be liable to an *actio utilis* for insult. **2.** The praetor says: "One who is said to have loudly shouted at someone (*convicium cui fecisse*) contrary to sound morals or one through whose efforts such shouting is effected contrary to sound morals, against him I will give an action." **3.** Labeo says that shouting is an affront. **4.** The term derives from a mob or gathering, that is, a combination of voices. For when several voices are directed at one person, that is called a shouting, as it were a gathering of voices. **5.** But the praetor's qualification "contrary to sound morals" shows that he does not condemn all loud calling after a person, but only that which offends against sound morals and is directed to the disgrace and unpopularity of an individual. **6.** Labeo says that "contrary to sound morals" is to be taken as referring not to those of the offender but to those of this city. **7.** Labeo also says that there can such a shouting against one who is absent no less than one who is present. If, say, a person comes to your house while your are away, there is said to be such a shouting, and the same applies if he should go to inn or tavern. **8.** Not only the person who actually gives tongue is guilty of such shouting but also he who incites others to or causes the clamor. **9.** "Someone" is inserted in the edict not without purpose; for if the shouting be against a nonspecific person, there is no legal consequence. **10.** If a man organize a shouting against someone but it does not take place, he will not be liable. **11.** From all this it will be apparent that not all vituperation constitutes a shouting. **12.** Only that which is effected loudly in a crowd, whether by one or several, constitutes a shouting. What is not said loudly and in a crowd is not properly called shouting, but abuse with a view to humiliation. **13.** If some astrologer or one offering some other unlawful foretelling, on being consulted, should say that someone is a thief, when he is not, there will be no action for insult against him, but he liable under imperial enactments. **14.** An action for insult arising out of such shouting is given neither to nor against heirs. **15.** If someone accost maidens, even those in slave's garb, his offense is regarded as venial, even more so if the women be in prostitute's dress and not that of a matron. Still if the woman be not in the dress of a matron and someone accost her or abduct her attendant, he will be liable to the action for insult. **16.** By "attendant," we mean one who escorts and follows, whether (as Labeo says) free of slave, male or female; and so Labeo defines an

attendant ass “one whose role is to follow someone for the purpose of companionship, in public or private, who is abducted.” Slaves who accompany children to school are included among attendants. **17.** As Labeo says, the person regarded as abducting is not he who begins to lead the attendant astray but he who achieves the result that the attendant is not with the mistress. **18.** Not only he who leads away by force is regarded as abducting but also one who persuades an attendant to desert the mistress. **19.** The edict applies not only to one who abducts an attendant but also to one who accosts or follows one of them. **20.** To accost is with smooth words to make an attempt upon another’s virtue; this is not a shouting but an attempt contrary to sound morals. **21.** One who uses base language does not make an attempt upon virtue, but he is liable to the action for insult. **22.** It is one thing to accost, another to follow. A person accosts who verbally solicits chastity; he follows who silently walks close behind; and assiduous proximity virtually reveals something disreputable. **23.** It must, though, be remembered that not everyone who follows or accosts is caught by this edict (nor does one who so acts, with a view to play together or to perform some proper office, fall forthwith within the edict) but only he who does so contrary to sound morals. **24.** I think that a fiancé also should be able to bring the action for insult; for there is an outrage to him in any affront that his betrothed may suffer. **25.** The praetor says: “In order that nothing be done that is shaming, if anyone acts to the contrary, I will deal with it according to the nature of the issue.” **26.** Labeo says that this particular edict is superfluous since we can proceed under the general edict on insults. But it appeared to Labeo himself (and he says so) that the praetor wished to speak specifically of this matter, for things which happen and merit redress may appear to be ignored unless they are specially mentioned. **27.** The praetor bans generally anything which would be to another’s disrepute. And so whatever one do or say to bring another into disrepute gives rise to the action for insult. Here are instances of conduct to another’s disrepute: to lower another’s reputation one wears mourning or filthy garments or lets one’s beard grow or lets one’s hair down or writes a lampoon or issues or sings something detrimental to another’s honor. **28.** When the praetor says, “if someone acts to the contrary, I will deal with it according to the nature of the issue,” this means that the praetor has the widest discretion so that if there be anything that influences him in the person of the plaintiff or of the defendant or in the nature of what was done or in the scale of the affront, he will not hear the plaintiff. **29.** Papinian says that if, after a complaint has been lodged with the emperor or another magistrate, a person abuses the character of another, proceedings for insult will follow. **30.** He also says that one who sells the award to be made in a court decision, as through giving the money, and who is cudged on that account by the governor is regarded as condemned for insult; he is treated as having committed an affront to the person in whose decision he was trafficking. **31.** If someone wrongfully appropriates another’s assets or only one of them, he is liable to the action for insult. **32.** Similarly, if someone announce that he is selling a pledge to denigrate me, as though he had received it from me, Servius says that I can bring the action for insult. **33.** If someone summon a nondebtor as if he were a debtor, by way of insult, he is liable to the action for insult. **34.** The praetor says: “Where a man shall be said to have thrashed another’s slave or to have submitted him to torture, contrary to sound morals, without the owner’s consent, I will give an action. Equally, if it be said that something else be done, I will, according to the circumstances, give an action.” **35.** If someone so inflict an outrage upon a slave that it be done to his master, in my view the master can bring the action for insult in his own right; but if the beating was not directed to the master, the outrage perpetrated upon the slave as such should not be left unavenged by the praetor, especially if it occurred through a thrashing or through torture; for it is obvious that the slave himself feels such things. **36.** If a man thrash a slave that he owns in common, he will not be liable to this action since he did what did by right of ownership. **37.** No more could a fructuary proceed against the owner or the owner against the fructuary in such circumstances. **38.** The words “contrary to sound morals” are inserted because not everyone (who) thrashes, but he who thrashes contrary to sound morals is made liable. One who does so by way of correction or reform is not liable. **39.** Hence, Labeo raises the question: If a municipal magistrate whips my slave, can I have the action against him as having done so contrary to sound morals? And he says that the judge must investigate what my slave was doing for him to thrash him; if he beat him for an audacious attempt upon his office and insignia, the magistrate must be absolved. **40.** A person who beats someone with his fists is also loosely said “to thrash.” **41.** By torture we mean the infliction of anguish and agony on the body to elicit truth. Mere interrogation or mild intimidation does not come within this edict. The word “torture” will also include what are called “bad quarters.” It is when an investigation is conducted with force and bodily torment that there is said to be torture. **42.** But if, on the

master's instructions, someone puts a slave to the question but exceeds the limit, Labeo says that he liable to the action. **43.** The praetor says: "If anything else be done, I will, having looked into the matter, grant an action." If, indeed, a slave be thrashed or put to the question with torture, an action will be granted against the wrongdoer without more; but if the slave suffer some other affront, an action will not issue without the praetor looking into the matter. **44.** Thus, the praetor does not promise an action for every affront in respect of a slave; if the slave be lightly struck or mildly abused, the praetor will not give an action; but if he be put to shame by some act or lampoon, I think that the praetor's investigation into the matter should take into account the standing of the slave; for it is highly relevant what sort of slave he is, whether he be honest, regular and responsible, a steward or only a common slave, a drudge or whatever. And what if he be in fetters, branded, and of the deepest notoriety? The praetor, therefore will take into account both the alleged affront and the person of the slave said to have suffered it and will grant or refuse the action accordingly. **45.** An affront to a slave sometimes affects the master also, sometimes not; for if the slave is posing as a freeman or if the person who beat him thinks he belongs to someone else and would not have done it if he knew that the slave was mine, Mela writes that the striker cannot be sued as having affronted me. **46.** If, when the slave has been thrashed, a master bring the action for insult and subsequently sues for wrongful damage, Labeo says that the two former issues are not the same for the second action relates to damage caused by fault, the former action to outrage.¹ **47.** If I have a usufruct in a slave and you own him and the slave is thrashed or put to the question, you as owner rather than I will have the action for insult. **48.** Again, if someone beat a free man who is in good faith acting as my slave, a distinction must be made; if he was beaten to affront me, I will have the action for insult. The same applies with respect of someone else's slave serving me in good faith, so that we allow the action for insult whenever what is done is done to affront me. Indeed, we do give a master the action for insult in the name of the slave. But if the slave is beaten to get at me, I also have my own action. And the same distinction can be taken in respect of the fructuary. **49.** It is more than obvious that if I beat a slave of several owners, each of them has the action for insult.

d. D.47.10.19

(Watson trans.)

GAIUS, *Provincial Edict*, book 22: If my creditor, whom I am ready to pay, to my discredit, should call upon my verbal guarantors, he will be liable to me in the action for insult.

e. D.47.10.11.9

(Watson trans.)

ULPIAN, *Edict*, book 57: ... **9.** There can be no doubt that the action is available to one alleged to be a slave but who maintains his free status against the man who declares himself his master. This is true whether the prospective plaintiff is being claimed from liberty into slavery or himself is asserting his freedom out of slavery. For here we make no distinction.

f. D.47.10.13.7

(Watson trans.)

ULPIAN, *Edict*, book 57: ... **7.** If someone prevent me from fishing in the sea or from lowering my net (which in Greek is σαγήνη), can I have an action for insult against him? There are those who think that I can. And Pomponius and the majority are of opinion that the complainant's case is similar to that of one who is not allowed to use the public baths or to sit in a theater seat or to conduct business, sit or converse in some other such place, or to use his own property; for in these cases too, an action for insult is apposite. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are to say if I forbid someone to fish in front of my house on my approaches (*praetorium*)? Am I or am I not liable to the action for insult? In this context, it has been frequently stated in rescripts that the sea and its shores, as also the air, being common to all, no one can be prohibited from fishing; no more can a person be from fowling, unless it be a case where he can be barred from entering another's land. However, the position has been adopted (by landowners), although with no legal justification, that one can be banned

¹ Compare CD's translation of this passage, above, p. 395.

from fishing before my house or my approaches; hence, if someone be so barred, there can, in those circumstances, be an action for insult. But I can prohibit anyone from fishing in a lake which I own.

g. D.43.8.2.9

(Watson trans.)

ULPIAN, *Edict*, book 68: ... **9.** If anyone is prevented from fishing or navigating in the sea, the interdict [to prevent things being done in public ways or places] will not serve him, any more than it will the person who is prevented from playing on the public sports ground, washing in the public baths, or being spectator in the theater. In all these cases, an action for injury must be employed.

h. D.19.1.25

(De Zulueta trans. [modified])

JULIAN, *Digest*, book 54: One who has bought a vintage on the vine can, if prevented by the seller from gathering the grapes, meet the seller's action for the price by the plea 'if the money in question is not the price of a thing sold and not delivered'. But if after the delivery he is prevented from either treading the crop of grapes or removing the juice, he can bring the action for production (*ad exhibendum*) or the action for invasion of right (*iniuria*), just as much as if he were prevented from removing any other property of his.

i. D.25.4.1.8

(Watson trans.)

ULPIAN, *Edict*, book 24: ... **8.** If all of the midwives or the majority of them declare that she is not pregnant (in an official inspection to determine pregnancy), can she bring an action for insult? I think that it is better to say that she can bring an action for insult if the husband intended to insult her here. But if he did not intend to insult her, but actually believed she was pregnant because of her great desire to have children or because she herself induced this belief by pretending during the marriage that this was as so, he will be excused with perfect justice.

j. D.47.10.26

(Watson trans.)

PAUL, *Edict*, book 19: If someone make a mockery of my slave or son, even with his consent, I am regarded as being insulted, as when he takes him into a cook-shop or plays dice with him. But this is so only where the person has the intention of perpetrating an affront. For one can give evil counsel without giving a thought to the master; hence, the need for the action for making a slave worse (*actio serve corrupt*).

k. D.44.7.34pr

(Watson trans.)

PAUL, *Concurrent Actions, sole book*: A person who beats another's slave contumeliously by this one act falls foul of both the Aquilian action and the action for insult; for the *iniuria* is done with intent, while the damage is done with fault, and consequently, both actions are competent. However, if the one action has been elected, some say the other is extinguished. Others say that the action for insult is extinguished by the Aquilian action, since it ceases to be just and equitable that one who has paid the assessed amount be condemned; but if the action for insult has been brought first, he is liable under the *lex Aquilia*. But even such a judgment ought to be prevented by the praetor, except to the extent that the action is for the excess amount competent under the *lex Aquilia*. Therefore, it is more reasonable to accept the view that he is allowed to bring that action first which he prefers, but also to recover the excess inherent in the other action.

l. D.47.10.3.1

(Watson trans.)

ULPIAN, *Edict*, book 56: ... **1.** Of course, there are some who cannot be guilty (of committing *iniuria*), such as the lunatic and the *impubes* not capable of wrongful intent; they can suffer affront but not be

guilty of perpetrating it. For since affront consists in the will of the culprit, it follows that these classes, even if they do strike people or shout abuse, will not be regarded as having committed an affront.

m. D.47.10.18.1, 4

(Watson trans.)

PAUL, *Edict*, book 55: ... **1.** It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised about. ... **4.** But when someone thinks a son-in-power to be a head of household, he cannot be regarded as insulting the son's father any more he insults her husband when he thinks a woman to be a widow; for no insult is directed to their person, and there can be no transferring of the imputation to them from the person of the son since the intention of the insulter (*affectus iniuriam facientis*) is directed to the son as being a head of household.

n. Gaius, *Institutes* 4.112

(above p. 46)

o. D.37.6.2.4

(Watson trans.)

PAUL, *Edict*, book 41: ... **4.** If an emancipated son has an action for insult, he should contribute nothing (to the hotchpot); for he has a claim for redress rather than money; but if he has an action for theft, he will be obliged to make contribution.

p. D.47.10.34

(Watson trans.)

GAIUS, *Provincial Edict*, book 13: If several slaves together beat someone or should abuse at him, each commits his own offense and, the more of them there are, the greater is the affront. Indeed, there are as many insults as there are participants.

q. D.47.10.11.3–6

(Watson trans.)

ULPIAN, *Edict*, book 57: ... **3.** If someone be affronted on my mandate, the majority say that both I and the person who accepted my mandate are liable to the action for insult. **4.** Proculus rightly says that if I hire you to perpetrate an affront, proceedings can be taken against each of us; for it was done by my design. **5.** He says the same even if it be my son to whom I gave my mandate for the wrong. **6.** And Atilicinus says that equally, if I persuade someone, who else would be unwilling, to obey me in perpetrating an affront, I can be sued in the action for insult.

r. D.9.2.5.1

(See above, p. 401)

2. *Iniuria* in rhetoric: Seneca the Elder, *Controversiae* 10.1

(Seneca the Elder, *Declamations*, (*Controversiae*, *Suasoriae*, *Fragments*). ed. Michael Winterbottom. 2 vols. Loeb Classical Library (Cambridge 1974), 2:369–389 [odd pp. only]. [Copied and reformatted from https://www.loebclassics.com/view/seneca_elder-controversiae/1974/pb_LCL464.373.xml].)

This is a collection of set-pieces used as exercises in the rhetorical schools. Seneca the Elder (father of the Stoic philosopher) died in 39 AD. All of the names of rhetoricians that he mentions seem to have been roughly contemporary with him, perhaps slightly older, and hence from the Augustan period. The arguments made in the case are summarized under the names of the rhetorician who is said to have made them. At the end Seneca offers some commentary on the rhetorical techniques that the rhetoricians used. Winterbottom's notes are helpful at explaining what otherwise could be quite cryptic and obscure.

[p.369] THE GRIEVING POOR MAN'S SON WHO FOLLOWED THE RICH MAN¹

An action may lie for injury.²

¹ Paralleled in Rhet. Gr. 4.235.32 Walz.

A man who had a son and a rich enemy was found killed, though not robbed. The youth, dressed in mourning, began to follow the rich man about. The rich man took him to court, and demanded that if he had any suspicions he should accuse him. The poor man said: "I shall accuse when I can," and continued to follow the rich man in mourning clothes just the same. The rich man stood for office, but was rejected; he accuses the poor man of injury.

For the son

[1] Vibius Gallus. I am grateful to the rich man that nowadays he is satisfied to bring those he hates to court.³—By day I am barred from appearing in public; ask yourselves what may happen at night.—"You shall not walk," he says, "on the same road as I, nor tread in my footsteps, nor afford my fastidious eyes the sight of your black clothes, nor weep or keep silent if I do not wish it." I should be dead if this man were magistrate.

Albucius Silus. That I was in mourning is due to grief; that I wept, to affection; that I did not accuse [p. 371] you, to fear; that he was rejected is your doing.⁴—Am I not to keep silent—I who am still alive because I kept silent?⁵—You know the suspicions entertained by a gossipy people: "Why did he never seek office while the father was alive?"—Now I beg everyone, yes everyone, to aid me in the investigation of my father's death: I should have come to your knees too, rich man, if I weren't afraid you'd say it caused you unpopularity. This is why I've been following you about so long: I'm looking for the opportunity to speak to you. And I cannot say that it is the result of your cruelty that I do not dare; but my usual fault dogs me—I keep silent. Would that my father too had had this fault! By speaking freely, he caused much offence—for I don't suppose you were the only enemy he had in the state.—Just as he says,⁶ I proved my case before the people.

[2] Julius Bassus. When are we not in mourning in the eyes of these rich men?⁷—"Accuse me," he says. Am I, a poor man, to accuse a rich man, am I, mourning, to accuse a candidate for office?⁸ I cannot even walk where I will.—He called me to law, said: "Prosecute me to the bitter end, plead your case through." Who would venture to accuse one who talks thus?—"Why do you follow me?" As if poor men had one street, rich men another.

Cestius Pius. I should not be defending myself if I were capable of accusing.—Beard untrimmed and in mourning, I have come—together with what is [p. 373] charged against me.⁹ Whatever may happen, I shall not stop looking for the murderer—perhaps I have already found him.—. . . when suddenly, in the middle of the city, my father—why do you look at me, why watch what I am going to say?—was removed.

[3] Arellius Fuscus. Those of my rank cannot go in great state, wearing bright clothes—that is possible for the rich: it is enough for us to be alive.—Since the body was found unrobbed, I don't know who the assassin was: but whoever he was, he resembled a rich man in despising loot.—"Why do you follow me in public?" A wicked crime has been committed: we, a rich man and a poor man, have gone along the same road.¹⁰

Moschus. "Accuse me," he says. What became of the man who began to?—"Why keep following me?" I wish my father hadn't left your side; he'd still be alive.—"Why not take me to court?" Because

² See Bonner, 115–16. The extension to defamation is in accordance with Roman practice: see Dig. 47.10.15.27, where "wearing mourning clothes to arouse unpopularity against a person" is one of the examples given.

³ Rather than to kill them. The next epigram implies just this danger.

⁴ That of the judges, who, as voters, had prevented the rich man getting office.

⁵ Whereas the father, being outspoken (see below), had been killed for abusing the rich man, and, as the next epigram suggests, to remove an obstacle to his candidacy.

⁶ The rich man, apparently, during his narration.

⁷ That is, our clothes are always dark and shabby compared with the rich man's: cf. the *pullatus circulus* of Quintilian 2.12.10 (cf. Plin. Ep. 7.17.9 and Suet. Aug. 40).

⁸ This too is a matter of dress: the poor man is in mourning clothes, a *candidatus* (as his name implies) wore a white toga.

⁹ i.e. his mourning clothes, which he wears *qua* defendant as well as because of his father's death.

¹⁰ Cf. Bassus' epigram in §13.

you have no fear of my accusations.—My father once dead—I'm afraid someone may think it an injury to him if I say "killed" . . .—My father was killed—by whom? If I am permitted to say so, I don't know.

[4] Junius Gallio. "You are in mourning; you weep." What else can I do, I, the son of a poor man who has been killed? My father was murdered in mid-city, though the laws still stood. Who could even tell the story without tears?—I shall not take off these dark clothes unless I find someone I can put them on to.¹¹—Who killed my father? I don't know. You can swear to no more than that I said¹² that.

[p. 375] And I still don't know. Meanwhile I am considering whom I am to clothe in the suit his assassin did not take from my father.¹³—"Why do you follow me?" Even magistrates do not clear the streets behind their backs.

[5] Fulvius Sparsus. What would he have done if I had been accusing him, considering that he harasses me even when I keep quiet?—"Why not sue?" Because you are so confident that you hope to force me to sue you.—Surely I do you no injury now, in these mourning clothes? Is one who grieves not allowed what a defendant is allowed?—What less could I do for my father? It was out of respect for him that I changed my clothes.

Argentarius. Don't you want me to weep for my father? You didn't use to take the first step in provocation in the old days.¹⁴

Clodius Turrinus Senior. "Why have you put on mourning?" What—am I not to grieve for one I cannot avenge? I do no-one injury except my father—for whom I still weep, in silence.

[6] Porcius Latro. Amid his inevitable grief for a father so cruelly slain, he can do nothing more brave than to groan.—"Accuse me," he says. Why are you so confident? You sound as though you have identified another man as the murderer.—He had no spoils that a highwayman might seek, but he had the highest virtue, he had what is the surest protection of poverty—innocence obstinate in the face of proud riches: these were the spoils his enemy was [p. 377] after.—Amid troubles there is a kind of pleasure in being troubled—and generally all grief flows out in the form of tears.¹⁵—He exults excessively in our bereavement; he didn't use to provoke us to accuse him while my father lived.—People may have felt surprise at what has hitherto been regarded as sloth on the part of the most wretched of all mortals in the midst of the tears inevitably shed over a slain father; but they may lay aside all their surprise in the face of the monstrousness of my present danger. [7] Is it any wonder to you that a poor man hasn't summoned up the courage to accuse a rich man? He keeps quiet, yet finds himself accused.—I beg you by these tears, by this filthy garb, by these trappings that are essential for all those on trial, I ask you a favour that your pity will not grudge: that when I am acquitted I may continue to dress as I do now as a defendant.—This rich man was powerful and influential, as he himself acknowledges: he thought he could never have anything to be afraid of, even if he were accused. Then hatred for him grew day by day, thanks to the violence of the one and the outspokenness of the other.¹⁶ The rich man thought us poor men nothing but harmful; we thought ourselves nothing but harmless. And amid these daily battles we were always the victors. I don't know who, meanwhile, plotted our death: I do know who prayed for it—that cannot be hidden.—He comes with his throng of clients and parasites, and pours out the riches of his whole palace to crush the poor.—"Why don't you accuse me, take me to court?" He could scarcely stop himself saying: "What would I not dare to do to you if you accuse me—I who arranged the killing of a man who [p. 379] merely quarrelled with me?"—[8] Generally neighbouring cities, when a sudden quarrel arises, are bursting to go to war; in civil strife sufficient revenge is taken by the man who has got his insult in first. How violently Macerio inveighed against the absence of Metellus!¹⁷ Marcus Cato had to listen to Pulcher levelling a

¹¹ As defendant.

¹² i.e. at the first trial.

¹³ Compare the previous epigram: the speaker imagines the same dark clothes worn by the victim as passing to the murderer in court.

¹⁴ Cf. §6 "He exults . . ." The father is represented as the stronger character, with a hold over the rich man (cf. the remarks of the populace mentioned by Albucius in §1).

¹⁵ For more on tears, see C. 8.6.

¹⁶ The rich man and the poor father.

¹⁷ For the feud of C. Atinius Labeo Macerio against Q. Metellus Macedonicus, see the Index of Names under Atinius.

charge of theft.¹⁸ What greater indignity for that age than for Pulcher to accuse, or Cato to be accused! There was a man¹⁹ capable of composing a lampoon against Pompey, victor on land and sea, who (as it said) scratched his head with one finger: a man capable of using the licence of a poem to make mock of three golden chariots.²⁰ He was torn by the eloquence of that most wicked of slanderers, Marcus Brutus,²¹ who said that his hands were stained and even steeped in civil blood. Yet though he was attacking three consulships and three triumphs, he was so far from being afraid of being accused that he even took the trouble to be eloquent. This²² is the only man in our state who is more innocent than Cato, more noble than Metellus, more brave than Pompey.

[9] Division

Latro's division went like this: Is there an injury in the case? "There is no injury if I am in mourning: how many do it! The law specifies all the types of

[p. 381] injury: one cannot strike another, one may not abuse contrary to good morals."²³

It was at this point that Scaurus said: "A new wording for injuries is being formulated: That he did weep contrary to good morals."

Even if there is an injury in the case, is he safe from condemnation if he does not act with evil intent? Does he act with evil intent? This Latro divided into two questions: If he believed the rich man had killed his father and if he was following him for that reason, is he to be forgiven? Next: Did he believe it?

Gallio made this the first question: If a man does something that everybody is entitled to do, is he liable to a charge of doing an injury? "It is permitted to weep, to walk where you like, to dress as you like." "But," the reply is, "one is not permitted to act in such a way as to arouse hatred against another. You are in mourning—I do not complain; but if your mourning arouses hatred for me, I do complain."

[10] Questions were raised about the colour. Some openly attacked the rich man, some said nothing at all against him, some took a middle way. Though there is no course apart from these three, Latro wanted the prestige of discovering a fourth type; this involved addressing the rich man as follows: "No, you didn't do it, but all the same I had reasons for being misled and for entertaining false suspicions about you: you were my enemy, my father was found unrobbed," and so on. But this in fact is the middle course, that of neither letting the rich man off nor accusing him: he ought not to let him off, despite [p. 383] having put off the accusation, and he ought not to accuse him, just because he has put the accusation off.

[11] Albucius said nothing against the rich man. His declamation had the following colour: "To accuse someone without having prosecuted him is to commit an injury. Why do you follow me?" he says. So that you should at last take pity on me, should cease to persecute a prostrate household, should realise that I cannot in this plight accuse you, should covet the glory of avenging a death. You alone, if you will, can find the man who killed him, you alone can accuse him. 'But some people regard me as suspect because of this.' You can dispel that suspicion: look for the man responsible.' If you want to see that you are causing me unpopularity, remember that when I said: Accuse me, you didn't say you wouldn't, but instead you replied: I will accuse when I can.' Forgive me, I can no more accuse anyone yet than acquit him: I am looking for the man responsible. Mine are feeble proofs—but the ones that weigh against other people are empty. You are my enemy, he was found unrobbed; I have here no reason to accuse you—but I do have reason to suspect."

[12] Vibius Rufus used this as a colour: "I am in mourning—I grieve. I follow you so as to be safer. I am afraid of whoever it was who killed my father; I know that I cannot perish so long as I am with you."

¹⁸ For Clodius' attacks on Cato for misappropriating money in Cyprus see Plut. Cat. Min. 45.1.

¹⁹ Calvus: see C. 7.4.7.

²⁰ Three triumphs. See Plut. Pomp. 45 on the occasion of the third (61 b.c.).

²¹ For Brutus' attacks on Pompey see ORF, 463. For his hatred of the general R. Syme, *The Roman Revolution*, 58.

²² Latro says sarcastically that the rich man can claim immunity from criticism, being so far superior to these great personages.

²³ For these two aspects of "injury" see Gaius 3.220.

Following this colour, Murredius said, very foolishly:²⁴ “Why do I follow you? My father was killed because he walked the streets alone.”

Moschus’ colour displeased Gallio. “I follow you,” said Moschus, “to find who did the deed. This is my [p. 385] train of thought: whoever did it will want to lay the blame on an enemy of mine, and he will come to the rich man.” “It is much more injurious,” said Gallio, “if he does this in order to make his investigations, if he follows the rich man not only to insult him but to endanger him.”²⁵

Gallio thought that one should employ finesse, and adapt the colour of the speech to the theme of the controversia, saying: “I suspect that you killed my father. Who else hated him more than you? Who else is so influential? Without doubt, some other murderer would have coveted his clothes. Someone may object: ‘Well? If he is your enemy, does that straightaway make him the killer?’ No: that is just why I make no accusation.”

[13] Romanus Hispo made open accusations, and said that he lacked not the motive to bring a charge but the strength to carry it through. And he placed in his proem an epigram that was highly applauded: “I have an accuser who is surprised that he is not the defendant.”

[14] Julius Bassus said on this subject: “‘Why do you follow me in public?’ Judges, a dreadful crime has been committed: we, a poor man and a rich, have trodden the same ground.” He used to go in for vulgarity, and found people to admire that above all else. I remember him declaiming a controversia²⁶ on a pimp who forbade ten youths to go into a brothel. The young men slipped into a pit filled with fire [p. 387] and concealed with earth, which the pimp had prepared, and were burned up; the pimp is accused of harming the state. He was heard declaiming by Albucius, who was liable to listen with scorn to things that he might feel jealous about; he liked this epigram of Bassus’: “I should not tolerate you if you had tied up a dog at the door.”²⁷ This same man said that Latro’s epigrams, that were being circulated with great admiration, were bombastic rather than forceful: “The fathers pick out their proofs, and use conjecture to make division of their children’s bones.”²⁸ Also: “Bring out your priestess!”²⁹ And: “Over the ashes of our children, the brothel must be rased to the ground.” But he did at least praise the things he had inspired himself: for in this same controversia—making sure that Bassus shouldn’t be thought to have said anything more vulgar—Albucius himself said: “Are ten youths to perish because of your two-pences?”

[15] Euctemon, on the son’s side, having narrated how his father had been caught alone, with no companions, and murdered, said: “That is why it is safest to go about with rich men.” He also said: “Why am I silent? My father spoke—and died.”

Hermagoras said: “Let us poor men found a city separately: the rich have one of their own.”³⁰ And in his narration: “I don’t know who killed him. He had enemies, for he was by nature outspoken and could be abusive.”

[p. 389] Artemon said: “When I find the killer, I shall accuse him: and I’ll do it even if it’s a poor man I find.”

²⁴ It is not clear why this is so foolish.

²⁵ Apparently by helping the true criminal in his attempt to incriminate the rich man. But *inputare* may = “claim credit for.”

²⁶ For the declamation see Calp. Flacc. 5 and RLM p. 83.1: and in a rather different form Rhet. Gr. 2.135 Spengel.

²⁷ Let alone protecting his house with a pit.

²⁸ Latro describes the search for the remnants of the bodies with rhetorical double entendre.

²⁹ i.e. the prostitute you guard so carefully.

³⁰ For they exclude poor men from the existing city.

3.Vexatious Litigation (*De calumniatoribus*)

a. D.3.6

(Watson trans.)

VEXATIOUS LITIGANTS¹

1. ULPIAN, *On the Edict*, book 10: An *actio in factum* is available against a person who is alleged to have received money to bring or not bring a lawsuit with vexatious intent. Within the year it is for four times the sum he is alleged to have received after a year for the simple amount. 1. Pomponius writes that it is not only in civil cases but also with criminal offenses that this action has to do, especially as anyone receiving money to bring or not bring a lawsuit vexatiously is also liable under the *lex repetundarum*. 2. Anyone receiving money either before or after acceptance of the action is liable to prosecution. 3. Furthermore, a *constitutio* of our emperor, written to Cassius Sabinus,² forbade the giving of money to a judge or opponent in criminal, civil, or treasury proceedings and ordered that the case be lost from this cause. For it can be disputed whether the *constitutio* is inoperative if the other party accepted with the intention of making an honest compromise: In my opinion, it is inoperative, just as this action also is; for it is not compromise that has been forbidden but squalid extortion. 4. We shall say that we received money, even if we received something in place of money.

2. PAUL, *On the Edict*, book 10: Furthermore, anyone who has been released from an obligation can be considered to have taken money, and it is the same if a loan has been made interest-free or a thing has been leased out or sold for too little. And it does not matter whether anyone has received money himself or ordered it to be given to someone else or ratified its receipt in his name.

3. ULPIAN, *On the Edict*, book 10: And in general the same will be true of any gain at all which he has received on this account either from the other party or from anybody else whatsoever. 1. Therefore, if he received anything to bring an action, whether he brought it or whether he did not, he is liable to prosecution, and so is the person who took anything not to bring one even if he brought it. 2. A person who has compounded is also liable under this edict. A person is said to have compounded who has made a dishonorable agreement. 3. The following fact should be noted that a man who has given money to have anyone prosecuted will not himself have the right to reclaim it; for he has behaved disgracefully. But the right to claim it will be given to the man who was to be made the object of vexatious litigation as the result of the payment. Therefore, if anyone has taken money both from you to bring a lawsuit against me, and from me for him not to bring it against me, there will be two actions I can bring against him.

4. GAIUS, *On the Provincial Edict*, book 4: This action is not available to the heir because the right to reclaim the money the dead man gave should be enough for him.

5. ULPIAN, *On the Edict*, book 10: But an action is available against the heir for what has come to him. For it has been laid down that dishonest gains are to be taken from heirs also, even though charges lapse. For example, a reward given for committing fraud or to a judge for a favorable verdict and anything else gained by criminal means will be taken from the heir as well. 1. But in addition to this action *condictio* is also available if the only disgraceful behavior is on the part of the recipient. But if it is on the part of the giver as well, the position of the one in possession will be the stronger. If then *condictio* has taken place, is this action no longer possible, or should it be granted for three times the amount? Or as in a case of theft do we grant both an action for four times the amount and *condictio*? In my opinion, one or other of the actions is enough. Further, in cases where *condictio* is available, there is no need after a year to grant an *actio in factum*.

6. GAIUS, *On the Provincial Edict*, book 4: In the case of a person who gave money to avoid a lawsuit, the year runs from the time when he gave it, provided that he had the opportunity to go to court. In the

¹ The criminal aspects of *calumnia* are further treated in D.48.16. CD.

² Since Mommsen (followed by Bluhme and Frier) this has been taken as a reference to C.7.49.1. The substance fits, and the date would be 212 (Caracalla). The only problem is that that constitution is directed to one Gaudius, and one has to wonder how Ulpian, who was very much in the inner circle at this point, could have gotten it wrong. The Cassius Sabinus to whom Ulpian refers is probably P. Catius Sabinus, a well-known figure in this period (see English Wikipedia s.n., with referenes), who seems to be the addressee of C.9.46.1, below. A later scribe probably mixed up Catius with the more common Cassius.

case of the person someone else paid to have an action brought against, there is room for doubt whether the year should be reckoned from the day the money was given or rather from the time he got to know it had been given, because the man who does not know appears not to have the opportunity of going to court. In fact, the fairer thing is for the year to be reckoned from the time he got to know.

7. PAUL, *On the Edict*, book 10: If anyone has received money from someone else not to bring an action against me, if the payment was made on a mandate from me, or by a procurator with general powers over my affairs, or by one intending to transact business of mine and I ratified it, it is considered that I myself made the payment. But if someone else made a payment to him to prevent a lawsuit without a mandate from me, possibly out of pity, and I did not ratify it, then he himself can reclaim it, and I can also bring an action for four times the amount. 1. If money has been received to bring a lawsuit against a son-in-power, the father too should be granted an action. Likewise, if a son-in-power has received money to bring or not bring a lawsuit, an action will be granted against him, and if someone else without a mandate from me has paid to prevent a lawsuit against him, in this case too he can himself claim his money back, and I can also bring an action for four times the amount. 2. In a case where a tax farmer kept possession of slaves and money had been paid to him which was not due, he too according to this part of the edict is liable to an *actio in factum*.

8. ULPIAN, *Opinions*, book 4: If the official with cognizance in this matter has been informed that money has been received from an innocent man on the pretext of some offense which has not been proved against him, the official should order the restoration of what has been illegally exacted in accordance with the terms of the edict which deals with those who are alleged to have received money to bring or not bring a lawsuit, and he should inflict a penalty proportionate to the offense on the person who committed it.

9. PAPIAN, *Adultery*, book 2: If a slave who is accused is taken to court, an inquiry is held into his case. If he is acquitted, his accuser is ordered to pay his master double his value. But there is also, without reference to the assessment of value, an inquiry into his accuser's vexatious litigation. For the offense of vexatious litigation is distinct from the loss which has been suffered by the master in respect of his slave on account of the inquiry.

b. C.9.46

(Frier/McGinn trans.)

MALICIOUS PROSECUTORS (*calumniatores*)

[1] *Emperor ALEXANDER Augustus to Sabinus*.³ It is the standard operating procedure (*solet*) to punish malicious prosecution at the point when the case is decided, in the presence of the prosecutor. For that reason your request to punish an accuser for malicious prosecution after the case has (already) been decided is contrary to the usual practice (*consuetudinem*).

[2] *The same Augustus to Apollonia*. **pr.** A mother ranks among those persons who, without the fear of punishment for malicious prosecution, can avenge the death of her child. This privilege of the senatorial decree holds also in other public criminal trials (*publica iudicia*).⁴ 1. But even an outside heir, who follows up the suspicion that the decedent expressed concerning his or her own death, is exempted from the charge of malicious prosecution for this reason, since there is a great difference between a voluntary prosecution and the obligation imposed by an heir's duty.

Posted June 26, in the consulship of Julian and Crispinus (224).

[3] *The same Augustus to Eumelianus*.⁵ Whoever is adjudged not to have proven the charge that he has brought, if he is not convicted of malicious prosecution does not suffer any harm to his reputation

³ Lacking a subscription this item cannot be dated precisely other than by dates of Alexander Severus' reign (222 X 235). The fact that it appears before C.9.46.2, which is dated in 224 (but note items 8 and 9 below, which are in reverse chronological order) suggests a date early Alexander's reign., The addressee may be P. Cadius Sabinus, who, in turn, may be being referred to by Ulpian in D.3.6.1.3, above. CD.

⁴ The reference is to the *SC Turpillianum* C.9.45. Ed.

⁵ Lacking a subscription this item cannot be dated precisely other than by dates of Alexander Severus' reign (222 X 235). CD.

(*detrimentum estimationis*, i.e., legal infamy). For if a defendant has been acquitted, it is not for this reason alone that the accuser, who might have had a good reason for coming forward to prosecute, shall be deemed as well to be a malicious prosecutor.

[4] *Emperors CARUS, CARINUS, and NUMERIANUS Augusti to Archelaus*. The penalty for malicious prosecution does not hold in the case of a prosecution for a father's death:

Posted November 21, in the consulship of Carus and Carinus Augusti (283).

[5] *Emperors DIOCLETIAN and MAXIMIAN to Caesius*.⁶ The risk of conviction for malicious prosecution typically holds only for public criminal trials (*publica iudicia*), not also for cases concerning free status, which are private disputes.

[6] *The same Augusti to Domitius*. A penalty for double damages arising out of the judicial examination of slaves under torture is given to masters by the *lex Iulia* against an accuser guilty of malicious prosecution.⁷

Written August 17, in the consulship of the Augusti (290 or 293).

[7]⁸ *Emperors VALENTINIAN and VALENS to Valerianus*. Your Uprightness will not order anyone to be brought to trial before your court until the reasons for his grievance has carried out the formalities of beginning a prosecution, since, according to the rule of the ancient law (*forma iuris antiqui*), the one who took the initiative of prosecuting attained either vengeance if he told the truth, or punishment if he lied.

Given November 25 at Reims, in the consulship of Gratian, Most Noble Boy, and Dagalaifus (366).

[8] *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS to Menandrius, Vicar of Asia*. **pr.** It has been laid down both in Our constitutions and in those of Our predecessors (*parentes*) that persons who have presumed to bring accusations in the names of others shall be classed as informers (*delatores*). 1. And on that account punishment (evidently, capital exile) shall attend the very malicious source and person (who is) afflicted with legal infamy (*infamia*) by the verdict of a wrongful prosecution, in order that henceforth both individuals and people in general shall learn that it is not permitted to importune the mind of judges in a matter that cannot be proven..

Given May 8, at Constantinople, in the consulship of Arcadius Augustus and Bauto (385).

[9]⁹ *The same Augusti to Florus, Praetorian Prefect*. Especially after the production of the defendant in court, those making false accusations shall not benefit from any legal pretext, as though their accusation was discharged. For no general or particular grant of dismissal shall advantage and assist such person. No special pardon, not even a general grant of favor shall free them from punishment.

Given May 18, at Constantinople, in the consulship of Antonius and Syagrius (382).

[10]¹⁰ *Emperors HONORIUS and THEODOSIUS send greetings to the Consuls, Praetors, Tribunes of the Plebs, and the Senate*. Whoever initiates a charge shall know that the freedom to lie will not go unpunished, since symmetry of punishment summons malicious prosecutors to vengeance (for their act).¹¹

Given August 6, at Ravenna, in the consulship of Asclepodatus and Maximianus (423).

⁶ The abbreviation for 'Posted' (PP.) is on the subscription line but not the date. Hence, this item can dated only by the bracketing dates when Diocletian and Massimin were Augusti (286 X 305). CD.

⁷ The *lex Julia iudiciorum publicorum* was passed together with the *lex Julia iudiciorum privatorum* c. 17 BCE. Ed.

⁸ C.Th. 9.1.9, where Valerianus is urban Prefect. Ed.

⁹ = (in part) C.Th. 9.37.3. Combine with C.4.19.25. Ed.

¹⁰ See Pap. D.48.16.8 and 10. Ed.

¹¹ *Calumnia*, as referred to above in the text, means malicious criminal prosecution, whose employment, together with promoting vexatious or groundless lawsuits, or demanding money for not doing so, constituted one of the most common and detested offences enumerated in Roman jurisprudence. All participants in it, whether directly or indirectly implicated, were liable to the penalty, which, in addition to the damages recoverable by an action, entailed the opprobrium of infamy.—SPS.

B. SECONDARY MATERIALS

1. The Underlying Sanctions of Roman Litigation

J. M. Kelly, *Roman Litigation* (Oxford: Clarendon Press, 1966), 1–30
[original footnote numbering preserved]

THAT the internal history of the Roman Republic was in large measure a social struggle is a commonplace. Every schoolboy has heard of the early conflicts of the patrician and plebeian orders, the gradual admission of plebeians to the magistracies, the plebeian office of the tribunate and its function of protecting citizens against the abuse of aristocratic magistral power. But we know, too, that the end result was not to turn the Republic into an egalitarian democracy in the modern sense. In the late Republic, wide differences of wealth and prestige existed, no longer corresponding to the ancient division between patricians and plebeians, since some plebeian families had advanced themselves into the aristocracy (and had then closed the door behind them), and political power was shared and disputed among a relatively small number of important families, who exercised it by operating a complicated system of alliance and dependence. Then and in the following centuries there was very little trace of the social and political fluidity which characterizes most modern democracies, whereby obscure birth does not necessarily exclude the acquiring of power and influence.

It was in the midst of this society that Roman law and jurisprudence grew into the state of perfection which subsequent ages have admired as unique. For the historian no less than for the lawyer, however, the question must arise: How did the practice (as distinct from the theory) of law fare in a state whose social and political life was conditioned by enormous differences in power, wealth, and prestige? Can it be that in the sphere of law alone the great were really made equal with the humble, the powerful with the weak? The effectiveness of law as an instrument of equal justice can best be appraised when it is in action, in other words, in litigation, and the aim of this study will be to illuminate the realities of litigation in the Roman world.

The very origins of litigation itself offer material for an hypothesis which may be used as a convenient (though not indispensable) starting-point for this inquiry. For more than a hundred years, ever since the publication of the first volume of Rudolf von Jhering's *Geist des römischen Rechts*,¹ speculation as to the origin of Roman civil procedure has been dominated by a single theory, namely, that it resulted from the State's imposition of restraint and order upon the régime of self-help and private vengeance which in primitive times was the only known way of enforcing supposed rights and redressing supposed wrongs. In recent years this theory has been criticized,² but never refuted; and despite its alleged background in eighteenth-century philosophy it seems the only plausible reconstruction of the emergence of civil actions. It still enjoys the adherence of most modern Romanists; thus (to cite only a few of the many scholars who have accepted it) Wenger wrote that everywhere and in all ages it has been the inclination of uninhibited passion to obtain for itself a real or supposed right which another withholds. Self-help, whether by the individual who feels himself strong enough, or by the tribe which lends the individual its armed support, is the primal means of enforcing a claim as well as of repelling an attack. But everywhere and in all ages, too, it means a huge advance in civilization when the State places restraints on the individual's right to enforce his own law."³ According to Luzzatto, 'Roman civil procedure in its earliest phase must be identified with the reception and regulation of self-help . . . Procedure arose through what was at first an extra-judicial incorporation of self-help into a ritual system prescribed by statute or by custom.'⁴ And Kaser wrote that 'for the early period, in which the protection of private rights was not yet the concern of the central power of the state, no mode of enforcing these rights other than self-help is conceivable', and referred to a recent study by H.J. Wolff¹ on the corresponding phenomenon in the

¹ In 1852. See pp. 118 ff. in vol. I of the 7th/8th edition (1924).

² Lévy-Bruhl, *Quelques problèmes du très ancien droit romain* pp. 9ff.; Noailles, *Du droit sacré au droit civil*, pp. 80 f.; Brogini, 76 ZSS 113 ff.

³ *Institutionen*, p. 6

⁴ 73 ZSS 29 ff.

¹ 4 *Traditio* (1946) 31 "ff.

Greek world as also pointing to the origins of civil procedure lying in interference by the State to control self-help.²

Now if this theory as to self-help preceding litigation be accepted, even with reservations, two important and plausible corollaries ensue. Firstly, the operation of self-help as a means of enforcing law must have been unequal. We may speak theoretically of a wronged individual or group righting or avenging the wrong by physical force, but in practice this possibility depends primarily on the individual or group possessing superior physical strength to that of the wrongdoer. No doubt we must allow, even in the theoretical reconstruction of an early society, for elements such as public opinion, popular justice,³ or religious ideas as influencing the outcome; but it seems unreal to suppose that such elements regularly made up for physical inferiority on the part of the victim of injustice, and safer to assume that self-help worked more satisfactorily where the injured party was superior to or at least a match for his adversary than when he was not.⁴ Secondly, the transition from a system of pure self-help to one where claims were enforced by process of litigation cannot have been completed overnight; as Kaser has written, it is not to be believed that the use of force in settling disputes can have been replaced by a pure system of objective judicial decision without any intermediate stages.⁵ In particular, it seems contrary to human nature to suppose that the relatively strong would have acquiesced at once in being placed through judicial process on the same footing as the relatively weak.

The considerations, taken together, would suggest a gradual process in which the advantage of the stronger may have coexisted with judicial process even after the abolition of naked self-help. But can a period in which this was so be proved as a matter of history? One might be inclined to look for it in the conditions of the Republic and early Empire where the existence of uncontrolled discrepancies in power, wealth, and influence must have provided a favourable setting. (This hypothesis is suggested by a consideration of the converse situation: in an egalitarian democracy there would certainly be no room for accepting, in litigation, an advantage on the side of the more powerful party.). The instinctive reply to such an hypothesis would be that this age, in spite of its social and political inequalities, was the age when Roman law and jurisprudence experienced their most vigorous development, that the *ius civile* and the *ius honorarium* were open to all, that the norms of positive law and the writings of the jurists contain no hint of inequalities in rights corresponding to inequalities in strength. And indeed, the assumption that Roman law operated equally and regularly in litigation underlies all the theoretical expositions of it. But the question must be asked, is this assumption justified?

We may begin by considering one aspect of litigation which is the special subject of this chapter, namely, the sanctions underlying litigation.

It follows from any definition of a lawsuit, whether referable to ancient or to modern times, that only one of the parties is anxious to press ahead with the matter, while the other would be pleased if it went no further. Only the plaintiff is dissatisfied with the present state of affairs and wishes to improve his position at the expense of his opponent; the defendant would be well content to be left alone. When they appear in court together, it is because the plaintiff wants to, and the defendant has to. The corollary to this simple axiom is that, if no sanction existed to compel or induce the defendant's submission to legal process, there could be no such thing as litigation.

The modern English defendant, when sued, normally engages legal advisers, enters an appearance, files a defense, attends the hearing of the action, gives evidence on his own behalf as well as calling witnesses. Underlying his behaviour is the knowledge that if he ignores the plaintiff's proceedings, judgment will be given against him; and, if he ignores the judgment, sooner or later servants of the state will come and take away some of his property, or perhaps even put him in prison. No doubt there are other factors—public opinion, family feeling, a sense of duty or pride or honour—which are often at work

² *Das altrömische Ius*, pp. 15 18,

³ 'Volksjustiz': see Jhering, *op cit.*, p. 122.

⁴ The likelihood of this assumption will perhaps appeal most strongly to those who have experienced life in a boys' boarding-school; 'the nearest', as a reviewer wrote some years ago in *The Spectator*, that most of us are likely to come to a primitive society'.

⁵ *Op. cit.*, p. 19.

in a defendant's mind, but the one unvarying and irresistible sanction supporting English litigation is the power of the state, which the plaintiff can ultimately invoke against the defendant if he is intransigent. It is this fact which must account for the regularity of English litigation; even the weakest plaintiff can sue even the stronger defendant without giving a thought to the physical, social, political, or economic disparity between them.¹

In modern English law, moreover, a plaintiff may recover judgment in default of the defendant's appearance or defence, and can therefore afford to wait until the judgment stage before setting in motion the sanction of state power to enforce the judgment. In the Roman law of the Republic and early Empire, on the other hand, no action was constituted and accordingly no judgment could be recovered unless the defendant actually appeared before the magistrate in obedience to the plaintiff's summons at the outset of proceedings, and remained present during the preliminary state *in iure leading to litis contestatio*.

Unlike the position in English law, therefore, there were two distinct points in an action—the stage of summoning and the stage of execution—at which a defendant's reluctance might need to be overborne.¹

The summoning of a defendant before a magistrate was called *in ius vocatio*, and the Twelve Tables begin with rules about it, rules which, so far as can be seen, remained in force throughout the republican and classical periods of Roman jurisprudence: *Si in ius vocat, ni it, antestamino: igitur em capito. Si calvitur pedemve struit, manum endo iacito*. Neither the text nor its meaning is free from difficulty,² but the general sense is clear: if the plaintiff summons the defendant, and the defendant fails to respond to the summons, the plaintiff may exert physical force to compel him before the magistrate.³ Towards the end of the Republic actual *in ius vocatio* came to be generally replaced, as a means of initiating litigation, by *vadimonium*⁴ in which the defendant bound himself to appear *in iure* on a stated day; and this is the procedure found, for example, in all the speeches of Cicero. But *in ius vocatio* remained possible where the defendant declined *vadimonium*.¹

Most writers on Roman procedure content themselves with giving briefly these facts about summoning, paying surprisingly little attention to the question of possible physical resistance on the part of a defendant who is stronger than the plaintiff;² or, if the possibility is adverted to, it is dismissed with a

¹ When the power of the modern state is temporarily removed from behind the private plaintiff, conditions emerge which must have had a parallel in ancient states where the plaintiff had to fend for himself. See the interesting Irish case of *Irish Agricultural Wholesale Society v. St. Enda's Co-operative Society*, [1924] 2 I.R. 41, which arose out of the disturbed conditions of the Irish civil war in 1922–3. The report shows that, owing to the Government's weak grip on some of the more remote country areas, civil-bill officers were unable (because physically afraid) to attempt the service of writs on the defendants named in them, to the detriment of plaintiffs pursuing their lawful claims. During the worst part of the civil war the Government provided military protection for the civil-bill officers, but later withdrew this protection, and, for a time, the result was the possession of a shotgun and the reputation of not being afraid to use it made intended defendants immune from civil process.

¹ The stage *apud iudicem* did not require compulsion of the defendant; if he did not appear, he simply lost the case: *post meridiem praesenti litem addicito* (Twelve Tables, tab. I, 8, (*Fontes Iuris Romani Antiqui*, 7th edn.). This rule could, of course, also operate against the absent plaintiff, if the defendant had turned up.

² The text adopted here is that maintained as genuine by Daube, *Forms of Roman Litigation*, pp. 28 ff. The main difficulties arise from the word *antestamino* (what function did the calling-up of witnesses fulfil?) and from the apparent distinction between *capito* and *manum endo iacito*. According to Juncker (*Gedächtnisschrift für Seckel*, p. 206) *manum endo iacito* represents an intensified form of arrest, but the legal difference remains uncertain.

Daube (*op. cit.*, pp. 57 ff.) maintains that in early Latin the third person has an impersonal force, and, if he is right, one need not actually translate the imperative *capito, manum endo iacito* as meaning 'let the plaintiff seize'. But the other evidence as to the absence of state help in summoning makes it clear that here it is, in fact, the plaintiff who has to do the seizing (assisted presumably by such slaves and friends as he has).

³ No special words seem to have been laid down for the *in ius vocatio*; we find in Plautus the forms *in ius eamus*. So far as can be gathered from the texts, there were also no special forms for the forcible production of the defendant *in iure*. One of Plautus' characters speaks of being dragged before the praetor *obtorto collo* (*Poen.* 790); the same expression is found in reference to execution of a judgment in Seneca, *Apocol.* 11. 5–6; and see also Cicero, *pro Cluentio* 21.59.

⁴ See Steinwenter, *RE* 7 A. 2054.

¹ Horace, *Serm.* I.9.

² e.g. the physical resistance offered by the soldier. Thereapontigonus in the *Curculio* of Plautus, 624 ff. (he strikes Phaedromus, who has summoned him, so that Phaedromus has to shout for help: '*O cives, cives!*').

treatment as short and superficial as possible. Thus, for example, Wenger writes simply that ‘the defendant cannot personally put up resistance to *in ius vocatio*’,³ and he thinks in any case that ‘the idea of forcible dragging before the court is inappropriate in a more advanced era [than that of the XII Tables]’.⁴ Wesner contents himself (in an article devoted specifically to *in ius vocatio*) with saying that ‘after *manus iniectio*, further resistance by the defendant is unlawful’.⁵ Noailles, in the course of a highly artificial treatment of *manus iniectio*, says: ‘on the one hand, the calling to witness [*antestatio*] prevented the possibility of interference by the defendant’s friends; on the other hand, the *manus iniectio* broke the resistance of the defendant himself.’⁶ Juncker’s suggestion is hardly very convincing: ‘if the relation of physical strength [between plaintiff and defendant] was such that [the former] could not expose himself to the risk of resistance [by the latter], he could be sure at least that if he could arrange to meet his dangerous opponent in the proximity of the magistrate, in the Forum, active resistance was no longer to be feared’⁷ Kaser considers the possibilities of physical resistance at somewhat greater length, though without solving the problem; he excludes anything like a magical or sacral sanction against the defendant’s putting up physical resistance, but says the plaintiff could overcome the defendant’s resistance ‘with the help of the friends and relations who had come to witness the summoning’¹. But what if the defendant also recruited the help of friends and relations (or slaves)? All Kaser can say to this is that such an act on the part of the defendant was ‘forbidden’. He ends his discussion of the matter by begging a serious question: According to him, only on the supposition of the plaintiff’s being allowed, and the defendant’s not being allowed, to recruit superior force can one understand ‘how it was possible to hold fast for a long time to the principle of the private summons, and how the latter could be of service even to a weak plaintiff as against a defendant who was physically superior to him’.²

It will be noticed that the situation envisaged by Kaser—that the private summons fulfilled its purpose effectively, even in the service of a physically inferior plaintiff—is tacitly assumed as a fact by all the other writers. Yet none of them can produce a convincing demonstration, or even a persuasive hypothesis, as to how, in the end, the opposition of a powerful and intransigent defendant could be overcome. It is not enough merely to say that such opposition was ‘impossible’ (Wenger), ‘unlawful’ (Wesener), ‘broken by *manus iniectio*’ (Noailles), that it might be frustrated by a surprise summons in the praetor’s presence (Juncker) or that to maintain it by the support of others was ‘forbidden’ (Kaser). We still want to know what could be done about the powerful man with plenty of slaves who keeps out of the magistrate’s way, snaps his fingers at the weaker plaintiff, and succeeds in preventing the plaintiff by physical force from bringing him to law. The authors mentioned above would be reluctant to believe that this situation could arise, but they adduce nothing to disprove the possibility that in fact it did.³

Contemplation of this possibility will naturally excite resistance among those whose instincts is to think of Roman law as having functioned with the same impartial regularity as modern law; and no doubt the fact that the sanction underlying modern litigation is the power of the State, which the plaintiff can ultimately invoke, will suggest to some that perhaps in fact the weak Roman plaintiff could hope for help from the praetor with his *in ius vocatio* of a stronger defendant. There is, however, not the smallest shred of evidence that a magistrate ever intervened with physical force to compel obedience to a summons; nor has any author ever suggested that such was the case. The praetor, moreover, did not dispose of a police

³ *Institutionen*, p. 92

⁴ *Ibid.* p. 94

⁵ 21 *RHD* 23.

⁶ *RE* 9 A.I. 686.

⁷ *Gedächtnisschrift für Seckel*, p. 203n.

¹ *Das altrömische Ius*, pp. 192–3.

² *Ibid.*

³ The violence of which Roman litigants were capable is evidenced by what is no doubt the extreme case of A. Sempronius Arsellio who was actually murdered by a crowd of capitalist creditors because he was favouring the debtor defendants by applying old laws against usury (Livy, *epit.* 74; Val Max. 9. 7.4.; Appian, *bell. civ.* I.232–9). Is it to be imagined that, for example, one of these rich and desperate men would, if summoned by a weaker citizen, docilely follow him before the praetor? Cf. also the little maxim of Apuleius, *Apol.* 26: *Sicarium qui in iudicium vocat, comitatus venit.*

force sufficient to subdue a powerful defendant determined not to be subdued. He had two¹ lictors and a number of other subordinates such as *scribes* and *viatores*; one frequently reads in Roman literature of lictors and *viatores* as performing services such as clearing a crowd,² enforcing respect in the magistrate's presence and running messages for him,³ as well as executing criminal sentences;⁴ but nowhere is there any report of their having been used in private litigation.

In case it may be said that the mere absence of sources for the use of pretorian servants to enforce a summons does not prove that they were not in fact so used, a word about interdictal procedure may be in place. Interdicts are always described as a sort of police-orders ('Befehle polizeilicher Natur'); thus, instance, Bethmann-Hollweg,⁵ Berger,⁶ and Wenger.⁷ They are commands springing from the magistral *imperium*, and are directed to a rapid securing of peace and order. After the issue of the command, which is given on the plaintiff's application to the magistrate, a *second* proceeding must be begun, which, depending on the type of interdict in question, may be *per sponsionem* or *per formulam arbitriam*, and leads in either case to the mere condemnation of the defendant in a sum of money if he turns out to have disobeyed the interdictal command.¹ Now if the interdict, as a 'police-measure', had been carried out by lictors,² the further proceeding would have been superfluous; therefore we may conclude that interdictal procedure was free of lictors. And if lictors were not used to enforce such 'police-measures', it seems impossible that they could have been used to enforce a summons in any ordinary action.

There were, in fact, certain formal legal sanctions backing up the private *in ius vocatio*. Thus Gaius tells us that the praetorian edict contained *formulae in factum conceptae* for actions *adversus eum qui in ius vocatus neque venerit neque vindicem dederit* and *contra eum qui vi exemerit eum qui in ius vocatetur*³ (the very existence of such actions is, of course, a further proof that *in ius vocatio* was not backed up by the magistrate's physical intervention). Yvonne Bongert attaches great importance to the former of these actions: 'the plaintiff need no longer have recourse to force in order to produce his adversary *in iure*, thanks to the penal actions created by the praetor';⁴ Wesener⁵ and Lenel⁶ say the same thing. Pugliese, however, recognizes the real difficulty in regarding such actions as valuable sanctions of the private summons: "these actions, too, had to begin with *in ius vocatio*, and it might happen that this second *in ius vocatio* met with no better success than the first one'.⁷ Beseler was at first⁸ so strongly influenced by this consideration ('Numerius kommt nicht vor den Prätor!') that he was inclined to doubt if such an action really existed—'or, if it did exist, it must have been an unusually useless remedy'.⁹

A more effective sanction, according to Pugliese,¹⁰ lay in the possibility of obtaining *missio in possessionem* from the praetor against one who ignored (or, presumably, resisted) *in ius vocatio*; this possibility, although nowhere directly evidenced, is assumed by Pugliese to have existed side by side with the special and not very different *missiones* against one *qui fraudationes causa latitarit* and *qui absens*

¹ Censorinus *de die natali* 24: *Postea M. Plaetorius tribunus pleshiscitum tulit in quo scriptum est: Praetor urbanus qui nunc est quique posthac fuat duo lictores apud se habeto. ...*

² Livy 3.48.

³ Cic. *Verr.* 1.18.3; Tac. *Ann.* 6.40; Aul. Gell. 13.12. 3–6; Livy 2.29.3; 2.56.13; 3.56.5; 6.15.1; 8.18.8; Juvenal 3.128.

⁴ Livy 1. 26. 7–8; 8.7 26. 16.

⁵ *Der Civilprozess des gemeinen Rechts*, 11.344.

⁶ *RE* 9.2. 1609 ff.

⁷ *Op. cit.* p. 237.

⁸ Wenger, pp. 238 ff.

² There is, of course, no trace of any such thing in the texts.

³ *Inst.* 4. 46.

⁴ Varia 1952: *Recherches sur les Récupérateurs*, p. 160.

⁵ *RE* 9 A 1.688

⁶ *EP* 65 ff.

⁷ 3 *RIDA* (1949) 267.

⁸ *Kritik der römischen Rechtsquellen*, iii. 20, 202.

⁹ Beseler later admitted the existence of the formula, but called it 'kein drohendes Übel': *Kritik*, iv.164–5.

¹⁰ *Op. cit.* p. 267,

iudicio defensus no fuerit,¹ *Missio*, like in *ius vocatio* could apparently be effected by the plaintiff with the help of friends; perhaps it was even possible for the plaintiff to have the taking of possession carried out for him by another on his behalf, as is suggested by the words *suo quis an alieno nomine prohibitus sit, nihil interest*.² One can conceive that *missio* may have been an effective sanction against a *latitans* who did not dispose of physical force to prevent the forcible taking possession of his property; but how effective was it against a powerful defendant? We know from Cicero's *pro Quinctio*³ that a plaintiff awarded *missio* by the praetor had to make his own arrangements about actually taking possession (though the Edict apparently contained directions as to doing this), and in the case of Quinctius at least violence was used by Naevius to seize some of his opponent's property, and violence was used by Quinctius' procurator in recapturing part of it.⁴ That the person who was the object of a *missio* might in fact resist force by force, and resist effectively, is shown by the fact that there existed a special set of interdicts *ne vis fiat ei qui in possessionem missus erit*, together with an *actio in factum* with the same end.⁵ And at this point the vicious circle is complete; because if a plaintiff is given *missio* to reinforce a frustrated *in ius vocatio*, and an interdict or *actio in factum* to reinforce the *missio*, how is he assured that the *in ius vocatio* necessary for the latter remedies will succeed any better than that which the defendant has defeated?

The law of the Empire contained one further sanction to shore up the weakness of the private *in ius vocatio*; it was a crime to hinder by group force the summoning of a defendant: *legis Iuliae de vi privata crimen committitur, cum coetum aliquis et concursum fecisse dicitur, quo minus quis in ius produceretur*.⁶ Of any similar law before Augustus' time there is no trace; and it may be presumed that in fact nothing more effective existed.¹ (Admittedly, the ordinary law of *iniuria*, whether pretorian or statutory, might in theory have applied to such an act. But what were the prospects of instituting an *actio iniuriarum* or *legis Aquiliae* against someone who had physically prevented the institution of another action?) it is very doubtful whether in fact the *crimen vis* was of much use in frightening powerful defendants at any rate if at any rate if the frustrated plaintiff, who would presumably be the accuser, was a person of inferior standing; the difficulty of successfully conducting a prosecution in such circumstances was well known.²

Before the days of the *actio ad exhibendum* the plaintiff in an *actio in rem* had equally to use his own force in order to secure the presence *in iure* of "a disputed moveable object. There is nowhere the least sign that the State provided him with any help for this purpose, and indeed von Lübtow expressly admits that self-help was the only possibility open to him: 'The plaintiff had to put himself, by his own force, in possession of the thing. ... He was permitted, for the purpose of producing the object, to make a forcible entry on the defendant's premises and to infringe his domestic peace.'³

The second point in a Roman action at which a sanction might be needed, that of the execution of judgment, presented to the weak plaintiff (if he had succeeded in getting as far as judgment) difficulties no less great than those presented by the private *in ius vocatio*, quite apart from the uncertainty of successful execution, common to all systems of law.⁴ The twelve Tables contain provisions about

¹ Lenel, p. 415.

² D.43. 4.2.pr.

³ 6.25–28

⁴ 19.61.

⁵ D. 43. 4 1. 2; 43. 4. 4. The interdicts applied only to certain kinds of *missio*: *legatorum servandorum, fideicomissi servandi, damni infecti causa*: Berger, RE 9.2.1656.

⁶ D. 48.7.4. The act which under the *lex Iulia* gave rise to this prosecution is probably contained in an episode related by Livy (2.27) from the early Republic: *Appius ... quam asperrime poterat ius de creditis pecuniis dicere. ... Plebi creverant animi, et longe alia quam primo instituerant via grassabantur. Desperato enim consulum senatusque auxilio, cum in ius duci debitorem vidissent, undique convolabant. Neque decretum exaudiri consulis prae strepitu et clamore poterat, neque cum decresset quisquam obtemperabat. Vi agebatur, meusque omnis et periculum, cum in conspectu consulis singuli a pluribus violarentur, in creditoribus verterant.*

¹ Unless perhaps Sulla's *lex Cornelia de iniuriis* applied to such cases.

² See below, Chapter II.

³ 68 ZSS 325

⁴ See, e.g., D. 15. 1. 5 51: *cum . . . eventus exsecutionis posit esse incertus . . .*

execution: *Aeris confessi rebusque iure iudicatis XXX dies iusti sunt. Post deinde manus iniectio esto. In ius ducito. Ni iudicatum facit aut quis endo eo in iure vindicit, secum ducito, vincito*,¹ and there follows the procedure by which the judgment debtor may, if the judgment remains unsatisfied, be sold into slavery, if not killed. The procedure remained basically the same at the end of the Republic, as can be seen from the *lex coloniae genitivae Iulia* of c. 44 B.C. [*Cui quis ita ma] num inicere iussus erit, iudicati iure manus iniectio esto itque sine fraude sua facere liceto. Vindex arbitrato Ilviri quive iure dicundo praeerit locuples esto. Ni vindicem dabit iudicatumve faciet, secum ducito. Iure civile vinctum habeto....*² Here again it is the successful plaintiff who is in contemplation as the actual enforcer of his own judgment.³ We are, indeed, told this specifically by Gaius; according to him, *qui agebat* [i.e. the plaintiff, now the judgment creditor] *sic dicebat: Quod tu mihi iudicatus (sive damnatus) es sertetium decem milia, quandoc non solvisti, ob eam rem ego tibi sestertium decem milium iudicati manum inicio; et simul aliquam partem corporis eius predebat*.⁴ The defendant was ‘not allowed’ to shake off the arresting hand (*nec licebat iudicato manum sibi depellere*)⁵ but was obliged to find a *vindex* or, in default of this, could be led away and imprisonment, in times when the notion of physical vengeance had died out, was to make the defendant work off the judgment debt by his labour as a bondsman. In the formulary period the execution process was introduced by a separate *actio iudicati* (which again required *in ius vocatio*); this was equally directed towards securing the person of the defendant. But there also appeared in this period the praetorian *missio in possessionem* followed by sale of the defendant’s property as a means of execution, and this continued to exist side by side with execution on the person, never expressly abolished.⁶ These remedies—the *actio iudicati* and *missio*—depended no less than *manus iniectio iudicati* on the physical capacity of the judgment creditor to put them into effect. The praetor gave no more help in execution than he did in summoning; Bethmann-Hollweg, indeed, speaks,¹ in connection with real actions, of the successful plaintiff getting the help of the praetor’s assistants to seize the thing of which he has been declared owner (or rather the thing in respect of which the praetor has given his *duci vel ferri iubere*), but cites not a single text in support of this idea.

The result of the foregoing considerations is that Roman litigation in the republican and classical periods was devoid of the sanction of state power which modern English litigation enjoys, and that the only physical sanction of Roman litigation in these periods consisted in such force as the plaintiff was able to muster in order to overbear the actual or possible resistance of a weaker defendant. If, therefore, the only sanction of any kind supporting a system of litigation were to consist in the plaintiff’s own strength, we would be driven to conclude that this system must have functioned with the utmost irregularity, since the tendency would be for potential plaintiffs who were weaker than their prospective adversaries to refrain from instituting a useless proceeding. Only those would emerge as plaintiffs who were stronger than, or at least as strong as, the defendants; only those would appear as defendants who were weaker than, or at least no less weak than the plaintiffs.

It might be objected, by way of general disagreement with this hypothesis, that, if it were true, there would be no such thing as the *actio quod metus causa*. This action (it might be argued) presupposes a plaintiff who has at some time or other been bullied by the defendant and is therefore probably weaker than him. Accordingly (leaving out of account the important possibility that the action is brought after a sudden reversal of the respective positions of strength) we would have an example of an action in which the typical plaintiff is weaker than the typical defendant.

¹ Tab III. I–3 (Bruns): from Aul. Gell. 1.20. 1. 42 ff.

² Bruns, p. 123 (s. 61 of the *lex*).

³ No other practical conclusion seems possible, in spite of Wenger’s formulation (op. cit., p. 212) that ‘the creditor could not himself execute’ but his co-operation was important’. If in the period before the rescript of Antoninus Pius (below, p. 29) and the growth of execution *manu militari* the plaintiff did not take the physical steps necessary to execution, who did?

⁴ *Inst.* 4. 21.

⁵ *Ibid.*

⁶ Wenger, op. cit., pp. 301–2.

¹ Op. cit. i. 192.

There would be some significance in this objection if it could be sustained (it would not, of course, be conclusive against the hypothesis advanced above, because on either view it would be admitted that the *actio quod metus causa* could be successfully instituted in cases either where the respective positions of strength had become reversed since the act of bullying, or where the weak plaintiff had somehow recruited the protection or representation of a powerful *patronus*). But the force of the objection depends entirely on the view one takes of the *actio quod metus causa*; in particular, whether after the period immediately following its creation it was a real and effective weapon rather than a more or less dead letter. It is not easy, because of the very scanty evidence, to come to a firm conclusion on this point, but there are some indications at least that the latter alternative may be the truer one.

First, the action on *metus* carrying a quadruple penalty bears all the signs of having been introduced in order, to deal with a special and transitory situation, namely the disorders accompanying and following the Sullan proscriptions about 80 B.C., and perhaps those of the subsequent Lepidan insurrection.¹ The action was, according to Cicero² based on a formula *Octaviana*, and thus on a formula included by a praetor Octavius in his edict; this Octavius must have been either Cn. Octavius, consul in 76, or L. Octavius, consul in 75.³ During the Sullan proscriptions 10,000 slaves were freed at one stroke, and many bands of lawless men took the opportunity to terrorize the countryside, robbing and driving owners from their property.⁴ If the action, as seems certain, was originally directed against those who had forcibly seized other people's property during this period, then it was directed primarily against the offscourings of the population: even those to whom confiscated estates were formally awarded were very largely freedmen of the lowest type.¹ The measure of resentment felt at the confiscations may be judged from the serious uprising at Faesulae, when the Sullan colonists were attacked;² and no doubt after Sulla's retirement and death the recapture of extorted property from his followers, at any rate from the less important ones, became a practical proposition. Not all of them were as rich and powerful as Chrysogonus.³ *Cogebantur Sullani homines quae per vim et metum abstulerant reddere*, says Cicero,⁴ and this probably refers to the effect of the *formula Octaviana*, which was already, like the classical *actio quod metus causa*, a penal action carrying fourfold damages.⁵ Condemnation did not involve *infamia*, a further circumstance which may illuminate the historical background of the formula: no doubt Octavius did not think of attaching *infamia* to condemnation because he was dealing with a class of defendant, belonging to the lowest order of freedmen, who had no civic honour to lose.

The incorporation of the *formula Octaviana* in the praetor's edict in these circumstances, and its use at that time, are quite consistent with the hypothesis outlined above concerning the relation of strength to litigation: the return of more settled conditions restores the balance of power temporarily upset in the terror of the proscriptions; many of the forcible usurpers find themselves without political or social influence, and physically unable to hold on to their grains or to resist *in ius vocatio*; most of them, perhaps make restitution or abandon their plunder rather than face personal execution on foot of the fourfold judgment which they would probably be unable to satisfy.⁶

¹ To the same period belong the edict on violence and robbery (*De hominibus armatis coactis et vi bonorum raptorum*, Lenel, 391) and (no doubt) those on rioting (*De turba*, Lenel, 395) and looting (*De incendio ruina naufragio rate nave expugnata*, Lenel, 396).

² *Ad Q. fr.* 1.7.21; in *Verr.* 2.3.65..152.

³ See Broughton, *The Magistrates of the Roman Republic* ii.92,96. It may be thought that the former, who must have been praetor by 79 at the latest is the more likely of the two to have been the originator of the *formula Octaviana*. He was a friend of Cicero's, who refers to him as an *optimus atque humanissimus vir* (*de fin.* 28.93) and places him among the *praesidia reipublice* (*Brut.* 222). Sallust calls him *mitis* (*Hist. a.* 26 Maur.). Despite his having held office in the Sullan restoration he had no obvious connexion with Sulla (*RE* 17.2.1818). He suffered severely from arthritis (*Cic. ibid.*, *Sall, ibid.*), and it does no harm to guess that this physical disability might have predisposed him, no less than did his good character, against bullying.

⁴ Sallust, *or. Lep.* 7.16–17, 21, 24.

¹ Plutarch, *Sulla* 33.2.

² Granius Licinianus 45 (Bonn).

³ *Cic. Pro Rose. Am., passim*

⁴ *Ad Q. fr.* 1.7.21.

⁵ See Schulz, 43 ZSS 219

⁶ The later *actio quod metus causa* contained a *clausula arbitraria* which perhaps goes back to Octavius.

All this is a long way from proving that an *actio* based on *metus* was a common or ordinary remedy in normal times thereafter, the enforcement of which presented the plaintiff with no problems. It may be significant that secular literature contains no report of any actual case of the *actio* being brought; indeed it might almost be said that what evidence there is in lay literature suggests that the *actio* was *not* used. Cicero¹ recounts Clodius' apparently unhindered acquisition, by means of; threats, of estates belonging to a woman (Scantia) and a young man (P. Apinius): textbook cases for the application of the *formula Octaviana*, yet apparently Clodius was not afraid of it. The *actio* is also not mentioned by Gaius in his Institutes. There are, of course, other strange omissions in Gaius, e.g. that of all the real contracts except *mutuum*.² But he does mention the two praetorian delictal actions *vi bonorum raptorum*³ and *iniuriarum*,⁴ so why not the action on *metus*? Perhaps the answer may be that it was an extremely rare action, like the *actio de dolo*,⁵ which also goes without mention in his account of the delicts. The *exceptio* based on *metus*, on the other hand, is mentioned by Gaius in two passages,⁶ and is also mentioned indirectly by Cicero;⁷ and this again is altogether consistent with the hypothesis advanced above. It may not be possible for A, whom B has bullied into some disadvantageous position, to get redress as plaintiff against B; but if what B has done is to bully A into an undertaking or obligation of some kind, and he then sues A to enforce it, A can easily get (or at any rate apply for) the *exceptio* based on *metus*, notwithstanding his physical inferiority. He has not had to drag B to court in order to raise the question of *metus*; B has dragged A there, but he cannot stop him speaking when they have arrived.

The only place in Roman literature where the *actio quod metus causa* or the *in integrum restitutio* based on *metus* is discussed at length (or indeed even mentioned in so many words) is the Digest title *Quod metus causa gestum erit*;¹ and the question is, how far does this title represent a living and useful remedy in the first centuries B.C. and A.D.? It is clear that there is no obstacle in the way of belief in the action's effectiveness in cases where the balance of power has changed since the bullying, so as to put the victim in a superior position to that of the wrongdoer; or where the action is directed against a third party, himself weaker than the victim of the *metus*, who has derived a benefit from it; but is there any reason to think that the notion of *metus*, as grounding a plaintiff's remedy, had any wider application than this?

If anything, such shreds of evidence as we have indicate the contrary. Firstly, the effect of force on the free will seems to have been a known philosophical and rhetorical topic. For example, the expression *coactus volui*, used by Paulus to ground the view that I become heir even if I am forced to enter upon an inheritance,² is recognized by Schulz 'to sound so much like a Stoic thought as to make it impossible to deny the influence of this philosophical school on that jurist'.³ Cicero discusses in the *de officiis*, as a moral question, whether one ought to stand by promises which have been extorted by threats or induced by fraud.⁴ One of Seneca's *Controversiae* turns on the point whether *per vim metumque gesta irrita sint*.⁵ The great majority of the passages in the Digest title *Quod metus causa gestum erit* are cast in theoretical form: this would be a poor argument for the view that none or not many of them resulted from actual cases known to the jurists, but it is easy to imagine many of the jurists' answers in this field proceeding from theoretical interest in the topic of *metus* rather than from any great experience in the bringing of actions based on it.

¹ *Pro Milone* 27.75. See also *pro Milone* 32.87: ... *multos sedibus ac fortunis siecerat* (of Clodius).

² Though perhaps this can be explained: see Honoré, *Gaius*, pp. 63–65.

³ *Inst.* 3. 209.

⁴ *Inst.* 3.220 ff.

⁵ See Watson, 'Actio de dolo and actiones in factum', 78 *ZSS* 992.

⁶ *Inst.* 4.117, 121.

⁷ *De off.* 1.10.32

¹ *D.4.2.*

² *D.4.2.21.5.*

³ *Op. cit.*, pp. 180 ff. *Contra* von Lübtow, *op. cit.*, p. 62, unconvincing.

⁴ 1.10.32: *Iam illis promissis standum non esse quis non videt, quae coactus quis metu, quae deceptus dolo promiserit? quae quidem pleraque ure praetorio liberatur, non nulla legibus.*

⁵ *Contr.* 4.8. The argumentum continues: *Bello civili patronus victus et proscriptus ad libertum confugit. Receptus est ab eo et rogatus ut operas remitteret. Remisit consignatione facta. Restitutas indicit operas. Contradicit.*

Secondly, the title does contain one passage which suggests, that the bringing of actions for *metus* was in fact uncommon. Ulpian reports,¹ in the only passage in the title which purports to represent an actual happening:

Sed ex facto scio, cum Campani metu cuidam illato extorsissent cautionem pollicitationis, rescriptum esse ab imperatore nostro posse eum a praetore in integrum restitutionem postulare, et praetorem me adsidente interlocutum esse, ut sive actione vellet adversus Campanos experiri, esse propositam, sive exceptione, adversus petentes non deesse exceptionem.

This passage comes from a discussion on the point whether both *actio* and *exceptio* are available even where a transaction entered into under duress is *imperfecta*. The passage itself is recognized by von Lübtow² and others³ to have been originally in the commentary on the quadruple action, and Beseler⁴ assumed that the original relevance of the text was to the question whether the quadruple action would lie against a juristic person (i.e. the *municipium* of Capua) because of the act of the governing organ of the juristic person. But it seems incredible that by the time of Ulpian the liability or non-liability of a *municipium* in delict⁵ could still have been a matter of doubt; and what seems a more likely explanation⁶ is that the *actio*; based on *metus* was so little known in that period that it needed; an imperial rescript to resurrect the *formula Octaviana* and to direct the victim's attention to the fact that the praetor could give *in integrum restitutio*. There is no doubt that where what had: been extorted was an obligation, as here, the victim of the extortion would normally prefer to await the other party's action: and then to apply for an *exceptio*: what could be gained by taking the offensive? This circumstance alone sheds an air of unreality on the case; but the mere fact that in the second century A.D. Ulpian thought it worth while to report the praetor's declaration that such an action was available seems to point significantly to its rarity in practice.

The result of the impression left by the Digest title and by the other matters mentioned above is that there is no evidence that the action based on *metus* was a common or practical remedy in the era of the private *in ius vocatio*, and some evidence that it was not. Accordingly, the existence of the *metus* concept is not inconsistent with the hypothesis advanced above, that the average Roman lawsuit up to the mid-second century A.D. was one in which the plaintiff either commanded physical superiority over the defendant, or was at least a good match¹ for him.²

¹ D.4.2.9.3.

² Op. cit., p. 224

³ Beseler, Betti: see von Lübtow, *ibid.*

⁴ *Kritik der römischen Rechtsquellen*, i.73.

⁵ See von Lübtow's discussion of this topic: op. cit. 227 ff.

⁶ Von Lübtow's own explanation of the reason behind the passage is very difficult to believe: op. cit., p. 230. He admits, however, that any answer to the question must be arbitrary. His treatment of *interlocutus* seems unsound (p. 226).

¹ A good match: see Horace, *Sat.* 1.7.

² The foregoing arguments are in no way intended to prove that, when the classical jurists wrote about the *actio quod metus causa*, they were discussing a remedy which to their knowledge was useless. As has been said, a certain scope for the action must have existed, whenever a reversal in the respective positions of strength took place; and, of course, as soon as the power of the State could be recruited by the plaintiff, in other words from the mid-second century A.D. onward, the remedy must have been effective (though no doubt, after this development, cases of *metus* became fewer because potential *metus*-wrongdoers would know they could no longer extort with impunity even though themselves stronger than their victims).

In modern English law what corresponds to *metus* (duress) plays a very small part. With regard to its status in the law of contract, Cheshire and Fifoot (*Introduction to the Law of Contract*, 6th edn., p. 253) say 'it is a part of the law that nowadays seldom raises an issue'. This is no doubt due not to better morals in England than in Rome but to the efficacy of English litigation: a strong A does not bully a weak B into a disadvantageous deed or contract, because he knows that B enjoys the protection of effective laws and can easily sue for rescission. Duress is known in the law of wills; but, of course, here the wrongdoer hopes that all knowledge of the duress will disappear with the testator's death.

If the conclusion tentatively advanced above be accepted, that the *metus* concept did not, after the period immediately following its introduction, constitute a generally effective remedy so far at any rate as the *actio* was concerned, it may be that the same conclusion ought to be drawn about the *condictio ob turpem vel iniustam causam*, so far as this was directed to recovery of money or property forcibly extorted.

Before, however, concluding that this really was the character borne by all Roman litigation in this period, it is worth looking around to see whether the situation of the private summons and execution, at first sight unfavourable to a presumption of impartial regularity, may have been modified in practice by other elements tending to redress the balance in the weaker plaintiff's favour. By this is not meant that purely personal elements such as a defendant's sense of honour or pride or justice may have been at work—such things are imponderable and cannot be assessed as constant factors in the situation—but rather that if we cast around we may find more general forces, forces of a social kind, tending to induce obedience to legal process even among the great and powerful.

One such element in a society like Rome, where the personal reputation, the *existimatio*, counted for a great deal,¹ was certainly the force of public opinion. We have, in fact, some indirect evidence from the Digest title on *iniuria* that one's *existimatio* suffered if one were thought to be committing an injustice. Thus, one text of Ulpian² speaks of the *actio iniuriarum* lying against a person who goes about in mourning in order to create the impression that he has been grievously wronged by another, and thus to bring disrepute on that other.³ Two further texts, one of Ulpian⁴ and one of Gaius,⁵ imply the disgracefulness of being thought unable or unwilling to pay a debt: the former gives the *actio iniuriarum* against one who *non debitorem quasi debitorem appellaverit iniuriae faciendae causa*, the latter against my creditor, *cui paratus sum solvere*, who *in iniuriam meam fideiussores meos interpellaverit*.

Further evidence of the part which must have been played by public opinion in inducing submission to litigation is provided by the material collected (but not related to the present problem) by H. Usener at the beginning of the century in an article entitled 'Italische Volksjustiz'.⁶ This material amounts to a convincing reconstruction of the ancient Italian custom of 'popular justice', which seems to have been known and practised at least up to the end of the Republic, and very likely well into the Empire. Usener begins by reflecting generally that some form of self-help is found wherever the normal processes of law are defective, and that popular moral sensibility fills the gaps left by the law. In primitive Italian society the gaps were filled by the popular condemnation of a wrongdoer, which may originally have taken the form of mob-justice and the forcible expulsion by flogging of the culprit from the community; later the forcible expulsion was replaced by a communal disgracing of the offender. This communal disgracing took the form of an organized shouting of insulting words in the offender's presence, words which normally consisted of, or were connected with, the aggrieved party's demand against the wrongdoer.¹ Usener relates this custom to the word *flagitium*, which in later literary Latin means a crime of some disgraceful kind, but, on Usener's interpretation, developed this meaning by transference from its original sense of *flagitatio*, or the making of an insulting exhibition in someone's presence or outside his house with a view to compelling him to make good or compensate for some disgraceful act (most often the non-payment of a debt), and four passages in Plautus reveal this earlier meaning of *flagitium*.² Not altogether removed from this field of thought and behaviour is the permission accorded by the XII Tables to a person whose witness has failed to appear in court to go to the witness's house and shout (*ob portum obvagulatum ito*)³ in front of it.

¹ Note, for example, the rhetorical equation of one's good name with life itself, which is a constant feature in Cicero's *pro Quinctio*: e.g. 2.8; 15.49–50; 31.99.

² D.47.10.15.27.

³ Cf. with this the case raised by Seneca, *controversiae* 10.1.30; as to which see Daube, *Atti del Congr. Intern. di dir. rom.* (1948) iii. 433 ff.

⁴ D.47.10.15.33. Cf. Gaius, *Inst.* 3.220: *Iniuria autem vommittitur cum quis.....bona alicui quasi debitoris, sciens eum nihil sibi debere, proscriseri*.

⁵ D.47.10.19.

⁶ 56 *Rheinisches Museum für Philologie* [1901] 1 ff.

¹ Usener identifies this with the *occentare* of the XII Tables (Bruns: tab. VIII.1) and with *convicium*, which he understands as derived from *vicus* and as meaning something like an activity of the whole village community. *Convicium* is more usually associated with *voc-*, and is thought to mean merely a raising of several voices; the identification with the earlier *occentare* (a capital offence, which perhaps had magical associations) seems doubtful.

² *Trin.* 612; *Merc.* 417; *Curc.* 198; *Epid.* 516.

³ Bruns: tab. ii.3. Festus gives *vagulatio=quaestio cum convicio*.

Some idea of the form taken by *flagitatio* may be got from the literary sources. Thus Usener cites the urgent cry of a usurer in Plautus:⁴

Cedo faenus, redde faenus, faenus reddite.
daturin estis faenus actutum mihi?
datur faenus mihi?

Ovid too, reflects a knowledge of the custom of public demand:⁵

‘redde meum’ clamant spoliatae saepe puellae,
‘redde meum’ toto voce boante foro. ...

And Petronius:¹ *nemo mihi inforo dixit ‘redde quod debes’*. Perhaps the best example is one from the late Republic, a poem of Catullus² in the form of a *flagitatio* directed at a woman who would not return his notebooks (*codicilli*); the poem resounds with the reiterated phrase ‘*redde codicillos, redde codicillos*’, coupled with vulgar abuse of the woman, and with the calling-up of others to join in the shouting (the ‘others’ are admittedly, in Catullus’ whimsy, poetical abstractions).³

This phenomenon—the popular sense of justice expressing itself in defamatory behaviour—obviously reflects a background of moral standards to which the members of society are generally sensitive; if this were not true, if wrongdoers were usually as insensitive to loud abuse as Plautus’ character Ballio,⁴ the practice would have disappeared because of its ineffectiveness; whereas the literary evidence seems to show that it was a living custom into the Empire. There is no doubt that it must reflect a state of affairs in which the processes of law were inadequate to ensure the righting of all wrongs; and because of its popular character it may be assumed that it tended typically to be employed against individuals who were more powerful than the wronged instigators of *flagitatio*. This evidence bears a certain relation to the Digest passages on *iniuria* cited above; *wrongful* insinuations against innocent parties are actionable, but we are left to infer that circumstances might sometimes justify public insinuations if no other course were open to an injured party, and indeed one Digest passage may well be read as expressly authorizing this: *eum, qui nocentem infamavit, non esse bonum aequum ob eam rem condemnari: peccata enim nocentium nota esse et oportere et expedire*.⁵

Public opinion as an operative force against one who denies another his rights is in a sense institutionalized and given official expression in the practice surrounding the infliction of *infamia*. There is no direct evidence for the infliction of either praetorian or censorian *infamia* as a punishment for physically preventing the institution of an action or the execution of judgment; but there is evidence of an indirect kind which allows the infliction of *infamia* to be presumed, very tentatively in the case of praetorian, fairly conclusively in the case of censorian, as an additional sanction of *in ius vocatio* at least.

Physically resisting *in ius vocatio* is not found among the grounds for praetorian *infamia*,¹ yet one form taken by, praetorian disgrace was a prohibition of a person’s appearing for another in litigation as a *cognitor*, or demanding an action on behalf of another.² Why should just this mode of *infamia* have occurred to the praetor {or possibly to the legislator on whom he modelled his procedure}?³ In order to answer this question, it may be instructive to consider a well-marked feature of early Roman legislation, namely the creation of sanctions which are appropriate to the act giving rise to the sanction. The XII

⁴ *Most.* 603 ff.

⁵ *Ars amatoria* 3.449.

¹ *Cena Trimalchionis* 57.

² *Carmina*, 42.

³ It is possible that there is here a specifically legal play on words, and that *flagitatio* was sometimes used against those who failed to respect *codicilli* in the sense of informal additions to testaments? These *codicillos* were in Catullus’ time not yet legally enforceable, but perhaps some cry like *codicillos imple* was well known.

⁴ *Pseud.* 360 ff.

⁵ *D.*47.10.18.pr.

¹ Lenel, pp. 77 ff.

² Lenel, pp. 76 f.

³ Lenel, *ibid.*

Tables contain several examples: possible *talio* in the case of *membrum ruptum*,⁴ death by fire for one who sets fire to another's house or grain-heap,⁵ and—particularly significant, perhaps, for the present purpose—the rule that a witness who refuses his testimony shall thereafter be *improbis intestabilisque*.⁶ The praetor's edict contains a similar type of rule, which has the appearance of being ancient: *quod quisque iuris in alterum statuerit, ut ipse eodem iure utatur*.⁷ It is not inconceivable that the praetorian mark of disgrace implied in the orders about *qui nisi pro certis personis ne postulent*⁸ and *qui ne dent cognitorem, qui ne dentur cognitores*⁹ equally echoes rules of this general type, and that the procedural restrictions given here in the edict have their origin as punishments of some misbehaviour connected with the position of a defendant. The most obvious way in which a potential defendant can misbehave is by refusing to defend, and perhaps these rules, or rules like them, originally had the effect of placing a man at the same disadvantage when he is a plaintiff, as he had inflicted on another plaintiff when he was a defendant.¹

We are on much firmer ground with censorian *infamia*, thanks to a passage from Asconius,² in which we are told that Cicero recounted how Gellius and Lentulus the censors³ *Antonium ...senatu moverunt, causasque subscripserunt, quod socioi diripuerit, quod iudicium recusarit, quod propter aeris alieni magnitudinem praedia manciparit, bonaque sua in potestate non haberet*.⁴ Here we are expressly told that one of the matters leading to the exclusion of Antonius from the Senate was the fact that he *iudicium recusarit*, a technical phrase which somehow goes without mention in the standard books and articles on Roman procedure. The earliest text in which the notion of *iudicium recusare* appears is one of Plautus;⁵ in it Agorastocles, Antamoenides, and Hanno repeatedly summon the *leno*, Lyco, before the praetor;⁶ Lyco ignores the summoning, offering to hang himself, instead, and finally Agorastocles says: *numquid recusas contra me?*: Lyco replies: *haud verbum quidem* ('not a bit'). Here it looks as though *recusare* in its legal context has, or can have, the sense of physically resisting an *in ius vocatio*; and the only other passage in Plautus where the word *recusare* occurs—equally in a legal context—goes some way to support this impression.⁷ Cicero, however, uses the word frequently, mostly in the *pro Quinctio*⁸ in a technical sense, which appears by his time to be free of physical associations, and the same is true of the many passages from the classical jurists in the Digest in which interest centres around whether or not a defendant is entitled to *recusare iudicium*. In the Digest, the question of being entitled to *recusare iudicium* is treated quite separately from the question whether a defendant, if in fact he did consent to defend, would win the case or not; apparently there were situations in which the praetor concluded, before any hearing *in iure* of both parties and on the mere complaint of the plaintiff, that the defendant was right in refusing to obey the *in ius vocatio*. Phrases such as *iuste*,¹ *recte*,² *probe*,³ *recusare* appear (though from these and other⁴ texts another possibility emerges: that *recusare* had by the classical period developed the sense of refusing *litis*

⁴ Bruns, *Fontes*: tab. VIII.2.

⁵ *Ibid.*, tab. VIII.10.

⁶ *Ibid.*, tab. VIII.22 (Aul. Gell. 7.7.2–3; 15.13.11).

⁷ Lenel, p.58.

⁸ Lenel, p.77.

⁹ Lenel, pp. 89 ff.

¹ It must be admitted that there is no trace in the texts of this original situation, so that the remarks above must remain a pure hypothesis.

² *Orat. in toga candida*, p. 111.

³ Of 70 B.C.; see Broughton, *The Magistrates of the Roman Republic*, ii. 126.

⁴ This Antonius was subsequently Cicero's colleague in the consulship: see *RE* I.2577.

⁵ *Poenulus* 1355.

⁶ Using three different forms: *eamus in ius* (1342), *in ius te voco* (1343), *in ius eas* (1349).

⁷ *Curc.* 162 ff.

⁸ 6.23; 8.30; 13.44; 19.61; 20.63.

¹ *D.* 16.1.8.10.

² *D.* 26.9.5.1.

³ *D.* 27.8.6.

⁴ *D.* 3.3.31pr; 4.4.46; 5.1.36.1; 9.4.29; 15.1.21.3; 42.1.4 pr.2; 46.1.51.1.

contestatio after the hearing *in iure*, so that a justified *recusare iudicium* would imply for the plaintiff (*denegatio actionis*)⁵ To *recusare* seems to have been thought shameful: a text of Celsus⁶ cites Q. Mucius Scaevola as speaking of a *fideiussor* who was unwilling *propter suam existimationem recusare*. Wrongful *recusare* might incur *missio* as against an *indefensus*⁷ as well as exposing the person wrongfully *recsans* to the censorian *infamia* but, whatever the exact meaning of *recusare iudicium* may have been at any time, it seems an easy and certain inference that the most insolent form it could take, viz. a resistance to *in ius vocatio* by actual or threatened force, could attract censorian *infamia*. Even if we interpret the action of Antonius as having been a mere refusal *in iure* to proceed to *litis contestatio*,⁸ for which reason the censors removed him from the Senate-list, *a fortiori* this disgrace must have fallen on him if he had unceremoniously beaten off the plaintiff in the first place.

Three other factors which might tend to mitigate the effects of the private *in ius vocatio* and execution ought to be mentioned. The first is the institution of *clientela*, very widespread in the Republic and early Empire, under which weak and impoverished people attached themselves to some greater person, a *patronus*, and, in return for doing him services such as *salutatio* and political support, received assistance from him in their own difficulties, notably in litigation. It is true that this assistance may in certain cases have gone no further than giving a *cliens* some legal advice (*Romae dulce diu fuit et sollemne ...clienti promere iura*);¹ on the other hand, Dionysius Halicarnassensis in his account of the client status tells us² that *patroni* were obliged to explain the law, and to take up the cases of their wronged clients, in case of a breach of contract or a prosecution. There is no direct record of a *patronus* summoning the adversary of his *cliens* to law, yet if the words of Dionysius mean anything it is a fair presumption that a *cliens* who needed physical help in summoning or executing against someone stronger than himself might apply to his *patronus* for it. Of course, this possibility is to some extent balanced by the converse possibility, that a defendant *cliens* might recruit the help of his *patronus* in order to avoid meeting his obligations. Perhaps one ought to go no further than to say that, in the power-question necessarily arising from the private summons and execution, *clientela* must have played a part. How strong the obligations arising from *clientela* on the side of the *patronus* were is shown by the XII Tables' outlawry of the fraudulent *patronus*³ and by the words of C. Caesar the *pontifex maximus* reported by Gellius:⁴ *neque clientes sine summa infamia deseri possunt*.

The second factor which may have lessened the unequal effects of the private summons and execution lies in the nature of many Roman actions. Some of these are such that a bond (or the remains of a bond) of friendship is likely to exist between the parties; thus, for example, one might expect that perhaps a defendant in the *actio commodati* or *depositi* or *depensi* or *mandati* or *negotiorum gestorum* would not intransigently resist *in ius vocatio*, but would submit with a good grace to the action, as to an arbitration. The same might possibly be said about the *actio pro socio* or *fiduciae*. Again, some actions concerning wardship or testamentary disposition or the like would very often take place between parties linked by blood relationship or marriage; thus, even a weak plaintiff might often hope to encounter no physical resistance in bringing an *actio tutelae* or *legati* or *rei uxorial* or *funeraria* or *ex testamento* or *ad supplendam legitimam*. The relationships of neighbouring farmers who are perhaps evenly matched, and anyway perhaps cannot afford to do anything too unneighbourly to one another, are in play in a further group of actions: *aquae pluviae arcendae*, *arborum furtim caesarum*, *de pastu pecoris*, *de pauperie*,

⁵ *Recusare* sometimes seems to mean merely the setting up of a defence to the plaintiff's allegation; and in Tac. *dial.* 5.1 the phrase *recusare iudicem* (objecting to a particular person as judge) appears.

⁶ 17.1.48.pr.

⁷ Lenel, pp. 410 ff.

⁸ *Litis contestatio* could only come about through the co-operation of the parties, a circumstance which led Wlassak (*Die Litiskontestation im Formularprozess*, 1889) and, following him, many others (e.g. Wenger, *Inst.*, p. 165, Weiss, *RE* 13.1. 777–8) to interpret *litis contestatio* as a *contract*. Against this view see Jahr, *Litis Contestatio*, 1960.

¹ Hor. *epist.* 2.1. 103 f.

² 2.10.1.

³ Bruns: tab, VII. 21: *patronus si clienti fraudem fecerit, sacer esto*.

⁴ 5.13.6. See also 20.1.40. Representation in litigation may also have played a part in righting the imbalance of strength as between a weak plaintiff and a strong defendant.

finium regundorum. Defendants in the *actiones institoria, exercitoria, tributoria* could scarcely afford to beat off just claims, for fear of bringing their businesses into disrepute: the same consideration of a merchant for his good name may often have smoothed the path of plaintiffs in the actions based on sale, hire, and pledge.

Thirdly, it seems in general likely that in a horizontally stratified society a large proportion of all legal relations would exist *within* a given stratum, whether high or low, so that the parties in a particular transaction or situation of law would very often be of approximately equal strength, or would at least very often stand in a relation of disparity to one another insufficiently great to encourage the stronger one to intransigence: this was quite probably the usual case in a large range of contracts and in most situations arising from the law of succession.

But when all possible allowance has been made for the operation of public opinion (whether informal or institutionalized), for the role of *clientela*, and for practical considerations arising from the nature of many actions, the irreducible fact remains that a powerful and intractable defendant who was not sensitive about his public reputation could and doubtless very often did frustrate the just claim of a plaintiff by resisting summons or execution, and this situation must have continued to exist for so long as the State took no band in physically assisting the wronged plaintiff. There may, it is true, have been isolated occasions in the Republic and early Empire on which in fact state assistance was provided for the execution of a judgment—Cicero, for example, recounts¹ how a provincial official gave some troops of cavalry to one Scaptius in order to, help him to exact a debt from the town of Salamis in Cyprus, and seems himself to have contemplated assisting the creditor's claim by military force (*dixi denique me coacturum*)—but it seems that the earliest formal state execution depended on (or at least its earliest stages were recognized and approved by) a rescript of Antoninus Pius. Ulpian reports:² *a divo Pio rescriptum est magistratibus populi Romani, ut iudicum a se datorum vel arbitrorum, sententiam exsequantur hi qui eos dederunt*; two other Ulpian texts refer to the use of *apparitores* in carrying out judicial measures, one of them referring to another rescript of Antoninus Pius;³ and a fourth text, also of Ulpian, speaks of the enforcement by a magistrate, perhaps *extra ordinem* and *manu militari*, of an order of *missio in possessionem fideicommissi servandi causa*.⁴ This innovation is in itself significant. It must be taken to represent an improvement in efficacy on the system which preceded it; and the inference nearest to hand is that the relative inefficacy of the preceding system was due to the judgment-creditor sometimes not disposing of sufficient force to execute his judgment for himself.

At about the same period, perhaps a little earlier, a new form of summons with official co-operation (*evocatio*)⁵ came into use; it is associated with the *cognitio extraordinaria*, and not with the formulary system. The old private *in ius vocatio* was never formally abolished, but was in practice overshadowed and replaced by the new form of *evocatio*, since these were naturally more advantageous to the plaintiff.¹ The most important change brought in the train of the *cognitio extraordinaria*, and one closely connected with the *evocatio* was the institution of a special proceeding on foot of a defendant's *contumacia*, or failure to appear in response to *evocatio*; in this proceeding the plaintiff, could produce his evidence in the absence of the defendant and recover immediately a judgment against the defendant, which in certain circumstances was inappellable;² and this possibility made the importance of sanctions for *in ius vocatio* disappear at one stroke. The contumacy procedure probably goes back to the time of Hadrian if not further,³ and, taken together with the state-operated execution of judgments, provided for

¹ *Ad Att.* 5.21.10.

² *D.*42.1.15.pr.

³ *D.*11.4.3; *D.*21.2.50.

⁴ *D.*43.4.3.pr.

⁵ See Wenger, *Inst.*, pp. 260 ff.

¹ Wenger, *Inst.*, p. 260 n.

² *D.* 5.1.73.3.

³ *C.*7.43.1; *D.*4.1.7.pr. In the former text Antoninus Pius refers to a *subscriptionem patris mei, qua significavit etiam contra absentes sententiam dari solere*. Kipp (*RE* 4.1169) asserts that the contumacy procedure is already envisaged by the *SC Rubrianum* of A.D. 103.

the first time an adequate apparatus for the enforcement of private law, whatever the relative strengths of the plaintiff and defendant.

2. Improper Influences in Roman Litigation

J. M. Kelly, *Roman Litigation* (Oxford: Clarendon Press, 1966), 31–68
[footnotes renumbered]

EQUALITY before the law, as a modern democratic maxim, means, among other things, that the administration of justice, between citizens proceeds on objective legal considerations only, and that a party to a civil action once begun¹ cannot hope for an advantage from any social, political, or economic superiority over his adversary. In most democracies this kind of equality is taken absolutely for granted. Indeed, in some cases the superior position of a potential defendant is a positive encouragement to the potential plaintiff; a figure prominent in social or political life is peculiarly vulnerable (because of public opinion and its ‘organs’) to actions based on a disgraceful wrong, like conspiracy or assault; and no poor man injured by an act of negligence hesitates to litigate with a powerful magnate or a financial giant. The only sure protection against civil proceedings is in fact poverty; no one will bother to sue someone who cannot satisfy a judgment; but wealth and power, instead of conferring immunity, invite attack, and every day doubtful claims are bought off in cash settlements (based on their ‘nuisance value’) by newspaper groups, insurance corporations, and departments of government as well as by private individuals. The climate of justice which produces this situation has nothing to do with the relative perfection of the laws of tort, contract, or property; but these laws would have a very limited usefulness or interest if this climate did not exist. Equally, our idea of an antique jurisdiction is two-dimensional and incomplete unless we can see how it worked in its social setting and assess the limits within which its abstract rules in fact found objective application.

In the preceding chapter the sanctions underlying Roman litigation were considered, and an answer was sought to the question: To what extent was it possible for a physically inferior citizen, in the era of the private summons and execution, to induce or compel the appearance in court of a physically superior citizen against whom he had a legal claim? In this chapter a different question must be asked: given the appearance of the defendant, could both parties expect the case to be decided on impartial considerations of law alone? The testimony of Roman literature seems to be that the objective and regular application of civil justice, which today seems so ordinary, was not one of the achievements of the Roman world, and was, at most, an aspiration of some of its better spirits.

Cicero’s speech *pro Caecina* before a court of *recuperatores* contains a passage which, when all allowances have been made for his rhetorical style and his advocate’s purpose, offers a revealing perspective which shows the way this study may take. The presentation of Caecina’s case (an application for a possessory interdict) involved Cicero, first, in an appeal to the judges to have regard to the spirit rather than to the letter of the law, then in a disquisition on the *ius civile* itself. This disquisition rests on a not very realistic distinction between issues of fact (which can be wrongly resolved if a witness is dishonest or a judge unfair) and issues of law (which depend on known rules, and cannot be perverted); thus, a litigant may reasonably say to a judge ‘Declare this to have happened, or not to have happened; believe this or that witness; find this or that document authentic’, and he may succeed in persuading the judge, ‘even though he is in the wrong; but he cannot say ‘Decide that a man’s will is to be upheld despite the subsequent birth of a son; or, Give judgment that a woman is bound by an undertaking given without her guardian’s authority.’² The latter kind of issue, says Cicero, is immune from improper influence or corruption: why? because it depends on the law.

¹ Once begun: leaving out of account here the considerations arising from the *cost* of litigation; in this respect a person in the so-called middle-income bracket, who would be heavily hit by an adverse order for costs, may be unfairly deterred from pursuing a bona fide claim.

² *Pro Caecina* 71 ff.

Quod enim est ius civile? quod neque inflecti gratia neque perfringi potentia neque adulterari pecunia possit. ...³

It is clear at once that what Cicero has in mind in this context is the pure, the abstract civil law, the civil law purged of the gross realities of human controversies, like the soul purged of the contaminating flesh. The law, after all, can be applied only to a set of facts; and if the wrong facts are established, the law will be wrongly applied. This is so obvious, that we have no option but to understand Cicero's words as describing the immunity of the *abstract* rules, and as pointing a sharp contrast between their theoretical immunity and their practical vulnerability; the rules themselves remain inviolate (though their operation may be perverted, overcome or corrupted).

The forces which can destroy the regular operation of law are a triad in Cicero's rhetoric: *gratia*, *potentia*, *pecunia*; a triad, moreover, peculiarly united, because in human societies anyone or two of the three tend to produce the other one or two and to be produced by them. In fact, the three ideas belong closely together, and are merely different normal aspects of social superiority in the broad sense.⁴

Of the three, that which is most familiar in the Roman sources as a perverter of justice is *pecunia*. The bribing of judges (and sometimes of an adversary's advocate) was an apparently constant factor in Roman life, and is evidenced both by the ineffectual legislative measures enacted from time to time to punish it, and by the complaints about it which are common in Latin literature, complaints ranging from loud invective to a cynical satirizing of an accepted evil. Criminal justice is always more spectacular and more politically important than civil justice; and in our sources on judicial corruption the bribing of judges in criminal cases predominates heavily. But the *iudices* of the *quaestiones* were drawn from the same classes⁵ as the *iudices* who heard private litigation; a senator or knight who sat as a judge in a criminal trial today might decide a private action tomorrow; and the corruption which seems to have been more or less habitual in the former field cannot possibly have been without effect on the latter. Is it to be imagined that a party who gave, or a *iudex* who accepted a bribe to condemn or, acquit in a *iudicium publicum*, proceeded on different moral standards in a *iudicium privatum*? The *a priori* answer is, that the climate of both kinds of justice must have been the same, and that evidence about bribery in the criminal courts must raise similar presumptions about the atmosphere of the civil courts, modified only by the consideration that a defendant will go to greater lengths to avoid (or a plaintiff/accuser to procure) a condemnation of death or exile, than a mere award of a sum of money. Accordingly, although independent evidence of corruption in civil cases exists, the sources on bribery in criminal cases are also relevant, and must strengthen the impression made by the former.

The earliest instance mentioned in literature of bribery used to secure a criminal condemnation is the case of the praetor Tubulus, who was condemned in a special *quaestio*⁶ for accepting bribes while presiding at murder trials in 142 B.C. It is conceivable that this trial took place under the XII Tables' provision against judicial bribe-taking, of which our only knowledge comes from a passage of Aulus Gellius,⁷ but whether this provision survived as a living law into the second century B.C. cannot be known with certainty. However, not long after the case of Tubulus, judicial corruption led C. Gracchus to introduce a measure, the *lex Sempronia* of 123 B.C., whose purpose was to repress it. It has been a popular view that this *lex* was intended to combat corruption in the new *quaestio perpetua de rebus repetundis*; but it has recently been suggested convincingly that this is unlikely, since bribery was used on

³ Ibid. 73

⁴ This unity may be seen at work in the complex of Latin words deriving from the root *OPS. Thus, e.g., *opes* (= pecunia), *optimus* (in the social, one with a high degree of *gratia*), *inops* (not just poor, but also weak or defenceless, lacking, in *potentia*)

⁵ i.e. the highest social classes originally senators, later *equites* as well.

⁶ See Kunkel, *Kriminalverfahren*, p. 45. See also below, p. 86.

⁷ *Noctes Atticae* 20.1.7: *Duram esse, legem [in istis legibus scriptam] putas quae iudicem arbitrumve iure datum, qui ob rem iudicandam pecuniam accepisse convictus est, capite poenitur.* ... In the setting of Gellius' report of what Sextus Caecilius says, the provision certainly seems to refer to corruption in civil rather than in criminal matters, but too much weight ought not to be attached to the words of what it obviously a paraphrase.

the extortion judges to secure acquittals whereas what we know of this *lex Sempronia* shows that it envisaged primarily (if not exclusively) corrupt condemnations.⁸

In reliance on references to it in Cicero's *pro Cluentio* the statute has been called the *lex Sempronia ne quis iudicio circumveniat* and its purpose, which had no connexion with abuses in *repetundae*—proceedings was the punishment of those who conspired or intrigued to procure the condemnation of a defendant.⁹ In 91 B.C., when criminal prosecutions were regarded less as weapons of justice than of political intrigue. M. Livius Drusus apparently attempted to re-enact the *lex Sempronia* (hitherto applicable only to the senatorial order) so as to extend its sanction to the *equites*, upon whom Gracchus had conferred some judicial functions;¹⁰ Appian's account of this episode,¹¹ though not free of problems, states both that bribery was raging unchecked (τῆς δωροδοκίας ἀνέδην ἐπιπολαζούσης) and that prosecutions for it had fallen into general (διὰ τὸ ἔθος) abeyance. Sulla's *lex Cornelia de sicariis et veneficis* of 79 B.C. treated corrupt condemnations in capital cases on the same footing as murder, and, according to Marcianus,¹² applied to anyone

qui. ... cum magistratus esset publicove iudicio praeaset, quo quis falsum indicium profiteretur. ut quis innocens circumveniretur condemnaretur ... quive magistratus iudexve quaestionis ob capitalem causam pecuniam acceperit, ut publica lege reus fieret. ...

There is some ground for thinking that this provision re-enacted or absorbed the *lex Sempronia*.¹⁰ In 70 B.C. the *lex Aurelia iudiciaria*, passed on the initiative of the praetor L. Aurelius Cotta as a measure against the scandalous corruption of the senatorial judges, extended the qualification for judge-service to *equites* and *tribuni elarii*.¹³ But it does not seem that corrupt condemnations were stopped, as the reflections on Oppianicus in the *pro Cluentio*¹⁴ show. As for corrupt acquittals Cicero complains in the exordium of his first Verrine oration that it was widely accepted both at home and abroad that the condemnation of a wealthy man was an impossibility:¹⁵

... opinio perniciose rei publicae vohisque periculosa, quae non modo apud nos sed apud exterarum nationes omnium sermone percrebuit, his iudiciis quae nunc sunt pecuniosum hominem, quamvis sit nocens, neminem posse damnari. ...

And in the second Verrine oration the same thought is expressed¹⁶ (though no doubt rhetorical exaggeration may be at work here):

Reus est enim nocentissimus; qui si condemnatur, desinent homines dicere his iudiciis pecuniam plurimum posse. ...

In a letter written to Atticus in 61 B.C.¹⁷ Cicero recounts the acquittal of P. Clodius; this, according to him, was largely due to bribery; and while extremely indignant at the acquittal he uses a phrase meaning something like 'prostitute-judges' in an utterly casual way as though the idea were already quite familiar:

... insectandis vera exagitandisque nummariis iudicibus omnem omnibus studiosis ac fautoribus illius victoriae παρρησίαν eripui. ...

⁸ See Ewins, 'Ne quis iudicio circumveniat', 1960 *J.R.S.*, 94; following and enlarging upon Miners, 'The *Lex Sempronia ne quis iudicio circumveniat*', 1958 *C.Q.* 241.

⁹ *Pro Cluentio* 148, 151: *Atque ut omittam leges alias omnes quibus nos tenemur, ceteri autem sunt ordines liberati. Hanc ipsam legem NE QUIS IUDICIO CIRCUMVENIATUR: C. Gracchus tulit. ... Iubet lex ... in quem quaerere? ... QUI EORUM (sc. MAGISTRATUUM) COIT COIERIT CONVENIT CONVENERIT QUO QUIS IUDICIO PUBLICO CONDEMNARETUR. ...*

¹⁰ See Ewins. op. cit.

¹¹ i.35; see also i.22

¹² *D.*, 48, 8. I pr. I; and *D.* 48. 10. 1. 2 (also Marcianus): ... *poena legis Corneliae adfertur e qui iudicem corruperit corrupendumve curaverit*

¹³ See Kunkel, *RE* 24.I.753.

¹⁴ *Pro Cluentio* 59 ff.

¹⁵ *In Verr* 1.1.1

¹⁶ *In Verr* 2.1.2.6.

¹⁷ *Ad Att.* 1. 16; see also *pro Milone*, 32.87, where Cicero says of Clodius: *pecunia se a iudicibus palam redemerat.*

Cicero alleges in this letter that thirty-one judges were bribed before the trial. Two years later the passage of Caesar's *lex Julia repetundarum* and, in 55 B.C., that of Pompey's *lex de ambitu*,¹⁸ illuminate the persistence of judicial corruption in the dying Republic. In two passages from the *Digest*,¹⁹ of which the former may perhaps be a paraphrase of the latter, the late classical jurist Macer reports the *lex* as having extended the law of *repetundae* to the taking of bribes by judges (or magistrates functioning judicially):

Lege Iulia repetundarum tenetur, qui, cum aliquam potestatem haberet, pecuniam ob iudicandum vel non iudicandum decernendumve acceperit. ...

Lex Iulia de repetundis praecipit, ne quis ob iudicem arbitrumve dandum mutandum iubendumve ut iudicet: neve ob non dandum non mutandum non iubendum ut iudicet: neve ob hominem in vincula publica coiciendum vinciendum vincirive iubendum exve vinculis dimittendum: neve quia ob hominem condemnandum absolvendumve: neve ob litem aestimandam iudiciumve capitis pecuniaeve faciendum vel non faciendum aliquid acceperit.

The second passage has every appearance of being the literal text of part of the *lex*; moreover, one important fact emerges clearly: corruption in civil proceedings is contemplated by the *lex* as much as corruption in criminal trials, since some of the phrases can, relate only to civil litigation (*iudicem arbitrumve litem aestimandam, iudicium pecuniae*). This statute is, accordingly, apart from the XII Tables provision reported by Aulus Gellius,²⁰ the first of which we know which specifically takes note of, bribery in civil litigation.

It may be no more than an accident; but among the surviving Roman lay or legal texts on judicial bribery, it is remarkable that in the Republican sources corruption in criminal trials is most frequently mentioned, while in the texts from the first two or three centuries of the Empire most complaints about judicial corruption relate clearly to civil litigation. It is not inconceivable that this shift in direction perceptible in the sources reflects the engrossment (and less intrigue-ridden conduct) of criminal justice by the *principes* and their officials, while imperial absorption of civil jurisdiction came much more gradually, and did not finally supplant the Republican system based on praetor, and *iudex privatus* until the third century A.D.

Two passages from Horace are doubtless inspired by conditions which he knew, but are not unambiguous enough to be very useful.²¹ With his younger contemporary, Ovid, firmer ground is reached in a scathing reference to the 'yawning coffer' of the *iudex selectus* or judge in a private lawsuit:²²

Nec bene conducti vendunt periuria testes
Nec bene selecti iudicis arca patet.
Turpe reos empta miseris defendere lingua;
Quod faciat magnas turpe tribunal opes. ...

In another line²³ the same thing is hinted at: *difficilem tenui sub iniquo iudicis causam*: the man of small means is at a disadvantage before a bad judge, i.e. the man who can afford to bribe the judge is the man who wins. Ovid suggests the same thing more subtly in a further passage:²⁴

¹⁸ Asconius in *Pison* (Orelli) p. 16. See Kunkel, *RE* 24. 1.753, who says that the purpose of this *lex* was to exclude the influence of *ambitio*, *gratia*, and *almulatio*, to which the praetor was exposed in the drawing-up of the judge-lists, an influence to which he evidently all too often yielded. Not much is known about this *lex Pompeia*, but clearly an improvement was hoped for from it: Cicero (in *Pis.* 39. 94) says optimistically: *Ecquid vides, ecquid sentis, lege iudiciaria lata quos posthac iudices sumus habituri? Neque legetur quisquis voluerit, nec quisquis noluerit non legetur. Nulli conicietur in illum ordinem, nulli eximentur: non ambitio ad gratiam, non iniquitas ad simultatem conicietur. Iudices iudicabunt ii, quos lex ipsa, non quos hominum libido delegerit. ...*

¹⁹ *D.*48.11.3; 48.11.7pr.

²⁰ See above p. 34, n.2.

²¹ *Sat.* 2.2.9 *male verum examinat omnis / corruptos iudex ...*; and *carm.* 4.9.40 ff.: *sed quotiens bonus atque fidus / iudex honestum praetulit utili / reiecit alto dona nocentium / voltu ...*

²² *Am.* 1. 10. 37 ff. Perhaps an overtone of conditions familiar to Ovid can also be heard in *ep.* 15.79 (about the judgment of Paris): *ingentibus ardent / iudicium donis sollicitare meum. ...*

²³ *Met.* 13.90

²⁴ *Am.* 3.8. 55ff.

Curia pauperibus clausa est: dat census honores;
 Inde gravis iudex, inde severus eques.
 Omnia possideant: illis Campusque forumque
 Serviat: hi pacem crudaque bella gerant,
 Tantum ne nostros avide liceantur amores.

Some years later the *Satyricon* of Petronius, who died under Nero's principate, describes²⁵ how a pair of rascals find a shirt which they had lost, and which contains their savings, being offered for sale by a countryman in the market. How are they to get it back? '*Quo iure rem nostram vindicamus?*' asks one of them. The other is against any cunning method: '*plane iure civili dimicandum, ut si nollet alienam rem domino reddere, ad interdictum veniret.*' The first is doubtful about risking a lawsuit in a strange place:

Quis hoc loco nos novit, aut quis habebit dicentibus fidem? Mihi plane placet emere, quamvis nostrum sit, quod agnoscimus, et parvo aere recuperare potius thesaurum, quam in ambiguum litem descendere.

At this point Petronius inserts the following bitter poem:

Quid faciant leges, ubi sola pecunia regnat,
 Aut ubi paupertas vincere nulla potest?
 Ipsi qui Cynica traducunt tempora pera
 Non nunquam nummis vendere vera solent.
 Ergo iudicium nihil est nisi publica merces,
 Atque eques in causa qui sedet, empta probat.

The connexion between the narrative and the outburst is not very strong; but there is no reason to suppose that Petronius did not write the little verse, and, if he did, it cannot be anything but powerful evidence for the common venality of judges in private litigation in the mid-first century A.D.

Probably not many years after Petronius' death we find Quintilian writing on the technique of the *exordium*, the introductory part of the forensic speech;²⁶ his work on the art of rhetoric is highly academic and is not, in general, a very interesting historical source, but one piece of advice given here is significant. One way, the usual one (*modus ille frequens*) of performing the *exordium* is to say things pleasing to the judge; the other way, rarely used (*alter autem asper et rarus*) is that *quo minatur corruptis accusationem*. This is quite safe, says Quintilian, if you are addressing a numerous body of judges (a *quaestio*? the *centumviri*? *recuperatores*?) because the corrupt ones are frightened and the good ones pleased; but *apud singulos vero nunquam suaserim, nisi defecerint omnia*: the single judge, on the other hand, ought not to be threatened like this except as a last resort. Why not? because (this must be the answer) it is tactless and will antagonize the judge, not because it is necessarily a fantastic suggestion.

Quintilian goes on to apologize, as it were, for the appearance of a vulgar realism in his discourse: the corruption or purity of judges does not lie within his purpose. If one absolutely *must* make a charge of corruption, *non erit iam ex arte oratoria*. ...His contemporary, Martial, gives us a tiny epigram on the same theme of corruption: convincing, as such sources always are, because not particularly concerned to prove the point which interests us:

Et iudex petit et petit patronus:
 Solvas censeo, Sexte, creditori.²⁷

If you contest your creditor's claim, you will have to pay not only your counsel but the judge as well; so you might as well give in now.

Judicial corruption in criminal cases, as has been said, is not much heard of in this age; though Pliny reports²⁸ a the trial in A.D. 100 of Marius Priscus, who was charged that while proconsul of Africa *ob innocentes condemnandos interficiendos etiam pecunias accepisset*.

²⁵ *Sat.* 13–14.

²⁶ *Inst. orat.* 4.1.21.

²⁷ *Epigr.* 2.13.

More interesting is a passage in Apuleius²⁹ where we are given in the middle of the narrative a piece of fierce invective against the sale of judgments; the form taken by the satire is a denial of any surprise at such corruption, since in the first of all judgments (that of Paris) the decision was bought by the winner:

Quid ergo miramini, vilissima capita, immo forensia pecora, immo vero togati vulturii, si toti nunc iudices sententias suas pretio nundinantur, cum rerum exordio inter deos et homines agitatum iudicium corruerit gratia et originalem sententiam magni Iovis consiliis electus iudex rusticanus et opilio lucro libidinis vendiderit cum totius etiam suae stirpis exitio?

Toti nunc iudices sententias suas pretio nundinantur: words written by a man whose life-span stretched across the high period of classical Roman jurisprudence, who was born while Gaius was alive, and who was a contemporary of Papinian. Yet one can count on one's fingers the passages in the classical jurists preserved in the *Digest* where the fact that judges may be bribed is so much as noticed.³⁰

The post-classical age brought no improvement; Cyprian, the third-century bishop of Carthage, in his letter *ad Donatum* writes bitterly that the evils of the law-courts are as bad as those of the surrounding and corrupt world:

Incisae sint licet leges duodecim tabulis et publico aere praefixo iura proscripta sint: inter leges ipsas delinquitur, inter iura peccatur, innocentia nec illic, ubi defenditur, reservatur. ... Quis inter haec; vero subveniat? patronus? sed praevericatur et decipit. Iudex? sed sententiam vendit. ... Nullus de legibus metus est, de quaesitore, de iudice pavor nullus: quod potest redimi non timetur.³¹

It is hardly necessary to say that the *ius civile*, to return to Cicero's phrase, could in practice be *adulteratum pecunia* in other ways than the bribing of judges; thus, witnesses could be (and were) paid to give perjured evidence;³² and there are traces of the practice of bribing one's adversary's counsel (presumably to; 'throw' the contest, like a jockey).³³ Indeed, some of the texts; which evidence widespread corruption do not specify who is corrupted; and where a complaint, like Petronius', reads something like *sola pecunia regnat*, there is no need to assume that it relates exclusively to the bribing of judges. Clearly, if wealth is brought into play to pervert justice, the simplest thing is to bribe the judge; but if he will not take a bribe, or if assurance is to be made doubly sure, it may be that the desired evidence can be bought at a price, too, or that one's adversary's counsel can be paid to put up a bad case.

The giving and taking of money, then, is the most spectacular, the most clearly-defined, and (as a result of modern historical~ interest in the political conditions of the late Republic) the best-known perverter of justice in the Roman sources; and doubtless, common though it was, it passed for a very wicked act.³⁴ The sources thus far given combine, however, to create the impression that a party's wealth might be a source of advantage, or his poverty a source of disadvantage, in civil litigation as in other departments of life.

But this impression is only part of a larger picture just as *pecunia* is only one normal incident of social superiority. The other two normal incidents of social superiority contained in Cicero's convenient triad, *potentia* and *gratia*, are by their nature less tangible and more elusive than *pecunia*, but an examination of the sources from the later Republic and early Empire shows that they, too, were brought into play in civil litigation as elsewhere, and that their operation was more widespread, more taken for granted, and less odious than straightforward bribery, but was no less effective a weapon.

²⁸ *Epist.* 2.11.12.

²⁹ *Met.* 10.33.

³⁰ e.g. *D.*4.6.26.4; 4.8.31; 12.5.2.2; 48.10.1.2; 48.10.21

³¹ *Ad Donat* 10

³² *D.*22.5.3.5; 42.1.33. See also Cic. *rhet. ad Her* 2. 11: *testes corrumpi posse vel pretio vel gratia vel metu vel simultato*; and Ovid's *conducti testes* (above p. 38).

³³ *D.*4.8.31; and the passage of Cyprian cited above.

³⁴ Thus Cicero, in speaking of the *equites*' resistance to Drusus' proposal to apply the *lex Sempronia* to them, says this was not because they favoured judicial corruption; on the contrary, *neque solum hoc genus pecuniae capiendae turpe sed etiam nefarium esse arbitrabantur* (*pro Rab. Post.* 16).

It would be theoretically possible to preserve the division suggested by Cicero and to deal with the influence of *potentia* on litigation separately from that of *gratia*; but the divergence between these two concepts, as they emerge from the Roman sources, is not as clear-cut as that between these two on the one hand, and *pecunia* on the other. On the contrary, a large number of texts treat *potentia* and *gratia* as a natural pair, by coupling them in phrases, and use them, if not as synonyms, at any rate as only vaguely differentiated ideas. If one were to juxtapose the most mutually distant meanings of *potentia* and *gratia* as forces in legal proceedings, one would have on the one side an influence consisting in an immediate threat of physical force if the wishes of the *potens* are not respected, on the other side an influence consisting only in the mind of the person influenced, in other words an unwillingness for any reason to offend the *gratiosus* or a desire to please him.³⁵ Between these extremes is a large spectrum of human dispositions, active and passive, doubtless by means all resting on a conscious desire to deflect the objective operation of the law, still less to deflect it in the direction of injustice but at any rate all reflecting an attitude towards the law totally different from that which today we take for granted: an attitude consisting of the assumption that not only the merits of the case, not even only a party's character and reputation,³⁶ but all the prestige, authority, power, influence, and favour which he can exert or solicit will naturally be brought to bear on litigation as on every other problem of life. In this spectrum it is difficult to say where *potentia* ends and *gratia* begins, and accordingly, in the texts which follow, it has seemed better to treat them in roughly historical sequence, while not implying that the different instances or conceptions of *potentia* or *gratia* always contemplate the same active or passive conditions.

It would be wrong to give the impression that the exercise of *potentia* and *gratia* on litigation, although taken for granted in the sense that every prospective litigant, unless a fool, must have reckoned on using it or on its being used against him, was admitted also *in theory* to be perfectly proper. In fact it appears that such was not the case, any more than that bribery was socially approved,³⁷ as is clear from the complaints of those who apprehended injury through another's superior *gratia* and *potentia*; such persons would plead for the purity of the law and its equal application. The essential wrongness of deflecting justice by power or favouritism is admitted, for example, by Livy, who shows in his reconstruction of early Republican utterances a modern democrat's *Rechtsgefühl*; thus he makes the companions of the Tarquin family regret the passing of the kingship with its arbitrary favours and its replacement by law equal for everybody:³⁸ '*leges rem surdam, inexorabilem esse, salubriorem melioremque inopi quam potenti; nihil laxamenti nec veniae habere, si modum excesseris. ...*' He invents a speech, full of proud and pathetic indignation, for the Samnite leader C. Pontius, on the failure of the peace negotiations with Rome before the battle of the Caudine Forks in 321 B.C.³⁹ '*quod si nihil cum potentiore iuris humani relinquatur inopi, at ego ad Deos vindices intolerandae superbiae confugiam.....*' And in connexion with the prosecution of P. Scipio Africanus (187 B.C. ?) Livy gives us the sentiments which he imputes to the citizens who favoured a trial,⁴⁰

... Neminem unum civem tantum eminere debere, ut legibus interrogari non possit: nihil tam aequandae libertatis esse, quam potentissimum quemque posse dicere causam. Quid autem tuto cuiquam, nedum summam rempublicam, permitti, si ratio non sit reddenda? qui ius aequum pati non possit, in eum vim haud iniustam esse.

The same kind of theory is found in Quintilian, directed this time specifically to the civil law:⁴¹ *summovendum vero est utrumque ambitus genus ...non enim fortuna causas vel iustas vel improbas facit*

³⁵ See Martial, *Epigr.* 2.32 (below, p. 52). It must be said that this entirely passive aspect of influence may still play a part in modern litigation. In Ireland, for example, there is still some reluctance to sue a priest (which is not to say that the reluctance is exploited by the clergy). And generally it may happen that, e.g., an employee is loath to offend his employers (and perhaps endanger his job) by suing them for injury received through an unsafe system of work.

³⁶ See, e.g., Aul. Gell. 14.2.4 ff: *constabat virum esse firme bonum notaque et expertae fidei et vitae inculpatissimae*; and Fronto, *ad amic.* 1. 1 (Naber p. 172).

³⁷ See p. 41 n. 4, above

³⁸ *Ab u.c.* 2.3.4.

³⁹ *Ab u.c.* 9.1.8.

⁴⁰ *Ab u.c.* 38.50.8.

⁴¹ *Inst. orat.* 12. 7.5–6

it is found in Valerius Maximus,⁴² in his story about the tribune L. Cotta; and it is found, too, in Cicero, in the passage from which this discussion started. In short, the theory which produced the symbol of blindfolded justice holding an equal scale was not ignored, nor could it be with decency. But a steady stream of evidence, from the mid-Republic to the 'age of the Antonine and beyond, shows that no one expected practice to conform with it.⁴³

Already in Republican comedy some passages illustrate the position of a wronged foreigner seeking justice; friendless, unknown, the *peregrinus* is the extreme example of the man with neither *potentia* nor *gratia*.⁴⁴ Thus, Plautus makes the Carthaginian Hanno say sadly to himself:⁴⁵

quid med hac re facere deceat, egomet mecum cogito
si volo hunc ulcisci, litis sequar in alieno oppido

It is clear that to come to one's rights (whatever they may be) is not easy in a strange town; the same idea is echoed in Petronius' story two and a half centuries later.⁴⁶ In the *Andria* of Terence it is again expressed, this time sardonically, by Crito:⁴⁷

... nunc me hospitem
litis sequi quam id mihi sit facile atque utile
aliorum exempla commonent. ...

The example of others has taught him the value of legal proceedings to a foreigner. The most revealing of all these comic passages is from Terence's *Eunuchus*: a girl urges the young man Chremes to summon the soldier Thraso to law if he should give any trouble.⁴⁸

... quicum res tibi est, peregrinus est,
minus potens quam tu, minus notus, minus amicorum hic habens.

Less powerful, less well known, less well supplied with friends: you can take him on safely. The converse implication is permissible: if he were better known or more powerful than you, you might hesitate to summon him to law. Why? because you would very likely lose your case (if you got as far as starting it). The conditions reflected by these words show the point in Terence's *Adelphi*, where the pimp Sannio, overwhelmed by outrages which he sees no means of avenging, cries:⁴⁹ *hicine libertatem aiunt esse aequam omnibus?*

It is, however, in the speeches of Cicero, even when all proper allowance has been made for the exaggerations of the forensic style, that we best see to what extent the conduct of both criminal and civil justice is permeated by the inequities of status.⁵⁰ Whenever Cicero pleads, part of his speech is devoted to dealing with the possible effect of *potentia* or *gratia* on the outcome. At the very outset of his defence of P. Quinctius in a civil action he says:⁵¹

Gratia Sex. Naevi [the plaintiff] ne P. Quinctia noceat, id vero non mediocriter pertimesco. ...

⁴² Val. Max. 6.5.4.

⁴³ One may compare the parallel phenomenon of modern international law, that no statesman or country withholds approval from its principles, though few bother about observing them when they conflict with national expediency.

⁴⁴ No doubt modern examples of this situation might be found. On 20 May 1964 the *Irish Times* printed a report, lent by the Glasgow correspondent of the *Daily Telegraph* and published in the *Irish Times* on 20 May 1864, about the horrifying execution at Glasgow of a man called Reilly for alleged murder: 'Whether [he] ...was guilty or not, it is difficult to say with confidence. But I have a strong conviction that, had he been tried out of Glasgow, and had he not been a friendless Irishman and Roman Catholic of rather repulsive, reckless aspect, he would have escaped.'

⁴⁵ *Poenulus* 1403 ff.

⁴⁶ See above, p. 38.

⁴⁷ 810 ff.

⁴⁸ 759 ff.

⁴⁹ 183.

⁵⁰ Cicero's *letters* also contain occasional evidence to the same effect: e.g. *ad Att.* 2.3. See below, p. 48 n.6.

⁵¹ *Pro P. Quinctio* 1.1.

The sympathies of the judge, C. Aquilius, are recruited for the ‘weaker’ side:⁵²

P. Quinctius, cui tenues opes, nullae facultates, exiguae amicorum copiae sunt, cum adversario gratiosissimo contendit. ... Quod si tu iudex nullo praesidio fuisse videbere contra vim et gratiam solitudini atque inopiae, si apud hoc consilium ex opibus, non ex veritate causa pendetur, profecto nihil est iam sanctum atque sincerum in civitate. ... Certe, aut apud te et hos, qui tibi adsunt, veritas valebit, aut ex hoc loco repulsa vi et gratia locum, ubi consiatat, reperire non poterit.

Later in the same speech the same theme, the vulnerability of truth and justice to power and influence even before the law, recurs briefly:⁵³

Omnia sunt, C. Aquili, eius modi, quibus ut perspicere possit in hac causa improbitatem et gratiam cum inopia et veritate contendere. ...

His tone is different, though his point is the same, in the second Verrine oration; here he warns the other side not to attempt to sway the issue of the prosecution by influence or corruption; he addresses his adversary Hortensius, saying it would not be worth his (Cicero’s) while to prosecute a man already damned by public opinion,

nisi ista tua intolerabilis potentia, et ea cupiditas qua per hosce annos in quibusdam iudicia usus es, etiam in istius hominis desperati: causa interponeretur. ... Haec te omnia dominatio regnumque iudiciorum tanto opere delectat. ...⁵⁴

The whole senatorial order is afflicted by the evil behaviour of a few, and by the disgrace they have brought on legal proceedings (*infamia iudiciorum*); but, this time, let such people be warned:⁵⁵

qui aut deponere aut accipere aut recipere aut polliceri aut sequestres aut interpretes corrumpendi iudici solent esse, quique ad hanc rem aut potentiam aut impudentiam suam professi sunt, abstineant in hoc iudicio manus animosque ab hoc scelere nefario. ...

In particular, let Hortensius not try to exert his influence behind the scenes:⁵⁶

cetera si qua putas te occultius extra iudicium quae ad iudicium pertineant, facere posse, si quid artificio, consilio, potentia, gratia, copiis istius moliri cogitas, magno opere censeo desistas. ... Tulit haec civitas quoad potuit, quoad necesse fuit, regiam istam vestram dominationem in iudiciis et in omni re publica. ...

Anyone who tries to corrupt or deflect justice this time will have to reckon with Cicero:⁵⁷

Proinde si qui sunt qui in hoc reo aut potentes aut audaces aut artifices ad corrumpendum iudicium velint esse, ita sint parati ut disceptante populo Romano mecum sibi rem videant futuram. ...

Other references to the obviously often decisive force of *potentia* and *gratia* abound in Cicero’s speeches. In the first Verrine oration, he speaks of the foolish pretence of the accused that he has confidence in such things (which, by implication, might normally be enough to ensure acquittal):⁵⁸

Non gratia, non auctoritate cuiusquam; non potentia nititur. ... Simulat le (nobilium hominum) praesidio confidere, cum interea aliud quiddam iam diu machinatur. ...

In the *pro Milone* we get a picture of Clodius’ lawlessness {perhaps exaggerated} in which he is represented as infringing private rights with complete impunity—his *potentia* presumably rendering him immune from legal action:

⁵² *Pro P. Quinctio* 1.1.1.5.

⁵³ *Ibid.* 27. 84.

⁵⁴ *In Verr.* 2.1.35.

⁵⁵ *Ibid.* 2.1.36.

⁵⁶ *Ibid.* 2.5. 174–75.

⁵⁷ *Ibid.* 2.5. 183.

⁵⁸ *Ibid.* 1.15.

... qui cum ab equite Romano splendido et forti, M. Paconio, non impetrasset, ut sibi insulam in lacu Prilio venderet, repente lintribus in eam insulam materiem, calcem, caementa, harenam convexit dominoque trans ripam inspectante non dubitavit exstruere aedificium in alieno. ... Quid enim ego de muliercula Scantia, quid de adulescente P. Apinio dicam? quorum utriusque mortem est minitatus, nisi sibi hortorum possessione cessissent.⁵⁹

In the speech *pro Sestio* Cicero affects to admire the temerity of a man who openly breaks the law, although he is a man *qui neque elabi ex iudicio iucunditate sua neque emitti gratia potest neque opibus et, potentia leges ac iudicia perfringere*;⁶⁰ such men exist, but he is not one of them. And in the *pro Caelio*⁶¹ we get a sarcastic picture of a suborned witness, a *rivulus arcessitus et ductus ab ipso capite accusationis vestrae*; really, says Cicero, I must be glad that in spite of all your *gratia* and *opes* you can only find this one poor senator who wishes to oblige you: *laetabor, cum tanta gratia tantisque opibus decusatio vestra nitatur, unum senatorem esse solum qui l vohis gratificari vellet inventum*. Another picture of *potentia*, the influence which expects to reign at law as elsewhere, is offered in the *pro Roscio Amerino*; a witness dared to name Chrysogonus, a powerful freedman of Sulla and an enemy of Roscius, as being implicated in a disgraceful plot:⁶²

postea homines cursare ultro et citro non destiterunt, credo, qui Chrysogono nuntiarent esse aliquem in civitate qui contra voluntatem eius dicere auderet; aliter causam agi atque ille existimaret, aperiri bonorum emptionem, vexari pessime societatem, gratiam potentiamque eius neglegi, iudices diligenter attendere, populo rem indignam videri. ...

This kind of position *vis-a-vis* justice is shortly defined by Cicero in the passage from the *pro Caecina* mentioned above,⁶³ the position of influence to which the practice of the law may be subject, but from which the abstract law is exempt:

In iure nihil est eius modi, reciperatores, non tabulae falsae, non testis improbus, denique nimia ista quae dominatur in civitate potentia in hoc solo genere quiescit; quid agat, quo modo adgrediatur iudicem,⁶⁴ qua denique digitum proferat, non habet. ...

Nimia ista potentia: the influence which reaches the judge, which shows him the desired judgment by a motion of the finger.⁶⁵

Finally, though this selection by no means exhausts such passages in Cicero, there is in the *pro Murena*⁶⁶ a condemnation of this *nimia potentia* being brought to bear on justice:

Nolo accusator in iudicium potentiam adferat, non vim maiorem aliquam, non auctoritatem excellentem, non nimiam gratiam.

There follows immediately an interesting statement of where, in Cicero's view, such influences may be properly brought to bear:

Valeant haec omnia ad salutem innocentium, ad opem impotentium, ad auxilium calamitosorum, in periculo vero et in pernicie civium repudientur.⁶⁷

⁵⁹ *Pro Milone* 27. 74–75. Notice in particular that in the first of these cases, the house so built would belong to Paconius by operation of law. If this thought occurred to Clodius, it clearly did not bother him.

⁶⁰ *Pro Sestio* 134.

⁶¹ *Pro Caelio* 8.19.

⁶² *Pro Rosc. Am.* 60.

⁶³ *Pro Caecina* 71.

⁶⁴ *Iudicem adgredi*: as to one mode of doing this (calling the judge's home) see below, p.61.

⁶⁵ A hint that judges might even be effectively threatened into giving a wrong judgment is contained in Cicero's *pro Flacco*, 21.49: *Ad [Quintum] adiit [Heraclides] causamque ita detulit, recuperatores vi Flacci coactus et metu falsum imitos iudicavisse*. Here, of course, the accusation was evidently groundless, but apparently not so far fetched as to be *per se* implausible. Another suggestion of judges' being overawed by power is contained in the letter *ad Att.* 2.3; *Valerius absolutus est Hortensio defendente. Id iudicium Auli filio [i.e. Afranius, the Pompeian consul of 60 B.C.] condonatum putabatur, et Epicraten [i.e. Pompey] suspicor, ut scribes, lascivum fuisse*.

⁶⁶ *Pro Murena* 59.

Many of Cicero's cases were *causes célèbres*, and no litigant who had Cicero on his side was wholly *inops* or *calamitosus*. In Cicero's speeches we get a picture of litigation at the top of Roman society; but what of the small man? is he in the picture at all? Not Cicero, but his very much younger contemporary, the elder Seneca, gives us in his *Controversiae* an insight into the hopeless, helpless condition of the poor man who knows he cannot contend with wealth, at law or anywhere else. The case outlined⁶⁸ for dispute is that of a poor man whose father is found murdered. The father, through his over-frank speech, had made enemies, among them a certain rich man, whom the murdered man's son now takes to following through the streets wearing mourning, thus gradually leading people to think that the rich man is to blame for his father's death. The rich man finally, rounds on the poor mourner: 'Why do you follow me like this? If you think I killed your father, why don't you prosecute me?' It is made quite clear that the poor man would have absolutely no hope of getting the rich man convicted; the challenge is disingenuous:

'Pauper divitem ... ego accusem?' [How laughable!] Potens iste et graciosus, id quod ne ipse quidem negat, dives, fuit et qui nihil umquam putavit sibi timendum, etiam reo. ... Venit iste cum turba clientium ac parasitorum et adversus paupertatem totam regiam effundit. 'Cur me non accusas, non postulas?' Vix temperabat, quin diceret: 'Quid ego in te accusatorem non audeam, qui occidendum curavi eum, qui tantum mecum litigaverat?'

The cynical contempt of the *dives* for the law (above all, for the possibility of its being set in motion successfully against him by a *pauper*) is realistic. In the end, however, the poor man succeeds in making people believe the *dives* is a murderer; he is defeated in an election, and brings an *actio iniuriarum* against his tormentor.⁶⁹

The value of the literary genus to which *controversiae* and the like belong is doubtful so far as providing historical evidence is concerned; but these exercises in disputation certainly reflect at least some notions and attitudes which their authors take for granted in their audience. Thus the arguments put up in one of Pseudo-Quintilian's *Declamationes*⁷⁰ are not irrelevant to the present purpose. The question is argued whether an exile from Rome may return to the city under the benefit of a law which permits an exile to return if he denounces a tyrant, even though, on the denunciation made by the exile, the person accused of tyranny is acquitted through an equality of votes. The whole question, though a legal one, is pervaded by the atmosphere of extra-judicial power and influence. The exile was originally expelled from the city *gratia pressus, inimicitiiis actus*. The 'orator' asks his audience to consider then

causam qua condicione dixerit damnatus, exul, contra potentem, contra graciosum: quid necesse est diu dicere, quando is exitus iudicii fuit, ut non plures sententiae pro adversario fuerint? ... Solam pietatem in causa indicii habuit, qui in urbem detulit litem, et litem iniustam condicione: ex altera parte solus et exul, damnatus; ex altera parte homo potens, graciosus. ... Immo hercle si mentitus est, si fictum detulit crimen, satis alioqui daturus est poenarum inter inimicos potentes, et inimicos graciosos.

The writings of Tacitus, Suetonius, and others disclose clearly that *gratia* and *potentia* counted for as much in litigation in the Empire as in the Republic. Suetonius reports that Augustus was anxious that no one should have an advantage at law through friendship with the princeps;⁷¹ the clear implication is that abject magistrates and judges were ready to concede such an advantage; and indeed we have evidence from Seneca⁷² that Augustus understood and accepted the fact that *gratia* played a part in litigation. He

⁶⁷ See Drexler, 'Potentia', 102 *Rheinisches Museum für Philologie* 89: 'Wir würden einwenden: wenn die *calamitosi* unschuldig sind, kann es des Einsatzes von Macht: *auctoritas* und *gratia* nicht bedürfen, um ein gerechtes Urteil herbeizuführen, aber offenbar trifft dieser Satz auf die römische Rechtspflege nicht zu.' The emotion aroused by the *gratia* of others was *invidia*, perhaps even in the sense of frank envy; thus, for example, Catiline is presented to us by Sallust (*de con. Cat.* 20) as complaining to his followers: *volgus fuimus sine gratia, sine auctoritate, eis obnoxii, quibus, si res publica valleret formidinis essemus. Itaque omnis gratia potentia honos divitiae apud illos sunt aut ubi illi volunt; nobis reliquere pericula repulses iudicia egestatem.*

⁶⁸ *Controversiae* 10.1. (30)

⁶⁹ See Daube, 'Ne quid infamandi causa fiat', *Atti del Congr. intern.* (1948) iii. 411ff.

⁷⁰ *Declamationes Minores*, 254.

⁷¹ *Augustus* 56

⁷² *De clem.* 7.10.

shows us Augustus upbraiding a conspirator and suggesting that the conspirator's hopes of setting himself in the princeps' place were small, since his personal influence was so slight that he could not even win a lawsuit against a freedman:

Quo, inquit [Augustus], hoc animo facis? ut ipse sis princeps? male mehercules cum populo Romano agitur, si tibi ad imperandum nihil praeter me obstat (domum tueri tuam non potes, nuper libertini hominis gratia in privato iudicio superatus es ...).

The idea that perhaps the freedman had the rights of the case does not seem even worth mentioning.

With regard to *gratia* in criminal cases, Tiberius seems to have been of a strict disposition: *primo eatenus interveniebat, ne quid perperam fieret. ... Si quem reorum elabi gratia rumor esset, subitus aderat iudicesque aut e plano aut e quaesitoris tribunali legum et religionis et noxae, de qua cognoscerent, admonebat.*⁷³ Claudius, whose passion for minding other people's business was proverbial, used to attend praetorian sessions, and his presence was responsible for many decisions being given *adversus ambitum et potentium preces*;⁷⁴ a report which would be pointless if it did not imply that it was exceptional for the *ambientes* and *potentes* not to have things their own way. Tacitus notes with surprise the indictment of Agrippina's champion while a very old man and at the height of his influence (*validissima gratia. ... Adeo incertae sunt potentium res*).⁷⁵ Power provoked resentment; in the trial of the informer Annius Faustus nothing was of so much help to the accused as the excessive power of the accuser;⁷⁶ and in the famous opening passage of the Histories, describing the frightful disorder at the death of Nero, Tacitus tells us that nobility, wealth, or position were thought sufficient grounds for accusations.⁷⁷ Yet in general and in more settled periods power had its way; Martial could write lines like these:⁷⁸

Lis mihi cum Balbo est, tu Balbum offendere non vis
Pontice; cum Licino eatt hic quoque magnus homo est.
Vexat saepe meum Patrobas confinis agellum,
Contra libertum Caesaris ire times ...

in which he shows the fear of litigating with powerful freedmen as making one acquiesce in injustice.⁷⁹ Under Tiberius, we are told, Lucius Piso was thought extremely bold to summon in civil proceedings Urgulania, whom friendship with the ex-empress Livia had raised above the law (*quam supra leges amicitia Augustae extulerat*).⁸⁰ Livia took the summons as an insult to herself, and only with reluctance advised Urgulania in the end to pay the money claimed.⁸¹ Would anyone less noble and powerful than Piso have got away with this?

Tacitus' contemporary, Pliny, writes⁸² of the trial in which he appeared for the province of Baetica against the corrupt officers, of the deceased governor Caecilius Classicus; he thought that if the defendants were indicted all together there was a possibility

ne gratia singulorum collata atque permixta pro singulis quoque vires omnium acciperet; postremo ne potentissimi vilissimo quoque quasi piaculari dato alienis poenis elaberentur.

One reckoned, accordingly, not only with one's adversaries' *gratia* being used against oneself; but also with its being used as between themselves; the powerful might escape at the expense of the weak, who could be made scapegoats.

⁷³ Suetonius, *Tiberius* 33.

⁷⁴ Tac. *Ann.* 1.75.1

⁷⁵ Ibid. 12.42.3

⁷⁶ Tac. *Hist.* 2.10.1

⁷⁷ Tac. *Hist.* 1.2.

⁷⁸ *Epigr.* 2.32

⁷⁹ According to Friedländer, *Martial*, i.254–5, 'Licinus' is a reminiscence of Augustus' wealthy freedman, 'Patrobas' a reminiscence of a powerful freedman of Nero. 'Balbus' denotes a man of standing (Cornelius Balbus, Caesar's favourite?).

⁸⁰ Tac. *Ann.* 4.21.

⁸¹ Ibid.; and see also *ibid.* for an account of Urgulania's arrogant behaviour when summoned as a witness in another case.

⁸² *Epist.* 3.9.

A later piece of evidence comes from Lucian a contemporary of the jurist Gaius. In his *Alexander Pseudomantis* he tells of a plot instigated by Alexander the false prophet to murder him; when he complains to Avitus (who was the governor of Pontus in A.D. 165), Avitus begs him not to press for a prosecution of Alexander; Alexander is a protégé of Rutilianus,⁸³ one of the most powerful men in Rome, and Avitus could not punish him, even if he found him guilty (διὰ γὰρ τὴν πρὸς Ῥουτιλλιανὸν εὐνοίαν μὴ ἄν δύνασθαι, καὶ εἰ φανερώς λάβοι ἀδικοῦντα, κολάσαι αὐτόν).⁸⁴ At this, Lucian gives up the attempt to have him prosecuted.

Some of the sources from the early Empire which deal with the advocate's profession show that lawyers were well aware of the part played in litigation by *gratia* and *potentia*. Tacitus puts words in the mouths of advocates defending their own fees to the effect that defendants *need* advocates to help them, lest otherwise they might be left at the mercy of the powerful (*ne quis inopia advocatarum potentibus obnoxius sit*).⁸⁵ In his *Dialogus*⁸⁶ he shows us Marcus Aper priding himself on the advocate's privilege, *si quando necesse sit, pro periclitante amico potentiorum aures, offendere*. Pliny, however, reports⁸⁷ a case in which an advocate failed to appear for his clients through fear or offending their adversary, (a senator; his friends had advised him *ne desiderio senatoris ... quasi de gratia, fama, dignitate, certantis tam pertinaciter ...repugnaret, alioqui maiorem invidiam ...passurum*. Not just the litigant, but also his counsel, might be frightened by the standing of his adversary; and this is recognized even by the praetor's Edict, in which assignment or counsel is promised in cases where the influence of one's adversary, or fear of him, prevents a litigant from finding a *patronus*.⁸⁸

It may be appropriate to mention at this stage that, if *gratia* or favour could win a case, conversely also the personal enmity of the judge might lose it. Thus Horace says each man has his own way of attacking his enemies; one Turius is sure to afflict; you, if he does not like you, with a *grande malum, si quid se iudice, certes*;⁸⁹ Persius evokes the fear of a person who finds himself litigating before a recently emancipated (and therefore resentful?) judge ('*Marco' sub iudice palles?*);⁹⁰ and Quintilian deals, in his academic way, with the hazards of appearing before a judge who is an enemy.⁹¹ No doubt a judge might become hostile during the hearing of a case, even though he might not formerly have been an enemy; thus it is a commonplace for those addressing judges to propitiate them with compliments, compliments ranging from the polite formalities of Cicero to the obsequiousness of the nervous Apuleius.⁹²

Personal standing, personal influence, personal relations, then, which in this kind of context have been called *gratia* and *potentia*, are constant factors in all departments of Roman life, not excluding the criminal or civil jurisdictions, whatever may have been the theory of equal justice. Already in the Republic both words seem to have acquired distinctly pejorative overtones; and it is with these overtones very much strengthened that they are met with in the many rescripts of the Codex Theodosianus (A.D. 438) which condemn the exercise of *gratia*; and *potentia* towards deflecting or influencing justice. In these imperial constitutions, as has been pointed out,⁹³ *gratia* means 'not so much "grace" as "favour",

⁸³ This is P. Mummius Sisenna Rutilianus; *floruit* c. A.D. 170. See *RE* 16.1.529.

⁸⁴ Ch. 57.

⁸⁵ Tac. *Ann.* 11.7

⁸⁶ 10.12.

⁸⁷ *Epist.* 5.4, 5.13.

⁸⁸ D.3.1.1.4 (Ulpian): *Ait praetor: 'Si non habebunt advocatum, ego dabo.' Nec solum his personis hanc humanitatem praetor solet exhibere, verum et si quis alius sit, qui certis ex causis vel ambitione adersarii vel metu patronum non invenit.*

⁸⁹ *Serm.* 2.1. 47 ff.

⁹⁰ 5.73 ff.

⁹¹ *Inst. orat.* 4.1.18

⁹² See *Apol.* 1, 3, 48, 53, 54, 60, 102.

⁹³ J.N.L. Myres, 'Pelagius and the end of Roman rule in Britain', 50 *J.R.S.* (1960) 21 ff. This is an extraordinarily interesting study of, *inter alia*, the social content of Pelagianism. According to the author, the doctrinal aspect of the heresy, which repudiated the necessity for grace (*gratia*) for salvation, rested psychologically on a protest against contemporary conditions, in which *gratia* secured salvation in legal contests. The Pelagians' 'whole teaching of the relation of God and man was based on the conception that Divine justice could not be remotely like this' (*ibid.*, p.27). To the Pelagians there should be no need for patron saints (*patroni*) or for grace (*gratia*) or for any other irrelevant or corrupt interference with God's strict execution of

and not so much “favour” as “favouritism”. *Gratiosus* does not mean “gracious”, but simply “corrupt”. Equally *potentia* is seen to mean not so much ‘power’ as ‘oppression’; ‘*gratia* and *potentia* thus go hand in hand as major social evils’.⁹⁴ No doubt it is true that moral standards were in decline between the second and the fifth centuries, and that corruption and oppression flourished in the third and fourth centuries as they had not done before; but there is equally no doubt that the roots of *gratia* and *potentia* as social evils and perverters of justice lie much further back, in the late or middle Republic; and only a lack of written sources, together perhaps with a predisposition to believe in an age of pristine Roman virtue, prevents us from tracing further back still the operation of social and psychological elements in a world where a lawsuit was only one of life’s problems, to be overcome, like the others, with whatever resources one’s position offered.⁹⁵

The texts so far adduced show the operation of *gratia* and *potentia* at a distance, so to speak; prosecutions fail or succeed, private lawsuits are confidently begun or not even thought of, according as some dominating influence can be imputed to one side or the other, it would be interesting if, apart from the objective accounts of real, projected, or imaginary cases,⁹⁶ we were to find in other texts first-hand material on how *gratia* or *potentia* worked in practice.

Ironically enough, it is Cicero, the denouncer of *gratia* as a perverter of justice, who gives us in his letters a close-up view of how *gratia* was exerted. His correspondence with friends who were praetors (or, more, commonly, provincial governors, in charge of justice in their provinces) abounds with personal recommendations. Generally they run more or less like this: ‘X is an old friend of mine and a splendid fellow. Do all you can for him; any favour you show him I will look on as shown to myself. I urge you most strongly about this.’ In letters of this kind, of which there are dozens, no mention is made of any special litigation or other business in which Cicero’s old friend may be engaged (though no doubt a specific problem was often in his mind). But there are others in which Cicero openly says: ‘My old friend X will be appearing before you in a lawsuit; I hope you will see him right.’ He does not actually say: ‘Decide for him, whatever his adversary may say’; perhaps he does not even intend such a thing to be understood; but the effect of such a letter on a less important politician may be imagined. *Digitum profert*.

An example with the same flavour as many others is Cicero’s letter to Q. Minucius Thermus, propraetor of Asia, written in 51 B.C.⁹⁷

L. Genucilio Curvo iam pridem utor familiarissime, optimo viro, et homine gratissimo. Eum tibi penitus commendo atque trado: primum, ut omnibus in rebus ei commodes, quoad fides tua

justice on the merits of each man’s case (p. 29). The Pelagians were called the *inimici gratiae* by Augustine and his followers. See more recently on the same question Liebeschuetz, ‘Did the Pelagian movement have Social Aims?’, 12 *Historia* [April 1963] 227, in which much of Myres’s theory is admitted, though the social character of the movement itself is denied.

⁹⁴ Myres, *op. cit.*, p. 26.

⁹⁵ Words of Epictetus (3.17) might be applied to litigation in particular as well as to life in general: μέμνησθε οὖν ἀεὶ καὶ πρόχειρον ἔχετε, ὅτι νόμος φυσικὸς τὸν κρείττονα τοῦ χείρονος πλεον ἔχειν, ἐν ᾧ κρείττων ἔστιν, καὶ οὐδέποτε ἀγανακτήσετε.

⁹⁶ And apart too from the general reflections in lay literature on interference with objective justice. Ovid, for example, uses metaphors of a legal kind; not direct evidence, but no doubt a suggestion of how familiar it was that influence could be brought to bear on a judge to destroy his impartiality, may be seen perhaps in *Amores* 3.14.47 ff., which envisages a mistress clearing herself of a charge of infidelity before her lover, who is only too ready to believe her to be faithful:

Prona tibi vinci cupientem vincere palma est,
 Sit modo ‘non feci’ dicere lingua memor
 Cum tibi contingat verhis superare duobus,
 Etsi non causa, iudice vince tuo.

And again (*Amores* 2.2.55 ff.) this time a husband reluctant to believe stories about his wife:

Culpa nec ex facili quamvis manifesta probatur
 Iudicis illa sui tuta favore venit
 ...gremio iudicis illa sedet,

(Could the phrase *gremio iudicis sedere* be proverbial?) A curious usage of Ovid’s is to associate the adjective *tutus* with real or metaphorical trials (see also *Tr.* 2.97 f., 4.1.91f., 4.10.39 f., 4.11.21 f.) The suggestion that one is ‘safe’ with a particular judge (if the usage may be so interpreted) throws some light on Ovid’s experience of how judges work in practice.

⁹⁷ *Ad fam.* 13.53.

dignitasque patietur: patietur autem in omnibus: nihil enim abs te umquam quod sit alienum tuis aut etiam sua moribus postulabit. Praecipue autem ubi commendo negotia eius, quae sunt in Hellesponto: primum, ut obtineat id iuris in agris, quod ei Pariana civitas decrevit et dedit et quod semper obtinuit sine ulla controversia, deinde, si quid habebit cum aliquo Hellespontio controversiae, ut in illam \square διοίκησιν reiicias. Sed non mihi videor, cum tibi totum hominem diligentissime commendarim, singulas ad te eius causas perscribere debere. Summa illa est: quidquid officii, beneficii, honoris in Genucilius contuleris, id te existimabo in me ipsum atque in rem meam contulisse.

Minucius Thermus is said by Cicero in a letter to Atticus⁹⁸ to have governed Asia honourably; but it may be imagined that, if the town of Parium had some answer to the pretensions of Genucilius, it was not, after Cicero's letter, in the best position for making it with success. Another letter to the same governor⁹⁹ in the same year shows us Cicero interceding for one Cluvius Puteolanus; he is owed money by two municipalities, a *hypotheca* has been given to secure part of the debt, and the *hypotheca* has lapsed. Cicero writes:

... Velim cures ut aut de hypothecis decedat easque procuratoribus Cluvii tradat aut pecuniam solvat, praeterea Heracleotae et Bargylitae, qui item debent, aut pecuniam solvant aut fructibus suis satis faciant. ...

May there have been another side to these *controversiae*? Perhaps there was, perhaps not. But certainly the *gratia M. Tulli*, thrown in the balance against it, would have gone some distance towards outweighing it.

In the following year we find Cicero writing to praetors at Rome; in one letter, to G. Curtius Peducaeus,¹⁰⁰ he makes a show of not wishing to influence judicial independence, while, (of course, this must be precisely the effect of his intervention:

M. Fadum unice diligo summaque mihi cum eo consuetudo et, familiaritas est pervetus. In eius controversiis quid decernas a te non peto—servahis, ut tua fides et dignitas postulat, edictum et institutum tuum—sed et quam facillimos ad te aditus habeat, quae erunt aequa lubente te impetret, ut meam amicitiam sibi, etiam cum procul absim, prodesse sentiat, praesertim apud te: hoc te vehementer etiam atque etiam rogo.

In another letter, to G. Titius Rufus, the *praetor urbanus*,¹⁰¹ very much the same kind of request is made:

L. Custidius est tribulis et municeps et familiaris meus. Is causam habet; quam causam ad te deferet. Commendo tibi hominem, sicut tua fides et meus pudor postulat, tantum, ut faciles ad te aditus habeat: quae aequa postulabit ut lubente te impetret sentiatque meam .ibi amicitiam, etiam cum longissime absim, prodesse, in primis apud te.

Yet another letter of 51 B.C. to Minucius Thermus in Asia shows Cicero in an agonized attempt to induce favourable treatment for his legate M. Anneius in a lawsuit whose merits (to judge by Cicero's elaborate persuasions) were at least doubtful:¹⁰²

... [M. Anneium) cum Sardianis habere controversiam scis: causam tibi exposuimus Ephesi: quam tu tamen coram facilius meliusque cognosces. De reliquo mihi mehercule diu dubium fuit quid ad te potissimum scriberem. Ius enim quem ad modum dicas clarum et magna cum tua laude notum est. Nohis autem in hac causa nihil aliud opus est nisi te ius instituto tuo dicere. Sed tamen cum me non fugiat quanta sit in praetore auctoritas, praesertim ista integritate, gravitate, clementia, qua te esse inter omnes constat, peto abs te pro nostra coniunctissima necessitudine plurimisque officiiis paribus ac mutuis, ut voluntate, auctoritate, studio tuo perficias ut M. Anneius intellegat te

⁹⁸ *Ad Att.* 6.1.13.

⁹⁹ *Ad fam.* 13.65.

¹⁰⁰ *Ad fam.* 13.59.

¹⁰¹ *Ad fam.* 12.58.

¹⁰² *Ad fam.* 13.55.

et sibi amicum esse quod non dubitat—saepe enim mecum locutus est—et multo amiciorem his meis litteris esse factum.

These examples could be greatly extended. The same elements always recur; a statement of how closely bound the person recommended is to Cicero; a hint that litigation of some kind is on the way; a request, usually softened by some stock phrase; (*quoad tua fides dignitasque patietur*) that the magistrate will see the claim of Cicero's client satisfied; an assurance that a favour so conferred will give Cicero the greatest pleasure. We never find, in so many words the request that justice and the rules of law should be side-stepped or partially applied; only a request for favours so far as justice will permit. But are not justice and favour mutually exclusive ideas, even in Latin? Could such requests have been addressed in a system where it was well known that personal interventions in the administration of justice were useless? And if Cicero, a good man by the standard of his age,¹⁰³ thought fit to make interventions like these, what may have been done by men of lesser integrity?¹⁰⁴

Cicero himself seems on at least one occasion to have allowed a word to be spoken in his ear by Brutus, a friend of Atticus, in a legal matter:¹⁰⁵

Familiaris habet Brutus tuus quosdam creditores Salaminorum ex Cypro, M. Scaptium et P. Matinium, quos mihi maiorem in modum commendavit. ... Scaptius ad me in castra venit. Pollicitus sum curaturum me Bruti causa ut ei Salamini pecuniam solverent. ...

It is astonishing to open the letters of M. Cornelius Fronto, written two centuries later than those of Cicero, and to find exactly the same kind of thing going on. In one of them¹⁰⁶ the recommendation, addressed to Claudius Severus, is prefaced by: a pompous explanation of the origin and purpose of *commendationes*:

Commendandi mos initio dicitur benivolentia ortus, cum suum quisque amicum alii amico suo demonstratum conciliatumque vellet. Paulatim denique iste mos progressus est, ut etiam eos qui publico vel privato iudicio disceptarent, non tamen improba res videretur iudicibus ipsis aut iis, qui consilio adessent, commendare, non, opinor, ad iustitiam iudicis labefactandam vel de vera sententia deducendam. Sed iste in ipsis iudiciis mos inveteratus erat causa perorata laudatores adhibere, qui quid de reo existimarent, pro sua opinione cum fide expromerent: item istae commendantium litterae laudationis munere fungi visae sunt.

Non, opinor, ad iustitiam iudicis labefactandam; perhaps not, but who would be so naive as to imagine that it could not have this effect? Certainly the unrecommended adversary could not feel happy about it. Fronto then goes on:

Quorsum hoc tam ex alto prohoemium [preface going as far back into history]? Ne me existimares parum considerasse gravitatem auctoritatemque tuam commendando Corneliano Sulpicio familiarissimo meo, qui propediem causam apud vos dicturus est. Sed, ut dixi, veteris instituti exemplo necessarium meum laudare apud te ausus sum. [The praises of Cornelianus Sulpicius follow.] Quam ob rem quantum plurimum possum, tantum quaeso ut carissimo mihi homini in causa faveas. ...

Another letter¹⁰⁷ shows Fronto pleading to Arrius Antoninus (the *juridicus per Italiam regionis Transpadanae*) in A.D. 164 for a prospective litigant called Baburiana; Fronto says that many people

¹⁰³ See Kunkel, *Kriminalverfahren*, p. 124: 'Cicero repräsentiert das höchste Niveau der Geistigkeit und Humanität seines Zeitalters.'

¹⁰⁴ In the second speech against Verres, 3.65.153, Cicero refers with ironic understanding to the refusal of a provincial governor, L. Metellus, to grant the formula Octaviana against a friend of his [i.e. of Metellus]: *Non reprehendo Metellum (pepercit homini amico et, quem ad modum ipsum dicere audivi necessario)*. But the ideal of a judge who refuses to be moved by *gratia* is not absent in the Roman world; Tacitus in his *Dialogus* (5.1.) makes Secundus say: *faciam quod probi et moderati iudices, ut in iis cognitionibus se excusent, in quibus manifestum est alteam apud eos partem gratia praevalere*.

¹⁰⁵ *Ad Att.* 5.21.

¹⁰⁶ *Ad amic.* 1.1 (Naber, p. 172; van den Hout, p. 164). About A.D. 157–61.

¹⁰⁷ *Ad amic.* 2.88 (Naber, p. 199; van den Hout, p. 187)

solicit his favour with Arrius, and that he turns down¹⁰⁸ those whose prayer seems based on wrong. But perhaps the most significant thing about Fronto's *commendationes* is their patent resemblance in structure to those of Cicero. This might be based, in a learned man like Fronto, on deliberate imitation, through acquaintance with Cicero's correspondence; but another and more likely explanation is that the convention of recommendations required certain elements to appear, and that the convention of the Antonine age was the same as that of the late Republic. Thus, Fronto, like Cicero, disclaims any intention (both for himself and for his client) to interfere with justice by asking something unworthy:

Magno opere iis obsequi cupiam, ita tamen ut prima mihi ac potissima sit iustitiae ratio habenda.
...109

Nihil postulavit pro sua verecundia nisi quod probum honestum que sit et tibi datu et sibi postulatu. ...¹¹⁰

And we even find the old formula 'Whatever you do, for X, you will be doing for me':

Quantumcumque Aquilino meo honoris tribueris, id te mihi tribuere existimato.¹¹¹

Again, the habit discernible in Cicero of placing at the very beginning of the *commendatio* the name of the person recommended turns up in Fronto.¹¹² These various features lead one to suppose that the *commendatio*, useful litigation and anywhere else where favour could count, was a well-established pattern (*veteris instituti exemplum*); and this assumption, in its turn, greatly devalues the saving clause 'so far as your dignity': and justice will permit, etc.', which probably meant as little to the recipient as to the sender, as the broad wink of *gratia* passed between them.

The solicitation of judicial favour by letter may be glimpsed, therefore, in the letters of Cicero and Fronto. As for its solicitation in any other way, we have only the indirect testimony offered by the fact that the crime of *ambitus*, or canvassing for office, was extended in the late Republic to canvassing for judgments; and the words reported by Modestinus from the *lex Iulia de ambitu* of Augustus: *et si quis reus vel accusator domum iudicis ingrediatur, per legem Iuliam iudiciariam in legem ambitus committit*.¹¹³

The picture thus far given of the personal element in Roman litigation may be very briefly summarized as follows: the administration of justice, civil as well as criminal, tended both in the pre-classical, classical, and post-classical periods of jurisprudence to be subject to the influence of powerful men; sometimes that influence found expression in the outright bribery of judges, advocates, or witnesses; more often it operated by fear, by favour, and by personal connexions. The theory of an equal and objective justice was perfectly familiar, but no one reckoned on finding it applied in practice.

In a system of which such general statements were true, one would expect to find litigation following a rather different pattern from that which it follows today. Today, as was said at the outset, the climate of municipal justice is such that a poor man will sue a rich man as often as the reverse will happen; perhaps indeed oftener, for the reasons already given. Thus, if one looks, for instance, at the cause list of a modern English or ii Irish court, no conclusion whatever may be drawn to the effect,; for example, that a party to a case who seems more important or powerful in life than his opponent is likely to win the case. If this were *not* true, if power and status could confer a likelihood of victory in litigation, and if this were well known, a cause list would exhibit the following phenomenon: the plaintiffs would all tend to be more powerful than the defendants, or at least would be evenly matched with them. Why? Because a weak would-be plaintiff will not waste his time in suing a defendant he knows to be stronger than himself,

¹⁰⁸ *Ipse denego*: the technical word used of the praetor refusing an action!

¹⁰⁹ *Ibid.* But, just before this, we get: *eo fit, ut ad me decurrant plurimi, qui tuam gratiam cupiunt*.

¹¹⁰ *Ad amic.* 1.3 (Naber, p. 175; Haines, ii. 278; excised in van den Hout). This letter written to Egrillius Plarianus, proconsul of Africa A.D. 156–9, does not seem, however, to be in connexion with litigation.

¹¹¹ *Ad amic.* 1.4 (Naber, p.176; van den Hout, p.167) The letter begins: *Iulium Aquilinum virum, si quid mihi credis, doctissimum facundissimum, etc. ... commendo tibi quam possum studiosissime*.

¹¹² See foregoing note. Is this habit a mere convention of style, or may one imagine the desk of a proconsul loaded with such *commendationes*? In the latter case, the position of the name of the person recommended would help it to be turned up easily.

¹¹³ *D.48.14.1.4.*

because he knows that. being stronger, the defendant would be likely to win. Perhaps, of course, he may be a defendant with a quixotic sense of justice, who will abide by the result of the evidence without bringing his influence to bear on judge or witnesses; or perhaps the would-be plaintiff may be equally quixotic, pitting himself blindly against wealth and power; but, in general the plaintiff side of the cause list will show ore wealth and power than the defendant side.

This hypothesis as to cause lists would necessarily have to be applied to the Roman world if the foregoing study of *gratia*, *potentia*, and *pecunia* is at all near the mark. It is impossible to produce such a thing as a Roman cause list; but it would be interesting to set out a short list of some civil actions, real, projected, or imaginary,¹¹⁴ of which Roman literature contains traces, and to see whether or not the hypothesis can be borne out.

Such a list would begin with situations in the comedies of Plautus and Terence in which, as a rule, one character summons or threatens to summon or is advised to summon another before the praetor; though once or twice a lawsuit is reported from the past (whether truly or falsely). One group of instances concerns the *leno*, a favourite target for threatened litigation; thus we get the following items:

1. Agorastocles (*adulescens*) v. Lycus (*leno*)¹¹⁵
2. Pleusidippus (*adulescens*) v. Labrax (*leno*)¹¹⁶
3. Lyco (*trapezita*) v. Cappadox (*leno*)¹¹⁷
4. Saturio (*parasitus*) v. Dordalus (*leno*)¹¹⁸

The *leno* is, of course, a man in an unpopular profession, doubtless with few friends; while the four plaintiffs are two *adulescentes* (wild young men, but of good family) a *trapezita* (rich and certainly enjoying more prestige than his adversary) and a *parasitus*, who although not a respected figure stood somewhat higher in the social scale than a pimp. In none of the plays is a *leno* ever found in the position of a plaintiff or intending plaintiff.

A further case which despite non-conformity with the rules of Roman law exhibits the same disparity between plaintiff and defendant is

5. Mercator v. Leonida (*servus*)¹¹⁹

The *parasitus* in his turn is sued by the old man of good family

6. Demipho (*senex*) v. Phormio (*Parasitus*)¹²⁰

The figure of the soldier, again someone not high in the social scale, is found twice in comic litigation, and each time in the character of defendant, the plaintiff being the young man of good family:

7. Phaedromus (*adulescens*) v. Therapontigonus (*miles*)¹²¹
8. Chremes (*adulescens*) v. Thraso (*miles*)¹²²

Another play gives a further similar situation, although legally un-Roman:

9. Hanno (*Poenus*) v. *meretrices*¹²³

¹¹⁴ Imaginary: such as the instances in Plautus and Terence of threatened litigation. For the present purpose, these offer as good evidence as one could wish, because it must be assumed that the comedians would reflect reality, and would not offer to their audiences threatened lawsuits based on a social relationship between the parties which the audience might know would render litigation most unlikely.

¹¹⁵ Plaut. *Poenulus* 183 ff., 785 ff., 1336–60

¹¹⁶ Plaut. *Rudens* 859 ff.

¹¹⁷ Plaut. *Curculio* 683.

¹¹⁸ Plaut. *Persa* 745.

¹¹⁹ Plaut. *Asinaria* 480.

¹²⁰ Ter. *Phormio* 936, 981.

¹²¹ Plaut. *Curculio* 621 ff.

¹²² Ter. *Eunuchus* 765 ff.

Apart from these nine cases in which there appears to be a certain superiority of status on the plaintiff side, there are three in which the parties seem socially equal:

10. Theopropides (*senex*) v. Simo (*senex*)¹²⁴
11. Callicles (*senex*) v. Diniarchus (*senex*)¹²⁵
12. Euclio (*senex*) v. Lyconides (*adulescens*)¹²⁶

And there is a single passage in which a *parasitus* summons a *senex*:

13. Phormio (*parasitus*) v. Demipho (*senex*)¹²⁷

The last case mentioned is thus the only one of thirteen which, seems to conflict with the hypothesis advanced. Yet the conflict may be no more than apparent; no doubt the fire of the *parasitus* conveyed to the Roman audience something like the *cliens-status*; and for litigious purposes the standing of a *parasitus* may have been equivalent to that of his 'patronus'. This case apart, it is remarkable how generally comic litigation conforms to the hypothesis that inferiors do not tend to see superiors, but only superiors inferiors, or persons of equal status.

The speeches of Cicero offer further material; from those delivered in civil cases, something can be learned of the relative status of plaintiff and defendant. Thus:

- | | |
|--|--|
| <ol style="list-style-type: none"> 14. Sex. Naevius
Admittedly superior in <i>gratia</i> to Quinctius;¹²⁸
had many friends including <i>homines</i>
<i>nobiles</i>:¹²⁹ able to indulge in <i>luxuries et</i>
<i>licentia</i>.¹³⁰ 15. M. Tullius
Landowner.¹³⁴ 16. Hermippus
<i>Homo eruditus</i>.¹³⁶ | <ol style="list-style-type: none"> v. P. Quinctius
Simple, old-fashioned Roman of <i>rusticana</i>
<i>parsimonia</i>; ¹³¹ not wealthy enough to endow his
daughter; ¹³² elderly.¹³³ v. P. Fabius
Also landowner, but desperate in his actions:
ruined?¹³⁵ v. Heraclides
Had not succeeded in entering the local senate at
the age usual for such an honour, and had
already been condemned in several <i>iudicia</i>
<i>turpissima</i>.¹³⁷ |
|--|--|

¹²³ Plaut. *Poenulus* 1225 ff.

¹²⁴ Plaut. *Most.* 1089 ff.

¹²⁵ Plaut. *Truc.* 840. This is perhaps not very significant, as it seems to be a joke.

¹²⁶ Plaut. *Aulularia* 759.

¹²⁷ Ter. *Phornio* 438 ff. Terence is, of course, less 'Roman' than Plautus, and this may partly account of the apparent anomaly of this case.

¹²⁸ 30.93 (*Pro Quinctio*).

¹²⁹ Ibid. 14.47.

¹³⁰ Ibid. 30.92.

¹³¹ Ibid. 30.92.

¹³² Ibid. 31.98.

¹³³ Ibid. 11.39

¹³⁴ *Pro Tullio*.

¹³⁵ Ibid.

¹³⁶ *Pro Flacco* 46.

¹³⁷ Ibid. 42. This was an *actio depensi*; the plaintiff won, and the defendant, not having paid the judgment, was arrested by him (ibid. 48). It is fair to add that the defendant subsequently started *vindicatio* proceedings against the plaintiff, in vain, (ibid. 49), and other proceedings against C. Plotius, a senator of good character, which Heraclides then abandoned (ibid. 50).

In a large number of other civil cases mentioned in Cicero and other sources, it is impossible (short of exercising an ingenuity hostile to reality) to discover any disparity in standing or influence between plaintiff and defendant. Thus:

17. A. Caecina	v. S. Aebutius ¹³⁸
18. Q. Roscius	v. Q. Flavius ¹³⁹
19. Calpurnius Lanarius	v. Claudius Centumalus ¹⁴⁰
20. Otacilia	v. C. Visellius Varro ¹⁴¹
21. C. Titinius Minturnensis	v. Fannia ¹⁴²

These instances could be much extended; their significance is not neutral, but is rather a pointer to the correctness of the hypothesis advanced above, inasmuch as in none of them can any weakness be detected on the plaintiff side relative to the defendant side. It has been suggested above that in the conditions of Roman justice litigation might take place where the parties were evenly matched; and this seems to be the case in these instances from Cicero and Valerius Maximus. The *causae forenses* printed in Bruns's *Fontes Juris Romani Antiqui* are also, significantly enough, all cases in which the contestants appear equally weighted: disputes between *civitates* or between persons of the same trade.¹⁴³ Pliny in one of his letters¹⁴⁴ reports something of the centumviral court which is not without an interesting overtone: the cases being heard, he writes, are tedious rather than interesting: *sunt enim pleraeque parvae et exiles, raro incidit vell pesonarum claritate vel negotii magnitudine insignis*. There is a hint in the phrase *personarum claritate* that ought not to be overlooked; it is that if a distinguished person appears as a party, the other party will be distinguished too. Litigation, one might be tempted to infer, runs in Pliny's eye almost as modern boxing does—divided into classes according to weight; and indeed this: kind of simile seems to be not far from Horace's mind when in a satire¹⁴⁵ he writes of a law-suit before the governor Brutus between two powerful men:

... duo si Discordia vexet inertia
 Aut si disparibus bellum incidat, ut Diomed
 Cum Lycio Glaucō, discedat pigror, ultro
 Muneribus missis, Bruto praetore tenente
 Ditem Asiam Rupili et Persi par pugnat, uti non
 Compositus melius cum Bitho Bacchius. In ius
 Acres procurrunt, magnum spectaculum uterque.

But, if, by chance, two parties of disparate weight should meet, the likelihood is that the advantage is on the plaintiff's side. Thus Aulus Gellius recounts a case which he heard between an *optimus* as plaintiff and a *deterrimus* as defendant,¹⁴⁶ although the legal rights appear to be on the side of the *deterrimus*, Gellius cannot bring himself to award him his verdict, but swears (no doubt more conscientiously than the average judge, his account is so full of self-congratulation) that the matter *sibi non liquere*.

The pieces of evidence so far collected show that social superiority and its normal incidents tended to confer an advantage in civil litigation as elsewhere. It remains to add a further dimension to this impression by considering briefly the extent to which a position of *formal* advantage was attached by private law to superior social status.

¹³⁸ *Pro Caecina*.

¹³⁹ *Pro Rosc. Com.*

¹⁴⁰ Val Max. 8.2.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ See Bruns, *Fontes*, under *Causae forenses*.

¹⁴⁴ *Epist.* 2.14.

¹⁴⁵ *Sat.* i.7.

¹⁴⁶ *N.A.* 14.2.22.

The earliest evidence in this direction concern the delict of *iniuria*. Thus Gaius tells us in his Institutes¹⁴⁷ that an *iniuria* could be aggravated (*atrox*) depending on the relative status or the persons involved (*ex persona*): *veluti si magistratus iniuriam passus fuerit, vel senatori ab humili persona facta sit iniuria*. Justinian in his Institutes¹⁴⁸ repeats this distinction, adding that an *iniuria* is *atrox* if committed by a child or freedman on parent or *patronus*, and says: *aliter enim senatoris et parentis patronique, aliter extranei et humilis Personae aestimatur*. The views of Gaius and Justinian are more generally expressed in the *Sententiae* of Paulus:¹⁴⁹

Atror iniuria aestimatur ... persona, quotiens senatori vel equiti Romano decurionive vel alias spectatae auctoritatis viro [inrogatur]: et si plebeius vel humili loco natus senatori vel equiti Romano, decurioni vel magistratui vel aedili vel iudici, quilibet horum, vel si his omnibus plebeius.

The instances given in Gaius, Paulus, and Justinian are doubtless only illustrations of the general attitude to damages rather than special rules in favour of senators, &c., as such; this general attitude would accordingly be reflected in a tendency to award higher damages to a person of higher rank, lower to a person of lower; damages would be aggravated if the plaintiff were of much higher rank than the defendant, but mitigated (to vanishing point?) if the reverse were the case.

A parallel discrimination exists in the field of the *actio de dolo*; Ulpian tells us¹⁵⁰ that because of its disgraceful nature (*cum sit famosa*) it is not given to certain persons such as children or freedmen as against parents or *patroni*;¹⁵¹ but moreover,

nec humili adversus eum quid dignitate excellit debet dari: puta plebeio adversus consularem receptae auctoritatis, vel luxurioso atque prodigo aut alias vili adversus hominem vitae emendatoris. et ita Labeo.

The distinction (to judge by the reference to Labeo) goes back, according, to the beginning of the Empire. The only remedy which such *humiles personae* can have, according to Ulpian, is an *actio infactum*. The *actio iniuriarum* is, of course, also *famosa* in the strict sense that it exposes an unsuccessful defendant to *infamia*; and the sharp divisions of status recognized by the Romans apparently made it seem shocking to them that an important person should be exposed to *infamia* at the suit of someone less important.¹⁵² Again, consideration for the high status of a defendant might cause the execution of a judgment to be postponed; Ulpian reports (although the passage looks interpolated) that:¹⁵³

qui pro tribunali cognoscit non semper tempus iudicati servat, sed nonnumquam artat, nonnumquam prorogat pro causae qualitate, et quantitate vel personarum obsequio vel contumacia.

In the later Empire the distinction between upper and lower classes hardened into a fully legal one; and there are many instances of criminal punishment being differentiated according to whether the guilty person was an *honestior* or an *humilior*; if the latter, his lot was harder.¹⁵⁴ This formal differentiation goes in: essence back to the Republic, according to a recently advanced and convincing view;¹⁵⁵ it seems likely that if such formal distinctions existed in the criminal law, at least informal ones, of which we have now no direct evidence, existed to a great extent in private litigation. The strength of witnesses' testimony, too,

¹⁴⁷ 3.225.

¹⁴⁸ 4.4.9.

¹⁴⁹ 5.4.10; and see *D.47.10.7.8*.

¹⁵⁰ *D.4.3.11*.

¹⁵¹ The provision in favour of parents and *patroni* is doubtless one of *pietas*: cf. *D.2.4.4.1*. (prohibition of summoning parent or patron *in ius* without praetor's authority).

¹⁵² It is fair to say that there was apparently some reluctance to condemn any respectable defendant in an *actio famosa*: see Cicero, *pro Caecina* 2.6–7.

¹⁵³ *D.42.1.2*.

¹⁵⁴ See *Coll.* 1.2.2; 8.4.1; 8.5.1; Paul *Sent.* 1.21.4–5; 5.20.6; 5.23.13; 5.25.1; *D.47.10.45*; 47.12.11; 47.17.1; 47.18.1.1, 2; 48.5.39(38).8; 48.19.28.2; 48.19.38.3, 8.

¹⁵⁵ Kunkel, *Kriminalverfahren*, pp. 67 n., 76–78.

seems to have been measured according to social and financial standing and *existimatio*,¹⁵⁶ and one text.¹⁵⁷ seems even to suggest that a person of standing could more confidently expect help from a magistrate against oppression than could a simple citizen.

¹⁵⁶ *D.22.5.3 pr., 2; 22.5.21.3.*

¹⁵⁷ *D.4.2.23 pr.: Non est verisimile compulsus in urbe inique indebitum solvisse eum, qui claram dignitatem se habere praetendebat, cum potueri ius publicum invocare et adire aliquem potestate praeditum, qui utique vim eum pati prohibuisset.*

3. Economic Aspects of Roman Litigation

J. M. Kelly, *Roman Litigation* (Oxford: Clarendon Press, 1966), 69–84
[footnotes renumbered]

In the foregoing two chapters an attempt has been made to show, firstly, that so long as the system of the private summons prevailed, it was in theory possible and no doubt in practice also common, for one who was physically stronger to resist being sued by one who was physically inferior; secondly, that where litigation did occur between parties of unequal status, the conditions of society conspired to give the advantage to that party whose status was superior. It is obvious that in general the party who commands physical superiority also enjoys social and political superiority; and thus the conclusions suggested in the preceding chapters agree with and supplement each other. A further dimension may now be added to the emerging picture by considering some specifically economic aspects of Roman litigation; the result here too will be to suggest that the Roman system tended during the Republic and at any rate the early Empire to confer an advantage upon wealth at the expense of poverty.

A feature peculiar to the Roman formulary period, and thus one corresponding chronologically with the later Republic and the earlier Empire, was that all judgments were money judgments: nothing like the English equitable remedy of specific performance of contract existed, nor could a *iudex* order the restitution of the plaintiff's land or chattel wrongfully withheld "by the defendant. This situation is briefly described by Gaius in a much debated passage¹ which reads (according to the version here adopted) as follows:

Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio concepta est. Itaque, et si corpus aliquod petamus, veluti fundum, hominem, vestem, aurum, argentum, iudex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, (sed) aestimata re pecuniam eum condemnat.

The Veronese codex of Gaius in fact reads ... *fundum hominem vestem argumentum, iudex ..*: and there is no *sed* anywhere in the passage. *Aurum argentum* is substituted for *argumentum* in view partly of the apparent irrelevance of the word *argumentum* in this position and partly of the appearance elsewhere in Gaius of the word-series *fundus homo vestis aurum argentum*² and of the mistake *argumento* for *argento*.³ Nicolau-Collinet⁴ followed by v. Lübtow⁵ place the *sed* between *actum est* and *sicut*, the effect of which is to change entirely the sense of the passage: instead of making Gaius say (as he is generally taken to have said) that now there was only a *condemnatio pecuniaria* in contrast with former times when there was a *condemnatio in ipsam rem*, this version would make him say that nowadays, just as in former times, judgments were in terms of money. There are two main objections to the view of Nicolau-Collinet and v. Lübtow: firstly, the words *sed sicut olim fieri solebat* seem in their alleged meaning too pointless to have been written by Gaius: secondly, it seems a priori unlikely that at no period, however remote (even before the introduction of coined money), was a *condemnatio* other than *pecuniaria* (though this in fact is what

¹ *Inst.* 4. 48.

² *Inst.* 2. 13.

³ *Inst.* 2.79: see Wenger, 59 ZSS 325.

⁴ 1936 *RHD* 751.

⁵ 68 ZSS 358–9.

Nicolau-Collinet and v. Lübtow would have us believe).⁶ Kreller⁷ also refuses to believe that there could ever have been *condemnatio in ipsam rem*, and gets rid of the difficulty presented by the Gaius passage by means of a complicated and far-reaching surgical operation on that text which, although ingenious, is not convincing, and seems amply refuted by Wenger.⁸

The better opinion, supported by Wenger⁹ and, more recently, by Brogini,¹⁰ is that the version given above (which goes back to Krüger's edition of Gaius) is the only plausible and meaningful one which can be got from the text as it stands. V. Lübtow objects to it on the ground, *inter alia*, that *olim* must mean the period of the *legis actiones* and that no *legis actio* knew of a *condemnatio in ipsam rem*: but, as Wenger and Zulueta¹¹ pointed out, it may well be that Gaius had in mind the *legis actio sacramento in rem*, in which the practical result of the decision as to whose *sacramentum* was *iustum* would be to attribute ownership to one side or the other and thus would amount in a sense to a judgment *in rem*: and indeed, as Wenger emphasized,¹² the fragmentary final words in Gaius, *Inst.* 4.16 (where the *legis actio sacramento in rem* is described), *<id>que legis actio ne restituium est*, are appropriate only to a judgment *in rem*.

Wenger and Brogini, accordingly, accept that in the *legis actio* period *condemnatio in ipsam rem* did take place, but both authors seek the beginnings of the *condemnatio pecuniaria* in this period. Yet according to Wenger¹³ *condemnatio pecuniaria* is most unlikely if not indeed impossible in the period before the introduction of a currency economy in about 338 B.C.: and Wenger inclines to view the *condemnatio pecuniaria* as a feature peculiar to the formulary procedure (in the later *cognitio* procedure *condemnatio in ipsam rem* became normal). As to the genesis of the *condemnatio pecuniaria*, v. Lübtow saw this in the monetary estimation which must have accompanied the *legis actio sacramento in rem*, e.g. in order to assess the double penalty of one who *falsam vindiciam tulit*,¹⁴ and also in the later *legis actiones per iudicis postulationem* and *per conditionem*.¹⁵ Wenger, on the other hand, sees several elements as possible historical forbears of the *condemnatio pecuniaria*: the necessary *aestimatio* in the *sacramentum* procedure as to whether the thing in issue was worth more or less than 1,000 *as*: the rough *aestimatio* which would have taken place in order to arrive at the appropriate ransom to free the defendant in a case where he had failed to produce the *res* in an *actio in rem*: the *aestimatio* which was necessary in a case of multiple damages as in *furtum*: the *aestimatio* which must have been used in dividing the components of an inheritance in *communi dividundo*. But neither v. Lübtow nor Wenger can explain satisfactorily how it was that the *condemnatio pecuniaria* became a generalized and compulsory element of Roman civil procedure. V. Lübtow asserts in a confident tone that the generalized principle of *condemnatio pecuniaria* arose in a sense through natural necessity, that it was the unavoidable product of an organic development:¹⁶ but the proof of this statement is fairly thin if it rests on nothing better than traces of money estimations in the *legis actio* procedure. Wenger attends to the existence of fixed money penalties in cases of *iniuria* regulated by the XII Tables and says that here, as in the field of *actiones in rem*, the idea had become accepted that 'one might, indeed one must, instead of possible revenge or restoration *in natura*, allow oneself to be compensated by a money-payment'. But these views fall far short of making clear the reason for the compulsory generalization of the principle. It is unbelievable that in spite of its far-reaching effect it could have been adopted half-consciously or have merely developed by

⁶ Zulueta (*The Institutes of Gaius*, ii.264), while tentatively accepting the usual reading given above, makes the very puzzling statement in regard to *condemnatio in ipsam rem*, that 'the farther back one goes the more unlikely such a practice becomes'. Why?

⁷ 58 ZSS 36 ff.

⁸ Op. cit., pp. 317 ff.

⁹ Ibid.

¹⁰ *Iudex Arbiterve*, p. 14–5.

¹¹ Op. cit. ii.264

¹² Op. cit., pp. 330 ff.

¹³ Op. cit., pp. 340 ff.

¹⁴ Festus, s.v. *vindiciae*.

¹⁵ Op. cit. 349. According to v. Lübtow, *olim* in the Gaius passage (as read by Nicolau-Collinet) refers to those two *legis actiones*.

¹⁶ Op. cit., p. 350.

a natural process from what were really quite different features of the *legis actio* system: some conscious and deliberate act, perhaps a legislative one, must explain its presence in, for example, the *actio empti* or the *actio locati* of the formulary period. How can one say, for example, that if a buyer is disappointed in his expectation that a seller will convey to him the slave Stichus, who has already been paid for, the natural and necessary course for the law to take is to condemn the seller, not to hand over Stichus, which is what the buyer really wants, but in effect to pay back the purchase money?¹⁷ The mere fact that in the law of obligations the possibility of personal execution exists does not seem enough to justify expressing judgments, in actions founded on obligations, in terms of the ransom necessary to secure release from personal execution, and it is not surprising that nowhere in the whole of Roman jurisprudence is this idea expounded.

Wenger indeed does attempt an explanation of the phenomenon, by referring it to the capitalistic character of the late Roman Republic: according to his reading of the situation, one can appropriate compulsorily someone else's property if only one has enough money to pay the amount of the *condemnatio*.¹⁸ Wenger thinks, accordingly, that the *condemnatio pecuniaria* existed for the benefit of, or at least in practice worked to the advantage of, the defendant: his picture is of a rich defendant whose money allows him to defy the just claim for restitution made by the plaintiff.¹⁹ Here Wenger is alone. Orestano, in the foreword to his Italian translation of Wenger's own *Institutionen des römischen Zivilprozessrechts*, comes fleetingly nearer what may be the truth when, in referring to this theory of Wenger's, he says that the *condemnatio pecuniaria*, in an agrarian society where money is in short supply, 'must have represented the most desirable object for the plaintiff, and the most difficult one for the defendant to produce'. Wenger comments on this suggestion of Orestano²⁰ that 'the main period of the operation of the *condemnatio pecuniaria* does not lie in the period of early agrarian petty economy, but in that of big-city money economy'. But this reply says nothing as to the relative rarity of money, which is here the principal issue. The idea behind Orestano's suggestion seems to be not far away from the notion that the *condemnatio pecuniaria* had by its very nature the effect of penalizing the defendant: and the same notion is found in other writers, though never more than hinted at in passing. Thus Jhering²¹ mentions the penal aspect of the money condemnation (though he like Wenger thinks of the defendant who pays a *condemnatio pecuniaria* as expropriating the plaintiff's thing). Alexander Beck²² in an essay on the origins of *locatio conductio* comments in passing that the *condemnatio pecuniaria* represented a procedural penalty for the defendant on account of the general scarcity of money at the end of the second century B.C. Brogginì cites Beck with approval.²³ and says that the *condemnatio pecuniaria* became generalized because of its advantages for the plaintiff.²⁴

Here we are face to face with a possible feature of the *condemnatio pecuniaria* which might go some distance towards explaining its introduction. But two points arise. Firstly, the writers who have mentioned the idea of penalty refer it to the conditions of the mid-Republic, whereas, as has been seen, it is more likely that the *condemnatio pecuniaria* first arose along with the formulary system. Does the idea of currency shortage seem apposite in this context? Secondly, even if it could be established that the wish to penalize or to put at a disadvantage lay behind the *condemnatio pecuniaria*, must the search for a reason for the system end with this conclusion? Might the further question not be asked, why should it have been a purpose of the system to penalize defendants or to put them at a disadvantage ?

The answer to the first question may appear from a consideration of some interesting evidence provided by writers of the late Republic and early Empire. Cicero writes in his correspondence of the

¹⁷ We may leave out of account for the purpose of this example the possibility of the *condemnatio* exceeding the purchase money because of an upward fluctuation in Stichus' value.

¹⁸ Op. cit. pp. 360 ff.

¹⁹ See also Wenger, *Institutionen*, 138.

²⁰ 59 ZSS 362 n.

²¹ *Der Zweck im Recht*, i.412.

²² *Festschrift Lewald*, p. 12.

²³ *Iudex Arbiterve*, p. 102. Brogginì adds (n. 32) that in his opinion the 'advantages' of the system, its adaptability to every concrete case, its superiority to *condemnatio in ipsam rem* were realized early.

²⁴ Op. cit., p. 100 n. 24.

conditions of 49 B.C., when a straightforward shortage of currency produced far-reaching effects even among the better off sections of society. Thus we find him in a letter to Atticus²⁵ interceding on behalf of his brother Quintus, who apparently owed Atticus money:

Quintus frater laborat ut tibi quod debet ab Egnatio solvat: nec Egnatio voluntas deest nec parum locuples est, sed cum tale tempus sit ut Q. Titinius (multum enim est nohiscum) viaticum se neget habere idemque debitoribus suis denuntiarit ut eodem faenore uterentur, .atque hoc idem etiam L. Ligus fecisse dicatur, nec hoc tempore aut domi nummos Quintus habeat aut exigere ab Egnatio aut versuram usquam facere possit, miratur te non habuisse rationem huius publicae difficultatis.

Several things must be noticed here. The main point is that Quintus, who was not a poor man, cannot pay because he has no *nummi*. Secondly, Quintus cannot get in a debt due to himself from Egnatius, who is not poor either (*nec parum locuples est*): we must assume that he, too, simply cannot lay his hands on any money. Then, as if to heighten the effect, Cicero says that Q. Titinius and ‘even’ L. Ligus are in similar difficulties: these²⁶ must have been normally financially quite solid, or Cicero would not have introduced their names at this point. Then we find that because of *haec publica difficultas* Quintus is unable to raise a loan. (Not the least interesting feature of the passage is that it shows Quintus evidently unwilling to sue Egnatius at law and thus to bring about perhaps the sale of his estate in order to satisfy the judgment.) One might ask: how can a shortage of money, i.e. currency, affect people who are financially solid because of owning landed or other property? The answer may perhaps appear from another letter of Cicero’s,²⁷ written in the same year, in which he speaks of buying an estate whose owner had at first refused Cicero’s offer of 90,000 sesterces. ‘But now’, says Cicero, ‘I think all these prices are depressed because of the scarcity of money (*sed nunc omnia ista iacere puto propter nummorum caritatem*) .’ The shortage of currency gives coins an unusually high value and thus relatively drives down the value of other forms of property, just as an inflationary excess of money drives prices up: and so a debtor in the year 49 B.C. would find himself altogether in a buyer’s market and would fail to realize the true value of his goods if he had to sell in order to satisfy a creditor in money. This must be why even people who were *nec parum locupletes* found themselves in difficulties: to meet a money debt they might have to throwaway a great deal of other property .²⁸ In the following year the same conditions seem to have continued: Caesar reports his own measures as dictator for the relief of the situation:²⁹

... cum fides tota Italia esset angustior nec creditae pecuniae solverentur, constituit ut arbitri darentur: per eos fieret aestimationes possessionum et rerum, quanti quaeque earum ante bellum fuisset, atque eae creditoribus traderentur. Hoc et ad timorem novarum tabularum tollendum minuendumque, qui fere bella et civilis dissensiones sequi consuevit, et ad debitorum tuendam existimationem esse aptissimum existimavit.

The fear of war, Caesar reports, usually results in the fear of a cancellation of debts: why? Doubtless because at such times creditors press unusually hard to get in their debts, general distress results among the debtor class, and the cry *novae tabulae* goes up. The reason why creditors press at times of crisis is, again, because they wish to accumulate and hoard as much solid money as possible. The fear of war (for obvious reasons) also made it hard to get a loan of money: Atticus wrote to Cicero in 44 B.C.: *mirifica enim δυσχρηστία est propter metum armorum*.³⁰ There cannot be any ‘doubt that, under the system of *condemnatio pecuniaria*, the volume of litigation also rose with the threat of disturbance (though once

²⁵ *Ad Att.* 7. 18.4

²⁶ Titinius was a well-off senator: *RE* 6A.2 1549. Nothing is known about L. Ligus, but to judge by the *etiam* he was even richer than Titinius.

²⁷ *Ad Att.* 9. 9. 4.

²⁸ Further evidence of the conditions of 49 B.C. can be found in other letters of Cicero: *ad Att.* 10.11.2; *ad Att.* 10.14. That even rich men found themselves embarrassed by shortage of coin at times for which we have no direct evidence of an unusual general shortage appears from the case of Sopater, one of the richest and most honoured citizens of the town of Halycia in Sicily (*homo domi suae cum primis locuples atque honestus*); when he found himself obliged to bribe Verres (governor in Sicily 73–70 B.C.) he had to borrow 80,000 sesterces (a fairly modest sum for a rich man) from his friends, presumably several of them, because he himself was extremely short of cash (*ostendit se in summa difficultate esse nummaria*): *Cic. in Verr.* 2. 2. 28. 69.

²⁹ *Bell. civ.* 3. I. 2–3.

³⁰ *Ad Att.* 16. 7. 6.

hostilities started litigation might be interrupted altogether, as happened during the wars following the death of Nero),³¹ because any claim whatever, since it might result in a money judgment, was from the creditor's point of view as good as an ordinary *mutuum*-debt and must therefore be as energetically pursued. Probably it was the general calling-in of debts and hoarding of the money realized which caused the currency shortage of 49 B.C. of which Cicero writes: just as a similar currency shortage resulted from a general calling-in of debts in the reign of Tiberius, as Tacitus reports:³²

Hinc inopia rei nummariae, commoto simul omnium aere alieno, et quia tot damnatis bonisque eorum divenditis signatum argentum fisco vel aerario attinebatur. ...Copiam vendendi secuta vilitate, quanto quis obaeratur, aegrius distrahebant, multique fortunis provolvebantur: eversio rei familiaris dignitatem ac famam praeceps dabat, donec tulit opem Caesar. ...

It will be noticed from this passage that yet another economic factor (together with the shortage of currency) contributed to the ruin of many debtors: the fact that 'in times of crisis all creditors act simultaneously, therefore all debtors must realize their assets in order to raise money simultaneously, therefore a great deal of property comes simultaneously on the market, and the phenomenon of too many goods chasing too little money ensues, with fatal results for the economically weaker sections.

Two questions now arise. To what extent are these conditions dependent on acute crisis? And even in times of comparative tranquillity was the supply of currency sufficiently and evenly distributed ?

The first question can only receive an approximate answer . No doubt a relation existed between the acuteness of the political crisis and that of the financial crisis, otherwise we should not hear from Cicero about *tale tempus* in special reference to 49 B.C., but it must be remembered that the last century of the Republic was in general turbulent and dangerous, and it seems probable that the conditions of 49 B.C. represented merely a peak of creditor-apprehension which was generally present anyway. A further pointer to this probability is afforded by the chronic usury in which many of the wealthier Roman citizens were involved (Tacitus says of the financial crisis reported above that everyone of the senators 'was himself guilty of usury—*neque enim quisquam tali culpa vacuus*). Interest rates were fixed by the XII Tables at the *unciarium fenus* which is generally³³ understood to mean 100 per cent. per annum, but to judge by the complaints about usury with which Roman literature abounds, even this enormous rate was frequently exceeded. These conditions in regard to money-interest could reflect two factors, either of which is instructive for the present purpose: the chronic insecurity of credit, whereby due to unsettled times the creditor had to 'insure' himself by high rates against the danger of getting nothing back at all from some of his debtors: or (and this seems more likely, having regard to the very high rates even in quiet times) the chronic heavy demand for supplies of currency due to shortage or uneven distribution, which would naturally tend to drive up the 'price' of the currency, i.e. the interest payable on loans.³⁴

And indeed it does seem as though currency was in fact in generally short supply in the Roman Republic and early Empire at least. Firstly, it must occur to anyone reading the passages of Cicero and Tacitus cited above that a society in which an *inopia rei nummariae* could be at once produced by a war-scare and/or a general calling-in of loans simply did not have as much currency as a modern society, or at least did not have its currency as evenly distributed as it is in a modern society: that is to say, it is possible that a very large volume of coins actually existed, but that this volume was concentrated and retained idle in a very small number of hands, a circumstance which in its turn, since it created a monopoly or 'corner', enabled high interest rates to be charged without apparently any capitalist having the idea of enlarging his business by charging a competitive, lower rate of interest. Again, there are one or two other clues to be found which indicate that the Roman currency was not evenly spread. Firstly, during a large part of the

³¹ Suet. *Vesp.* 10.

³² *Ann.* 6.17.

³³ See Balogh, 'Adaptation of law to economic conditions according to Roman Law'. *Atti del Congr. Int. di dir. rom.* 1948, ii.315.

³⁴ See Tenney Frank, 56 *American Journal of Philology* (1935) 340: 'High rates of interest are ... a common symptom of contracted currency'; also p. 337. The converse is evidenced by Suetonius (Aug. 41) who says that when Augustus brought the royal treasures of Egypt to Rome money became so abundant that the rate of interest fell and the value of land rose: *invecta urbi Alexandrino triumpho regia gaza tantam copiam nummariae rei effecit, ut faenore deminuto plurimum agrorum pretiis accesserit.*

first century B.C. the Roman state issued no bronze coinage at all. This might (despite the apparent parallel with eighteenth-century England, when small change was so scarce that private tokens were issued in huge quantities) indicate that money was used not so much to facilitate the exchange of goods and services, as to contain capital masses: for if in fact its function was the same as it is today, one would expect to find the opposite of what in fact is found: one would expect to find quantities of small-denomination coins rather than of the more valuable silver coins. What did a first-century B.C. Roman use to pay for a loaf of bread or the cobbling of his shoes? It is not impossible that small-scale economic functions depended (apart from slavery and *clientela*) not on currency but on barter and the mutual rendering of services. Secondly, archaeological investigation has not yet been directed to the question of distribution of currency, but it seems as if this was generally uneven, to judge by the inhabited sites in which no coins of any kind have been found. Tenney Frank has, moreover, shown³⁵ that ‘while Augustus increased the coinage for circulation very strikingly from 30 to 10 B.C., he in his last twenty years and Tiberius during his nineteen years of power before 33 [the year of the monetary crisis reported by Tacitus] coined relatively little and spent very frugally; so that, while gold and silver went abroad increasingly to pay for imports, the per capita circulation inside of Italy was steadily decreasing for forty years’.

How ought this factor of general, sometimes acute money shortage in the late Republic and early Empire to be related to the *condemnatio pecuniaria* of the formulary procedure? It is clear, to begin with, that the scattered hints in modern authors as to the penal character of the *condemnatio pecuniaria* are on the right track if these conclusions about chronic money-shortage are true. Plutarch gives a very valuable indication that this is the way in which the ancient world did in fact regard money judgments when he tells us, in his account of Solon’s laws against adultery,³⁶ that it seemed illogical that Solon should punish the same act in some cases with great severity (death), in other cases leniently, by fixing a money penalty, ‘though of course perhaps on account of the scarcity of currency in the city at that time, the difficulty of obtaining it made money penalties in fact great’ πλὴν εἰ μὴ σπανίζοντος τότε τοῦ νομίσματος ἐν τῇ πόλει μεγάλας ἐποίει τὰς ζημίας τὸ δυσπόριστον. It is very doubtful if Plutarch could have had exact knowledge of currency conditions in the Athens of Solon, and much more likely that he is here expressing a possibility based on recent experience in his own (i.e. the Roman) world.

Now at first sight, one might suppose that since the *condemnatio pecuniaria* was general, in an era of money-shortage it weighed as an equal inconvenience on all classes, which various defendants would have felt in proportion to their varying degrees of economic strength—in other words, the effect would have been much the same as a modern law to the effect that judgment debts could be paid in gold coins only. But the Roman world was not a modern one, and it has been suggested in the foregoing chapters that the personal standing (including physical, economic, and social strength) of the parties or would-be parties to litigation had a direct effect on the outcome of the litigation. It follows from this, as has been said before, that the general pattern of litigation shows a disproportion of strength in favour of the plaintiff side: and, since in this world one form of strength tends to attract the others, it is a fair assumption that this disproportion would have existed on the economic plane as much as on the other planes. A plaintiff who is *gratiosior* than the defendant is likely also to be richer. The result, seen in large terms of the trend over a century or so, would have been that the *condemnatio pecuniaria* in general (of course not always) tended to hit the weaker half of society, the half with fewer surplus goods, the half which would find it harder to get credit, the half with whom hard cash was in shortest supply.³⁷ And, assuming this to be true, one would be inclined to conclude that in the century following the Gracchi, if not indeed also well into the Empire, the administration of civil justice contained an element whose effect

³⁵ Op. cit., pp. 336–7.

³⁶ *Solon* 23. 2.

³⁷ There is the further factor, which would only be felt by a man who had to sell property in order to raise ready money, that very often when one has to sell something to meet an emergency one realizes less than if one had been able to choose one’s own time for the sale. This naturally hits only the poor man who has no ready cash.

As for the economic reality of being forced to sell in order to meet a money-debt, see Plutarch, *De Vitando Aere Alieno* 3, in which he graphically describes the tactics of a money-lender; if you (have to) sell (to raise the money), he beats down the price: κᾶν πωλῆς, ἐπευωνίζοντα. No doubt what is implied here is that a debtor without cash offers his other property or some of it to his creditor, who would accept it at a very disadvantageous valuation from the debtor’s point of view.

was to bear with especial economic force upon the poorer half of the Roman world, and ultimately to transfer more and more wealth into fewer and fewer hands.

This, then, may well have been the effect of the *condemnatio pecuniaria*. Of course, it may have been an unintended and accidental effect.³⁸ But it would not be right to ignore the possibility that it was foreseen and intended. Any such hypothesis would involve attributing a large degree of callousness to the Roman upper class from whose political control the principle must have sprung. Is there the least evidence that that class was capable of practising economic oppression, inside or outside the administration of justice? That the idea is not fanciful so far as concerns the non-judicial field, is sufficiently demonstrated by the history of Roman usury. That it is no less plausible so far as concerns the administration of justice may appear from a consideration of some features of the *legis actio* procedure to which attention was first drawn by Rudolf Von Jhering in his book *Scherz und Ernst in der Jurisprudenz*.

In a chapter entitled 'Reich und Arm im altrömischen Civilprozess', instructive if rather overloaded with heavy whimsy, Jhering examined the five types of *legis actio* which Gaius mentions.³⁹ Of these five, the *legis actio sacramento* and the *legis actio per manus iniunctionem* seemed to Jhering to be in a sense engines of oppression of the economically weak would-be litigant. The former type of *legis actio* probably originated, as its name suggests, in a mutual swearing of oaths by the two parties, to which there was then added the forfeiture of a sum of money by the losing party by way of conciliating the god for having sworn falsely. In historical times there is no trace of the oath, and the essence of the procedure is that each party had to deposit, before the action could be heard, a sum of money with the pontifices, which was restored to the winning party, but retained as against the loser. This sum of money was either 50 or 500 *as*, according to Gaius, depending on whether the value of the matter in dispute, was under or over 1,000 *as*. This *legis actio* was *generalis*, and one proceeded by it if no other *legis actio* had been specially prescribed.⁴⁰ The larger deposit of 500 *as* was certainly a large sum in the early Republic (cf. the *lex Aternia Tarpeia* of the same era as the XII Tables which valued a sheep at 10 *as* and an ox at 100, or the XII Tables themselves, under which the composition for the breaking of a free man's bone was 300 *as*), and Jhering gives as an instance of the reality of this deposit the case of a small farmer whose land and goods are occupied by a rich neighbour while he is away at the wars. Perhaps his entire estate is worth 1,500 *as*: but so long as the estate is withheld from him, where is he to get the 500 *as* deposit, necessary before he can hope to sue the usurper? (Of course, this problem is quite separate from the problem of how he is in any case to make a richer and stronger neighbour amenable to justice.) Even where the lesser *sacramentum* of 50 *as* is involved, the system still means a fairly heavy investment in the case of a poor man (the value of five sheep). At some stage the arrangement whereby the *sacramentum* was deposited in advance was replaced by a credit-system whereby no previous deposit was required, but the losing party had to pay the amount of the *sacramentum* at the end of the case, when the *tresviri capitales* decided whether the matter in issue was worth more or less than 1,000 sesterces. This innovation is attributed by Jhering to a *lex Papiria*⁴¹ which he holds to be identical with the *lex Papiria* mentioned by Pliny,⁴² the effect of which was to reduce the value of the *as* to 1/24 of its former value: and, according to Jhering, the general purpose of the statute was to relieve poor plebeian litigants from the hardships associated with the earlier *sacramentum* system. Furthermore, in the course of the Republic the value of the *as* declined greatly so as to render derisory, for example, the compositions provided by the XII Tables, and this, too, lightened the burden of the procedural deposit. None the less, the fact remains that until the passage of the *lex Papiria*, it was extremely difficult for a poor man to litigate by means of

³⁸ And one mitigated in some few actions by the effect of a *formula arbitraria*. As to this, see Schonbauer, *Studi Riccobono*, ii. 416: 'Die iudicia arbitraria sind m. E. in einer Zeit entstanden, in der das Geld im römischen Bauernhofe sehr rar war, so dass der indirekte Zwang der *poena* vollkommen genügte, um in fast allen Fällen die Sache durch den Schiedspruch endgültig zu bereinigen.' If one sees in the *condemnatio pecuniaria* a penal element which hits the poor harder than the rich, then one would have to see in the *formulae arbitrariae*, which enabled defendants to avoid the pecuniary condemnation, something like a measure of social relief, perhaps going back to some reforming praetor.

³⁹ *Inst.* 4.11ff.

⁴⁰ Gaius, *Inst.* 4. 13.

⁴¹ After 242 B.C.: Festus, s. v. *sacramentum*.

⁴² *Nat. hist.* 33. 46.

the *legis actio sacramento*, which in many cases was the only form of litigation open to him. It might at first sight appear that, inasmuch as both sides had to make the same deposit, a poor man who could not afford the deposit was protected from being sued: but no doubt it is naive to imagine that poverty was a protection against anything in the early Republic, and, in any case, a powerful and rich adversary could, by taking the law into his own hands and committing acts of self-help, force the other into a position in which he either had to sue as plaintiff or else put up with the injustice.

The *legis actio per manus iniectioem* worked equally harshly as against the man of small means. Anyone who wished to contest this *legis actio* as defendant had to find a *vindex* who, in the event of the defendant's case being unsuccessful, had to pay by way of penalty as much money as the matter in issue was worth. Jhering points out that there is no reason to assume that it was a simple matter to find a *vindex*: indeed the likelihood is that anyone approached by an intending defendant and asked to be a *vindex* would demand in advance an amount of money to cover the possibility of his being condemned. Here there was no limitation of the amount of the procedural penalty as in the *legis actio sacramento*: where the matter in issue ran to perhaps several thousand as, the penalty for unsuccessful defence which was exacted from the *vindex* was of exactly the same amount. Just as in the *legis actio sacramento*, here too a reform of the institution resulted in a lessening of the burden from the point of view of the poor man: the introduction of *manus iniectio pura*, in which the defendant could as it were act as his own *vindex* and, in the event of an unsuccessful defence, was liable to be condemned in double the amount of the matter in issue. The nature of this reform underlines the inequitable nature of the preceding system, in which there was not even an equality of risk on each side: as Jhering points out, anyone might institute a *legis actio per manus iniectioem* without the least risk, as no penalty was attached to being an unsuccessful plaintiff, but, for a poor man at any rate, to defend the *legis actio* was at best hazardous and costly, and at worst impossible.

It is probable that many of Jhering's formulations would today be thought exaggerated, and of course the presence of his views on the *legis actio* procedure in a collection of essays entitled *Scherz und Ernst* reduces their chances of being taken seriously. Yet how can one possibly deny their basic correctness? Jhering alleges that the economic oppressiveness of this early procedure was a result of deliberate ruling-class policy; and, if the system was oppressive, one is in fact bound to conclude that its oppressiveness was foreseen and therefore intended. If, then, the conclusion advanced earlier be accepted, namely, that the *condemnatio pecuniaria* of the formulary procedure worked penally and therefore (given the general social character of litigation) with especial hardship against the economically weaker part of the population, it does not seem at all out of the question that this effect may have been equally foreseen and equally intended.⁴³

⁴³ In the modern world the chief obstacle to a poor man's litigation is the heavy bill of costs, consisting mostly of professional fees, which he may have to discharge if he loses; but of this system the Roman world was innocent, at least in the Republic and early Empire. Curiously enough, we find no serious complaints that advocates' fees prevented the small man from litigating; no doubt the institution of *clientela* and that of gratuitous *mandatum* sufficiently explain this. In the Empire there is evidence of the wealth and power (Tac. *Dial.* 7–8; Petr. *Sat.* 46; Mart. *Epigr.* 1.76; 2.30) as well as of the avarice and unscrupulousness (Sen. *Apocol.* 12; Tac. *Ann.* II.5–7; 13.5; Pliny *ep.* 5.4; 5.9; 5.13; Hor. *Serm.* 2.5.27) of the legal profession; but the services of some kind of advocate seem to have been fairly easily available, as we read of barristers taking fees in the form of agricultural produce from their rustic clients (Mart. *Epigr.* 4.46). So far as the advantages of status in litigation are concerned, the matter of advocates and their fees appears to be a neutral area.