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THE 'PROVOCATIO MILITIAE' AND PROVINCIAL JURISDICTION.

In the early Republic we know that the right of criminal appeal did not extend beyond the limits of one mile from the city (Liv. 3, 20 'neque enim provocationem esse longius ab urbe mille passuum'). It is a matter of considerable importance in the development of criminal procedure at Rome to determine whether these limits were ever exceeded: whether, as the city state expanded to include Italy and then the provinces, the bounds of the 'provocatio' kept pace with this expansion, and whether the Roman citizen, in whatever part of the Roman world he found himself, could eventually make a legal claim to this right of appeal. The importance of this question is due to the fact that, in the later stages of Republican history, we are not concerned merely with a relic of popular sovereignty which was almost extinct and only resorted to when the cumbrous machinery of the 'comitia' was put in motion for judicial purposes. The 'provocatio' is the basis of the whole criminal jurisdiction at Rome, and the right of appeal at the end of the Republic is the right to be tried in certain of the standing courts (*quaestiones perpetuae*) which had replaced the popular jurisdiction of the 'comitia.' It must be remarked, however, that if the 'provocatio' was extended beyond its original limits, it certainly did not give a right to be tried in all these courts, since the jurisdiction of some of them was limited by law. Thus the 'lex Cornelia de sicariis et veneficis' only took cognizance of murders which had taken place in Rome and within a mile of the city.[1] But, on the whole, the appeal is the claim of a Roman citizen to be tried before the courts of the central state, and, consequently, when we find the 'provocatio' extended to Latins during the last period of the Republic (Lex Acilia Rep. l. 78), one at least of the meanings of this extension must be that these Latins could exercise a choice of jurisdiction between Roman courts and those of their native towns.

The early writers on Roman constitutional law, at least from the time of Conradi, recognized vaguely that, at the end of the Republic, there was some guarantee of protection extended to the lives of Roman citizens against the jurisdiction of the governors of the provinces. Evidence for this fact appeared to be furnished by Cicero's diatribe against Verres for the crucifixion of a Roman citizen in Sicily. But they did not suppose any legal extension of the right of appeal, which is never mentioned by our authorities, and is indeed, as we shall see,

[1] Collatio, i. 3: 'Capite primo legis Corneliae de sicariis cavetur, ut is praetor judexve quaestionis, cui sorte obvenerit quaestio de sicariis, *ejus quod in urbe Roma propiusve mille passus factum sit*, uti quaerat cum judicibus, &c.' They are the old limits of the 'provocatio,' and must in this case have continued to the end of the Republic. That they had ceased to exist in the early Principate seems shown by the procedure connected with the trial of Piso for the murder of Germanicus. Although the imputed crime had been committed in a province, it is mentioned as a possibility that Piso should be tried before this 'quaestio' (Tac. *Ann.* 3, 12, 10). The early limitations of this kind may have been done away with by the 'lex Julia de judiciis ordinandis' or 'judiciorum publicorum.'

implicitly denied by Cicero. This view has, however, been taken by some recent writers,[1] and it is possible that, in spite of the apparently contradictory evidence, it may be correct. It may be of some value, however, to point out (perhaps for the first time, for I have seen no thorough discussion of the subject) how contradictory this evidence is, and to attempt to show that this theory has been too absolutely stated, and that, if held at all, it can be held only in an exceedingly modified form.

Historically, the 'provocatio' should have been extended to Italy before it was extended to the provinces. It is true that the term 'militiae' covers both, and, when the original limits were disregarded, both spheres of administration might have been included at the same time. Yet there seems to have been a pressing necessity for the 'provocatio' to be extended to Italy at a very early period of the history of Rome. The necessity was due to the existence of citizen colonies, the 'praefecturae.' Members of these colonies possessed 'communio comitiorum' and therefore the 'provocatio.' How was it exercised outside the limits of the city domain? There is no evidence to show that it was ever exercised outside these limits; yet protection against the magistrate must have been granted to these Roman residents in Italy. Although there are no actual instances to guide us, the most reasonable solution of the problem seems to be that, when such a resident had committed a crime, the punishment for which would lead inevitably to the 'provocatio,' he was arrested and brought within the sphere, within which alone such an appeal could legally be made. He was then qualified to be tried in the ordinary way by a 'judicium populi.' That such must have been the procedure employed for crimes committed by Roman citizens in Italy is shown by a curious application of the principle, which dates from the second Punic war. Q. Pleminius, 'propraetor' and 'legatus' of Scipio Africanus, in the year 205 B.C. plundered the town of Locri in Southern Italy, and a complaint was lodged by Locrian envoys before the Senate. The Senate appointed a commission to investigate the matter, and the commission ('praetor et consilium') found Pleminius and his accomplices guilty ('damnaverunt') and sent them in chains to Rome. Pleminius died in prison before the close of the 'judicium populi' which was investigating his crime (Liv. 29, 21 and 22). The use of the equivocal word 'damnaverunt,' employed to describe the judgment of the commission, has led Geib[2] and Mommsen[3] to suppose that we have here a unique case of an appeal from the judgment of a special judicial commission. But Livy's account of the appointment of this board shows that its functions were not meant to be judicial. It was a commission appointed by the Senate to investigate and report, primarily on the responsibility of Scipio Africanus for the conduct of his lieutenant. The commission concluded its functions by arresting the parties found guilty as a result of its inquiries and sending them home for trial. There was no sentence and therefore no appeal, but the right of Pleminius to be tried before the people could only be asserted inside the ancient limits, within which alone the 'provocatio' was possible. The other explanation, besides the difficulty it involves of an appeal from a special judicial commission, would necessarily imply that the right of appeal was legally extended beyond the ancient limits in the year 205 B.C. This view has, however, never been held. The usual date to which such an extension has been assigned by those who hold that it was actually realized is almost a century later.

The evidence on which this view of a later extension rests is gathered from a passage which refers, strangely enough, to discipline in the army. It is strange, because we should have imagined that, had any exceptions been made to the universality of the appeal (and that there were exceptions even after this period is undoubted) these would certainly have been found in favour of offences against military discipline. Yet during the Jugurthine war we are told that an officer, who had been appointed prefect of one of the conquered towns of Numidia garrisoned by Roman troops, and who had deserted his post, was condemned, scourged, and executed by Metellus, 'nam is civis ex Latio erat' (Sallust, *Jug.* 69). Unfortunately the words which give the justification for this execution are susceptible of two different interpretations, which in their turn present two wholly different issues in constitutional law. 'Civis ex Latio' may conceivably be an expression modelled on other qualified uses of the word 'civis' such as 'civis sine suffragio'; for 'Latinus' here can hardly be taken as equivalent to a local designation, the term, when unqualified,

[1] *E.g.* Rudorff, *Röm. Rechtsgesch.* i. p. 25; Bethmann-Hollweg, *Civilprozess*, ii. pp. 34 and 99; Mommsen, *Staatsrecht*, ii. p. 117; Willems, *Le droit public Romain*, p. 821.

[2] *Criminalprocess*, p. 161.

[3] *Staatsrecht*, ii. p. 117.

having in Sallust's time merely a juristic and not an ethnic signification. In this case the ground for Metellus' execution of the officer would have been that he was a Latin, and the words contain an implication that a Roman citizen would have been exempt from such summary punishment. But the use of the expression 'civis ex Latio' for 'Latinus' is unparalleled, and the words are subject to a more reasonable interpretation if we remember that the designation 'civis Romanus' tended to be restricted to the inhabitants of the capital (Forcellini *s. v.* '*civis*') and that individuals who had attained citizenship by other means than that of birth in the Roman community would naturally be designated by a qualifying epithet. 'Civis ex Latio' would in fact be the expression we should expect to find employed to describe a member of a Latin community who had acquired citizenship through holding a magistracy in his native town. Such a position would almost certainly have been attained by a man who was of sufficient importance to be the prefect of a garrisoned town and who was in the immediate retinue of Metellus (Plut. *Mar.* 8). According to this interpretation the explanatory clause implies that Latins were exempt from punishment by Roman commanders on military service, and Sallust is explaining why, though a Latin by origin, Turpilius was yet subject to the martial law of Rome. This exemption had been granted to the Latins by a law of the elder Livius Drusus (Plut. *C. Gracch.* 9), and there is no reason for regarding this law as having become extinct within fourteen or fifteen years of its enactment. Individual inquirers will no doubt form different judgments as to the respective probability of these two conclusions; but it must be admitted that the sole instance which we possess of the denial of the jurisdiction of an 'Imperator' in the field is, to say the least, an extremely doubtful one; and, if even we hold that Turpilius was a Latin, we shall perhaps find an explanation of Metellus' motives which does not necessitate the view that the 'provocatio' ever existed legally against the command of an Imperator.

In any case the sole instance which we possess refers only to martial law on a military expedition. No case is known of the jurisdiction of a provincial governor over a Roman citizen having been successfully challenged; and, before we proceed further in our inquiry into the reality of the extension of the 'provocatio' to the provinces, it will be necessary to determine whether the term 'militiae' is a simple conception, whether the same rules necessarily held good for service in the field and for ordinary provincial jurisdiction. The best evidence on this point is gathered from the 'lex Julia de vi publica.' This law proves, as we shall see, that the conception was the same, and that any limitations on the powers of the magistrates 'militiae' affected both spheres of administration; but it also proves that special reservations might be made in favour of the one or of the other. It will, therefore, be necessary to examine separately the evidences we possess for military jurisdiction on the one hand, and for ordinary criminal jurisdiction in the provinces on the other.

As regards military discipline a strong evidence that the old rigour of the Roman martial law was preserved to the end of the Republic is to be found in the principle laid down in the *De legibus* of Cicero (3, 3, 6), 'militiae ab eo, qui imperabit, provocatio ne esto.' It is one of the most curious instances of the application of *a priori* principles of criticism to evidence that, while the *Laws* of Cicero are supposed to reflect with a singular degree of accuracy the public law of Rome, this principle should almost alone be singled out as expressing a 'pious wish' of the author (Mommsen, *Staatsrecht* ii. 117, n. 2).[1] All that we hear of the maintenance of military discipline at the close of the Republic (with the exception of the single doubtful instance noticed above) bears out Cicero's statement. The right of appeal, if strictly interpreted, should have abolished flogging in the army; yet the *vitis* was still used on the backs of the Roman legionaries in 134 B.C. (Liv. *Ep.* 57),[2] and the exceptions made by the

[1] Another unhistorical statement of Cicero's in the *De legibus* has been found by some in the words 'magistratus nec oboedientem et noxium civem multa, vinculis, *verberibus* coerceto' (3, 3; Bethmann-Hollweg, *Civilprozess*, i. p. 95, note 32). But they are immediately qualified by the words which follow: 'ni par majorve potestas *populusve prohibessit*, ad quos provocatio esto.' The lex Porcia prohibited the scourging of a Roman citizen by a 'gravis poena,' but that it technically submitted the threat of such 'coercitio' to appeal is shown by the fact that the law is classed amongst those regulating the 'provocatio.' Hence Cicero's statement of the extent of the 'coercitio' of a Roman magistrate is correct from a juristic point of view.

[2] 'Quem militem extra ordinem deprehendit (Scipio Africanus), si Romanus esset, vitibus; si extraneus, fustibus cecidit.' This distinction—whether it refers to a period before or after the supposed extension of the 'provocatio'—is characteristic of the care for the 'Roman name' which formed the safeguard of Romans in the provinces: but it is not a

'lex Julia' in favour of this punishment probably reflect the later Republican law. The language in which Plutarch describes the law of Drusus passed in favour of the Latins seems clearly to imply that flogging existed in all branches of the army at the time. The novelty of the law consisted in its giving immunity from scourging 'even on service.'[1] Drusus did actually outbid Gaius Gracchus in his grants to the Latins by conferring on them a right not possessed by Roman citizens. Instances of the capital punishment of soldiers are numerous, and fully bear out Cicero's injunction with respect to magistrates in the field, 'Capitalia vindicanto' (*De leg. l.c.*). Decimation was employed by Crassus during the servile war (Plut. *Crassus* 10), and there are frequent instances of its use during the civil wars, though these are perhaps not a safe index of its legality. But the severest kind of capital punishment recognized in the Roman army, the 'fustuarium,' is mentioned by Cicero as existing in his own day (*Phil.* 3, 6, 14) and was actually inflicted on a 'primus pilus' by Calvinus proconsul of Spain in B.C. 39 (*Vell.* 2, 78); its employment on this occasion is mentioned as unusual but not as illegal. If the so-called 'leges militares' dealt with questions of discipline,[2] the extension of the 'provocatio' must have been combined with many exceptions in favour of these laws.

If we turn now to the ordinary criminal jurisdiction of Roman governors in the provinces, we have indeed abundant evidence that a protest was raised against the infliction of capital punishments—especially disgraceful punishments such as crucifixion—on Roman citizens, but we have no evidence that it was illegal. Cicero's appeal in the famous passage of the *Verrines* is throughout to the injury done to the 'Roman name' in the eyes of the provincials by Verres' action; he appeals to the precedents of the 'lex Porcia' and the 'lex Sempronia,' not to any law that made Verres' act illegal. When an advocate has a law that exactly fits his case, he quotes it; when he has not, he appeals to principles of the constitution. This is Cicero's procedure here. The force and the weakness of his legal argument can only be estimated by reading the whole passage (*in Verr.* v. 63, 163–170). The conclusion is that it is a 'facinus' to put a Roman citizen in bonds, a 'scelus' to scourge him, 'prope parricidium' to put him to death (§ 170). All this is true, but had any of these acts been illegal, Cicero would have told us so. The passage where the legal argument is closest exhibits its inherent weakness best, 'O nomen dulce libertatis! O jus eximium nostrae civitatis! O lex Porcia legesque Semproniae! O graviter desiderata et aliquando reddita plebi Romanae tribunicia potestas!' The 'tribunicia potestas' is put on a level with the laws establishing 'provocatio.' But it is well known that the former did not extend beyond the limits of the city. Why should the latter have done so? A further evidence that Verres' action was not illegal is shown by Cicero's threat to prosecute him for 'perduellio' in a 'judicium populi' (*in Verr.* 1, 5). The threat was, perhaps, an idle one; but it shows that the offence could not have been classed either as 'perduellio' or as 'majestas' in the 'leges de majestate' or 'de vi'—in other words, that the laws establishing the criminal courts of Rome, which took cognizance of such offences, did not reckon it as a crime.

The records of criminal jurisdiction in the provinces are exceedingly scanty for the time of the Republic; yet, scanty as they are, they show us both the threat, and apparently the execution, of capital punishment on Roman citizens. Diodorus (37, 5, 2) preserves a tradition that Q. Mucius Scaevola when governor of the province of Asia (probably in 98 B.C.) pronounced capital sentences on 'publicani,'[3] and he seems to imply that these sentences were carried out.[4]

legal distinction. 'Fustibus' here, if read instead of 'virgis,' which has been suggested, cannot refer to the punishment known as the 'fustuarium.' For a somewhat similar distinction between the modes of corporal punishment inflicted on a Hellene of Alexandria and on a native Egyptian, see Philo, *in Flacc.* 10; Mommsen, *Provinces*, ii. p. 240.

[1] *ὅπως μηδ' ἐπὶ στρατείας ἐξῇ τινὰ Λατίνων ῥάβδοις αἰκίσασθαι* (Plut. *C. Gracch.* 9).

[2] 'Leges militares' are mentioned in Cic. *pro Flacco* 32, 77, and Livy 7, 41, but only as conferring rights on the soldiers.

[3] Diod. *l.c.* *καταδίκους ἐν ἅπασιν ἐποίει τοὺς δημοσιώνας, καὶ τὰς μὲν ἀργυρικὰς βλάβας τοῖς ἠδικημένοις ἐκτίνειν ἠνάγκαζε, τὰ δὲ θανατικὰ τῶν ἐγκλημάτων ἠξίου κρίσεως θανατικῆς.*

[4] Diod. *l.c.* § 4, *καὶ συνέβαινε τοὺς ὀλίγῳ πρότερον διὰ τὴν καταφρόνησιν καὶ πλεονεξίαν πόλλα παρανομοῦντας παρ' ἐλπίδας ὑπὸ τῶν ἠδικημένων ἀπάγεσθαι πρὸς τοὺς καταδίκους.* *ἀπάγεσθαι* (duci) may refer to any kind of imprisonment, but may be used in the sense in which Pliny employs 'duci' (*ad Traj.* 96, 3: 'perseverantes duci jussi'). That Diodorus understands the 'publicani' themselves and not merely the 'familia publicanorum' to have been the objects of Scaevola's sentences is shown by the word *τούτων* in the story which follows (§ 3): *ὅτε δὴ τὸν κορυφαῖον τούτων οἰκονόμον, διδόντα μὲν ὑπὲρ τῆς ἐλευθερίας*

Cicero also furnishes more direct evidence than that contained in his speeches of the possibility of the death penalty being inflicted by a provincial governor on a Roman. Writing to his brother who was 'propraetor' of Asia, and commenting on the criminal jurisdiction of the latter, he says (*ad Q. fr.* 1, 2, 5), 'ecce supra caput homo levis ac sordidus, *sed tamen equestri censu* Catienus.' Quintus, it appears, had already condemned his father, and writes to the son, 'illum crucem sibi ipsum constituere, ex qua tu eum ante detraxisses; te curaturum, fumo (*or* in furno) ut combureretur, plaudente tota provincia.' The man was apparently a Roman 'eques,' and Quintus threatens to put him to death. As he is described as 'asperior' to the father, and the provincial governor in his dealings with Roman citizens had apparently no choice between a fine and a capital punishment,[1] the death penalty had perhaps been inflicted in this case as well. M. Cicero, while commenting on the brutality of the language, does not give a hint of the illegality of the procedure threatened, although elsewhere he takes Quintus to task for legal irregularities of a far smaller kind (*ad Qu.* 1, 2, 3). Making all allowances for the exaggeration of expression, it is not altogether an unfair conclusion to draw from a passage such as this that the right of a Roman citizen to be tried at Rome on a capital charge could not yet have established itself, or at any rate that it could not have been a universal legal proviso.

If we ask finally by what law the 'provocatio' was so extended, the choice has generally been supposed to lie between the 'lex Sempronia' of C. Gracchus[2] and one of the 'leges Porciae.'[3] Of the 'lex Sempronia' we know too little to assert whether such a conclusion is justified or not. That the law prohibiting a 'judicium' dealing with the 'caput' of a Roman citizen from being established without the consent of the people (Cic. *pro Rab.* 4, 12) may have been so widely framed as to be susceptible of the interpretation that it limited the jurisdiction of provincial governors, is possible; that C. Gracchus meant it to be so applied, or that pro-magistrates as well as magistrates were mentioned in the sanction preserved by Plutarch,[4] is unlikely, since his immediate object seems to have been simply to limit the power of the senate to establish 'quaestiones.' About the 'leges Porciae' we have more positive evidence. Cicero tells us that the three laws which bore this title introduced no novelty in the principle of the 'provocatio' beyond their sanction.[5] The well-known coin of P. Porcius Laeca, with the word 'provoco' on it, first cited, I believe, in connection with the 'provocatio' by Conradi,[6] which is regarded by Mommsen[7] as a token of the extension of the appeal to the provinces, really proves nothing. The figures of the lictor and of the prisoner with upraised hand are as applicable to the 'provocatio' within as without the city; the fact that the 'imperator' appealed against is 'paludatus' need only show the denial of the military 'imperium' within the city, and the coin may have been struck by any member of the house which had produced three champions of freedom. Against such an extension must also be set the facts noticed above of the limited jurisdiction of certain criminal courts at Rome and the apparent absence of a legal sanction in the criminal laws for enforcing this proviso.[8]

Yet, if on this evidence we decline to admit the existence of a definite law extending the appeal to the provinces, there can be little doubt than an unwritten rule did tend to limit the competence of provincial governors. This is sufficiently explained by the character of their jurisdiction and by the position of the Romans in the provinces. The jurisdiction of the governor did not rest on *leges*. The 'quaestiones' in the

πολλὰ χρήματα καὶ συμπεφωνηκότα πρὸς τοὺς κυρίους, φθάσας τὴν ἀπολύτρωσιν καὶ θανάτου καταδικάσας ἀνεσταύρωσεν. Diodorus implies that the reason why Scaevola anticipated the emancipation of the man was, not that he might be able to execute capital punishment, but that he might be able to inflict the 'servile supplicium' of crucifixion.

[1] Unless relegation from the limits of the province was practised in the Republic. Imprisonment was not recognized as a punishment in Roman criminal law.

[2] Rudorff, *Röm. Rechtsg.* i. p. 25.

[3] Mommsen, *Staatsr.* ii. p. 117.

[4] *C. Gracch.* 4: τὸν δὲ (νόμον εἰσέφερε), εἴ τις ἄρχων ἄκριτον ἐκκεκηρύχοι πολίτην, κατ' αὐτοῦ διδόντα κρίσιν τῷ δήμῳ.

[5] *de Repub.* 2, 31: 'neque vero leges Porciae, quae tres sunt trium Porciorum, ut scitis, quidquam praeter sanctionem attulerunt novi.'

[6] *Jus provocationis*, p. 15, cf. Wöniger, *Provocationsverfahren*, p. 302.

[7] *Staatsrecht*, ii. p. 117, n. 2. The earliest writer known to me who drew this deduction from the coin was Labowlaye, *Essai sur les lois criminelles Romaines* (Paris, 1845), p. 94. He assigns the law to Porcius Laeca, tribune 197 B.C.

[8] It is of course possible that the law was protected by its own sanction, which would give rise to a 'judicium populi,' and it might be thought that Cicero was appealing to this in his threat to prosecute Verres before the people. But had there been a definite law with a definite sanction Cicero must have mentioned them.

Republic held good only for Italy, and it was by these alone that what were generally understood as 'capital' penalties (exile and interdiction) could be imposed. The 'lex Julia de vi publica,' in defining the powers of governors, contains no mention of a capital penalty other than the death penalty.[1] In the exercise of their jurisdiction over Roman citizens we should expect governors to model the exercise of their powers on the principles valid at Rome where the death penalty had disappeared. Added to this was the necessity, dwelt on by Cicero in the *Verrines*, of keeping up the dignity of the Roman name in the provinces; it is the immunity from capital punishment, above all from the death penalty in a degrading form,[2] that protects him amongst barbarous nations. Where this motive is not present, there the death penalty is retained, and hence the hands of the 'imperator' in the field are sometimes free while those of the 'proconsul' or 'propraetor' are tied by custom. It is, perhaps, due to the fact that the citizen is protected by law at Rome, by custom in the provinces, that, while in the one case he says 'provoco' against the decree of the magistrate, in the other he asserts his claim by the words 'civis Romanus sum' (Cic. *in Verr.* v. 166 and 169). In any case the latter words are an admirable illustration of the motive that underlay this partial extension of the appeal.

The whole subject of criminal jurisdiction 'militiae' during the Republic furnishes an admirable illustration of a profound remark of Ihering's (*Geist des Römischen Rechts*, ii. p. 280, note 444), 'Es wäre ein verdienstliches Unternehmen, anstatt wie bisher bei der Bearbeitung des römischen Staatsrechts sich durch den zweck leiten zu lassen, überall bestimmte und sichere Grundsätze zu gewinnen, umgekerht einmal die Controversen derselben zu constatiren.' The conflict of evidence, the weak arguments of Cicero, all show a controversy. The 'provocatio' could not have been extended in the simple way supposed. Its place must have been taken by some unwritten principle. Or, if we still hold that a legal principle existed, it must have been maintained with considerable reservations both in favour of military discipline and in favour of the punishment of certain offences.

[1] Later the capital penalty of 'deportation' was introduced for the provinces, but it was, as we should expect, prohibited to governors.
Cf. Cic. *pro Rabir.* 5, 17.

Writers on criminal law, such as Geib,[3] who have not held the theory of an extension of the 'provocatio' have sometimes substituted for it a power supposed to have been possessed by the tribunes of summoning to Rome, on appeal, cases from the court of the provincial governor. It is an unlikely power for the tribunes to have possessed, since there is no other evidence of their *auxilium* having extended outside the city walls; and the only passage on which the procedure rests is so incorrect in its details that little weight can be attached to it. Plutarch (*Caes.* 4) tells us that Caesar, out of gratitude to the Greeks for the assistance which they had rendered him in his impeachment of Dolabella, assisted them in the prosecution of P. Antonius for bribery before Marcus Lucullus propraetor (στρατηγοῦ) of Macedonia. He continues καὶ τοσοῦτον ἴσχυσεν, ὥστε τὸν Ἀντώνιον ἐπικαλέσασθαι τοὺς δημάρχους, σκηψάμενον οὐχ ἕξειν τὸ ἴσον ἐν τῇ Ἑλλάδι πρὸς Ἕλληνας. It is undoubtedly the same story as that told of C. Antonius by Q. Cicero in the letter 'de petitione consulatus' (§ 8) and by Asconius (in *orat. in tog. cand.* p. 111). These accounts show that Plutarch is mistaken, not only in the character of the trial but in the more important detail as to where it took place. Antonius was tried for *repetundae* at Rome, and with Plutarch's narrative vanishes the only evidence for a summons to Rome from the provincial governor's jurisdiction.[4]

The first positive enactment which we hear of as directly limiting the competence of provincial governors is the *lex Julia de vi publica.* The statement of the injunctions of this law which is given by Paulus (*Sent.* 5, 26, 1) and Ulpian (in *Dig.* 48, 6, 7) represents it as accepting rather than as creating the principle of the 'provocatio' to Rome (Paul. *l.c.* 'lege Julia de vi publica damnatur, qui aliqua potestate praeditus civem Romanum, *antea ad populum, nunc ad imperatorem appellantem* necarit necarive jusserit,' &c. Ulpian *l.c.* 'civem Romanum *adversus provocationem* necaverit verber-

[3] *Criminalprocess*, p. 251.

[4] Although Plutarch's narrative is wrong, his representation of the trial as having taken place in the province contains no absurdity from a legal point of view. Antonius had been only a legate in Macedonia, and had he remained in the province either in a private capacity or even as a legate, might have been impeached before the provincial governor. More usually the prosecution would have been lodged at Rome, and in this case even a legate might be summoned back to take his trial, for he was not, like a magistrate, exempt from prosecution. Cf. Cic. *ad Att.* iv. 15, 9.

averit,' &c.). So far as language goes they both seem to represent it as merely supplying a sanction for an already existing right of appeal, as bearing, in short, to the Republican legislation which extended the 'provocatio' to the provinces the same relation as the 'leges Porciae' bore to the earlier laws permitting the appeal in Rome (Liv. 10, 9; Cic. *de Rep.* 2, 31). We may notice further that the law strictly follows the analogy of the Republican 'provocatio'; it enunciates again the curious principle of Roman criminal legislation, which limits the power of magistrates not by prohibiting their right to sentence, but by prohibiting execution. That it should follow this analogy was inevitable, whether it was the consequence of an unwritten rule or a positive enactment. But the language of the jurists leaves it wholly uncertain which of the two had preceded it. The 'provocatio' of Ulpian need not refer to a time antecedent to the passing of the law, for by limiting competence the law creates the appeal. The expression of Paulus 'antea ad populum—appellantem' *may* refer to any time between the passing of the law and the centering of this jurisdiction in the emperor's hands, for the claim to be tried before a 'quaestio' at Rome is technically the 'provocatio ad populum' in its later form. In these words, however, we probably have a reminiscence of the early Republican appeal, which had always formed the basis of the limited jurisdiction of provincial governors; but they do not state the belief, still less the fact, that the limits of this appeal were so wide as those prescribed by the *lex Julia*. The exceptions made by the law in favour of military discipline throw considerable light on the legal practice of the Republic. Exemptions are made in favour of the 'tribuni militum' and the 'praefecti classium alarumve' with respect to the punishment of military offences. Nothing is said about the 'legatus legionis' who had in the Empire the power of life and death over the soldiers (Dio Cass. 52, 22, 3). If this clause of the law was passed by Augustus and not by Caesar, we may regard this power as specially delegated by the emperor; but the true explanation of this silence seems to be that the power of the commander of the legion to execute capital sentences was so undisputed that no exception was needed to confirm it.

After the passing of the *lex Julia* we meet for the first time with a recognition of the principle that Roman citizens should be sent to Rome for trial on a capital charge (Plin. *ad Traj.* 96, 4 'quia cives Romani erant, adnotavi in urbem remittendos'). There they would naturally be tried before the 'quaestiones,' unless the 'provocatio,' or 'appellatio' as it was now indifferently called, was coupled with a request to be tried before one of the high courts. The case of St. Paul has been taken to show that a request for the jurisdiction of the emperor was the usual accompaniment of such an appeal, and that this practice prepared the way for the final centralization of such jurisdiction in the emperor's hands, which was reached by the time of the early classical jurists. But, arguing from the evidence alone, such a simple solution is impossible for the procedure of the early Principate, which was directed by the provisions of the 'lex Julia.' The cases in which the law was violated during this period are equal in number to the cases of its observance,[1] nor can they be explained on general principles. We do not know what justification Marius Priscus had for scourging and strangling a Roman knight in the province of Africa (Plin. *Ep.* 2, 11), but Galba's crucifixion of a tutor for poisoning his ward[2] could not possibly have come under the only exceptions known to have been made by the criminal laws.[3] The legal theory in the early Empire seems to have broken down in some cases as completely as the quasi-legal theory of the Republic; and, as this cannot have been a consequence of the weakness of the central government, it must have been due to administrative causes of which we are ignorant.[4] It is indeed almost impossible

[1] There are only two clear instances for the early Principate, the appeal of St. Paul and Pliny's procedure with regard to those Christians who were citizens (*ad Traj.* 96, 4). The passage sometimes quoted from Dio Cassius (64, 2) is inconclusive, as it speaks simply of an appeal to the emperor.

[2] Suet. *Galba*, 9: 'tutorem, quod pupillum, cui substitutus heres erat, veneno necasset, cruce affixit; implorantique leges et civem Romanum se testificanti, quasi solatio et honore aliquo poenam levaturus, mutari, multoque praeter ceteros altiorem et dealbatam statui crucem jussit.' The words 'imploranti leges' probably mean 'appealing for a legal trial' (*i.e.* a trial 'lege' and not a 'cognitio' of the governor) rather than 'calling on the laws (establishing the 'provocatio').

[3] Such exceptions are found in the title of the *Digest* dealing with the lex Cornelia de sicariis et veneficis (*Dig.* 48, 8), *e.g.* 'transfugas licet, ubicumque inventi fuerint, quasi hostes interficere' (§§ 3, 6), a principle which is itself sufficient to prove the maintenance of this military jurisdiction during the Republic: and in § 16 a general prohibition is limited by the clause 'nisi forte tumultus aliter sedari non possit.'

[4] There was a general prescription to governors to clear their provinces of disreputable characters (Ul-

to see real exceptions in these apparent violations of the law. They seem to show a division of competence between the central courts and those of, at least, the 'public' provinces, which appear to have the right to execute capital sentences on Roman citizens in the case of ordinary crimes. It is hardly an accident that, while the instances of the violation of the law are apparently of this latter type, the cases which illustrate it are cases of treason, or at least of disturbance of the public peace, in Caesar's provinces. Whatever view may be taken of the motive for the persecution of the Christians under Trajan, it appears certain that the crime for which they were tried was technically one of treason.[1] The distinction drawn by Mommsen[2] and Ramsay[3] between the police supervision of the governor and regular legal trial, is only valid with reference to procedure, not with reference to the conception of crime. Whether the governor proceeds 'lege' or 'imperio' the punishment must be directed against a definite crime known to Roman law. The choice lies between 'vis publica' and 'majestas,' and as in the case of the Christians we are dealing with illicit associations, it was most probably the latter.[4] In the case of St. Paul, the readiness of Festus to admit the 'appeal' of the prisoner does not seem to have been based mainly on the fact of his Roman citizenship—this indeed was not made the ground of the appeal,—but on the unwillingness of a subordinate official, a mere agent of the emperor (*procurator pro legato*), to pronounce on the gravity of a political charge after the appeal to his immediate superior had been made. It is difficult to estimate the standpoint from which the eastern mind regarded the position of the Princeps, but it is difficult to believe that St. Paul's words, 'I am standing before Caesar's judgment seat where I ought to be judged—I appeal unto Caesar' could have been spoken to a proconsul of a senatorial province. Any court of the Roman world is certainly not 'Caesar's judgment seat' in the early Principate.

Where, on the other hand, we find exemption from punishment claimed by St. Paul in virtue of his Roman citizenship, it is not from punishment following condemnation but from punishment without trial.[5] The negative and positive instances, which form our sole means of interpreting the 'lex Julia,' may perhaps show that this law was either limited from the first, or was interpreted as being limited, to the 'coercitio' consequent on summary political jurisdiction,[6] and that the provincial courts (at least in the public provinces) did exercise a large amount of capital jurisdiction over Roman citizens in their own right.

A conclusion, such as the current view on this subject, which has seemed to be established by the grouping together of a series of apparently similar passages, may often be modified by a detailed examination of the evidence. Each procedure has its own inherent weakness; in discussing fragmentary evidence one may be too critical as well as uncritical; but the former practice is the more dangerous, for such an exercise of constructive power often tends to ignore possible differences of circumstances and conflicting evidence at the moment when the collective correspondence is observed. It has been my main business here to give the negative evidence, and a comparison of this with the positive 'data' has led me to the following conclusions:—

(i.) That there was probably no enactment extending the 'provocatio' in the later period of the Republic, but that the rules observed with respect to jurisdiction over Roman citizens were a part of

pian in *Dig.* 1, 18, 13: 'congruit bono et gravi praesidi curare—ut malis hominibus provincia careat eosque conquirat: nam et sacrilegos latrones plagiarios fures conquirere debet et prout quisque deliquerit in eum animadvertere'), but this of itself could hardly have empowered governors to violate the provisions of the 'lex Julia.'

[1] It was the offence provided for by the 'lex Julia de majestate' (*Dig.* 48, 4, 1) in the clause 'quove coetus conventusve fiat hominesve ad seditionem convocentur.'

[2] *Historische Zeitschrift*, xxviii. p. 398.

[3] *The Church in the Roman Empire*, p. 209.

[4] Ulpian in *Dig.* 47, 22, 2, 'quisquis illicitum collegium usurpaverit, ea poena tenetur, qua tenentur, qui hominibus armatis loca publica vel templa occupasse judicati sunt' (*Dig.* 48, 4, 1). That the cases tried by Pliny were technically those of 'majestas' seems also shown by his torture of the 'ancilla' (*ad Traj.* 96). Slaves could only be tortured against their masters in cases of incest, adultery, and 'majestas,' a principle that would have applied directly to the accused who were 'cives,' and might have been extended to 'peregrini.'

[5] At Philippi: 'They have beaten us publicly, uncondemned, men that are Romans, and have cast us into prison.' At Jerusalem: 'Is it lawful for you to scourge a man that is a Roman and uncondemned?' These passages lend colour to Huschke's restoration of a passage in the lex Julia (Paul. *Sent.* 5, 26, 1), in which he reads 'lege Julia de vi publica damnatur, qui aliqua potestate praeditus civem Romanum—cumve nondum condemnaverit in publica vincula duci jussit' (for 'Condemnaverit inve, &c.').

[6] This is probably the sense in which it is treated by Ulpian and Paulus, and is the only possible meaning which it can have as cited in the *Digest.*

customary law (*consuetudo*). In consequence a breach of these rules was not a specific crime, but could be punished only by the extraordinary power of the 'comitia' which knew no limits to the conception of 'perduellio.'

(ii.) That the first positive enactment, enjoining a penalty, was the 'lex Julia de vi publica.' It probably referred to extraordinary jurisdiction in political cases. Perhaps ordinary capital jurisdiction over Roman citizens was in the case of certain crimes extended to all the provinces, and the right to exercise extraordinary jurisdiction seems to have been recognized in certain cases in the 'public' provinces.

(iii.) There is no evidence for a universal appeal to Caesar, resting on a denial of the jurisdiction of all governors over Roman citizens, although there appears to have been some such appeal in certain cases from the emperor's delegates.

Our researches into this question must be limited to the early Principate, since such a principle, if it ever existed, must have become merged in the universal criminal appeal to the emperor which subsequently grew up. We can hardly imagine that it was thought necessary to keep up this denial of jurisdiction when every criminal case could go ultimately before the High Court. It would probably have been extinct by the time of the Antonines, and the extension of citizenship to the Roman world by Caracalla was not necessary to render it meaningless.

A. H. J. Greenidge.

THE ORTHOGRAPHY OF EARLY LATIN MINUSCULE MSS.

In part ix. (1895) of his *Paléographie des Classiques latins* M. Chatelain gives a photograph (pl. 116) of a page of the famous *Codex Puteaneus* of Livy, an uncial MS. of the fifth century, which belonged to the Abbey of Corbie, and another (pl. 117) of a page of the ninth century minuscule MS. of Livy in the Vatican (Regin. 762). The Vatican MS. is a copy, made at Tours, of the *Puteaneus* which had been borrowed from Corbie. The two photographs in M. Chatelain's collection exhibit the same passage of Livy; and M. Chatelain points out that the scribe of Tours has in some instances deviated from the orthography of his original, in writing, for example, *subplicatio* instead of SUPPLICATIO of the uncial MS. and *apsumptis* instead of ABSUMPTIS.

Our editions of a large number of Latin authors depend on minuscule MSS. of the Carlovingian period, and the spelling adopted by editors is generally that of some early MS. of this kind. Thus the two last editors of Nonius Marcellus, Prof. Lucian Mueller and Mr. Onions, follow the orthography of the Leyden MS. (Voss. Lat. Fol. 73), which is, like the Vatican Livy, a ninth century MS. of Tours. That MS. differs from others in exhibiting spellings which are recognized as the probable spellings of Nonius himself; *e.g. adpetentes* 28 M. 25, *inruere* 32, 34, *inmittere* 34, 2, *subplantare* and *subponere* 36, 3, where other MSS. have the modernized spellings, *appetentes*, *irruere*, *immittere*, *supplantare*, *supponere*. By the well-known canon of textual criticism, that mediaeval scribes may be supposed to have changed unfamiliar to familiar forms but not familiar to unfamiliar, we infer that the scribe of the Leyden MS. reproduced the orthography of his original, while the scribes of the other MSS. have changed the unfamiliar spellings *adpetentes*, etc. to the familiar forms, *appetentes*, etc.

But what becomes of this canon, if it can be shown that in a definite instance of a minuscule copy of an uncial original, the mediaeval scribe has deliberately inserted 'archaisms' like *subplicatio*, *apsumptis*, which were not found in his original? If this was a common practice of mediaeval scribes in general, or the monks of Tours in particular, the orthography of our Latin editions, which cannot at the best be said to be securely established, becomes very insecure indeed. It seemed to me, after reading this remark of M. Chatelain's, that it was absolutely necessary to determine how far this substitution of 'archaic' for 'modern' forms was carried in the Vatican Livy; and I took the opportunity of a recent visit to Rome to examine the treatment in this MS. of prepositions in compounds and of words like *apud* (*aput*), *sed* (*set*), etc. For this purpose I collated (not very minutely, but sufficiently for the pur-