Lex Acilia and the Rise of Trial by Jury in the Roman World

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THE LEX ACILIA AND THE RISE OF TRIAL BY JURY IN THE ROMAN WORLD*

I

The Background of the Lex Acilia

It is not commonly known that the institution of trial by jury, for so long the pride of English-speaking peoples, played an important part in the legal system of the Roman world, as long ago as a century and a half before the birth of Christ and can be traced at least as far back as a series of enactments passed by the Roman comitia, or popular assembly, in 149 B.C. These enactments, embodied somewhat sketchily first in the lex Calpurnia (149 B.C.) and later more fully in the lex Acilia (123/122 B.C.), contained a series of rules to be applied for trying certain specifically defined crimes.\(^1\) The most important aspect of this innovation was a provision for securing a relatively small body of jurors to determine the guilt or innocence of a person charged with crimes of misconduct while holding public office in the provinces. This was indeed a significant innovation, since previously Roman citizens had been tried before the entire

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\(^1\) In reference to the Leges iudiciorum publicorum, see article on “Crimen” in Pauly-Wissowa, Realencyklopädie der klassischen Altertumswissenschaft, IV, column 1713 ff.
body of their fellow-citizens, assembled in the comitia. Now, with the lex Calpurnia, and its successor, the lex Acilia, a special body of jurors (consilium iudicum) was chosen to decide upon the guilt or liability of a defendant charged with public misconduct. This body, the consilium iudicum, was presided over, as a rule, by a special magistrate or praetor, the praetor de repetundis;² who also was in charge of the preliminary investigations and the supervisor of the execution of the final finding of the jury.

The purpose of this new procedure was of course to provide an instrument for a better administration of justice throughout the Roman Empire; and these special but permanent institutions which set up extraordinary courts commonly referred to as quaestiones perpetuae or quaestiones de repetundis pecunii were intended to protect the inhabitants of the Roman provinces from widespread extortion by predatory Roman officials. The very term quaestio de repetundis pecunii indicates that the chief concern was to establish a court of inquiry—quaestio—to determine whether or not a Roman official who was accused of taking money from the provinces should be forced to return this money—pecunia repetere. This newly devised court of inquiry was really a body of jurors which represented the Roman popular assembly in some of its traditional judicial functions—a miniature popular assembly.

In order to expedite matters, the quaestio de repetundis, this special board of jurors, replaced the rather clumsy and often incompetent comitia, the full assembly of the Roman people, by a smaller and hence more efficient "jury court." It should also be remembered here that only Roman citizens could plead before the comitia, and that there were only few people who during the second century before Christ enjoyed the privileges of full Roman citizenship. Now the

² Th. Mommsen, Römisches Strafrecht, in Systematisches Handbuch der deutschen Rechtswissenschaft, Leipzig, Dunker and Humblot (1899), II, 205 ff, however, insists that the president is a special magistrate or quaestor.
very nature of the crime *de repetundis pecuniis* implied that the plaintiff as such was an alien or *peregrinus*, that is to say, a non-citizen. During the first half of the second century before Christ all complaints made by provincials who were naturally non-citizens, concerning the misconduct of Roman magistrates in the *provinces*, had to be brought to the attention of the Roman Senate by special ambassadors. Such a procedure, as might be expected, was not only most inefficient, but held out little hope for eventual success. For, since these remonstrations were only those of foreigners, the Roman Senate could, and often did, refuse to listen to these complaints.

Livy reports an interesting incident which happened not long after the passing of the *lex Calpurnia*. Ambassadors of the peoples of both Spains called upon the Senate and charged the Roman governors with extortion. The Senate ordered the praetor Canuleius to convene a special court composed of five senators to try each of the accused persons. The Senate also decreed that the plaintiffs should choose *patroni* to assist them in their cause. As it happened, the plaintiffs after having chosen four *patroni* were permitted to appear before a court of *reciperatores* in order to press their charges against the former governor M. Titinius. Titinius was acquitted. After this first failure, the plaintiffs formed two groups, one representing Ulterior Spain and the other Citerior Spain. They brought their charges separately against two new persons who, in order to escape threatened conviction, departed from Rome. Hence the trial was called off. Thus it seems that early *quaestiones de repetundis* were tried by a "board" of *reciperatores*, in other words, by an exceptional institution established by a special decree of the Senate whenever the need arose. The *lex Calpurnia* of 149

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3 See, for instance, Livy 38.43 ff; 39.3; 43.2. See in general, A. Zumpt, *Criminalrechte der Römischen Republik*, Berlin, Ferd. Dümmler (1868), II, 11 ff.
5 In 149 B. C.
B. C. apparently still operated with *reciperatores*, although the procedure from now on became a regular one in that a permanent magistrate was appointed to deal with the *quaestiones de repetundis*. Livy, on the other hand, does not mention a permanent magistrate presiding at the earlier *quaestiones*.

There can be little doubt that the *quaestio de repetundis* beginning with the *lex Calpurnia* was introduced for the sake of the *socii* or Roman allies. This at least is the impression we gather from the writings of Cicero on the subject. It was, in other words, a *lex socialis causa rogata, constituta, comparata*. It might be said, therefore, that the whole procedure was a *iudicium sociale* in which the *socii* recovered their rights. This idea of Cicero is fully born out by the remaining fragment of the *lex Acilia*, for here the plaintiff was usually a “friendly alien” and the witnesses who supported the charges of the plaintiff were also aliens, although the question of guilt and the amount of damage (restitution) was decided by Roman citizens alone. Hence it is obvious that in keeping with the traditional Roman legal policy, the magistrate who presided at the *quaestio* had to be the *praetor peregrinus*.

As soon as we realize that the *quaestio de repetundis* originated as a procedure for foreigners we can assume that the whole *quaestio de repetundis* contained elements borrowed from foreign judicial institutions and foreign lands of which the plaintiffs were citizens. On the whole, it is not surprising that a procedure in which foreigners were involved should be greatly influenced by foreign laws and customs. We know that the judicial reforms of Gaius Gracchus, of which the *lex Acilia* was an essential part, were

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6 Since Livy is quite well informed about the legal institutions of the Republican period of Rome, the fact that he does not mention a permanent magistrate managing the earlier *quaestiones perpetuae* is rather significant. Hence his statement in all its implications can be accepted.

7 See, for example, Cicero, *Divinatio in Caecilium*, 5.17.19; *In Verrem* II, 3.94.218.
influenced by Greek legal ideas. Thus, for instance, the *lex Frumentaria* was modelled after a Greek law, the Greek original of which has been found in an inscription of Samos. Hence it is quite possible that the innovations contained in the *lex Acilia* were of Greek origin, or to be more exact, improvements on already existing Greek laws.

The crime for which this novel procedure was instituted is the *crimen repetundarum*, the taking of money from a provincial. One of the laws dealing with this crime has come down to us in the form of a fragment which contains, according to Mommsen, Zumpt, and Rudorff,\(^8\) the so-called *lex Acilia repetundarum* of 123/122 B. C. This law is also mentioned several times by Cicero.\(^9\) As we have already pointed out, the *lex Acilia* was closely related to the judicial reforms of Gaius Gracchus.\(^10\) We also possess the additional information that about twenty-five years before the *lex Acilia*, namely in 149 B. C., the *lex Calpurnia* instituted another *quaestio de repetundis*.\(^11\) The *quaestio Calpurnia*, however, was not yet a trial by jury in the strict sense of the term, but rather an improved form of the old civil procedure.

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\(^8\) Th. Mommsen, in *Corpus Inscriptionum Latinarum*, I, no. 198, pp. 49 ff., and *Gesammelte Schriften*, Juristische Schriften, Berlin (1890), I, pp. 1 ff. C. Zumpt, *Commentatio de Legibus Judiciisque Repetundarum in Republica Romana*, Berlin (1845). K. Rudorff, “Ad Legem Aciliam de Pecuniis Repetundis,” in *Abhandlungen der Berliner Akademie*, philos.-histor. Klasse, (1861), pp. 411 ff. K. Rudorff, in *Zeitschrift für geschichtliche Rechtswissenschaft*, 10 (1839), pp. 1 ff. See also A. Zumpt, *Das Kriminalrecht der römischen Republik*, Berlin, Dümmler (1868), II, pp. 99 ff.—Eleven fragments of a bronze tablet containing the *lex Acilia* were found before the year 1521 at an unknown place. Seven of these fragments are now in the National Museum in Naples, two in Vienna, and two have been lost, although their content is known to us through copies. Klenze (in *Fragmenta legis Serviliae*, 1825) first succeeded in reconstructing the extant fragments, now to be found in the *Corpus Inscriptionum Latinarum*, I, no. 198, pp. 49 ff., also Th. Mommsen, *Gesammelte Schriften*, I, pp. 1 ff. See also Bruns-Gnadewitz, *Fontes Iuris Romani Antiqui*, 7th edit. Tübingen (1912) no. 11 and 12. Mommsen has clearly shown that the front part of this tablet contains the *lex Acilia* and not, as Klenze supposed, the *lex Servilia*.

\(^9\) In his: *In C. Verrem Actiones*, for instance.


For the *quaestio Calpurnia* in many respects still followed the forms of the traditional *legis actio sacramento*. Hence the *quaestio Calpurnia*, but not the *quaestio Acilia*, might be called an outgrowth of the traditional Roman civil procedure or, to be more exact, a more severe form of this civil procedure. It was, in other words, not yet a jury trial under the presidency of a magistrate, but merely a "pre-trial" under the guidance of a praetor and thus only the first step in the creation of jury trial in the Roman legal world.

Before 149 B.C. no official or magistrate *cum imperio* of the Roman commonwealth while still in office could be sued or criminally prosecuted in an ordinary court.\(^\text{12}\) The only way of bringing charges against a magistrate holding office was a somewhat loosely defined appeal to the Roman people or to the Senate,\(^\text{13}\) a process commonly referred to as *provocatio*.\(^\text{14}\) This practical immunity of the magistrate was the cause of distressing sufferings on the part of the provincials, all the more regrettable since some of these provincials were friendly allies of the Romans. The *lex Calpurnia* was passed in order to prevent these abuses. Under the consulship of Censorinus and Mamillius, in 149 B.C., the popular tribune, Lucius Calpurnius Piso Frugi, passed the first *lex de pecuniis repetundis*\(^\text{15}\) by which the *quaestio perpetua* was established. This *quaestio* became the model for all subsequent legislation concerning similar matters, including the *lex Acilia*. In it the Roman assembly delegated its judicial powers in certain criminal matters to judges or jurors and thus created an extraordinary popular court. Only foreigners, *socii* and *peregrini*, but as a rule no Roman citizens, could plead before this extraordinary court. It seems,

\(^\text{12}\) See Ulpian 1.2; *Digest* (of Justinian), *De In lus Vocando* 2.4. No suit can be brought against a consul, a praetor, a) (proconsul, or any other magistrate *cum imperio* who have the power to coerce others and to order them imprisoned.

\(^\text{13}\) See, for instance, Valerius Maximus, *Memorable Deeds and Sayings* 6.1.7; Livy, 29.19 ff.; 43.16.

\(^\text{14}\) See, for instance, Livy 10.9; Cicero, *De Republica* 2.31.

\(^\text{15}\) See Cicero, *Brutus* 27.106.
however, that according to the *lex Calpurnia* the *quaestio de repetundis* was a civil court dealing with an issue of private or civil law. Only with the *lex Acilia* did the *quaestio de repetundis* become a matter of public law.\(^{16}\)

The *lex Acilia*\(^{17}\) has been made the subject of several investigations, significant among which are those of Mommsen and Zumpt.\(^{18}\) A more thorough investigation of this problem is presented by Hesky,\(^{19}\) Brassloff,\(^{20}\) Girard,\(^{21}\) Wlassak,\(^{22}\) Mitteis,\(^{23}\) and Hitzig.\(^{24}\)

## II

### The Presiding Magistrate

As we have already mentioned, the *lex Acilia* had its precursor in the so-called *lex Calpurnia* which was passed in 149 B.C. As a matter of fact, the extant fragments of the *lex Acilia* make reference to the *lex Calpurnia*.\(^{25}\) Another possible forerunner of the *lex Acilia* may have been the *lex Iunia*,\(^{26}\) of which very little is known. In order to under-

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\(^{10}\) See, for instance, *Digest* (of Justinian), 1.7 *De Publicis Iudiciis*, which makes it clear that the verdict of a *quaestio de repetundis* has the nature of a public law (criminal law) decision.

\(^{17}\) As to the many cases tried under the *lex Acilia* see A. Zumpt, *Der Criminalproces der römischen Republik*, Leipzig, Teubner (1871), 470 ff.


\(^{19}\) "Anmerkungen zur *lex Acilia repetundarum,*, in: Wiener Studien, 25, 272 ff.

\(^{20}\) "Beiträge zur Erläuterung der *lex Acilia repetundarum*," Wiener Studien, 26, 106 ff.

\(^{21}\) In: *Zeitschrift der Savigny Stiftung*, 14, 45 ff.; 29, 125 ff.

\(^{22}\) *Römisches Prozessgesetze*, II, 187 ff.

\(^{23}\) *Römisches Privatrecht*, I, 52; 124.

\(^{24}\) *Die Herkunft des Schwurgerichts im römischen Strafprozess*, Zürich, Institut Orell Füssli (1909).--Aside from these more detailed works the reader should also consult the great works on the history of Roman Law by Karlows, Krüger, Voigt, Kübler, and others.

\(^{25}\) line 74 "ex lege, quam legem Calpurnius L[ucii] f[ilius] tr[ibunus] pl[ebeius] rogavit." Compare line 23, quoted in note 26, *infra*--Latin letters or words found in brackets are reconstructions of missing parts of the fragment dealing with the *lex Acilia*.

stand the problem of the origin of the *lex Acilia*, we may investigate some of the major provisions. The most important provisions, in our opinion, were the rules defining the nature and function of the presiding magistrates during the whole trial as well as the rules establishing the relationship of this magistrate to the body of jurors.

The magistrate who, according to law, presided at the *quaestio de repetundis* was at first the *praetor peregrinus*.27 As a matter of fact it may be assumed that the *lex Calpurnia* of 149 B. C. charged the *praetor peregrinus* with the *quaestio de repetundis*. Soon afterwards, however, a special *praetor de repetundis* was appointed.28 This praetor, it seems, was elected in the *comitia* like all other Roman magistrates *cum imperio*. Immediately after his election and not later than ten days afterwards, he had to draft a list of four hundred and fifty jurors.29

The law contained several provisions as to the qualifications of these jurors. The most important of these provisions seems to have been that they had to be members of the equestrian class who maintained their domicile in Rome. The names of these jurors were announced publicly; 30 and the juror lists had to be publicly exhibited.81

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27 See line 12 ff: "... Pr[ae]tor, quei inter peregrinos ious deicet ..." The *praetor peregrinus* dealt with all legal controversies that arose between Roman citizens on the one hand and aliens on the other hand. This arrangement is in line with an old Roman tradition. Compare also Th. Mommsen, *Gesammelte Schriften*, I, 51 ff.


29 "Viros legere"; See line 12: "pr[ae]tor ... in diebus X proxum[eis] ... CDL viros legat ..." Line 16: "praetor qui post h[anc] l[egem] rogatam ex h[ace] l[ege] ioudex factus erit ... is in diebus X proxumels ... [. ... CDL viros ... legat ...]" Compare line 15; line 18; line 19; line 20; Compare Cicero, *Philippica* V, 5, 15.

30 "In contione recitare," in line 15; see also line 14; "... CDL vires ... ea nomina omnia in tabula, in albo atramento scriptos ..." line 15; "... eosque
The function of the presiding magistrate was clearly defined by law. It consisted primarily in conducting the inquiry by passing on evidence submitted by the plaintiff (quaerere). For the praetor "quaerit ex lege," and "praetoris quaestio est ex lege." The exact definition of the president's function reads as follows: "praetor rem quaerit ab eis qui judicium sunt" (the praetor conducts the trial in collaboration with those who constitute the body of jurors). Aside from these statements we also find the following passages: "praetor rem agit ex lege," and "praetor iudicium exercet ex lege." In some places the presiding praetor is also called iudex. But in other passages again the individual juror is referred to as iudex, especially such individuals who are charged with particular duties such as the index pronuntiationis faciendae causa factus, that is...
to say, the "foreman" who announces the findings of each juror.

According to the *lex Acilia* the various tasks of the presiding praetor were the following: he drafted a list of jurors for the year; he accepted the *nomins delatio*; he appointed the various panels of jurors for each trial; he set the time limit for the submission of evidence and also provided for the safe keeping of such evidence; he passed on the various exceptions or objections of the defendant and the jurors; he directed the trial in general; he passed on consultations among the jurors; he supervised the counting of votes and the pronouncement of the final verdict; and he was in charge of the statement of damages to be paid. At the same time he issued orders concerning the payment of these damages, and also supervised the distribution of the estate of the defendant in case this estate should be less than the damages awarded.

The main problem with which we are concerned is whether or not the presiding magistrate voted with the jurors whenever the question of guilt or liability as such was being decided. Mommsen insists that this was the case and adduces two reasons for his views: namely, the even number of the jurors and the fact that the magistrate is referred to as "iudex." Hence in the case of a tie vote by the jurors, the president would have to cast the deciding vote. Mommsen's arguments, however, are not valid, because the law demanded that a man could only be found guilty by the majority of the

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40 line 12.
41 lines 4; 5; see also note 111, infra.
42 lines 5; 15; 14.
43 lines 30 ff.
44 line 34.
45 lines 39 ff.; 46 ff.
46 lines 53 ff.
47 lines 58 ff.
48 lines 59 ff.
49 lines 63 ff.
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jurors. This means that in case of a tie the defendant was acquitted. Hence the presiding magistrate had not to be called upon for the decisive vote. It should also be remembered that the designation of the presiding officer as *iudex* appears only whenever the *praetor acted* independently of the jury, in other words whenever he issued mere directives or exercised his prerogative to maintain order in the court. For the law clearly distinguished between the activity of the magistrate and the function of the juror: *praetoris quaestio, iudicum iudicatio, litisque aestimatio*.

III

The Empanelling of the Jurors and the Functions of the Jury

In regard to the empanelling of the jurors, the *lex Acilia* followed a complicated procedure. At the first session, twenty days after the indictment (*nominis delatio*), the plaintiff chose one hundred persons from the "year list" of four hundred and fifty jurors. In doing so, he had also to designate all those jurors to whom he was related either by blood or marriage or with whom he had any business or professional relation. These persons were then declared ineligible for jury duty in this particular trial. In addition there

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51 line 55 says that a man could only be condemned if "[sententia]e . . . plurumae erunt condemno . . ."—if the majority voted "guilty."

52 See in particular Cicero, *Pro Cluentio* 27 and 73; "In consilium erant iuris judices XXXII, sententis XVI absolutio confici poterat."


54 line 2: " . . . primis aliqua earam fuerit, queive filius eorum quouis erit, queive ipse vel] quoquis pater siet, in annos singulos pequniae quod siet am[pitus Hs . . . n[uumnum] . . . pro imperio prove potestate ipse regive populoque ipsius, parentive ipsius, queive in potestate manu mancipio suo parentisve sui siet fuerit [quo]ive ipse paresve suus filiuseve suos heres siet, abiatum captum coactum conciliaum aversumve siet: de ea re eius petitio nominisque delatio esto, . . ."

55 About the *nominis delatio*, see footnote 111, *infra.*

56 line 21: " . . . die vicensumo ex eo die, quo quoisque . . . in n[omine] detolerit, C viros ex eis, quei ex h[ace] l[ge] CDL vire[i] in eum annum lectei erunt, . . . legat. . . ."
were other grounds for disqualifying a person as a juror, such as the provision that there should not be two members of the same family serving as jurors. Both plaintiff and defendant in the presence of one another had to state under oath that they had complied with the rules which disqualified certain persons as jurors. Within sixty days from the indictment the defendant on his part chose (legit) fifty jurors from the list of one hundred previously proposed by the plaintiff. Should the defendant fail to make this choice within the prescribed period of sixty days he forfeited this privilege, which then was exercised by the plaintiff, who now selected the final fifty jurors. Contrary to the opinion previously advanced by some scholars, the presiding magistrate or praetor did not select the jurors or appoint substitutes for disqualified jurors.

The fifty jurors who were to deal with the case at hand were called *indices in rem lecti*, in contrast with the four hundred and fifty jurors of the annual list, the so-called *indices in eum annum lecti*. The names of these fifty jurors, together with the names of the two parties and those of the so-called *patroni*, were published on tables and displayed for

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57 line 23: "... neive amplius de una famifl]ia unum ..." Compare also lines 3 and 13.
58 line 21.
59 line 24: "["... sei is quei petet, ita C] viros ediderit iuraritque, tum eis pr[ae]tor facito, ut ei is unde petitur die L[X postquam] elus nomen delatum erit, quos C is quei petet ex h[ace] l[ege] ediderit, de eis judices qu[os volet L legat. . . ]"
62 line 26: "Quei ita lectei erunt, eis in eam rem ioudices suntu. . . ."
63 line 14: "... CDL vires in eum annum lectei erunt. . . ."
the duration of the whole trial.⁶⁴ This system of empanelling jurors, however, was later superseded by another system, according to which the jurors were chosen by lot. From those thus selected the plaintiff and the defendant could reject an equal number.⁶⁵ The system proposed by the *lex Acilia* seems to have been quite unfavorable to the defendant, something which Cicero describes as "acerbum genus iudicii."⁶⁶ It was unfavorable because the defendant could choose only from the hundred jurors previously selected by the plaintiff.

The body of the final fifty jurors was referred to as the *consilium* of the presiding magistrate.⁶⁷ The advice and collaboration of this *consilium*, which primarily constituted a "fact finding board," was necessary in order to reach a verdict. In all his actions the presiding magistrate was bound by the opinions of this *consilium*. This fact is brought out by the technical expression that the presiding magistrate decided on the basis of the findings of the *consilium*.⁶⁸

The activity of the jurors began the very moment the trial to which they had been summoned⁶⁹ was declared opened.⁷⁰ In all preparatory actions leading to the opening

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⁶⁴ line 27: "[.. in taboleis popliceis scriptos habeat. Ea nomina qu[uel petiverit et unde petitiur erit, quod eorum volet ex taboleis poplii[ceis describendi is pr[ae]tatem facito. . .]


⁶⁶ Cicero, *Pro Plancio* 15. 36-37. *In Verrem* I.1.17.51 Cicero speaks of the "most severe" judges (jurors) of the *lex Acilia*, while in his *In Verrem* II.1.9.26 he calls the *lex Acilia* a "lex atroc."


⁶⁸ line 57: "de consilii . . . sententia. . . ."; compare also Th. Mommsen, *Römisches Strafrecht*, I, 319.

⁶⁹ line 39: "[.. Sei . . . causam sibi esse deicet, quominus ad id] iudicium adesse possit, de ea re prae[tori qui ex hae[ce] l[ege quae] ret cognoscere . . . ius esto.] [De iudicio proferendo vel referendo. Quam rem pr[aetor] ex h[aec] l[ege] egerit, sei eas rem proferet, . . .]" Mommsen's assumption that the jurors were already present when one of the two contestants asked for an adjournment of the opening of the trial in order to be able to submit additional evidence, cannot be maintained. In any event, Mommsen's reconstruction of line 32 as: "pr[ae]tor] iudiciumque" is highly doubtful.

⁷⁰ See, for instance, Cicero, *Divinatio in Caecilium*, 7.24.
of the main trial, however, the appointed magistrate might consult with a special board of "legal advisors" which was also called consilium. But this special consilium was not identical with the jury as such. The function and activity of the jurors were by no means completed by their casting a vote on the guilt or innocence of the defendant. As we shall see later, they also decided on the question concerning the damages to be paid, the litis aestimatio. Likewise they were called upon if any further complaint for calumnia or praevaricatio was lodged against the plaintiff.

IV

Plaintiff and Representation of the Plaintiff

The leges de repetundis or repetundarum penalized any form of taking money by any magistrate while holding office abroad. The ill-gotten money, the res, was then taken away from him (repetere). It should be noted that the taking of money as such constituted the crime. It was not necessary that the money had to be extorted. In defining the situation of fact which constituted the crime, the law used the following definition: ablatum captum coactum conciliatum aversumve. In order to exempt from punishment the taking of insignificant amounts of money, the law provided that criminal charges could be made only if the magis-

71 Called divinatio; See Hitzig's article "Divinatio" in Pauly-Wissowa, op. cit., and note 118, infra.
73 See, in general, line 58, and infra, chap. VI.
74 Calumnia and praevaricatio are charges against any person wantonly bringing charges against a third person. It is what we call malicious prosecution and abuse of process. See Cicero, Pro Sextio Roscio 20.57; Pseudo-Asconius, Ad Ciceronem pro Scauro ad Divinationem, p. 30; also Cicero, Ad Divinationem 8.2. See also line 75.
75 A magistrate according to the lex Acilia is a person who has the right to speak up in senate, namely a Senator, a praetor, a military tribune or a consul. C. Zumpt, De Legibus iudiciis repetundarum in Republica Romana, 21.
76 line 3.
treat within one year accepted amounts the total of which exceeded one hundred aurei, that is, ten thousand sestertiae.\(^{77}\)

According to the *lex Acilia* two parties (*adversarii*) contended before the jury court—the plaintiff, who pressed charges (*petit, pecuniam petit, or pecuniam repetit*) on the one hand; and the defendant (*unde petitur*) against whom these charges were levelled on the other hand. The charging of the offender by the plaintiff was called *petitio nominisque delatio;*\(^{78}\) the plaintiff “*dejert nomen alicuius*”\(^ {79}\) (or alicui) *de pecuniis repetundis.*\(^ {80}\) This whole procedure on the part of the plaintiff was called *agere cum eo unde petit.*\(^ {81}\)

On the whole this procedure moves along a certain order which in part observes the traditional rules of Roman civil procedure and in part changes them considerably.

Tradition has it that the whole legislation *de repetundis* was introduced primarily to permit legal action against persons who by using their public authority (*imperium*) had received money from those who were subject to this authority. It was instituted *sociorum causa,*\(^ {82}\) that is, in the interest of “friendly aliens.” The *quaestio de repetundis* could be applied only against certain persons: (1) against magistrates who were duly elected by the assembly and who dur-

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\(^{77}\) line 2: “... in annos singolos pecuniae quod sit amplius sestertium... .” Obviously the most important part of the sentence, the exact figure, is missing. Hence we have to substitute the missing figure from other sources. Venuleius Saturninus (*Digest* 48, 11, 6, 2) states: “urbani magistratur . . . ne . . . plus doni muneris in anno accipiant quam quod aureorum centum.” The *aureus* was worth 100 sestertiae. Th. Mommsen, *Römisches Strafrecht,* II, 705 ff. See also Pliny, *Epistola* 5.9; Tacitus, *Annales* 11.5.

\(^{78}\) See note line 21, and note 111 *infra.* Compare lines, 9; 10; 19; 20; 21; 23; 24.

\(^{79}\) See line 78 *supra.*

\(^{80}\) See line 75 and line 76: “... ei sunt quei eius nomen detolerit, ...”


\(^{82}\) line 1.
ing their office as provincial administrators accepted gifts;\textsuperscript{88} (2) against a Roman senator who exercised public functions in matters concerning the administration of a province;\textsuperscript{84} (3) against the sons of the aforementioned persons if the former received money during the office of their fathers.\textsuperscript{85} The wives of provincial governors, however, could not be prosecuted for gifts received, although later the husbands were held liable for the acceptance of such gifts by their wives.\textsuperscript{86} Also the members of the equestrian class who were attached to senatorial magistrates in the provinces were not liable under the \textit{quaestio de repetundis}, at least not at the time the \textit{lex Acilia} was passed.

The \textit{lex Acilia}, like the \textit{lex Calpurnia}, was conceived as an instrument for preventing extortion and bribery in the provinces. Since, however, the proof of the crime of extortion by valid evidence was an extremely difficult undertaking, it was decreed that any official in the provinces who accepted presents (\textit{pecunias capere}) from a provincial was liable under the \textit{quaestio de repetundis} and, hence, could be forced to return the gift (\textit{pecunias repetere}).\textsuperscript{87} The mere acceptance of presents under the aforementioned circumstances was sufficient for setting into motion the \textit{quaestio de repetundis}.\textsuperscript{88}

This law was so strict that it even applied to purchases made by the magistrate in the provinces. Hence the vendor by invoking the \textit{quaestio de repetundis} could reclaim objects sold without restitution of the purchase price.\textsuperscript{89} Gifts of small value could be accepted with impunity, but if the total value of these small objects exceeded ten thousand \textit{sestertiae} a year, then the magistrate became liable for restitution under

\textsuperscript{88} line 2.
\textsuperscript{84} line 2.
\textsuperscript{85} line 2. Compare also Tacitus, \textit{Annales} 13.43.
\textsuperscript{86} See \textit{Digest} 1.16.4.27. Compare also Tacitus, \textit{Annales} 3.33 ff; 4.20.
\textsuperscript{87} See Cicero, \textit{Ad Herennium} 1.11.20; \textit{Divinatio in Caecilium} 5.8.
\textsuperscript{88} See Cicero, \textit{De Legibus} 3.4.11; \textit{Digest} 1.16.6.3. Pliny, \textit{Epistola} 4.9.6 ff.; Dio Cassius 72.11.
\textsuperscript{89} See \textit{Digest} 18.1.46; 49.14.64.2; \textit{Codex Theodos.} 8.15.25; 8.15.5; 8.15.1.
the provisions of the *quaestio de repetundis.*\(^9\) Subordinate magistrates could not accept even small presents.\(^9\) The levying of new taxes which were not officially decreed was also subject to an investigation, according to the provisions of the *quaestio de repetundis.*\(^9\) Likewise punishable under the provisions of the Acilian *quaestio de repetundis* were the following actions of provincial governors: (1) general business transactions carried on in the provinces for the *benefit of the governor;*\(^9\) (2) the maintenance by the governor of sea-going ships which might be used to carry on private trade;\(^9\) and (3) the lending of money to provincials by the governor for his own profit.\(^9\)

The preamble of the *lex Acilia* designated as plaintiff the "*socius nominisve Latini exterarumve nationum, quoive in arbitratu dicione potestate amicitia* [e populi romani . . .]."\(^9\) Lines 76ff. also mentioned the three possible types of plaintiffs, namely, first, the alien in general ([*si ceiv*] *eis Romanus non erat*); second, (line 78) one who enjoyed Latin status ([*si quis eorum quei nominis Latinii sunt*]); third, under exceptional circumstances the Roman citizen as such ([*sei quis cei*] *vis Romanus [sit]*).\(^9\) We must assume, however, that the *aliens* and *socii romani* furnished the bulk of plaintiffs under the *lex Acilia.* Whenever the person complaining was a non-citizen, we have to make a further distinction, namely, whether or not the whole foreign people (*populus, civitas*) or merely an individual member of this foreign nation has complained about the actions of a Roman magistrate. Cicero,

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\(^9\) See line 2 where the sum of a hundred *aurei* is mentioned, and the *aureus* is one hundred *sestertiae*; compare also *Digest* 48.11.6.2.

\(^9\) *Codex Theodos.* 11.11.1.


\(^9\) See Cicero, *In Verrem* 4.5.9; 3.72.169; 4.4.5; 5.18.46; *Digest* 12.1.34; 18.1.62; 12.1.33; 49.12.46.2; *Codex Theodos.* 8.16.1.

\(^9\) See *Digest* 49.14.46.2.


\(^9\) See line 1.

\(^9\) line 87. This seems to be the exception and perhaps refers to Roman citizens living in the provinces where they might have become the victims of a greedy governor. In any event the reading or the reconstruction of the fragment might be spurious, although — *vis Romanus* — seems to signify "[*cilir Romanus."
in any event throughout his works deals with the two situations separately. The fragments of the *lex Acilia* likewise distinguish between several types of plaintiffs. This distinction is found in those sections which deal with the *litis aestimatio* \(^98\) and the *de tributis*.\(^99\) In line 60 ff. mention is made of a case where, following the *litis aestimatio*, the plaintiff, after the conviction of the defendant, reclaimed from the quaestor money that had been deposited in the state treasury by the defendant beforehand. Whether or not the money would be paid out immediately depended on whether the claimant acted "in his own name, that of his father, or as the heir of his parent’s estate" ([*nomine su*]o *parentisve suei, quoive ipse parensve suos heres siet, leitem aestumatam esse*),\(^100\) or whether he acted in the name of his government or people (*regis populeive ceivisve suei nomine litem aestumatam esse sibei*).\(^101\) In the first case (*aestimatio suo nomine*), where the plaintiff acted in his own behalf, the money was refunded to him directly.\(^102\) In the second case, however, special emmissaries had to be sent out by the complaining community to which the money would be restored.\(^103\) Hence, whoever legally represented these foreign communities before the jury was not entitled himself to collect the money to be refunded. It is quite likely that the contrasting terms, *suo nomine* and *populi regisve nomine*, were also contained in the partially lost preamble of the *lex Acilia*, and that the term "*alieno nomine*" found in line 6 refers to this distinction.

All this makes it quite clear that foreigners were permitted to bring charges against Roman citizens in Rome proper. But a clear distinction was made as to whether they repre-

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\(^98\) lines 58 ff.
\(^99\) lines 62 ff.
\(^100\) line 60.
\(^101\) line 60.
\(^102\) line 61: "[... tanta pequnia ...] ... ex hace lege solvatur; ..." Compare line 63.
\(^103\) line 63: "... quoius regis populeive nomine lls aestumata erit, legati adessint. ..."
sented their own case or the case of one of their fellow citizens. There is no reason why we should not assume that one and the same person could act in his own behalf, as well as to be an attorney for his home state or a fellow citizen. For we know that the whole case was conducted in such a manner that the damages were awarded to the plaintiff either in his own name or in that of a third party which the plaintiff represented.

The law also speaks of the so-called *patroni* of the plaintiff.\(^\text{104}\) The particular provisions found in line 9 ff. merely applied to criminal procedure and not to civil procedure,\(^\text{106}\) since cases involving the latter procedure were to be argued before the so-called *recipерatores*. In case the plaintiff himself could not find a *patronus* to support his charges he might, upon his special request (*si volet*), be assigned a patron or patrons by the presiding magistrate.\(^\text{106}\) As to the qualification of this patron we find a number of statements in lines 10 ff.\(^\text{107}\) It seems to be quite obvious that the patron had to


\(^{107}\) line 9: "quei ex h[ace] l[egel] pequim petet . . . sei eis volet sibei patronos in eam res darei, pr[ae]tor, . . ."

\(^{107}\) lines 10 ff.: "[. . . pr[ae]tor] . . . [patronos civeis Romanos ingenuos ei dato, dum] nei quem eorum det scientia d[olo] m[alo], quiei is, . . . [gener sicer vitricus privignusvue siet, queve eiel sobrinus siet pr[ae]tiusue eum ea cognitione at][igat, queve eiel sodalis siet, queve in eodem conlegio siet, quoiae in fide is erit maisoresve in maiorem fide fuerint . . . queve quaestione iudiciculo populo condemnatu[s siet, quod circa eum in senatum legel non liceat, . . . neive eum que]i ex h[ace] l[egel] ioudex in eam rem erit, neive eum erit ex h[ace] l[egel]
be a Roman citizen.\textsuperscript{108} The patron \textsuperscript{109} acted in the capacity of what we would call an attorney. About his specific activity nothing is said in the extant fragments. The only information that we can gather is that his name, together with those of the parties and jurors, was made public.\textsuperscript{110} The nominis delatio,\textsuperscript{111} or indictment, was not made by the patron, inasmuch as he was not appointed until after the indictment.\textsuperscript{112} Nor did the patron participate in the empaneling of the jury. On the whole, it appears that the patronus was not an essential figure in the Acilian quaestio de repetundis.

The type of procedure described so far is not in complete agreement with the description which we gather from Cicero's writings.\textsuperscript{113} According to Cicero, it was the patronus who brought charges against (or denounced) the corrupt magistrate (nomen deferre) and who, therefore, also swore the "calumnia—oath."\textsuperscript{114} The patronus declared his inten-

\begin{footnotesize}
\begin{enumerate}
\item The victims of the abuses of Roman provincial administrations always found champions among the leading Roman gentes. Thus the Spaniards could always count on the advocacy of a Sempronius Gracchus; and the Allobroges in Gallia Narbonensis on that of Fabius Maximus and his descendants.
\item The nominis delatio ("denunciation" or indictment) is the technical term for pressing and stating charges on the part of the plaintiff in all quaestiones [nomen deferre]. See, for instance, line 19; line 3; line 4; line 9; Cicero, Pro Sextio Roscio 3.8; 44.132; In Verrem II.1.6.15; II.2.28.68; Pro Cluentio 4.11; 8.23; 17.49; Pro Caelio 11.26; 23.56; Pro Scauro 11.23; compare Digest 37.14.10). The correlative term of nomen deferre is nomen recipere by the magistrate. See, for instance, Cicero, In Verrem II.2.38.94; Caecilius ad Famil. 8.8.2; Valerius Maximus 3.79. Thus nomen deferre actually signifies that the name of the accused person is being entered in the list of persons indicted for a crime (compare line 5; line 40). Such "denunciation" was unknown to the Roman civil law. See, Th. Mommsen, Römisches Strafrecht, II, 382 ff.
\item This passage makes it quite clear that the delatio nominis has already taken place when the patronus is being appointed. However it should be noted that the passage "nomen detulerit" is a reconstruction and hence not completely reliable.
\item See for instance: Divinatio in Caecilium; Pro Sextio Roscio; Pseudo-Asconius, Ad Ciceronem pro Scauro ad Divinationem; In Verrem; etc.
\end{enumerate}
\end{footnotesize}
tion to bring charges (postulat nominis delationem)\textsuperscript{115} by stating the crime and the name of the accused. At an open sitting he requested the praetor’s permission to prosecute. If several patroni declared their intention to prosecute, then the presiding magistrate, usually the praetor peregrinus, decided who should be granted the right to do so (constituere accusatorem actorem\textsuperscript{116} or dare nominis delationem).\textsuperscript{117} When deciding this issue the presiding magistrate had to take into consideration the wishes of the plaintiff in so far as the latter was the primarily interested party. The representative or representatives of the plaintiff or plaintiffs, who must be distinguished from the patronus, were always present at the divinatio.\textsuperscript{118} They were present during the remainder of the trial, and cooperated with the patronus. They gave him instructions and, if necessary, testified in behalf of the plaintiff.\textsuperscript{119}

On the whole, Cicero gives us the impression that the activities of the plaintiff, that is, the foreigner and his representative or representatives who were also foreigners,\textsuperscript{120} were

\textsuperscript{115} Cicero, Divinatio in Caecilium 20.64.
\textsuperscript{116} See Cicero, Divinatio in Caecilium 3.10; 15.48. Compare also Gellius, Noctes Atticae II.4.1.
\textsuperscript{117} Cicero, Divinatio in Caecilium 3.10; 20.63; In Verrem II.1.6.15; Compare, in general, Hitzig, “Divinatio,” in Pauly-Wissowa.
\textsuperscript{118} Cicero, Divinatio in Caecilium 4.14. Divinatio in Roman criminal procedure or criminal law signifies the ascertaining of the plaintiff or “accuser” (de accusatore constituendo — Cicero, Divinatio in Caecilium 3.10; Gellius, Noctes Atticae II.4.1). Since according to the ordinary Roman criminal procedure everyone could press charges against the defendant, particularly in the case of so-called crima publica, it frequently happened that several “accusers” showed their willingness to do so. Roman criminal procedure, however, as a rule did not permit a plurality of “accusers.” Hence a selection of just one person had to be made by means of the so-called divinatio (compare Pseudo-Asconius, Scholia in Milonianam 99: “Divinatio dicitur haec oratio, quae non de facto quaeritur, sed de futuro, quae est diviniatio, uter debeat accusare.”) This decision was made immediately after the postulatio (indictment). It preceded the delatio nominis (specific indictment). The divinatio was decided by the magistrate presiding at the quaestio. Compare, in general, Hitzig, article cited in note 117 supra.
\textsuperscript{119} Cicero, Pro Flacco 15.34. Compare also ibid. 10.22 ff.
\textsuperscript{120} It seems that between the complaining foreign community and the Roman patronus there existed a kind of special agent or trustee. Compare Cicero, Pro Flacco 15.34 and 18.42.
of a minor nature and were greatly overshadowed by the importance of the *patronus* who had to be a Roman citizen. If we compare the text of the *lex Acilia* and the statements of Cicero, we are forced to assume that Cicero describes a later form of Roman "*quaestio* procedure" which probably originated with the *lex Servilia*. According to the *lex Acilia* all the different motions during the whole procedure were made by the alien himself, acting on his own behalf or on that of the foreign community which he represented. It is also obvious that the *litis aestimatio* was given directly to him.\(^1\) Hence, it seems that according to the *lex Acilia* there was no actual need for a *patronus*.\(^2\) In the later procedural order described by Cicero apparently all the important motions were made by the *patronus*, and only the *litis aestimatio* was given directly to the plaintiff. Thus it seems that the *lex Acilia*, the older system, emphasized above all the interest of the alien.\(^3\) In the later system referred to by Cicero, however, the interest of the Roman commonwealth was given a more prominent place. For instead of a mere private representative of the alien, we encounter in Cicero what may be called a quasi-official Roman prosecuting attorney, the Ciceronian *patronus* who volunteered to act in behalf of the alien plaintiff. This new aspect of the Roman *patronus* becomes evident in the fact that during the time of Cicero he was also called *accusator*, that is to say, the quasi-official representative of the Roman commonwealth. At the same time he was also referred to as *actor* or *cognitor*. He was, in other words, the representative of the complaining alien as well as a kind of public prosecutor.\(^4\)

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1. Compare lines 58 ff.
2. Compare lines 9 ff; and 11 ff.
3. lines 1 ff; and 59.
The Functions of the Prosecutor or Plaintiff

After the *nominis delatio*, a definite day was set for the trial (*dies judicii*).\(^{125}\) The plaintiff was granted sufficient time to collect evidence supporting his charges.\(^{126}\) Hence the period between the *nominis delatio* and *dies judicii* varied from instance to instance. The plaintiff petitioned the court to be granted a certain number of days *ad inquisitionem faciendam*.\(^{127}\) Then he proceeded to collect (*conquirere*) all evidence needed to support his claim. He might use either witnesses or written documents.\(^{128}\) Since as a rule the defendant did not commit the crime in Rome or Italy, the collecting of evidence was usually connected with travel abroad.\(^{129}\) Thus the plaintiff or "accuser" might be expected to go to the province where the defendant had committed the crime. There he collected the evidence and interviewed persons or magistrates. He could appear before the assemblies of these provincial communities and induce them to pass resolutions in which the opinion of the community concerning the defendant was expressed.\(^{130}\) The plaintiff was usually accompanied by some assistants, the maximum number of which was later determined by law.\(^{131}\) The *lex Acilia* (line 31) mentions the various localities where the accuser might carry out his investigations, namely *in terra Italia in oppedeis foreis conciliaboleis, ubei ioure deicundo praesse solent*. Whenever the plaintiff asked for a postponement of a trial so that he might be able to collect new evidence, he

\(^{125}\) line 30: [Praetor . . . dies quot sibi videbitur det].

\(^{126}\) line 30: "... [ad inquisitionem fac]iundam...".

\(^{127}\) line 30.

\(^{128}\) lines 32 ff.

\(^{129}\) *Pro Scauro*, 11.23 ff; Cicero in his defense of Scaurus reproaches the plaintiff for having failed to collect evidence properly by limiting himself to interviewing of some persons in Rome, rather than traveling to the province where Scaurus supposedly committed the crime.

\(^{130}\) See Cicero, *Pro Flacco* 7.15 ff.

\(^{131}\) Cicero, *Pro Flacco* 5.13: "Lege recenti et nova certus est inquisitioni comitum numerus constitutus."
also had to designate the place or places where he intended to gather this additional evidence.\footnote{Cicero, \textit{Pro Scauro} 11.23; \textit{In Verrem} 1.2.6.}

The plaintiff, but not the defendant, when granted the right to collect evidence, was vested with a quasi-magisterial power to carry out his inquiries and, if necessary, to force people to testify.\footnote{Cicero, \textit{In Verrem} II.1.6.16: "Vim in inquirendo tantam habui quanquam mihi lex dabat." Cicero, \textit{Pro Flacco} 37.92; 15.36; "Vi legis, jure accusationis opibus suis terrenti."} Hence he had the power to summon persons to appear as witnesses in Rome during the trial (\textit{testibus publice denuntiare, testes evocare.})\footnote{\textit{Lex Acilia}, lines 31 ff.: particularly line 32: "[pr[ætor] ioudiciumque postquam] audierit, quod eius rei quaerundai censeant referre, et c[aesam proburit, quibus is qui petit denuntiaverit, eos homines d[um] t[axat] III testimonium deicere iubeto et quom c[aesam res agertur quam quisque testis er[it, in eam rem factio eis] omnes adsidet testimonio [numque deicant, dum nei quem testimonium deicere iubeat . . .]." Cicero, \textit{Pro Flacco} 15.35; 15.37; 15.92. Compare also Cicero, \textit{In Verrem} II.1.19.51; II.2.26.64 ff.} He also had the right to impound relevant documents (\textit{tabulas})\footnote{Line 34.} and to transfer them to Rome (\textit{potestas tabularum; obsignare et deportare tabulas}).\footnote{Cicero, \textit{In Verrem} II.4.66.149.} The witnesses were summoned and they travelled with the plaintiff to Rome. They usually gathered in one of the main provincial cities (\textit{conducere testes}).\footnote{Cicero, \textit{In Verrem} II.2.27.65.} In Rome, as a rule, they stayed within the immediate reach of the plaintiff,\footnote{Cicero, \textit{Pro Flacco} 10.22 ff.} but during the trial itself they were under the orders of the magistrate (\textit{praetor}) presiding at the trial. The praetor ordered them to speak up and penalized them for contempt of court in case they did not appear in court or refused to testify.\footnote{\textit{Lex Acilia}, lines 32 ff., particularly line 34.} The expenses incurred by the witnesses for the trip to Rome, as well as the expenses for staying in Rome, were borne by the plaintiff. But it is quite possible that the witness received also a remuneration (\textit{viaticum publicum}) from his own people, and thus acted in the capacity of an official representative of his
own home town.\textsuperscript{140} The documents collected in the provinces by the plaintiff had to be handed over as soon as possible to the custody of the presiding praetor.\textsuperscript{141}

The manner in which the plaintiff enforced his efforts to collect relevant evidence is not treated by the remaining fragments of the \textit{lex Acilia}. Mommsen,\textsuperscript{142} however, suggests the following procedure: “For the summoning of witnesses the plaintiff has at his disposal the same means of public power... which we have already encountered in the older forms of legal procedure which were under the direction of a magistrate. The question as to whether or not a witness should be excused from testifying is probably decided \textit{in camera}. In case of an unexcused absence it probably penalized the witness severely.” It may be assumed, therefore, that the power of coercion exercised by the plaintiff consisted in permitting him to employ what might be called quasi-magisterial powers. In any event he could expect the full support and cooperation of a magistrate in case of a refusal on the part of the witness. However, this did not mean that the magisterial power of coercion was delegated \textit{in toto} to the plaintiff. The latter had merely a right to ask the local magistrate to invoke certain coercive measures in order to make the witness testify. In case of a refusal, the magistrate stepped in and acted as if his own orders had been disobeyed. The carrying out of this principle was rather simple in a district which was under the jurisdiction of the

\begin{footnotes}
\item[140] Cicero,\textit{ Pro Flacco} 6.14; 7.17.
\item[141] Cicero,\textit{ Pro Flacco} 9.21. See also \textit{lex Acilia}, lines 34 ff.: [Is quem petet... elia quae iita conquaesiverit et sei qua tabulas libres leiterasve pop[licas preivativasve produ]cere proferrem[v.e volet]... de ea re volet apud pr[ae]torem], is praetor el moram ne faci[to, quominus ...].lat.” This fragment which cannot be fully reconstructed obviously implies that the written evidence had to be handed over to the praetor’s custody. Mommsen prefaces this line with “\textit{de testibus tabulisque custodiendis},” quoting also Cicero,\textit{ Pro Flacco} 9.21: (Litteras) triduo (after three days) lex ad praetorem deferri, iudicum signus obstignari iubet.” This would mean that the written evidence had also to be sealed. In this connection Cicero mentions a law according to which these documents had to be handed over to the praetor within three days. They were sealed so that they could not be forged or altered.
\item[142] Cicero\textit{ In Verrem} II.4.66.149.
\end{footnotes}
praetor presiding at the jury trial. However, if the witness should be under the jurisdiction of another magistrate, for instance that of a provincial governor, then the right to issue a summons might collide with the imperium of this provincial governor.\textsuperscript{143} Such collisions are referred to in Cicero’s oration Against Verres. Cicero, who himself brought charges against Verres, had been charged by Acilius Glabrio, the presiding praetor, with the collection of evidence in Sicily. These efforts were met with disfavor by the new governor of Sicily, M. Metellus, who not only tried to retain the witnesses summoned by Cicero,\textsuperscript{144} but also attempted to prevent the removal of documentary evidence.\textsuperscript{145} In order to facilitate the gathering of the necessary witnesses, Cicero produced a letter of Glabrio addressed to Metellus, in which the former not only lists the names of the various witnesses to be interviewed, but also asks Metellus to cooperate with Cicero in rounding them up.\textsuperscript{146} Nevertheless, Metellus refused to cooperate and Cicero claimed that this conduct of Metellus was contrary to law. If Cicero’s claim is correct, and we have no reason to doubt his word, then it appears that the law actually charged the local governor with putting at the disposal of the plaintiff all his magisterial powers for procuring witnesses, provided that the plaintiff was properly charged and empowered by the president of the quaestio. In any event this much is certain, that Metellus had no right to interfere with the work of Cicero, inasmuch as the latter carried a letter of instruction issued by Glabrio, to the effect that Cicero was dully charged to summon certain witnesses specifically designated in the letter.

The number of witnesses which the accused could force to appear in Rome was limited by the \textit{lex Acilia}\textsuperscript{147} to the

\textsuperscript{143} See, in general, Cicero, \textit{In Verrem} I.2.6.
\textsuperscript{144} Cicero \textit{In Verrem} II.2.4.12; II.2.26.64; II.2.4.12.
\textsuperscript{145} Cicero \textit{In Verrem} II.4.66.149.
\textsuperscript{146} Cicero \textit{In Verrem} II.2.26.64; II.2.27.65.
\textsuperscript{147} line 32: "[..] eos homines declamare iubeto...." See also line 34.
number of forty-eight.\textsuperscript{148} Aside from these witnesses, whose appearance in court could be enforced, the law also permitted witnesses who volunteered their testimony (testes voluntarii). As a rule it was not permissible to introduce a written statement in the place of the witness himself,\textsuperscript{149} even if the witness resided abroad. The credibility of a citizen witness testifying in behalf of the defendant was often favorably compared with the unreliability of an alien witness who testified for the plaintiff.\textsuperscript{150} Here again, as so often, the word of a Roman in Rome weighed heavier than the statement of an alien.

The "accuser" delivered his accusation in a continuous speech. The subscriptores followed him, then the accused and his patroni. At first there was no time limitation for their speeches (actiones), but afterwards, in order to correct the possible abuse of this privilege, a water-clock was introduced to limit the time of each speaker. The time allowed for the defense was about a third longer than that permitted for the prosecution. Then followed an examination of the evidence (probatio). Documents, circumstantial evidence, and the statements of witnesses were introduced in the probatio.

VI

The General Verdict (Iudicatio) and the Particular Finding of Fact (Litis Aestimatio)

Under the provisions of the lex Acilia, the jurors actually had two main tasks to perform: the indicatio and the litis aestimatio. The indicatio resulted in a general verdict either of guilty or not guilty. Each juror voted either con-

\textsuperscript{148} Later this number was increased to one hundred and twenty. See Valerius Maximus, Memorable Deeds and Sayings VIII.1.10.

\textsuperscript{149} Cicero, Pro Flacco 37.92.

\textsuperscript{150} See Cicero, Pro Fonteio 21.49: "Curate ut nostris testibus plus quam alienigenis credidisse videamini." Compare also Cicero, ibid. 5.11 ff. Pro Flacco 3.6 ff.
demno or absolvo. The presiding magistrate counted the votes and announced the results. The law also provided for the manner in which the vote was to be taken: each juror marked a small slate with either a C (condemno) or an A (absolvo). A man once acquitted could not be tried again for the same offense, unless the acquittal had been procured by collusion. There was no way of altering the verdict of the jurors. In cases where the jurors were unable to reach a decision, they could signify this by writing on the table the letters N L (non liquet). If the majority of the jurors found the defendant guilty, the hearing was continued. This second phase was called the litis aestimatio. The law particularly provided that the litis aestimatio did not constitute a violation of the principle of the res iudicata. For the litis aestimatio always presupposed the indicatio, that is, a previous decision as to the general guilt or liability of the defendant.

The purpose of the litis aestimatio was to ascertain in detail the various accusations and charges made by the different "accusers" or plaintiffs. In addition, the litis aestimatio also stated in detail the value of the various articles which the defendant had taken illegally from each of the

151 lines 53 ff. "[... in eum r]eum sententiam ea sors habuerit, is ei[... palam pronuntiato, ubel A leitera scripta erit absolvo, ubel C leitera scripta erit con]demno....]"

152 line 55.

153 See line 53, quoted in note 151, supra.

154 line 55: "... sententiae ubei plurumae crunt condemno...." From this it follows that a majority must find the defendant guilty. In case of a tie vote the defendant was found not guilty. See also note 51, supra.

155 See, in general, line 58.

156 line 56: ["De eadem re ne bis agatur. Quei ex h[ace] l[ege] condemnatus aut absolutus erit, quem eo h[ace] l[ege], nisei quod post ea fecerit, aut nisei quod praevericationis causa factum erit, aut nisei de litibus aestumandis aut nisei de sanctione huiusce legis, actio nei es[to ...]"]

157 line 58: ["Quei ex hac[e] lege condemnatus erit ab eo quod quisque petet, quoius ex hae lege peti[tio erit, id praetor, quei eam rem quaeferit, eos iudices, quei am rem judicaverint, aestumare lubeto ... quod ante h[anc] l[ege] rogatam consilio judicaverint capturum coactus ab]latum aversum conciliatumvve esse ... "]

158 line 59.
plaintiffs.\textsuperscript{159} The total value was fixed in money. Originally, in case of a favorable verdict, the plaintiff got back the full value he had made over to the defendant.\textsuperscript{160} But after the passing of the \textit{lex Acilia}, the plaintiff was entitled to twice the value he had given the defendant.\textsuperscript{161} In the so-called \textit{indicatio} the various claims or accusations were joined into one general charge. Hence only one verdict was handed down concerning all these charges. The \textit{litis aestimatio}, on the other hand, might lead to several verdicts, each by itself dealing with one particular charge (\textit{aestimare lites}).\textsuperscript{162} The decisions in the \textit{litis aestimatio} were handed down by the same persons who passed on the \textit{iudicatio}, namely the presiding magistrate or praetor,\textsuperscript{163} and the jurors. But while in the \textit{iudicatio} the jurors were usually referred to as \textit{iudices}, they were designated in the \textit{litis aestimatio} as the \textit{concilium iudicum}.\textsuperscript{164} Hence in the \textit{litis aestimatio} the decision rested with the majority of the \textit{concilium iudicum}.\textsuperscript{165} The technical expression that the defendant was found guilty by the sentence of the \textit{concilium} (\textit{de concilii sententia})\textsuperscript{166} makes it quite clear that this \textit{concilium} was not merely an advisory board which assisted the praetor, but a body whose decision was binding on the praetor.

\begin{footnotes}
\footnotetext[159]{line 59.}
\footnotetext[160]{line 59: “quod ante hanc legem rogatum . . . eas res omnis simpli.”}
\footnotetext[161]{line 59: “. . . res omnis quo[d] hanc legem rogatum consilio probabitur captum coactum, ablatum aversum consiliatumve esse, dupli . . . .” The contrast of “quod ante hanc legem rogatum . . . probatur captum . . . eas res omnis simpli” (line 59) and “quod post hanc legem rogatum probabitur captum . . . esse, dupli . . . .” makes it quite clear that with the passing of the \textit{lex Acilia} the plaintiff in case of a favorable verdict was entitled to double the amount the defendant had previously taken from him.}
\footnotetext[162]{line 58 speaks of “\textit{de litibus aestumandeis}” that is, of “\textit{lites}” (plural) and not a mere “\textit{lites}” (singular).}
\footnotetext[163]{The \textit{lex Acilia} is at times inaccurate when it speaks of the presiding magistrate as \textit{judex} (lines 59; 60; 61; 62) or mentions his \textit{iudicatio} (line 72). It is also inaccurate when it refers to the \textit{aestimatio praetoris} (line 68).}
\footnotetext[164]{line 59: “[. . . consilioque . . .]”; 60; also 59: “[. . . [consilio probabitur]. . .].”}
\footnotetext[165]{line 59: “. . . [consilioque eius maiorei parti . . .]. . . .” line 60: “. . . consilioque eius maiorei pa[r]ti eorum sa]lis fecerit. . . .”}
\footnotetext[166]{line 59; 60, both quoted in note 165, \textit{supra}.}
\end{footnotes}
The manner in which the vote was taken in the *litis aestimatio* cannot be ascertained with absolute certainty from the extant fragments of the *lex Acilia*. But it is certain that considerable difficulties must have arisen in this whole procedure, for it is most likely that the many jurors displayed a great variety of opinions as to the amounts to be awarded to the different plaintiffs.

The final finding of the jurors was announced by the presiding magistrate and then entered into the records (*referre in tabulas publicas*).\(^{167}\) The awarding of individual damages to individual persons was called "*litem aestimare alicui,*"\(^{168}\) that is, to the individual claimant (*ei qui petit*). In addition to this definition we also find the expression "*lites aestimantur alicui,*"\(^{169}\) which seems to refer to the defendant,\(^{170}\) and means that the defendant was liable to pay certain damages.

In the *iudicatio* the defendant was either found guilty or, at least in a general way, was acquitted.\(^{171}\) In the *litis aestimatio*, however, the individual charges were examined in a more detailed manner as to their nature and foundation in fact. Now it was quite possible that in the *litis aestimatio* all individual charges might be, for some reason, rejected one after another. Thus a case might arise where the defendant was found guilty of the general charge of having taken money illegally, but on closer scrutiny was acquitted of the particular and more detailed charges and hence was not found guilty at all. We may assume with Mommsen,\(^{172}\) therefore, that the *condemnatio* in the *iudicatio* was nothing more than a general finding of the jury based upon a general impression. Hence all that the *iudicatio* really meant was that the defendant appeared to be guilty, but that this

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167 Cicero *In Verrem* II.1.38.95 ff.; Cicero *Ad Divinationem* 8.8.2.
168 line 58.
169 line 60.
170 Cicero, *Pro Rabirio Postumo* 4.9; *In Verrem* II.1.38.95 ff.
171 line 54.
guilt would still have to be fully established in the *litis aestimatio*.\textsuperscript{173} It also meant that the general evidence submitted in the *iudicatio* warranted a continuation of the whole procedure against the defendant in the form of the *litis aestimatio*. In this sense we may say that the *iudicatio* very much resembled the finding of our grand jury, while the *litis aestimatio* amounted to our regular jury trial. The Romans do not seem to have worried very much over the possibility that a defendant might be found guilty in the *iudicatio* and acquitted in the *litis aestimatio*. For in practice it usually happened that a verdict of guilty in the *iudicatio* also assured a verdict of guilty in the *litis aestimatio*. This presupposes again that even during the *iudicatio* some of the more detailed points of the case, as well as some of the evidence, had been discussed.\textsuperscript{174} In any event, the political interest at stake in any one of these *quaestiones de repetundis* had already been dealt with in the general findings of the *iudicatio*\textsuperscript{175}

The *lex Servilia*, which was perhaps an amendment to the *lex Acilia*, also contained provisions in case the defendant, after having been found guilty, could not offer any security, or if his estate was less than the amount awarded to the plaintiff. Thus a further procedure might be started against any third person or third persons to whom the defendant, for the purpose of collusion, had passed any money (*quo ea pecunia pervenerit*) which he had acquired in a manner forbidden by the *lex Acilia*.\textsuperscript{176}

Our main source of information about this novel procedure against third persons who derived money from the defendant is to be found in Cicero's oration *In Behalf of Rabirius Postumus*. In this new procedure appeared the

\textsuperscript{173} Th. Mommsen, *ibid.*

\textsuperscript{174} Compare line 35: "Praetor ubei interroget . . .," and lines 37 ff.

\textsuperscript{175} Cicero, *Pro Cluentio* 41.115: "numquam ea diligentia quae solet adhiberi in ceteris judiciis eadem reo damnatio adhibita est." It could be maintained that the *litis aestimatio* was merely a "financial arrangement" between the defendant — found guilty in the *iudicatio* — and the plaintiff.

\textsuperscript{176} Cicero, *Pro Rabirio Postumus* 4.8 ff.
same officials or jurors who acted in the *iudicatio* and the *litis aestimatio*.

Cicero informs us that this action against a third party was but an "appendix" to the previous decision against the defendant proper: *quaedam appendicula causae iudicatae atque damnatae*. It could be directed only against those persons who had been especially mentioned in the *litis aestimatio* as having received money originally extorted from provincials (*in litibus aestimandis appellatus*). The naming of these persons (*appellatio*) was done either by witnesses or on the strength of documentary evidence.

But it was also possible to have A declared guilty in the *litis aestimatio*, while B, who, in the *appendicula causae iudicatae atque damnatae*, officially had been named as the recipient of stolen or extorted money, might not be found guilty.

Such a verdict in favor of the third party was by now a means tantamount to an acquittal of the main defendant. In any event this new procedure against a third party (*quo ea pecunia pervenerit*) was a unique feature in Roman law. The uniqueness of the procedure against a third party consisted in the fact that it was determined by a decision directed against the original defendant, that is, determined by the *condemnatio* of the latter. It was also unique in that it insisted that this third person must be a member of the equestrian order, in other words, that the third party must belong to the same class as the main defendant in the *iudicatio* and *litis aestimatio*. From all this we may gather that it was a common practice for the defendant, usually a member of the equestrian order, to pass on the money to another equestrian in order to cover up the initial crime or to save the ill-gotten gains in case the extortioner should be indicted and found guilty.

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177 Cicero, *ibid.*, 5.10.
178 Cicero, *ibid.*, 4.8; 13.37.
179 Cicero, *ibid.*, 4.9.
180 Cicero, *Pro Cluentio* 41.114: "Quotidie fieri videmus, ut reo damnato de pecuniis repetundis, ad quos pervenisse pecunias in litibus aestimandis statutum sit, eos judices absolvant."
VII

The Enforcement of the Verdict

In the *litis aestimatio* each of the several plaintiffs was awarded a certain amount of money (*tantae pecuniae lis eo nomine ei aestimatur*).\(^{182}\) This award, in the final analysis, was nothing more than a form of restitution or recovery for damages. The recovery of the money, that is to say the execution of the final decree, was not left to the discretion of the plaintiff. Neither was it carried out according to the usual rules of Roman civil procedure. It was accomplished by a special procedure which is described in the *lex Acilia*, lines 57-69. The presiding magistrate was given a prominent function in this procedure.\(^{183}\) The organs of the State, namely the praetor or *quaestor urbanus*, collected the amount awarded and saw to it that his money was transferred to the plaintiff or plaintiffs.\(^{184}\) Hence the plaintiff or plaintiffs received it directly out of the hands of the State. In the event that the defendant had not sufficient funds to satisfy the demands of the plaintiff, the claims of the latter were satisfied by what we would call a special "bankruptcy" proceeding.\(^{185}\)

In order to guarantee payment, the praetor forced the defendant immediately after the *condemnatio* to put up bail or furnish some other form of security.\(^{186}\) The amount of

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\(^{182}\) line 61: *quanta ea pequnia erit, is iudex facito . . . sei de ea re praedes dati erunt seive quantae pecuniae eae lites aestumatae erunt, [tanta pequnia ex] hace lege in aerario posita erit ob eam rem quod eo nomine lis aestumata erit, in triduo prosumo, quo ita sat[i]s [factum erit] ex hace lege solvatur:*. Compare also Cicero *In Verrem* 1.38.95.

\(^{183}\) In the old Roman civil procedure the plaintiff to whom damages were awarded was actually empowered by the decree of the court to execute by himself the decision of the court.

\(^{184}\) lines 59 ff.

\(^{185}\) line 62.

\(^{186}\) If this security consists of money, it must be paid to the quaestor. See *lex Acilia* line 62: "*[Quanti iudex qui eam rem quaesierit, leitis aestumaverit, sei is iud]ex ex hace lege pequniam omnem ad quaestorem redigere non potuerit, tum in diebus X proxumeis quibus [quae potue]rit redacta erit, iudex qui eam rem quaesierit, queive iudex hace lege fac[tus erit, tum cum pequnia illa redacta erit, tributum iudicito . . . ] . . ."
this bail or security was determined by the jurors, who estimated the probable damage in advance, that is, before the beginning of the *litis aestimatio*.\textsuperscript{187} The quaestor held the security (usually money) in trust and, after having made a special entry into the *tabulae publicae*, deposited it into the *aerarium* (*in aerarium ponere*).\textsuperscript{188} The money was kept in a special *fiscus* (basket) and sealed by the quaestor (*obsignare*).\textsuperscript{189} An inscription on this basket gave the name of the praetor presiding at that specific *quaestio de repetundis*; the name of the defendant; and the exact amount of money deposited in the *fiscus*.\textsuperscript{190} Each quaestor on assuming his office had to check the contents of these special *fisci* within five days of the beginning of his term of office.\textsuperscript{191}

All payments were made through the quaestor and through him alone, but only after the latter had received special instructions from the praetor presiding at the *quaestio de repetundis*.\textsuperscript{192}

Whenever the hearing had reached the stage of the *litis aestimatio*, all persons mentioned as possible recipients of money to be returned had to report to the quaestor.\textsuperscript{193} Between the *litis aestimatio* and the actual payment of the money, we meet with an unusual procedural feature which is referred to in the *lex Acilia* as *satisfacere*.\textsuperscript{194} The person to whom the money was supposed to be paid had first to satisfy the quaestor that the *litis aestimatio* had actually turned out

\textsuperscript{187} line 61.
\textsuperscript{188} line 61: "*[tanta pequnia ex] hace lege in aerario posita erit.*" line 65: "* . . tributus . . . apud forum palam, ubei de planco recte legi possitur . . . ;*" Compare also line 67.
\textsuperscript{189} line 67: "* [. . . Quaestor ea pequnia facito in fiscis siet fiscique signo suo opsignentur . . . ] . . . ;*
\textsuperscript{190} line 68.
\textsuperscript{191} line 68: "*Quaestor, quei . . . recti factum esse volet, facito in diebus V proxumeis, quibus quomque eiei aerarium provincia obvenerit, [fisci resignantur, et sei ea pequnia, quam in eo fisco esse inscriptum erit, ibei inventa erit, denuno opsignentur. . . . ]*"
\textsuperscript{192} line 69: "* . . pr[ae]tor, quei ex hace lege quae[ret] darei solvi iuserit, id quaestor. . . . ]*"
\textsuperscript{193} line 61.
\textsuperscript{194} lines 60 ff.
in his favor. Hence we may assume that this "satisfaction" of the quaestor was nothing else than the establishment of the identity of the person or persons awarded damages in the *litis aestimatio*. This special identification of each person also indicates that during the trial only one person acted for all plaintiffs and that only one person appeared in the *quaestio de repetundis*, namely that person who through the *nominis delatio* had formally been given the role of the one official plaintiff or "accuser." The other plaintiffs, therefore, had yet to establish in the *satisfactio* their proper identity and the fact that they were entitled to a recovery of damages.

If the defendant, after having been found guilty in the *iudicatio*, refused to furnish bail or any other form of security, he was declared insolvent. In such case, the praetor ordered confiscation and public sale of his whole estate: *bona publicae possideantur conquaerantur veneant.* The quaestor held in trust the receipts from this public sale. If the receipts were less than the total awards made by the court, then the amount was divided equally among the several plaintiffs — a procedure which was called *tributus*. The praetor publicly announced the amount to be distributed and also set the date for the carrying out of the distribution of the receipts. Should one of the creditors have been prevented from being present at the *tributus*, he was given five years in which he might claim his portion.

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195 line 60: ". . . queive eiei iudiciei consilioque eius maiorei pa[tri eorum sa]tis fecerit, . . .” Compare also line 64.
196 See note 111, supra.
197 line 57. Compare also Livy 4.15.8.
198 line 57: "[quantae pequniae ea bona venierint, tantam pequniam ioudex . . . ab empitore exigito . . . quaestorique eam pequniam et quanta fuerit] scriptum transitio; quaestor accipito et in taboleis poplicis scriptum habeto."
199 line 62: "[. . . sei is iud]ex ex hace lege pequniam omnem ad quaestorem redigere non poterit . . . ."
200 line 63 ff; "[. . . tantam pequniam in eas lites, quae aestumatae erant, pro portioni tribuito . . . ] . . . ."
201 See, in general lines 62-66.
202 line 7; also lines 65-66. Compare lines 62-63.
After the expiration of this period the unclaimed money became the property of the State.  

As long as the defendant acted in good faith and in accordance with the instructions given by the presiding magistrate, and as long as he furnished several "hostages" (stipulatores) or persons who guaranteed proper payment in the proper time (praedes dare), he was not liable with his own private estate for the amounts awarded to the plaintiff or plaintiffs. The security was given or guaranteed to the quaestor. In case the defendant himself was unable to pay, the quaestor proceeded against all persons who had given security for the defendant, and demanded payment from them.

The defendant’s ability to furnish sufficient security was considered tantamount to full payment on his part. In such case he was no longer personally liable. For from this moment on the law no longer speaks of the defendant’s personal liability. It is very likely that the defendant himself could be held in custody if he failed to furnish sufficient security. Livy informs us that Lucius Scipio refused to produce any "bondsmen" or security. Hence he was taken into custody. But the tribune of the people, Tiberius Gracchus, intervened on his behalf. He was released from custody and only his estate was seized. This incident shows that in early days it was possible for the defendant, and per-

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203 line 66: "Quae pequnia ex hace lege in aerarium posita erit, quod in anniis qu[ine proximeis ex ea die, qua tributus factus erit, eius pequnia quaestor ex h[ace] ll[egae] non solverit, populei esto ...] ..."

204 See line 57.

205 See line 57: "... q[uaestori] praedes facito. ..."

206 line 67: "... quod eius is reus non solverit, ab eis pr[aedibus primo quo]que die pequnia exigatur."

207 line 61: "[... sei de ca re praedes dati erunt seive quanta pequniae eae lites aestumatae erunt ...]"

208 line 67: "... quoi quaestori ex h[ace] ll[egae] praedes datei erunt, quaeve quaestor deinceps] tandem provin[cijam habebit, eis faciunto, ut eiu quod recte factum esse volet, quod eius is reus non solverit, ab eis pr[aedibus primo quo]que die pequnia exigatur."

209 Compare the meaning of line 67, quoted in note 208, supra.

210 36.56 ff.
haps even his "bondsmen", to be arrested in case he or they refused (or were unable) to pay or procure sufficient security. It seems, however, that in later days neither the defendant nor his bondsmen could be held in custody. We have no way of determining which of the several "bondsmen" was held liable. Neither do we know whether the amount was divided up among the several *stipulatores*,\textsuperscript{211} and if so, whether each *stipulator* was held liable for the same amount.

VIII

*Foreign Derivation of the Lex Acilia*

We have already mentioned the possibility that certain aspects or innovations of the *lex Acilia* might have been of Greek origin and that, in essence, the provisions of the Acilian *quaestio de repetundis* were closely related to certain Greek or Attic forms of legal procedure in which aliens were involved. Let us now investigate what particular features of the *lex Acilia* are of Greek origin.

The principle of having a special magistrate preside at a trial was not known to Roman jurisprudence prior to the *lex Acilia*. This principle cannot be derived from the idea of the *comitia* or the notion of the elected *consilium*. In its original form Roman civil procedure did not contain the notion of a magistrate who took part in the procedure *in iudicio*.\textsuperscript{212} On the other hand, Greek civil procedure was based upon the basic idea that the presiding magistrate not only accepted the charges and directed the whole procedure, but also presided at all hearings held before the jurors. This magistrate directed all the various procedural acts: he decided when

\textsuperscript{211} The bondsmen, that is the person furnishing the security for the defendant, was generally called *stipulator* in Roman law.

\textsuperscript{212} While it is true that Roman Law under the Republican days knew the institution of a magistrate presiding at a civil trial, namely in the so-called "centumviri procedure," we cannot ascertain the real age of this procedure. It is quite possible, therefore, that this procedure was a copy of a Greek model and may have been introduced approximately at the same time as the *quaestio de repetundis*. 
the witnesses should be heard and when the parties should be heard; he ordered the taking of a vote by the jurors; he counted the votes and publicly announced the results of the vote. In short he was, in the true sense of the term, the president of the court.

As we have already seen, according to the *lex Acilia*, the plaintiff selected one hundred jurors from the annual jury list. Out of these one hundred the defendant chose fifty who constituted the final jury panel. The basic idea at the bottom of this method of selecting judges or jurors was this: the foreign plaintiff who had to choose Roman judges was definitely at a disadvantage. Therefore, he was to have the privilege of choosing his own judges first. Naturally he could not choose a person to whom he was in any way related either by blood, friendship, or business connections. The same principle prevailed in Greek procedural law whenever aliens were involved. In Athens, for instance, the alien could choose the jurors provided that he was related to none of them.

We have also seen that the alien could sue in his own name, the name of a third person, or in the name of his community. The same was true in Athens, where the alien plaintiff could plead in his own name, in that of a third person, or in that of his home town. In Rome as well as in Athens, one alien was permitted to represent several alien plaintiffs. And in Athens, as in Rome, the alien could be assisted by a patron.

According to the *lex Acilia* the plaintiff summoned his own witness and collected his own evidence. In doing this he could appeal to the organs of the State for assistance. The same held true for Greek civil procedure. If the summoned witness failed to appear, the plaintiff could collect damages from him or petition the court to fine him. The amount of this fine was determined by law. This makes it obvious that failure to heed such a summons was a wrong committed
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not only against the plaintiff himself, but also against the court and, therefore, against the State. However, the right to summon witnesses, by force if necessary, was in Attica a legal right backed by special laws, while in Roman civil procedure it had to be based on an express order issued by the magistrate presiding at a particular quaestio.

The two phases of the quaestio de repetundis, namely the iudicatio and the litis aestimatio, were also known to Greek law. For in Athens the question of general guilt was separated from the other question which determined the type of punishment or estimated the fine.213 Both in the quaestio de repetundis as well as in Attic law one and the same panel of jurors decided the iudicatio and the litis aestimatio.

The enforcement of the verdict according to the lex Acilia was very much like certain phases of Attic legal procedure in which aliens were involved. In Rome as well as in Attica the alien was assisted by the State in the recovery of damages suffered by him through the acts of a citizen. Thus it was the State, both in Rome and in Athens, which assisted the alien in the recovery of damages from citizens. This procedure was not followed in either Rome or Athens in cases where only citizens were involved in legal controversies. From all this we may conclude that the main legal and procedural innovations of the lex Acilia had in all probability their origin in Attic criminal procedure.

What is of even greater significance perhaps is the fact that an institution somewhat analogous to the Anglo-Saxon jury system existed in a mature form in the ancient world. Although it must be admitted that, so far as we know, this institution of trial by jury was applied only to a specific crime or wrong, and was never extended further in the Roman legal system, nevertheless it speaks well for the flexibility of the Roman legal genius to have employed a

213 We have but to remember the two distinct phases in the famous trial of Socrates as presented by Plato in his "Apology."
procedure generally thought of as unique to the English speaking peoples. It is also interesting to note that there is to be found in the *quaestio de repetundis* a form of action, akin to our action in tort, which employed a trial before a jury rather than merely before the usual Roman magistrate. In any case, the *lex Acilia* is deserving of our attention because it is a noteworthy effort on the part of the Romans to grant the generally exploited and abused alien a fair opportunity to obtain justice in Rome.

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