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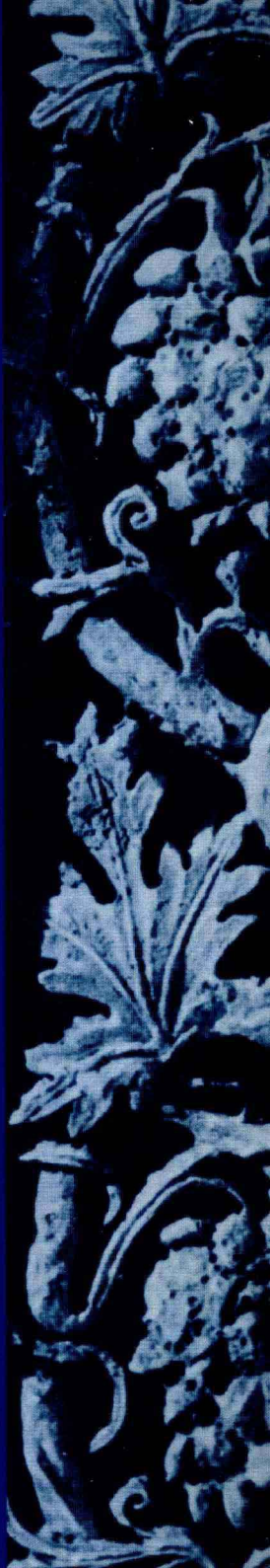
MARCUS TULLIUS CICERO

SPEECHES ON BEHALF OF MARCUS FONTEIUS AND MARCUS AEMILIUS SCAURUS

TRANSLATED WITH INTRODUCTION AND COMMENTARY BY

ANDREW R. DYCK



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Preface

On Behalf of M. Fonteius and *On Behalf of M. Scaurus* comprise early and late Ciceronian pleadings before the extortion court (*quaestio de repetundis*) and provide examples of his art of character-drawing and character defamation as well as his ability to stir powerful emotions. Anglophone readers have, however, not been well served by available texts and exegesis. Perhaps because of their fragmentary state of preservation the two speeches were not included in the survey by MacKendrick 1995 or the sets of speeches translated by Berry 2000 and Zetzel 2009. N. H. Watts's 1931 Loeb edition with facing English translation is available but is less than fully satisfactory. In the defence of Scaurus Watts has made Beier's conjectural supplements seem more authoritative than they are by inserting them (albeit italicized) into the Latin text and including an English version in square brackets; nowadays editors banish them from the text. Moreover, Watts is unreliable on some aspects of background and interpretation, confusing, for example, the discoverers of the Ambrosian and Turin palimpsests (p. 264) and raising the claim that the P. Crassus whose suicide is mentioned at *Scaur.* 1 is the son of the triumvir even though he was still alive when the speech was delivered (p. 270nc). Watts likewise has a shaky grip on legal procedure, remarking apropos of the defence of Fonteius 'for some reason the case was adjourned for a second hearing' (p. 307) as if this were an oddity and not standard procedure in extortion trials of the time. For interpretation of the ethnic stereotypes in both speeches readers can find some help in Vasaly 1993: ch. 6, but for detailed exegesis they have had to have recourse to older publications in foreign languages, namely for *Font.* Clemente 1974 and for *Scaur.* Gaumitz 1879. A new English translation and commentary on these speeches is thus overdue.

It is a pleasure to thank those who have encouraged and forwarded this project. The series editors, in particular Susan Treggiari and Miriam Griffin, as well as the Press's reader, Andrew Lintott, have contributed many suggestions that have improved the MS

throughout; Robert A. Kaster was so kind as to allow maps from his *Speech on Behalf of Publius Sestius* to be adapted for use in the present volume; and Hilary O'Shea and her staff at OUP have been unfailingly helpful at every stage. My greatest debt is indicated in the dedication. I bear sole responsibility for any remaining errors.

A.R.D.

Los Angeles, California

Abbreviations

CAH	*The Cambridge Ancient History.* 2nd edn. 14 vols. Cambridge, 1984–2005
CIL	*Corpus inscriptionum Latinarum.* 17 vols. Berlin, 1863–
ESAR	T. Frank (ed.), *An Economic Survey of Ancient Rome.* 5 vols. + index vol. Baltimore, 1933–40
FGrH	F. Jacoby (ed. and comm.), *Die Fragmente der griechischen Historiker.* Berlin and Leiden, 1923–
gram.	*Grammaticae Romanae fragmenta*, ed. H. Funaioli. Vol. 1. Leipzig, 1907
ILS	H. Dessau (ed.), *Inscriptiones Latinae selectae.* Berlin, 1892–1916
LIMC	*Lexicon Iconographicum Mythologiae Classicae.* 18 vols. Zurich, 1981–99
LTUR	E. M. Steinby (ed.), *Lexicon Topographicum Urbis Romae.* 6 vols. Rome, 1993–2000
MRR	T. R. S. Broughton, *Magistrates of the Roman Republic.* 3 vols. New York 1951–Atlanta, 1986
OCD	S. Hornblower and A. Spawforth (eds.), *The Oxford Classical Dictionary.* 3rd edn. Oxford and New York, 1996
OLD	*Oxford Latin Dictionary.* Oxford 1968
orat.	*Oratorum Romanorum Fragmenta*, ed. H. Malcovati. 4th ed. Turin, 1976
RE	G. Wissowa and W. Kroll (eds.), *Paulys Realencyclopädie der classischen Altertumswissenschaft.* 34 vols. in 68 + index and 15 supplements. Stuttgart, 1893–1980
RLM	K. Halm (ed.), *Rhetores Latini Minores.* Leipzig, 1863
RRC	M. H. Crawford, *Roman Republican Coinage.* 2 vols. Cambridge, 1974
RS	M. H. Crawford (ed.), *Roman Statutes.* 2 vols. London, 1996
TLL	*Thesaurus Linguae Latinae.* Leipzig, 1900–
TLRR	M. C. Alexander, *Trials of the Late Roman Republic, 149 BC to 50 BC.* Toronto, 1990

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General Introduction

1. THE EXTORTION COURT (*QUAESTIO DE REPETUNDIS*): FUNCTION AND HISTORY[1]

The third-century military encounters with Carthage led Rome to acquire her first overseas territories: much of Sicily by the end of the First Punic War (264–41), Sardinia in 227, and Spain established as two provinces in 197 in the aftermath of the Second Punic War (218–202). Though in each case Rome put an administration in place headed by a promagistrate, she was slow to develop a formal system for bringing corrupt provincial governors to book. Thus when in 172 Spanish envoys went to the senate to complain that their people had been plundered and humiliated by several previous governors, a special tribunal was empanelled consisting of five assessors (*recuperatores*) of senatorial rank presided over by the praetor who had been allotted Spain as a province (*MRR* 1, 416). An impressive group of advocates (*patroni*) were found to represent the plaintiffs: M. Porcius Cato, L. Aemilius Paullus, P. Cornelius Scipio Nasica, and C. Sulpicius Gallus. One of the defendants, M. Titinius (pr. 178), was acquitted; the other two, P. Furius Philus (pr. 174) and M. Matienus (pr. 173), went into voluntary exile after the first adjournment of the trial.[2]

In 149 an extraordinary court was proposed to consider charges of misconduct levelled against Ser. Sulpicius Galba in connection with his governorship of Lusitania the previous year; the proposal failed (*TLRR* 1). Perhaps moved in part by that failure, L. Calpurnius Piso Frugi as tribune of the plebs that year carried the first law regulating

[1] The approach taken here has been much influenced by Lintott 1981; dates throughout are BC unless otherwise indicated.

[2] Livy 43.2; for this and other such cases prior to 149 cf. Lintott 1981, 164–72.

extortion.[3] The *lex Calpurnia* established the first standing court (*quaestio perpetua*) at Rome. This court was established, according to C., 'for the sake of the allies' (*Ver.* 2.2.15, 3.127 and 218, 5.126; similarly *Div. Caec.* 17–18). By this enactment the senate recognized that misconduct by public officials in the provinces was an ongoing problem that should be dealt with in a regular forum, rather than on an *ad hoc* basis, as in the past. The procedure was modelled on that of private lawsuits seeking recovery of property or funds (*res* or *pecunias repetere*); hence the name *quaestio de repetundis*, literally 'the court about (funds) to be recovered'. The *lex Calpurnia* called for simple restitution without any additional penalty. The court was to consist of a panel of assessors (*recuperatores*) presided over by the praetor charged with handling disputes between Romans and foreigners (*praetor peregrinus*). The proceedings took the form of a *legis actio sacramento* ('suit by oath') according to which both parties asserted a claim under oath and the court determined which was correct (*iustum*).[4] This form of litigation was otherwise open only to Roman citizens, so it has been questioned whether Piso's law, in fact, benefited Rome's allies;[5] possibly some sort of legal fiction enabled an advocate (*patronus*) to swear on behalf of the allied plaintiff(s); otherwise one would have to assume that the allies still had to obtain authorization from the senate, as the Spaniards had in 172.[6] A *lex Iunia* is known to have intervened between the *lex Calpurnia* and the Gracchan extortion law, but its date and the nature of its modifications of Piso's law remain unclear.[7]

A law recorded on a tablet discovered in Urbino, sometimes called the 'lex Bembina' after Giovanni Bembo, the Venetian merchant and statesman (1473–1545) who was its first owner,[8] evidently represents the next stage of legislation on extortion. On the other side of the tablet is an agrarian law that seems to be identical with the third law

[3] Riggsby 1999*a*, 127, chooses to emphasize that there was no 'immediate triggering event' for Piso's law; while it is true that Galba's murder of some Lusitani and sale of others into slavery would not have fallen within the scope of the *lex Calpurnia*, the situation highlighted the absence of a regular procedure for handling provincials' complaints.

[4] Cf. Rotondi 1912, 292; Berger 1953 s.v. *legis actio sacramento*.

[5] Cf. Richardson 1987.

[6] Cf. Lintott 1992, 15.

[7] It is referred to at lines 23, 74 and (by restoration) 81 of the Urbino law.

[8] On him cf. Ventura and Moretti 1966; the law is also known as the 'lex Acilia' after its presumed sponsor, M'. Acilius Glabrio; see below.

discussed at Appian, *BC* 1.4.27; it is to be dated to 111. The text of the extortion law contains engraving errors at the bottom and was probably turned to the wall and never posted publicly; it will thus be older than the agrarian law.

There now seems to be consensus that the Urbino law represents the Gracchan reform of the extortion process and is likely to be the law carried by the *popularis* tribune M'. Acilius Glabrio to which C. twice refers (*Ver.* 1.51 and 2.1.26). It shows a fundamental rethinking of the whole problem, perhaps spurred by dissatisfaction on the part of the allies, since not a single conviction of a provincial governor in a public extortion trial is attested from 149 to 123.[9] The law removes a conflict of interest that must have been felt by senatorial jurors who might themselves one day face such a court, leverages state power to provide incentives to the prosecutor, and adds a punitive element as a deterrent. The prosecution begins with the laying of information against an individual (*nominis delatio*) before a praetor. The plaintiff can request certain advocates (*patroni*) or reject unsuitable ones. Rewards are made available for the successful prosecutor, such as citizenship (in the case of a non-citizen) or exemption from military service. Though the prosecutor could call as many as forty-eight witnesses and provide documentary evidence to the court, there is no indication that an onsite investigation in the province was available. The trial was divided into two parts, the determination of guilt or innocence (*in iure*) and, in the event of a guilty verdict, the assessment of damages (*litis aestimatio*); the punitive element consists in the exaction of a double penalty, rather than simple restitution, and exclusion from future participation as a juror in this court. The jury was to be non-senatorial (presumably equestrian, though this provision is not preserved) and to consist of fifty members. The compulsory adjournment after the first proceeding (*comperendinatio*), provision for recovery from the final recipient of the money (*quo ea pecunia pervenerit*),[10] and a contest among alternative prosecutors (*divinatio*) are not yet found.[11]

[9] Three acquittals are attested: *TLRR* 8, 9, and 23; in one case the trial was interrupted when the defendant was convicted in a family court presided over by his father and committed suicide (*TLRR* 7).

[10] See below.

[11] For text and commentary cf. Lintott 1992, 73 ff.; *RS* 65 ff.

Riding a tide of reaction against the preceding consulship of the *popularis* C. Marius, Q. Servilius Caepio was elected consul for 106. Called the 'patron of the senate' (V. Max. 6.9.13), he restored senators to the jury panels, probably as one component of mixed juries (Livy's epitomators represented by Cassiod. *chron.* under 106 and Obseq.), rather than as the sole jurors (so Tac. *An.* 12.60).[12] A further innovation of the *lex Servilia Caepionis* is likely to have been the limitation on the allies' choice of prosecutor by the process of *divinatio* in which several prospective prosecutors argued their claims before a jury.[13]

Very different in tendency was the *lex Servilia Glauciae* carried by C. Servilius Glaucia (tr. pl. 101, pr. 100), an associate of the revolutionary L. Appuleius Saturninus. Glaucia's law, probably carried either in 104 or 100,[14] rescinded a provision of Caepio by restoring the juries to the equites. Glaucia's law also provided for the first time for recovery from the final recipient of the money (*quo ea pecunia pervenerit*).[15] A procedural innovation of Glaucia's law was to divide the trial into two sessions (*actiones*) separated by the compulsory adjournment (*comperendinatio* (*Ver.* 2.1.26)), a provision that may in practice have restricted the use of repetition (*ampliatio*) of a pleading when the jury found the case to have been insufficiently clarified. Formal inquiry by the prosecutor in the affected province (*inquisitio*) is known to have been instituted by the time of the mutual prosecutions of Scaurus and Caepio c.92/91 (cf. *TLRR* 96 and 97); this feature, too, is likely to have been added by Glaucia since it is a sharpening of prosecutorial power.

The laws so far discussed provide remedies for Roman allies who complained of misconduct by Roman officials and, beginning with the *lex Acilia*, a criminal penalty for misconduct. Another approach to governance was to provide directives as to permissible conduct. As praetor in Sardinia, Cato the Elder gave an example by curtailing allies' expenditures for the maintenance of the governor and his staff

[12] Cf. Balsdon 1938, 102 ff.

[13] Cf. Lintott 1981, 188.

[14] It has been argued that Glaucia's law may have dated from an earlier tribunate, in 104, because C. Fimbria (cos. 104) was tried by equestrian jurors (*Font.* 26); but the evidence is also compatible with Fimbria's having been prosecuted after a praetorship (prior to 106) under the *lex Acilia*; cf. Lintott 1981, 189 with literature; *TLRR* 61.

[15] *Rab. Post.* 8; the provision was also incorporated into the *lex Cornelia* and *lex Iulia* (see below); C. Rabirius Postumus was alleged to have violated this; cf. *TLRR* 305; Klodt 1992, 52–9; Siani-Davies 2001, 90–1; Alexander 2002, 111–16.

(Livy 32.27.4), and his conduct was evidently the model for the legislation carried *c.*101 by his great-grandson, also named M. Cato, that limited a governor's impositions on the allies (and also his power of intervening in a province not assigned to him).[16] This law, which may have been coordinated with Caepio's as part of the same legislative programme, is the precursor of the elaborate rules for gubernatorial conduct embodied in the *lex Iulia* (59).

Sulla restored senatorial juries to all the standing courts (*quaestiones perpetuae*), including that for extortion, presumably in a separate *lex Cornelia* governing each.[17] He retained the competition among prospective prosecutors (*divinatio*), the prosecutor's onsite investigation in the province (*inquisitio*), the compulsory adjournment (*comperendinatio*), and the possibility of demanding restitution from the final recipient (*quo ea pecunia pervenerit*). The evidence also suggests that under the Sullan extortion law the charge could rise to a capital level (though it did not need to do) and could include the taking of bribes by a juror.[18] A *lex Aurelia* of 70 modified Sulla's provisions by revising the jury rolls of all the standing courts, the extortion court included, in such a way that they henceforth consist in equal parts of three groups, the senators, the equites, and the *tribuni aerarii*, a group with the same property qualification as the equites.[19] Fonteius was tried under the *lex Cornelia* so modified (cf. 36n.).

Julius Caesar's consular law of 59 represents the final stage of Republican legislation on extortion. The *lex Iulia* continues and adds detail to restrictions on governors' conduct of office initiated in the *lex Porcia* and further elaborated in the *lex Cornelia de maiestate*:[20] the governor could not enter another province or an allied kingdom without senatorial permission; was restricted in his requisitions of grain, money, and other commodities; had to respect privileges and immunities that the senate had granted to individuals or groups; and had to deposit copies of his accounts in two cities in the

[16] There appears to be a reference to this law at col. III lines 4–5 of the Cnidos inscription published by Hassall *et al.* 1974, 202, as well as in the Antonian law about the citizens of Termessus (*RS* p. 334, ll. 16–17).

[17] For his extortion law cf. Rotondi 1912, 360.

[18] Cf. the detailed argument from *Clu.* 115–16 at Lintott 1981, 198–201; it is possible that Caepio was the first to include these provisions; for the taking of bribes cf. also *Dig.* 48.11.7 (*lex Iulia*).

[19] Rotondi 1912, 369; Berger 1953 s.v. *tribuni aerarii*.

[20] On this cf. Rotondi 1912, 360; *Dig.* 48.11.

province and with the urban quaestor at Rome upon his return. There were likewise new procedural rules: the maximum number of witnesses to be called by the prosecution was raised to 120 (from 48), the number of assistants who could accompany the prosecutor to the province was restricted and documentary evidence gathered was to be deposited with the praetor and sealed with the jurors' seals. Brutality (*saevitia*) was probably proscribed in some form, though the provision is not directly attested.[21] Scaurus' trial was conducted under this law.

In 4 BC the *senatusconsultum Calvisianum* added an alternative, expedited procedure for provincials seeking only simple restitution without criminal penalties. It harked back to the procedure used to deal with the Spaniards' complaints in 171: the injured party or parties would apply directly to the senate, which would appoint a board of five senatorial assessors (*recuperatores*) with instructions to complete the process within thirty days.[22]

With the *senatusconsultum Calvisianum* granting the allies a tool for redressing their grievances, the Romans returned to their original aim in dealing with extortion by officials in the provinces. In the interim the extortion court had become a football in the political struggle between the equites and the senate and a vehicle for imposing strict standards of conduct on provincial governors; these developments had entailed some marginalization of the provincials even though their complaints continued to form the starting point for litigation.

2. A NOTE ON THE TRANSLATIONS

Effective rhetoric in a Roman court of the first century BC is very different from that of an anglophone court of the twenty-first century. One can move all the words across the linguistic divide but yet lose the effect. C. plays the Latin language as a virtuoso does an instrument, with supreme mastery of all its various registers and resources; no translator can begin to approximate the many shadings

[21] It was an item in the prosecution of Scaurus (cf. F 7n) and in extortion trials under the Empire; cf. Lintott 1981, 205; Henderson 1951, 74–5; Riggsby 1999*a*, 125.

[22] Cf. Lintott 1981, 206 with literature.

and subtleties, the coordinated effects of diction, figures of speech, word order, and rhythm. I have tried to approximate the sense in a fairly standard mid-Atlantic English and produce a version that can be read on its own, not merely a crib for readers of the Latin text. But the commentary must be consulted about the special qualities of the Latin since they are often difficult or impossible to represent in English.