

The Trial of C. Rabirius  
in 63 B.C.

In 63 B.C. the tribune T. Labienus accused C. Rabirius of *perduellio* or high treason for the murder of L. Appuleius Saturninus<sup>(1)</sup>. The prosecution was an attempt to discredit the *senatus consultum ultimum*, the right claimed by the state to defend itself against rebellious citizens but exploited by the senate in its struggles with its *popularis* enemies. Instead of an accusation before a *quaestio* or a tribunician action before the centuries Labienus at first revived the antiquated proceedings of the *duumviri perduellioni iudicandae*<sup>(2)</sup>. This has given the trial the appearance of a farce, and moderns have never taken it as seriously as Cicero<sup>(3)</sup>. But if it had suc-

(1) It is unlikely that Rabirius, or any one person, killed Saturninus, who was stoned to death with the tiles from the roof of the Curia (APPIAN, *BC*, I, 145; FLORUS, II, 4, 6). He may have vented his spleen upon the corpse (*Vir. ill.*, 73, 12: *caput eius Rabirius quidam senator per conuicta in ludibrium circumtulit*), but this rings of political slander. See VON DER MUHLL in PW, *RE*, s.u. *Rabirius* (5), col. 24-25.

(2) This is Mommsen's (*St. R.*<sup>3</sup>, II, p. 217 and note 4) reconstruction from LIVY, I, 26, 6. The commonly used expression, *duumviri perduellionis*, is not found in the sources.

(3) Cf. M. CARY in *CAH*, IX, p. 489: "Moreover Caesar, whose instincts of showmanship here got the better of his discretion, gave the proceedings a dramatic turn which in effect reduced them to a farce".

The following works, which are a selection from the extensive literature on the trial, will be cited in abbreviated form.

- A. BOULANGER, *Cicéron Discours. Sur La Loi Agraire pour C. Rabirius*, Paris, 1932.  
C. BRECHT in PW, *RE*, s.u. *perduellio*, col. 615-39.  
C. BRECHT, *Perduellio*, München, 1938.  
E. CIACERI, *Cicerone e i suoi Tempi*, vol. I, Milan, 1939, p. 218-37.  
A. H. J. GREENIDGE, *The Legal Procedure of Cicero's Times*, Oxford, 1901.  
E. G. HARDY, *Some Problems in Roman History*, Oxford, 1924, p. 99-125.  
E. HUSCHKE, *Die Multa und das Sacramentum*, Leipzig, 1874, p. 512-32.  
E. MEYER, *Caesars Monarchie und das Principat des Pompejus*<sup>3</sup>, Stuttgart, 1922, p. 549-63.  
Th. MOMMSEN, *Römisches Staatsrecht*, Leipzig, 1887, rept. 1952, II, p. 615-18.  
J. L. STRACHAN-DAVIDSON, *Problems of the Roman Criminal Law*, Oxford, 1912, I, p. 180-204.

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ceeded, the duumviral procedure would have shackled the ultimate decree as a political weapon. As it was, it brought vividly before the people the enormity of executing citizens without a trial.

Dio and Suetonius name Caesar as the force behind the prosecution. Their identification may be accepted to the extent that Caesar probably conceived the revival of the procedure and acted willingly as a *duumvir* (4). The power in the background, however, was Pompey, with whom Labienus and Caesar were cooperating at this time (5). In 63 Caesar was a politician of promise: he had the wit to fashion but not the following to carry out his extravagant plan.

The prosecution opened, according to Dio (XXXVII, 27, 1), with violent disputes in the senate whether the court should convene. Caesar's party won, and immediately another clash ensued concerning the judgment. C. and L. Caesar had been chosen *duumviri* by the praetor (6). C. Caesar condemned Rabirius, who then appealed to the centuriate assembly. He would have been convicted, had not the augur and praetor, Q. Metellus Celer, forestalled the voting by lowering the flag on the Janiculum, thus indicating that the sentries were no longer at their posts, and further business was forbidden (7). Labienus, although it was his right, did not resume the prosecution.

Suetonius (*Iul.*, 12) adds that C. Caesar was chosen by lot to judge Rabirius, that is, the lot fell to Gaius, not Lucius, to pass sentence. Caesar condemned him so eagerly that his own fierceness was the greatest advantage for the appellant. Unlike Dio, Suetonius suggests that Rabirius would have been acquitted, if the comitia had voted (8).

(4) DIO, XXXVII, 26-27; Suetonius, *Iul.*, 12. H. STRASBURGER (*Caesars Eintritt in die Geschichte*, München, 1938, rept. 1966, p. 119-20), on the other hand, thought that the extent of Caesar's role has been exaggerated. Perhaps Caesar was inspired to the unusual manner of the prosecution by his interest in ancient *caerimonia* (W. W. FOWLER, *An Unnoticed Trait in the Character of Julius Caesar* in *CR*, 30, 1916, p. 68-71). It is unlikely that the procedure was an invention, as Miss Taylor (*Roman Voting Assemblies*, Ann Arbor, 1966, p. 102) suggested, since Cicero accepted it as ancient. There would have been no reason for him to keep silent, if the procedure lacked juristic authenticity.

(5) R. SYME, *The Allegiance of Labienus* in *JRS*, 28, 1938, p. 116-18; L. R. TAYLOR, *Caesar and the Roman Nobility* in *TAPA*, 73, 1942, p. 14-20.

(6) The identity of this praetor is unknown. Q. Metellus Celer is usually suggested; however, see below, Meyer (p. 560, n. 1) believed that it was L. Valerius Flaccus.

(7) DIO, XXXVII, 27, 3-28, 3. Flag: LIVY, XXXIX, 15, 11; GELL. XV, 27; MOMMSEN, *St. R.* 3, 3, p. 387, n. 4.

(8) Suetonius, *Iul.*, 12: *sorte iudex in reum ductus*, as interpreted by Meyer (p. 560, n. 1) and Ciaceri (I, p. 231). Suetonius' account is corrupted by the use of the legal phrase *diem dicere*, which implies that Caesar caused Labienus to summon Rabirius before his tribunal (T. R. HOLMES, *The Roman Republic and the Founder of the Empire*, Oxford, 1923, I, p. 452, n. 1).

The only other instances of the duumviral procedure in the sources are the trial of the Alban victor and sororicide, P. Horatius, during the kingship of Tullus Hostilius (Livy, I, 26) and that of M. Manlius Capitolinus in 384 B.C. (Livy, VI, 20). The latter, too brief to show more than the existence of the procedure during the fourth century, is corrupted by being treated also as a tribunician accusation (9). The story of Horatius Livy tells as follows: Horatius killed his sister for mourning her betrothed, who was an enemy of the state (I, 26, 2-4) (10). He was brought before the king, who, to avoid the enmity of pronouncing and executing an unpopular decision, said (I, 26, 5): *Duumuiros, qui Horatio perduellionem iudicent, secundum legem facio*. If the *duumviri* found him guilty, he could appeal, in which case there would be a contest before the people between the magistrates and Horatius. Should the former prevail, then would be pronounced the sentence (I, 26, 6):

*Caput obnubito; infelici arbori reste suspendito;  
uerberato uel intra pomerium uel extra pomerium.*

Such was the text of the *lex horrendi carminis*, by whose terms the *duumviri* were appointed. One of them condemned Horatius; in fact, Livy says, they thought that the law precluded the acquittal of even an innocent man (11). But at the king's suggestion Horatius appealed and was pardoned by the people.

Because Labienus had resurrected the duumviral proceedings, according to Cicero (15), *ex annalium monumentis atque ex regum commentariis*, the trial of Horatius is usually considered to have provided the model for the accusation of 63 (12). *Prouocatio ad populum*, essential to both accounts, and Cicero's quotations from the *lex* (13) are taken to support this assumption. The context on appeal therefore must have taken place between Rabirius' advocates and the *duumviri*.

(9) Livy knew of a version with *duumviri* (VI, 20, 12: *sunt qui per duumuiros, qui de perduellione auquirent creatos, auctores sint damnatum*), but preferred the tribunician version (VI, 20, 1; 20, 12). Evidence of the duumviral proceedings is also preserved in GELLIUS, XVII, 21, 24: *ut Cornelius autem Nepos scriptum reliquit, uerberando necatus est (Capitolinus)*. Scourging was the form of execution used by the *duumviri* (below, p., n. 15). See BRECHT, *Perduellio*, p. 153.

(10) The grounds for the charge of *perduellio* are not clear, since the murder of a sister is *parricidium*. The relationship of *perduellio* to the story of Horatius is much discussed. See R. M. OGILVIE, *A Commentary on Livy*, Oxford, 1965, ad I, 26 for bibliography.

(11) I, 26, 7: *hac lege duumviri creati, qui se absoluere non rebantur ea lege innoxium quidem posse*.

(12) MOMMSEN, *St. R.* 3, II, p. 615, n. 2; *Strafr.*, p. 155, n. 1; HUSCHKE, p. 515; GREENIDGE, p. 355; HARDY, p. 112; HOLMES (above, n. 8) I, p. 250; MEYER, p. 556; BOULANGER, p. 124-25; BRECHT in *RE s.u. perduellio*, col. 635 and *Perduellio*, p. 170; J. VAN OOTEGHEM, *Pour une Lecture candide du Pro C. Rabirio* in *LEC*, 32, 1964, p. 240.

But Cicero's speech does not bear out this conclusion. His boasts in chapters 10 and 17, that he had crushed the duumviral proceedings, indicate that the trial for *perduellio* was finished. Moreover it appears from chapter 8 that Cicero was speaking in a tribunician accusation in which conviction carried the imposition of a fine<sup>(13)</sup>. This would explain why Labienus, not a *duumvir*, is mentioned throughout Cicero's speech as the prosecutor, and how Labienus could limit Cicero's speaking time. The tribune could preside over the tribes, where cases involving a fine over 3020 asses were heard<sup>(14)</sup>. This assembly met in the forum, where from his allusion (25) to Labienus' display on the Rostra of Saturninus' death mask, Cicero seems to have been speaking. Hence Rabirius is nowhere threatened with the punishment for *perduellio*, scourging<sup>(15)</sup>, but rather with infamy and exile, the consequences of failure to pay an exorbitant fine.

Because of these inconsistencies with the procedure described by Livy, Mommsen followed Niebuhr in rejecting Dio's claim that Labienus did not renew his accusation. He attributed Cicero's speech to a trial concerning a fine, undertaken after the failure of the prosecution for treason<sup>(16)</sup>. This theory has not found favor with most scholars, who attempt to explain the

(13) This theory depends upon the interpretation of *eadem* in *Rab. perd.*, 8. Before discussing the death of Saturninus, Cicero passed briefly over a list of charges brought against Rabirius by former accusers and raked up by Labienus (7-8). The last of these was a charge of immorality, about which Cicero asked (8):

*Nam quid ego ad id longam orationem comparem quod est in eadem multae inrogatione praescriptum hunc nec suae nec alienae pudicitiae peperisse?*

*Eadem* is taken to refer to the charges just listed, including that of immorality, as well as the present charge of murdering Saturninus (HUSCHKE, p. 515-16).

(14) Prosecutor: *Rab. perd.*, 4: *rem ... a tribuno pl. susceptam*; 6: *accusatoris conditioni*; 11; 12; 17; 20; 21; 23-25; 28; 30. Limitation: 6; 9; 38. Fine: MOMMSEN, *St. R.*, III, p. 353. When the tribune presided over the tribes, the assembly was properly a *concilium plebis*; with a consul or praetor presiding, it was called the *comitia tributa*.

(15) W. A. OLDFATHER (*TAPA*, 39, 1908, p. 49-72) has shown that the *carmen* (LIVY, I, 26, 6) specified scourging, not hanging or crucifixion. The phrase, *infelici arbori reste suspendito*, means "hang or fasten him with a rope on (or to) a tree", not "from a tree", where *arbori* is locative. The ablative with or without a preposition is the only construction used with *suspendere* to express "to hang from" (53-54).

(16) B. G. NIEBUHR, *M. Tulli Ciceronis pro M. Fonteio et pro C. Rabirio fragmenta*, Rome, 1820, p. 69-70; MOMMSEN, *St. R.*, II, p. 298, n. 3; 615, n. 2; *Strafr.*, p. 588, n. 1; p. 589-90 and n. 1. They were followed by HUSCHKE (p. 516; 527-28), upon whom Heitland in his edition of Cicero's speech (Cambridge, 1882) depended heavily (see p. 33-39), and by Gelzer (*RE*, s.u. *Tullius* (29), col. 870-72). Mommsen (*St. R.*, II, p. 298, n. 3) derived the words of the title, *perduellionis reo*, from *Pis.*, 4 (quoted below, p. n. 33), a scribe's embellishment upon the simple *pro Rabirio* of *Att.*, II, 1, 3 (HUSCHKE, p. 526).

inconsistencies without sacrificing Dio<sup>(17)</sup>. But however distinct their explanations, they are alike in accepting the story of Horatius as the precedent and model for the trial of 63. Here Mommsen's influence is most strongly felt. He held the *lex perduellionis*, in the form which Livy had received from the annalistic tradition, to be a valid formula for the duumviral procedure of the early Republic. *Prouocatio* was therefore an essential element from the outset; dependent upon the king's consent in the regal procedure, it was stipulated by law in the Republican. In accordance with its terms *duumviri* were appointed, at first by the king and then by the consuls, to judge cases of treason. Their appointment later passed to the people<sup>(18)</sup>. In each instance the purpose was the same: to allow appeal from an authority whose direct decision could not be overridden by an assembly<sup>(19)</sup>. By defending their verdict on appeal, the *duumviri* functioned as judicial magistrates and did not merely condemn, as Livy implied<sup>(20)</sup>.

Investigations into Mommsen's conception of Roman criminal law, however, have called his reconstruction of the duumviral procedure into question<sup>(21)</sup>. It is unlikely that the *duumviri* were judges or that they were

(17) Although alike in accepting Dio, these scholars differ in their interpretation of *Rab. perd.*, 10 and 17 and in how the trial for *perduellio* before the centuries came about. Regarding chapters 10 and 17 it is suggested that Cicero intervened to crush 1) the duumviral proceedings completely (HARDY, p. 118-19; HOLMES, n. 8, I, p. 251, 454; J. LINGLE, *Die staatsrechtliche Form der Klage gegen C. Rabirius* in *Hermes*, 68, 1933, p. 339-40), or 2) only the form of the punishment, changing it to a fine (MEYER, p. 554-56, 560-61) or to *aquae et ignis interdictio* (GREENIDGE, p. 355; CIACERI, I, p. 225, 230; BRECHT in *RE*, s.u. *perduellio*, col. 636), or 3) to prevent Rabirius' arrest and execution after he had been condemned (BOULANGIER, p. 128; VAN OOTEGHEM (above, p., n. 12, p. 241). In cases 2) and 3) the trial before the centuries thus came about as the result of Rabirius' appeal from the duumviral sentence. In the first instance, Labienus either converted a pecuniary accusation involving minor charges into a capital impeachment (Hardy and Homes) or brought a new tribunician accusation.

(18) According to Mommsen, the election of *duumviri*, although the prerogative of the comitia, could be accomplished by their representative (*St. R.*, II, p. 616-17). Since they were not a permanent magistracy, a special law was required in each case, which permitted variations in the manner of their appointment (*Strafr.*, p. 154, 587).

(19) MOMMSEN, *St. R.*, II, p. 615 and n. 1.

(20) MOMMSEN, *St. R.*, II, p. 617 and n. 5, referring to LIVY, I, 26, 7 (quoted above, p., n. 11). Cicero's insistence that they merely condemned (12: *indicta causa ciuem Romanum capitis condemnari coegit*) he called "eine advocatistische Flause" (*Straf.*, p. 155, n. 1), a pretense to discredit Caesar (*St. R.*, II, p. 617, n. 5).

(21) This research has shown that the comitial process in the pre-Sullan period was not a two stage process, as Mommsen imagined. The magistrate did not pronounce in an earlier trial a decision which he then defended as prosecutor before a comitia summoned by the defendant's *prouocatio*. He was rather an investigator in the preliminary stages, after which he proposed a penalty. He then came before the assembly as a prosecutor. For these researches, see W. KUNKEL, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, *Abh. bayerisch. Akad. d. Wissensch.*, N.F. Heft 56, München, 1962, and a brief statement in a review of Kunkel by P. A. BRUNT in *Rev. d'hist. du droit*, 32, 1964, p. 440-49.

empowered to acquit. They were rather an ad hoc board appointed in cases where the defendant's guilt was beyond doubt<sup>(22)</sup>. They did not indict Horatius or weigh the evidence against him in preliminary inquiries (*anquisitio*). They merely declared him guilty of *perduellio*, which is the meaning of *duumviri ... perduellionem iudicent*<sup>(23)</sup>. One pronounced the verdict; the other carried out the punishment. Since the trial of Rabirius did not reach the latter stage, we hear only of C. Caesar.

Secondly, there is no place in the procedure for the operation of *prouocatio*. A contest on appeal could have taken place only between the *duumviri* and Horatius. It consisted of a vote by a comitia whether to annul or endorse a magistrate's verdict and was fought in effect between the validity of the sentence and the justification of the appeal<sup>(24)</sup>. The hearing of witnesses and speeches of the litigants belonged to the investigations before sentencing. *Si uincent* (Livy, 1.26.6) can only mean "if the duumviral verdict be approved". But the *duumvir* did not hand down a sentence, the justice of which was open to doubt; he voiced the condemnation of a manifestly guilty person. The duumvirate therefore by its nature excluded appeal.

Nor was *prouocatio* part of the trial in 63, as is shown by Cicero's ironic taunts of Labienus as a *popularis* in chapters 10-17. This section will be examined more closely; it suffices here to mention chapter 12. Cicero has just given what became the *locus classicus* for the *lex Sempronia de capite ciuis* of 123 B.C.: that no Roman citizen may be tried on a capital charge without authorization by the people (*iniussu uestro*)<sup>(25)</sup>. He then reproaches Labienus:

(22) C. BRECHT, *Zum römischen Komitialverfahren* in *Zeitschr. Sav. St.*, 59, 1939, p. 311-13; J. BLEICKEN, *Ursprung und Bedeutung der Provocatio* in *Zeitschr. Sav. St.*, 76, 1959, p. 340; HARDY, p. 113; MEYER, p. 561 and 588.

(23) BLEICKEN in *Zeitschr. Sav. St.*, 76, 1959, p. 335. Livy's statement, that the *duumviri* did not think that they could acquit even an innocent man, preserves an awareness of this function in his sources. It is incompatible with the rest of his account of Horatius and may be compared with LIVY, VI, 20, 12 (quoted above, n. 8). Each statement alludes to an alternative version which Livy knew but was not following.

(24) BLEICKEN in *Zeitschr. Sav. St.*, 76, 1959, p. 335.

(25) C. *Gracchus legem tulit ne de capite civium Romanorum iniussu uestro iudicaretur*. Also CICERO, *Cat.*, 4, 10 and PLUTARCH, *C. Gracch.*, 4, 1. This law, as it is now interpreted, prohibited the institution of special courts in capital cases except by a law or plebiscite of the people (KUNKEL, above, p., n. 21), p. 28, n. 89). AS E. GRUEN, *Roman Politics and the Criminal Courts, 149-78 B.C.*, Cambridge, 1968, p. 82) has pointed out, this explanation is in better accord with the historical context of 123 B.C. The law was intended to make possible the punishment of the consuls of 132. Had it required, on the other hand, a comitial trial in capital cases, this purpose would have been frustrated, since Gracchus' enemies would have probably prevented completion of the trial.

*hic popularis a Iuvis iniussu uestro non iudicari de ciue Romano sed indicta causa ciuem Romanum capitis condemnari coegit.*

"This man of the people did not force a trial of a Roman citizen to be instituted by *duumviri* without your sanction; no, he forced a Roman citizen to be condemned without a hearing of his case". That is, C. Caesar merely pronounced Rabirius guilty of treason<sup>(26)</sup>. Livy's account of Horatius, in which *prouocatio* is so prominent, could not have been the pattern for the trial of Rabirius. Moreover the *lex horrendi carminis* is not likely to be a formula for a procedure dating before 300 B.C.

*Prouocatio* was a Republican institution, and no one now places its origin in the regal period<sup>(27)</sup>. But it was not a feature of the early Republican constitution, as the annalists believed. It grew up during the struggle between the orders as a political device to protect the plebeian from the *coercitio* of a patrician magistrate. *Prouocatio* at first was no more than the "call for help" to one's fellows and probably did not become a legal right until 300 B.C.<sup>(28)</sup>. Cicero's quotations from the *lex*, confined, as were Labienus', to the odious terms of the punishment, furnish no proof for the existence in 63 of the first part of the law. The impersonal imperatives of the second part, on the other hand, are common in ancient statutes and are found in the Twelve Tables, which prescribe scourging as the capital penalty<sup>(29)</sup>. The preservation of the formula in an ancient law would explain how Caesar and Cicero knew of the procedure. The procedure may be as old as the Twelve Tables<sup>(30)</sup>, but its inclusion in the *regum commentarii* (15) does not in-

(26) BLEICKEN in *Zeitschr. Sav. St.*, 76, 1939, p. 339, n. 36, pointed out that Suetonius' intimation (*Iul.*, 12) of Rabirius' acquittal from Caesar's sentence shows his superficial knowledge of the character of the *duumviri*. Suetonius did not realize that Caesar passed sentence without trying the case, and so he spoke of Caesar's haste and fierceness in condemning Rabirius (HARDY, p. 113).

(27) E. S. STAVELEY, *Provocatio during the Fifth and Fourth Centuries B.C.* in *Historia*, 3, 1955, p. 414. See also KUNKEL (above, p., n. 21), p. 24-33 for *provocatio*.

(28) STAVELEY, p. 414-16. BLEICKEN in *Zeitschr. Sav. St.*, 76, 1959, p. 345-56, especially 350.

(29) Imperatives: D. DAUBE, *Forms of Roman Legislation*, Oxford, 1956, p. 57-61. Scourging: Twelve Tables 8, 9 (BRUNS, *Fontes* 31). The language of the first part, on the other hand, is proper for an ancient law in the late Republic (BLEICKEN in *Zeitschr. Sav. St.*, 76, 1959, p. 334). The unexpressed subject in *si prouocarit*, where a later law would have *si quis prouocarit*, is a feature of the XII Tables (DAUBE, p. 60).

(30) The *decemviri* may have formulated the procedure in 451-50 B.C., but the magistrate was still free to disallow it (STAVELEY in *Historia*, 3, 1955, p. 421, who kept *prouocatio* as an integral part of the duumviral procedure from its inception). The expression, *uel intra pomerium uel extra pomerium*, places the terms of the punishment during the class struggle, since it presupposes that magisterial power within the *pomerium* was already limited in some way (LATTE in PW, *RE*, s.u. *Todesstrafe*, Suppl. 7, col. 1614).

dicate a greater antiquity. This section (10-17) teems with the political slogans from the struggle between the Optimates and Populares. *Regnum* and related words in this context do not refer to a monarchy or a period in history but to a power or privilege, which, though legal, was yet incompatible (*importunus*) with the spirit of the Republic<sup>(31)</sup>. Cicero expresses its connotation more fully with *illa crudeli, importuna, non tribunicia actione sed regia* (17), where *regia* summarizes the preceding adjectives.

The course of the prosecution may now be outlined. It began with Labienus' assertion<sup>(32)</sup> in the senate that Rabirius' guilt in the murder of the sacrosanct tribune was so evident that it warranted the appointment of *duumviri perduellionis*. This provoked the debate *περὶ τοῦ δικαστηρίου*. Caesar, backed by Pompey's supporters, prevailed, and he and his cousin, Lucius, were named by the praetor. The lot fell to Caesar to pronounce the condemnation. Cicero intervened, however, before its execution and crushed the judgment and with it the duumviral proceedings<sup>(33)</sup>. This happened in the struggle *περὶ τῆς κρισέως*. Labienus then renewed the prosecution as a tribunician action for *perduellio* before the centuriate assembly. To one of the *contiones* belong Labienus' display of Saturninus' death mask, the hearings of witnesses and Hortensius' defense of Rabirius. Cicero delivered his speech in the final *contio* on the day of the voting (5 ; 35). This explains how Labienus was able to limit his time to thirty minutes. But before the comitia could vote, Metellus Celer disbanded the assembly by lowering the flag on the Janiculum<sup>(34)</sup>.

(31) CH. WIRZUBSKI, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate*, Cambridge, 1960, p. 64; W. ALLEN, JR., *Caesar's Regnum* (SUET., *Iul.*, 9.2) in *TAPA*, 84, 1953, p. 227-36.

(32) It is not known how Labienus initiated the duumviral proceedings. See STRACHAN-DAVIDSON, I, p. 196 on the vagueness of the preliminary proceedings. Mommsen (*St. R.*, II, p. 616, n. 4), from no ancient authority, assumed that Labienus proposed a plebiscite which provided for the details of the procedure. His suggestion is unlikely in view of the interpretation of CICERO, *Rab. perd.*, 12 given above, page 290.

(33) From CICERO, *Pis.* 4 (*ego in Rabirio perduellionis reo XL annis ante me consulem interpositam senatus auctoritatem sustinui contra invidiam atque defendi*) the method of intervention was probably a decree of the senate (HARDY, p. 116). A consul's *maior potestas* over the *duumviri* and a tribune's veto have also been suggested. *Eadem* (*Rab. perd.*, 8), as often noted, does not refer to the present charge, as proponents of Niebuhr's theory of a pecuniary trial believe (above, p., n. 12 and 15). More likely it refers to an earlier prosecution involving a fine for detaining the slaves of others and for scourging Roman citizens, to which had been added a charge of immorality (BOULANGER, p. 126-27; CIACERI, I, p. 225-26).

(34) After the final *contio* Labienus' charge was submitted to the assembly, which was conducted by a praetor, and not by Labienus with borrowed auspices (TAYLOR (above, n. 4), p. 100-2).

Labienus could claim reasons of *inimicitiae* impelled him to prosecute Rabirius. His uncle was killed with Saturninus (2 ; 18-20). But, as Cicero said<sup>(35)</sup>, this was not the reason for the accusation. It was an attack upon the *senatus consultum ultimum*, not upon its validity or the senate's right to pass the measure<sup>(36)</sup>, but rather upon its use in the senate's interests to cloak political murders. The issue surrounding the *senatus consultum ultimum* concerned the right, assumed by the magistrates during the aftermath of the revolt, to put to death citizens who were no longer engaged in active hostilities. According to the opponents of the decree, once the crisis had passed, a rebellious citizen ceased to be a public enemy and became a criminal, subject to due process. They distinguished between its use as martial law and its exploitation as a political weapon by the senatorial party. The death of overt insurgents alone was justified by martial law; otherwise, the principles of arrest and trial could not lawfully be overridden<sup>(37)</sup>. This distinction Cicero tried to conceal by misrepresenting the accusation as an attack upon the right of the state to defend itself (2-3 ; 34), which was never questioned. But it was to his advantage to confuse the exigencies of state with the infighting of the senatorial aristocracy.

The death of Saturninus provided Labienus with a pretext. The tradition concerning his end was distorted, probably soon afterwards, by party bias seeking to exonerate the nobility from the results of the ultimate decree. The decree was not mentioned, and thus Saturninus became a casualty of open warfare against Marius, his former ally and now willing enemy<sup>(38)</sup>. But

(35) *Rab. perd.*, 2-3 ; *Orat.*, 102 (quoted below, n. 42). The personal motive of vengeance upon Rabirius probably was the reason that Labienus was chosen to conduct the prosecution.

(36) There was no way to challenge the senate's right to advise the magistrates. Its advice, however, did not increase their powers nor release them from any legal restraint. For the s.c.u., see G. PLAUMANN, *Das sogenannte Senatus Consultum Ultimum, die Quasidiktatur der späteren römischen Republik in Klio*, 13, 1913, p. 321-86 ; H. LAST in *CAH*, IX, 82-89 ; A. W. LINTOTT, *Violence in Republican Rome*, Oxford, 1968, p. 149-73, especially 168-69.

(37) These were the arguments, as Wirzubski (above, n. 31) 58-60 noted, for and against the actions of the consul L. Opimius, who augmented the s.c.u. in 121 B.C. against C. Gracchus and his followers (CICERO, *de Or.*, II, 106 ; 132 ; 134 ; *Part. Or.*, 106). Gracchus and many supporters were killed in the storming of the Aventine, but many others were arrested and later, at Opimius' orders, put to death without a trial. Opimius was prosecuted the following year by the tribune P. Decius, but was acquitted, which established the constitutional validity of the decree (MOMMSEN, *St. R.*, III, 1242, n. 2). For sources, see BROUGHTON, *MRR*, I, p. 520 and 524. *Popularis* politicians never recognized the legality of these and similar executions (cf. SALLUST, *Iug.*, 16, 2). Its use by the *popularis* senate in 83 B.C. (IUL. EXUP. 7) proves no more than the awareness of its political value.

(38) LIVY, *per.* 69 ; FLORUS, II, 4, 4-6 ; OROSIUS, V, 17, 5-9. The account of Marius' exploits began with the memoirs of his most uncompromising enemies, M. Aemilius Scaurus, P. Rutilius Rufus, Q. Lutatius Catulus and Sulla. Their distortions were subsequently formed by the Sullan annalists into a literary tradition of far-reaching influence. For the sources for Marius' life, see T. F. CARNEY, *A Biography of Marius in Proc. Afr. Class. Ass.*, Suppl. I, Assen, 1961, p. 2-7.

there was another account, that he perished while an unarmed prisoner in the Curia. He had surrendered to Marius and was placed there under a pledge of public safety (39). This version Labienus adopted (28). Saturninus' death, Labienus could then argue, was a breach of the consul's protective custody. Rabirius had not killed an enemy; he had murdered a Roman citizen, whom the laws guaranteed a trial and appeal to the people.

Cicero's defense assumed that Saturninus died while a *hostis* of the Roman people, and thus his murder was a deed of glory. Hortensius had proved that a slave killed him (18), so Cicero could claim only that Rabirius had taken up arms for that purpose. If it was legal to be in arms against Saturninus, he contended, it was legal to have killed him (18-19). Secondly, he argued that the senate alone could grant public protection: even so, if Marius did pledge it, then Marius, not Rabirius, violated it (28).

His first argument is valid only if Saturninus was under arms when he died, but Cicero gives no details of the circumstances of his death (40). The second argument, however, is damaging to his own case, because it admits the prosecution's claim that Saturninus was a prisoner when he was murdered. Cicero puts himself in the position of asserting that the *senatus consultum ultimum* authorized Marius to kill rebellious citizens but not to spare them when they were no longer a threat (41). Little wonder that Cicero needed the fire of rhetorical embellishment (42).

But Labienus did not have in mind merely to expose the illegalities sanctioned by the ultimate decree in 100 B.C. At the least he sought to give warning against its passage in 63. This was surely his object in the tribunician accusation undertaken after the failure of the earlier attempt. His first assault, however, had it succeeded, would have dealt a mortal blow. Henceforth a magistrate who killed or failed to prevent a henchman from killing a Roman citizen in any circumstances save armed conflict would automatically be guilty of treason. There would be no opportunity for defense: punishment would follow immediately upon pronouncement of condemnation. This would hold true even if Rabirius had escaped through

(39) APPIAN, *BC*, I, 144; PLUTARCH, *Mar.*, 30, 3; FLORUS, II, 4, 6.

(40) *Rab. perd.*, 19. Cicero avoided such embarrassing matters. The lacuna after 19 probably contained an account of Saturninus' actions before the passing of the *s.c.u.* (A. PASSERINI, *Caio Mario come uomo politico* in *Ath.*, 12, 1934, p. 286).

(41) *Rab. perd.*, 28, as interrupted by HARDY, p. 108. Cicero's discomfiture, although proving only Labienus' adoption of the story, is a strong indication for its truth, since elsewhere, even in the present speech (27, 29), he is very deferential to Marius (PASSERINI in *Ath.*, 12, 1934, p. 290).

(42) CICERO, *Orat.* 102: *ius omne retinendae maiestatis Rabirii causa continebatur; ergo in ea omni genere amplificationis exarsimus.*

voluntary exile. With this possibility before him a magistrate would be reluctant to implement the decree or, if he did so, would quickly disclaim any connection with the aftermath of the crisis. No pretense of legality would remain for the political assassinations perpetrated in the senate's behalf.

The duumviral proceedings, by permitting the execution of citizens without a law or plebiscite, resembled the authority assumed under the *senatus consultum ultimum* but without the confusion of civil strife, which obfuscated the issue under the decree. The prosecution probably never expected it to end in scourging. The proceedings served their purpose by pointing in a cold, businesslike fashion to the danger inherent in the arbitrary use of absolute power.

The accusation put Labienus in an awkward position. By advocating scourging he defied the very purpose which had gained the tribunes their sacrosanctity. The tribune traditionally was the defender of the individual. Far from succouring Rabirius, however, Labienus intended to rob him of the protection conferred by the bulwarks of Roman freedom, *prouocatio* and the *ius auxilii* (43). The roles of tribune and consul were reversed. Cicero was again able to pose as a *consul popularis*. The people had heard him claim to have their interests at heart in opposing Rullus' agrarian scheme (*Leg. agr.*, 2, 6). They now heard him defending their sacred rights against a wayward tribune; his weapons, the slogans and watchwords of *popularis* propaganda ironically (44) on the lips of a consul.

Cicero begins by asserting that the charge of murdering Saturninus demanded a consul's *auxilium* (10). As a stroke he assumes the role of the tribune, as he did before, when he thwarted the sentence pronounced by the *duumvir*. But he was not the first to drive the executioner from the forum, the cross from the Campus. That praise belongs to their ancestors, who banished with the kings every trace of kingly *crudelitas*, and to the brave men who wished their liberty fortified by the *lenitas legum* and not by the *acerbitas suppliciorum* (10). By identifying the *duumviri* with the kings, the tribune appears as champion of regal *crudelitas*, while the consul, recipient

(43) LIVY, III, 45, 8: *tribunicium auxilium et prouocationem plebi Romanae, duae arces libertatis tuendae*; III, 55, 4: *legem de prouocatione, unicum praesidium libertatis.*

(44) The *ius auxilii* was won at the consul's expense (CICERO, *Leg.*, II, 16; *Rep.*, II, 58; LIVY, II, 33, 1). It is often assumed that the audience did not understand the workings of the duumviral proceedings: hence Cicero could deceive them into believing that the penalty was crucifixion (OLD-FATHER in *TAPA*, 39, 1908, p. 59: by omitting *reste!* *Rab. perd.*, 13) from the *carmen* as it is given in LIVY, I, 26, 6, and that the sentence was without appeal (BRECHT, *Perduellio*, p. 186). Since Cicero felt free to speak in ironic terms, however, his listeners must have been familiar with the details of the procedure, and so such assumptions are unjustified.

of regal power and traditional enemy of the people, becomes the defender of their *libertas* (11): *integrum ius libertatis defendo seruari oportere*.

Moreover Cicero has turned against Labienus two slogans of the *popularis*: that liberty rested upon laws, and that it protected the people from unusual and severe punishments (45). It was Labienus who tried to outrage their liberty *non modo supplicis inuisitatis sed etiam uerborum crudelitate inaudita* (13). The expressions of the duumviral punishment, resurrected *ex regum commentariis* (15), belong not to the *libertas* and *mansuetudo* of the Roman people, not even to Romulus and Numa Pompilius: they are the cant of Tarquin, *superbissimus atque crudelissimus rex* (13). *Superbia* and *crudelitas* were traits more often attributed by the *popularis* to his optimate foes (46).

Two of these laws Labienus mentioned in his speech. He alluded to a *lex Porcia* on scourging, probably when listing the earlier accusations brought against Rabirius (8). The law provided that a man charged with a capital offense could escape the death penalty, even after condemnation, by voluntary exile (47). The second was the *lex Sempronia de capite ciuis*, which denied the senate the right to form special courts in capital cases (12). Both were catchwords in *popularis* attack upon the ultimate decree, but unhappy ones for a tribune who proposed to submit a Roman citizen, with no possibility of defense or escape, to the executioner (48).

*Aequitas* was probably a slogan of C. Gracchus, whom Labienus mentioned in his speech (13). The name of Gracchus had become a byword for *popularis* (49). Cicero asked why, if the duumviral procedure contained a shred of *aequitas*, Gracchus had not used it (14). In fact, even the censors,

(45) Laws: e.g., CICERO, *Leg. agr.*, 2, 102: *consistit libertas in legibus*. For other sources see MEIER in PW, *RE*, s.u. *Populares*, Suppl. 10, col. 600. Punishments: CICERO, *Dom.*, 77: *potest igitur damnati poenam sustinere indemnatus? est hoc tribunicium, est populare?*; MEIER, p. 601-2.

(46) Cf. *Rhet. Her.*, I, 5, 8, where the author appears to give a summary of *popularis* attack. For *superbia* and *crudelitas* as terms of abuse in *popularis* propaganda, see J. R. DUNKLE, *The Greek Tyrant and Roman Political Invective of the Late Republic in TAPA*, 98, 1967, p. 160; 168-70.

(47) SALLUST, *Cal.*, 51, 21-22, 40; LIVY, X, 9, 4. Voluntary exile had always been open to a defendant as a means of avoiding condemnation (POLYBIUS, VI, 14, 7). This *lex Porcia* made the custom part of statute law. The date and authorship of this law are uncertain (BROUGHTON, *MRR*, II, p. 472).

(48) CICERO, *Verr.*, 2, 5, 163: *O nomen dulce libertatis! o ius eximium nostrae ciuitatis! o lex Porcia legesque Semproniae!*; CICERO, *Corn.*, ap. ASCONIUS, 78. Clark: *Porciam (legem) principium iustissimae libertatis*. The *leges de prouocatione* were keystones in *popularis* propaganda (MEIER (above, n. 45, p. 600-1).

(49) *Aequitas*: WIRZUBSKI (above, n. 31) 44-46. If the present argument has any merit, Wirzubski's conjecture becomes more certain. *Popularis*: CICERO, *Dom.*, 24: *C. Gracchus, qui unus maxime popularis fuit*; *Sest.*, 105; WIRZUBSKI, p. 39, n. 5.

whose very name was odious to the people (50), wanted to banish the executioner from the forum (15).

The object of *popularis* politics during the 70's had been the restoration of the tribunate to its full powers. They had inveighed against the *dominatio* of Sulla and the nobility, which had reduced the people to *seruitium* and deprived them of their *uindices iuris* (51). Not all memory of their slogans had faded by 63. Perhaps Cicero evoked them against Labienus (16): even slaves were freed through the kindness of their masters from the fear of the executioner and cross, but *nos ... neque res gestae neque acta aetas neque uestri honores uindicabunt?*" This association, however, is less certain, since the expression, *uindicatio in libertatem*, had been overworked since the 70's by both Optimates and Populares.

However effective was Cicero's oratory, Rabirius owed his immediate rescue to Q. Metellus Celer. Celer, Pompey's brother-in-law, had been his legate in the Mithridatic war together with his brother, Q. Metellus Nepos, and was praetor in 63 (52). Since Caesar and Labienus were cooperating with Pompey at this time, Celer is usually thought to be their agent (53). Accordingly, he is assumed to have chosen C. and L. Caesar as *duumviri* and to have broken up the assembly at the instigation of the prosecutors. Their aim was to avoid a damaging acquittal by the centuries, whose organization favoring the senatorial party made that outcome likely. Hence Labienus, although it was his right, did not renew the prosecution. That Celer apparently was at odds with Cicero at this time is taken to bear out this assumption (54).

(50) CICERO, *Diu. Caec.*, 8: *ensorium nomen, quod asperius antea populo uideri solebat*; LIVY, IX, 33, 5; MEIER, (above, n. 44), p. 602.

(51) See especially SALLUST, *Hist.*, I, 55 M and III, 48 M; WIRZUBSKI (above, n. 31), p. 50-52.

(52) Brother-in-law: Mucia, Pompey's third wife, was the uterine sister of Celer and Nepos (CICERO, *Fam.*, V, 2, 6). Legate: DIO, XXXVI, 54, 2-4. Praetor: BROUGHTON, *MRR*, II, p. 166. For Celer's life see MUNZER in PW, *RE*, s.u. *Caecilius* (86), col. 1208-10.

(53) Agent: W. DRUMANN-P. GROEBE, *Geschichte Roms*<sup>2</sup>, Leipzig, 1902, II, p. 21-22; STRACHAN-DAVIDSON, I, p. 203; M. CARY in *CAH*, IX, 490; BOULANGER, p. 129; SYME in *JRS*, 28, 1938, p. 118 and *Roman Revolution*, Oxford, 1939, p. 32 and n. 4; CIACERI, I, p. 232; TAYLOR (above, n. 4), p. 103. He is less commonly described as an ally of Cicero: R. LALLIER, *Le Procès de C. Rabirius*, 12, 1880, p. 275 and n. 3; VON DER MUHLL, *RE*, s.u. *Rabirius* (5), col. 25; T. PETERSSON, *Cicero. A Biography*, Berkeley, 1920, p. 237; W. S. ANDERSON, *Pompey, His Friends and the Literature of the First Century B.C.*, Berkeley and Los Angeles, 1963, p. 6; VAN OOTEGHEM (above, n. 12), p. 245. According to GELZER (*RE*, s.u. *Tullius* (29), col. 870-871), Celer worked with the prosecutors in naming the *duumviri*, while the disbanding was a *völliger Meinungswechsel*.

(54) Celer in his letter to Cicero from the beginning of 62 B.C. spoke of their *reconciliata gratia* (*Fam.*, V, I, 1). Cicero politely replied (*Fam.*, V, 2, 5): *quod scribis de "reconciliata gratia" nostra, non intellego cur reconciliatam esse dicas quae numquam imminuta est*.

There are reasons for questioning this reconstruction. Celer's letter to Cicero (*Fam.*, V, 1) in early 62 B.C., occasioned by the latter's attack in the senate upon Nepos, reveals Celer as an arrogant *nobilis*, proudly conscious of the *dignitas* of his family and pompous in his service to the state. It is no wonder that he was not always on cordial terms with an upstart consul, a mere *novus homo*, who needed instruction on how to behave in accord with the *clementia* of their ancestors. It is not necessary to see political differences between them. Even in 60 B.C., when Celer was opposing Clodius' transfer to the plebeians, Cicero found him cold and forbidding<sup>(55)</sup>.

Nor was Celer ever as zealous in Pompey's interests as his brother. Nepos was a legate in both eastern wars from 67 through 63; Celer served only in 66<sup>(56)</sup>. Yet he could forget his blue-blood when advantageous. His resentment over Pompey's divorce of his sister did not come out until after Pompey had helped him to the consulship with L. Afranius. He then turned against him and, with Lucullus and Cato, blocked ratification of his Asian settlements and a land law for his veterans<sup>(57)</sup>. Secure in his nobility and family connections, Celer accepted support for his *cursus honorum*, wherever he found it, as his due without sacrificing his own ambitions.

Nothing certain concerning his loyalties can be derived from Dio's statement that the *duumviri* were chosen by the praetor (XXXVII, 27, 2). Even if Metellus were the urban praetor<sup>(58)</sup>, it is not known how Labienus initiated the *duumviral* procedure. A close look at Dio's account of Celer's disbanding of the assembly, however, indicates cooperation with the defense. Rabirius would have been convicted (XXXVII, 27, 3):

εἰ μὴ ὁ Μέτελλος ὁ Κέλερ οἰωνιστῆς τε ὦν  
καὶ στρατηγῶν ἐνεπόδισεν· ἐπειδὴ γὰρ οὔτε ἄλλως

(55) Clodius: CICERO, *Att.*, II, 1, 4; *Har. resp.*, 45; *Cael.*, 60. Celer: *Att.*, I, 18, 1; *Metellus non homo sed litus atque aër et solitudo mera!*

(56) Pirates: APPIAN, *Mith.*, 95. Mithridates: JOSEPHUS, *BJ*, I, 127. ANDERSON (above, n. 52), p. 6, pointed out that Celer, if he was military tribune in 78 under Metellus Pius in Spain and tribune pl. in 68 (i.e., the consulship of L. Caecilius Metellus), would not have owed either post to Pompey. Concerning these doubtful positions see BROUGHTON, *MRR*, II, p. 87 and 138.

(57) DIO, XXXVII, 49, 1, 3; SYME, *RR*, p. 33. On his return from Asia Pompey divorced Mucia (CICERO, *Att.*, I, 12, 3; DIO, XXXVII, 49, 3), reputedly for infidelity (PLUTARCH, *Pomp.*, 42, 7). Settlements: DIO, XXXVII, 49, 3-5. Land law: CICERO, *Att.*, I, 18, 6; 19, 4; DIO, XXXVII, 50, 1-5.

(58) MUNZER, *RE*, s.u. *Caecilius* (86), col. 1209, referring to CICERO, *Sull.*, 65, thought that Celer was urban praetor in 63, presumably because he was presiding over the senate, a right held by this praetor after the consuls. The passage seems to indicate rather that Celer was first to be recognized. According to VALERIUS MAXIMUS, (VII, 7, 7), however, Celer was the urban praetor.

ἐπέλιθοντο οἱ, οὔθ' ὅτι παρὰ τὰ νενομισμένα  
ἢ κρίσις ἐγγένοι ἐνεθυμοῦντο, ἀνέδραμεν ἐς τὸ  
'Ιανίκουλον πρὶν καὶ ὅτιοῦν σφας ψηφίσασθαι,  
καὶ τὸ σημεῖον τὸ στρατιωτικὸν κατέσπασεν...

Who would not obey him and were not alarmed that the trial was being conducted contrary to custom? The presiding praetor and Labienus. Celer in his capacity as augur announced that he had seen unfavorable omens, and thus the assembly ought to be broken up<sup>(59)</sup>. Perhaps it was for this reason that Dio mentioned his augurate, an otherwise otiose detail. An augur attended the assembly to assist the presiding magistrate with his special knowledge and to maintain religious decorum<sup>(60)</sup>. For this function he did not have *auspicia impetrativa* but could report unexpected *oblativa*, which by law caused adjournment. When he was disregarded, Celer rushed to the Janiculum and hauled down the flag<sup>(61)</sup>. He was neither presiding nor an agent of the prosecution. In either case there would have been no need to resort to the sham of the flag. To suppose that he was Labienus' agent but not presiding requires assuming that the defense wanted the voting carried out in order to obtain vindication of the ultimate decree. This conflicts with Dio, who maintained the assembly would have found Rabirius guilty.

Celer may have acted independently, but Cicero's arrangement with his colleague, C. Antonius, that Cisalpine Gaul fall to Celer in the lot for praetorian provinces, points again to some connection with Cicero<sup>(62)</sup>. Their association, however, was never close. Celer had a short memory, and

(59) CICERO, *Rab. perd.*, 17: *qua tu in actione ... omnis religiones atque auspiorum publica iura neglexisti ...* may hint at how Celer was to dismiss the assembly or be a later insertion, referring to the actual dismissal.

(60) G. W. BOTSFORD, *The Roman Assemblies*, New York, 1909, p. 112-13.

(61) Pompey had no difficulty in disbanding the comitia in 55 B.C., when it appeared that Cato would be elected praetor (PLUTARCH, *Pomp.*, 52, 2; *Cat. Min.*, 42, 3-4). This is especially pertinent because it was the centuriate assembly, though in its elective capacity, and the *boni* favored Cato's election. In 44 B.C. Antonius, as augur and presiding magistrate, waited until the second class had voted for Dolabella as *consul suffectus* before announcing evil omens (CICERO, *Phil.*, 2, 82-84). Cf. TAYLOR (above, n. 4), p. 104-5, on the power of the presiding magistrate, particularly in conjunction with an augur.

(62) CICERO, *Fam.*, V, 2, 3-4. It seems unlikely that Celer heard of this for the first time in early 62, as W. ALLEN (*Cicero's Governorship in 63 B.C. in TAPA*, 83, 1952, p. 239) believed. Cicero's modest reminder of his services at the time of the *sortitio*, in keeping with the guarded and constrained tone of the letter, was the appropriate manner in dealing with the sensitive aristocrat.

an insult to Nepos outweighed any comradeship that might have developed between them<sup>(63)</sup>. Pompey, on the other hand, would forgive him in deference to his ancestors. Throughout his career Celer sought advancement with the traditional presumption of the noble. Perhaps Cicero knew him better than his modern evaluators (*Att.*, II, 1, 4):

*Est consul φιλόπατρις et, ut semper iudicavi,  
natura bonus.*

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(63) Cicero expected a word of praise from Celer at the end of 63 in recognition of their collaboration against the Catilinarians (*Fam.*, V, 2, 1-2). Although he tried to explain away the laughter in the senate as directed against himself, not Celer, his disappointment and humiliation were genuine. For a *novus homo* Cicero expected too much of the supercilious and clannish noble. Celer, on the other hand, was more likely to remember Pompey's insults to the Metelli, Pius and Creticus.