

A STUDY OF
THE CRIMEN MAIESTATIS IMMINUTAE
IN THE
ROMAN REPUBLIC AND AUGUSTAN PRINCIPATE

THESIS SUBMITTED FOR THE DEGREE OF
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EXPLANATORY NOTE

The bibliography has been designed as an integral part of the thesis. It sets out every work which has been consulted, with the exception of certain works which, for particular reasons, are more conveniently listed in footnotes. Furthermore, the bibliography does not list the particular articles in the Real-Encyclopädie which have been consulted, except Mübler's article on maiestas; nor does it list the articles consulted in the Cambridge Ancient History.

It will be observed that in respect of each of the works set out in Section I of the bibliography, which lists the source-material, an asterisk and an abbreviated citation appear under the title of the work. That work is cited in the text under the abbreviated form which appears next to the asterisk. A similar procedure has been followed in the case of modern works, which make up Section II of the bibliography. It will be noticed in Section II, however, that an asterisk and an abbreviated citation do not appear under certain works. The reason is that the works in question, although consulted in the preparation of the study, are not cited in the text.

It will be seen that in Section II of the bibliography, in respect of certain works where the modern authorities concerned have functioned as editors rather than as authors, the names of the modern authorities are given, in parentheses, in the left-hand column, and repeated in the right-hand column. This has been done for ease of reference, in view of the method of citation which has been adopted.

It has been found advisable to restrict footnotes, as far as possible, to additional commentary which does not readily fit into the text, and to give references in the body of the text. Where, however, the quantity of references at a particular point would unduly burden the text, they are given in a footnote.

INTRODUCTION

⁵ Definitions of treason are seldom precise, but the Romans do not seem to have attained even a moderate degree of precision in the matter, and trials for maiestas were decided mainly on political considerations".

(Jolowicz, 327-8)

"There is no conception of Roman criminal law whose history it is easier to trace than that of treason ...".

(Greenidge, Treason 240)

The subject of this study is the "crimen maiestatis populi Romani in minutae", which is also known as "crimen maiestatis in minutae (minutae)", "crimen maiestatis", and simply as "maiestas". The crime will generally be referred to hereinafter as the "crimen maiestatis", or as "maiestas" (where there is no possibility of confusion with the general concept of "maiestas", as distinct from the crime). The crimen maiestatis will be studied during the period of the Roman Republic and the Augustan Principate. As far as the "Roman Republic" is concerned the enquiry will, apart from occasional glances at the earlier period, concentrate on the period from the third century B.C. onwards. The reasons for the selection of this starting-point appear in Chapter II. For reasons which will appear (Chapter I, and *passim*), it is not proposed to attempt a definition of the crimen maiestatis.

It should be emphasised at the outset that to speak of "treason" or "high treason" as equivalents of the crimen maiestatis is misleading. A representative definition of modern treason is: "High Treason ... is committed by those who with a hostile intention disturb, impair or endanger the independence or safety of the State, or attempt or actively prepare to do so".¹ To a certain extent such a definition serves to indicate some of the features of the crimen maiestatis, insofar as certain forms of the crime were directed against the "safety of the State", and in those cases

¹ Lansdown, C.W.H., Hoal, W.G., and Lansdown, A.V., South African Criminal Law and Procedure, 6th ed., Juta & Company, Ltd., 1957, 987.

the wrongdoer acted "with a hostile intention". But there were many forms of *maiestas* which did not endanger the safety of the State, and were not committed with hostile intent. A conspiracy against the "*res publica*" may well have resembled "treason", but the modern law of treason would exclude many of the categories which formed part of the *crimen maiestatis*. It was *maiestas* to conspire against the State, or to collude with the enemy, but it was also *maiestas* to lose a battle; to disregard the auspices; to ill-treat prisoners of war; to leave a province without authority; to use violence against a magistrate; to interrupt a tribune; to lay false claim to Roman citizenship; to visit a brothel in an official capacity; to hold court while intoxicated, or dressed in women's clothes; to give dishonest judgments; to falsify public records; to publish defamatory pamphlets; and to commit adultery with the emperor's daughter. There was an homogenous principle running through all these cases (with the probable exception of the last-mentioned), but it was not a principle which can be brought under one category in terms of the modern concept of treason.

The present study approaches the *crimen maiestatis* in two ways. The first approach is basically a direct chronological one, whereby the successive stages in the development of the crime are examined, from its origin up to and including the Principate of Augustus. This approach is concerned with the '*crimen maiestatis populi Romani immutatae*' properly so called. This crime consisted in the performance of various acts which "diminished" '*maiestas populi Romani*', that is, the *maiestas* of the Roman People, which means the *maiestas* of the '*res publica*', or of the State. '*Maiestas populi Romani*' was a technical legal concept, which was probably first formulated in the mid-third century B.C., and which expressed the superior position which the Roman State conceived itself as occupying, as against all other peoples. '*Maiestas populi Romani*' was given technical legal protection against diminution at the hands of other peoples by the conclusion of treaties in a form which bound the other contracting party to "respect and preserve" the *maiestas* of the Roman People; and it was protected against diminution at the hands of Roman citizens by the *crimen maiestatis*. The fundamental feature of the *crimen*

maiestatis is that the only form of 'maiestas' with which it was concerned was 'maiestas populi Romani'. Although Roman magistrates possessed 'maiestas', they did so only in a derivative sense, as the delegates of the Roman People, and when the protection of the crimen maiestatis was extended to them it was quite clear in legal theory that the ultimate 'maiestas' which was being protected was 'maiestas populi Romani'.

The first approach will be to examine the process whereby the public criminal law of Rome evolved rules for the protection of 'maiestas populi Romani', and to consider the application of these rules to concrete cases. This approach is pursued in the whole of Part One, which covers Chapters I-IV, and in Chapters V, VI, VIII and IX of Part Two, and in Chapters X, XII and XIII of Part Three.

The subject is introduced, in Chapter I, by an analysis of the concept of 'maiestas' (as distinct from the crime) in certain of its connotations, with particular reference to 'maiestas populi Romani'. This chapter is intended to give some indication of how the Romans understood their 'maiestas', for in order to appreciate what they meant when they said that their 'maiestas' had been "diminished", it is necessary to know what their 'maiestas' was.

The development of the crimen maiestatis divides into two distinct periods, namely, the period prior to the first 'lex maiestatis', and the period which began with the first maiestas statute. The first of these two periods is discussed in Chapter II, which analyses the process by which the crimen maiestatis was first brought within the ambit of the public criminal law, by way of the fragmentation of a particular segment of the diffuse crime of perduellio.

Chapter III introduces the second period, namely, that of the maiestas statutes. This chapter is devoted to the first lex maiestatis, namely, the lex Appuleia maiestatis of Saturninus. There is a brief review of the legislation which preceded this statute, and some attention is given to certain laws which were

carried in the years immediately before the lex Appuleia. The chapter then proceeds to consider the crucial problems of the lex Appuleia, namely, the permanence or otherwise of the 'quaestio' which it established, the date of its enactment, and the scope of the crime with which it was concerned. The chapter concludes with a discussion of two fragments which some authorities have identified as containing provisions of the lex Appuleia.

Chapter IV (A) deals with the maiestas law of Varius. The problem of its date is briefly discussed, and attention is then given to the content of the law and the circumstances of its enactment. The discussion concludes with the curious question of the execution of Varius under his own law.

Chapter IV (B) considers the maiestas law of Sulla. The content of the law is approached by way of the attempt which was made, at the trial of C. Cornelius, to give the law an extensive interpretation. The reasons for the law's enactment are then examined, and the provisions of the law are analysed. Attention is also given to two special problems connected with the law, namely, as to whether it introduced torture in maiestas cases, and as to the relationship between the crimes of maiestas and extortion.

Chapter IV (B) also introduces a theory which forms the first of the two propositions which the thesis attempts to defend. It will be submitted, in Chapter III, that the lex Appuleia maiestatis established a permanent 'quaestio maiestatis', and brought a particular category of wrongful acts under its jurisdiction. It will further be submitted, in Chapter IV (A), that the lex Varia maiestatis brought another category under the same permanent quaestio. Chapter IV (B) argues that the lex Cornelia maiestatis, contrary to a fairly widespread belief, was not a "general" law of maiestas, but merely submitted another category to the existing permanent quaestio. The proposition which is formulated as a result of this finding, together with the findings in regard to the maiestas laws of Caesar and Augustus (which are considered in Chapters IX and XIII

respectively', is described by the author as "the theory of the little laws", and may be stated as follows:

It is believed, in opposition to all the authorities who have been consulted, that the maiestas laws of Sulla, Caesar, and Augustus conformed to the pattern of the Appuleian and Varian laws, in that each of these laws merely submitted a further category to the jurisdiction of the quaestio maiestatis, and that none of these laws was a "general" law of maiestas. It is further postulated, in opposition to the general view, that the legislation of Saturninus, Varius, Sulla, Caesar, and Augustus by no means made up the entire body of maiestas statute law. On the contrary, there may have been any number of other "little laws of maiestas", including the lex Papia, the lex Licinia Iunia, the lex Hirtia, and the lex Pedia.

Chapter IV (B) attempts the identification of the first of the other "little laws of maiestas" mentioned in the proposition, namely, the lex Papia.

Chapter IV (C) gives a conspectus of the crimen maiestatis, as it was developed in the Republic, up to and including the legislation of Sulla. Consideration is given to the view that the crimen maiestatis could be committed only by magistrates and senators. This is followed by a characterisation of the crimen maiestatis as the crime whose sole objective was the protection of 'maiestas populi Romani'.

Chapter V considers Caesar's contraventions of the maiestas law during his first consulship. There is an analysis of the way in which the carrying by Caesar and Vatinius of Caesar's first agrarian law constituted the crimen maiestatis. The law which was breached is identified as the lex Licinia Iunia, which is the second of the other "little laws of maiestas" mentioned in the proposition. The discussion then turns to the circumstances of the prosecution of Vatinius, and the attempted prosecution of Caesar, in respect of their breaches of the maiestas law.

Chapter VI canvasses the breaches of the *maiestas* law of which Caesar is believed to have been guilty during his Gallic proconsulship. Attention is then directed to the reaction which Caesar's conduct provoked in Rome. The chapter examines the Optimates' desire to prosecute Caesar for his *maiestas* contraventions, as committed in both his first consulship and his Gallic proconsulship, and Caesar's determination to avoid such a prosecution, and concludes by considering this question as a factor relevant to the outbreak of the Civil War.

The principal topic in Chapter VIII is a series of three cases during Caesar's dictatorship, in each of which Cicero appeared. These cases have been selected because of particular points of interest which they exhibit in regard to the nature of the *crimen maiestatis*. The chapter then examines the legal principles involved in the crowning of Caesar's statue and his salutation as "king". The chapter concludes with an examination of the '*maiestas*' implications of the literary "war" which turned on the memory of Cato.

Chapter IX is mainly devoted to a detailed examination of the evidence for Caesar's *lex Julia maiestatis*. The core of the investigation is supplied by certain passages in Book I of Cicero's *Philippics*, and the analysis leads to the conclusion that the content of Caesar's *maiestas* law can, despite the general view to the contrary, be specifically pinpointed, and that the historical background gives a clear indication of the date of the *lex* and of the circumstances which made its introduction necessary. The findings in regard to this law are submitted in support of "the theory of the *lex* laws". The chapter concludes with an examination of the *lex Hirtia*, which is identified as the third of the other "little laws of *maiestas*" mentioned in the proposition.

Chapter X (A) discusses the *lex Pedia*, and its extensive interpretation in connection with certain conspiracies against Octavian. This *lex* is identified as the fourth of the other "little laws of *maiestas*" mentioned in the proposition. The argument in this regard is developed partly in Chapter X (A),

and partly in Chapter XIII.

Chapter X (B) discusses a number of conspiracies against Augustus. These have been selected because of their general significance to the *crimen maiestatis*, more particularly in that they demonstrate that the crime with which they were concerned was still the '*crimen maiestatis populi Romani immutatae*', properly so called. They are also of interest because of the particular problems of legal interpretation and chronology which they pose.

Chapter XII considers the relationship between defamation and *maiestas*, both in the Republic and in the Augustan Principate. After a survey of the position prior to Augustus, attention is given to the problem presented by the trial of Cassius Severus, and by Tacitus' assertion that it was in this case that Augustus first dealt with defamation under the guise of the *maiestas* law. After a full discussion of the evidence, the conclusion is reached that the case of Cassius Severus is closely connected with, and explicable in terms of, the conspiracy of 6 A.D., and a theory is submitted as to the manner in which Augustus made defamation a form of *maiestas*.

Chapter XIII examines the *maiestas* legislation of Augustus. The discussion turns on the juristic source-material, and in particular Digest (48,4). The juristic evidence for the lex is collated with the literary, and a proposal is made as to the probable content and date of the law. The findings are submitted in further support of "the theory of the little laws". The chapter concludes with an examination of three problems of interest posed by Digest (48,4).

The second approach to the *crimen maiestatis* turns on the question as to whether there was a transformation of the '*crimen maiestatis populi Romani immutatae*' at any stage during the period under discussion. In this regard the author postulates the theory which forms the second of the two propositions which the thesis attempts to defend, which is described as "the theory

of the unchanged 'maiestas populi Romani'," and which may be stated as follows:

At no stage in the Roman Republic or the Principate of Augustus did the technical legal concept of 'maiestas populi Romani' cease to be the sole focal point of the 'crimen maiestatis populi Romani immutatae'.

The proposition is linked to the following question: Is there any reason to believe that there came a time when 'maiestas populi Romani' ceased to be the focal point of the crime, and when another connotation of 'maiestas' took its place as the subject of the protection afforded by the maiestas laws? The answer to this question depends on whether there was a transformation, under Caesar or Augustus, of the concept of 'maiestas populi Romani'. If there was such a transformation it would mean that there was a fundamental change, whereby the technical legal concept of 'maiestas populi Romani' was replaced by another technical legal concept, namely, that of 'maiestas Caesaris' or 'maiestas principis'. Such a "maiestas shift" from the Roman People to Caesar or Augustus would have had two consequences. Firstly, it would mean that Caesar or Augustus had become identified with the State, and solely expressive in his person of the 'maiestas' of the State. In other words, the State would have become a special kind of juristic person, namely, a "corporation sole" in the person of Caesar or Augustus, rather than the kind of juristic person constituted by the 'populus Romanus'. Secondly, such a change in legal personality would have required a re-orientation of the crimen maiestaticum, for there would have had to be a new set of legal rules to protect the new 'maiestas'. There would, in other words, have been a transformation of the crime of maiestas from the 'crimen maiestatis populi Romani immutatae' to the 'crimen maiestatis Caesaris (principis) immutatae'. The validity of the proposition depends on there having been no such transformation, and it is proposed to examine the evidence in this regard.

Chapters V and VI, apart from their relevance to the

development of the *crimen maiestatis*, properly so called, also lay the foundation for consideration of a possible transference of *maiestas* to Caesar. The theme is then developed in Chapter VII, which attempts a detailed examination of the evidence. But as the date of Caesar's *maiestas* law is 47 B.C. (according to the author), or 46 B.C. (according to the authorities consulted), the enquiry is not pursued in detail beyond 46 B.C. The reason is that a *maiestas* shift to Caesar later than 46 B.C. would not have been reflected in a *lex maiestatis*, as no second Caesarian *maiestas* law seems to be attested. In order to complete the presentation, however, the investigation is continued, although in brief, over the period 45-44 B.C. Further information, and in particular for the years 46 and 45 B.C., is presented in Chapter VIII, when discussing the three trials at which Cicero appeared. Finally, the theory which is submitted in Chapter IX, in regard to the content of Caesar's *lex Julia maiestatis*, is also relevant to the question of a *maiestas* shift. The conclusion is reached that there was no *maiestas* shift to Caesar, and that '*maiestas populi Romani*' remained the technical focal point of the *crimen maiestatis*.

The question of a *maiestas* shift to Augustus is taken up in Chapter XI. The anomalies arising out of the prosecution of the elder Julia and her paramours are analysed, and these trials are used as the frame of reference for consideration of a possible transference of *maiestas* to Augustus. There is an analysis of three elements which are believed to be crucial on this question, namely, tribunician sacrosanctity, the '*coniuratio*' of 32 B.C., and the grant of the title '*pater patriae*' in 2 B.C. The conclusion reached is that there was no disturbance of '*maiestas populi Romani*' as the technical focal point of the *crimen maiestatis*, properly so called. It is found, however, that a new concept emerged, namely, that of the '*majesty*' of Augustus, which was analogous to '*maiestas populi Romani*', but distinct from it. The protection of Augustan '*majesty*' was not entrusted to the *crimen maiestatis*, but to a new crime which was introduced into the public criminal law, namely, the crime of '*violated majesty*'. It will be

suggested that much of the confusion which surrounds the crimen maiestatis in the early Principate is due to the failure of both Roman and modern historians to appreciate the distinction between the crimen maiestatis and the crime of "violated majesty".

It remains to consider the orientation of the study. Although the crimen maiestatis is a "legal" question, it is also a "classical" question, and the present work is neither entirely "legal" nor entirely "classical". The author, who is a lawyer by profession and a reader of classics by inclination, doubts whether it is desirable, or indeed possible, to attempt to affix a label to a study of this nature. It is pertinent, in this regard, to consider the recent observations of Wolff (73): "It is a somewhat surprising and discouraging fact that most Latinists and Roman historians show at best but a perfunctory interest in the history and sources of the Roman Law ... Nevertheless, legal writings form an important, in fact the most typically Roman, part of the whole of Roman literature; and the legal history of Rome has at every turn close contacts with its political, social, and economic history".

Maiestas was a political crime, and as such cannot be adequately considered without constant reference to the historical conditions prevailing at the various stages of its development. But it was also part of the public criminal law, so that it cannot be approached properly without due regard to the legal system which evolved the crime, and the legal rules which were formulated concerning it. A classical scholar recently gave a striking demonstration of the dangers involved in approaching maiestas without a sufficient grounding in Roman law when, in a paper on treason in the early empire, he made the rather startling assertion that the classical jurists of the third century A.D. reflected the law only as it was in their day.

The Roman Criminal Law has long been the special field of German-language scholars, such as Rein; Zumpt; Mommsen; Lenel; Hitzig; Pallack; Krüger; Wenger; Levy; Kribler;

Lengle; Vollmann; Siber; Schulz; Brecht; Schönbauer; Gundel; Fuhrmann; Kelly; and Bleicken. The tendency of such authorities is to approach the subject on what may be termed a classico-legal basis. The exiguous nature of the juristic source-material makes a coherent picture impossible without constant reference to "classical" sources, and the result is an exposition which is neither baldly legalistic nor solely historical. The initial object is the isolation of the fundamentals of an aspect of the criminal law, but the enquiry ranges far afield, and it is not easy to say whether the end result is a "legal" study with a considerable "classical" background, or a "classical" study with a considerable "legal" background. The author, if pressed to choose between these alternatives, would be inclined to prefer the latter, if only for the reason that the excision of all the legal texts would leave some sort of coherent picture, but the exclusion of all the literary sources and the historical background would leave no picture at all. The present study leans heavily towards the classico-legal approach, particularly as it has been developed by the German-language school. It is, indeed, only fair to say that the present work would not have been possible without access to a substantial segment of the learning of this school.

The classico-legal approach is not, of course, confined to German-language authorities. Much valuable work on Roman Criminal Law has been done by French-language scholars, such as Girard, Gaudemet, Scheltema, and Van Warmelo; and by members of the Italian-language school, such as Rotondi, Cicaceri, Arangio-Ruiz, Riccobono, Flore, Volterra, and Archi.

There is a lack of major works in English in the field of Roman Criminal Law. The works of Strachan-Davidson and Greenidge are on a level which is not often reached, even by foreign-language authorities, but the last work of either of them was published 50 years ago, and - regrettably - their respective purposes did not include a systematic treatise. Heitland could have written a valuable work, but his purpose

lid not permit of it. Botsford is useful for tribunician jurisdiction in the Republic. The contribution of Jolowicz is significant, but the scope of his work dictated brevity.

On the specific question of maiestas, Merrill has published a significant paper on the loss of civic rights by those guilty of treason. There has been some valuable work by Rogers, but it falls, in the main, outside the period of the present study. Two full-length works devoted mainly to maiestas are disappointing, for neither Schiass nor Lear says very much which would have taken Mommsen by surprise. Hammond furnishes a fairly useful case-book for Augustus and his successors. H. Last has made valuable contributions, more particularly in the Cambridge Ancient History. Atkinson has produced an impressive paper on two maiestas trials. Smith has made a valuable contribution to the question of defamation and maiestas, and Eadian is significant on certain individual trials. Maiestas has also been discussed by Chilton.

On other aspects of the criminal law, there have been significant discussions of criminal jurisdiction by McFayden, Marsh, A.H.M. Jones, and Stuart Staveley; of the forms of Roman criminal legislation by Daube; of the primitive criminal law by Von Fritz; and of extortion by Baldson, Sherwin-White, and Henderson. Various aspects of the criminal law have also been discussed by Charlesworth, Erwins, Grant, Hardy, Momigliano, Reid, and Stuart Jones.

The field has tended to be neglected in South Africa, perhaps because of the overriding importance of Roman Civil Law from the practical point of view. Mention should be made, however, of Gonin's paper on perduellio.

Three centuries ago the eminent Roman-Dutch jurist, Antonius Mattheaues, prefaced his discussion of maiestas with an apology: "*Verum, cum de maiestatis iuribus accurate disseruerit Ioannes Bodinus ... timui post Roscium in scenam uescendere ...*". Many knowledgeable men have trod the boards

since "Roscius", but the author, believing that there may still be room for a discussion of the crimen maiestatis, humbly ventures to move on to the stage.

PART ONE

MAIESTAS IN THE ROMAN REPUBLIC

CHAPTER I

THE ROMAN CONCEPT OF MAIESTAS

A. THE MEANING OF MAIESTAS

Maiestas was a peculiarly Roman concept¹. Greek authors, in default of an adequate equivalent for the word 'maiestas', resorted to approximations. Thus: τὴν δρχήν καὶ τὴν δυναστείαν τοῦ δήμου τῶν Ῥωμαίων (Polyb. 21.32.3) is used for "impervium maiestatemque populi Romani" (Livy 38.11.2). Other equivalents are μεγαλειότης, σπουδαιότης, ἐξουκρέμεια, μεγαλοκρέμεια, μεγαλοσύνη (Dumézil 9-10.14) and μεγαλειότης, δόξα, ἐξουσία (Gundel 295). For 'crimen maiestatis' the usual rendering is ὑβρεῖς and, in Byzantine times, κατ'ὀφθαλμὸν².

Etymologically 'maiestas' is derived from 'maior'.³ As 'maior' expresses not an absolute value but the comparative degree, so maiestas is not an absolute quality but a relationship.⁴ This fact is fundamental to Roman maiestas. The word denotes an unequal relationship, with one component occupying the position of the 'maior', and the other that of the 'minor', but it denotes only a relationship, and not a quality or attribute existing in isolation. A man on a tightrope may have, in relation to the rope, an equilibrium depending on a number of qualities, such as muscular power, eyesight, and

¹ Sherwin-White (Citizenship 222-3); Dumézil 14; Brixley 198.

² Mommsen, Straf 540. But see p.248 n. 1 below.

³ Rein 504; Mommsen, Straf 538.2; Pollack 3; Kibler 542; Dumézil 8; Wagenvoort 120.124; Lear 13; Gundel 298.

⁴ Dumézil 8. Wagenvoort 124 remarks that "... the maiestas populi Romani, the 'being greater' or 'superiority' of the Roman people, must always be measured according to its position compared with the surrounding world." Cf. Pollack 3, McFayden 209.

co-ordination. But the state of equilibrium is neither any one of those qualities, nor even their sum; it is rather the situation resulting from them.

Several authorities have drawn attention to the difficulty of defining *maiestas*.¹ Part of the difficulty perhaps lies in the approach to *maiestas* as a quality rather than a relationship. Pollack (15) equates *maiestas* to 'auctoritas dignitasque', which is to take it as a sort of super-quality, to be defined only by defining each of the constituent terms. Even then the result is not a definition of *maiestas*, but a mere composite definition of 'auctoritas-dignitas'. This leads to the dilemma posed by Hayakawa (172-3):

People often believe, having defined a word, that some kind of understanding has been established, ignoring the fact that the words in the definition often conceal even more serious confusions and ambiguities than the word defined. If we ... try to remedy matters by defining words, and then, finding ourselves still confused, go on to define the words in the definitions of the defining words, we quickly find ourselves in a hopeless snarl. The only way to avoid this snarl is ... (by) giving specific examples of what we are talking about.

Cicero refers to *maiestas* as 'magnitudo quaedam', and says that "*maiestas est in imperii atque in nominis populi Romani dignitate*" (Part.Orat. 30,105), and that *maiestas* is "amplitudo ac dignitas civitatis"². These passages have been criticised as "nichts als Umschreibungen" (Mommesen, Straf 539.1). But closer examination of their contexts

1. Thus Kühler 542.594: "Einer genauen Begriffsbestimmung entzieht sich das Wort". "Ein schief und unlässiger staatsrechtlicher Begriff ist *maiestas* nie gewesen". Cf. Fr. Teeger (cited by Gundel 288): "Kaum ein römischer Begriff ist uns so geläufig wie *maiestas*, und kaum einer entzieht sich so leicht wie dieser jedem Versuch, ihn präzise zu erfassen." See also Mommesen, Straf 539.1; Pollack 4; Jolowicz 327-B; OCD 532 s.v. '*maiestas*'; Drexler 200.
2. Orat. 2.39.164; Cf. Cic. Invent. 2.17.53; Auct. Herenn. 2.12.17.

shows that no comprehensive definition is being attempted. Cicero shows (*Part. Orat.* 30.103ff) how accuser and accused come to grips. He discusses the stage of 'disceptatio' (30.105), and takes the *maiestas* charge against Norbanus as an example. The defence, relying on its 'definition' of *maiestas*, contends that the conduct of the accused was not culpable. The accuser, relying on a different 'definition', claims that he is guilty. Cicero then states the issue: "*minueritne maiestatem qui voluntate populi Romani rem gratiam et aequum per vim egerit*". The misunderstanding of this passage seems to have originated with Quintilian (*Inst. Orat.* 7.3.35): "*est interim certa finitio, de qua inter utramque partem convenit; ut Cicero dicit, maiestas est in imperii atque in nominis populi Romani dignitate*". But Cicero, far from saying that both sides agreed on this 'definition', says: "*existit illis disceptatio*". Elsewhere (*Orat.* 2.39.164) Cicero merely gives an example to guide a budding orator on the method of formulating a 'definition', so as to fit it to the facts of his case. He does not say "*maiestas est amplitudo ac dignitas civitatis*", but "*si maiestas est amplitudo ac dignitas civitatis, is eam minuit qui exercitum hostibus populi Romani tradidit*". He is showing the student how to frame a 'definition' if he has to prosecute a case of '*exercitus traditio*'. Discussing the '*constitutio definitiva*', which is the issue arising when there is a dispute as to the name by which an act is described, he lays down that the first function of the accuser is to propose a crisp definition. As an example, purely of a definition which would suit the accuser's purpose, he gives: "*maiestatem minuire est de dignitate aut amplitudine aut potestate populi aut eorum, quibus populus potestatem dedit, aliquid derogare*" (*Invent.* 2.17.53). He continues: "*post erit infirmanda adversariorum descriptio. ea autem infirmabitur, si falsa demonstrabitur*". (Cf. Auct. Herenn. 2.12.17)¹

The significant point about these passages is the springing to mind of the words '*magnitudo*', '*potestas*',

1 But see pp. 58-60 below for the significance of these passages in regard to the *Lex Appuleia maiestatis*.

4

'imperium', 'dignitas' and 'amplitudo' when maiestas is mentioned. Cicero, with perhaps greater semantic insight than his critics, does not attempt a comprehensive definition.¹ Rather does he give "specific examples of what [he is] talking about", namely, certain attributes which contribute to the maiestas relationship. The impairment of any of these attributes tends to 'diminish' Roman maiestas, that is, to prejudice the continuance of a relationship in which the Roman People is the 'maior'. These attributes cannot be stated exhaustively, but an attempt can be made to analyse certain aspects which the Romans regarded as necessary features of their maiestas, an analysis which will perhaps make clear some of the principles which guided them when they came to formulate the crimen maiestatis. It is proposed to pursue the concept of maiestas in its principal connotation, as a relationship between sentient beings.²

B. THE MAIESTAS OF THE GODS

Maiestas was regarded by the Romans as primarily expressive of a relationship between the gods as 'maiores' and men as 'minores', arising out of the inherently superior nature

1 It is doubtful if Cicero would have approved the purple passage of Drexler (205-6): "Maiestas ist dem, der sie besitzt von Natur, wesentlich eigen. Sie ist ... das Muminosum, und daher sowohl ein Fascinosum wie ein Tremendum, d.h. sie ist von stärkster unmittelbarer, suggestiver Wirkung. Sie ist Macht, aber nicht die Macht ausserer Mittel, sondern allein Kraft des Eindrucks, den sich niemand entziehen kann, der ihr begegnet. Sie ist 'Herrlichkeit' und daher mit den Sinnen wahrnehmbar, ein ästhetisches Phänomenon. Sie erweckt und fordert Scheu und Verehrung, ja Unterwerfung, sie bindet und verpflichtet und ist daher zugleich etwas Sittliches, im tiefsten wirklichkeitsbezogenen, d.h. religiösen Sinn."

2 There are other connotations. Wagenvoort (106f, 123 and n.3) cites the maiestas of herbs, oxen, and the power of speech in support of his 'mana' concept.

of the former.¹ The earliest mention of *maiestas*² is in the 'Aegisthus' of Livius Andronicus, where the divinity presents herself as '*maiestas mea*'. The sources stress the divine origin of *maiestas*: "*verum in deis generaliter primum maiestatem ipsius eorum naturae venerabimur, deinde proprie vim cuiusque et inventa, quae utile aliquid hominibus attulerint*" (Quint. Inst. Orat. 4.7.7; cf. Sen. Ben. 4.19.4). Cicero argues that if the gods do not disclose the future to men, the reason may be: "*non consent esse suae maiestatis praesignificare hominibus quae sunt futura*" (Divin. 1.38.82). He proceeds to controvert this postulated reason, and concludes: "*neque hoc alienum ducunt maiestate sua; nihil est enim beneficentia praestantius*".³ The reference to '*beneficentia*' underlines something which the Romans regarded as an integral feature of the *maiestas* relationship. Men are under a duty of '*veneratio*' towards the gods, but in turn the gods owe them benefits. The bilateral obligations which the relationship implies are clearly expressed by Horace (Carm. 3.6.5): "*dis te minorum quod geris, imperas*".

The divine origin of *maiestas* is sketched by Ovid (Fasti 5.17ff) in a passage which draws attention to several important aspects of the concept. Before the birth of *Maestas* there were no maior-minor relationships (v.18), and Jack was as good as his master (vv.19f). *Maestas* is immediately '*magna*' (vv.25f) - clearly so, for the relationship exists as soon as there is a '*maior*' (cf. Wagenvoort 122) - and regulates all relationships: "*mundum temperat omnem*" (v.25).

1 Dumézil 9; Drexler 196; Kühler 543; Wagenvoort 123.

2 Although Gündel (289) holds that this reference "*naturlich gar keinen Anhaltspunkt geben kann*".

3 The passage seems to be misunderstood by Drexler (199), who cites only the first-mentioned (hypothetical) case. But it is clear that Cicero raises the first possibility only in order to explode it, and makes his definitive point in the second statement. Cf. Cic. Nat. Deor. 2.30.77.

There is bilaterality of obligation, 'pretium dignis' in return for 'suspectus honorum' (vv.31f). Moral associations are emphasised: Maiestas was born of 'Honor' and 'decens Reverentia' in lawful wedlock (vv.23f), and was associated with Fudor' (v.29). Maiestas had to be defended by force of arms against the assault of the Giants (vv.35-44). Maiestas was transmitted from the gods to the founders of Rome (vv.45-8).

C. MAIESTAS POPULI ROMANI

Parallel to the maiestas relationship between gods and men was that between Rome and other peoples (Wagenvoort 123; Dumézil 11). When the Romans attributed maiestas to themselves they were mindful of its divine origin (Drexler 196). The Gauls, bursting into Rome in 390 B.C., "adeo haud secus quam venerabundi intuebantur in aedium vestibulis sedentes viros praeter ornatum habitumque humano augustiorem maiestate etiam quam voltus gravitasque oris prae se ferebat simillimos dis" (Livy 5.41.8. Cf. Cic. Phil. 6.19). Drexler (197) doubts whether the sources anywhere distinguish between the maiestas of the gods and that of the Roman people. This circumstance suggests that the change from one focal point of maiestas to another was accepted as a natural development, inherent in the concept.

Juno, consenting to the union of Trojans and Latins from which the Roman race will spring, prays for one concession:

Illud te, nulla fati quod lege tenetur,
pro Latio obtestor, pro maiestate tuorum:
cum iam comubiis pacem felicibus, esto,
component, cum iam leges et foedera iungent,
ne vetus indigenas nomen mutare Latinos,
ne Troas fieri iubeas Teucrosque vocari,
aut vocem mutare viros, aut vertere vestem,
sit Latium, sint Albani per saecula reges,
sit Romana potens Italia virtute propago:
occidit, occideritque sinas cum nomine Troia.
(Vergil Aen. 12.819-28)

Dumézil (10f) understands the passage as emphasising

the special relationship between Jupiter and the Latins, as the cultivators of Iuppiter Latialis (hence: pro maiestate tuorum)¹. Because of that relationship the Latins are superior to the Trojans, who are the simple protégés of Venus, and the characteristic Latin name, language and customs (particularly clothing)² should not be allowed to disappear before those of the Trojans, militarily superior though they may be.

It may be objected that the Trojans, as the conquerors, can scarcely be said to be the inferiors of the Latins³. Indeed Jupiter has already made it clear (vv. 798ff) that there can be no setting aside of Trojan physical superiority. Two interpretations are possible. If Dumézil (l.l.) rightly takes 'pro maiestate tuorum' to mean 'by reason of, in proportion to', then it must be assumed that Vergil intends to distinguish between the maiestas resulting from physical superiority and that which accompanies pre-eminence of language and custom; in the latter sense Latin maiestas is regarded as already existing. But if 'pro' means 'on behalf of, in furtherance of', the unreal partition of maiestas is avoided, and Latin maiestas does not yet exist. This is perhaps Vergil's whole point. Juno proposes a compact, a concession in return for the withdrawal of her opposition - in other words, a bilateral maiestas agreement. She well knows that what she asks will not follow in the ordinary course: "nulla fatis quod lege tenetur". The 'lex fatis' marks the Trojans out for domination and maiestas, but Juno asks that the natural result be avoided. This, rather than any thought of Jupiter's superiority to

1 Cf. Bailey 171-2: "Thus by his character as the supreme protector of the State ... Iuppiter rose ... to a position of unchallenged dignity; and his maiestas was the majesty of Rome itself. ... Iuppiter became in fact a magnified tribal god, and in worshipping him the Roman people saw but the reflected image of itself."

2 Cf. Vergil Aen. 1.281f: "maecumque fovebit/Romanos rerum dominos, gentemque togatam".

3 This point was made by Professor E.J. Haerhoff of the University of the Witwatersrand, in the course of discussion.

Venus, may be Vergil's meaning.¹ The passage has echoes elsewhere, particularly in regard to language and clothing as elements in maiestas: "magistratus vero placet quantopere suam populi que Romani maiestatem retinentes se gesserint, hinc cognosci potest, quod ... illud quoque magna cum perseverantia custodiebant ne Graecis unquam nisi Latine responsa darent (Val. Max. 2.2.2): "neque Romani civis [quidquam est] praeter habitum vestitumque et somni Latinae linguae" (Livy 29.17.11).

Roman maiestas was primarily an attribute of the Roman People as a whole - 'maiestas populi Romani' - in relation to other peoples.² The Roman People, in virtue of its maiestas, made claim to "Gehorsam, Untertänigkeit und Reverenz" from all other peoples (Mühler 542). That claim might be contested, and the Romans had to be alert to maintain it; the relationship might be breached (laedi, violari), and the superiority of the Romans diminished or lessened (imminui, minui, dedimui), so that maiestas had at all times to be defended and preserved (servari, conservari) - (Drexler 196, 193). The point is fundamental. The maiestas relationship was an uneasy equilibrium, always exposed to disturbance, and always needing positive action for its maintenance.

When the Romans regulated their relations with other states they sometimes required the other contracting party to bind itself to respect Roman maiestas. The locus classicus is Livy (38.11.2) on the treaty with Aetolia in 189 B.C.: "imperium maiestatemque populi Romani gens Aetolorum conservato sine dolo malo" (Cf. Polyb. 21.32.3). The clause "maiestatem populi Romani comiter conservato" was included

1 Cf. Servius (ad loc.): "si fataliter imminet ut a Troianis origo Romana descendat, Troiani Italorum nomen accipiant: ut Romani de Italia, non de Troianis videantur esse progeniti".

2 Wagenvoort (123) cites, as equivalents of 'maiestas populi Romani': 'maiestas populi', 'maiestas populi Romani Quiritium', 'maiestas publica', 'maiestas rei publicae', 'maiestas civitatis', 'maiestas patriae', 'maiestas nominis Romani'.

in the treaty with Gades in 78 B.C. - which was possibly a renewal of a similar treaty of 206 B.C. (Gundel 291-2) - and the relationship thus established is analysed by Cicero (Balb. 16.36) as follows: "Deinde cum alterius populi maiestas consarvari iubetur, de altero siletur, certe ille populus in superiore condicione causaque ponitur cuius maiestas foederis sanctione defenditur". Although the 'foedus iniquum', namely the form of treaty which included a 'maiestas' clause, was designed to impose subordination to Rome more directly and effectively than a 'foedus aequum'¹, the Romans were concerned to present the maiestas relationship as not only imposing obligations on the 'minor', but conferring benefits as well. Cicero (Balb. 16.37) makes the point in his discussion of the Gaditanian treaty: "Potest esse ulla denique maiestas, si impediri quo minus per populum Romanum beneficiorum virtutis causa tribuendorum potestatem imperatoribus nostris deferamus?" This aspect of maiestas received juridical recognition, for the juriconsult Proculus was at pains in the first century A.D.² to emphasise the 'free' status of the 'maiestas minor': "Liber autem populus est is, qui nullius alterius populi potestati est subiectus: sive ... foedere comprehensum est, ut is populus alterius populi maiestatem comiter conservaret. hoc enim adicitur, ut intellegatur alterum populum superiorem esse, non ut intellegatur alterum non esse liberum: et quemadmodum clientes nostros intellegimus liberos esse, etiamsi neque auctoritate neque dignitate neque viribus nobis paria sunt, sic eos, qui maiestatem nostram

1 On the 'foedus iniquum' as an instrument of imperialism see particularly Sherwin-White (Citizenship 112-25, 149-63). Cf. Gelzer (RE 12.959-60): Grant 401-5. Coli (87) believes that until the Social War the purpose of the 'maiestas' treaty was to vest the populus Romanus with the exclusive command, and therefore with imperium, vis-à-vis the Italian cities, but this does not account satisfactorily for the Aetolian and Gaditanian treaties. For the view that the 'maiestas' treaty was not older than circa 206 B.C. see Gundel (93-4.) Thubler (62-6, 50-1, 56, 450-1, 456) is still authoritative on the reconstruction of the form of a 'maiestas' treaty and on the fluctuations in the degree of subordination which such a treaty imposed.

2 For Proculus see Schulz (Legal Science 103, 119, 120).

comiter conservare debent, liberos esse intellegendum est." (Dig. 49.15.7.1).¹

Proculus here draws attention to two concepts of importance to an understanding of *maiestas*, namely '*dignitas*'² and '*vires impares*'³. '*Dignitas*' was "der dem Senator zuerkannte Rang im politischen Leben" (Gelzer 83), or "rank, prestige and honour" (Syme 13; cf. Taylor, *Politics* 33). '*Dignitas*' is not to be identified with *maiestas* merely because Cicero uses it by way of illustration in some of his '*maiestas*' passages⁴. The parallel which Cicero draws is that, as a prominent man has rank and prestige vis-à-vis other men, so Rome has *maiestas* as against other peoples. '*Dignitas*' connotes a man's place in the queue within the Roman body politic; *maiestas* signifies Rome's place in the international field. Proculus' notice of '*vires impares*' on the part of the 'minor' as a feature of *maiestas* raises the curious distinction between theory and practice which marked the attitude of the Romans to their *maiestas*. During the Second Punic War, Hanno, attempting to detach Nola from the Roman alliance, "*Hannibalis virtutem fortunamque extollit: populi Romani obterit senescentem cum viribus maiestatem*" (Livy 23.43.10). The Nolans base their rejection of the Carthaginian overtures on the advantages inherent in the Roman connection: "*multos annos iam inter Romanum Nolanumque populum amicitiam esse, cuius neutros ad eam diem paenitere; et sibi, si cum fortuna mutanda fides fuerit, sero iam esse mutare*" (Livy 23.44.1). This passage has persuaded modern scholars that physical superiority was not essential to *maiestas* (Dumézil 11 and n.3), and

¹ On the meaning of '*libertas*' see Kunkel §25-46.) Cf. Grant §01-5).

² Cf. '*dignitas*' in Cic. *Orat.* 2.164; *Part. Orat.* 105; *Invent.* 2.53; and *Auct. Merem.* 4.25.35.

³ '*Auctoritas*' was not an element of *maiestas* in the Republican period (Gundel 300-1).

⁴ *Part. Orat.* 30.105; *Orat.* 2.39.164; *Invent.* 2.17.53.

even that *maiestas* could not be based on external power at all (Drexler 201). This is a tribute to the skill of Roman propagandists, for after stating the noble sentiments which moved the Nolans, Livy almost casually discloses the real reason: "*cum is qui ad sese tuendos venissent omnia sibi et esse conso-ciata et ad ultimum fore*". In case the recollection of *maiestas* had been dimmed, "*si qui venissent*" would remind the Nolans of their duty. Elsewhere Livy makes it even plain-er that strength was indispensable to *maiestas*: "*huic tantae tempestati cum se consules obtulissent, facile experti sunt parum tutam maiestatem sine viribus esse* (2.55.9).

At the same time, however, Rome resolutely set her face against a relationship based solely on force. There can be no doubt that there was, on the Roman side, a deliberate acceptance of the fact that a strong obligation rested on the 'major' to maintain a high moral standard in its dealings with the 'minor'. It was immoral, and therefore culpable under the crimen *maiestatis*, for a proconsul to execute a Gaul for the entertainment of his mistress (Sen. Controv. 9.2.13ff; Livy 39.42.10); the perpetrator was stigmatised "*quod amplis-simi honoris maiestatem tam taetro facinore inquinaverat*" (Val. Max 2.9.3), in that "*cum probro privato coniungeret im-perii dedecus*" (Cic. Senect. 12.42). It was immoral to ill-treat Gallic (Livy 6.1) or Punic prisoners of war (Diod. 24. 19). The principle received formal legal expression under Diocletian: "*nihil enim nisi sanctum ac venerabile nostra iura custodiunt et ita ad tantam magnitudinem Romana maiestas cunctorum numinum favore pervenit, quoniam omnes leges suas religione sapienti pudorisque observatione devinxit*" (Collatio 6.4.5). The law-minded Romans consistently stressed that the *maiestas* relationship was a bilateral contract, with duties and benefits on both sides. Cicero notices that "*conservanto*" in the '*maiestas*' clause of a treaty is a term more apt "in

legibus quam in foederibus" (Balb. 16.36). It is no accident that the verb "praestare" is used so frequently in relation to maiestas¹, for it regularly describes one of the duties to which a contracting party was bound in Roman Law. Thus: "obligationum substantia ... [in eo consistit] ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum" (Dig. 44.7.3pr; cf. Gaius 4.2). As Dumézil (11) aptly puts it: "Aussi sa maiestas n'a-t-elle pas été la conséquence fortuite, mais la justification presque juridique, presque rationnelle, de son accroissement et de son empire ..."²

D. DERIVATIVE MAIESTAS

Magistrates had maiestas³, but the concept was a limited one, for a magistrate had maiestas solely in virtue of his office, which he held only because the populus Romanus had appointed him to it: "maiestatem sumere est de dignitate aut amplitudine aut potestate populi aut eorum, quibus populus potestatem dedit, aliquid derogare".⁴ Magisterial maiestas was an extension of 'maiestas populi Romani', and subordinate to it (Drexler 197). The consul P. Valerius Poplicola "submissis fascibus in contionem ascendit. gratus id multitudini spectaculum fuit, submissa sibi esse imperii insignia confessionemque factam populi quam consulis maiestatem vixque maiorem esse" (Liv 2.7.7.) It was required of Appius Claudius "ut tantam consularem maiestatem esse vellet quanta esse in

1 Cic. Divin. 1.38.2; Nat. Deor. 2.30.77. Ovid Fasti 5.46.

2 Utschenko (cited with approval by Gudel 288.1) takes the diametrically opposite view: "Maiestas gehöre nicht zu dem Begriffen, die das ius bildeten, sondern das fas."

3 Pollack 101-11; Kibler 543; Wagenvoort 125.

4 Cic. Invent. 2.17.53. Cf. Pollack 101-2, 106, 164; Wagenvoort 125. Wenger (Review of Pollack 486) regards magisterial maiestas as historically older than 'maiestas populi Romani'.

concordi civitate posset" (Livy 2.57.3). This further gradation of *maiestas* agrees with the position of the *populus Romanus* as a 'minor' as against the gods, but a 'maior' as against other peoples, for the *maiestas* relationship was a hierarchy, and the subordination of one *maiestas* to another was integral to the concept (Dumézil 9). This was possible only because *maiestas* was a relationship, and not an attribute in isolation. A magistrate, possessing no absolute attribute of *maiestas*, could not maintain his *maiestas* against the Roman People. The latter was the 'maior' in relation to its delegate, the magistrate, and he in turn was the 'maior' in relation to individual citizens.

It has been suggested that the Senate, as a body, possessed *maiestas* (Wagenvoort 126-7), but the better view is that in the Republic *maiestas* was confined to the People and its magistrates, with 'auctoritas' as the appropriate expression for the Senate's position¹. It has also been said (Dumézil 12) that the concept of '*maiestas plebis*' arose during the struggle between the orders: "*Maiores vestri, parandi iuris et maiestatis constituendae gratia, his per secessionem armati Aventinum occupavere*" (Sallust Jug. 31.17). Dumézil (loc. cit.) takes "*parandi ... gratia*" to mean "to establish their natural superiority", that is, a superiority which in fact existed; in virtue of its numerical superiority the plebs could have existed without the patrician minority, but the converse was not possible. No doubt '*maiestas*', in the general sense of a 'maior-minor' relationship, is descriptive of the relationship between plebeians and patricians, but when so used it does not connote '*maiestas populi Romani*'. It should be emphasised that the legal affiliations of *maiestas* (pp. 8-12 above) are of paramount importance.

¹ Mommsen (Staat 1032, 1033 and n.1); Baladon (Auctoritas 43-4).

Those affiliations applied exclusively to 'maiestas populi Romani', and not to any other concept to which the word 'maiestas' may have been loosely attached. The concept of 'maiestas populi Romani', in the sense of that particular maior-minor relationship which was the only such relationship to be recognised by Roman Law, was a technical legal concept of such a distinctive and exclusive kind that it would not be incorrect to write it as 'maiestaspopuliromani'. In the same way as 'paterfamilias' means a great deal more than the neutral 'father of a family', so 'maiestaspopuliromani' was an indivisible expression, greater than and different from the sum of its parts, and connoting a specific legal notion with external and internal manifestations. Externally the concept meant the supremacy of Rome as against all other peoples, and received its legal expression in the 'maiestas' treaty, the sanction of which was war. Internally it meant the supremacy of the populus Romanus, that is, the State, over the magistrates and the general body of citizens, and received its legal expression and sanction in the *crimen maiestatis imminutae*. The crime of 'diminished maiestas' is 'definable' no more readily than the concept of maiestas itself, but the 'definition' of McFayden (208) will serve as a rough guide, namely

conduct tending to diminish the 'greatness', i.e. the power and dignity of the Roman People - including ... assistance rendered to an enemy, or levying war against the government, but also any maladministration of provincial or other public office which tended to weaken the empire or injure the good name of Rome'.

Valerius Maximus (2.10), in a chapter entitled "de maiestate", gives a number of examples of "maiestas clarorum virorum". This follows a chapter entitled "de censoria severitate", and begins with the observation: "est et illa quasi privata censura maiestas clarorum virorum, sine tribunalium fastigio, sine apparitorum ministerio potens in sua amplitudine obtinenda". The 'maiestas' here discussed is not the concept which has been analysed. The 'clari viri' are

not examined as magistrates of the Roman People¹, and the examples given show that the protection of their 'maiestas' was not to be found in the law, but in their own dignity. Some of the examples may be noticed, however, as they offer useful illustrations of the moral connotations of maiestas. When Metellus was charged with extortion the Court refused to look at his 'tabulae', holding that the proofs of honest administration were not in his records but in his way of life (2.10.5). P. Rutilius, having been convicted of extortion, was so received by the cities of Asia that his journey was a triumph rather than exile (2.10.5). The Cimbric appointed to kill Marius was so overwhelmed by his 'claritas' that he cast away his sword and fled (2.10.6). When M. Porcius Cato attended the theatre the people did not dare to ask that the 'mimae' disrobe (2.10.8).

1 This is clear from the pun (2.10pr): "quam recte quis dixerit longum et beatum honorem esse sine honore".

CHAPTER II

THE ORIGIN OF THE CRIMEN MAIESTATIS

A. PERDUELLIO IN THE THIRD AND SECOND CENTURIES B.C.

A 'lex maiestatis' which was introduced in the first or second tribunate of L. Appuleius Saturninus, in 103 or 100 B.C., was probably the first statutory recognition of the crimen maiestatis¹, and it is presumably with this in mind that H. Last (CAH 9, 296) says that the crimen maiestatis was 'invented' in 103 B.C.; his argument is (CAH, 159ff) that until the law of Saturninus the only competent charge against those, particularly generals, who acted to the detriment of the State was one of perduellio. Professor Last also believes that the crime of perduellio was ill-suited to the purpose of the Popular faction, as that purpose was revealed in a series of prosecutions of generals in the last decade of the second century B.C., and says that Saturninus found a more suitable remedy in the 'invention' of maiestas. The suggestion will be, however, that the sources mention the crimen maiestatis as early as the third century B.C., and that there is nothing anachronistic in such references. It will also be suggested that even the absence of the word 'maiestas', in relation to the criminal law, does not necessarily mean that the crimen maiestatis did not exist before Saturninus, for specific designation of crime was exceptional in the earlier Republic (Momsen, Straf 527) and, in common with several other crimes, the pre-statutory existence of maiestas is largely a matter of inference.

¹ But see p. 38 below.

The relationship between *perduellio* and the *crimen maiestatis* is a skein so tangled that its unravelling depends largely on the individual observer's point of view. Some of the attempts which have been made to state the difference between the two crimes will serve to illustrate the point. Zumpt (2.1.235) says: "Jeder vor der Volksversammlung geführte Capitalprocess war ein *Perduellionsprocess* . . . Within bezieht sich dieser Ausdruck auf das Verfahren, nicht auf das Verbrechen. Dagegen Verletzung der Majestät ist immer ein besonderes Verbrechen geblieben . . ." Mommsen (Straf 539) believes that the two concepts were contrasted "nur insofern, als zwar jede landesfeindliche Handlung ein Majestätsverbrechen, aber nicht füglich jedes Majestätsverbrechen eine landesfeindliche Handlung genannt werden kann"; *maiestas* includes *perduellio*, "aber reicht weiter, und gestattet . . . eine verschiedenartige prozessualische Behandlung und eine mindere Strafe . . ." (Cf. OCD 563). Köhler (545) holds that the distinction turned "nicht um zwei konzentrische, sondern eher um zwei sich schneidende Kreise". Brecht (*Perduellio* 264-5) considers that "*Perduellio* war nie in Gesetzparagraphen gefasst, sondern . . . stets das, was die jeweiligen Ankläger vor dem Volk daraus machten"; in this respect it was contrasted "zu dem sehr früh in gesetzlichen Normen festgelegten *crimen laesae maiestatis* . . ."¹

In recent years it has been realised that the correct approach to Roman Criminal Law is by way of the procedure which was adopted for the punishment of crime, rather than by attempting to differentiate one crime from another on the basis of watertight compartments, each with its appropriate compartment of substantive facts. This view has been crisply stated by Brasiello (cited with qualified approval by Archi 34):

È il processo, o meglio il tipo di processo, che conduce alla repressione di alcuni fatti, che imprime a quei fatti un determinato carattere; ed è opportuno che segua anche la precisazione delle linee fondamentali della

1. For other views see Rein 473-80; Schizas 12-13

repressione, in quanto la pena assume una importanza, e dà al fatto una impronta, che manca nel diritto moderno. Tutta la evoluzione storica dei singoli criminali e in funzione della evoluzione del processo, e anche della repressione.¹

The problem of perduellio and maiestas should be linked to the jurisdiction of the popular assembly sitting as a court - iudicium populi. It is generally accepted that in the third and second centuries B.C. political prosecutions were brought exclusively by plebeian tribunes and aediles. Girard (Organisation 239) puts it as follows:

Ils [sc. les tribunes] sont arrivés à s'emparer le monopole de fait des poursuites politiques. Les chefs révolutionnaires de la plèbe sont, après l'égalisation des patriciens et des plebeiens, devenus ... les magistrats de l'État les plus directement proposés à la surveillance du fonctionnement régulier de la constitution.²

The juridical basis of the criminal jurisdiction of plebeian magistrates is, however, disputed. Mommsen³ has

1 Cf. Henderson 78. This view is, of course, not entirely new. A similar approach is formulated by Zumpt (2.1.235), as far as perduellio - but not maiestas - is concerned, and Pollack (171-7) has developed a theme which gives a valuable lead to the essential distinction between perduellio and maiestas (pp.26-8 below). The merit of modern scholars such as Brasiello and Archi is that they have attempted to find a way out of the cul-de-sac in which the study of Roman Criminal Law was trapped when, as a result of Mommsen's monumental 'Strafrecht', there seemed to be nothing left to say.

2 Cf. Mommsen (Straf 156.2); Greenidge (Procedura 329); Botsford 317; Strachan-Davidson 1.107; Lenglé (Straf 15); Siber (Analogie 7, Verfassung 228); Jolowicz 323-4; Bleicken 358ff; Villers 310-1; Niccolini 113,126-9. A tribune could not, in strict law, convene or conduct the comitia centuriata, but did so by "borrowing the auspices" from a praetor - Mommsen (Staat 1.195); Strachan-Davidson 1.156-8; Botsford 245; Siber (Verfassung 228).

3 Straf 35ff,40,135ff,167,457,473ff; Staat 6.137f,150,162ff; 3.1.354.)

postulated a 'universal provocation' theory, according to which magisterial coercitio¹, which was the power to inflict punishment at discretion, became judicatio (trial according to rules of law) whenever a magistrate imposed a capital sentence or a fine exceeding 3020 asses (the 'multa maxima'). In either event the accused had the right of provocatio ad populum - an appeal to the comitia centuriata in capital cases, and to the comitia tributa in the case of a 'multae inrogatio'.² The magistrate pronounced judgment in the last of the three 'contiones' which made up the 'anquisitio' which he conducted, so that the proceedings before him constituted the trial of first instance, and the proceedings in the comitia were purely appellate.³ Mommsen's theory has been challenged by Brecht (Kontialverfahren, *passim*), who believes that the comitial process was appellate only when the magistrate who conducted the 'anquisitio' had imperium. A plebeian tribune or aedile, lacking imperium, could not pronounce judgment, and merely conducted a preliminary enquiry, at which he acted not as a judge, but as a prosecutor who proposed a penalty. The trial of first instance was in the comitia, the magistrate again acting as a prosecutor (Cf. Greenidge, Procedure 344f). Bleicken (*passim*)

1 See Strachan-Davidson (l.98ff) for a clear exposition of this concept.

2 Capital provocatio traditionally originated with a lex Valeria in 509 B.C., followed by a lex Valeria Horatia in 449 B.C. and a lex Valeria in 300 B.C. - Cic. Rep. 2.53f; Livy 3.26.7; 3.55.4; 10.9.3ff. The current view is that only the third Valerian is historic - Hous 93ff, 114ff; Bleicken (RE 23.2,2446) Stuart Staveley 415. Siler (Provocatio 379 Verfassung 94f) rejects the first Valerian, but believes that provocatio was introduced by the XII Tables. The traditional laws on the 'multa maxima' are the lex Aternia Tarpeia of 454 B.C., the lex Menenia Sextia of 452 B.C., and the lex Julia Papiria of 430 B.C. - Dionys. 10.50.1f; Livy 4.30.3. Stuart Staveley (421) believes that provocatio was first introduced in respect of the 'multa maxima', and later in respect of capital sentences. Bleicken (RE 23.2,2451) contra.

3 Mommsen is supported by Girard (Organisation 110ff); Strachan-Davidson 1.133ff (but with reservations 104); Schulz (Principles 173); Lengle (Straf 16); Jolowicz 324ff.

holds that there was no 'true' provocatio. A plebeian threatened with patrician coercion would appeal to a tribune, who would introduce a plebiscite in the concilium plebis. As this was prior to the lex Hortensia of 287 B.C. the plebiscite had no legal force, but gave the patrician magistrate notice of the will of the plebs (Cf. Stuart Staveley 416ff.) The third Valerian gave the tribunes the exclusive right to prosecute political crimes and made the informal appeal to the plebs unnecessary, as the sole jurisdiction of the tribunes was a sufficient safeguard against patrician magistrates. It is felt, however, that it does not make much practical difference whether provocatio is regarded as appellate or of first instance. In either event there was a final decision by the People, pursuant to proceedings whose initiation was the exclusive province of plebeian magistrates.

Perduellio was related to a 'perduellis' or enemy, particularly an internal enemy.¹ Hence the notion that it corresponded to modern treason, a parallel which fails in the earliest known case, for it is not possible on this basis to explain why the trial of Horatius, in the reign of Tullius Hostilius, is described as one for perduellio, in view of the fact that his crime was the murder of his sister (Livy 1.26). The anomalies do not disappear with time, for it was also perduellio when the tribune P. Rutilius prosecuted C. Claudius Pulcher and T. Sempronius Gracchus in 169 B.C., for having ignored his veto and interrupted him while he was addressing a contio (Livy 44.16,8; 45.15,8; Cic. Rep. 6.2.) Various solutions to the problem have been proposed. Zumpt (1.2.331ff) suggests that perduellio be divorced from the notion of a

1 Rein 464-5; Zumpt 1.2.327; Mommsen (Straf 536); H. Last (CAH 9.159); OCD 663; Polack 167,2; Jolowicz 327; Lear 13. Brecht (Perduellio 123) refers 'perduellis' to an external, and 'perduellio' to an internal enemy.

'perduellis' or 'hostis', and be taken as a general term for all capital prosecutions by tribunes in the comitia centuriata (Cf. Mommsen, Straf 545). Pollack (181.1) believes that Horatius' crime was an injury to maiestas, because he killed his sister in the sight of the king and the people. The explanation of Merrill (34ff) is that treason in the early Republic was a broad concept covering all cases of "disobedience to the mandate of the state", and including "almost any offense that appeared clearly to affect the state, and not ... primarily an individual"; there was no technical term for this loose aggregate of crimes, but when treason later came to be known as 'perduellio' the term was applied retrospectively to the crimes which had existed before the designation (cf. Greenidge, Treason 229).

A fruitful approach is adopted by Brecht (Perduellio, passim), who believes that perduellio had no application to 'Landesverrat' - hostility in external affairs, comprising proditio and serious military crimes; these were punished under magisterial imperium, and there was no question of a trial in the comitia. In the case of 'Hochverrat' (hostility in internal affairs), the original perduellio was 'affectatio regni' - any attempt to restore the monarchy. In the next stage the tribunes used perduellio as an instrument of 'Lynchjustiz' against the patricians. After the lex Hortensia of 287 B.C. the tribunes, acting for the whole community, brought prosecutions for perduellio against incompetent and dishonest generals and magistrates. This was the great tribunician 'Rechenschaftsprozess' which was conducted against 'Amtsverbrechen'. In the late Republic perduellio degenerated into a weapon of the Popular faction against the Optimates. Elsewhere (RE 19.1.628, 635) Brecht adds that the crime was perduellio only when there was a capital prosecution in the

comitia centuriata, perduellio never having formed the subject of a 'multae inrogatio' in the comitia tributa.¹

Brecht has given the correct historical setting to the 'Rechenschaftsprozess', which is the starting-point for the origin of the crimen maiestatis. A significant feature of the 'Rechenschaftsprozess' is that tribunician prosecutions were not merely an exercise of jurisdiction, but constituted an actual process of law-making. Strachan-Davidson (L.105ff) believes that the Roman Criminal Law originated in magisterial prosecutions in particular cases, which led to the gradual evolution of general principles of law. By stretching perduellio a magistrate could treat any wrongful act as injurious to the community, and punish the wrongdoer. It need not be assumed that the acts in question were previously laid down as culpable; on the contrary, the plebeian tribunes established liability in the case of political crimes by the very fact of bringing a prosecution (cf. Merrill 34). Brecht (Perduellio 193) amplifies this view with the statement that "Perduellio war ... einfach das was [die Volkstribunen] dem Volk erfolgreich als perduellio hinzustellen wussten". Siber (Analogie, passim) postulates a law-making process by 'Amtsrecht', which was the extensive interpretation of an assumed 'Volksrecht'. All these authorities have correctly seen that tribunician prosecutions made law, in opposition to Mommsen's rigid dogma (Straf 57): "Kein Delict ohne Criminalgesetz, keinen Strafprozess ohne Prozessgesetz, keine Strafe ohne Strafgesetz".

1 Bleicken (360f, 368ff), following the road taken by Brecht, believes that in the revolutionary period prior to the lex Hortensia the tribunes prosecuted the 'Amtsverbrechen' of patrician magistrates as perduellio. By the middle of the fourth century B.C. these prosecutions were no longer solely in the plebeian interest, but on behalf of the entire community, and the lex Valeria of 300 B.C. gave legal recognition to that situation. Towards the end of the fourth century recognition was also extended to 'multa' prosecutions by tribunes and aediles (cf. Lenglé, Straf 176).

The 'Rechenschaftsprozess' was directed against the following categories:¹ the misconduct of magistrates and pro-magistrates, especially unauthorised warfare and departure from a province, military failures, cowardice, ill-treatment of allies and enemy prisoners, disregard of the auspices, and unfair division of booty; retention of office beyond the due term; bias in the administration of justice; neglect of sacral duties; misuse of public funds; the misconduct of censors, tribunes, and inferior magistrates; and breaches of duty by legates, senators, and private individuals who undertook services on behalf of the State. These principles may be briefly illustrated by some of the cases. In 294 B.C. the Senate refused L. Postumius a triumph because he had gone from Samnium to Etruria without authority; he avoided a tribunician prosecution by staying away from Rome as a consular legate (Livy 10.37.6-12; 13.46.16). In 178 B.C. the tribunes, after questioning M. Junius as to the unauthorised Histrian war, asked why A. Manlius had not come to Rome "ut rationem redderet populo Romano cur ex Gallia provincia quam sortitus esset in Histriam transisset?"² C. Plautius was condemned in 146 B.C. for his failure against Viriathus in

1 Cf. Zumpt (I.2.305-23, 338-55); Mommsen (Staat 2.1.320-4); Rein 481-93; Botsford 246-53; Siber (Analogie, passim); Brecht (Perduellio 281-302).

2 Livy 41.7.7-8.10. Professor S. Davis of the University of the Witwatersrand suggested in the course of a discussion that there might be a connection between the Athenian *εἴσις* and the Roman process "ut rationem redderet". Greek historians seem to have identified the two procedures. Thus: *ἐκ τούτων οὐκ ἐστὶν ἀσφάλεια* (Dio fr. 30 - Greenidge & Clay 80), *ἀνερεθίσθησαν ἀρχῇ* (the censorship) (Dionys. 19.6.5), and *ἀνερεθίσθησαν* (tribunes) (Dionys. 9.44.7). The Athenian practice required every magistrate, on giving up office, to render an account of his administration, whereupon any citizen could indict him in a private suit or a public prosecution (Glotz 226ff). There is, however, nothing to show that a Roman tribunician prosecution necessarily followed the vacation of office by a magistrate. It depended entirely on whether a tribune decided to prosecute. It seems clear from Cicero (Leg. 1.20.47) that the introduction of the calling to account which he advocates (expressly on the lines of the Greek practice) would have been an innovation in Roman Law.

Spain (Appian Iber. 11.64; Diod. 33.2); Zumpt (1.2.345; cf. (Auct.) RE 21.9) says that the crime was maiestas, but the procedure was that of perduellio - a capital prosecution in the comitia centuriata. In 136 B.C. M. Aemilius Lepidus, in breach of an express directive from the Senate, made war on the Vaccaei, but unsuccessfully. He was relieved of his command and consulship, and condemned on a 'multae inrogatio' (Appian Iber. 13.81-3). In 241 B.C. the cruelty of the Attilii to Punic prisoners of war was so shocking that they were tried, and narrowly escaped the death penalty $\delta\epsilon\ \kappa\alpha\tau\alpha\sigma\tau\chi\epsilon\nu\sigma\iota\ \tau\eta\nu\ \text{'}\epsilon\phi\epsilon\nu\eta\text{'}$ (Diod. 24.12.3). In 204 B.C. Q. Pleminius was tried for ill-treating the Locrians and plundering their temple at Rhegium (Livy 29.16.7 - 21.12); the case is linked to maiestas, for the Locrians complained that Pleminius had kept only the garments and speech of a Roman (cf. p.8 above). In 150 B.C. the praetor Ser. Sulpicius Galba executed some Lusitanians and sold others into slavery, in breach of the terms of surrender. In 149 B.C. the tribune L. Scribonius proposed a plebiscite for the emancipation of the enslaved Lusitanians, and Galba seems to have been prosecuted, although the outcome is uncertain. Galba appealed 'ad misericordiam', exhibiting his two young sons to the People. Livy (Per. 49) says that the result was "ut rogatio antiquaretur", but Livy (Per.Oxy. 49) says: "Ser. Galba de Lusitanis reus productus. Liberaverunt eum filii, quos flens commendabat". In 363 B.C. the dictator L. Manlius was prosecuted by a tribune "quod paucos sibi dies ad dictatorem gerendam addidisset" (Cic. Off. 2.31.112), and for levying troops without authority (Livy 7.3.4). In 142 B.C. the praetor L. Tubulus, presiding at a murder trial, allowed money to influence the verdict. The following year the tribune P. Scaevola introduced a plebiscite authorising an enquiry. Tubulus' crime was maiestas in Cicero's day (Cic. Verr. 1.39). Misuse of public funds was the basis of the charges

against M. Acilius Glabrio in 189 B.C. (Livy 37.57.12) and C. Lucretius in 171 B.C. (Livy 43.8).

B. "JUDICIUM MAIESTATIS APUD POPULUM"

The 'Rechenschaftsprozess' was the basis of the crime of perduellio as it was developed by tribunician prosecutions in the third and second centuries B.C. As so constituted perduellio included the elements of a number of crimes which subsequently received independent statutory recognition, pursuant to a far-reaching change in the administration of criminal justice. Beginning with the lex Calpurnia repetundarum of 149 B.C., various crimes were regulated by laws which created 'quaestiones perpetuae' or permanent jury courts - also known as 'iudicia publica',¹ as distinct from the 'iudicium populi' or popular assembly (comitia centuriata or tributa) sitting as a court. Jurisdiction in respect of the category of wrongful acts enumerated in each lex was conferred upon a court consisting of a body of jurors ('iudices') under the presidency of a praetor.²

1. Henderson 82 believes that 'quaestio' and 'iudicium publicum' were not interchangeable terms, but meant 'a process of inquiry' and 'a single trial or judgment', respectively. She rather unfairly foists this notion on Mommsen, who would no doubt have defended himself adequately by citing Macer (Dig. 48.1.1).

2. Mommsen (Straf 190,708): Strachan-Davidson 2.4ff,20ff; Lenglé (Straf 26). Modern research, reviving a theory put forward a century ago by Zumpt (2.1.51-4,70-92,131-2,136, 184-5), seeks to re-interpret the introduction, probably by the lex Acilia repetundarum of 123 or 122 B.C. (Hitzig 3-4; Badian, Gracchi 208) of the class of 'iudices Gracchani'. Henderson believes that the quaestio repetundarum was originally a comprehensive criminal court for the trial of senators for various crimes, and that separate 'quaestiones' for particular crimes were first created by Sulla. For an effective criticism of her hypothesis see Sherwin-White (Extortion 51-3). Badian (Gracchi 209) argues well for the theory that the 'iudices Gracchani' were used for other 'iudicia publica' as these came to be established on the model of the extortion court.

A number of 'iudicia publica' dealt with crimes which had previously been prosecuted as perduellio. Thus, there were leges de repetundis, de peculatu, de ambitu, and several leges maiestatis. These laws dealt with 'Amtsverbrechen', and thus with acts which previously fell under the 'Rechenschafts-prozess'. In other words, perduellio was partly fragmented into a number of distinct crimes, each with its own questio perpetua. The present concern is with the fragment which later made up certain forms of the crimen maiestatis, under the leges maiestatis. There is reason to believe that this fragment existed before 103 B.C., not merely as an area of perduellio which was potentially maiestas, but specifically as the crimen maiestatis. Indeed several authorities entertain this possibility, although without detailed analysis. Siber (Analogie 41) says that the maiestas laws of Saturninus and Sulla "fanden schon eine ausgedehnte Praxis vor, die sich ohne Gesetze und deren Analogie entwickelt hatte, also nur auf tribunizischen Amtsrecht beruhen konnte". Köhler (545), although doubting whether tribunician prosecutions were specifically for maiestas, admits that "es kann kaum bezweifelt werden, dass der Begriff und seine Bezeichnung längst im Volke eingewurzelt war, als gesetzliche Regelung des Verbrechens und des Strafverfahrens darüber erfolgte" (cf. Meitland 2,398).

Pollack (154,161,166-77), although he bases himself on certain outmoded notions, has made an analysis which seems to open a worthwhile line of approach to the problem. His theory is that it is unrealistic to seek at any stage for a distinction between the facts which constituted perduellio and those which made up the crimen maiestatis. In the field of substantive law there was no differentiation of the wrongful acts which were prosecuted as perduellio from those which formed the subject of a charge of maiestas. Both were simply

the "Ausdruck für eine Summe von Handlungen, die, weil sie gegen die Majestät der Gemeinde gerichtet sind, bestraft werden. ... Der strafrechtlichen Idee nach sind 'perduellio' und 'crimen maiestatis' identische Dinge. In beiden Begriffen spiegelt sich die Majestätsidee wieder, sie fließen unterschiedslos ineinander" (169). The difference between the two concepts was purely procedural. The crime was perduellio when it was prosecuted by 'duoviri perduellionis', with a capital sanction, and maiestas when it was dealt with under "des Quästionenverfahren", with a non-capital sanction. (175-6).

In the first place it is objected that Pollack's identification of the substantive areas of perduellio and maiestas is too widely stated. It is preferable to regard maiestas as only one of the component fragments of perduellio, taking the latter in the general sense of all those 'Amtsverbrechen' which formed the subject of the 'Rechenschaftsprozess', and in this regard Köhler's "zwei sich schneidende Kreise" (above) is apt. For example, of the categories constituting the 'Rechenschaftsprozess', that which consisted in the misuse of public funds seems to have been associated so early with the crime of 'peculatus' (for which see Siber, *Analogie* 19-20) that it should not be regarded as ever having formed part of the 'maiestas' fragment of perduellio. And the category which included unauthorised warfare and departure from a province was ambivalent, in that it gave rise in the last century B.C. to 'iudicia publica' for both maiestas and the crimen repetundarum (pp. 9-9 below). Secondly, Pollack's reliance on the 'duoviri perduellionis' for cases of perduellio is scarcely warranted. The archaic duumviral procedure traditionally originated at the trial of Horatius, a case which no doubt reflects a very

old procedure,¹ but the process is not authentically attested later than the case of M. Manlius in 384 B.C. (Brecht, *Perduellio* 191.4; Siber, *Verfassung* 112), except for its artificial revival by the Popular faction in 63 B.C., for the trial of C. Rabirius (pp. 35-7 below). It can safely be assumed that this procedure became obsolete with the passing of the *lex Hortensia* in 287 B.C., and the consequent vesting of exclusive jurisdiction over *perduellio* in the *tribuni plebis*.² Thirdly, by identifying the *crimen maiestatis* exclusively with "das *Quästionenverfahren*" Pollack in fact denies the contemporary existence of *perduellio* and *maiestas*, for the first permanent *quaestio maiestatis* was set up in 103 B.C. (pp. 50-7 below). It would follow from Pollack's theory that the *crimen maiestatis* was not known 'eo nomine' until that year, which brings the problem back to the position taken up by H. Last (p. 16 above). It would also follow that until 103 B.C. "*Handlungen ... gegen die Majestät der Gemeinde*" were exclusively *perduellio*. But Pollack's contention that the distinction between the two crimes was purely procedural does, it is believed, give a valuable indication of the right approach. It is suggested that attention should be directed to certain cases in the third and second centuries B.C., where the same accused was tried on the same facts by the *comitia centuriata* and the *comitia tributa* in turn. The facts of these cases fall squarely under the tribunician '*Rechenschaftsprozess*', and when they were prosecuted in the *comitia centuriata* the crime was *perduellio*, in the sense in which Brecht understands it (p. 22 above). What was the crime when the same accused was brought before the

1 For the trial of Horatius see Livy 1.26. Brecht (*Komitälverfahren* 293; cf. *Perduellio* 126-32) is inclined to accept the historical value of the trial, but it is described as a "*Rechtslegende*" by Mommsen (*Straf* 155.1), and as "*ganz sagenhaft*" by Siber (*Verfassung* 96).

2 Brecht (*Perduellio* 191.4); Siber (*Verfassung* 127); Botsford 243 ff.

comitia tributa¹ on the same facts?²

In 249 B.C. P. Claudius Pulcher, when told that the sacred chickens had refused to eat during the taking of the auspices, contemptuously threw them into the sea, "quasi ut biberent quando esse nollent" (Suet. Tib. 2; cf. Livy Per 19; Val. Max. 1.4.3; Schol. Bob. 27). Claudius went on to suffer a disastrous defeat at the naval battle of Drepana. He was prosecuted by the tribunes in the comitia centuriata, expressly for perduellio: "dies ei dicta perduellionis a Pullio et Fundanio tr. pl." (Schol. Bob. 27; cf. Polyb. 1.52; Val. Max. 8.1.4; Suet. Tib. 2). A storm interrupted the trial, thus annulling the proceedings in accordance with the rule that the assembly had to give judgment without an adjournment: "cum comitia eius rei fierent et centuriae intro ducentur, tempestas turbida coorta est; vitium intercessit" (Schol. Bob. 27; cf. Cic. Dom. 1.43). An attempt to renew the charge of perduellio was vetoed by the tribunes: "postea tr. pl. intercesserunt, ne eadem homines in eodem magistratu

¹ Also known as the 'comitium plebis'. On the identification of the two assemblies, against Maassen, Staat 3.149.3, 322ff; see Botsford 119-38; Roos (passim).

² There is, of course, no suggestion that the 'Rechenschaftsprozess' did not occur earlier than the third century B.C. The tradition attests 'Amtsverbrechen' as early as 491 B.C. (Brecht, Perduellio 282-3) and thereafter a long line of cases in the fifth and fourth centuries B.C. See Zumpt 1.2, 305-10; Brecht (perduellio 281-7). The principles enunciated in these cases are substantially the same as in the cases which have been selected from the third and second centuries B.C. to illustrate the 'Rechenschaftsprozess' (pp. 23-5 above), and there is no doubt that a certain area of that process contained the elements of the crimen maiestatis prior to the third century B.C., no less than during the third and second centuries. The latter period is, however, selected as the starting-point of the crimen maiestatis for two reasons. Firstly, prior to the lex Hortensia of 287 B.C. the 'Rechenschaftsprozess' did not form part of the public criminal law of the Roman State. Secondly, it will be suggested that the first example of the crimen maiestatis proper occurred in 249 B.C., so that to discuss cases prior to the third century might further illustrate the general principles inherent in the crime of maiestas, but would not take the matter much further as far as the first appearance of the crime 'eo nomine' is concerned.

perduellionis his eundem accusarent" (Schol. Bob 27; cf. Val. Max. 8.1 abs 4). Claudius was then prosecuted by the same tribunes in the comitia tributa, and was condemned and sentenced to a fine of 120,000 asses: "iteque actione mutata iisdem accusantibus multa inrogata populus eum damnavit aeris gravis CXX milibus" (Schol. Bob 27; cf. Polyb. 1.52). The fine was calculated on the basis of 1000 asses for each ship lost (Cic. Nat. Deor. 2.3.7).

The second charge against Claudius, in the comitia tributa, is not given a name in the sources, but it may be possible to supply one from the trial of his sister, Claudia. In 246 B.C., when leaving the theatre, she was jostled in a crowd,¹ and ill-temperedly regretted that her brother was not present to reduce the rabble, as he had done at Drepana: "Sed utinam, inquit, reviviscat frater aliamque classem in Siciliam ducat atque istam multitudinem perditum eat, quae me nunc male miseram convexavit" (Gell. 10.6.2); "optaverat ut frater suus Pulcher revivisceret atque iterum classem excitaret, quo minor turba Romae foret" (Suet. Tib. 2; cf. Val. Max. 8.1 damn. 4). She was prosecuted by the plebeian aediles, Fundanius and Ti. Sempronius, on a 'multae interrogatio' in the comitia tributa, and her sentence was a fine of 25,000 asses (Gell. 10.6.3). Her crime was specifically the *crimen maiestatis*: "quo novo more iudicium maiestatis apud populum mulier subit" (Suet. Tib. 2). Gellius (10.6.3) does not name the crime.

Suetonius' reference to a '*iudicium maiestatis*' should not be dismissed as an anachronism. He says that the

1. So Gellius 10.6; Val. Max. 8.1. damn. 4; and Livy Per. 19. Suetonius (Tib. 2) says that her carriage was obstructed in a crowded street.

trial took place 'apud populum', which here means the comitia tributa on a 'multae inrogatio', and there is no reason to suppose that he is confusing the court with the 'iudicium publicum' (quaestio perpetua) which sometimes still dealt with maiestas in his day. And 'novo more' suggests that his source was specifically mindful of the law in the third century B.C., for the crimen maiestatis and the quaestio maiestatis were no novelty in Suetonius' day. His source may have been Ateius Capito, a prominent jurist under Augustus, and the founder of a law-school (Schulz, Legal Science 119). In this regard the remark of Gellius (10.6.4) is significant: "Id factum esse dicit Capito Ateius in commentariis de Iudiciis Publicis".

The historical background (T. Frank, CAH 7.687-9; Scullard 168-70) favours Suetonius. Drepana, as the only serious naval defeat suffered by Rome in the First Punic War, was a direct threat to her entire position. It was followed by the loss by L. Junius Pullus of a convoy to the Punic fleet under Carthago, and Rome was left without a navy. Bankruptcy threatened, and a call for new crews might drive the allies to revolt. The policy was merely to hold on. In 246 B.C., the very year of Claudia's ill-timed remark, Hamilcar struck at the rear of the Roman armies besieging Drepana and Lilybaeum, established himself on Mt. Heirkte and anchored a fleet at its foot, a position from which he was to hold the Romans at bay for three years. In the tense atmosphere of the time Claudia's words may well have been interpreted as a diminution of Roman maiestas.

Claudia was prosecuted in the same court as her brother. The same person was one of the accusers in both

cases, namely C. Fundanius, as tribune against Claudius and aedile against Claudia (cf. Broughton 1, 215 ff.). Her case was almost contemporaneous with his. Her offence was a remark alluding to the occasion of his misfortune. A fine of comparable magnitude was imposed on her. Her crime was *maiestas* while the charge against him was not *perduellio*. There is a reasonable possibility that the second prosecution of P. Claudius Pulcher was for the crime *maiestas*, expressly so described. His case, then, may be noted as the earliest known instance where the 'Rechtschaffensprozess' was pursued in the form of the crime *maiestas*.¹

The converse case is that of the army contractor M. Postumius Pyrgensis, who in 212 B.C. claimed compensation for losses sustained by shipwreck; in fact he had fraudulently sunk old ships. The tribunes L. and Sp. Carvilius prosecuted him, proposing a fine of 200,000 aases. Livy (25.3.8-5.1) does not name the crime, but it may have been *maiestas* (Siber, *Analogie* 60; Mommsen, *Straf* 767.5). The offence fell under 'Amtsverbrechen', as Postumius had undertaken a duty on behalf of the State (cf. p. 23 above). Postumius' publican friends stormed the Assembly, the tribunes terminated the trial in order to avoid bloodshed, and brought a second prosecution, this time for *perduellio*: "Carvillii tribuni plebis omnia multae certatione rei capitalis diem Postumio dixerunt" (Livy 25.4.8).

¹ Gundel 291-2 (cf. Sherwin-White, *Citizenship* 160) argues that the 'maiestas' treaty with Gades in 78 B.C. was a renewal of an earlier treaty of 206 B.C. which also contained the 'maiestas' clause. This date is close enough to 249 B.C. to support the supposition that the second half of the third century B.C. may have witnessed the more or less simultaneous introduction of *maiestas* as a technical concept in the external and internal fields.

Du 211 B.C. a 'multae inrogatio' was proposed against the ex-prætor Cn. Fulvius Flaccus, arising out of his disastrous defeat by Hannibal at Herdonea (Livy 26.3.5,8; Val. Max. 2.8.3). At the third contio it appeared that there had not only been a rout, but that the cowardly flight of Fulvius had precipitated it. Thereupon, "tanta ira accensa est ut capite anquirendum contio succlamaret" (Livy 26.3.5). This demand raised the question whether, after two contiones on a 'multae inrogatio', the third could be capital. The tribunes refused to intercede, and Fulvius was charged with perduellio. This case is perhaps a better example of a change of forum on the same facts than that of Postumius. The violent intervention of the latter's friends may have constituted a further crime, and therefore the perduellio charge was pressed "cum ... vinque eam contra rem publicam et pernicioso exemplo factam senatus decreasset" (Livy 25.4). In the case of Fulvius the charge was amended on the same facts, amplified by the aggravating circumstance of cowardice.

(Cicero Verr. 2.1.4.10ff) supplies a slightly different example. He says that if he does not get a conviction against Verres for extortion, he will charge him with peculatus. If that fails, he will prosecute him in the quaestio maiestatis. If the quaestio acquits, he will pursue him in the comitia tributa.¹ It is significant that the immediate alternative to the quaestio maiestatis is the comitia tributa, which suggests that the charge in the latter forum would also have been for maiestas.

1 Cicero, as a plebeian aedile (Broughton 1.220.3; 2.132, 136.5), had jurisdiction in the comitia tributa. The view of Strachan-Davidson (1.108) that he was a curule aedile fails to take into account the lack of any precedent for a political prosecution by a curule magistrate.

In three cases the existence of the *crimen maiestatis* in this period is attested 'eo nomine', and not merely as a matter of inference. The first is that of Claudia (pp. 30-3 above). The second concerns C. Flaminius, tribune in 232 B.C. who, while addressing the *concilium plebis* on an agrarian law which the Senate opposed, was forcibly removed by his father. Cicero (*Invent.* 2,17,52) says that the father was charged with *maiestas*: "*arcessitur maiestatis*". Before dismissing Cicero's testimony as a mere rhetorical exercise,¹ it would be necessary to dispose of the argument that Cicero is the best and most extensive source for Republican *maiestas*, and deals with it in a juristic manner. In the instant passage he sets out the contentions of the prosecution and the defence, and concludes with the issue: "*Iudicatio est: mimueritne is maiestatem qui in tribuniciam potestatem patria potestate utatur*". That Cicero does not confuse *perduellio* and *maiestas* is shown by his specific use of the word '*perduellio*' when he means *perduellio* and not *maiestas*, namely when he mentions the introduction by C. Caelius Caldus in 106 B.C. of a law providing for secret voting in *perduellio* trials (*Leg.* 3,15,36). The third case is that of the praetor L. Quinctius Flaminius, who in 193 B.C. beheaded a Gallic prisoner for the entertainment of his mistress. Seneca Rhetor (*Controv.* 25pr) attests a specific charge of *maiestas*, and some modern authorities agree with him (Köhler 546; Bonner 108; Dreyler 203). But according to another tradition his punishment was exclusion from the Senate by the censor M. Porcius Cato, "*quod amplissimi honoris maiestatem tam taetro facinore inquinaverat*" (*Val. Max.* 2.9.3; cf. *Cic. Senect.* 12,42). The difficulty is noticed by Götlin (13), who says: "*Die eisenardige is dat hierdie geval nie*

1. The historicity of the case is accepted by Bonner 27; and Santa Cruz 92-3.

voor die regsprekende instansies gadien het nie". If the case is to be accepted as one of *maiestas* it must be on the basis that it is evidence of a practice which was subsequently recognised by statute. In 104 B.C. a law proposed by L. Cassius Longinus provided that those who were condemned by the People or deprived of their *imperium* were to be excluded from the Senate (Ascon. 78C; Cic. Dom. 31.83). If there was a similar *de facto* procedure in Flamininus' time, his exclusion from the Senate may have been preceded by his condemnation in the *comitia tributa*, on a charge of *maiestas*.

The trial of C. Rabirius in 63 B.C., for his part in the murder of L. Appuleius Saturninus in 100 B.C., is of some relevance to the questions discussed above, for it may be another example of a prosecution for both *perduellio* and *maiestas* on the same facts. The case, whose difficulties are not resolved by the survival of a speech by Cicero (*Pro Rabirio Perduellionis Reo*), seems to have started before Caesar and L. Caesar, sitting as '*duoviri perduellionis*'.¹ Caesar condemned Rabirius, who exercised his right of '*provocatio ad populum*', but the trial in the *comitia centuriata* was vitiated when the praetor Metellus Celer struck the red flag on the Janiculum, thus dissolving the Assembly (Dio 37.27-8). The tribune T. Labienus, who played some part in the proceedings before the '*duoviri*',² then brought a further prosecution

1 As to whether they were appointed by the praetor or a lex, and whether there was an immediate judgment or an '*anquisitio*' in three '*contiones*', see Brecht (*Perduellio* 179-82, 186-9) and Siber (*Provocatio* 382, *Verfassung* 112). Perhaps the most intelligent attempt to resolve the difficulties of this case is made by Strachan-Davidson (1.188-203).
 2 On which see Strachan-Davidson 190-1; Brecht (RE 19.1. 535-6; Siber (*Provocatio* 382); Lengle (*Straf* 21).

in one of the popular assemblies. Despite Dio (37.28.4), it should be inferred that there was a second trial, in view of Cicero's assertion (Rab. Perd. 6.18; cf. 6.19) that if he were undertaking the defence 'ab initio' he would admit that Rabirius killed Saturninus, but that he is precluded from doing so because the falsity of the allegation has already been demonstrated by Q. Hortensius, who previously appeared for the accused. The question is whether the second trial, which seems to be the one at which Cicero spoke, was on a charge of perduellio (Brecht, Perduellio 178.3; RE 19.1.636) or maiestas (Pollack 176.3). The second trial included a number of minor charges (Cic. Rab. Perd. 2.7-8), but the death of Saturninus was brought up again, although in a slightly different form. In the first (duumviral) trial the allegation was: "C. Rabiri manu L. Saturninus esse occisum" (Rab. Perd. 6.18). But in the second trial it was: "interficiendi Saturnini causa C. Rabirium arma cepisse", and Cicero was not precluded from admitting this allegation (ib.). It has been suggested (Pollack 176.3) that the second trial must have been for maiestas, because of "ius omne retinendae maiestatis Rabirii causa continetur" (Cic. Or. 29.102). But Cicero probably means something quite different. His point is that to prosecute Rabirius is to deny the validity of the 'senatusconsultum ultimum' which advised the murder of Saturninus, a point which he makes even more forcefully when he says that the decree authorised the consuls to see to it "ut imperium populi maiestatique conservaretur" (Rab. Perd. 7.20; cf. 1.2). There is the further difficulty that the charge does not seem to have been based on the fact that the murder of Saturninus was an attack on a magistrate; it was rather a straight allegation of murder (Mommesen, Straf 358.1; 532.4; Brecht, Perduellio 170-1, 173.1, 177).

1. Is this a sly thrust by Cicero at his great forensic rival?

The minor charges (Rab. Perd. 2.7-8) could well have been pressed on a 'multae inrogatio' rather than a capital charge, and it seems that they were brought in the same (second) trial as the charge of having taken arms in order to kill Saturninus (Rab. Perd. 3.9, 6.1). Furthermore, a second trial for perduellio would have breached the rule laid down in the case of P. Claudius Pulcher (pp. 29-30 above). On balance the evidence seems to favour the view that the second trial was for maiestas, and if so it lends support to the theory which has been propounded, namely that when the 'maiestas' fragment of perduellio was prosecuted in the comitia tributa on a 'multae inrogatio', the crime was expressly the crimen maiestatis.¹

1 Mommsen's theory as to the origin of the crimen maiestatis can more conveniently be considered when the question of tribunician sacrosanctity as an element in the crimen maiestatis under Augustus is discussed. See pp. 239-41 below.

CHAPTER III

THE LEX MAIESTATIS: SATURNIUS

A. INTRODUCTION

In a certain sense it can be said that, in the same way as the principles which were subsequently enshrined in the *crimen maiestatis* go back to the fifth century B.C. (p.29 n.2 above), so legislation in respect of acts directed against the *maiestas* of the Roman People has its roots in laws which were introduced, or are attested as having been introduced, long before the crime specifically known as the *crimen maiestatis* was recognised by the public criminal law. In this sense *maiestas* legislation may be supposed to have begun¹ with the putative *lex Icilia* of 492 B.C., which forbade the interruption of a tribune who was addressing the *concilium plebis*,² a principle which was applied in historical times in cases such as those of C. Flaminius (pp. 34-5 above). A fair case has been made out (Brecht, *Perduellio* 142-50) for a primitive '*lex perduellionis*' which is equated to the '*lex horrendi carminis*' to which Livy (1.26) refers in his account of the trial of Horatius. It has been suggested (Pollack 168, 169 and n.2) that the concepts underlying *perduellio* and *maiestas* were dealt with in the XII Tables, although not '*eo nomine*', a view which is supported by the reference of Marcian (Dig. 48, 4.3). It has also been suggested (Lear 19) that the

1 The so-called 'law of Romulus', which is supposed to have subjected breaches of the patron-client relationship to the law of *proditio* (Dionys. 2.10.3) cannot be seriously considered as anything more than the propaganda of a political pamphleteer under Caesar or Augustus - Premerstein 8-12; cf. Brecht, *Perduellio* 34-41; Sundel 297, 4.

2 Siber (Analogie 29, *Verfassung* 41, 82); Niccolini 44-50. On '*leges sacratae*' see also pp.22-5 below.

Senatusconsultum de Bacchanalibus of 186 B.C., which advised the consuls to conduct an investigation into the conduct of the Bacchanals, was concerned with the crimen maiestatis, but the Senate had no legislative power at that period (cf. Krüg. 24-6; Daube 10-9), and in any event the decree was merely the grant of special emergency powers to the consuls (Gaudemet 336; Lengle, Straf 57.)

It is proposed, however, to limit the discussion to those laws which submitted the crimen maiestatis to a 'iudicium publicum' or quaestio. These laws, which are grouped as 'leges maiestatis', successively detached various 'maiestas' areas from the 'Rechtenschafterprozess', stated each area so detached in the form of a category of wrongful acts, and submitted the category thus ascertained to the jurisdiction of a quaestio. The result was that although the comitia tributa did not lose its jurisdiction entirely, its role was increasingly circumscribed as the area of jurisdiction of the quaestio maiestatis was extended.

Porcius Latro (Declamatio in Cato'nam 19), attests a lex Gabinia whereby "qui coitiones clandestinas in urbe conflasset" was to be punished 'more maiorum'; he assigns the original rule to the XII Tables. A certain Gabinus, tribune in 139 B.C. (Broughton 1.482), and those who accept this law date it to his tribunate.¹ Zumpt (2.1.383; 2.1.428 n.124) concedes the possibility of a law prohibiting nocturnal gatherings, but says that it was not a maiestas law because Porcius Latro does not refer to 'maiestas populi Romani'. The law is doubted by Mommsen (Straf 563 and n.3) and Rotondi (297), and flatly rejected by Gundel (297.4).

¹ See the authorities cited by Zumpt (2.1.428 n.124) and Kibler 546. Broughton (1.483.2) accepts the law, but is inclined to assign it to a later Gabinus.

Even if there was a *lex Gabinia* it was not a *maiestas* law, for punishment 'more maiorum' meant a capital sentence (*Kühler* 546), which excludes *maiestas* at the supposed time of the *lex Gabinia*. Cicero nowhere refers to this law in his many expositions of *maiestas*. He refers to this *Gaunius* in connection with his law which introduced secret voting in the Assembly (*Leg. 3.16.35*), and describes him as "*homine ignoto et sordido*". Livy (*Per.Oxy. 54*) refers to him as "*vernae nepos*". Both Cicero and Livy knew enough about him to stress his humble origin, and both knew of his ballot law, but neither credits him with a *maiestas* law. It may conceivably be argued that a law dealing with voting in the Assembly may have dealt with the related question of the '*contiones*' at which proposals which were to be put to the vote were discussed, but even then the capital sanction is against a *maiestas* law.

In 110 B.C.¹ the tribune C. Mamilius Limetanus carried a law setting up an extraordinary or *ad hoc* commission which, although not a *quaestio perpetua*, was modelled on such a court; the court was composed of '*Gracchanis iudices*' (*Badian Gracchi* 208). Its terms of reference were to try those who had incited Jugurtha to ignore the decrees of the Senate, those who had accepted bribes from him, those who had delivered elephants or deserters to him, and those who had negotiated with him concerning war and peace.² The establishment of the '*quaestio Mamiliana*' was prompted by the ignominious peace imposed on A. Postumius Albinus, legate of the consul Sp. Postumius Albinus, during the latter's absence in Rome. The *Populares* clearly wanted to press home the

1 So Mommsen (*Straf* 197); Greenidge (*History* 375, *Procedure* 381); *Greenidge & Clay* 68; *Strachan-Davidson* 1,239; *Rice Holmes* (*Republic* 1.38); *Lengle* (*Straf* 30); *Levy* 27.3. *Heitland* 2,347 and *Broughton* 1,546 prefer 109 B.C.

2 *Sall. Jug.* 40.1; *Cic.Brut.* 34.128. Cf. *Greenidge* (*History* 375,377; *Procedure* 381.)

attack on corruption in the administration with all speed, for three 'quaesitores' were appointed to preside over three separate courts.¹ M. Scarcus, "the guiltiest of the guilty" (Mommsen, History 3.397), surprisingly appeared not as an accused but as a 'quaesitor' (Sall. Jug. 40.4). The commission is criticised not only by Cicero (Brut. 33.127, 34.128; Planc. 29.70; Sest. 67.140), but also by Sallust (Jug. 40.3, 5), but Cicero may have had a motive. The condemned included L. Opimius, who had been the first to employ the 'senatusconsultum ultimum' when, in 121 B.C., he procured the judicial murder of C. Gracchus and his supporters.² Cicero, who in 63 B.C. executed some of those involved in the conspiracy of Catiline on the strength of such a decree, depended for the justification of his action on the theory which he invented, namely that a citizen who was guilty of perduellio forfeited his rights of citizenship retrospectively to the time when his crime was committed, and could therefore be summarily dealt with without trial.³ The condemnation of Opimius by the Mamillian Commission was an adverse finding against the man on whose credit Cicero relied so heavily for his own exoneration, and this perhaps explains the vehemence of his attack on the commission. The terms of reference of the commission (Sall. Jug. 40.1) do not use the words 'perduellio' or 'maiestas'; but in this respect Sallust's attestation of

1 Sall. Jug. 40.4; Cf. Greenidge (History 295, 375, 378); Broughton (1.520, 533, 540, 543-4). For some of those who were condemned see Greenidge (loc.cit.) and Broughton (loc.cit.).

2 Greenidge (History 258); Meiland 2.318-20; Merrill 42-3; Siber (Analogie 11).

3 Cic. Cat. 128, 4.10. The theory deceived Mommsen (Straf 256 and n.4, 257), and Siber (Analogie 12-13), but has been exploded by Merrill (44-52) and Brecht (Perduellio 205-9), on the simple basis that a retrospective loss of citizenship could not be ascertained until the guilt of the accused had been established by due trial.

the lex Mamilia is on all fours with the language used to record the provisions of the lex Varia, which is known to have been a lex maiestatis (pp.67,78 below). Indeed there is a close resemblance between the general format of the Mamilian law and that of the Varian, both of which dealt with external relations. It is only because of a casual reference that the lex Varia is known to have been a maiestas law, for the word 'maiestas' does not appear in the transmitted citation of its provisions (pp.67-8 below), and it may be felt that the same can be said of the lex Mamilia. It has been suggested (Lengle, Straf 26) that the provisions of the lex Mamilia were re-enacted in the lex Appuleia maiestatis of Saturninus, but the evidence for the latter suggests that it was confined to internal affairs (pp.61-2 below). There is no doubt that the categories enunciated in the lex Mamilia fell under the concepts both of 'Amstverbrechen' and proditio, and the significance of the lex is that it is the first attempt to subtract part of the 'maiestas' area from the jurisdiction of the 'tribunes prosecuting in the comitia tributa, and to submit the category so subtracted to a court consisting of 'iudices Gracchani'. It is perhaps only the temporary constitution of the commission which precludes the acceptance of the lex Mamilia as the first Lex maiestatis.

The experiment essayed by the Mamilian law does not seem, however, to have been immediately repeated, for in two instances in the same period the older procedure 'apud populum' was followed. In 109 B.C. the consul M. Tullius Siculus suffered a serious defeat at the hands of the Cimbri.¹ In 104 B.C. the tribune Cn. Domitius Ahenobarbus unsuccessfully accused him in the comitia tributa of military failure and of

¹ Livy Per. 65; Ascon. 58C; Florus 1.36.4; Velleius 2.12.2.

having begun the Cimbrian war 'in iussu populi' (Ascon. 80C). Asconius (80C), in his account of this case, uses the words "ipse quoque adversus Cimbricos rem male gesserat", which is reminiscent of Tacitus' "si quis male gesta re publica maiestatem populi Romani minuisset" (Ann. 1.72.3). Although the expression 'maiestatem minuire' is believed to have been first introduced into the public criminal law by Saturninus (pp. 58-62 below), it is not impossible that the indictment of Iunius 'apud populum' used similar language. In 107 B.C. the consul L. Cassius Longinus was defeated and slain by the Tigurini. His legate C. Popilius Laenas, who saved the remnant of the army by surrendering half the baggage and giving hostages, was prosecuted and went into exile.¹ The statement that Popilius "arcessitur maiestatis" (Auct. Herenn. 1.15.25) is accepted by Broughton (1.551-2) at face value. H. Last (CAH 9.159) says that he was prosecuted under Saturninus' maiestas law, but this is chronologically impossible, for the lex Appuleia was not introduced until 103 B.C. (pp. 55-7 below). It seems clear that the prosecution was 'apud populum' (Cic. Leg. 3.16.36; cf. Rotondi 324; Broughton 1.551), and this may be another example of a specific charge of maiestas in that court.

B. "EX QUO VERBO" TOTA ILLA CAUSA PENDERAT"

Q. Servilius Caepio was uncommonly skilled at engaging the Popular faction. As consul in 106 B.C. he carried a 'lex iudiciaria' abolishing the exclusive control of the 'iudicia publica' which the equestrian order had exercised

¹ Livy Per. 65; Caes. BG 1.7.4; Oros. 5.15.23-4; Cic. Rep. 1.3.6; Auct. Herenn. 1.15.25, 4.24.34.

since the time of C. Gracchus.¹ As commander in Gaul against the Volcae Tectosages he seized the sacred treasure from the temple at Tolosa. The treasure disappeared on its way to Rome, and it was thought that Caepio had a hand in the theft.² In 105 B.C. three armies were sent against the Cimbri, including one under the consul Cn. Mallius Maximus, and another under Caepio as proconsul. Caepio rejected Mallius' request that they combine their forces in order to resist the Gauls more effectively, and the result was the disastrous Roman defeat at Arausio, the worst since Cannae; both Mallius and Caepio, however, managed to escape.³ There was a strong popular reaction against Caepio, and⁴ it seems to have been well justified. On his return to Rome his imperium was abrogated, and in 104 B.C.⁵ the tribune L. Cassius Longinus carried a law whereby anyone who suffered condemnation by the People, or had his imperium abrogated, forfeited his seat in the Senate (Ascon. 78C; Livy Per.67). The law may have been of general application (Münzer RE 2A.2.1735), but was directly aimed at Caepio: "Tulerat autem eam maxime propter similitudines cum Q. Servilio" (Ascon. loc.cit.)

1 The nature of Caepio's reform is not clear. It seems that he restored senators to the juries in extortion trials, either jointly with the equites or exclusively. It is possible that his law was repealed by a lex Servilia introduced by Saturninus' associate, Glaucia, in 104 or 101 B.C., whereby control was restored to the equites ('iudices Gracchani'). See Hardy (Lex Iudicialia 99-104); Strachan-Davidson 2.80-2; Münzer (RE 2A.2.1784); Lengle (Straf 19); H. Last (CAH 9, 162-3); Balsdon (Extortion, passim); Broughton 1.553. The most recent research is summarised and criticised by Schönbauer (99-104), and an intelligent resolution of the difficulties is proposed by Badian (Gracchi 208-9).

2 Heitland 2.36-; Lengle (Arausio 302); Münzer (RE 2A.2.1784); H. Last (CAH 9.159).

3 Heitland 2.365-6; Lengle (Arausio 302); Münzer (RE 2A.2.1784-5); H. Last (CAH 9.159); Broughton 1.555.

4 Despite Sherwin-White's view (Violence 3) that the tribunes were "very rough with him".

5 105 B.C. according to Rotondi 325.

Caepio's son, Q. Servilius Caepio (Junior), was faithful to the family tradition. When Saturninus proposed a *lex frumentaria* during one of his tribuneships, Caepio (Jnr.), who was then quaestor urbanus, objected to the burden of the proposed law falling on the aerarium, and procured a decree of the Senate: "*si eam legem ad populum ferat, adversus rem publicam videri eum facere*". (Auct. Herenn. 1.12.21). Despite the intercession of his colleagues Saturninus put the proposal to the vote, whereupon Caepio (Jnr.) resorted to violence: "*cum viris bonis impetum facit, pontes disturbat, cistas deicit, impedimento est quo setius feratur*" (Auct. Herenn. loc.cit.).

The starting-point for the date and content of the *lex Appuleia maiestatis* of Saturninus is a series of prosecutions, all of which directly or indirectly concern the Servilii Caepiones. As these trials raise serious chronological and factual problems, it will be convenient to set them out briefly before discussing the difficulties. The first step was the setting up of a '*quaestio auri Tolosani*' to investigate the seizure by Caepio (Snr) of the Tolosan treasure and (more pertinently) its failure to reach Rome.¹ There were also prosecutions of Caepio (Snr) and Mallius in respect of the disaster of Arausio. Caepio (Snr) is said to have been prosecuted by the praetor (Auct. Herenn. 1.24.24) and to have been condemned and sentenced to confiscation of his property and abrogation of his imperium (Livy 47.67). There is a tradition that he was imprisoned, but was released by the tribune L. Reginus (Val. Max. 4.7.3), and went into exile at Smyrna (Cic. Balb. 11.28); according to another tradition he died in prison (Val. Max. 6.9.13). The tribune C. Norbanus

¹ Cic. Nat. Deor. 3.30.74; Dio fr. 90 (Greenidge & Clay 80); Oros. 5.15; (Victor) Vir. Ill. 73.5; Cf. Rotondi 327.

played a leading part in the trial, which was conducted in circumstances of some violence. A stone struck M. Aemilius Scaurus, the princeps senatus, and the tribunes L. Cotta and T. Didius were forcibly ejected when they tried to intercede (Cic. Orat. 2.47.197). Norbanus was subsequently tried for his seditious conduct, was defended by M. Antonius, and was acquitted.¹ Mallius is said to have been tried for the same crime as Caepio (Snr.), to have been defended by the same M. Antonius who afterwards defended Norbanus, and to have been exiled in terms of a plebiscite introduced by Saturninus.² Caepio (Jnr) was tried for his violent interference with the proceedings at which Saturninus' corn law was debated.³

A proper understanding of these trials is an indispensable approach to the lex Appuleia maiestatis. Mommsen's view⁴ is that both the Tolosan treasure and Arausio were investigated by a special commission established pursuant to a lex Appuleia, which was not a general lex maiestatis, but merely the enabling statute which created the *ad hoc* quaestio. The date of the lex is 103 B.C. rather than 100 because it is close to the events in question, and also because the fairly extensive sources for Saturninus' second tribunate do not mention Caepio (Snr.). It was this special commission which condemned Caepio (Snr) and Mallius. The fact that Caepio is reported to have addressed a plea "*ad tribunos plebis de exercitus emissione*" (Auct. Herenn. 1.14.24) does not require the inference that the trial was '*apud populum*' rather than before a quaestio, for the plea was not made at the trial, but during the debate on Saturninus' proposal of a law to

1 Cic. Orat. 2.25.107, 21.89, 40.167, 49.201; Part. Orat. 30.105.

2 Cicinianus p.13F (Greenidge & Clay 91; Cic. Orat. 2.28.125).

3 Auct. Herenn. 1.12.21, 2.12.17; Cic. Brut. 44.162, 46.169.

4 History 3.440.1; Staat 2.1.666.4; Straf 198.1 Cf. Kibler 546-7; Yarnold 166.

establish the commission.¹ Norbanus was tried under the same *lex Appuleia*, and the charge was admittedly one of *maiestas* (Straf 198.1), but for a reason which is not apparent Mommsen finds it possible to dismiss this significant fact with the bald assertion that "dies nöthigt nicht zu der Annahme, dass das appuleische Gesetz eine ständige Majestätsquellion eingesetzt habe". The trial of Caepio (Jnr) had nothing to do with the special commission under the *lex Appuleia*, having been conducted 'apud populum'.²

It is not possible to follow Mommsen's interpretation of any of these trials. The question of the Tolosan treasure has been subjected to a penetrating analysis by Lengle (Arausio 309-13), who finds that there were two separate traditions. One tradition is not concerned with the legal proceedings against Caepio (Snr), but with the legend that disaster befell anyone who had anything to do with the treasure;³ hence Arausio and the misfortunes of Caepio (Snr) and his family, including the prostitution and disgraceful death of his daughter. The other tradition is related to the prosecution of Caepio (Snr) and those to whom he entrusted the treasure for conveyance to Rome,⁴ but the charge was not *maiestas* but *peculatus*, namely, the theft of the treasure which, as booty, was State property (cf. Siber, *Analogie* 51). As the sources do not attest Caepio's condemnation by the

¹ Cf. Pollack 188 and n.5. Zumpt (2.1.227-9) and Greenidge (Procedures 350) believe that the trial was 'apud populum'.

² Zumpt (2.1.227-9) believes that this trial was the first to be held under the *lex Appuleia maiestatis*.

³ Strabo 4.1.13; Justinus 32.3.9-11; Gell. 9.9.7; Oros. 5.16.5-6. Perhaps the second version of Valerius Maximus (6.9.13 - p.45 above) in regard to Caepio's fate is part of this tradition: "Is (sc. Q. Caepio) ... assecutus in publicis vinculis spiritum deposuit, corpusque eius funesti carnificis manibus laceratum in scalis gemonis iacens magno cum horrore totius Fori Romani conspectum est".

⁴ Dio 42.90 (Greenidge & Clay 80); Cic. Nat. Deor. 3.30.74; Oros. 5.15.25.

'quaestio auri Tolosani', Lengle suggests that in 104 B.C. he was again prosecuted, in a quaestio established under his own judiciary law, and was either acquitted or fined.¹

In regard to Arausio, Lengle (Arausio 304-8, 312-4) believes that in 103 B.C. Norbanus brought a capital prosecution against Caepio (Snr) in the comitia centuriata for his loss of an army and flight.² The sedition of Norbanus, for which he was subsequently tried for maiestas, took place either at the 'anquisitio' preceding Caepio's trial in the comitia, or at the trial itself. Lengle believes that the lex Appuleia maiestatis was passed in the same year as Caepio's trial and prior to the trial, and that it set up a permanent quaestio maiestatis. He holds, however, that Caepio was not tried under the lex. His argument is, firstly, that the establishment of a permanent quaestio maiestatis in no way ousted the jurisdiction of the 'iudicium populi'. Secondly, he argues that the subsequent trial of Norbanus for his seditious conduct at Caepio's trial is known to have been conducted under the lex Appuleia maiestatis, which would not have been possible if his sedition had preceded the passing of the law, for although a special commission was necessarily retrospective, a quaestio perpetua could not be. It is not certain that there was an absolute prohibition against retrospectivity in regard to quaestiones perpetuae. There are instances of such a prohibition, but there are also examples the other way.⁴ In any

1 Broughton 1.566.8 dates the 'quaestio auri Tolosani' to 104 or 103 B.C., but does not find the evidence sufficient to say whether Caepio was one of the accused. Schaubauer 106 believes that Caepio was prosecuted only for Arausio.

2 Bédian (Caepio 319; cf. Marsh-Saillard 414) believes that Caepio and Mallius were charged under the lex Appuleia maiestatis, but seems to base himself on a misreading of Broughton (1.563-4).

3 Lex Acilia (Warmington 366, 11.73-6) and lex Julia de adulteriis (Dig. 48.5.1.1).

4 Cic. Cluent. 54.148 and, particularly, the expressly retrospective quaestio which tried Clodius in 61 B.C. - Cic. Att. 1.16.2, Parad. 4.32; Ascon. 45.52-3C. See also Strachan-Davidson 2.41-3; Siber (Analogie 44-55); Schulz (Principles 231.)

event 1 *lex Appuleia maiestatis* prior to Caepio's trial is not essential to Lengle's thesis that the trial was 'apud populum'. It is suggested that there are grounds on which Lengle can be supported, in regard to his view that Caepio was tried 'apud populum'. Mommsen's belief (*History* 3,440,1) that Caepio's plea "ad tribunos plebis de exercitus amissione" (*Auct. Herenn.* 1.14.24) was made during the debate on the proposal to create a special commission strains the language of the passage, the full terms of which are: "Purgatio est, cum consulto negat se reus fecisse. Ea dividitur in imprudentiam, fortunam, necessitatem: fortunam, ut Caepio ad tribunos plebis de exercitus amissione." Clearly Caepio was an accused (reus) at the time, and put forward the plea "consulto negat se ... fecisse". It would be unrealistic to say that Caepio attempted to establish his innocence in order to persuade the Assembly not to carry the law creating the special commission; for his argument to succeed it would have been necessary for the Assembly to give a finding that he was innocent, which would not only have prejudged the issue which was to be submitted to the commission, but would in fact have made it superfluous. Furthermore, if Caepio had been speaking at a legislative assembly, he would have addressed himself 'ad populum' rather than 'ad tribunos plebis'; but he would quite naturally have addressed himself 'ad tribunos' at one of the three 'contiones' preceding a trial in the comitia.¹

Lengle also holds that the trial of Mallius which followed that of Caepio was likewise 'apud populum'. The difficulty is: "Cn. Mallius ... L. Saturnini rogatione e

1. The same arguments would, of course, apply if it were suggested that the proposal on which Caepio is supposed to have spoken was for a law creating a permanent quaestio maiestatis, and not merely a special commission.

civitae plebiscito electus" (Licin, p.13F - Greenidge & Clay 91). Lengle argues that the plebiscite in question was only introduced for the purpose of imposing an 'aquae et ignis interdictio' on Mallius after he had anticipated condemnation by going into voluntary exile. It may be added that if Licinia intended to refer to the lex under which Mallius was condemned, it would have been more in accordance with the usual practice simply to have cited the law by the name under which it was known after it had been passed, without reference to the rogatio which was responsible for its introduction; for example, simply "lege Appuleia electus", rather than "L. Saturnini ... electus".¹

The trials of Caepio (Snr) and Mallius can properly be described as maiestas trials,² in the sense that they were the latest in the line of cases appropriating the 'maiestas' fragment of the 'Rechenschaftsprozesse' to the comitia tributa, but the supposition that they had nothing to do with the lex Appuleia maiestatis clears the ground for an approach to the problems of the date and content of this statute. The crucial questions are whether the law established a permanent questio maiestatis;³ whether the law was carried in 103 B.C.,

¹ Lengle is supported on the trials of Caepio and Mallius by Klebs (RE 2.262-3), Münzer (Norbis 223-5) and Broughton (L.563,565,4,7 and 578).

² Cf. Schönbauer (105-6), who argues on different grounds that the trial of Caepio (Snr) was for maiestas.

³ As is believed by Rein 507-8; Zumpt (2.1.227-30); Heitland 2.400; Botsford 394; Klebs (RE 2.262-3); Lengle (Arausio - above); H. Last (CAH 9.160.4,161); Schur (314.2, 318.2); Broughton (L.563; 567.4,7; 578); Erwins 103; Schönbauer 114; Badier (Gracchi 207,38 - although "it would be eccentric to deny that Saturninus set up a permanent court for his new crime" is rather hard on Mommsen). The view that the law set up only a special commission is taken by Mommsen (History 3.440.1; Straf 198.1); Rotondi 329; Kübler 547; Pollack 189; Sherwin-White (Extortion 51); Lear 21.

uring the first tribunate of L. Appuleius Saturninus,¹ or in 100 B.C. during his second tribunate;² whether the law 'defined' the crime of 'maiestas minuta', and if so, with what degree of completeness; and whether any fragments of the text of the law have survived.

The trials of Norbanus and Caepio (Jnr), arising out of their acts of sedition at the trial of Caepio (Snr) and the debate on Saturninus' corn law respectively, raise a number of problems which fall to be considered in connection with the date of the lex Appuleia maiestatis and the permanence or otherwise of the quaestio which it established. If the trial of Norbanus was held in 94 B.C. (Münzer, Norbanus 224-6; Broughton 1.566.7), it furnishes an important proof that the quaestio was permanent (cf. Siler, Analogie 51.7), for it seems clear that he was tried before the quaestio maiestatis: "C. Norbanum maiestatis crimine publicae quaestioni subiectus" (Val. Max. 8.5.2; Cf. Cic. Orat. 2.48.199); "ex quo verbo (sc. maiestate minuta) lege Appuleia tota illa causa (sc. Norbani) pendebat" (Cic. Orat. 2.107; cf. 2.197-201; 2.214). His trial in 94 B.C., for a seditious act committed in 103 B.C., cannot be reconciled with the assumption that in the latter year only an ad hoc commission was set up by the lex Appuleia. It is not possible to suppose that Norbanus was tried in 102 B.C., at the termination of his tribunate, and that therefore he may have been tried by a special commission established in 103, for M. Antonius, who defended Norbanus, was "homo censorius" at the time of the trial (Cic.

1 Zumpt (2.1.227-30); Mommsen (History 3.440.1; Straf 198); Klebs (RE 2.262-3); Lenglé (Araucio - above); H. Last (CAH 9.160.4, 161); Schür (314.2, 318.2); Broughton (1.563, 565.4, 7; 578); Schönbauer 106, 114. The same date is regarded as probable by Rotondi 329; Kibler 546; Yar-nold 166; Lear 21; Gundel 298. No date is suggested by Greenidge (Treason 232); Pollack 187-9, or Erwins 103.

2 Rein 507-8; Botsford 394; Heitland 2.400.

Orat. 2.198), which means that the trial cannot have been earlier than 96 B.C. (Badian, Caepio 319). The difficulty is, however, to explain why nine years elapsed between the trial of Caepio (Snr) in 103 B.C. and the bringing of Norbanus to book. To meet this difficulty it has been suggested¹ that the Q. Caepio who was defended by L. Crassus, in the latter's consulship (Cic. Brut. 44.162), was Caepio (Snr), whose trial should therefore be assigned to 95 B.C., as that was the year of L. Crassus' consulship. This argument is probably refuted by the fact that Caepio (Snr) died in exile before 95 B.C. (Münzer, Norbanus 225), so that Cicero (Brut. 44.162) should be understood to refer to the trial of Caepio (Jnr) (Münzer 224.1; Badian, Caepio 320). In any event, a lapse of ten years between Arausio and the calling of Caepio (Snr) to account would be incredible. A persuasive explanation of the delay in prosecuting Norbanus is offered by Münzer (Norbanus 226-31), who believes that Norbanus was protected against prosecution by his assumption of the office of quaestor in 102 B.C.,² after his quaestorship he continued to be protected, by Saturninus and Glaucia until 100 B.C., and thereafter by M. Antonius, but a change in the political climate made it possible to prosecute him in 94 B.C.³ It may be added that a substantial interval between the trial of Caepio and that of Norbanus seems to follow from the fact that when M. Antonius, defending Norbanus, denounced Caepio's conduct at Arausio, "eorum dolorem, qui lugebant suos, oratione refricabam" (Cic. Orat. 2.48.199.)

¹ For the references see Münzer (Norbanus 224).

² See Münzer (Norbanus 227-9; cf. Broughton 1.566.7) for the refutation of Mommsen's view (Staat 1.551.3) that the quaestorship always preceded the tribunate.

³ For the interaction of political forces which brought about the prosecution see also Badian (Caepio 325-35).

The trial of Caepio (Jnr) was also conducted before the quaestio maiestatis (Auct. Herenn. 1.21; 2.17; Cic. Brut. 162, 169), but the acceptance of this as evidence for a permanent quaestio depends on the date of the trial. It is known that Caepio was quaestor when he intervened violently in the debate on Saturninus' corn law, but Zumpt (2.1.227-9) does not seem to be justified in concluding that the ascertainment of the date of Caepio's quaestorship and of the lex frumentaria establishes the date of the lex Appuleia. Zumpt's argument is that the quaestorship and the corn law should be dated to 103 B.C.,¹ rather than to 100,² and that as the lex Appuleia maiestatis was introduced as a direct result of Caepio's sedition, the date of the lex is 103 B.C. This view depends on the (probably correct) assumption that there was no absolute rule against retrospectivity in a lex creating a quaestio perpetua. But the case of Norbanus shows that there is no need to assume the temporal proximity of the trial to the sedition, and if the Q. Caepio who was defended by L. Crassus in 95 B.C. is not Caepio (Snr) he must be Caepio (Jnr). It seems safer to accept 95 B.C. as the date of the trial of Caepio (Jnr), so that this case is further evidence of a permanent quaestio maiestatis under the lex Appuleia.

It is possible that support for a permanent quaestio is also to be found in the trials of Sex. Titius and T. Appuleius Decianus, both of which were conducted in 98 B.C. The charge against Sex. Titius was that he kept "imaginem L. Saturnini" at his house (Cic. Rab. Perd. 9.24; Val. Max. 8.1. dam.3). The evidence of Cicero (loc.cit.) that he was tried

1 Cf. H. Last (CAH 9.165 and n.3); Rice Holmes (Republio 1.354-5); Badian (Caepio 319 and n.9).

2 The date accepted by Heitland 3.397-8; Münzer (RE 2A.2.1786); Schür (320 and n.3); Broughton (1.578 nn. 3,5); Greenidge & Clay 107.

by a quaestio - "statuerunt equites Romani illo iudicio" - is to be preferred to the suggestion of Valerius Maximus (loc. cit.) that he was tried 'apud populum'. The problem is to identify the quaestio, for it cannot be supposed that Saturninus legislated against the keeping of "imagines Saturnini". A possible explanation is that the principal charge against Titius was sedition, or disregard of tribunician intercession, which would have fallen under the lex Appuleia, and that the 'imago Saturnini' was thrown in for good measure.¹ Titius, who was tribune in 99 B.C. (Broughton 2.2), persisted with an agrarian bill despite the intercession of his colleagues (Obsequens 46 - Greenidge & Clay 113), and was known as "seditiosus civis et turbulentus" (Cic. Orat. 2.11.48). That the charge against him was maiestas may also, perhaps, be inferred from the fact that Valerius Maximus (8.1.damn.4), immediately after discussing Titius' case, refers to the case of Claudia - "adiciatur his Claudia" - who is known to have been charged with maiestas (pp. 30-1 above), and then turns to cases of a different kind: "possumus et ad illos brevi deverticulo transgredi" (8.1.damn.5). Decianus was condemned for having regretted the death of Saturninus in the course of a speech of accusation against P. Furius (Cic. Rab. Perd. 9.24; Val. Max. 8.1.damn.2). The charge was probably maiestas (Badian, Decius 96), but Cicero (loc. cit.) does not mention 'eques Romani' as he does in the same passage in the case of Sex. Titius. It may be that there was no basis for a charge of sedition against Decianus, and that he was therefore tried 'apud populum'.

¹ Cicero (Rab. Perd. 9.24) was concerned only with the 'imago Saturnini'. For he cited the case merely to lend point to his criticism of Labianus for parading a similar 'imago' at the trial of Rabirius.

The cases discussed may well attest a permanent *maiestas* court, but they do not directly take the date of the *lex Appuleia* much further. The general tendency of the authorities who debate the date of the law (p. 51, nn. 1 and 2 above) is to consider whether the main weight of Saturninus' legislative programme fell within his first or his second tribunate, and from this to estimate which tribunate is more likely to have called for a *lex maiestatis*. Following this approach, a fairly good case can be made out for 103 B.C. Saturninus contemplated a fresh attempt to apply the economic policy of the Gracchi,¹ and with this policy in view he would have remembered the undisguised murder of Tiberius Gracchus.² He would have remembered that the *lex Sempronia* of C. Gracchus, forbidding the imposition of a capital penalty on a Roman citizen 'iniussu populi',³ had not forestalled the judicial murder of its author under the doubtful authority of a 'senatusconsultum ultimum'. He would have remembered that both the Gracchi had proposed their reforms as tribunes, and that violence had been done to Tiberius while a candidate for re-election,⁴ and to Gaius shortly after his turn of office (Livy Per. 61). He would therefore have known that the life-expectation of a reform-minded tribune was short, and that any revival of the Gracchan policy should be preceded by an attempt to ensure that he survived long enough to put it into operation.⁵ It may well be that protection was

¹ Stuart Jones 170; Heitland 2.398; M. Last (CAH 9. 154-5).

² Livy Per. 58; Auct. Harenm. 4.55.68; Val. Max. 3.2. 17; Vell. 2.3.2; Plutarch Tiberius Gracchus. 19.

³ Cic. Rab. Perd. 4.12; Sest. 28ff; Cat. 4.5.10; Verr. 2.5.63, 163.

⁴ Livy Per. 58; Cic. Cat. 4.2.4; Dio fr. 83.8 (Greenidge & Clay 8.)

⁵ If Saturninus's policy should be put on a broader basis, so as to include an extension of the effective power of the tribunes, intervention in the regular administration, and the subjection of the upper magistrates to detailed control of their activities (Sherwin-White, Violence 4), then a fortiori Saturninus needed protection.

sought in the *lex Appuleia*, introduced at the very outset of his first tribunate.

A useful argument in favour of 103 B.C. is put forward by Schönbauer (106), on the basis of Cicero's assertion (*Leg.* 2.6.14) that Saturninus' laws were invalidated by the Senate after his death: "M: Igitur tu Titias et Appuleias leges nullas putas? Q: Ego vero ne Liviae quidem. M: Et recte, quae praesertim uno versiculo senatus puncto temporis sublatae sint".¹ The argument is that as the trial of Norbanus (to which the trial of Cuspio (Jnr) should be added) proves the survival of the *lex Appuleia*, it should be assumed that it was only the laws of Saturninus' second tribunate which were abolished by the Senate (cf. Rotondi 331). The argument is not conclusive, for Schönbauer himself (*loc.cit.*) suggests that the Optimates would not have wanted to abolish a law which punished injuries to 'maiestas populi Romani'. The latter point can, however, be taken further, for there is a curious appropriation by the Optimates of 'maiestas populi Romani' in the 'senatusconsultum ultimum' which advised that extreme steps be taken against Saturninus and Glaucia. The form of the 'last decree' had previously been: "ut consul videret, ne quid res publica detrimenti caperet" (*fic. Cat.* 1.2.4). The decree against the Appuleians was in the form: "ut ... consules ... operam darent ut imperium populi Romani maiestasque conservaretur".² The older form was again used in the decree against Lepidus in 77 B.C. (*Sall. Orat. Phil.* 22),

1 Badian (*Gracchi* 218.87) takes Cicero's meaning to be that only the 'leges Liviae' (of L. Drusus) were abolished. But "ego vero ne Liviae quidem" surely implies: "I regard the *leges Titiae* et *Appuleias* as invalid, and I do not regard even the *leges Liviae* as valid".

2 *Cic. Rab. Post.* 7.20. The language is strikingly similar to that of the 'maiestas' treaty.

which suggests that the 'maiestas' form may have been confined to the decree of 100 B.C. It is also significant that, whereas the decree against C. Gracchus had authorised only the consul L. Opimius (Cic. Cat. 1,2,4), the decree of 100 B.C. advised the consuls to recruit "tribunos pl. et praetores, quos eis videretur", all of whom responded except Saturninus and Glaucia (Cic. Rab. Perd. 7,20). It may be argued that the decree contemplated the performance of acts of sedition under its authority, and that it was feared that when the wheel turned those responsible would be prosecuted under the lex Appuleia. By involving the tribunes and praetors in the action of the consuls it was hoped to leave nobody with sufficiently clean hands to invoke the lex maiestatis against those who took violent action against Saturninus and Glaucia, and by relying on 'maiestas' it was intended to set up a 'counter-attraction' to the concept formulated by the lex Appuleia, and so to confuse the jurors in any possible prosecution under the lex. It was a defence under the lex Appuleia to argue that seditious conduct had not diminished maiestas populi Romani¹ but had augmented it (pp. 59-61 below), and in case of need the assailants of Saturninus and Glaucia would raise this argument, and would cite a decree of the Senate in support of it.¹ The Optimates had found a way round the lex Sempronia by the 'last decree' of 121 B.C., and they found a similar way around the lex Appuleia maiestatis - but without abolishing the lex.²

The facts alleged against Norbanus were that he had used violence at the trial of Caepio (Snr), and was therefore guilty of seditious conduct. Thus: "quod egit de Caepione

1 Which is precisely the gravamen of Cicero's defence of C. Rabirius (Cic. Rab. Perd. 7,20 - 11,31).

2 For a further argument in favour of 103 B.C. see p. 309 and n. 1 below.

turbulentius", and "qui per vim multitudinem rem ad seditionem vocavit" (Cic. Part.Orat. 30,105); "hominem seditiosum furiosumque" and "illam Norbani seditionem" (Cic. Orat. 2,28,124); "vim, fugam, lapidationem, crudelitatem tribuniciam" and "vi pulsum ex templo L. Cottam et T. Didium" (Cic. Orat. 2,42,197); "seditiosum civem et in hominis consularis calamitate crudelem" (Cic. Orat. 2,48,198); "seditiosum et inutilem civem" (Cic. Off. 2,14,49).

M. Antonius, for the defence, admitted most of the facts alleged in the indictment, but joined issue with the accuser, P. Sulpicius Rufus, on the construction of the expression 'maiestatem minuire', as it appeared in the *lex Appuleia*: "pleraque enim de eis, quae ab isto obiciebantur, cum confiterer, tamen ab illo maiestatem minutam negabam, ex quo verbo lege Appuleia tota illa causa pendebat"¹ It was futile to attempt a 'definition' of the expression: "atque in hoc genere causarum non nulli praecipiant ut verbum illud, quod causam facit, breviter uterque definiat, quod mihi quidem perquam puerile videri solet" (Cic. Orat. 2,25,108; cf. 2,25,109). Neither Sulpicius nor Antonius essayed a 'definition', but confined themselves to debating the meaning of 'maiestatem minuire': "quod quidem in illa causa neque Sulpicius fecit neque ego facere conatus sum; nam quantum uterque nostrum potuit, omni copia dicendi dilatavit, quid esset maiestatem minuire" (Cic. Orat. 2,25,109; cf. 2,49,201).

At this point it was common cause that Norbanus had

¹ Cic. Orat. 2,25,107; cf. 2,49,201. Henderson 81,63 can scarcely be right when she says that Cicero here considers 'maiestas minuta' 'as defined by Sulla'. It is reasonable to suppose that when Cicero says "lege Appuleia" he does not mean "lege Cornelia".

committed the acts alleged, but the question was whether in so doing he had diminished 'maiestas populi Romani'. It was now for each side to state what it understood by 'maiestas', in order to crystallise the issue as to whether the conduct of the accused constituted 'maiestas minuta'. Sulpicius proposed the following: "maiestas est in imperii atque in nomine populi Romani dignitate, quam minuit is qui per vim multitudinem rem ad seditionem vocavit" (Cic. Part.Orat. 30, 105). Antonius replied with: "non minuit maiestatem quod egit de Caepione turbulentius; populi enim Romani dolor iustus vim illam excitavit, non tribuni actio; maiestas autem, quoniam est magnitudo quaedam populi Romani in eius potestate ac iure retinendo aucta est potius quam diminuta" (ibid.). There followed a joinder of issue on the question: "minueritne maiestatem qui voluntate populi Romani rem gratam et aequam per vim egerit" (ibid.). The defence put forward by Antonius was that violence was not necessarily culpable, for many desirable reforms had been effected by this means (Cic. Orat. 2.48,199). Caepio (Snr) had incurred the just wrath of the Roman People by his conduct at Arausio (ibid.), and in using violence against him Norbanus had simply acted as the People's instrument: "populi enim Romani dolor iustus vim illam excitavit, non tribuni actio" (Part.Orat. 30,105); "si magistratus in populi Romani potestate esse debeat, quid Norbanum accusas, cuius tribunatus voluntati paruit civitatis?" (Cic. Orat. 2.40,167). Although Antonius devoted the greater part of his speech to an emotional appeal (Orat. 2.49,200-1), and touched only briefly on the lex Appuleia and the question "quid esset minuire maiestatem" (2.49,201), he made one significant submission of law: "maiestas autem ... populi Romani in eius potestate ac iure retinendo aucta est potius quam diminuta" (Part.Orat. 30,105). By acting as an

instrument for the satisfaction of the People's just anger Norbanus increased rather than diminished 'maiestas populi Romani'. This defence of 'maiestatem auxi, non minui' was destined to recur frequently in subsequent maiestas trials, and to furnish a sympathetic jury with a convenient peg on which to hang an acquittal.¹

The trial of Caepio (Jnr) was likewise based on allegations of violence: "Caepio ... cum viris bonis impetum facit, pontes disturbat, cistas deicit, impedimento est quo setius feratur: arcessitur Caepio maiestatis" (Auct. Herenn. 1.12.21). As in the case of Norbanus, the accuser submitted a proposition on the question of 'maiestas minuta': "maiestatem is minuit, qui ea tollit ex quibus rebus civitatis amplitudo constat. Quae sunt ea, Q. Caepio? Suffragia populi et magistratus consilium. Nempe igitur tu et populum suffragio et magistratum consilio privasti, cum pontes disturbasti?" (Auct. Herenn. 2.12.17): The defence submitted a counter-proposition: "Maiestatem is minuit qui amplitudinem civitatis detrimento adficit. Ego non adfeci, sed prohibui detrimento; aerarium enim conservavi, libidini malorum restiti, maiestatem omnem interire non passus sum" (ibid.). The defence of 'maiestatem auxi, non minui' appears again. The facts on which Caepio relied were that when Saturninus had proposed his corn law, the Senate had decreed that if he submitted his law to the Assembly he would be deemed to act "adversus rem publicam". Saturninus had disregarded the intercession of his colleagues, and had put his bill to the vote. Thereupon Caepio, "ut illum [contra] intercedentibus collegis,

¹ See, for example, the case of Gabinius (pp.88-9, 258 below).

adversus rem publicam vidit ferre", had violently overthrown the proceedings (Auct. Herenn. 1.12.21). Caspio, like Norbanus, claimed that he had been an instrument for the protection of 'maiestas populi Romani' rather than for its diminution.

It is clear that the lex Appuleia used the expression 'maiestatem minuire', but without 'defining' it. It is not certain, however, that Schönbauer (105; cf. Gundel 298) is justified in inferring, from the absence of such a 'definition' in the lex, that "ebenso politisch-elastisch war anscheinend der Tatbestand gefasst, der nun neu unter Strafe gestellt wurde".¹ A distinction should be drawn between the appearance in the lex of the expression 'maiestatem minuire' and the setting out of a category of wrongful acts in respect of which the quaestio was to have jurisdiction. The Republican practice was to set out categories "in a circumstantial, clumsy, pedantic and meticulous style, the purpose of which is to achieve complete certainty" (Schulz, Legal Science 96). The typical form of a 'category' clause is illustrated by the law of C. Gracchus against judicial corruption (Cic. Cluent. 54,148): "Quicumque fecerit vendiderit emerit habuerit dederit ... Qui tribunus militum legionibus quattuor primis quive quaestor tribunus plebis (deinceps omnes magistratus nominavit). ... Qui eorum coit coierit convenit convenerit quo quis iudicio publico condemnaretur" (cf. lex Acilia, Warrington 316-70). There is no reason to suppose that the lex Appuleia was an exception to the rule, so that it should be assumed that it set out a detailed category of acts, and that

1 A similar view is expressed by Zumpt (2.1,230-1): "Das Gesetz enthält nur den einen Ausdruck (sc. 'maiestatem minuire') und gab keine besonderen Fülle an, in denen eine Verringerung der Majestät stattgefunden hätte."

the jurisdiction of the *quaestio* was restricted to that category. The two known cases under the *lex* dealt with acts of violence and seditious conduct, and the disregard of tribunician intercession, and there is reason to believe that the third possible trial '*lege Appuleia*', that of *Sex. Titius*, was also concerned with sedition (p.54 above). It therefore seems reasonable to suppose that the *lex* set out a category in some such form as: "*qui homines ad seditionem vel vim convocavit convocaveritve*" *quive tr. pl. intercedenti non paruit parueritve*". The *lex* would therefore not have left any room for uncertainty as far as the acts of the accused, viewed objectively, were concerned. For example, if the *lex* had been in the form suggested, it would not have applied to "*qui loca occupavit occupaveritve vel templa*" (cf. *Dig. 48.4.1.1*). The 'undefined' part of the *lex* was its reference to '*maiestatem minuire*', for culpability under the category was qualified by the fact that it had to be shown that the accused had diminished '*maiestas populi Romani*'. The principal element in the crime was the diminution of *maiestas*, and the subordinate element was the bringing about of that diminution in a certain manner. In modern terms an indictment under the *lex Appuleia* would read: "That the accused is guilty of the crime of diminishing the *maiestas* of the Roman People, in that he incited the multitude violently and seditiously to overthrow *Saturninus*' meeting". The text of the law may therefore have been something like this: "*qui homines ad seditionem vel vim concitavit concitaveritve quive tr. pl. intercedenti non paruit parueritve quo maiestas populi Romani minueretur*".

1 Cf. *Dig. 48.4.1.1*.

Two inscriptions which may go back to the period of Saturninus, namely the 'Lex Latina Bantiae reperta'¹ and the 'Lex Tarentina'², have provoked a great deal of discussion. The current view is that the lex Bantia should be assigned to one of the tribunes of Saturninus.³ It has been suggested that it is a fragment of his agrarian law,⁴ or of a judiciary law of Glaucia (Carpino, Gracchi 205-34). Stuart Jones (170, 171 and n.3) has suggested that it is a fragment of the lex Appuleia maiestatis, and his view has received fairly wide support.⁵ His argument is that "iudex ex h.l. plebive scito factus" (ll. 15-6) is a reference to the president of a quaestio established by the law. This is probably correct, but it proves only that the fragment is "ein Stück öffentlichen Strafrechts" (Wenger 373). The theory is in no way strengthened by Stuart Jones' assumption that Bantia was bound to Rome by a 'maiestas' treaty, for the existence of such a treaty is as hypothetical as the attribution of the fragment to the maiestas law. Yarnold (166) draws attention to a serious difficulty. The lex Bantia (ll. 14-32) provided for the taking of oaths by magistrates and senators to observe the provisions of the law, and not to act against or frustrate it. Saturninus' agrarian law of 100 B.C. is known to have provided for a similar oath (Livy Per. 69; Appian B.C.1.29), and Metellus Numidicus went into exile rather than comply with the obligation

1 The so-called 'Latin Law of Bantia'. For the text see Warmington 294-302.

2 A fragment found at Tarentum. For the text see Schönbauer 110.

3 Stuart Jones 171; Carcopino (Gracchi 211 and n.4); H. Last (CAH 9.160.4); Sherwin-White (Citizenship 146); Warmington 294; Wenger (373 and nn. 18, 19).

4 Wenger (373 and nn. 18, 19); See also the authorities cited by Stuart Jones 171.

5 M. Gelzer (Hermes LXIII (1935) p. 124); Warmington 294; H. Last (CAH 9.160.4, 161); Marsh-Sculard 415; Sherwin-White (Citizenship 146.)

to swear to the agrarian law.¹ Yarnold argues that there would not have been such perplexity in regard to the oath imposed by the agrarian law if a similar oath had been introduced by the maiestas law three years previously. Schönbauer (105) argues that the fragment should contain some reference to 'maiestas populi Romani' if it were part of a maiestas law. This argument is not conclusive, for apart from some procedural provisions (II, 1-6), the fragment deals only with the sanction and the taking of the oath; when the lex Acilia imposes a penalty for frustrating the holding of a trial (Warmington 362), it does not repeat the substantive category (Warmington 318) which enables the general nature of the law to be ascertained. Schönbauer (107-8) is, however, on safer ground when he notices that the fragment does not include 'tribuni militum' among the magistrates who are enjoined to take the oath, which is a curious omission in view of the fact that Saturninus based his legislative programme largely on the interests of Marius' veterans.

The lex Tarentina has similarly formed the subject of whatadian (Gracchi 206) aptly terms "a parlour game". It has been identified as a judiciary law and as one or other of the 'leges de repetundis'.² Schönbauer (109-17) argues that it is part of the lex Appuleia maiestatis. He is probably correct when he says (110-1) that the inclusion in the

1 Livy Per.69; Appian B.C. 1.29; Cic. Dom. 31.62, Sest. 16.37; Auct. Vir. Ill. 62.73. Schur 318 believes that Metellus was prosecuted under the lex Appuleia maiestatis. For a criticism of this view see Brecht (Perduellio 300.3). It need only be added that the sources do not attest any violence or sedition on Metellus' part when he refused to take the oath. On the contrary, his objection to swearing was specifically because, in his view, the lex had been carried 'per vim'. Livy Per.69; Cic. Sest. 16.37; Auct. Vir. Ill. 62.

2 For the references see Schönbauer 92-104.

fragment of citizenship or its equivalent as the reward of a successful accuser does not require the assumption of a *lex repetundarum*, for a similar reward is attested in the case of *ambitus* (Cic. Balb. 25, 57, Cluent. 36, 98). It also seems clear (111, 113) that '*nomen deferre*' (1, 18) is from a criminal *lex*. Schönbauer (112) then bases an argument on the fact that the *lex Tarentina* provides for publication of the law throughout the empire, to which he links the provision that all magistrates are to swear to the law. He holds that the extortion law would have been so well known by circa 103 B.C. that general publication of a new *lex repetundarum* would have been superfluous. Furthermore, an extortion law would have been in the interest of all allies, but, with the exception of Latins, allies are excluded from the fragment; the reason is that the innovation of an oath by all magistrates concerned only the *populus Romanus*, not provincials and allies. A further point made by Schönbauer can be used to meet the possible repetition in the case of the *lex Tarentina* of the objection raised by Yarnold to Stuart Jones' hypothesis concerning the *lex Bantia*, for he points out (112-3) that the obligation to take an oath is made applicable only to magistrates, and not to senators, and argues that the imposition of an oath on the latter first occurred in 100 B.C. (presumably in the agrarian law). He concedes (113-4) that a *lex* establishing a *quaestio* during the period in question could have been '*de repetundis*' or '*de ambitu*', as well as '*de maiestate*', but having already excluded an extortion law, he argues that at this *ambitus* would have concerned only the *comitia* at Rome, and would not have been of sufficient general interest to justify universal publication. But the innovation of placing '*maiestas populi Romani*', which allies in many territories had contracted to respect, under the jurisdiction of a *quaestio perpetua* would have understandably called for general publication (114, 116). Finally, Schönbauer conjectures (115) that the incomplete "... *te omnium*

rerum" (L. 3) should be restored as "de maiestate omnium rerum". In view of the impressive argument developed by Schönbauer, it may reasonably be supposed that if either of the elusive fragments is part of the lex Appuleia maiestatis, it is the Tarentine rather than the Bantian.

CHAPTER IV

THE LEX MAIESTATIS: VARIUS AND SULLA

A. LEX VARIA MAIESTATIS

The lex Appuleia had brought only a small segment of the 'Reichsgerichtsprozess' under the *quaestio maiestatis*, a segment which covered sedition in Rome itself, but which did not touch on external relations. The first attempt to bring external treason under the permanent *quaestio maiestatis* was made by the lex Varia of the tribune Q. Varius Hybrida (Zumpt 2.1.255; Gundel, RE 8A, 1.388). The only direct evidence that the Varian law was 'de maiestate' is Cicero (sp. Ascon. 79C), but this evidence is generally accepted. The terms of the law were "ut quaereretur de iis, quorum ope consiliove socii contra populum Romanum arma sumpassent" (Ascon. 22C; Cf. Val. Max. 8.6.4; Appian B.C. 1.37).

Appian (B.C. 1.37) places the law between the death of Drusus (B.C. 1.36) and the outbreak of the Social War (B.C. 1.38), but Asconius (22C) and Valerius Maximus (8.6.4) say that the war had already begun when the law was passed. Zumpt (2.1.250-1) argues that as Drusus was probably murdered in November, 91 B.C., at the end of his tribunate, the new tribunes would not have had enough time to introduce the law that year; as Cicero (Brut. 68.303) discusses the death of L. Crassus before the outbreak of the war and the introduction of the lex Varia, and as Crassus died in September 91 and C. Aurelius Cotta was condemned under the lex a few months later, the war should be dated to the end of 91, and

the lex to soon afterwards. This view requires the arbitrary rejection of the order of events in Appian. (B.C. 1.36.-1.37.-1.38). The present participle in Appian should be noticed: κατὰ τὴν τοῦ Ἰταλικοῦ ἐκείνου χρόνου συνέστατο ἡ κρισιμὴ βοηθοσύνη. If Appian believed that the war had already begun, βοηθοσύνη would have corresponded more accurately than βοηθόων to "sumpessent" (Ascon. 22C), and "coacti essent" (Val. Max. 8.6.4). It should therefore be accepted that Appian placed B.C. 1.37 between 1.36 and 1.38 because he believed, rightly or wrongly, that this was the correct sequence. Modern authorities date the law to 91 (Mommson, Straf 198), the end of 91 or early 90 (Strachan-Davidson 2.84), or 90 (Rotondi 339; Broughton 2.26). Gundel (RE 8. Al. 388-9) believes that the war began in March, 90, but that in October 91 there was unrest at Asculum and in Oscan territory, to which Asconius may be referring when he speaks of "Italico bello exorto" (22C); but he dates the law to the beginning of 90, on the ground that it was passed only after Varius took office as tribune on the 10th December, 91.

M. Aemilius Scaurus is crucial to the lex Varia. In Clark's edition of Asconius (22C) Cicero is reported to have said, in his defence of M. Scaurus, that M. Aemilius Scaurus had been the accused in one prosecution at the instance of Varius, namely a charge under the lex Varia: "ab eodem etiam lege Varia custos ille (sc. M. Aemilius Scaurus) rei publicae proditiōnis est in crimen vocatus: vexatus a Q. Vario tribuno plebis est". The comment of Asconius (22C) is that after the introduction of the lex Varia, whose terms he sets out briefly, Scaurus was prosecuted by Varius. But in the context of Asconius' commentary he can be referring

only to a prosecution 'apud populum' and not under the lex, for "Q. Varius tribunus plebis ... adesse apud se Scaurus iuberet" seems to mean a summons to the 'inquisitio' preceding a trial in the comitia; only the praetor could summon to a quaestio (Wlassak, Anklage 6-8, 24-5). And in the same passage Asconius records that Scaurus addressed himself to "Quirites", which can mean only the Roman People in assembly, not the 'iudices' of a quaestio. A further difficulty in Clark's text is that "ab eodem" in the citation of Cicero's own words must mean Varius, which makes "a Q. Vario tribuno plebis" redundant. Some authorities¹ seem to have seen a different text of Asconius, in which "non multo ante" is excised from the beginning of Asconius' commentary, and is attached to the excerpt of Cicero's own words: "ab ... vocatus; venatus a Q. Vario tribuno plebis est non multo ante", which avoids redundancy. On this reading Cicero refers to a prosecution 'apud populum' by Varius, and to a charge under the lex Varia by "eodem" (not being Varius), which gives an understandable order of events: Varius prosecuted Scaurus 'apud populum'; then the lex Varia was passed; then "eodem" accused him under the lex.

It is probable that "eodem" was Q. Servilius Caepio (Cicero), who accused Scaurus of extortion under Glauucia's law, in 92 or 91.² This was before a quaestio, and raises no difficulty. But the tradition in regard to the trial 'apud populum' is confused. Valerius Maximus (3,7,8) says that

¹ Zumpt (2.1.429,133); Klebs (RE 1.586); Greenidge & Clay (1st ed. of 1903, p.106; but not the revised ed. of E.W. Gray, (1930) p.137).

² Cicero (ap. Ascon. 21C); Asconius (ad loc.). See Greenidge & Clay (1st ed. p.106 for the identity of "eodem", 2nd ed. p.127 for the date). Cf. Broughton 2.18,6; Badian (Caepio 328,341).

Scaurus was accused "quod ab rege Mithridate ob rem publicam prodendam pecuniam acceperisset". He then attributes to Scaurus a crushing attack on Varius, which forced the latter to drop the case: "Varius Severus Sucronensis Aemilium Scaurum, regia mercede corruptum, imperium populi Romani prodidisse ait; Aemilius Scaurus huic se affinem esse culpae negat: utri creditis?" Asconius (22C) attests a similar attack by Scaurus on Varius, also in a trial 'apud populum', and a similar abandonment of the case: "Q. Varius Hispanus M. Scaurum principem senatus socios in arma ait convocasse; M. Scaurus princeps senatus negat; testis nemo est: utri vos, Quirites, convenit credere?" Cicero (on the older reading of Asconius), Asconius, and Valerius Maximus therefore agree that Varius prosecuted Scaurus in the comitia. But Valerius attests a trial, probably in 91 B.C. (Broughton 2.6.16) for proditio in relation to Mithridates. Asconius says it was on a charge of inciting war - "belli concitati crimine" - which means the Social War, for Asconius reports that Scaurus described the charge as "socios in arma ... convocasse". Cicero himself does not give the charge, but in the context of his statement that the charge by Caepio (Jnr) under the lex Varia was proditio, it probably follows that the trial 'apud populum' was on a similar charge. All three sources seem to be referring to the same trial, but the problem is to reconcile proditio in re Mithridates with proditio concerning the Italian allies.

Zumpt (2.1.256,429-30) believes that Asconius' "socii" included Mithridates, because of: "Scaurus senex cum a Varro tribuno plebis argueretur, quasi socios et Latium ad arma coegisset" (Auct. Vir. Ill. 72). He argues that at the time of the allied revolt there were substantial ties between prominent Romans and Mithridates, and that

Scaurus was believed to have had a finger in both pies. This is not impossible, although "socios et Latium" looks very much like a hendiadys. It should be noted that a charge of extortion under the lex Servilia Glaucia was brought by Caepio (Jnr) against Scaurus, "ob legationis Asiaticae invidiam et adversus leges pecuniarum captarum" (Ascon. 21C). The "legatio Asiatice" would probably have been an embassy to Mithridates, possibly in 93 B.C., of which Scaurus was a member (cf. Broughton, 2.15, 16.6). These facts may assist in explaining the order of events. It is known that Scaurus wriggled out of the charge of extortion in relation to the "legatio Asiatice" which Caepio (Jnr) brought against him (Ascon. 21C). It may well be that Caepio, the inveterate enemy of the Drusus faction to which Scaurus belonged (Badian, Caepio 325, 328, 341), tried again. He persuaded Varius, on his assumption of office as tribune, to prosecute Scaurus 'apud populum'. As Scaurus had also supported the Livian line on the Italian question, his susceptibility in the East and his liberalism in the West could conveniently be visited upon him in one prosecution.

But Caepio and Varius failed again. Thereupon, realising that they could never insult the Assembly against Scaurus, they decided to put it up to the less impressionable equites who would make up the jury panel of the quaestio maiestatis. Hence the lex Varia. Proceedings 'apud populum' had to be instituted by a tribune, but anyone could be an accuser before a quaestio.¹ Caepio would prosecute, thus avoiding further sneering references to Varius' origin.

¹ Wlassak (Anklage 6-8); Lengle (Straf 26); Greenidge (Procedure 416).

That Caepio was in fact the accuser is attested by Cicero's "eodem" (Ascon. 22C), which refers back to Cicero's reference to the prosecution by Caepio under the extortion law (Ascon. 21C), and also by a passage of uncertain origin cited by Klebs (RE I. 586): "Q. Caepio in M. Aemilium Scaurum lege Varia".¹

Cicero (Brut. 89.304) says that the quaestio Vari-
ana was the only court which sat during the war, "ceteris"
propter bellum intermissis, and it is difficult to reject
his testimony, for he was in court: "cui frequens aderam".
But Asconius (73-4C) cannot easily be reconciled with Cicero:
"Bello Italico ... cum multi Varia lege inique damnarentur,
quasi id bellum illis auctoribus conflatum esset, ... nunc-
tus iustitiae occasionem senatus decrevit ne iudicia, dum
tumultus Italicus esset, exercerentur: quod decretum eorum
in contionibus populi saepe agitatum erat". This passage
seems to mean that the Varian commission was suspended, for
if the 'iustitium' had only concerned other courts, "cum
multi damnarentur" would be irrelevant. Why was the decree
"saepe agitatum" at meetings? The populace would not have
been much concerned at the suspension of the courts for
other crimes, but the commission which was trying Rome's
enemies would have been of great popular concern. Mommsen
(Straf 364.2) may be right to suggest that there was first
a suspension of the other courts, and of the Varian later in
the war.

The most curious aspect of the lex Varia is the con-
demnation of Varius himself under his own law: "Consequente
anno (sc. 89 B.C.) Q. Varius sua lege damnatus excesserat"

¹ For some of the trials under the lex Varia see Gmdel
(RE 8A.1.390).

(Cic. Brut. 89.305); "summo cruciatus supplicioque Q. Varius, homo importunissimus, perit" (Cic. Nat. Deor. 3.338); "sed, dum ante pestiferum tribunal plebis quam certum civem agit, sua lex sum domesticis laqueis constrictum absumpsit" (Val. Max. 8.6.4). It is clear that Varius cannot have been condemned for assisting the Italians. The sources suggest that the charge related to the seditious circumstances in which the law had been passed, for his colleagues had interposed their veto, but the equites had intervened violently on his behalf (Appian B.C. 1.37; cf. Val. Max. 8.6.4). Zumpt (2.1.253-5) argues that at the end of 90 B.C. harmony was restored between the factions, when the law of L. Julius Caesar granted citizenship to allies who had remained loyal (cf. Badian, Caepio 341; Broughton 2.25); and that the climate favoured the prosecution of Varius in 89. As the only charge which suggests itself is one of sedition, and as Varius was prosecuted "sua lege", Zumpt concludes that the lex Appuleia had been incorporated in the lex Varia, which was therefore a general law of maiestas, possibly with a more exact 'definition' of 'maiestas minuta' than the lex Appuleia (cf. Botsford 400-1).

The difficulty is Valerius Maximus (8.6.4), a passage which appears in a chapter entitled: "Qui quae in aliis vindicarent ipsi comiserunt". Even if Varius' law had been couched in general terms, it is clear that Valerius Maximus (loc. cit.) is concerned only with that part of it "quae iubebat quaeri quorum dolo malo socii ad arma ire coacti essent". Taken with the title of the chapter, this suggests that Varius was guilty of something concerning the allies - or concerning the issue which had driven the allies to arms, namely Roman citizenship. At this point the doubtful nature of Varius' own citizenship becomes relevant. Scaurus

contemptuously suggested that the court would not believe a Spaniard against a *princeps senatus* (Ascon. 22c; Val. Max. 3.7.8), and the cognomen "Hybrida" was due to "obscurum ius civitatis" (Val. Max. 8.6.4). The accusation against Varius was directly related to his citizenship, according to Valerius Maximus (8.6.4): "... dum ante pestiferum tribunal plebis quam certum civem agit ..." Gundel (RE 8A.1.387) takes this passage to mean that Varius acquired his citizenship in a questionable way. A clue to the method of acquisition is given by Münzer (Norbanus 227-9), who argues that Norbanus was a new citizen who lacked the 'ius honorum'. The reward of a successful accuser in this period took a political form, in particular the right to assume the citizenship of an accused who was capitally condemned. Norbanus prosecuted Caepio (Snr) for Arausio in order to facilitate his own entry into the 'curatus honorum'. Although Münzer sees a parallel between the situations of Norbanus and Varius, he does not press it fully. It is perhaps possible to do so on the strength of "dum ante pestiferum tribunal plebis quam certum civem agit", for this was precisely the position of Norbanus. Perhaps Varius' real crime was the abuse of his law for his own purposes.

There is, however, the difficult fact that an actual death sentence was not only imposed on Varius, but was carried out. Levy (15, 18-21) shows that even in the time of Sulla the only capital sentence was still the actual death penalty, although since the mid-second century B.C. there had been a convention whereby an accused was allowed to anticipate condemnation by voluntary exile; if he waited until judgment the responsible magistrate could execute him. From about 123 B.C. this practice hardened into a rule of law, whereby even after condemnation it was the magistrate's duty to

allow the accused a reasonable opportunity of a voiding execution by going into exile. Whether he left before or after judgment, an *aquae et ignis interdictio* could be enacted against him, so that if he returned from exile he could be killed with impunity by the first comer. The effect of the interdict was to recognise that by his change of allegiance he had forfeited his rights of citizenship; the interdict did not impose a sentence of exile, but gave effect to the situation created by the accused's own act.

The actual execution of Varius requires the unlikely assumption that, conscience-stricken, he elected not to avail himself of his right of exile. There is, however, another possibility, namely that there was a reason for denying him the right. Levy (27) notes Varius' case in passing as an example of an actual execution, but does not attempt to reconcile this with the right of exile. Lengle (Straf 44-5) says that Varius was tried by the *comitia centuriata* and not the *quaestio*, although under his own law. This is an attempt to meet the case of C. Aurelius Cotta, who was *eiectus e civitate* under the *lex Varia* (Cic. *Orat.* 3.11). Does *eiectus* mean voluntary exile, or was it the actual punishment imposed by the *lex*? Levy (22, 31) holds that the sanction of the Varian law was death (but subject to the right of exile), and points out that exile as an actual sentence - known as *aquae et ignis interdictio* in common with the enactment which followed voluntary exile - was unknown until Cicero's *ambitus* law c. 63 B.C. (cf. de Zulueta, *CAH* 9, 878). Siber (Analogie 61), while accepting this proposition for

- Cf. Mommsen (Straf 68-70); Greenidge (Procedure 513); Strachan-Davidson (2, 24, 28-41, 52-72), who aptly calls the interdict "a conditional death sentence"; Siber (Analogie 55, 57-5).

permanent commissions, suggests the introduction of an actual sentence of exile at an earlier date in the case of special commissions, among which he includes the Varian. But whatever meaning "electus" has, why was Cotta exiled and Varius executed? Lengle (Straf 44-5) in proposing the comitia centuriata as the court which tried Varius, is attempting to capitalise on Mommsen's view (Straf 201) that the tendency to restrict the death penalty was more marked in the quaestiones than in the comitia; Lengle's argument is that if Varius was tried in the comitia, there was nothing to prevent the imposition of the actual death sentence. But in fact there was no difference between a quaestio and the comitia as far as the right of exile was concerned (Levy 27-9).

It follows that even if Varius had been tried by the comitia centuriata the problem would remain, for he would have had a right of exile whether the death sentence flowed¹ from the judgment of a quaestio or was imposed by the comitia. Only one circumstance can have deprived Varius of that right - the fact that he was not a citizen. This, it is suggested, is the explanation of his execution. Citizenship was the basic issue in respect of which the Italians had received 'opes consiliumve', and having regard to the doubtful quality of Varius' citizenship, and the possibility that his trial

¹ A quaestio did not pass sentence. The penalty had been laid down by the enabling statute, and the court simply had to answer a specific question: "Did the accused do what is alleged?" If the answer were affirmative the praetor pronounced "fecisse videtur" and the penalty followed by operation of law. This is why there was no provocatio from a quaestio. The People, by enacting the *lex*, had already conditionally sentenced the accused. The condition was fulfilled when the quaestio's answer was "condemno". Strachan-Davidson 2,43-50; cf. Levy 16-7; Baube 73-4.

was connected with it, it may be supposed that the *lex Varia* included a provision whereby those who acquired citizenship '*dolo malo*' could be deprived of it. It is suggested that in order to convict Varius at all it had to be shown that he had become a citizen by fraud. Therefore, his very condemnation annulled his citizenship, and as a peregrine he was exposed to summary execution.

Some authorities¹ believe that the *lex Varia* created a permanent *quaestio*, while others² favour a special commission. The acceptance of a special commission would partly resolve the difficult sequence in Asconius (22C), for Varius may have been appointed the presiding '*quaesitor*' (Mommesen, *Straf* 198.2). But this would still not explain why Scaurus addressed the court as "*Quirites*". Lengle's belief that Varius was tried by the *comitia*, although under his own law, raises the problem that it would have to be assumed that the *lex* had not submitted a category of acts to the exclusive jurisdiction of the *quaestio*. Henderson (76) believes that a *lex* either defined crimes or regulated procedure, but did not do both. It would follow that the *lex Varia* laid down a *maiestas* category, but did not concern itself with the establishment of a court. This would mean that it was open to the *comitia centuriata* to apply the Varian law. But Henderson's theory of a clearcut distinction does not seem to be justified. The *equites* had actively helped Varius to push his law through (Appian B.C. 1.37), and their reward was surely a monopoly of the jury panel and exclusive jurisdiction over the substantive category. It should be noticed

1 Zumpt (2.1.253-5); Greenidge (Procedure 385); Gundel (RE 8A.1.385)

2 Mommesen (*Straf* 198); Strachan-Davidson 2.21; Lengle (*Straf* 30); Kähler 547; Siber (Analogie 61).

that the Lex Varia seems to have been amended procedurally without affecting its substantive provisions, for when Cn. Pompeius was tried in 89 the charge was one of maiestas 'lege Varia', but the court was a mixed panel of senators and equites under the lex Plautia (or Plotia) of that year: "Memoria teneo, cum primum senatores cum equitibus Romanis lege Plotia iudicaret, hominem dis ac nobilitati perinvisum Cn. Pompeium causam lege Varia de maiestate dixisse" (Cic. ap. Ascon. 79C). The survival of the Varian law, despite a realignment of the jury panel, is perhaps the strongest argument in favour of its permanence.¹

B. LEX CORNELIA MAIESTATIS

Sulla's lex Cornelia maiestatis was passed in 81 B.C. as part of his programme of criminal legislation, which set up certain new permanent courts and reshaped others, although it is not certain which were new, and which were simply remodelled by Sulla. In regard to maiestas the scope of Sulla's law depends on whether a permanent quaestio was already in existence as a result of the lex Appuleia or the lex Varia. The evidence for a permanent court 'lege Appuleia' is very strong, and the probabilities somewhat favour a similar position for the lex Varia. It is therefore believed that the first permanent quaestio maiestatis should not be credited to Sulla, who should rather be regarded as having introduced

¹ Cicero (loc. cit.) may be corrupt. Cn. Pompeius Strabo was consul in 89 and proconsul in 98 (Broughton 2.32.42), and as he could not be tried while holding either office, there does not seem to have been time to try him in either year. But the trial must have been in 89, for it was the first under the Plautian Law, and M. Plautius Silvanus was tribune that year (Broughton 2.34). Greenidge & Clay (151) suggest "Cn. Pomponius", tribune in 90. This is possible, for he and Varius "habitabant in rostris" (Cic. Brut. 89.305) - which would certainly have made him "nobilitati perinvisum".

innovations in a permanent court which already existed.¹

It is believed by some authorities that the *lex Cornelia* was a general law of *maiestas*. Thus Greenidge (*Treason* 232):

The great change comes with this period of codification. A law is passed which professes to cover the whole of a crime designated by a certain word. It is therefore necessary to specify every possible case of that particular crime.²

Zumpt (2.1.383) believes that Sulla incorporated the particular categories specified in the Appuleian and Varian laws, and also extended the *crimen maiestatis* to a large number of new categories. There is perhaps a too ready assumption that the Roman practice was to enact consolidating statutes which gathered up and restated the provisions of previous laws. Thus Zumpt (2.1.253-5, 383; cf. Bonner 109) says that Varius re-enacted Saturninus' law with additions of his own, and that Sulla incorporated the provisions introduced by Saturninus and Varius, with further additions. Similarly, Greenidge (*Treason* 232) believes that the *lex Julia maiestatis* re-enacted the *lex Cornelia*. The evidence does not entirely support this perpetual game of leap-frog. The *lex Acilia* of 123-2 B.C., which was preceded by two other *leges de repetundis*, the *lex Calpurnia* of 149 B.C., and the *lex Junia* of uncertain

1 So Zumpt (2.1.377-8); Lengle (*Straf* 28-9). Cf. the authorities who accept a permanent court '*lege Appuleia*' (p.50 n.3) and '*lege Varia*' (p.77 n.1). For the view that Sulla established the first permanent *quaestio maiestatis* see Mommsen (*Straf* 203); K hler 509.

2 Cf. Zumpt (2.1.378); K hler 547-8; H. Last (CAH 9.295-7); Brecht (*Maiestas* 357); Botsford (id and n.11); Rotondi 360; Pollack (191-6), and particularly his assertion (195) that with the passing of the *lex Cornelia* "zum ersten Male partiell kodifiziert worden ist". Rein 510 more conservatively believes that Sulla's law merely brought more categories than previous laws under the concept of '*maiestas minuta*'.

date, has a significant provision: "Quibusquom iudicium fuit fueritve ex lege quam L. Calpurnius L. f. tr. pl. rogavit, exve lege quam M. Iunius D. f. tr. pl. rogavit, quei eorum eo iudicio apertus vel condemnatus est eritve, quo magis de ea re eius nomen hanc lege deferatur quove magis de ea re quom eo ex h.l. agatur, eius h.l. nihilum rogato" (Warwington 364,6). It seems clear from "fueritve" and "eritve" that the earlier laws were still in force. Gaius (4,19) says: "legis actio constituta est per legem Siliam et Calpurniam, lege quidem Silia certas pecuniae, lege vero Calpurnia de omni certa re". This lex Calpurnia is the extortion law of 149 B.C.,¹ while the lex Silia was slightly earlier (Buckland 373). The lex Calpurnia stated in the general form "de omni certa re" the rule which the lex Silia had applied to "certa pecunia", but Gaius does not suggest that the latter was no longer current. Gaius (1,185) cites a 'lex Iulia et Titia' dealing with tutela; the reference is probably to two separate laws, both of which survived (Jolowicz 249,3). And Diocletian decreed that "maximi enim criminis est retractare quae semel ab antiquis statuta et definita sunt statum et cursum tenent ac possident" (Coll. 15,3,2).²

These examples substantiate the significant observations of Schulz (Principles 84-6):

1 So Mommsen (Straf 708). Contra Strachan-Davidson 2,5-6; Hitzig 7; Henderson 73,19. Even if it was not the same law, the point here made is not affected.

2 There are also examples going the other way. Thus Cicero (Rab. Post. 4,9): "hoc totid i verbis translatus caput est, quod fuit non modo in Cornelia sed etiam ante in lege Servilia". See also the cases of translation cited by Henderson (76 and n.34).

Never did the Romans attempt to interrupt the even flow of legal development by radical change.

.....
There was a disinclination to abolish any valid law, rather was it allowed to lapse through disuse; a new rule was often set up side by side with one antiquated or moribund, to be used at choice, so that in this way the disuse of the older law was accomplished gradually.

.....
It cannot be denied that this conservatism ... was responsible ... for unwieldiness and intricacy in the legal system; if a decision to clear up and cast out is never taken, it is clear that finally we have legal rules and legal institutions derived from the most various periods of development existing side by side or mixed up with each other in a strange and confusing way. The fundamentally conservative attitude just described was maintained with astonishing consistency throughout Roman legal history. It dominated the subjects of the Republic, of the Principate, and of the later imperial era.¹

The sources for Sulla's law do not furnish any evidence for the prosecution 'lege Cornelia' of something which was previously included in the categories introduced by Saturninus or Varius. The one possible exception to this assertion is the case of C. Cornelius, tribune in 67 B.C. During his tribunate he proposed a law prohibiting loans to foreign states, but it was rejected by the Senate (Ascon. 57C). Cornelius retaliated with a proposal "ne quis nisi per populum legibus solveretur", which was an attack on the Senate's exercise of the power of dispensation. At the instigation of indignant senators the tribune P. Servilius Globulus interceded when the herald was about to read out Cornelius' bill, whereupon Cornelius promptly read it out himself. The consul C. Piso protested, there was a violent scene, and Cornelius closed the meeting (Ascon. 58C). He then carried a law "ne

1 Cf. the assertion of McFayden (281) that "... the Romans were as disinclined to make or repeal statutes as we Americans are inclined the other way. The result was that the statute law was always failing to keep up with advancing social needs and ideas".

quis in senatu legibus solveretur nisi CC adfuissent", which the Optimates also disliked (Ascon. 59C).¹

A prosecution for *maiestas* was brought against Cornelius in 66 B.C. The accusers were the 'fratres Cominii' (Ascon. 59C). Asconius (59-60C) graphically describes how the accusers were threatened by a hostile crowd, but managed to escape under cover of darkness and left the city over the rooftops. The case was dropped, but was taken up again the following year. Cominius, who was anxious to refute the belief that money had influenced the abandonment of the previous proceedings, "repetit Corneliū lege maiestatis" (Ascon. 60C). Leading senators gave evidence, and attempted to persuade the court that Cornelius was guilty of what Asconius (61C) describes as "crimen inimitae maiestatis tribuniciae".² This submission was based on the brushing aside by Cornelius of the intercession which the tribune Globulus had entered against the reading of Cornelius' bill in 67 B.C. (Ascon. 60-1C). Cicero defended Cornelius and admitted the facts, but argued "non ideo quod lectus sit codex a tribuno inimitae esse tribuniciam potestatem" (Ascon. 61C) - a close parallel to the line followed by the defence at the trial of Norbanus. By skating delicately between the senators whom he did not want to alienate and the interests of his client, Cicero secured an acquittal (Ascon. 61C).

Asconius (62C, although the passage is bracketed by Clark) concludes his account of the trial with an analysis which is reminiscent of the manner in which the issues were

¹ Dio's version (39.38ff) differs slightly on details, but is substantially the same.

² For the relevance of this passage to Mommsen's theory as to the origin of the *crimen maiestatis* see p. 240 below.

were developed at the trials of Norbanus and Caepio (pp. 58-61 above): "In hac causa tres sunt quaestiones: prima, cum sit Cornelius reus maiestatis legis Corneliae, utrum certae aliquae res sint ea lege comprehensae quibus solis reus maiestatis teneatur, quod patronus defendit; an libera eius interpretatio iudici relicta sit, quod accusator proponit. Secunda est an quod Cornelius fecit nomine¹ maiestatis teneatur. Tertia an minuendae maiestatis animam habuerit". Asconius here raises the question of the extensive interpretation of the lex, that is, the application of a statute to a case for which it does not make express provision, but which is held to have been within the contemplation of the legislator.²

There does not seem to be any suggestion that the charge against Cornelius related to the violent termination of the meeting at which Globulus had interceded. Rather would it seem to have concerned Cornelius' disregard of Globulus' veto (Ascon. 61C). If so, the question arises as to why Cornelius was charged 'lege Cornelia', in view of the possible inclusion in the lex Appuleia of a provision "qui tr. pl. intercedenti non paruit parueritve" (p. 62 above.) The fact that it was sought to bring the charge under the lex Cornelia by way of extensive interpretation must mean that there was no express rule in Sulla's law which could be applied. This would support the view that the lex Cornelia had not re-enacted the lex Appuleia, at least as

1 ne ca codd: nomine surser (Clark 62).

2 The only authority of those consulted who discusses the question of extensive, or judicial, interpretation in Roman Criminal Law in any detail is Rein (223-6). Siber (Analogie) builds his work on extensive interpretation and analogous principles, but neither defines nor explains the concepts.

far as disregard of the veto was concerned, but at the same time it poses the question as to why Cornelius was not charged 'lege Appuleia', in which event no interpretation would have been necessary. The answer should perhaps be sought in the assertion by Asconius (80-1C) that the senators who testified against Cornelius criticised his reading of the bill himself as something unprecedented "Vidisse se cum Cornelius in tribunatu codicem pro rostris ipse recitaret, quod ante Cornelium nemo facisse existimaretur. Volebant videri se iudicare eam rem magnopere ad crimen imminutae maiestatis tribuniciae pertinere; etenim prope tollebatur intercessio, si id tribunis permitteretur". The meaning may be that although the indictment may have included disregard of the veto, this was not the gravamen of the charge, for it would not in that case have been criticised as unprecedented. The main attack was rather on the reading of the bill by Cornelius. As there is no reason to suppose that the lex Appuleia dealt with the personal reading of bills, it follows that a charge 'lege Appuleia' would not have helped.

The substance of the allegation against Cornelius was, therefore, that in his capacity as a tribune he had done something in breach of his office when he read out the bill himself. This agrees with the general characterisation of the crimen maiestatis stated by Seneca Rhetor (Controv. 9.25.17): "Lex (sc. maiestatis) quid oporteat querit, aliae quid liceat". It also agrees with Cicero's assertion (Verr. 2.1.33.84) that when Verres failed to exact retribution on the people of Lampsacus, whose sedition had diminished his 'ius legationis', his failure to uphold the dignity of his office was maiestas, for "qui potentatem suam in administrando non defenderit, imminuti magistratus veluti

maiestatis laesae reus est" (Ps-Ascon. ad loc.). The crucial problem is, however, the statement of Asconius (61, 62C) that the reading of a bill by a tribune, although not expressly included in the *lex Cornelia*, could have been interpreted into the *lex* as a case of '*imminuta maiestas tribunicia*'. At first sight this seems to suggest that the *lex Cornelia* made some mention of '*maiestas tribunicia*' rather than '*maiestas populi Romani*', for there had to be a reasonably close connection between the desired interpretation and an actual provision of the *lex* (Rein 224, note). The problem is to reconcile a reference to '*maiestas tribunicia*' in the *lex Cornelia* with Sulla's policy, which was to "kill the tribunate" (H. Last, CAH 9.292). It is scarcely credible that the man who in 88 B.C. forbade the introduction of laws which had not received the prior approval of the Senate (Appian B.C. 159), and who in 81 B.C. very possibly deprived the tribunes of the power to introduce legislation,¹ and certainly disqualified them from passing on to any other office (Appian B.C. 1.100), and imposed some form of restriction on their power of intercession,² would have been concerned to make special provision for '*maiestas tribunicia*' in his *maiestas law*. Sulla's attack on the tribunate went even further, for in 88 B.C. he enacted that voting was no longer to be by tribes, but only by centuries (Appian B.C. 1.59), a measure which meant that 'the *Comitia Populi Tributa* was condemned to idleness" (H. Last, CAH 9.208). Although the temporary measures of 88 B.C. were abolished by Cinna in

1 Livy Per. 89 cf. Cic. Leg. 3.9.22; Caes. B.C. 1.7. On the problems involved in the assumption of such a provision in 81 B.C. see Rice Holmes (Republic 1.357-60, 385-6); H. Last (CAH 9.293, 896.3); Siber (Verfassung 229-30); Broughton (2.141.8).

2 Cic. Verr. 2.1.60.155; cf. Cic. Leg. 3.9.22; Livy Per. 89; Vell. 2.30. On prior limitations of the veto and the scope of Sulla's legislation on this question see Mommsen (Staat 1.238; 2.1.308 and n.1); Rice Holmes (Republic 1.61); H. Last (CAH 9.292).

87 (Appian B.C.1.73), the probability that they were revived and extended in 81 B.C.¹ has a particular bearing on the crimen maiestatis, in view of a statement in Scholia Gronoviana:² "Decem tribuni eligebantur antea, qui quasi tuerentur populi Romani maiestatem ... Hos omnes pro nobilitate faciens sustulit Sulla". The evidence seems to suggest that Sulla inhibited the 'Reichenschaftsprozess' entirely, at least as far as the comitia tributa, and therefore the prosecution of maiestas otherwise than in the quaestio maiestatis, was concerned. It is not possible to accept Asconius at face value, insofar as he is to be understood as suggesting that the expression 'maiestas tribunicia' occurred in the Lex Cornelia.³ It is not certain, however, that this is what he intends to convey, for in the same passage (61C) he says that the defence raised by Cicero was a denial that the reading of the bill meant "a tribuno imminuta esse tribunician potestatem". A tribune was one of those "quibus populus potestatem dedit" (Cic. Orat. 2.39.154), and it was as the possessor of maiestas by way of derivation from the Roman People, rather than in his own right, that Cornelius was alleged to have been guilty of diminishing maiestas. The maiestas in question was 'maiestas populi Romani', and 'imminuta maiestas tribunicia' was simply a loose way of saying that a possessor of maiestas by delegation had, by doing something which derogated from the dignity of his office, diminished the maiestas of the Roman People, which had appointed him to that office. It should therefore be accepted that, as in the case of the Lex Appuleia, the only expression used

1 Heitland 2,456; Fröhlich (RE 4,1558, 1562).

2 Cited in full by Zumpt (2.1.349) and in part by Greenidge & Clay 214.

3 For other criticisms of this passage in Asconius see p. 240 below.

in the *lex Cornelia* was 'minuere maiestatem populi Romani'.

The principal and perhaps the only sphere of Sulla's maiestas law lay outside Rome, for it is probable that the law was introduced to serve the needs of the new constitution which Sulla constructed.¹ This constitution was designed to convert the customary authority of the Senate into positive law,² and the particular sphere of senatorial activity with which Sulla was concerned was the regulation of relations between the Senate and military commanders abroad, so as to avoid a repetition of the disasters of the previous decade, when Rome had on three occasions fallen to armed attack.³ The main source for the provisions of the *lex Cornelia maiestatis* is Cicero (Pis. 21.50): "Mitto exire de provincia, educere exercitum, bellum sua sponte gerere, in regnum iniussu populi Romani aut senatus accedere, quae cum plurimae leges veteres, tum *lex Cornelia maiestatis*, Iulia de pecuniis repetundis plenissime vetat". The rules here enunciated were not novel, for matters of this kind had fallen under the 'Rechen-schaftsprozess' for a very long time (pp. 23-4 above), and there was no lack of recent examples to emphasise the critical state of the problem. In 89 B.C. M. Aquilius, acting on his own initiative, incited the kings of Bithynia and Cappadocia to attack Mithridates, which involved Rome in a war in the East at a time when the Italian issue was still unresolved, and in 83 B.C. L. Licinius Murena invaded Pontus without

1 "It was Sulla who made the *lex maiestatis* the sanction of the constitution of Rome" (H. Last, CAH 9.297); cf. Cobban 158.

2 Marsh-Scullard 130; cf. H. Last (CAH 9.298); Fröhlich (RE 4.1560).

3 H. Last (CAH 9.293-8). On Sulla's organisation of provincial commands see H. Last (loc.cit.), Heitland (2.519), Marsh-Scullard 132. For a recent divergent view see Carney 73.

authority and suffered a reverse (Cobban 159; Broughton 2,35-6,43,64). The submission of proconsuls to the jurisdiction of the *quaestio maiestatis*, in respect of matters such as leaving a province or taking an army out of it, and waging war or entering foreign territory without authority, became inevitable when Sulla inhibited the tribunes' function as the watchdogs of the constitution, for with the curtailment of the 'Rechenenschaftsprozess' there was no way of bringing such offenders to book except by means of a *lex maiestatis*.

The operation of Sulla's law may be illustrated by the trial of A. Gabinus. In 54 B.C. Gabinus, acting on Pompey's instructions (and fortified by Ptolemy's gold), left his province of Syria and went to Egypt, where he restored Ptolemy to his throne (Dio 39.55; cf. Cobban 69-9, 159-60). In so doing he breached both Sulla's Law and a specific resolution of the Assembly.¹ Crassus sent a legate to take over Gabinus' command, but *οτι εδελξατο, ελλ' ουκ εδωκεν την ηγεμονιαν ελληνας, κατελθεν αυτην* (Dio 39.60). On his return to Rome Gabinus was tried for *maiestas*. Pompey intervened to save him from certain condemnation, whereupon an enraged mob nearly murdered Gabinus and the jury.² Dio (39.62) says that Cicero was Gabinus' accuser, but Cicero himself denies that he played any part in the trial except

1 Dio 39.56: *επι την Αλγυπτου ηγεσθην, και περ απαγορευοντος μεν τοσ νόμου μητε ες την υπερορταν τοις εχροντας τιμην αποκωμεσθην μητε κολεμους δε' εαντων αναρρεσσαι, απειρηδωτος δε και τοσ δήμους ... μη κατασθηναι τών άνόμων.*

2 Cic. Quint.Frat. 3.1.15; 3.1.24; 3.2.1. Dio 39.62 According to the melodramatic version of Valerius Maximus (8.1.4b,3) Gabinus was saved by the tearful intervention of his son, which seems to have been a stock theme (cf. the trial of Sex. Gaiba, p.24 above). Pompey's attitude is in marked contrast to that of the emperor Tiberius, who would not allow Cn. Piso to disclose secret instructions. Piso's crime was leaving his province (also Syria) and attempting to return by force (Tac. Ann. 3.14,16).

that of a witness (Quint. Frat. 3.9.1). Yet he was plainly disgusted at the narrow acquittal - 38 votes to 32 (Att. 4.18; cf. Quint. Frat. 3.9.1). Gabinius was then tried for extortion. Cicero defended him, but he was condemned and fined 10,000 talents, and went into exile. Dio (39.55) ironically remarks that this astonished Gabinius; money had secured his acquittal of maiestas, but money brought about his conviction for extortion.

The trial of Gabinius for maiestas had a curious sequel. An hour after his acquittal his freedman, Antiochus Gabinius, was condemned under the lex Papia: "Itaque dixit statim resp. lege maiestatis ΟΥΚΟΙΜΕΝΙΚΑΜΑΣΙΗΙ" (Cic. Att. 4.18). It is regrettable that the Greek *crux* has not been resolved, for the linking of the lex Papia and the lex maiestatis is intriguing. The lex Papia of 65 B.C. was introduced in order to restrain the illegal assumption of Roman citizenship, by expelling from Rome all peregrines who resided outside Italy (Broughton 2.158). Having regard to the fact that citizenship was linked to maiestas in the lex Varia (pp. 73-7) above, it is permissible to speculate on the possibility that the lex Papia may be identifiable as another lex maiestatis. In this regard it should be noticed that the identification of a law as a lex maiestatis can depend on an accident. It is only the chance circumstance that Cicero (ap. Ascon. 79C) happens to mention that the trial of Cn. Pompeius was judged by jurors appointed "lege Plotia", but on a cause "lege Varia de maiestate", that enables the lex Varia to be identified as a maiestas law, for the sources dealing with the introduction of the law and its application in 90 B.C. are silent as to its nature. It may be that the lex Manilia, which dealt with a similar category of maiestas to the lex Varia (external relations), has been excluded from

the 'leges maiestatis' only by the lack of a similar accident (cf. p.42 above). But the possibility that the lex Papia was a maiestas law is lessened if the reconstruction and interpretation of the Greek in Cicero (Att. 4.18) which is proposed by Shackburgh (326.1) is accepted: *ὁ τοῦ καὶ ἐπ' αὐτῷ μὲν ἔστι*.

Shackburgh's point is that Gaius Antiochus was tried under the lex Papia for a contravention of the provision "ne quis peregrinus se pro cive gereret". When Antiochus said "the Republic will not acquit me under the maiestas law as it did you", he meant that he was really condemned in place of Gaius, perhaps in order to pacify the angry mob, and that therefore he was virtually convicted of maiestas in place of his patron. On the other hand, the particular provision of the lex Varia under which Varius was condemned to death amounted, in effect, to a rule "ne quis peregrinus se pro cive gereret", and the lex Varia was certainly a lex maiestatis.

It is relevant to consider which *questio* convicted Antiochus. Public criminal courts were divided into 'questiones perpetuae' and 'questiones extraordinariae'.¹ A special court differed from a permanent one in that it was an ad hoc measure introduced to meet a situation which was not expected to recur, such as Pompey's lex de vi of 52 B.C. (Momsen, *Straf* 199 and n.2), and which therefore did not lay down rules of general application for the future. If it is borne in mind that the total number of 'questiones perpetuae' established in the last century of the Republic and the Principate of Augustus did not exceed eleven (Momsen *Straf* 203-4), the question arises as to what happened when other laws created criminal offences of a permanent

¹ Momsen (*Straf* 193, 3, 196.1) prefers 'cotidianae' to 'extraordinariae'.

nature. As no further 'quaestiones perpetuae' can be assumed, the only alternative is to suppose that in all such cases jurisdiction was given to one or other of the existing permanent courts. This is precisely what happened in the case of 'illicita collegia': "quisquis illicitum collegium usurpaverit, ea poena tenetur, qua tenentur qui hominibus armatis loca publica vel templa occupasse iudicati sunt" (Dig. 47.22.2). If this is compared with the maiestas category "quo (s. armatis hominibus) loca occupentur vel templa" (Dig. 48.4.1.1), it will be seen that the penalty for 'illicita collegia' was the penalty for maiestas. But the penalty for a crime was imposed by operation of law (p. 76 n.1 above). Therefore in order to be bound by the penalty for maiestas the crime had to be tried by the quaestio maiestatis. The case of 'illicita collegia' is particularly relevant to the trial of Antiochus, for in 54 B.C. C. Alfius Flavius was 'quaesitor de sodaliciis' at the trial of Plancius, and 'quaesitor de maiestate' at the trial of A. Gabinus.¹ It is not impossible that the lex Papia conferred jurisdiction on the quaestio maiestatis, and that when Antiochus Gabinus said that he would be condemned 'lege maiestatis' he was being accurate rather than subtle.

It is possible that Cicero refers to another part of Sulla's law in two other passages. One Bulbus was convicted of maiestas for having tampered with a legion in Illyria: "legionem esse ab eo sollicitatam in Illyrico ... planum

¹ Cic. Planc. 17.43, 42.104; Quint. Frat. 3.1.24; 3.3.3. Mommsen (Staat 2.202.4) holds that Alfius was not a praetor, but a special quaesitor. But Greenidge (Procedure 430 and n.2) argues that 'quaesitor' was a generic title, and that the office could have fallen within a praetor's sphere of competence, a view which Broughton (2.227.3) supports with the observation that Alfius had power to issue edicts, and had previously stood for the praetorship in 56 B.C. (cf. Pöschke 128-9).

factum est, quod crimen erat proprium illius quaestionis (sc. maiestatis), et quae res lege maiestatis tenebatur" (Clement. 35,97). Staienus was guilty of maiestas when, during his quaestorship, he was found to have incited sedition in the army: "plane factum est maxime ejus opzra ... in exercitu seditionem esse conflatum" (Clement. 35,99). It is probable that incitement of the army was an attack on the commander's authority, and therefore injurious to 'maiestas populi Romani' (Zumpt 2.1.390). The rule seems to have originated much earlier than Sulla: "ne cui fraudi esset concitare milites aut plebem" (Livy 3,53,4). The coupling of 'milites aut plebem', together with the fact that under the lex Appuleia it was maiestas "si quis homines ad seditionem convocavit" (p. 62 above), suggests either that 'milites' as the subjects of incitement to sedition formed a separate category under the lex Appuleia, or that they were brought under the lex by interpretation. Other Sullan provisions concerning provincial governors are attested, although not expressly as maiestas. Appius Claudius was probably guilty of a technical offence when he went to his province without his command having been confirmed by a 'lex curiata' (Cic. Fam. 1,9,25), and the crime may have been maiestas (Zumpt 2.1.386-7; Broughton 2.75). A governor who failed to quit his province within 30 days of his successor's arrival, or permitted his legates excessive expenditure, was probably liable for maiestas.¹ There were no doubt other provisions, such as failing to depart timeously for a province, a rule which seems to have originated early: "tribuni plebis ... consilibus mactam se dicturos, nisi in provinciam exissent, denuntiarent".²

1 Cic. Fam. 3,6,3; 3,10,6. Cf. Zumpt (2.1.385); Mommsen (Straf 556); Broughton 2.75.

2 Livy 42,21,4. Cf. Mommsen (Straf 557.) But Baladon (Provinciae 63,65) believes that a consul could choose his own date of departure.

Cicero threatens to charge Verres with *maiestas* for a variety of misdeeds. If he is acquitted of extortion and *peculatus* a prosecution for *maiestas* will follow, both in the *quaestio* and the *comitia tributa* (p. 33 above). Verres was guilty of *maiestas* by not punishing the people of *Lampsacus* (pp. 84-5 above). Verres' remission of the *Mamertine* obligation to furnish a warship was *maiestas* (Verr. 2.5.20.50); the passage gives a clear exposition of *maiestas* in its external connotations: "*Minuisti maiestatem rei publicae, minuisti auxilia populi Romani, minuisti copias maiorum virtute ac sapientia comparatas, sustulisti ius imperii, condicionem sociorum, maiestatem foederis*" - a striking illustration of the link between '*maiestas*' treaties and the crimen *maiestatis*. There is a similar implication in the allegation that it was *maiestas* to force *Tyndaris* to surrender a statue: "*est (sc. crimen) maiestatis, quod imperii nostri, gloriae, rerum gestarum monumenta evertere atque asportare ausus est*" (Verr. 2.4.41.88). Verres' execution of the captains whose ships were seized by pirates was not murder, because they were peregrines; but it was a breach of his official duty (Cic. Verr. 2.5.50.133), and his crime was *maiestas* (Mommson, *Straf* 79.1; *Siber*, *Analogie* 34).

The *lex maiestatis* was frequently invoked in cases of judicial irregularity. M. Atilius was condemned for *maiestas* because he had allowed money to influence a verdict.¹ This appears to be M. Atilius Bulbus, a senator in 74 B.C., and apparently the same Bulbus was guilty of sedition in *Illyricum* (Broughton 2.488). He could not, however, hope to compete with the senator "*qui cum iudex esset, in eodem iudicio et ab reo pecuniam acciperet quam iudicibus*

¹ Cic. V. A. 1.39. Cf. the case of L. Tubulus (p. 24 above.)

divideret, et ab accusatore ut reum condemnaret"¹ Praetores, it seems, were a particular source of concern: "Licet ire in lupanar: si praecedentibus fascibus praetor deducitur in lupanar, maiestatem laedet ... Licet qua quis velit veste uti: si praetor ius in veste servili vel muliebris dixerit, violabit maiestatem" (Sen. Rhet. Controv. 9.25.17).

The various crimes which Cicero alleges against Verres relate to his activities as a provincial governor, and can therefore be assigned to the *lex Cornelia maiestatis*, either as express provisions or by way of an easy interpretation, without disturbing the proposition (pp. 87-8 above) that this law was directed principally to the external sphere of maiestas. But the cases of judicial dishonesty and eccentricity are not so readily assignable to the postulated limited framework of Sulla's law. It therefore has to be supposed either that the scope of the *lex Cornelia* was wider than has been suggested, or that the cases of judicial corruption were not tried under Sulla's law at all. The first point to be noticed is that the sources for these cases nowhere suggest that they were prosecuted 'lege Cornelia'; indeed, judging by the juristic texts on the *lex maiestatis* (p. 285 below), there is nothing to suggest that this particular category of maiestas was ever submitted to the quaestio maiestatis. It is true that the *lex Cornelia*, like the *lex Appuleia*, used the expression 'maiestatem minueret' (Pollack 196; Gmdel 298), but there is no reason to believe that it varied the approach adopted by the Appuleian law, namely the setting out of a specific category of acts whose commission would be a diminution of maiestas. The category introduced by Sulla was no more exhaustive than that laid down by Saturninus (cf. Pollack 196-8; K hler 507). In view of

¹ Cic. Verr. 1.39. Cicero does not say how the obliging senator carried out his double mandate.

the absence from the sources of any evidence that an act not in some way connected with the activities of proconsuls fell under the *lex Cornelia*,¹ and in view of the probability that Sulla followed the usual Roman practice of not legislating unless it was necessary, it is not unreasonable to assume that his *maiestas* category was confined to the particular problem with which he was concerned, namely, to clip the wings of provincial governors. It is therefore found that in the late Republic the segment of the *crimen maiestatis* which was subtracted from the 'Rechenenschaftsprozesse' and submitted to the *quaestio maiestatis* was probably regulated by three principal statutes: Domestic sedition by the *lex Appuleia*, *proditio* by the *lex Varia*, and proconsular misconduct by the *lex Cornelia*. Each of these would, in its own particular field, have been the subject of considerable interpretation, and in addition there may have been a number of subsidiary laws which invoked the *quaestio maiestatis*, such as the *lex Papia*.² Finally, the unappropriated portion of the *maiestas* segment of the 'Rechenenschaftsprozesse' continued to be prosecuted by the tribunes in the *comitia tributa*, as in the case of C. Rabirius (p.35-7 above).

Little is known of the procedural rules under Sulla's law, but one provision which is attested by Ammianus Marcellinus (19.12.17) causes some difficulty: "*ubi maiestas pulsata defenditur, a quaestionibus vel cruentis nullam Corneliae leges exasere fortunam*". Although torture in *maiestas* cases was common enough in the Dominate (Dig. 48.18.10.1; Paul Sent. 5.29.2), the Sullan origin of the rule is not generally accepted (Mommson, *Straf* 407.4; Kibbler 548).

¹ See pp.266-9 below as to whether Sulla brought defamation under the *lex maiestatis*.

² For another example, the *lex Licinia Iunia*, see p.108 and n.1 below.

But Ammianus needs further consideration. The only 'leges Corneliae' which survived 'eo nomine', and so found their way into Justinian's Corpus Iuris, were the 'lex de sicariis et veneficiis' and the 'lex de falsis' (Dig. 48.8.10). Whatever survived of the rest appears in the Digest under various 'leges Iuliae' (Mommsen, *Straf* 615; Strachan-Davidson, 2.21, 23). *Maiestas* is discussed in Digest (48.4: *ad legem Iuliam maiestatis*), and the jurists whose works are there excerpted flourished in the late second and the third centuries AD. (Jolowicz 400, 402, 403 and n.7), so that their works would have been available to Ammianus. It is therefore curious that Ammianus attests a rule 'lege Cornelia', when his juristic sources had placed their discussions of *maiestas* under the heading "*ad legem Iuliam maiestatis*". It is not correct to say that Ammianus chose the *lex Cornelia* because it was the first comprehensive *maiestas* law (Zumpt 2.1.391), for it is not clear why Ammianus should have been a better legal historian than the jurists.

It is possible that Ammianus reflects a tradition which was not taken up by the classical jurists. Despite appearances, the Sullan proscriptions were not in fact lawless.¹ Sulla procured a law which appointed him dictator and ratified his acts in advance, and although it is generally known as a 'Lex Valeria', there is a suggestion that it was also known as a 'Lex Cornelia': "*ista ipsa leg^o quae de proscriptione est, siue Valeria est siue Cornelia*" (Cic. *Rosc. Amer.* 43.125). There may even have been several 'leges Corneliae' on the subject, which would explain the plural used by Ammianus: "*eam (sc. legem) quam L. Flaccus ... de Sulla tulit, ut omnia quaecumque ille facisset essent*".

¹ Mommsen (*Staat* 2.1.736); cf. Heitland (2.500-1); Rice Holmes (*Republic* 1.58).

rato ... nam Valeria lege Corneliaque legibus eripitur civi, civi datur" (Cic. Leg. Agrar. 3.2.5; cf. Leg. 1.15.42). The 'senatusconsultum ultimum' of 100 B.C. had made use of the word 'maiestas' in order to give a colour of right to the action against Saturninus (pp. 56 - 7 above), and Sulla may have made a similar use of the word in his 'leges de proscriptione'. There may therefore have been a tradition which linked these 'leges Corneliae' to maiestas, quite distinct from the lex Cornelia maiestatis. In Asinius' day 'quaestiones orventes' in fact applied to the crimen maiestatis, and he may therefore have misunderstood the 'leges Corneliae de proscriptione' as being the origin of a rule which he knew as part of the lex maiestatis.

Cicero (Pis. 21.50) assigns the rules confining proconsuls to their provinces both to Sulla's maiestas law and to Caesar's lex Julia repetundarum of 59 B.C. (p. 87 above). This raises the question as to how the same act could be both maiestas and extortion. It should be observed that there was sufficient precedent for prosecuting the same act as different crimes. Examples have been cited of prosecutions for both perduellio and maiestas on the same facts (pp. 29 - 33 above), and notice has been taken of Cicero's threat to charge Verres in quick succession with extortion, peculatus, and maiestas (p. 93 above). Cicero (Client. 41.115) poses a difficult problem: "Itaque et maiestatis absoluti sunt permulti, quibus damnatis de pecuniis repetundis lites maiestatis essent aestimatae". Henderson (77-8) believes in a double trial 'de repetundis'. If the first trial resulted in condemnation a 'litis aestimatio' followed, at which the claimants proved their individual shares of the globular amount which had already been assessed. But this view does not seem to be correct. A 'litis aestimatio' did follow.

condemnation, but it was to determine and allocate the amount due, not merely to allocate it. The condemnation itself did not sound in money for, as in all judgments of a quaestio, the court pronounced only on the guilt or innocence of the accused. The peculiarity of the quaestio de repetundis was that a second stage was necessary, because of the quasi-civil restitution and damages which the *lex contemplata* (Mommsen, *Straf* 447.1, 725-6, 1020; Ritzig 10,17). Henderson argues that if the evidence at the first trial disclosed the commission of an offence other than extortion - for example, *maiestas* - the court might name the second crime at the '*litis aestimatio*' and there might be a second trial which, even if for *maiestas*, would be brought in the quaestio de repetundis. Henderson's reasoning is: "The process de repetundis was capacious of public and capital charges alongside the private claims ... The interpretation of Roman public law as centred round the crime rather than the process is a product of the Reception ... In the older processes the charges of the indictment are heterogeneous: the principle of unity is procedural."

It is accepted that the procedural approach to Roman Criminal Law is the correct one (cf. pp 17-18 above), but not in the sense in which Henderson understands it. An act fell under the crimen *maiestatis* either because it was prosecuted as such by the tribunes in the *comitia tributa*, or because it was submitted to the quaestio *maiestatis* by a *lex maiestatis*. It was not the crimen *maiestatis* when it fell under the quaestio de repetundis, any more than when it was prosecuted as *perduellio* in the *comitia centuriata*. There would have been no point in having separate quaestiones 'de maiestate', 'de peculatu', and 'de ambitu', if the quaestio de repetundis had been available for all purposes. The answer may be that it is not necessary to seek a complex explanation for "*litis aestimatio* essent *aestimatae*".

Cicero (Cluent. 41,116) is really posing this sort of anomaly: "Proconsul X was condemned for extortion. At the 'litis aestimatio' there was evidence that, in pursuit of wealth, he had left his province. This act of maiestas was proved, and influenced the quantum of damages. Subsequently he was charged with maiestas (in the quaestio maiestatis), but acquitted". The answer to this anomaly may be that Sulla's maiestas law and Caesar's extortion law had different objectives, and therefore differed in their scope. A governor who left his province was guilty of maiestas only if his conduct diminished 'maiestas populi Romani'. He could, for example, secure an acquittal by successfully pleading 'maiestatem ruxi'. Under the lex Julia repetundarum the issue was whether he had received money. For example, if he left his province without profit to himself, he could not be condemned 'lege Julia'; but he could be convicted 'lege Cornelia' if he had diminished 'maiestas populi Romani'. It was probably easier to secure a conviction under the Julian law than the Cornelian, for the receipt of money was a simple question of fact, while 'minuere maiestatem' was a complex issue. On the other hand, if money had not passed there was always the lex Cornelia. The distinction between the two laws is precisely illustrated by the trials of A. Gabinius, for whom money secured an acquittal 'lege Cornelia', but a conviction 'lege Julia' (p. 89 above.)

C. CONSPECTUS OF THE CRIMEN MAIESTATIS IN THE REPUBLIC

Substantial support exists for the view that in the Republic the crimen maiestatis could be committed only by magistrates and senators.¹ It must be considered how far

¹ Zumpt (2.1.232-3, 254, 379-8) 388; Siber (Analogie 25,41); Brecht (Maiestas 357-8).

this restrictive application of the *maiestas* laws can be accepted. The *lex Appuleia* was directed against sedition, and it may be thought that there is no reason why only magistrates and senators should have created violent disturbances. Indeed, when Caepio (Jnr) overthrew the debate on Saturninus' corn law, "*cum viris bonis impetum facit*" (Auct. Herenn. 1. 1221). 'Boni' may well have included his clients and members of his 'familia', and possibly idle citizens in search of bread and wine. It is true that it is not possible to point to the prosecution of a 'humilis' under the *lex Appuleia*, but this may be because the sources were concerned only with the great and the powerful. A similar restriction under the *lex Varia* is perhaps even more difficult. M. Livius Drusus, tribune in 91 B.C., found support for his citizenship campaign among Italian leaders (Plut. Cat. Min. 2; Diod. 37.11), who would have included financial interests able to make a substantial monetary contribution to the movement. It is very possibly because of their part that 'ope' was included in the provision: "*si quorum ope consiliove*" (Ascon. 22C). In the case of the *lex Cornelia*, however, it necessarily follows from the view which has been submitted as to its scope, that it was confined to the official and senatorial classes. Even if the *lex Cornelia* was a 'general' law of *maiestas* it is not likely that it embraced other classes, if the analogous position under the *lex repetundarum* is any guide. Only magistrates, senators, and their sons were liable under that law (Mommsen, *Strat* 710-1), and a proposal by Pompey in 55 B.C. to extend its application to prefects, scribes, and other associates was defeated (Cic. *Rab. Post.* 6.13).¹ It would also seem to follow from the origin of the *crimen maiestatis* as a segment of the

¹ At a later date the *lex repetundarum* was extended to 'socii ministrigue' in connection with the extortionate practices of *Craecilius Classicus*, governor of Baetica (Plin. *Epp.* 3.9; 6.29).

'Amtsverbrechen' which were punished by the 'Rechenschaftsprozess' that it was confined to magistrates and senators, although in the maiestas trials 'apud populum' there were exceptions, such as the trials of Claudia and Postumius Pyrgensis (pp. 30-3, above). Perhaps Claudia's case can be regarded as an example of the subsequently attested extension of the crime to members of a magistrate's family. This principle was applied when Claudius Puscus, the son-in-law of Caecilius Classicus, was prosecuted under the lex repetundarum, and charges were also brought against Classicus' wife and daughter (Pliny Epp. 3.9; 6.29). The case of Pyrgensis can be explained on the basis that as a contractor to the State he accepted a quasi-magisterial position.

It is accepted that the crimen maiestatis was not 'defined' in any lex, in the sense that 'maiestatem mimmere', which was the ultimate criterion, was not 'defined'. A category of acts was laid down and it was left to the court, in its discretion, to say whether the commission by the accused of any of those acts had diminished 'maiestas populi Romani'. But the fact that the court had a discretion does not justify criticism of the crimen maiestatis as vague and unascertainable. The concept of maiestas, as the Romans understood it, is a matter for painstaking analysis on the part of any modern scholar who would acquire some sort of appreciation of the notion. It may be that 'maiestas minuta' seems to have been a most unsatisfactory yardstick for the assessment of criminal responsibility. But did the Romans have difficulty with it? They did not have to make a conscious intellectual effort in order to appreciate what their 'maiestas' was, for it was something which permeated their entire thinking about themselves and their position in the world.¹ Nor

¹ The "white man's burden" was current coin in a recent imperial era. Would any 'definition' of 'burden' have conveyed the special political, social, and economic values which the expression implied?

did they find it unduly difficult to know when their maiestas was impaired.¹ But this does not mean that no serious attempt was made to put the concept of maiestas on a proper juridical basis. Categories were set out with some particularity, and an act falling outside a category was not culpable unless it could, in accordance with juridical principles which were developed for the purpose, be interpreted into the lex. It is true that the crimen maiestatis was a political crime, and that the introduction of a new category, at the instance of a faction which happened to command a majority in the Assembly, could furnish an effective weapon against political opponents. The crime of maiestas was peculiarly suited to political purposes, for its connection with the interests of a particular faction could always be concealed by presenting it as demanded by the interests of the State. In the time of Saturninus the dominant faction believed that the public interest called for a programme of economic reform, and introduced a lex maiestatis to prepare the ground for their programme. Citizenship for the Italians was the dominant theme in Varius' time, and the issue duly found its way into a lex maiestatis, introduced at the instance of the faction which opposed the allies. Sulla sought a constitutional safeguard for his Optimist State, and found it in the lex maiestatis. At no time was the dominant faction concerned with matters irrelevant to its immediate purpose. The law of Saturninus protected the tribunes because they were essential to the implementation of his faction's policy; Sulla's law ignored them because they were inimical to his party's interests.

1. The expressions "it isn't cricket" and "it isn't playing the game" connote rather a complex set of social values, but a member of a group which subscribes to those values does not have to ponder deeply in order to conclude that certain conduct does not measure up to the code. But is there any conceivable 'definition' or 'cricket' or 'game' which could convey the full meaning of the expressions to one not acquainted with the way of life which inspired them?

There was one overriding feature common to the Republican *crimen maiestatis* in all its forms, whether under the 'Rechtschaftsprozess', the 'leges maiestatis', or the extensive interpretation of the latter. The only form of 'maiestas' with which the law was concerned was 'maiestas populi Romani', the maiestas of the Roman People, that is, of the Roman Republic. Personalities were relevant only insofar as the holder of an office which was in the gift of the Roman People was deemed to possess maiestas in his representative capacity, and therefore an injury to or by a magistrate immediately diminished 'maiestas populi Romani'. Maiestas did not vest in any individual as an individual, nor did it vest in any group other than the juristic person known as 'populus Romanus'. Sulla was quite unable to entrench his senatorial regime by inventing a 'maiestas senatus' for, whatever the realities of effective control, Rome's superiority was given a juristic formulation only as 'maiestas populi Romani', and the constitutional safeguards furnished by the *crimen maiestatis* were riveted to that concept. This was the meaning of the '*crimen maiestatis populi Romani* *diminutae*' in the Roman Republic, at least until the period of Caesar's rise and ultimate supremacy. It remains to consider whether the crime, or the maiestas which it was intended to protect, underwent any change under Caesar or Augustus.

PART TWO

CAESAR AND THE LEX MAIESTATIS

CHAPTER V

"ADVERSUS AUSPICIA LEGESQUE ET INTERCESSIONES"

The crimen maiestatis loomed large in the recriminations between Caesar and the Optimates during the period from Caesar's first consulship to the outbreak of the Civil War. There were frequent threats of prosecution, principally by the Optimates, but occasionally by Caesar as well.¹ It did not come to an actual trial of Caesar, but only because he was at no time a 'privatus' in the relevant period. There were good grounds for his indictment, and if the Optimates had had their way the most celebrated maiestas trial in Republican history would have resulted. Caesar saw this danger and feared it, and devoted a good deal of his propaganda resources to averting it. Statements in Caesar's Commentaries are said to show a transference of maiestas from the Roman People to Caesar (p. 133 below), but it is suggested that the evidence shapes differently if related to Caesar's urgent desire to avoid a prosecution.

1. It is just possible that Caesar was the first to use the maiestas law in this period. Mommsen (Straf 566-7) postulates, on the authority of Appian (B.C. 2.2.12), that the inclusion in Caesar's first agrarian law of 59 B.C. of the death penalty for refusing to swear to the law was "Subsumierung dieser Unterlassung unter die Perduellion"; he also invokes the 'Rechenschaftsprozess' for the refusal of Metellus Numidicus to swear to Saturninus' agrarian law of 100 B.C. (Staat 2.324 and n.2; cf. p.64 n.1 above). Levy (34 and n.2; cf. Lenglé, Straf 47) describes refusal to swear to Caesar's law as maiestas, but holds that the sanction in fact meant interdiction from fire and water. Siber (Analogie 36.3) rejects Appian in regard to Caesar's law, and holds that the meaning of περὶ τὰς ἀγροτικῶν ἐπιτίμων (Plut.Cat.Min.32.3) is that the penalty was a fine. Siber regards the agrarian laws as ad hoc laws creating a 'delictum sui generis' which was not based on a general criminal concept, and was therefore not related to maiestas. It is not possible to exclude the possibility that the agrarian law, like the lex Papia (pp. 89-91 above), referred breaches to the questio maiestatis, although the inclusion of a capital sanction in Caesar's law would seem to exclude maiestas.

The attack on Caesar was launched immediately after his consulship, in the early part of 58 B.C., when the praetors C. Memmius and L. Domitius sought to bring his 'acta' on review in the Senate, alleging that he had acted "adversus auspicia legesque". Caesar declared his readiness to submit to the Senate's decision, but after three days' altercation with the praetors he left for his province.¹ Suetonius (Caes. 23.1) reports that there was then a "praeiudicium aliquot criminibus" against Caesar's quaestor; thereafter the tribune L. Antistius initiated a prosecution against Caesar himself, but on appeal to the tribunes Caesar "obtinit cum rei publicae causa abesset reus ne fieret". The appeal would have been under the lex Memmia, whereby anyone who was absent on public service could not be tried.² It is probable in Suetonius' context that the "aliquot crimina" against the quaestor were also brought up in the proposed indictment of Caesar. The charges were, broadly, that Caesar had acted "adversus auspicia, legesque et intercessionem" (Suet. Caes. 30.3).

For further information as to the "aliquot crimina" it is necessary to go to the trial of P. Vatinius, tribune during Caesar's consulship, and Caesar's legate in 58 B.C.³ It is said that in the latter year Vatinius returned voluntarily to Rome to stand trial, waiving the protection of the lex Memmia (Cic. Vat. 14.34). At the trial there was a preliminary issue on the appointment of the president of the quaestio. Memmius apparently wanted to appoint a 'quaesitor' by lot, but Vatinius claimed a right of challenge under

1 Suet. Caes. 23.1; Suet. Nero 2.2; Cic. Vat. 6.15; Sest. 40; Schol. Bob. 89-90, 116.

2 Mommsen (Staat 2.1.585.4; Straf 353.2); Greenidge (Procedure 461).

3 Broughton (2.199) queries thislegation. Gelzer (87) accepts it without comment, while Pocock (123) takes Cicero (Vat. 15.35) as evidence for it.

his own 'lex de alternis consiliis reiciendis'.¹ As a tribunal had not yet been constituted (Mommsen, Staat 2.1.586.1), the proceedings can properly be described as a 'præiudicium'.² Memmius having ruled against Vatinius, and having directed that lots be drawn, Vatinius appealed to the tribunes "ne causam diceret", a step described by Cicero as unprecedented.³ The appeal would not have been under the lex Memmia, but may well have been directed against the ruling of Memmius on the preliminary issue, for the tribunes had power to quash proceedings at any stage before the constitution of a court (Greenidge, Procedure 517). The appeal apparently failed, whereupon Clodius and his friends brought the proceedings to a violent conclusion (Cic. Vat. 14.33-4; Schol. Bob. 122).

It is suggested that the charges against Vatinius can be brought under the three heads of "adversus auspicia, legesque et intercessionem" which were, according to Suetonius (Caes. 30.3), alleged against Caesar. Vatinius was summoned under the 'lex Licinia et Iunia'⁴ and there is mention of the 'leges Aelia et Fufia' and the 'lex Cascillia Nidia' (Cic. Vat. 2.5; 7.18; 9.23; Sest. 135; Att. 2.9.1). These charges correspond to "adversus leges", and it may be possible to be more specific. Pocock (191) believes that the charge "lege Licinia et Iunia" was one of maiestas and,

¹ Schol. Bob. 122; Cic. Vat. 11.27. Although 'quaestor' primarily meant the president of the murder court, a 'quaestor' could preside over any quaestio instead of a praetor. Mommsen (Staat 2.201.4; 2.584 and m. 2.4; Straf 206); Greenidge (Procedure 431). Cf. p. 91 n.1 above. For the nature of Vatinius' law see Pocock 111.

² A 'præiudicium' was a proceeding to decide a preliminary issue. Buckland (382, 395); Greenidge (Procedure 460). The scholiast makes the preliminary nature of the proceedings clear: "Vatinius cooperat accusari" (Schol. Bob. 122).

³ Schol. Bob. 122; Cic. Vat. 14.33-4; cf. Pocock 123.
⁴ Cic. Vat. 14.33; Sest. 135; Att. 2.9.1. The scholiast (Schol. Bob. 122) confuses this law, passed in 62 B.C., with the 'lex Licinia de sodaliciis' of 55 B.C. Cf. Mommsen (Staat 2.1.586.1); Pocock 194.

although he does not develop his hypothesis, it is found that there is evidence to support his view. The purpose of the *lex Licinia et Iunia* was "ne cum aerario legem ferri liceret, quoniam leges in aerario condebantur"; the rogator had to lodge a copy of his rogatio in the aerarium, and after this it could not be amended.¹ Falsifying public records was *maiestas* (Dig. 48.4.2), and the suggestion is that it was precisely in this way that Vatinius frustrated the *lex Licinia et Iunia*, and that he did so in connection with the passing of Caesar's first agrarian law in 59 B.C.

The principal attack on Caesar's 'acta' was aimed at his first agrarian law (Schol. Bob. 116), and Vatinius had a great deal to do with that statute.² The circumstances of its introduction were that Caesar, having made no progress in the Senate, took his proposal to the comitia without a *senatus-consultum*.³ At this stage the rogatio would already have been lodged in the aerarium, and not be amended. After a series of 'contiones', which Bibulus and Cato tried to obstruct, the law was passed (Taylor, Chronology 259; Gelzer 66). At this point Appian must be consulted. After reporting that the law was carried (B.C. 2.2.11), he continues (B.C. 2.2.12) as follows: καὶ ἐκ' αὐτοῦ τὸν τε ἔθμον ἔγραψεν ἐν δὲ κορίνθῳ νομίσεν καὶ τὴν βουλὴν ἐκέλευεν ὁρμῆναι. ἐν-ισταμένῳ δὲ πολλῶν καὶ Κάτωνος εἰσέγγεστο μὲν δ' Καίσαρ ὁνόμαον τῷ μὴ ὁμῶσιναι καὶ ὁ ἔθμος ἐπεκέρροτο.

¹ Schol. Bob. 196; cf. Mommsen (Staat 3.1.31 and nn. 4, 5). In 51 B.C. the consul Marcellus was able to say that Pompey's 'lex de iure magistratuum' barred Caesar from standing for the consulship in absentia, because Pompey had only added a proviso for Caesar "lege iam in aere incisa: et in aerarium con-dita" (Suet. Caes. 28.2-3).

² Pocock (161-79), discussing the ambiguous nomenclature of laws introduced by a tribune at the instance of a consul, shows that a *lex* could be named either for the tribune who introduced it, or the consul who instigated it. He argues that Caesar's agrarian law, although known as a 'lex Julia', was in fact proposed by Vatinius.

³ See particularly Taylor (Chronology 259); cf. Gelzer 66.

According to Appian, then, the penalty was introduced after it had become known that some Optimates refused to swear to the law. Whatever the penalty was (p.104, n.1), its introduction overcame the resistance of Cato and his friends (Plut. Cat.Min. 32.5; Dio 38.7.1-2). It cannot be supposed that εἰσνεῖτο ... ἐκείνου means the introduction of a fresh law creating the penalty, for Caesar's first agrarian law was carried on the 20th January, and the senators took the oath at the beginning of February (Taylor, Chronology 267). There would therefore not have been time for a 'trinum nundinum' between the proposing of an amending law when the refusal of some Optimates to swear became known, and its enactment by the beginning of February. Appian's meaning may be that the penalty was added before the vote (Gelzer 57; Taylor, Chronology 259). The other possibility is that it was added after the vote, access having been obtained to the copy of the bill in the aerarium in order to amend it, although Appian's καὶ ὁ δῆμος ἐκείνου is against this. In either event there was tampering with a public record in the aerarium, and therefore something which could have been charged as maiestas. The lex Licinia et Iunia, which certainly had a criminal sanction,¹ was probably one of the laws which, being of general application, cannot have created an ad hoc court, and must therefore have specified a particular quaestio perpetua to which breaches were to be referred (cf. pp. 89-91 above). Given an act of Vatinius which was maiestas, and given that he was brought before a quaestio, it is probable that it was the quaestio maiestatis.²

1 "poena recenti lege Iunia et Licinia" (Cic.Phil. 5.3.9).

2 This hypothesis may explain the scholiast's confusion of the lex Licinia Iunia and the lex Licinia ~~de~~ sodalicis (p.105 n.4). It has been submitted (p.91 above) that 'illicita collegia' were prosecuted in the quaestio maiestatis. The scholiast, knowing this, and also recognising Vatinius' conduct as maiestas, but not addressing himself to the maiestas implications of the lex Licinia et Iunia, may have believed that Cicero (Vat. 14.32) meant the lex Licinia de sodalicis.

The allegations against Vatinius included breaches of the *leges Aelia et Fufia*, and the *lex Caecilia Didia* (p.106). The Aelian and Fufian laws of the second century B.C. dealt with 'obnuntiatio', which Bibulus had used as a political weapon against Caesar in their joint consulship.¹ As these laws preceded the first standing court for maiestas, the threat against Vatinius here would not have been in the quaestio maiestatis. But the crime was disregard of the auspices, which could have been prosecuted as maiestas in the comitia tributa, in the same way as in the case of P. Claudius Pulcher (p.29-32 above). This allegation against Vatinius therefore corresponds to the "adversus auspicia" raised against Caesar.²

Cicero says that Vatinius, when tribune, was guilty of violent disregard of the veto of his colleagues (Vat. 2.5; 7.16). This is clearly a reference to the circumstances of Caesar's first agrarian law, when violence was done to three tribunes who interposed their veto.³ Therefore the allegation of "adversus intercessiones" against Caesar also applies to Vatinius. Furthermore, Cicero (Vat. 2.5) contrasts Vatinius' conduct with that of C. Cornelius, whom Cicero had defended on a charge of maiestas (pp. 81-6 above); the reference to the case of Cornelius suggests a maiestas charge - or the possibility of one - against Vatinius.

Who was the quaestor whom Suetonius (Caes. 23.1) says was charged with "aliquot crimina"? Gelzer (87 and

¹ Mommsen (Staat 1.111 and n.4; 113.1); Pocock 81-2; Taylor (Politics 82,88,134); Gelzer 70.

² The *lex Caecilia Didia* of 98 B.C. restated the requirement of a 'trinum nundinum' between the promulgation of a law and the vote on it (Mommsen, Staat 3.1,377 and n.1). It has been suggested (p. 106) that no amending law can have been proposed, because there was not time for a 'trinum nundinum'. There is, however, the alternative possibility that there was an amending law which disregarded the statutory period.

³ Dio (36.1-3); Plut. Cat. Min. 32.2; Appian B.C. 2.10-4. Cf. Taylor (Chronology 259); Gelzer 46.

n.142) dismisses him as Caesar's ex-quaestor who was prosecuted with an unknown outcome, and indeed very little is known of the quaestors who held office in 59 B.C. Broughton (2.190) lists under that year L. Aemilius (Lepidus) Paullus and one Caecilius, and records M. Favonius as "quaestor before 59". None of these was a likely accused at the instance of Caesar's opponents. Paullus was no friend of Vatinius, and had helped to destroy Latiline and Cethegus (Cic. Vat. 10,25; Schol. Bob. ad loc.). Caecilius the quaestor may be the uncle of Atticus whom Cicero cultivated; but as Atticus would have been 50 in 59 B.C., and as Caecilius was an elderly uncle, the latter would not have been on the bottom rung of the ladder in 59 B.C. (Cic. Att. 2.9.1; 1.1; 2.19.5; 2.20.1; Nepos Att. 5). Favonius was as resolute as Cato in his opposition to Caesar's agrarian law (Dio 38.7.1-2). But two expressions in Suetonius (Caes. 23.1) fit Vatinius very well: "praesudicium" and "aliquot criminibus". "Praesudicia" are not often mentioned in the literary sources, and a magistrate who had "aliquot crimina" to his debit should have better documentation than a casual mention by Suetonius. If the description of Vatinius as a quaestor can be explained, it can probably be accepted that Suetonius (loc.cit.) refers to the preliminary proceedings against Vatinius in the *quaestio maiestatis*.

Vatinius and P. Sestius were quaestors in 63 B.C., and both had their terms extended in 62. But their titles differed. Vatinius became "legatus" in Further Spain to the praetor C. Cosconius, while Sestius served as "quaestor" to the ex-consul C. Antonius in Macedonia.¹ It may be thought

¹ Cic. Vat. 5.11,12; Sest. 13. Cf. Broughton (2.166, 166,176-7); Mommsen (Staat 2.1.531, 563 and n.4); Greenidge (Public life 213). Broughton (2.176) describes Sestius as a "proquaestor" in Macedonia, but Mommsen (Staat 2.1.562) believes that there was no generally accepted appellation for provincial quaestors.

that, in reflection of the close link between the urban quaestorship and the consulship (Mommsen, Staat 2.1.525ff), a quaestor in his second year was a "legatus" if he served an ex-praetor, and a "quaestor" if attached to an ex-consul. But the rule is not uniform. Caesar was quaestor in 69 B.C., and served under the ex-praetor C. Antistius Vetus in Spain, for that and part of the following year (Broughton 2.127, 132, 133, 139). Even if his first year in Spain was his magisterial year, his second year there was prorogationary. But although he served an ex-praetor, the sources uniformly describe him as a quaestor.¹ It was not certain whether Q. Pompeius Eithynicus was attached to the ex-praetor M. Iuncus, in Bithynia in 75 B.C., as a quaestor or a legate. (Broughton 2.100). C. Malleolus, quaestor in Macedonia under the ex-praetor Cn. Cornelius Dolabella, died in office in 80 B.C.; C. Verres, who was already legate to Dolabella, was appointed "legatus pro quaestore" in place of Malleolus (Cic. Verr. 1.4.11; 2.1.15; 2.1.36; cf. Broughton 2.76, 80-1). The offices held by Verres fluctuated greatly. He was quaestor in 85, and proquaestor to the ex-consul Carbo in 83; he remained proquaestor in 82 and 81, and was a legate and "legatus pro quaestore" to Dolabella in 80 (Broughton 2. 61, 64, 70, 633). If Suetonius had had occasion to refer to Verres at any time during this period, he may well have confined himself to the word "quaestor".

In the late Republic the appointment of "legati" required the Senate's approval, and Cicero criticises Vatinius for having become Caesar's legate without a *senatus consultum*.² But Cicero himself discloses the basis of the appointment (Vat. 35): "tua lege, dicis" - that is, the *lex Vatinia de imperio*

¹ Suet. Caes. 5. 7. (nuct.) Bell. Hisp. 42.1; Vell. 2.43. 4.

² Cic. Vat. 15.35-6; cf. Sest. 33. See also Mommsen (Staat 2.1.677ff).

C. Caesaris' (Pocock 124). As the regular procedure 'senatus auctoritate' included sortition (Mommsen, Staat 2.1.67), Vatinius would have been appointed 'sine sorte'. The appointment of Antony to Caesar's staff in 52 B.C. should now be considered. In the summer of 52 he was Caesar's legatus during the siege of Alesia (Caes. B.G. 7.81.6). But at the end of the campaign that year "Caesar M. Antonium quaestorem suis praefecit hibernis" (Hirt. B.G. 8.2.1.) Antony had returned from Gaul to seek election as quaestor, and during his election campaign he had tried to kill Clodius (Cic. Phil. 2.48.49). As Clodius was eventually murdered in January 52 (Cic. Mil. 27), Antony's attempt to kill him would have been in the summer of 53, shortly before the elections in July that year. Therefore his return from Gaul to seek the quaestorship was in the early summer of 53. It follows that this sojourn in Gaul was not the occasion of the legation attested in Bellum Gallicum (7.81.6). Cicero (Phil. 2.50) criticises Antony as follows: "Quaestor es factus; deinde continuo sine senatus consulto, sine sorte, sine lege, ad Caesarem cucurristi". "Quaestor es factus" refers to Antony's assumption of office, which would have been on the 5th December, 53 (Mommsen, Staat 1.606; 2.1.531). The allotment of quaestors' competences would have been made before the 1st January, 52 (Mommsen, Staat 1.606), but as Antony's departure was "continuo" and "sine sorte", he would have rushed off to Caesar in December 53 (Ascon. 41C). But Cicero's "sine lege" cannot be right. Why should Antony, having taken the trouble to canvass for the quaestorship, and having done so with Caesar's blessing (Cic. Phil. 2.49), have thrown away the benefit of his election by not awaiting the sortition which would determine his sphere of competence? He did not wait because it was not necessary. There was probably a clause in the lex Vat'ia de imperio, empowering Caesar to appoint 'quaestores legatosque' to his staff without the Senate's approval, and without allotment.

Antony's title oscillated rather wildly after his arrival in Gaul as quaestor. In the summer of 52 he was a legate, and in the winter of that year a quaestor (p.112). In 51 he was a quaestor (B.G. 8.24.2,38.1), and a legate (B.G. 8.46.4). In 50 he was a quaestor (B.G. 8.50.1). Suetonius would have found that Antony the quaestor and Vatinius the legate had taken office under the same lex, and with the same apparent disregard of protocol. He would have noticed that Antony the quaestor was also Antony the legate. He is not to be condemned for describing Vatinius the legate as a quaestor.¹

The sequence of events in Suetonius (Caes. 23.1) may now be re-examined. After three days' debate in the Senate, the following took place: "(Caesar) in provinciam abiit. Et statim quaestor eius in praefudicium aliquot criminibus arreptus est. Mox et ipse a L. Antistio tr. pl. postulat^o appellato deum collegio obtinuit, cum rei publicae causa abesset, reus ne fieret". Gelzer (87-9) puts forward a different sequence, holding that Caesar preferred not to await a decision in the Senate, but to pass outside the pomerium, and so to take up his proconsular imperium. Before doing so he was summoned by Antistius, and successfully appealed to the tribunes. He then waited outside the city for the outcome of his counter-measures, including Clodius' proposal for the banishment of Cicero. A contio on this proposal was held outside the pomerium, to enable Caesar to attend. And it was only late in March that he left for Gaul. Similarly, Taylor (Politics 137) believes that the attempt to prosecute

¹ Dio also seems to have had trouble with "legates" (53. 14.5), and with Antony, whom he says was Caesar's quaestor in Spain (45.40.3).

Caesar was made when he was about to depart for his province, but that the presence of his soldiers at the gates persuaded the tribunes to intercede.¹

Gelzer and Taylor, then, believe that the attempt to prosecute Caesar was made before his departure, even in the limited sense of leaving the pomerium, and this seems to be the correct order of events. Caesar said at Pharsalus: "Hoc voluerunt; tantis rebus gestis Gaius Caesar condemnatus essem nisi ab exercitu auxilium petissem" (Asinius Pollio ap. Suet. Caes. 30.4). Although Caesar's proconsulship furnished his opponents with a great deal more material for a maiestas prosecution (ch. VI below), the context of Sueticius (Caes. 30.3-4) suggests that Caesar was referring, at least among other things, to the attempt to prosecute him for maiestas after his first consulship. Suetonius (loc.cit) cites Caesar's words at Pharsalus in support of the theory that the Civil War was precipitated by Caesar's fear "ne eorum quas primo consulatu adversus auspicio, legesque et intercessionibus gessisset rationem reddere cogereetur". But if the attempt to prosecute Caesar was made before he left for his province, the 'praeludicium' against Vatinius must have taken place before he took up his legation. How is this to be reconciled with Cicero's assertion that Vatinius returned from his legation to stand trial: "ex legatione redieris" (Vat. 14.34)? The answer seems to be that the protection of the lex Mamilia extended to one who was about to depart 'rei publicae causa'.² This explains why Cicero (Vat. 14.33) begins his attack on Vatinius' conduct at his trial (in the course of which he

1. In regard to the date of Caesar's departure for Gaul, the evidence is that the Helvetii had fixed the date for their assembly at the Rhone: "Is dies erat a.d. v Kal. April., L. Pisone A. Gabinio consulibus. Caesari cum id nuntiatum esset ... maturat ab urbe proficisci" (B.G. 1. 64.7.1).

2. Mommsen (Straf 353.2), citing (ad Suetonius Caes. 23) Paul (Dig. 3.3.54pr): "neque qui rei publicae causa afuturus est ... invitatus indicium pati [non] potest".

mentions 'ex legatione redieris') with the question: "Quaero etiam illud ex te, quod privatus admisisti?" Vatinius, although a 'privatus', and merely 'rei publicae causa afuturus', was protected by the lex Memmia: 'redire ex legatione' simply meant to waive that protection.¹

In the light of the riotous termination of Vatinius' trial by Clodius and his friends, why did Vatinius "return from his legation" in the first place? The answer may be that, relying on his 'lex de alternis consiliis reiiciendis', he foresaw two possibilities. He might secure a quaesitor to his liking, and an acquittal would take the sting out of the attack on Caesar. Or, which is more likely, the pressing of challenges under his law would delay or even frustrate the constitution of a court. Time was of the essence for Caesar. There were matters to be completed before he left (cf. p. 113 above), but the Optimate attack was gathering momentum. The first step was probably Memmius' summons to Vatinius to appear within 30 days (Vat. 14.33). Caesar felt that they were likely to leave him alone until they had settled with his legate, and it was decided that Vatinius would appear, and would adopt delaying tactics. When, therefore, the praetors launched their attack in the Senate, Caesar could confidently agree to submit to its jurisdiction, for his real fear was a prosecution for maiestas, and Vatinius was holding the fort in that quarter. But something went wrong. Memmius ruled against Vatinius, and Clodius could find no legal basis on which to intercede (Vat. 14.33). Violence resolved that difficulty, but the Optimates were not shaken off, and put up the tribune Antistius to prosecute Caesar. Mommsen (Staat 1.275. 3) believes that it was proposed to try Caesar in the quaestio, but the better view is that it was intended to bring him

¹ Caesar's legate Messius seems to have done something similar in 54 B.C. (Cic. Att. 4.15.9).

before the comitia tributa (cf. Taylor, Politics 137; Gelzer 87). The quaestio had not proved effective against Vatinius, but the Optimates could anticipate a more favourable result in the comitia, for there was a marked public reaction against the dynasts, and Optimate influence in the Assembly was strong (Taylor, Politics 136-7). Caesar managed to block the proceedings by invoking the lex Memmia, but his readiness to abide the Senate's decision could not be safely maintained. It is known that Cato swore to bring him to book as soon as his legions were disbanded (Suet. Caes. 30.3), and Taylor (Politics 137) is probably correct in her assertion that Cato first made his intention known when Caesar evaded prosecution at the instance of Antistius - although he often repeated it subsequently (Suet. loc.cit).¹ In these circumstances prudence dictated the hurried breaking off of the altercation with the praetors, and the exit from the wall.

¹ Gelzer 90 illustrates the neat way in which Caesar turned Cato's fulminations of maiestas against him. In 58 B.C. Clodius had Cato appointed 'extra ordinem' as quaestor pro praetore to administer the annexation of Cyprus under Clodius' law of that year. Cato, the enemy of all extraordinary authority, had the unenviable choice of accepting, to the prejudice of his principles, or of refusing, at the risk of a charge of maiestas. Gelzer's suggestion is not fanciful. If it was maiestas for Verres to omit something which his office required him to do (pp. 84-5 above), it was not difficult to extend the rule to a refusal to accept office.

CHAPTER VI

"SUAM INNOCENTIAM PERPETUA VITA ESSE PERSPECTAM"

Caesar left for Gaul with cries of "maiestatem minui-sti" ringing in his ears - and promptly collided with the *lex maiestatis* at the very outset of his command. Consequent upon his refusal of passage through the province to the Helvetii, the migrants elected to traverse Aeduan and Sequanian territory outside the province. Caesar left his province in order to forestall them (S.G. 1.6-11), and did so 'in iussu populi aut senatus'. This breach of Sulla's *maiestas* law called for an explanation and, as Rambeau (112) puts it: "Dès le début, le Bellum Gallicum plaide".¹ Caesar's main defence was that Santonian territory, the objective of the Helvetii, was uncomfortably close to Tolosa in the province: "Caesari remittitur Helvetiis esse in animo per agrum Sequanorum et Aeduarum iter in Santonum fines facere, qui non longe a Tolosatium finibus absunt, quae civitas est in provincia. Id si fieret, intellegebat magno cum periculo provinciae futurum ut homines bellicosos, populi Romani inimicos, locis patentibus maximeque frumentariis finitimos haberet" (S.G. 1.10.1-2).

Gelzer (93 and n.4; 94 and nn.7,8; cf. 155-6) holds that the principle of "gefährlichen Nachbarn" gave Caesar a

1 Cf. Taylor (Politics 157-8): "The whole work ... is an apology for the Gallic proconsulship ... It is an answer to the charges that his enemies and notably Cato had made against Caesar". Gelzer 94 is to a similar effect: "Caesar wusste, wie seine Gegner in Rom jeden seiner Schritte mit argwöhnischen Augen beobachteten und gerade in solchen Eigenmächtigkeiten das willkommenste Anlagematerial finden würden. Als er im Jahr 51 seine Kriegsberichte veröffentlichte, hat er darum mit besonderer Sorgfalt herausgearbeitet, wie dieser Helvetierkrieg, aus dem alle andern zwangsläufig hervorgingen, mit den bewährten Grundsätzen der römischen Politik durchaus im Einklang stand".

complete defence to the proposed charge of *maiestas*, but the passages on which Gelzer relies¹ would not have commended themselves to the *quaestio maiestatis*. Polybius (1.10,11) illustrates the Roman dilemma when the Mamertini appealed for aid. A favourable response would be inconsistent with Rome's attitude to her own citizens who had betrayed Rhegium, but Punic encroachment raised the fear μή ἡ πόλις παρὰ τὴν ἐξουσίαν τοῦ λαοῦ γένοιτο ἀντιπαρὸν τῷ κράτει. The Senate having refused to sanction an expedition, the People entrusted the command in aid of the Mamertini to the consul Appius Claudius. This was not a case of a proconsul leaving his province. But even if it had been it would not have been *maiestas*, for it was '*iussu populi*'. In Livy (42,52,15) the accusation is levelled at the Roman State, not at a proconsul, of attempting to enslave Macedonia "ne rex vicinus imperio sit Romano". St. Augustine (Civ. Dei 4.15) confines himself to the moral issue facing a state, not a proconsul, which has an inconvenient neighbour.

If Caesar had acted '*iussu populi aut senatus*' the *lex maiestatis* would not have been in issue. The principle of "dangerous neighbour", which was invoked to justify Roman aggression, was presumably one on which Caesar intended to rely in support of a plea of '*maiestatem auxi*', if it ever came to a prosecution. Although the trial of Norbanus, at which this defence was developed, was held '*lege Appuleia*', while Caesar would have been charged '*lege Cornelia*', there is nothing against the view that a similar defence was open under Sulla's law, which also used the expression '*maiestatem minuire*'. It may well be that the trial of Gabinius (pp. 88-9 above), which was '*lege Cornelia*', was a test case to prepare the ground for Caesar, in case it ever became possible to prosecute him. As it was common cause that Gabinius

¹ Polybius 1.10,11; Livy 42.52,15; St. Augustine Civ. Dei. 4.15.

had left his province without authority, it may be assumed that the basis of his acquittal (apart from money) was a successful plea of 'maiestatem auxi'.

Caesar's principal difficulty was to explain why he had not sought authority to leave his province. His attempt to meet this difficulty in *Bellum Gallicum* (1.10) deserves to be added to Rambaud's many striking illustrations of Caesar's "déformation historique". Standing alone, the position as depicted in this passage would have supplied some sort of answer to a maiestas charge. Caesar presents the sequence of events swiftly and persuasively: He learns of the intention of the Helvetii to pass through Sequanian and Aeduan territory; he appreciates the danger to Tolosa, hurries to Cisalpine Gaul, gathers additional forces there,¹ fights his way over the Alps - and takes his army across the Rhone and out of the province. The calculated impression was that the matter was so urgent that there was simply not enough time to refer to Rome for authority, and the Court might well have hesitated to convict in such a case.

The passage is, however, misleading. Before he left for Gaul Caesar knew that the Helvetii preferred the easier route through the province to the more difficult one through Sequanian territory (1.6.1f; 1.7.1). He decided that it would be dangerous to let them through the province (1.6.3). He therefore realised that they would be forced to take the

1 Gelzer (33-4) and Rambaud (112) believe that this levy was unconstitutional. If so, it would have formed the basis of another charge of maiestas (cf. Mommsen, *Straf* 558). But Suetonius (Caes. 24.2) seems to imply that it was only after Luca (56 B.C.) that Caesar raised legions "privato sumptu" in addition to those "quas a re publica accepisset". Perhaps Vatinius' law authorised Caesar to raise troops at the public cost in Cisalpine Gaul.

extra-provincial route, and that he would find it necessary to oppose them.¹ On his arrival in Gaul he immediately ordered satters to that end. He negotiated with the Helvetii, intending to deny them passage, but needing time to complete his preparations (1.7.3ff); these included the calling up of the additional forces (1.7.5) which he later ingeniously represents (1.10.3) as being collected only after the news of the Helvetian decision to take the extra-provincial route. Having adjourned the negotiations (1.7.5), Caesar carried out extensive works and dispositions (1.8.1f), and then communicated his refusal to the Helvetian delegates. The Helvetii, after an unsuccessful attempt to force the Rhone crossing (1.8.4), negotiated with the Sequani; Caesar's account of the negotiations is not inspired conjecture, but seems to be based on accurate information. In all this, however, Caesar does not mention the danger to Tolosa nor that he intends leaving his province in order to avert it. These matters are introduced for the first time when he receives the "surprising" report that the Helvetii have chosen the extra-provincial route (1.10). The fallacy in Caesar's presentation becomes patent if it is realized that in fact the danger to Tolosa was quite independent of the route taken by the Helvetii. The danger arose from the fact that Santonian territory was the ultimate objective of the migration (1.10.1), an objective which would have been reached whichever road was followed. If Caesar truly believed in a danger to Tolosa,² the danger and the steps to be taken to meet it must have been continuously present to his mind from the time when he received his first reports while still delaying outside the pomerium at Rome. Yet he made no attempt at any

1 When the Helvetii requested permission to go through the province they cannot have said "propterea quod aliud iter habere nullo" (1.7.3), for on Caesar's own showing he already knew of the alternative route (1.6.1).

2 Mich Zambaud (114) denies, holding that it was only by a "déformation géographique" that Caesar was able to present the distance between the Santones and Tolosates as negligible.

stage to obtain permission to leave his province.

Caesar, well knowing the weakness of the "dangerous neighbours" defence, tried to bolster it up. The disastrous defeat of the consul L. Cassius by the Helvetian Tigurini in 107 B.C. is mentioned four times in the account of the events leading to the outbreak of the Helvetian war. At the first interview with the Helvetian delegates Caesar's decision to refuse them passage was prompted primarily by his recollection of the disaster (L.7.4). It was perhaps divine justice that the Tigurini were the first Helvetian canton to be defeated by Caesar (L.12.3f). The Helvetii warned Caesar that a continuation of the war might bring a repetition of the ancient disaster (L.13.2ff). Caesar replied that the recent "iniuriae" made it impossible to overlook the "vetus contumelia" (L.14.3). The defeat of Cassius had strong allusions to maiestas, for not only was there the general involvement of 'maiestas populi Romani' in the external field, but the crimen maiestas was directly concerned, for the legate C. Popilius Laenas had been prosecuted as a result of the disaster (p.43 above). Furthermore, it so happened that Cassius had had some success against the Tigurini before the disaster, in the region of Tolosa (Oros. 5.15.23-4). The linking of Tolosa and disaster had other evocations, for men would not have forgotten the curse of the Tolosan gold and the calamity of Arausio (pp. 44,47-8 above.)

Caesar again exposed himself to a charge of maiestas when he left his province in the campaign against Ariovistus. His defence was that when the Germans had occupied the whole of Gaul they would not refrain "quin ... ut ante Cimabri Teutoni-que fecissent, in provinciam exirent atque inde in Italiam contenderent, praesertim cum Sequanos a provincia nostra Rhodanus divideret" (B.G. 1.33f). The reference to the

Cimbrian and Teutonic threat which had been repelled by Caesar's kinsmen, Marius, (B.G. 1.40.5) strongly suggested "maiestatem auxi", for that threat had nearly meant the end of 'maiestas populi Romani'.

Caesar also implied that as Marius had admittedly acted lawfully, his own conduct should not be called in question. There was probably a further implication of maiestas in the fact that Ariovistus had been received into the 'amicitia' of the Roman People (1.35.2, 40.2, 42.4, 44.5). Sherwin-White (Citizenship 150.4, 159) suggests that the 'maiestas' treaty was widely used in Gaul; that there was a treaty of this type with Ariovistus seems to follow from the 'beneficia' and 'praesidium' which he had, or was entitled to expect, from Rome (1.42.3, 43.4-5, 44.5). The treaty was contracted in Caesar's consulship and, it is strongly implied, through his good offices (1.35.2, 40.2, 42.3). There was also a 'maiestas' treaty between Rome and the Aedui, entered into in 61 B.C. (1.33.2, 35.4, 43.6-8). Mutual aid against aggression was a feature of a 'maiestas' treaty (Tribler 47), and Ariovistus pinpointed the mutual failure to observe this provision of the Aeduan treaty when he taunted Caesar with the fact that the Aedui had not assisted Rome against the Allobroges, nor Rome the Aedui against the Sequani and Ariovistus (1.44.9).

Caesar's case therefore was, in effect, that he had compelled Ariovistus 'maiestatem comiter conservare', and had given the Aedui the benefits to which their 'maiestas' treaty with Rome entitled them. But Ariovistus, who prided himself on his knowledge of affairs (1.44.9), aimed a shrewd blow when he said (inaccurately): "Numquam ante hoc tempus exercitum populi Romani Galliae provinciae finibus egressum" (1.44.7). He was probably prompted to this by the Optimates circles in Rome who had been negotiating with him with a view to securing Caesar's death (1.44.12; cf. Schmittlein 6). The same

source may have inspired the panic which, according to Caesar, seized his army at the prospect of fighting the Germans (I. 39ff). Dio (38.35.2, 37.1, 41.1) says that the soldiers declared that they wanted no part of a war which was neither justified nor authorised by Senate or People, and was merely designed to aggrandize Caesar. Caesar himself reveals the true nature of the "panic", for he found it necessary to point out to his troops that in previous cases where armies had disobeyed their commanders, "aut male re gesta fortunam defuisse aut aliquo facinore comperto avaritiam esse convictam: suam innocentiam perpetua vita ... esse perspectam" (I.40.12). This plea is very carefully framed. "Male re gesta" was a typical form of maiestas under the 'Reichenschaftsprozesse' in respect of unsuccessful commanders (pp. 23-4, 42-3 above). Caesar makes two suggestions. Firstly, he implies that fortune has not deserted him, and that therefore there can be no question of "male re gesta". Secondly, he suggests that it would have amounted to "aliquid facinus" only if "avaritia" were proved. This is a clear reference to Caesar's own lex Julia repetundarum, which dealt with the same category of unauthorised departure from a province as the lex Cornelia maiestatis (pp. 97-9 above). In this way Caesar manages to avoid dealing with the legal position which arose as a result of his departure from his province irrespective of "avaritia", that is, a departure which was penalised by the lex Cornelia. Caesar probably knew that "avaritia" could not be alleged against him, and tried to show that he had therefore been guilty of no crime. The fact that Caesar found it necessary to put the matter in this form suggests that Optimate agents had contrived to whip up a good deal of feeling against his unauthorised acts. They could not have done this unless there were a solid substratum of truth to the allegations which they put about against Caesar. His own soldiers, for example, would not have been impressed

by mere hearsay and insinuation.¹

Sufficient precedents having been established, further extra-provincial wars did not demand much apology. The entry into Roman territory (B.G. 2.5.4) was justified by the bare report that the Belgae were conspiring against the Roman People (2.1.1), and the reminder that they had been strong enough to repel the Teutons and Cimbrians (2.4.2). The sale of 53,000 Aduatuci into slavery (2.33.7) is reminiscent of the crime of Ser. Sulpicius Galba (p. 24 above), for in the case of the Aduatuci as well there was ill-treatment after an unconditional surrender (2.31.2, 32.3-4). Rambaud (117-8), while not believing that Caesar dishonestly alleged treachery on the part of the Aduatuci, points to his patent desire to win his readers' approval, particularly his prejudicial mention of the descent of the Aduatuci from the Cimbrians and Teutons (2.29.4).

Caesar's massacre of the Usipetes and Tencteri in 55 B.C. set a new high-water mark for this form of maiestas. The strong attack of Rambaud (118-22; cf. Taylor, *Politics* 142) finds its surest confirmation in the attitude of Caesar's friends: Rice Holmes (Gaul 194) admits that Caesar's conduct urgently demands an explanation, while Gelzer (116-7) uncomfortably limits himself to a bald précis of Caesar's own narrative, but admits (119 n.119) that Caesar exaggerated the perfidy of the Germans in order to meet the accusations which were being levelled at him when *Bellum Gallicum* was published in 51 B.C. Rambaud (117-22) shows that Caesar decided at the outset to make war on the two migrant tribes (B.G. 1.6.1,5; 1.7.1), and had plausible reasons for his decision (4.2.2-5;

1. On the whole question of Caesar's justification of his campaign against Ariovistus see particularly Schmittlein (6-9, 17, 23).

4.4,5; 4.6,2-4). It certainly seems that some drastic special pleading was needed for the annihilation of some 430,000 people,¹ particularly in view of the desperate efforts which the enemy had made to come to terms. Two German embassies which tried to negotiate with Caesar (4. 7,2-9,2; 4.11,1-5) did not get a fair hearing, for Caesar "knew" that they were merely delaying in order to bring up their cavalry (4.9,3, 11,4). Rambaud (118-9) well analyses the sleight of hand which followed. Although Caesar refused the second embassy a "tridui spatium", (4.1,3-5) when 800 German horse routed some 5,000 of Caesar's cavalry the latter were off their guard because the Germans had requested a truce.² The "proven" perfidy of the Germans enabled Caesar to justify the arrest of the third embassy on the ground that it was simply a further attempt at treachery (4.13,4-6). There followed the sudden descent on the German camp and the massacre.³ Caesar clearly violated the 'ius legationis' and was liable to prosecution, as Saturninus had been in 101 B.C. when he ill-treated the envoys of Mithridates.⁴ The indictment would probably have alleged maiestas in two respects - the breach of the 'ius legationis' and the massacre, for it was maiestas so to act "ut ex amicis hostes populi Romani fiant" (Dig.48,4,4).

The crossing of the Rhine and the expedition to Britain brought the usual pleas in mitigation (B.G. 4. 16,17,1,20), but Caesar's Commentaries carefully omit all reference to the

1 The figure is Caesar's own - B.G. 4.15,1-3; cf. Appian *Celtica* 18; Plutarch *Caes.* 22,3. Collins (Review of Rambaud 531-2) criticises Rambaud (283-93) for suggesting that Caesar's 'clementia' was a mere device to win popularity. But Collins walks curiously around the corpses of the Usipetes and Tencteri.

2 B.G. 4.12,1. Appian *Celt.* 18 and Plutarch *Caes.* 22,2 follow Caesar, but Dio (39,47,3) speaks only of a small Roman detachment.

3 B.G. 4.14,15. Plutarch cynically remarks (*Caes.* 22,2) that Caesar acted thus *τὴν κατὰ νόμον ἐκείνων καὶ παρανομῶν νόμων κριτὴν ἀνέθεσαν ἑαυτοῖς*.

4 Dio, p.631. Cf. Mommsen (*Staat* 2,1,112,3); Rambaud 118; Broughton 2,219.

unfavourable reaction provoked by the campaigns of 55 B.C.¹ The precise chronology of the events making up the reaction is not certain. Suetonius (Caes. 24.3) says: "Nec deinde ulla belli occasio, ne iniusti quidem ac periculosi abstinuit, tam foederatis quam infestis ac feris gentibus ultro lacessitis, adeo ut senatus quondam legatos ad explorandum statum Galliarum mittendos decreverit ac nonnulli dedendum eum hostibus censuerint". Suetonius goes on to mention the frequency with which thanksgivings were voted after Caesar's campaigns. It is known that after the campaigns of 55 the Senate voted a 20 days' supplicatio (B.G. 4.38.5; Dio 39.3.2; Plut. Caes. 22.3, Cat.Min. 51.1). It also seems clear that the proposed noxal surrender of Caesar which Suetonius attests is that which was proposed by Cato (App.Celt.18; Plut. Caes. 22.3, Cat.Min.51.1). Caesar's reaction to Cato's proposal was an abusive letter to the Senate, which illustrates his "way of losing his good sense when he dealt with Cato" (Taylor, Politics 142). Cato calmly disposed of Caesar's abuse, and proceeded to analyse his motives, warning that the danger was not the Germans and Celts, but Caesar himself (Plut. Cat.Min. 51.2-4). The problem is to determine at which debate Cato moved his proposal for a noxal surrender. Plutarch (Caes. 22.3, Cat.Min. 51.1) says that it was moved as an amendment to the proposed thanksgiving, which gives no difficulty. But Suetonius implies that the appointment of a senatorial commission was approved in the same debate as that at which Cato's proposal for a 'noxae deditio' was made. If the accounts of Plutarch and Suetonius were combined, it would mean that in the same debate there were proposals for a noxal surrender, a supplicatio, and a senatorial commission, and that the latter two were carried. But it is scarcely

¹ Dio (39.53.1) was not impressed with the British expedition, which brought nothing to Caesar or Rome πλὴν τοῦ ἀσπαρευμένου ἐκ αὐτοῦ βδέλου.

possible that the Senate passed a resolution which partly commended Caesar, and partly condemned him.

If the thanksgiving debate was not the occasion when the commission was decreed, is it necessary to assign the latter to late 55 B.C. at all? At first sight Plutarch (Cat. Min. 51.2-4) seems to imply that the commission was decreed during the debate on Caesar's letter, and therefore almost contemporaneously with the debate on a supplicatio and on Cato's amendment; Cato found considerable support, and Caesar's friends regretted that by reading the letter they had furnished Cato with *καίρων ... λόγων δίκαιον καὶ κατηγορίαν ἀληθῆν*. But in conclusion Plutarch observes that the Senate took no action, except to note the advisability of appointing a successor to Caesar. Rambaud (132-3) rejects a date as early as 57 or 56 B.C. for the senatorial commission, arguing that Cicero would have mentioned criticisms of Caesar in his 'de provinciis consularibus' if there had been talk of a commission at the time, and suggests 52 or 51, on the ground that the Senate intervened only "lorsque la conquête sembla perdue". But Cicero's silence need be no more than skilled advocacy; where details were embarrassing it was more convenient to make out only a general case. The real question seems to be: What are the implications of Suetonius' "legatos ... mittendos" (Caes. 24.3)? Suetonius' statement should be considered in the light of the assertion of Dio (39.25.1) that the legates decreed to Caesar by the Senate after Luca constituted a senatorial commission to reorganise the conquered province. Gelzer (112.84) believes that "imperatorii decem legatos decrevit" (Cic. Balb. 61) may support Dio, but concludes that the decree attested by Dio was one which validated the provisions of the lex Vatinia which authorised Caesar to appoint legates. It is possible, however, that Suetonius (loc.cit.) in fact

corroborates Dio. His "legatos ad explorandum statum Galliarum mittendos" may well mean a commission sent by the Senate after Luca, in order to have a report available on the complaints against Caesar, before considering the proposal that Caesar be authorised to pay his legions with State funds (Cf. Cic. Fam. 1.7.10; Prov. Con. 28; Balb. 61). There were precedents for senatorial intervention against pro-consuls who were guilty of *maiestas*. In 310 B.C. the Senate sent two tribunes to warn Q. Fabius not to leave his province, and in 204 B.C. a delegation interviewed Scipio Africanus "quod de provincia decessisset iniussu senatus" (Livy 9.36.14; 29.19.6). The suggested reconciliation of Dio and Suetonius seems to follow from the order of events in Suetonius: the conference of Luca (Caes. 24.1), the raising of legions at Caesar's expense (24.2), and the senatorial commission (24.3) which investigated the complaints against Caesar. As the commission recommended the grant of a 'stipendium' to Caesar, it is to be assumed that he managed to persuade it that he had left his province for good cause. But the massacre of the Usipetes and Tencteri gave Cato a fresh opening, and the whole issue was again canvassed in the debates of 55 B.C. on a supplicatio and on Caesar's letter attacking Cato.

The legislative struggle during the latter years of Caesar's Gallic command turned largely on whether he would have to face his accusers. The crucial question was whether the Optimates would get hold of Caesar before Caesar got hold of his second consulship.¹ The lex Pompeia Licinia of 55 B.C. extended Caesar's command, and the Ten Tribunes' Law of 52 authorised him to stand as a candidate for the consulship

1 "Caesar's great concern was to make sure that he could move from his proconsulship directly into his consulship, so that he would not be accused in the courts" (Taylor, *Politics* 150). Cf. Syme 48; Gelzer 138, 154-5.

'in absentia'.¹ Whether Caesar intended to become consul in 49 B.C. (Taylor, Politics 151) or 48 (Gelzer 137-8, 154, 160, 328) is not presently material, for it is generally agreed that the practical result of the legislation in his favour would have been immediate continuity between his proconsulship and his consulship, and that therefore there would have been no interval during which he could have been prosecuted (Gelzer 137; Taylor, Politics 150-1; Cuff 464, 468). Caesar's safeguard was prejudiced by two laws introduced by Pompey in 52 B.C., the 'lex de iure magistratum', which reversed the effect of the Ten Tribunes' Law,² and the law authorising the allocation of provinces to former consuls and praetors who had not previously received an allocation (Dio 40.56.1).

It was in these circumstances of uncertainty as to his availability for prosecution that Caesar published *Bellum Gallicum* in 51 B.C.³ Apart from the legislative manoeuvres, recent events would not have encouraged Caesar to believe that old wrongs had been forgotten. In 52 B.C., after the conviction of Milo, the Optimates "Herrschaft in den Gerichtshöfen" was able to secure the condemnation of a number of Clodians (Gelzer 139; cf. Taylor, Politics 150, 231.34). Cato was

1 Suet. Caes. 24.1; 26.1; Vell. 2.46.2; Plut. Crass. 15.7; Pomp. 52.4; Caes. 21.6; Appian B.C. 2.17-8; Dio 40.51.2; Caes. B.C. 1.9.2; 1.32.3; Cic. Att. 8.3.3. For an intelligent approach to the much-debated 'Rechtsfrage' see Cuff (passim), whose theory of an ambiguity in the enabling law, which both sides exploited, offers a reasonable solution to the problem.

2 Suet. Caes. 28.2-3; Dio 40.56.1-3. The confidence expressed by Gelzer (139, 218) and Cuff. (463, 57) in Pompey's honesty of purpose is misplaced. This piece of political chicanery (cf. Syme 40) was aggravated by the comedy of the purported amendment after the adoption of the law (p. 107. n. 1 above), for Pompey cannot have been ignorant of the *lex Licinia et Iunia*. Perhaps he felt that in the case of the agrarian law of 59 B.C. (pp. 107-8 above) Caesar and Vatinius had created a precedent for his own breach of the *maiestas* law by tampering with a lex which had already been lodged in the *aerarium*.

3 See Rambaud (9-12 and passim) on the date. Cf. Gelzer 94 and Taylor (Politics 157).

still threatening to prosecute Caesar as soon as his army was disbanded, and it was being openly said that if he returned as a 'privatus' he would, like Milo, be tried by a quaestio "circumpositis armatis" (Suet. Caes. 30.3). Taylor (Politics 156, 234.57-8) believes, on the basis of Sallust,¹ that the threat to Caesar was trial under Pompey's lex de ambitu. Her argument is that in Epistula ad Caesarem (2.4.2) Sallust refers to trials under the 'leges Pompeiae' of 52 B.C., and then immediately (2.4.3-4) turns to the proceedings contemplated against Caesar. The argument is not persuasive. If the trials of 52 B.C. are to furnish the criterion, it should be noticed that they were 'de vi' rather than 'de ambitu', and were brought under both the Pompeian and the Plautian laws 'de vi' (Ascon. 54-5C). And Sallust himself (2.4.3) gives a clear indication that it was maiestas rather than vis which was in issue in Caesar's case: "Quem optatus habent ex tua calamitate periculum libertatis facere, quam per te populi Romani imperium maximum ex magno fieri". The Optimates tried to prosecute Caesar for maiestas early in 58. They continued trying to bring him to book in the years which followed, and according to Suetonius (Caes. 30.3-4) the basis of their attack remained Caesar's actions during his first consulship. Caesar's breaches of the lex maiestatis were on an unprecedented scale during his proconsulship, and his opponents exhausted their ingenuity in their attempts to call him to account. It is inconceivable that in 51 B.C. all this petered out in a feeble threat to prosecute him for the relatively minor crime of ambitus. Finally, where is the evidence that Caesar breached the lex de ambitu at all, as against the overwhelming mass of his violations of

1 Ep. ad Cres. 2.4.2-4. Taylor (loc.cit.) accepts this document as genuine, and dates it to 51 B.C. Gelzer (106 and n.357) accepts the letter as Sallustian, but dates it to 50 B.C. Syme (52.3, 248, 460) vacillates between doubt as to its authenticity and admiration of its contents. Laistner (169.4) rejects both the Sallustian 'Suscoriae'.

the *lex maiestatis*?

Geizer (94; cf. 115) believes that in *Bellum Gallicum* Caesar effectively disposed of the proposed charges against him by his masterly exposition of his and his army's achievements. Caesar himself did not share Geizer's optimism, for he said at Pharsalus that despite his achievements he would have been condemned if he had not sought the aid of his army.¹ Suetonius (Caes. 30), discussing various theories as to the reasons for the Civil War, goes so far as to suggest that Caesar was driven to war by his dread of having to account for the irregularities of his first consulship.

1 Suet. Caes. 30.4. Lucan *Pharsalia* 7.304-5 puts even grimmer words into Caesar's mouth before the battle: "*Caesareas spectate cruces, spectate catenas, et caput hoc positum rostris, effusaeque membra*".

CHAPTER VII

"EGO ET POPULUS ROMANUS"

It is suggested that Caesar's fear of a prosecution for maiestas was so great that he could not bring himself to rely on a mere presentation of the facts in Bellum Gallicum, even if they were put in the light best calculated to support one or other of the legal defences open to him. What he in fact did in Bellum Gallicum was to introduce a technique which, as amplified in Bellum Civile, was intended to furnish the complete and final answer to any possible charge of maiestas which might be preferred against him. Caesar's approach was very subtle, but also very simple. A plea of 'maiestatem auxi' might or might not succeed, as long as there was a clear distinction between the maiestas alleged to have been augmented and the person claiming credit for the augmentation. But absolutism would be placed beyond doubt if men could be persuaded that the distinction was no longer valid, that Caesar somehow expressed in his person the maiestas of the Roman People.

The vehicle selected for the conveyance of this impression was 'dignitas Caesaris'. The distinction between 'dignitas' and 'maiestas' has already been mentioned (p.10 above), and it should be noticed that there was a fairly close parallel between the two concepts, for 'dignitas' expressed within the internal political sphere a concept not unlike that which maiestas expressed externally. The two concepts intersected in expressions such as 'dignitas rei publicae', which was merely a synonym for 'maiestas populi Romani' (cf. Dig. 49. 15. 7. 1). Caesar set out to suggest another point of intersection. By constant reiteration of his dignitas, in juxtaposition to references, direct or

indirect, to 'maiestas populi Romani', he created the illusion that there was a special relationship between the latter concept and 'dignitas Caesaris'. His method not only induced defeatism in his opponents and elation among his friends, but continues to mislead scholars 2,000 years later.¹ Drexler (209-10) uses language which clearly postulates a technical maiestas shift from the Roman People to Caesar:

Das höchste Geschenk, das der Gefolgshauptführer seinem Gefolgsmann gibt ... ist dies, dass er ihn dienend an seiner dignitas und maiestas teilhaben lässt, dass er die homines tenuissimi zu einer höheren Existenz erhebt ... Gewiss hätte in Rom das Ganze, an das man sich anschließen muss, die res publica sein sollen, aber man vergesse nicht, dass der kleine Mann niemals in einem Immediatverhältnis zu ihr gestanden hat. In Caesar erhebt sich dann die dignitas eines einzelnen zur maiestas, und sein Sieg setzt an die Stelle der maiestas rei publicae oder populi Romani die seine.²

Before examining the evidence it would be well to consider how a technical maiestas shift to Caesar would have taken place. Drexler's "dignitas erhebt sich zur maiestas" is well chosen, for if it is remembered that maiestas was a relationship, and not an attribute or a quality, it will be readily understood that its acquisition was not a matter for a specific grant. It would not have happened that at any given time any organ of the Roman State would have declared that Caesar expressed in his person the maiestas of the Roman People. A maiestas relationship was recognised because it

1 Cf. Collins' anecdote (Review of Rambaud 527) of the scholar who, told that Rice Holmes had been 'bewitched' by Caesar, replied: "Wen hat er nicht bezaubert?" A wise observation, for it is not easy to escape the magic of the omnipotent Caesar of the classroom.

2 Gelzer (94) speaks of "die tantae res gestae, die ihn eine unantastbare dignitas eingebracht haben", and says (130) that Caesar's power "war zu einer autonomen Größe geworden". Cf. Taylor (Politics 163): "Caesarism meant the identification of the Roman people with Caesar."

in fact existed. The ally who bound himself to respect Roman maiestas did so because in fact he was the 'minor' in a 'maior-minor' relationship. A lex maiestatis did not create 'maiestas populi Romani', its purpose was to give legal protection to the maiestas which the Roman People in fact possessed. It was necessary to bind all members of the Roman community to respect that maiestas, and in a sense a lex maiestatis was a 'maiestas' treaty. If, therefore, Caesar had in fact reached such a position of pre-eminence that he was patently the 'maior' vis-a-vis the Roman People and its magistrates, then there was a maiestas shift. But although the fact of Caesarian maiestas could exist independently of any legislative pronouncement, its existence would have had two necessary consequences. There would have had to be a lex maiestatis to give legal recognition to the new relationship and to protect it. For example, it would have been meaningless to prosecute departure from a province 'iniussu populi aut senatus' under the lex Cornelia, when the crime could be committed only by a departure 'iniussu Caesaris'. Secondly, an ally would not have bound himself "maiestatem populi Romani coniter conservare", when in fact he was obliged to respect 'maiestatem Caesaris'. Evidence such as the survival of the expression 'maiestas populi Romani' in Caesar's lex Julia maiestatis (pp. 172-84 below), or of a Caesarian 'maiestas' treaty binding the ally to respect 'maiestatem populi Romani', would go against a technical maiestas shift to Caesar. Conversely, Drexler's hypothesis would need no further verification if 'maiestas Caesaris' were attested for the lex maiestatis or for a 'maiestas' treaty.

Caesar was obsessed with his dignitas. During his mentorship L. Vettius charged him before Novius Niger, the quaesitor investigating those implicated in the conspiracy of Catiline. Caesar reacted with extreme coercive measures,

confiscating Vettius' goods and imprisoning him. Novius was also imprisoned "quod compellari apud se maiorem potestatem passus est".¹ It was also during his praetorship that Caesar discovered that he was able to solicit widespread support from the common man in defence of his dignitas. When the Senate suspended his praetorship, "multitudinem ... operam sibi in adserenda dignitate tumultuarius pollicentem conpescuit" (Suet. Caes. 16.2). It was probably at this time that Caesar first appreciated the value of his dignitas as an instrument of propaganda, for in 51 B.C. Salust still looked back to the time when Caesar "in praetura inimicorum arma inermis dialecit" (Ep. ad Caes. 2.2.4).

The introduction of Caesar's personal concerns in *Bellum Gallicum* is made with studied casualness. After noticing that the Tigurini had paid the penalty for having been the first to cause "insignem calamitatem populo Romano" (B.G. 1.12.6), Caesar says: "Qua in re Caesar non solum publicas sed etiam privatas iniurias ultus est, quod eius socii L. Pisonis avum, L. Pisonem legatum, Tigurini eodem proelio quo Cassium interfecerant" (1.12.7). Applying the tests laid down by Rambaud (92-3), this statement is found to be part of an insertion at the time of composition. There is a break in logical continuity between the defeat of the Tigurini (1.12.3) and the resumption of the factual narrative (1.13.1), marked by a characteristic phrase - "hoc proelio facto" - referring back to the section immediately

1. Suet. Caes. 17. Caesar was probably entitled to complain that an inferior magistrate had received a charge against a superior. Cf. Mommsen (Straf 352 and n.1; Staat 1.705 and n.4; 706); Gelzer (53 and n.126). But there was probably more to it, for on the termination of his praetorship Caesar hurried off to Spain without even waiting for senatorial confirmation of his appointment (Suet. Caes. 18). As Suetonius (loc.cit.) caustically remarks, the reason was either Caesar's fear of being impeached while still a 'privatus', or his anxiety to respond to the Spanish appeal for aid. It would seem that an urgent desire to be elsewhere than within the jurisdiction of a criminal court was a not uncommon characteristic of Caesar.

preceding the insertion. The effect of the insertion was carefully calculated. Revenge for the "insignis calamitas" suffered by the Roman People might support a plea of 'maiestatem auxi', but on the face of it revenge for Caesar's personal wrongs was not relevant to the issue. Caesar was not, however, given to irrelevancies. This passage was the first of numerous suggestions designed to condition men's minds to the notion that the protection of 'maiestas populi Romani' went hand in hand with the protection of Caesar's dignitas.

It would tend to narrow the gap between dignitas and maiestas if Caesar and the Roman People had the same enemies and friends. Therefore Dumnorix hated "Caesarem et Romanos" (1.18.7), while his brother Diviciacus entertained "summa in populum Romanum studium, summam in se voluntatem" (1.19.2). In response to the entreaties of Diviciacus, Caesar agreed to forgive Dumnorix "et rei publicae iniuriam et summa dolorem" (1.20.5). The partnership between Caesar and the Roman People became progressively more close-knit. Gaul would be subjugated by Ariovistus "nisi quid in Caesare populoque Romano sit auxilium" (1.31.14), and the Germans could be deterred "vel auctoritate sua ... vel nomine populi Romani" (1.31.16). The subjugation of the Aedui by Ariovistus was "in tanto imperio populi Romani turpissimum sibi et rei publicae" (1.33.2). "Beneficia" being in the dispensation of the 'maior' in a maiestas relationship (p. 9 - 10 above), it was convenient to mention that Ariovistus had been "tanto suo populi Romani beneficio adfectus" (1.35.2; cf. L. 42.3, 43.4-5); if he met Caesar's demands, "sibi populoque Romano perpetuum gratiam atque amicitiam cum eo futuram" (1.35.4). Caesar was persuaded that Ariovistus "neque suam neque populi Romani gratiam repudiatum" (1.40.3). The 'maior' owed military aid to the

'minor', therefore "neque suam neque populi romani consuetudinem pati uti optime merentis socios desereret" (1.45.1).

"Ego et populus Romanus", which is such a consistent theme in *Bellum Gallicum* I, is entirely absent from Books II and III. This fact is significant. Book I sets out Caesar's defence to the great maiestas contraventions which attended the campaigns against the Helvetii and Ariovistus, and insinuations of personal maiestas were an essential part of that defence. The campaigns of 57 and 56 B.C. do not seem to have furnished Caesar's opponents with any new ammunition of note; indeed, a supplicatio was decreed at the end of the campaign season of 57 (2.35.4). "Ego et populus" was not used indiscriminately, but only for the serious business of refuting charges of maiestas. The maiestas graph for 55 B.C. took a sharp upward turn as a result of the massacre of the Usipetes and Tencteri, and the incursion into Germany, and "ego et populus" duly reappears in Book IV. Some of the cavalry of the Usipetes and Tencteri having taken refuge with the Sugambri, Caesar demanded the surrender of those "qui sibi Galliaeque bellum intulissent" (4.16.3). The Ubii considered that "tantum esse nomen atque opinionem eius exercitus ... uti opinione et amicitia populi Romani tuti esse possint" (4.16.7). Caesar decided that to cross the Rhine in boats would be dangerous, "neque suae neque populi Romani dignitatis esse" (4.17.1). The theme is absent from Books V,¹ VI, and VII, for the campaigns of 54 to 52 had not added to the pending charges. It is noteworthy that on the only occasion on which Caesar uses the word 'maiestas' in *Bellum Gallicum* (7.17.3), there is no attempt to bring "se" into conjunction with 'the People'. The army suffered severe privations at Avaricum, but "nulla tamen vox est ab eis cucita

1 Except 5.7.2: Caution was needed against Dumnorix, "ne quid sibi ac rei publicae nocere posset". But this is only an echo of the point made in 1.18.7.

populi Romani maiestate et superioribus victoriis indigna" (although "superioribus victoriis" in the same passage as "maiestate" is suggestive.)

It is therefore postulated that for the period 58 to 52 B.C. Caesar used the suggestive theme "ego et populus" only when he was concerned to meet the threatened prosecution for maiestas. It is concluded that when he published *Bellum Gallicum* at the beginning of 51 B.C., his propaganda bureau¹ had not yet worked out the full implications of the equation: dignitas Caesaris = maiestas populi Romani. But a new approach became necessary. The forensic and legislative attack of the Optimates in 52 B.C. was followed in 51 by the attempts of the consul M. Marcellus to have Caesar prematurely superseded.² Linked to this was the attempt to bring the demobilisation of Caesar's veterans under the Senate's jurisdiction (Cic. Fam. 8.8.7). It was against this background that the "big build-up" of Caesar's dignitas began, in *Bellum Gallicum VIII*.³ The partnership between "ego" and "populus" was now dissolved, or at best converted into a societas leonina. The only consideration which weighed with the Bituriges was "cum sibi viderent clementia Caesaris reditum patere in eius amicitiam" (8.3.5). The threat to the SueSSIONES gave Caesar to consider "pertinere autem non

1 It is possible that the jurist C. Trebatius conceived Caesar's defence to the maiestas charges. He was appointed to Caesar's staff in Gaul through the influence of Cicero, whose protégé he was (Boissier 232ff; Schulz (Legal Science 43.62). He must have had an astute legal mind, for he had 'auctoritas maxima' under Augustus (Inst. 2.2-pr). He seems to have been the only jurist on Caesar's staff, for Caesar thanked Cicero for having sent him Trebatius: "Megat enim in tanta multitudo eorum qui una essent quoniam fuisse qui vallo munium concipere posset" (Cic. Quint. Frat. 2.13.3). Perhaps the defence was the joint product of the brilliant mind of Cicero and the legal skill of Trebatius.

2 Cic. Fam. 8.8.5; Suet. Caes. 28.2; Hirtius B.G. 8.53.1). On the issues of law see Cuff 467, 469.

3 The passages to be discussed were all taken by Hirtius from Caesar's despatches. See Rambaud (58-9) on the structure of Book VIII.

tantum ad dignitatem sed etiam ad salutem suam ... nullam calamitatem socios optime de re publica meritis accipere" (8.6.2). Caesar's meaning could not have been plainer. The allies had rendered services to the State, but the requital of those services was a personal obligation resting on Caesar. This is not, of course, evidence of a *maiestas* shift unless it is shown that Caesar's pretension was generally accepted, but it is a clear indication of the strong '*maiestas*' line which was introduced in 51 B.C. The theme is pursued throughout Book VIII. It was found that Cornutus "*conspirationem contra Caesarem facere*" (8.23.3). It was "*proximum suae dignitatis*" to ravage the territory of Ambiorix (8.24.4). There are several other references to Caesar's *dignitas* in Book VIII (50.4; 52.4; 53.1). These, which refer to events in 50 B.C., derive from sources other than Caesar's despatches (cf. Rambaud 59). But it seems that Caesar himself pressed his *dignitas* very hard that year, for Cicero said in January 49: "*Aitque haec ait omnia facere se dignitatis causa*" (Att. 7.11.1). An insinuation of *maiestas* could be made even by the casual use of a word in an extraordinary sense. Lucterius realised "*quam inimicum deberet Caesarem habere*" (8.44.5). Regularly, an external enemy was "*hostis*", and "*inimicus*" was a personal political enemy (Taylor, *Politics* 7.35; Syme 288). Lucterius had been a lieutenant of Vercingetorix (7.5,7,8) and took part in the revolt of 51 (8.30-35,39). He should have been a "*hostis*", but the insinuation was that Caesar's "*inimici*" were also the enemies of the State.

There can, of course, be no suggestion that in 51 or 50 B.C. there was in fact a *maiestas* shift to Caesar, despite the strongly suggestive propaganda of those years. Gelzer (94) may believe that Caesar's achievements in Gaul had given him "*eine unantastbare dignitas*", but this is precisely what Caesar wanted him to believe. Cicero hit

the mark in February 49 when he said of the struggle between Caesar and Pompey: "Dominatio guesita ab utroque est, non id actum beata et honesta civitas ut esset" (Att. 8.11.2; cf. Dio 41.17.3). The previous month, discussing Caesar's claim that he was acting "dignitatis causa", Cicero had said: "Ubi est autem dignitas nisi ubi honestas?" (Att. 7.11.1). It is clear that Cicero regarded an attempt at 'dominatio' as incompatible with dignitas. The point need not be laboured. There could be no question of Caesarian maiestas in fact, when the outcome of the struggle for mastery of the State was still unknown.

Drexler (209-10) bases his inference of a maiestas shift to Caesar on *Bellum Civile* (1.7.7) and *Bellum Africum* (45.3)¹. These are only two of a number of passages which may seem to suggest Caesarian maiestas, but before discussing these passages it should be pointed out that if they are found to be no more than an intensification of the line taken in *Bellum Gallicum*, their value as evidence of an actual maiestas shift, as opposed to suggestive propaganda, will be materially reduced. Furthermore, the complete absence of an

1 *Bellum Africum* 45.3 scarcely merits discussion. Scipio offers life and reward to a party of captured Caesarians, if they will defend the Republic "cum optimo quoque" (Bell. Af. 44.4). The centurion who acts as spokesman asks: "Egone contra Caesarem imperatorem meum, apud quem ordinem duxi, eiusque exercitum, pro cuius dignitate victoriarumque amplius XXXVI annos depugnavi, adversus armatusque consistam?" (45.3). This is surely no more than "fighting talk" by an old campaigner. Cf. Bell. Af. 45.5: "Elige ex tuis cohortem unam quam putas esse firmissimam et constitem contra eam; ego autem ex meis commilitonibus non amplius X sumam". Dio (43. 5.3, 4; cf. 42.48, 4) was not impressed. He says that Scipio's inability to win over Caesarians was merely due to the fact that instead of offering rewards he urged them to liberate the Senate and People. It was one thing for the Caesarians to emphasise cases of signal loyalty. For example, the mutiny at Placentia (Suet. Caes. 69; Dio 41.26.1; Appian B.C. 2.181; Lucan Pharsalia 5.246) is not noticed in *Bellum Civile*. See also Rambaud (239-42) on Caesar's hedging regarding the defections among Curio's troops.

outright assertion of *maiestas* by Caesar, or his contemporaries on his behalf, is not without significance. Drexler's case is weakened by the fact that Caesarian *maiestas* is at best a matter of inference.¹ If there had been a *maiestas* shift it would have been generally recognised, and there would not have been so much juggling with words. The subtleties of *dignitas* need not have been pressed if it had been transformed into *maiestas*. It is no answer to say that political expediency dictated allusion rather than direct assertion. If Caesar's hints had accurately conveyed his possession of *maiestas* his opponents would have received the message in any case, and would have found it no more palatable because it was indirect.

Bellum Civile introduces "*dignitas Caesaris*" with the complaint that Pompey "*neminem dignitate secum exaequari volebat*" (1.4.4), a complaint which Caesar repeats at *Arminium*,² contrasting his support of Pompey's "*honor et dignitas*" with the latter's attitude (1.7.1). Caesar's point is that mutual promotion of *dignitas* was a term of the first triumvirate (*Florus* 2.13.9-11), but if Drexler is right Caesar goes further than this when he says: "*Hortatur, cuius imperatoris ductu VIII annis rem publicam felicissime gesserint plurimaeque proelia secunda fecerint, omnes Gallias Germaniamque pacaverint, ut eius existimationem dignitatemque ab inimicis defendant. Conclamant legionis XIII quae aderat milites esse praeatos esse imperatoris sui tribuorumque plebis iniurias defendere*" (1.7.7-8). Although Drexler does not develop his hypothesis, he would presumably say

1 When something analogous to a *maiestas* shift in fact occurred in the case of Augustus, he did not hesitate to say so. See pp.247-8 below.

2 For Caesar's incorrect location of this speech at Ravenna see Rambaud (134-5); cf. Galzer (176,399, 174,392).

3 On which claim Rambaud (194) aptly remarks: "*c'est confondre une partie ... avec le tout*".

that the injury to the tribunes Antony and Cassius,¹ who possessed magisterial *maiestas*, fell under the crimen *maiestatis*. By linking his injuries to theirs Caesar brought himself within the ambit of *maiestas*. As magisterial *maiestas* was a mere derivative of '*maiestas populi Romani*', Caesar's placing of himself prior to the tribunes was a claim to the '*maior*' position vis-a-vis the Roman People and its magistrates. But the better view of this passage is simply that the tribunes gave Caesar "the one constitutional battle-ory with which they could supply their master, that the rights of the tribunes were being overborne" (Adcock, CAH 9.637). Indeed the ancients took a similar view.²

Bellum Civile (1.9.2) is crucial, because of a textual difficulty which modern authorities seem to have overlooked. L. Caesar and Roscius, having been sent by the Senate to negotiate with Caesar,³ told him that Pompey was acting "*rei publicae causa*", that he had always considered "*rei publicae comoda privatis necessitudinibus ... potiora*". They suggested to Caesar that he follow Pompey's example: "*Quoque pro sua dignitate debere et studium et iracundiam suam rei publicae dimittere neque adeo graviter irasci inimicis ut, cum illis nocere se speret, rei publicae noceat*" (B.C. 1.8.3ff). The suggestion to Caesar, then, was that he postpone his dignitas to the interests of the State. In effect the envoys squarely put the question as to how far he was prepared to go in pressing his dignitas in opposition to '*maiestas populi Romani*'.

1 Their expulsion from the Senate on the 7th January 49. Caes. B.C. 1.5.2,5; 1.7.3ff; Cic. Phil. 2.21.51; Plut. Caes. 31.2. But the expulsion may have been non-violent. Cic. Fam. 16.11.2; Dio 41.3.2.

2 Cic. Phil. 2.29.72; 2.22.53; Plutarch (Caes. 31.2) is particularly clear: τῆς δημοτικῆς ἁγέρων καὶ κοινῶν ἀποκλεισθέντες ἐξέλασαν ἄνθρωπος, τὴν ἐκπερισσοτὴν κοινῶν τῶν προεδρῶν αὐτοὶ μηχανηθέντες.

3 On Caesar's chronological distortion of the negotiations see Rambaud (135-6).

Caesar's reply is given in *Bellum Civile* (I.9.2), and it is found that there are two vitally different versions of what he said. According to the Oxford and Teubner texts¹ his reply was: "Sibi semper primam fuisse dignitatem vitae potiore". This seems to be the reading on which several modern authorities base important conclusions about Caesar.² The other reading is: "Sibi semper primam rei publicae fuisse dignitatem vitae potiore" (italics mine). This version seems to have appeared in Oudendorp's edition of 1736, judging by later editors whose texts are based on Oudendorp.³ The curious feature is that the editors who give one version seem to be quite unaware of the other. There is no notice of "rei publicae" in the apparatus criticus of the Oxford or Teubner editions, but on the other hand there is no suggestion in any of the "Oudendorp" editions that these words ought to be deleted. The only critical note on this passage in the editions which have been consulted is that of Oberlinus (op.cit. 373), who observes: "Reip. primam f.d. Codd. quidam, Rempubliacam primam fuisse dignitate". As Klotz and Du Pontet made their own rescensions it might be assumed that there was an error in Oudendorp's rescension, were it not for the fact that Oberlinus seems to have seen some of the MSS independently.

If Oudendorp's version is the right one, this passage severely damages the hypothesis that Caesar's various allusions

¹ R. Du Pontet, Oxford 1900; A. Klotz, Teubner 2nd, ed., 1950.

² Syme 48; Taylor (Politics 163, 236.4); Ramsdell 145; Gelzer (52, 83, 94 and n.8); Baladon (Auctoritates 45).

³ Rev. Iac. Oberlinus, "C. Iulii Commentarii de Bello Gallico et Civili: E Rescensione Francisci Oudendorpii", Editio Nova Lipsiae in Libreria Weidmannia, 1819; Joannis Dymock, "C. Iulii Caesaris Opera Omnia", Editio Decima Sexta, Edinburgi, 1804; Oxford Pocket Classics, Oxford 1890; A.G. Peskett, Loeb ed., 1914. Du Pontet and Klotz notice a number of Oudendorp's readings, and Oudendorp's 1736 edition was seen by Du Pontet.

in Bellum Gallicum and Bellum Civile were in fact a claim to personal maiestas. As 'dignitas rei publicae' was simply a synonym for 'maiestas populi Romani' (p. 132 above), it follows that Caesar, when obliged to say unequivocally where his maiestas stood in relation to the State, retreated and acknowledged the People's maiestas. Even if Klotz and Du Pontet have the right reading the position is not materially different, for in the context Caesar does not make an outright assertion of personal maiestas. After stating his attitude on his dignitas he goes on to say: "Doluisse se quod populi Romani beneficium sibi per contumeliam ab inimicis extorqueretur, cuius absentis rationem haberi proximis comitiis populus iussisset. Tamen hanc iacturam honoris sui rei publicae causa aequo animo tulisse" (1.9.2-3). The People's maiestas is acknowledged in "populi Romani beneficium", for the recipient of 'beneficia' typically occupied the 'minor' position in a maiestas relationship (p.9-10 above). This acknowledgement is coupled with a further advance in the technique which was introduced in Bellum Civile (1.7.8). There, by basing his case on "tribunorum plebis iniurias", Caesar passed from defending himself against charges of maiestas to levelling such charges at his opponents. He does the same in the present passage. It would have been a simple interpretation to bring "iacturam honoris sui", the frustration of something "(quod) populus iussisset", under the crimen maiestatis. If it was maiestas for Cato to decline an office to which the People had appointed him (p.116 n.1 above), it was equally maiestas to frustrate Caesar's exercise of a privilege which the People had granted him.¹

¹ Assuming, of course, that there was a frustration. See Cuff (471) for the irreconcilable views of the Optimates and Populares on the 'Rechtsfrage'.

There is also a recognition of the People's *maiestas* in "*rei publicae causa*" (1.9.3.5), and in "*libera civitas atque omnis res publica senatus populoque Romano permittatur*" (1.9.5). The latter passage is echoed by "*liberam et sui iuris civitatem*" (B.G. 8.52.5), and the expression "*sui iuris*" is significant. A mere "*libera civitas*" was not necessarily independent, for *libertas* was not inconsistent with a dependent position. The client and the *filii* families were free; so was the '*minor*' in a *maiestas* relationship.¹ But "*libera et sui iuris*" has a special meaning, for the legal term '*sui iuris*' implies that the State should be its own unfettered master.

Caesar reverted to his defence in *Bellum Civile* (1.22.5): "*Se non maleficii causa ex provincia egressum, sed uti se a contumeliis inimicorum defenderet, ut tribunos plebis in ea re ex civitate expulsos in suam dignitatem restitueret, ut se et populum Romanum factione paucorum oppressum in libertatem vindicaret*". The implication was that defence of the tribunes' *maiestas* justified the crossing of the Rubicon (cf. 1.7.8). Caesar, realising the doubtful validity of this extreme application of the '*maiestas auxilii*' rule, sought to bolster up his case, but in effect he merely repeated previous arguments. The insinuation in "*uti se a contumeliis inimicorum defenderet*" is no more significant than the similar suggestion which he made in partial justification of his departure from his province against the Helvetii (pp. 135-6 above).² The present passage leads Taylor (*Politics* 163) to infer an identification of the Roman People with Caesar, but the repeated use of "*se et populum*" in *Bellum Gallicum* I was merely a general defence to the *crimen maiestatis*, and there is no need to

1. Kunkel 340. Cf. Cicero (*Off.* 3.85): "*Civitatemque (sc. Romanam) non modo liberam sed etiam gentibus imperantem.*"

2. For Caesar's repetitive technique see Rambaud (186-90).

attribute any greater significance to it in *Bellum Civile*.

Caesar, addressing the Senate in April 49, added to his previous arguments the mild contention that he sought only "quod omnibus civibus pateret" (1.32.2),¹ but promptly spoilt the effect by committing the crime of sacrilegium, when he emptied the 'aerarium sanctius' despite the veto of the tribune L. Metellus, and the crime of maiestas, when he threatened violence to Metellus.² This incident cost Caesar so much popular goodwill that he left Rome without carrying out his intention of addressing a contio (Cic. Att. 10.4.8; Fam. 8.16.1). He had not won general acceptance of his position from the urban plebs or the Senate,³ despite his earlier claim that on a free vote the Senate would have supported him (B.G. 8.52.3; cf. B.C. 1.1.3; 1.2.6; 1.3.5). Even after the first Spanish campaign it was expedient for him to simulate humility. The restitution at the end of 49 of persons convicted under Pompey's ambitus law was effected "iudicio populi" rather than "suo beneficio", for the significant reason "ne ... arrogans in praeripiendi populi beneficio videretur" (3.1.5).

It was time to exploit the wider possibilities of 'maiestas populi Romani'. "Ego et populus" could be shelved,⁴ and its place taken by "ego et omnis gentes". Even before the Civil War a start had been made with "voluntas totius

1 In sudden regard for protocol he held the session outside the pomerium. Dio 41.15.2.

2 Dio 41.17.2; Cic. Att. 10.4.8. Sacrilegium was not a form of maiestas in this or any other period with which the present study is concerned. See p. 308-9 below.

3 The Senate's lukewarm response was influenced by Pompey's threat that those who remained in Rome would be regarded in the same light as those who joined Caesar. B.C. 1.33.1-2; cf. Cic. Marc. 18; Att. 11.6.2, 6. Men were not persuaded of the inevitability of Caesar's victory.

4 Although not entirely abandoned. See B.C. 3.26.1; 3.53.5; 3.91.2; 3.99.3.

Italiae" (Rambaud 278-80), and this concept was to be extended. A significant example is Caesar's virgine grant of citizenship to Cadiz (Dio 41.24.1; Livy Per.110). The Gaditani had expelled the Pompeian Gallonius (2.20.2-3), but in so doing they had merely followed the example of other communities, such as Carmona (2.19.4). Yet only Gades was rewarded with citizenship. As there was a 'maiestas' treaty with Gades (p. 9 above), the implication was that special recognition was due to an ally who, by adhering to Caesar, was deemed to have discharged its obligation "maiestatem populi Romani comiter conservare".¹ At Oricum the Greeks, refusing to fight "contra imperium populi Romani", spontaneously attempted to admit Caesar into their city (3.11.4).² The Apolloniates refused to take any decision "contra atque omnis Italia populusque Romanus iudicavisset" (3.12.2; cf. Bell.Alex 67.2).³ This broader 'maiestas' concept was linked to Caesar's "peace offensive", which aimed at "quietem Italiae, pacem provinciarum, salutem imperii" (3.57.4).⁴ Gelzer (213.191), citing Sallust (Ep. ad Caes 1.3.1; 1.8.4) and Dolabella (ap. Cic.Fam. 9.9.3), rightly says that this new concept of the State was generally accepted by Caesarians, but is on less safe ground when he asserts that Caesar's opponents clung to Rome as the focal point of the 'res publica'. Caesar's strategy at Dyrrachium was designed "ut auctoritatem qua ille (sc. Pompeius) maxime apud exteras

1 Cf. Caesar's grant of citizenship to the Transpadane Gauls $\alpha\gamma\epsilon\kappa\alpha\iota\ \delta\epsilon\gamma\epsilon\kappa\alpha\ \alpha\theta\epsilon\omega$ (Dio 41.36.3).

2 The prototype for enthusiastic admissions was Auximum, whose decurions could not bring themselves to exclude "C. Caesarem imperatorem, bene de re publica meritum, tantis rebus gestis" (1.13.1). As to whether the decurions so expressed themselves, see Rambaud 192.

3 The Apolloniates would have recalled the fate of the Massilienses who, invited to follow "Italiae totius auctoritatem", had presumed to reply that the populus Romanus was divided into two parts, to both of which they were equally indebted for benefits (1.35.1,3,5).

4 On the "peace offensive" see Gelzer (212-3,221,223 and n.239).

nationes uti videbatur, minueret" (3.43.3); and after Caesar's setback there Pompey sent despatches "per omnes provincias civitatesque" (3.79.4), and did not sail for Italy, because he did not want to give the impression that it was the stake for which he was fighting (Mio 41.52.2-3). Caesar had no monopoly of "ego et omnis gentes".

The period from Pharsalus to the Ides of March furnishes evidence on both sides of the line. After the battle Caesar said: "Tantis rebus gestis Gaius Caesar condemnatus essem nisi ab exercitu auxilium petissem" (Suet. Caes. 30.4).¹ The combination of the impersonal "Caesar" of the Commentaries with the personal verb is so strongly suggestive of the royal "we" that Lénail (103.65) observes that Caesar's name had become a concept. It may indeed seem that "tantis rebus gestis Gaius Caesar" had coalesced in a similar way to the suggested "maiestaspopuliromani" (p. 14 above). At Alexandria the carrying of the fasces before Caesar caused a disturbance, for "in hoc omnis multitudo maiestatem regiam minui praedicebat" (3.106.4). As the Greek-speaking Alexandrians would not have had an exact Greek equivalent for "maiestas regia" (p. 1 above), it may be felt that Caesar introduced an un-Hellenistic element in order to fix a link between his fasces and regal maiestas. It may also have been intended to emphasise that, unlike the consul Appius Claudius (pp. 12-13 above), Caesar did not dip his fasces before any maiestas. But this impression is weakened by the immediately following statement: "controversias regum ad populum Romanum et ad se, quod esset consul, pertinere existimans" (3.107.2; cf. Bell. Alex. 68.1).

The continuators do not tend to emphasise Caesarian

¹ The passage has been cited before, but bears repeating because of its several implications.

maiestas. "Ego et populus" appears (Bell. Alex. 24.2; Bell. Af. 54.4; Bell. Hisp. 42.3), but in Bellum Hispaniense (42.3) the context strongly implies the normal crimen maiestatis, based on 'maiestas populi Romani': "Populi Romani magistratibus sacrosanctis manus ... attulisti". Two mass trials of Roman citizens for maiestas were conducted by Caesar in Africa. At Utica confiscation of property was threatened against "civis ... Romanos negotiatores et eos qui inter CCC pecunias contulerant Varo et Scipioni", but the accused secured mitigation to a fine of HS 2000 (Bell. Af. 90). The crime seems to have fallen under the category introduced by the lex Varia (p. 67 above). There is some suggestion here that the crime had been committed against Caesar, for the accused are contrasted with the citizens of Utica, whom Caesar thanked "pro eorum erga se studio" (Bell. Af. 90.1). But at Zama confiscation was decreed against those "qui cives Romani contra populum Romanum arma tulerant" (Bell. Af. 97.1; cf. Dig. 48.4.1.1). Hirtius¹ includes three passages in Bellum Alexandrinum which seem to be deliberately intended to rebut any suggestion of Caesarian maiestas. The expressions "imperii nostri dignitas" (33.4) and "dignitas populi Romani" (36.2) flank the most explicit passage in all the Commentaries: "Donditius ... (cum) turpe populo Romano et C. Caesari victori sibi infame esse statueret regna sociorum atque amicorum ab externo rege occupari, nuntios confestim ad Pharnacem misit ... neve occupatione belli civilis populi Romani ius maiestatemque temptaret" (34.2). Here "ego et populus" is expanded to "ego et populus et ille" by the inclusion of "sibi infame", and this in a context where 'maiestas populi Romani' is expressly mentioned. The subordinate nature of magisterial maiestas is similarly acknowledged in Bellum Africanum (57.3): "Usu venisse hoc civi Romano

1. For Hirtius as the probable author of Bellum Alexandrinum see Rice Holmes (Republic 3.483-4); Gelzer (231, 283, 236, 306).

et ei qui ab populo Romano honores accepisset". In contrast to Kirtius' suggestive "bene d. se et populo Romano meriti" in *Bellum Gallicum VIII* (p. 138-9 above), he and the other continuators now base the notion of a deserving ally solely on the criterion "de populo Romano" or "de re publica" (Bell. Alex. 66.5; Bell. Af. 77.1; Bell. Hisp. 3.3).

It can be asserted with some confidence that there was no general recognition of a technical *maiestas* shift to Caesar up to and including the second Spanish campaign, and that until then the technical concept of '*maiestas populi Romani*' was undisturbed. Whatever degree of effective control Caesar may have exercised, the legal concept of '*maiestas populi Romani*' endured, which means that the technical orientation of the *maiestas* law would not have been changed. It is not possible to be as confident for the period from Munda to the Ides of March, but it should be pointed out that Caesar's *maiestas* legislation was introduced in 47 or 46 B.C. (pp.179-82below), and there is no reason to believe that he passed another *lex maiestatis* as late as 45 or 44 B.C. It will be suggested (pp.177,2below) that the technical orientation of his *maiestas* legislation was identical to that of his predecessors, in that it continued to be based on '*maiestas populi Romani minuta*'.

For the sake of completeness, however, three of the honours which were showered on Caesar, and which may be regarded as particularly significant for a *maiestas* shift, will be briefly considered. The first is that attested by Dio (42. 20.1), namely the appointment of Caesar after Pharsalus as the arbiter of war and peace, without any obligation to consult the People or Senate. There is no clear evidence that Caesar used this power inconsistently with the survival of '*maiestas populi Romani*'. In the East, after the Alexandrian campaign,

Caesar laid down duties for rulers who were "et sibi et populo Romano am'icissimi" (Bell. Alex. 65.4), but 'ego et populus' did not raise a necessary implication of personal maiestas. Caesar's decrees in favour of the Jews were subsequently confirmed and amplified by the Senate.¹ The treaty which Augustus concluded with Mitylene in 25 B.C. furnishes a clue to the form of Caesar's treaties. This renewal of an earlier treaty was probably a 'maiestas' treaty, in the form of that with the Aetolians in 189 B.C.² As there were negotiations between Caesar and Mitylene in 48 or 47 B.C., and as a senatusconsultum is attested for 45 B.C. (Muhler 46; Gelzer 241), it is reasonable to suppose that the treaty of 48 or 47 B.C., as confirmed by the Senate in 45, was the original treaty which, as renewed in 25 B.C., retained the expression "maiestatem populi Romani comiter conservare."

In view of the close link between the maiestas of the Roman People and that of the gods, particularly Jupiter (pp. 5-8 above), it may be important that in 44 B.C. Δία τε αὐτὸν ἑνταῖς 'Ιουλιον προσηγόρευον (Dio 44.5.4). A temple was to be dedicated to Caesar and his Clemency, with Antony as the priest ἄρχων τινὲς Διάλιον. It is preferable to understand Δία 'Ιουλιον as "Jupiter Julius" (Rice Holmes (Republic 3.332; Carson 47), rather than as "Divus Julius" (Taylor, Politics 175; Gelzer 293), particularly in view of ἄρχων τινὲς Διάλιον, which must mean "a sort of flamen Dialis" (cf. Cic. Phil. 2.110). This step, following on the dedication of the temple of Venus Genetrix in 46 B.C.,³ the inscription on Caesar's statue that he was ἡγεεὺς

1 Josephus Ant. 14.192. Cf. Rice Holmes (Republic 3. 307-8); Gelzer (238.309).

2 Cf. p. 8 above. See also Muhler (54-5, 451, 454, 455); Sherwin-White (Citizenship 46, 50-1, 56.3, 159-60).

3 Rice Holmes (Republic 3.283); Taylor (Divinity 63-4); Gelzer (226.251).

in 46 B.C. (Dio 43.14.6), and the erection of a statue in the temple of Quirinus inscribed θεῷ Ἰουλίῳ in 45 B.C. (Dio 43.45.3), may suggest a maiestas shift to Caesar in the primary sense of the concept. But there was ample Republican precedent for the acceptance of Caesar as a god by Hellenistic communities,¹ and even in Rome extravagant honours had been offered to Republican heroes at various times.² Caesar had ἡμεῖς deleted from his statue, and the θεῷ Ἰουλίῳ inscription may have been added after his death (Adcock, CAH 9.719-20; Taylor, Divinity 65). There was no applause when his statue appeared with that of Victory at his Spanish triumph, and much dissatisfaction at the placing of his statue among those of the kings (Cic. Att. 13.44.1; Deiot. 33.4). This absence of general recognition should be taken with the fact that many people hoped by voting honours to Caesar to expose him to contempt and ridicule (Dio 44.7.2-4; cf. 44.3.2-3). Cicero's grim jest may have expressed a widely held view: "Eum (sc. Caesarem) στυγῶν Quirini malo quam Salutis" (Att. 12.45.2).

Premarstein (33-6; cf. Taylor Politics 174) believes that the oath for the protection of Caesar's person in 44 B.C. was sworn by both Senate and People, and marked the establishment of a patron-client relationship, a "Gefolgschaft", between Caesar and all citizens; ancillary to the oath were the honours voted by the Senate and confirmed by the People, including the title "pater patriae", the oath by Caesar's "Salus" and "Genius", and the rights of tribunician inviolability and the "ius auxilii". The crown Caesar, having been imposed by senatusconsultum and law, was therefore akin

1 Bailey (138-9); Taylor (Divinity 35-42); Gelzer 225-6). Adcock (CAH 9.722) aptly remarks that the Greek East would have said the same of Pompey if he had won.

2 Baile, 139; Taylor (Divinity 41, 59; Carson 50).

to an "Untertanenid". If Premerstein is right there may be good reason to believe in a technical maiestas shift to Caesar in 44 B.C., for a 'clientela' bound by an "Untertanenid" would have been the internal equivalent of an external community which contracted to respect Roman maiestas.¹ The terms of the oath are given by Appian (B.C. 2.20.145). Antony, in the course of the funeral oration, read out τοὺς ὅρκους, ἃ μὲν φυλάττειν Καίσαρα καὶ τὸ Καίσαρος σῶμα παντὶ σέβειν πάντας ἦ, εἰ τις ἐπιβουλεύσειεν, ἐξόλης εἶναι τοὺς οὐκ ἑμμένοντας αὐτῷ.

Premerstein would have to show that πάντας means all citizens and not merely senators,² and that the obligation to swear was imposed by a lex. There is some support for this interpretation in Antony's ἡ τε βουλὴ καὶ μετὰ αὐτοῦ ὁ δῆμος ἔτι περιόνοι ἐφημέσιον (Appian B.C. 2.20.144), and in οἰόμενος τῇ πάντων εὐνοίᾳ φυλάττεσθαι (Nic.Dam. Vit. Caes. 22.80), if Premerstein (34) correctly holds that Nicolaus used εὐνοία as the technical expression for "Gefolgsreue". But

Appian himself (B.C. 2.20.145) indicates a limitation on πάντας, for when Antony said that he would not avenge Caesar because senators were in favour of an amnesty, the Senate was disturbed ἐπὶ τοῦδε μάλιστα κροῖανθ' ἐς αὐτῆς εἰρημίας. Suetonius (Caes. 84.2) limits the oath to the Senate, while Dio (44.7.4) attests τὸ πρὸς τε τῶν βουλευτῶν καὶ πρὸς τοῦν ἱππέων τηρεῖσθαι. Livy (Per. 116) specifies decrees of the Senate as the source of the "plurimi maxime honores". Nicolaus of Damascus (Vit. Caes. 22.80; cf. Dio 44.7.3-4; Suet. Caes. 86) believed that the declaration of sacrosanctity and the title "pater patriae" were intended by Caesar's enemies to put him off his guard. There must have been a strong belief in Caesar's gullibility

1 Cf. Premerstein 18. It will be suggested (pp. 241-50 below) that the elements analysed by Premerstein in regard to Caesar are of paramount importance in the case of Augustus.

2 The general view is that only senators had to swear. Rice Holmes (Republic 3.332); Geizer 292. Taylor (Politics 174) accepts a universal oath, but believes that only senators had taken it at the time of Caesar's death.

induced by mental illness, for Antony found it necessary to rebut it (Dio 44.46.2).¹

¹ It is no paradox to say that Caesar's most prominent office, the dictatorship, is not significant for a *maiestas* shift. Despite Mommsen (Staat 2.170), it has been shown by Siler (Verfassung 210-1) that the mere disregard, in Caesar's case, of the temporal limit on the dictatorship did not take the office out of the category of a Republican magistracy. Therefore in legal theory it was no more than a magistracy, from which it follows that its holder merely had derivative *maiestas*. Despite Dio (43.44.2), it is not likely that Caesar used 'imperator' as a 'praenomen' (Syne, Imperator 175-9; Adcock, CAH 9.728), so that it need not be considered as evidence of *maiestas*. The tribunician power had important connotations for '*maiestas Augusti*' (pp.232-41 below), but its grant to Caesar - for which see Hohl (Caesar, passim) and Strack (365-9) - does not seem to be significant for a *maiestas* shift.

CHAPTER VIII

CICERO ON CLEMENCY

In September 46 L. Piso drew the Senate's attention to the case of M. Claudius Marcellus, a prominent Pompeian and an old opponent of Caesar,¹ then living in exile at Mitylene (Cic. Fam. 4.7.4). Caesar, although not well-disposed towards Marcellus, and knowing that he was irreconcilable, pardoned him in deference to the almost unanimous wish of the Senate (Cic. Marc. 1.3; Fam. 4.4.3). Cicero, breaking his long silence (Fam. 4.4.4), delivered a speech of thanks which, apart from fulsome praise and some modest advice, mentioned a recent conspiracy against Caesar, to which Caesar had yielded when pardoning Marcellus, and in regard to which he had said: "Satis diu vel naturae vixi vel gloriae" (Cic. Marc. 8.25). Cicero spoke gravely of Caesar's "gravissima querela et atrocissima suspicio", which it was the duty of all men to forestall. It was inconceivable that danger threatened from Caesarians, and equally impossible that Pompeians, who owed their lives to Caesar, would plot against him (7.21). But men's minds were so complex that Caesar should be even more suspicious and cautious, for not even a god could save the State if "scelerum ... insidiarumque consensio" were added to natural hazards (7.22-3). Caesar had been lenient, but there were ingrates who remained hostile (10.31). He was enjoined "ut vitae, ut salutis tuae consulas"; as he believed "subesse aliquid ... quod cavendum sit", he was assured of the constant protection of all (10.7).

1. As consul in 51 Marcellus raised the question of a successor to Caesar, and encouraged a citizen of Comum in contempt of the citizenship which Caesar had granted to the city. Rice Holmes (Republic 2.242-3, 317-20); cf. Boissier (269-70).

Gelzer (261) believes that the conspiracy to which Cicero refers was one which was organized by disgruntled Caesarians, led by Antony. This view is based on Cicero's allegation that an assassin sent by Antony had been caught at Caesar's house, and that Caesar had openly accused Antony in the Senate (Cic. Phil. 2, 29, 74). Gelzer is right if it can be shown that the accusation against Antony was made by Caesar during the sitting at which he pardoned Marcellus, but the chronology is against this. The attempted assassination occurred at the very time when Caesar levied execution against Antony for the purchase price of Pompey's assets, and interdicted him from selling the estate of L. Rubrius which he had inherited (Cic. Phil. 2, 29, 73-4). Caesar, after accusing Antony in the Senate, granted him a short extension of time for payment, and left for Spain (Cic. Phil. 2, 29, 74). As Caesar set out for Spain in November 46,¹ and as Marcellus was pardoned in September,² the affair of Antony would have been some four months after the case of Marcellus. But even if Caesar was not referring to the attempted assassination at Antony's instance when he addressed the Senate in regard to Marcellus, it is not impossible that the "gravissima querela et atrocissima suspicio" which he then expressed concerned a conspiracy of Caesarians rather than Pompeians. The relationship between Caesar and Antony is far from clear, but it should be noticed that Cicero attests a long-standing conspiratorial purpose on Antony's part. When Antony was at Narbo to meet Caesar on his return from Spain, he contracted with Trebonius to join a conspiracy against Caesar. Cicero describes this fact as "notissimum", and says that it was "ob eius consilii societatem" that Trebonius detained Antony outside the Curia

¹ Julian Calendar. See Rice Holmes (Republic 2, 541-2); Gelzer 272.

² Republican Calendar. Cic. Fam. 4, 4. Cf. Gelzer 280.

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¹ Julian Calendar. See Rice Holmes (Republico 2.541-2); Gelzer 272.

² Republican Calendar. Cic. Fam. 4.4. Cf. Gelzer 260.

on the Ides of March, while Caesar was being murdered.¹ The levying of execution against Antony, in or about November 46, was not the beginning, but the culmination of his differences with Caesar. Relations became strained after Caesar's return to Rome in October 47, when Antony was allowed no discount on his purchase of Pompey's assets (Gelzer 242); it is possible that the violence which had prevailed at Rome during Caesar's absence, and Antony's failure to restrain it (p. 118 below), had something to do with the coolness which developed at this time. Antony's failure to accompany Caesar to Africa (Phil. 2.29,71) was probably due to this estrangement, and thenceforth he cannot be excluded from the reckoning in regard to conspiracies. It should be noticed that Cicero's reference to the possible authors of a conspiracy (Marc. 7,21) is couched in the form of a series of questions which raise, only to reject, the possibilities that the plotters were Caesarians or Pompeians. It is clear that Caesar had not been specific in his allegations, for otherwise Cicero would not have speculated on the identity of the authors. Vagueness on Caesar's part suggests reluctance to name his own supporters, for to have disclosed Pompeian names would not have been embarrassing. And Caesar's expression of utter weariness (Marc. 8,25) would have been prompted by the shock of finding hostility in his own camp, rather than by a not unexpected Pompeian plot.

The case of Marcellus was in no sense a criminal trial. There was neither a charge nor an accuser, and Caesar did not sit as a judge, but simply exercised his prerogative of mercy. The case of Q. Ligarius, which came before Caesar in October, 46 B.C., is more significant.

1 Cic. Phil. 2,14,34; cf. Plut. Ant. 11,2,13.2. Gelzer (278) accepting the evidence against Antony, makes a pronouncement which in fact discounts Caesarian maieestas: "Diese Episode ... zeigt, wie die politisch hervortragenden Helfer ... in ihm durchaus noch nicht das rechtlichen Herrscher anerkannten ... Fehlte so bei den Hauptanführern jegliches Ehrfurchtsgefühl ... so fand Caesar erst recht bei Anerkennung bei der früheren Gegenpartei".

Ligarius was a legate of Considius Longus, the governor of Africa, in 51 and 50 B.C., and was left in command in the latter year when Considius went to Rome to stand for the consulship.¹ Ligarius' legation under Considius immediately gives him a similar political orientation to that of his superior, for although legates were appointed by the Senate, it was customary in the late Republic to confine the choice to names submitted by the governor (Moenson, *Staat* 2.1.677ff; Greenidge, *Public Life* 324). And Considius was a determined Pompeian, who held Hadrumetum and Thysdra for the Republicans in 49 and 46 B.C. respectively, and would not even read a letter by which Caesar's legate, L. Plancus, tried to win him over.²

The Senate allotted Africa to L. Aelius Tubero for 49 B.C., but whether as governor³ or merely as a commissioner for the purchase of grain⁴ is not clear, although a governorship seems to be better attested. Tubero was in no hurry to take up his office (*Cic. Lig.* 7.21). When P. Attius Varus was driven out of Auximum by Caesar in February 49 he went to Africa and took over the command, apparently with the approval of the inhabitants, who remembered him as propraetor (*Caes. R.C.* 1.12.3, 13, 31.2; *Schol. Gron.* p. 83). When Tubero arrived off Utica, Varus, alleging that he held Africa for the Pompeians, would not allow him to land, nor to put off his son Q. Tubero, who was ill, nor to take in water.⁵ A variant tradition attributes the prohibition against

¹ *Cic. Lig.* 2.4, 30.34; *Schol. Gronov.* (Teubner ed. of *Pro Ligario*, p. 83.)

² *Caes. B.C.* 2.23.4; *Bell. Af.* 3.1.4; 33.3; 76.1; 86.3. Cf. Rice Holmes (*Republic* 3.239, 273).

³ *Caes. B.C.* 1.30.2; *Cic. Lig.* 7.21; 9.77; *Schol. Gron.* (Teubner ed. p. 83).

⁴ *Quint. Inst. Orat.* 11.1.80. Walser (90) assumes a governorship for Tubero.

⁵ *Caes. B.C.* 1.31.3; *Cic. Lig.* 7.22; 8.24; 6.25; 9.27; *Oros.* 6.15.7; *Schol. Gron.* p. 83.

landing directly to Ligarius (Dig. 1.2.2.46; cf. Cic. Lig. 3.9). L. and Q. Tubero went off to join Pompey in Greece, fought at Pharsalus, and were pardoned by Caesar.¹

Ligarius probably fought with Varus against Curio in 49 B.C.² After Thapsus Ligarius was captured at Hadrumetum, Caesar spared his life, but obliged him to go into exile (Bell. Af. 89.2; Cic. Lig. 4.11; 5.13). In the summer of 46 B.C. Cicero sought a pardon for Ligarius and found the prospects very favourable. But when Caesar was on the point of granting a pardon Q. Tubero, the son of L. Tubero, brought a prosecution against Ligarius.³ The case was heard by Caesar in the Forum. Q. Tubero was the accuser, and C. Vibius Pansa and Cicero appeared for Ligarius. The outcome was a pardon for Ligarius.⁴

The charge against Ligarius was "quod in Africa fuerit" (Cic. Lig. 1.1; 3.9; Schol. Gron. p.84). Further particulars are supplied by Quintilian (Inst. Orat. 11.1.80): "(Tubero) ut primum licuerit a partibus recessisse, Ligarium et perseverasse et non pro Cn. Pompeio ... sed pro Tuba atque Afris inimicissimis populo Romano stetisse" (cf. Cic. Lig. 8.24). But Pomponius (Dig. 1.2.2.46) gives a different version: "Is est Quintus Ligarius, qui cum Africae oram teneret, infirmum Tuberonem applicans non permisit nec aquam haurire, quo nomine eum accusavit (sc. Tubero) et Cicero defendit". The charge has been variously described as perduellio

¹ Cic. Lig. 3.9; 4.10; 9.27; Schol. Gron. p.84. Cf. Long 398; Walser 91.

² So Walser (91). The sources do not name Ligarius - Caes. B.C. 2.23-44; Appian B.C. 2.175-90; Dio 41.41-2; Livy Per. 110; Lucan Phars. 4.581-824 - although his participation is likely enough. But Rice Holmes (Republic 3.289 and n. 8) wrongly cites Digest 1.2.2.46 as evidence that Ligarius served under Varus at Utica.

³ Cic. Fam. 5.13.14; Schol. Gron. pp.83-4. Cf. Walser (92); Geizer 271.

⁴ Cic. Lig. (passim); Quint. Inst. Orat. 11.1.80; Plut. Cic. 39.7; Plut. Brut. 11.1.

arising out of Ligarius' association with Juba (Walser 92; Münzer, RE 13.1.521), as an unspecified "Capitalprozess" (Mommesen, Staat 2.1.735), and as no charge at all (Long 4.400-1).

The first problem is whether Tubero relied on Ligarius' hostility to Caesar (or the Roman People), or on the personal 'iniuria' suffered by the Tuberones. Cicero (Lig. 10.29) puts this question squarely, arguing that Q. Tubero's continued adherence to Pompey after the rebuff in Africa is inconsistent with his present concern with an injury to the 'res publica'; and, if he relies on personal injury, there is no reason to believe that Caesar will punish Tubero's opponents when he has forgiven his own. This passage suggests that Tubero framed the charge in language which admitted of two constructions, which would not have been the case if the indictment had given the degree of particularity suggested by Quintilian or Pomponius. It therefore seems that the only allegation of fact was the bald "quod in Africa fuerit".¹ Cicero did not elaborate on the indictment, and understandably so. An outright "quod arma contra populum Romanum tulisset" would have been embarrassing, in view of the decision of the defence to admit the facts, and not to seek even to give them an innocent interpretation (Lig. 1.1; 10.30); such a line, if taken in reply to an indictment alleging the bearing of arms against the Roman People, would have ensured a conviction.

But even the bald "quod in Africa fuerit" must have been coupled with a conclusion of law in the indictment. Mere presence in Africa, unlike the mere bearing of arms against the Roman people, could not constitute an offence.

1 Plutarch's $\alpha\lambda\lambda' \epsilon\kappa \alpha\iota\sigma\alpha\rho\omicron\varsigma \pi\omicron\lambda\epsilon\mu\iota\omega\upsilon \epsilon\iota\varsigma \epsilon\gamma\gamma\epsilon\gamma\omicron\tau\epsilon\iota$ (Cic. 39) is, 'in the light of the Latin texts, unacceptable.

for it is not possible to assume a rule: "hac lege tenetur qui in Africa fuit fueritve". The charge must have run: "(aliquid fecit) quod in Africa fuerit"; the obvious complement is "maiestatem populi Romani minuit quod ...". This, like the charge against Norbanus (pp. 57-60 above) would have disclosed an indictable offence, while not excluding a degree of uncertainty which Cicero was able to turn to his advantage. Cicero toyed with the idea of submitting the legal defence of 'maiestatem auxi': "Taceo, ne haec quidem conligo, quae fortasse valerent etiam apud iudicem: 'Legatus ante bellum profectus, relictus in pace, bello oppressus, in eo ipso non acerbus, totus animo et studio tuus'" (10.30); but realising that the facts were against him, he wisely abandoned this defence in favour of a straightforward plea 'ad misericordiam' (ibid.).

It is not impossible that the ambiguity in the charge was deliberate on Tubero's part. As a recognised jurist (Dig. 1.2.2.46) he may well have come to the conclusion that Ligarius' conduct was maiestas, regarded from both the "public" and the "private" points of view. Ligarius' connection with Juba was clearly maiestas,¹ and a case could also have been based on the wrongs done to the Tiberones. There had been a wrongful act against L. Tubero in his capacity as a magistrate, and it could also have been urged that Ligarius, in his quasi-magisterial capacity as a legate, had not lived up to the moral standard required of him when he refused aid to a Roman citizen in distress. Some such reasoning must underlie Pompeius' version of the charge (Dig. 1.2.2.46). It may therefore be supposed that Tubero enlarged on both

1 Cf. Dig. 48.4.4pr: "cuiusve opera dolo malo hostes populi Romani commeatu armis telis equis pecunia aliave quae adiuti erunt"; and Dig. 48.4.10: "cuius ope consilio dolo malo provincia vel civitas hostibus prodita est." This should be read with the fact that Juba had been declared a 'hostis' by the lawful organs in Rome, although the Pompeians had made him an ally. Dio 41.42.7; cf. Lig. 8.24. See also Walser (91).

the "public" and the "private" grounds in his address to Caesar (although not in the indictment), inviting the acceptance of either or both. One alternative was transmitted by Quintilian's source, and the other by that of Pomponius. It is just possible, having regard to the very corrupt form in which excerpts from Pomponius' Enchiridion found their way into Digest (1.2) (Schulz, *Legal Science* 158), that something has been lost between "aquam haurire" and "quo nomine" in Digest (1.2.2.46). Pomponius may have said that Ligarius failed to leave the province on the arrival of a successor to his principal (Considius), and that it was for this that he was prosecuted; it would have been a simple extension of the *lex Cornelia maiestatis* to apply to a legate the rule requiring a retiring governor to leave promptly (cf. p.92 above). This view receives some support from Cicero's admission that, while there was nothing criminal in Ligarius' assumption of his legation, or in his acceptance of a mandate when Considius left (Lig. 1.2 - 2.4), it was a "necessitatis crimen" to remain after the arrival of Varus.

Long (400-1) argues that the proceedings against Ligarius did not amount to a trial at all, for four reasons: there was no charge; the case was heard by Caesar, and not by a quaestio; Ligarius was not present; and Cicero's speech falls under the category of "deprecatio", and deprecatio had no place in regular criminal trials (cf. Mommsen, *Straf* 435 and n.1). As to the charge, this has been sufficiently analysed above. As to Caesar's exercise of jurisdiction, Mommsen does not doubt that it was a criminal trial, although conducted under Caesar's extraordinary dictatorial authority (*Staat* 2.1.735); *Straf* 144). As to the absence of Ligarius, there was no general prohibition against trying an accused 'in absentia', although it was frowned upon (Mommsen, *Straf* 333-5). It is suggested that a general

right to prosecute 'in absentia' is implied by the existence of special rules forbidding it in particular cases (e.g., *Big.* 3.3.54pr; 48.2.12pr; 48.5.16.1). As to *deprecatio*, it is defined as follows: "*Deprecatio est cum et peccasse se et consulto fecisse reus confiteatur, et tamen postulet ut sui misereantur*" (*Auct. Herenn.* 1.14.24; cf. 2.17.25; *Cic. Invent.* 2.11.15). Quintilian says that there is room for *deprecatio* "in senatu et apud populum et apud principem et ubicumque iuris clementia est" (*Inst. Orat.* 7.4.18), including trials "apud C. Caesarem et triumviros" (*Inst. Orat.* 5.13.5); he cites the general opinion "quod genus causae (sc. deprecationem) plerique negarunt in iudicium unquam venire",⁴ and says that this is corroborated by Cicero's assertion (*Lig.* 10.30) that he has never before urged, as he now does, "ignoscite iudices, erravit, lapsus est, non putavit; si unquam posthac." It will be noticed that *deprecatio* required the admission not only "peccasse se", but also "consulto fecisse", in which regard Quintilian seems to have overlooked Cicero's express denial that his client acted with intent: "Quod post adventum Vari in Africa restitit, si est criminis, necessitatis crimen est, non voluntatis" (*Lig.* 2.5). Furthermore, the rule "(nunquam) in iudicium venire" could apply only to proceedings before a *quaestio*, for Quintilian allows *deprecatio* in all other criminal courts. It is clear that *deprecatio* was not possible before a *quaestio*, for there the only competent verdicts were "*fecisse videtur*" and "*fecisse non videtur*" (p.76 n.1 above). In all other courts *deprecatio* was possible, but this in no way meant that the court ceased to be a criminal tribunal.

Walsen (94-5) believes that the trial of Ligarius was engineered, in that Cuesar knew and approved the charge and the defence in advance, and had decided before-hand to

⁴ *Inst. Orat.* 7.4.17; cf. 5.4.5; cf. *Auct. Herenn.* 1.14.24; 2.17.25; *Cic. Invent.* 2.11.15.

pardon Ligarius, knowing that his part in the bargain with Juba had been negligible; the purpose of the trial was to show that any man could hope for forgiveness, and so to persuade Varus and Labienus to cease, rather than to continue the fight in Spain. Even if this is so, it is significant that Caesar elected to pardon Ligarius after a public trial, rather than by an act of clemency in the Senate, as in the case of Marcellus (cf. Cic. Lig. 12,37). It was necessary to press home the lesson that people like Varus and Labienus were guilty of maiestas; to this end an indictment was raised against Ligarius, and prosecuting and defence counsel were encouraged to canvass the issues fully. The more clearly the guilt of Ligarius was established, the more dramatic would be the impact of the pardon which Caesar granted. In order to heighten the effect, Tubero was allowed to demand an actual death sentence, and not the mere continuation of the exile which had already been imposed on Ligarius (Lig. 4,11; 5,13). Cicero (Lig. 4,11) is probably right to describe this demand as unprecedented (cf. pp. 74-6 above), but the fact that Caesar entertained the demand makes the whole case curiously reminiscent of the similar tactics which he had adopted against Rabirius (pp. 35-7 above). In both cases a minor political figure was involved in a "cause célèbre", with a threat of execution looming large, and in both cases the purpose was not so much to secure a conviction as to propagate a message; in the case of Rabirius, that Roman citizens could not be executed without trial (Brecht, *Perduellio* 176-80); and in the case of Ligarius, that the remnants of the Pompeian forces could no longer claim to represent the 'res publica'.

In November 45 B.C. the Galatian tetrarch Deiotarus was accused by his grandson Castor, and his slave Phidippus, of having attempted to murder Caesar when the latter was his guest after Zela. Deiotarus was represented by legates at

the trial, and Cicero appeared in his defence. The case was tried by Caesar at his house, apparently sitting with a consilium (Cic. Deiot. 2.5-7; 11,32). Caesar seems to have reserved judgment,¹ and had not given his verdict at the time of his death; but subsequently Antony posted a decree in favour of Deiotarus, which allegedly came from Caesar's documents (Cic. Phil. 2,93-5).

The principal charge against Deiotarus was "domi te suae interficere voluisse" (Deiot. 5,15), which was maiestas under the rule stated in Digest (48,4,1,1): "cuiusve opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatem habet occidatur".² Indeed Cicero uses similar language: "Contra cuius vitam consilium facinoris inisse arguere" (Deiot. 2,4). There was also a twofold supplementary charge: "Uma regem in speculis semper fuisse, cum a te animo esset alieno, altera exercitum eu. contra te magnum comparasse" (Deiot. 8,22). Deiotarus' hostile attitude to Caesar had allegedly been manifested in various ways (8,24,25,26; 12,33), the most significant being the allegation that Deiotarus had received letters from his legate, Blesamius, "te in invidia esse, tyrannum existimari, statua inter reges posita animos hominum vehementer offensos, plaudī tibi non solere"³. The "exercitum magnum" which Deiotarus was alleged to have raised against Caesar (8,22) was apparently a force which Deiotarus had attempted to send to Cassilius Bassus (8,23).

In striking contrast to the abject tone of the speeches

1 There may, however, have been several hearings on various charges. Cf. Cicero (Phil. 2.37.95): "Semper enim absenti adfui Deiotaro".

2 See, however, p.302 below.

3 Deiot. 12,33. If Cicero's fatuous answer to these allegations (12,33-4) was acceptable to Caesar, a serious doubt arises as to the latter's mental state at the time.

for Marcellus and Ligarius, the charges are demolished in a manner strongly reminiscent of the old tearaway Cicero of the Republican courts (5.15 - 12.33). There is also a critical note which is absent from the other two speeches. Cicero suggests that it is wrong for Caesar to be the judge in his own cause (2.4), and that his house was chosen as the venue in order to cut off the rhetorical flourishes which would have swayed a public audience (2.5-7). This seems to suggest that Caesar deliberately frustrated a plea of "maiestatem auxi", for it was precisely by means of rhetoric that M. Antonius pressed home that plea at the trial of Norbanus (p.59 above). Most pertinently of all, Cicero launches a veiled attack on Caesar's clemency. Caesar, having already written a letter of encouragement to Deiotarus, has committed himself to clemency, and it is not his practice to go back on his word (14.38). This leads to the general admonition that no one whom Caesar has pardoned should have any reason to fear a revocation of the pardon (14.39). It seems that revocation must have been an issue at the time. Perhaps the substantial assets of the pardoned and the needs of the proposed Parthian campaign had dictated a revision of the policy of clemency.

The real significance of Deiotarus' trial, however, lies elsewhere. Heitland (3.361) comes close to the truth when he says: "the whole trial was a striking assertion of arbitrary power, for the Senate do not seem to have had any voice in the matter at any stage, though it was so closely connected with external policy". It is suggested that the key is the existence of a 'maiestas' treaty between Rome and Deiotarus, and that his trial was the first example of the use of the domestic Roman Criminal Law to coerce an ally who had failed to uphold Roman maiestas. Deiotarus' maiestas relationship with Rome probably went back to Pompey's command

in the East. The 'acta' of Pompey whose ratification Caesar procured in 59 B.C. included the creation of twelve Galatian tetrarchs under the suzerainty of Deiotarus; there was probably a general enabling law under which the ratification of individual treaties was dealt with by Vatinius, to the exclusion of the Senate (Pocock 170; Gelzer 68 and n. 32). Deiotarus owed his position initially to Pompey (Cic. Phil. 11.13.34), but for its legal validity he was indebted to Caesar (Bell. Alex. 66.1). Gelzer (241.319) infers a 'maiestas' treaty with Deiotarus from Bellus Alexandrinus (68.1; see below). There is perhaps a better piece of evidence. Domitius Calvinus, approached by Deiotarus for aid against Pharnaces, realised that for "regna sociorum atque amicorum" (i.e. 'maiestas' allies) to be seized by a foreign king would be "infame"; he warned Pharnaces to leave Armenia and Cappadocia, "neve occupatione belli civilis populi Romani maiestatesque temptaret" (Bell. Alex. 34.2). In other words, an attack on Armenia would be an assault on Roman maiestas. But as Deiotarus held Armenia Minor (Bell. Alex. 34.1), it can be argued that Roman maiestas was involved only if there were a 'maiestas' treaty with him.

Deiotarus supported Pompey in the Civil War, and accompanied him on his flight after Pharsalus. In 47 B.C. the other Galatian tetrarchs complained to Caesar that Deiotarus had appropriated territory unlawfully; Deiotarus sought Caesar's pardon on the ground that it had not been for him to judge the disputes of the Roman People, but to obey the power on the spot (Bell. Alex. 67). Caesar, saying that Deiotarus ought to have known "quis urbem Italianque teneret, ubi res publica esset, quis denique ... consul esset" (Bell. Alex. 68.1), restored Deiotarus' royal titles, but ordered him to furnish a legion against Pharnaces, and postponed his decision on the tetrarchs' complaint (Bell. Alex. 68.1.2). As Caesar

had pointed out, the issue was whether Deiotarus had discharged his 'maiestas' obligation to Rome by lending support to Pompey. Cicero canvassed this issue at the trial, arguing that Caesar had never accused Deiotarus "ut hostem, sed ut amicum officio parum functum" (Deiot. 3.9). When the Senate had passed the ultimate decree against Caesar, and the consuls and Senate had left Italy, Deiotarus had not unreasonably assumed that the security of the Roman People, on which his own safety depended, was in jeopardy (4.11). He had joined Pompey "vel rogatus ut amicus, vel excessitus ut socius, vel evocatus ut is qui senatui parere didicisset" (5.13) - that is, in discharge, as he saw it, of his 'maiestas' obligation. It may seem that, in trying Deiotarus, Caesar came very close to an outright assertion of personal maiestas, but in the final analysis there was still a saving clause in the suggestion put forward in Bellum Alexandrinum (68.1): Deiotarus had misconceived the whereabouts of the Roman State, and had therefore not in fact honoured the 'maiestas' treaty; and he had also forgotten that Caesar, as consul, was the proper representative of the State.

In January 44 B.C. Caesar's statue on the rostra was found crowned with a diadem. The tribunes Epidius Marcellus and Caesetius Flavius ordered it to be removed.¹ This was all that happened, according to Dio (44.9.2-3); Caesar, although annoyed, held his peace. Suetonius (Caes. 79.1-2) adds that the tribunes imprisoned the men responsible, whereupon Caesar reprimanded and summarily degraded them. Closely connected² with this incident is that which occurred when Caesar was returning after celebrating the Latin Festival

¹ Suet. Caes. 79.1-2; Dio 44.9.2-3; Appian B.C. 2.108. 449; Plut. Caes. 61.3.

² Later on the same day, according to Rice Holmes (Republic 3.334.)

on the Alban Mount. Some of the spectators lining the route hailed him as king, to which Caesar replied: "Caesarem se non regem esse".¹ Suetonius says nothing more about the incident, but Dio reports (44.10.1-3) that the tribunes Marcellus and Flavius attempted to prosecute the first man who had hailed Caesar as king, whereupon Caesar became very angry, although he took no action for the moment. But when the tribunes issued an edict, declaring that their freedom of speech was being inhibited, Caesar acted. According to Dio (44.10.2-3) Caesar accused the tribunes in the Senate; rejecting the proposed death sentence, he accepted a decree removing them from the tribunate, and then struck their names from the Senate list. Dio, no doubt influenced by the practice of a later period, is wrong to speak of a trial in the Senate, for the criminal jurisdiction of the Senate was still in the future (cf. p. 192 below). Velleius (2.68.4) says, perhaps correctly, that Caesar refrained from exercising his criminal jurisdiction as dictator, and confined himself to a censorial notation (cf. Lévy Per. 116.)

From a legal point of view Caesar had no case against the tribunes. Whether they took criminal proceedings against the man who crowned Caesar's statue, or the spectator who first hailed him as king, it is clear that the tribunes were well within their rights. Both acts fell squarely under "affectatio regni" and as such were a form of perduellio in one of its oldest connotations, the proper prosecution of which was in the comitis centuriata at the instance of the tribunes.² There is no reason to believe that "affectatio regni" was ever included in a lex maiestatis. Indeed it is

¹ Suet. Caes. 79.2; cf. Dio 44.10.1; Appian B.C. 2.108. 450-3. Gelzer's explanation (296) that "Rex" was a "Beiname eines Zweiges der Marcii" - namely the Rex Marcus who flourished circa 54 B.C. (Syme, Imperator 174) - is strained. Dio (44.10.1) would have conveyed this subtlety by circumlocution, rather than by οὐκ ἔφη βασιλεὺς ἀλλὰ Καίσαρ καλεῖσθαι.

² Mommsen (Staat 2.318.2; Straf 551.4); Brecht (Perduellio 191, 196.2; Maiestas 355.1, 357); Pollack 179 note.

unlikely that it could have been prosecuted as *maiestas* at all, even on a '*sultae inrogatio*' in the *comitia tributa*, for, although a form of *perduellio*, it had no connection with the '*Reichenschaftsprozess*' in respect of '*Amtsverbrechen*' (cf. Brecht, *Maiestas* 358.10). It was because the tribunes had the law on their side that Caesar was unable to make use of his dictatorial criminal jurisdiction, but he nevertheless reacted with the sensitivity which he habitually showed to any attempt to attack him by means of a political prosecution.¹ Not content with the political ruin of the tribunes, Caesar tried, although without success, to persuade Caesetius' father to disown his son (Val. Max. 5.7.2).

The *crimen maiestatis* was the subject of Caesar's literary activity during his dictatorship, as it had been in Gaul. Taylor (*Politics* 170-1) makes the interesting suggestion that Caesar's '*Anticato*', which was published in 45 B.C. in rebuttal of Cicero's '*Cato*', was presented as a speech for the prosecution, charging the dead Cato with *maiestas*. The testimonial and fragments² seem to support this hypothesis. Cremutius Cordus, charged with *maiestas* in 25 A.D. for having praised Brutus and Cassius in his history, said in the course of his discourse on freedom of speech: "*Marci Ciceronis libro, quo Catonem caelo aequavit quid aliud dictator Caesar quam rescripta oratione, velut apud iudices, respondit?*" (Tac. Ann. 4.34.7). Cicero is to a similar effect: "*Nam aut negari*

1 Caesar was never allowed to forget the *maiestas* prosecution which his opponents had long sought to bring. His triumph in 46 B.C. his soldiers shouted: *ἄν μὲν καὶ τοὶ θεοὶ, καὶ ἀνθρώποι, ἔν δὲ καὶ οὐρανὸς, βασιλεύσει* (Dio 43.20.3). Dio (43.20.3-4) understood this to mean that if Caesar took the just course of restoring the government to the people he would have to stand trial for what he had done *ἔξω τῶν νόμων*. But if he took the unjust course of retaining his power he would be king.

2 For which see Oberlinus (792-3); Klotz, C. Iulii Caesaris *Commentarii* (Teubner 1927) 3. 185-90.

potest id factum esse quod laudetur, aut non eo nomine adficiendum quo laudator adfecerit, aut omnino non esse laudabile, quod non recte non iure factum sit, quibus omnibus generibus usus est nimis impudenter Caesar contra seum Catonem."

One of Caesar's accusations was that, as praetor, Cato had often been improperly dressed when presiding in court (cf. p. 94 above). Plutarch (Cat. Min. 44.1) reports this allegation in language which, for a Greek author, gives an uncharacteristically clear indication that the crimen maiestatis is meant: εἰς δὲ τὸ ἀξίως ἔτος αἰρεθεὶς ὁ Κάτων στυγνὸς οὖδ' ἐν ἔδοξε προστιθέναι τῇ ἀρχῇ τοσοῦτον εἰς σεμνότητα καὶ μέγεθος ἔρχων καλῶς, ὅσον ἀφαιρᾶν καὶ κατασχέειν ἀνυπερβητόν καὶ ἡλίτων πολλῶν· ἐπὶ τὸ βῆμα κροεργόμηνος καὶ θανατοῦχος δίκας ἐκίμων ἐνδεδυμένος ὄντω βραβεύων.

Another charge was that Cato had transacted public business while drunk (Plut. loc. cit.) It was also alleged (Plut. Cat. Min. 44.7) that Cato, when attempting to curb bribery, had usurped the functions of the Senate, the Courts, and the magistrates - a fone of maiestas analogous to "quive privatus pro potestate magistrature quid sciens dolo malo gesserit" (Dig. 48.4.3.)

CHAPTER IX

"QUI MAIESTATEM POPULI ROMANI MINUERIT PER VIM"

It has been said¹ that the evidence for Caesar's maiestas law is Cicero (Phil. 1.9.23): "Quid, quod obrogatur legibus Caesaris, quae iubent ei qui de vi, itemque ei qui maiestatis damnatus sit, aqua et igni interdici? quibus cum provocatio datur, nonne acta Caesaris rescinduntur?"² This evidence has been diversely interpreted. Mommsen³ summarily dismisses Caesar's maiestas law as a mere penal section in his judiciary laws.⁴ The argument is, presumably, that if Cicero here purports to give the full content of Caesar's law he cannot be referring to a substantive lex maiestatis, for a law consisting only of a sanction is not conceivable;⁵ it would follow that, as a mere penal amendment, the provision attested by Cicero would properly have been included in a general judiciary law. Other authorities⁶ are inclined to take this evidence as proof of a substantive law. Although the point does not seem to have been debated by the authorities consulted, the reasoning would probably be that Cicero's language should be given a wider import. He says (Phil. 1.9.21) that Antony has introduced a law granting 'provocatio ad populum' to those

1 Rein 515; Mommsen (Straf 541 and n.2); Greenidge (Procedure 427); Girard (Leges 303); Rotondi 422; Rice Holmes (Republic 3, 284-5); Cicero 251.1; Kibler 548; Schiwas 132; Arangio-Ruiz 137; Chilton 75; Rogers (Treason 91).

2 Straf 541.2; cf. Zumpt (2.2.476-7); Botsford 455 and n. 7; Cicero 251.1; Lengle (Straf 47); Brecht (Maiestas 357).

3 An argument which depends, before anything else, on the validity of the assumption that the known *leges Juliae iudiciorum publicorum et privatorum* were introduced by Caesar, and not by Augustus. On this question see p. 304-5 below.

4 But see Cicero (Rep. 2.31.54): "Neque vero Leges Porciae ... quicquam praeter sanctiones attulerunt novi".

5 Rein 515-6; Greenidge (Treason 234-5; Procedure 427); Pollock (199.3); Girard (Leges 321.1); Schiwas (132); Kibler (548); Arangio-Ruiz (137); Siber (Analogie 22,66; Verfassung 290); Chilton (75). See also p.179 n.2 below.

convicted of vis and maiestas: "Altera promulgata lex est, ut de vi et maiestatis dammati ad populum provocent, si velint". He then contends (Phil. 1.9.23) that the law promulgated by Antony obrogates Caesar's laws which laid down interdiction from water and fire as the penalty for those crimes, and that therefore Caesar's 'acta' are, in effect, annulled. "Obrogatio" was the tacit repeal of an earlier law by the passing of a later one which was inconsistent with it, and which was therefore deemed to repeal it (Krugger 22), and Cicero's point is that the grant of provocatio is such a tacit repeal. It does not matter, as far as the present problem is concerned, whether 'provocatio ad populum' meant the exercise of jurisdiction by the comitia as a court of first instance, or as a court of cassation which heard an appeal against a tribune's judgment (pp.18-20 above), for in either case the final decision rested with the comitia.¹

It would therefore be argued that Antony's introduction of provocatio must have related to trials conducted in the quaestio maiestatis or the quaestio de vi, for it would not have been an innovation if it had merely dealt with the long-standing right of provocatio in the anquisitio-comitia procedure. The further argument would be that, according to Cicero, Caesar's laws were obrogated because the final decision would no longer rest with the quaestio, but with the comitia. It would follow that Caesar's laws had not only laid down a penalty, but had also prescribed a substantive category of vis and a substantive category of maiestas over which the respective quaestiones were to have jurisdiction, and to which the penalty of interdiction was to apply.

1 Antony's introduction of provocatio in respect of matters which fell under a permanent quaestio (de vi or maiestatis) does, however, tell against Brecht's view (p. 19 above) that the comitia was the court of first instance. On Brecht's theory the 'anquisitio' conducted by a tribune was a preliminary procedure designed to ascertain a proposal on the question of sentence, which the tribune would then press before the comitia. But it would not have been within the competence of a quaestio to return a verdict which amounted merely to a proposed sentence, for it was inherent in the constitution of a quaestio that the presiding praetor could pronounce only "fecisse videtur" or "fecisse non videtur" (p. 76 n.1 above).

It is suggested, however, that Caesar's *maiestas* law should not be debated on the basis of Philippic (1.9.23), for it is felt that this passage does not furnish the crucial evidence for the law. It is found that none of the authorities consulted seems to have noticed the specific and unambiguous evidence which Cicero in fact furnishes,¹ Cicero (Phil. 1.7.16 - 1.10.25) attacks Antony for attempting to ratify those 'acta' of Caesar which he found in the latter's papers, while promulgating laws which nullify Caesar's real 'acta', the 'leges Iuliae'. Antony's introduction of *provocatio* is criticised twice. One of these criticisms has already been discussed (Phil. 1.9.23). The other occurs in Philippic (1.9.21,22), where Cicero says that no one is now accused under Caesar's *lex de vi* and his *lex maiestatis*, nor is anyone likely to be: "Nemo reus est legibus illis, nemo quem futurum putamus" (1.9.21). The reason is: "Arms enim gesta nunquam profecto in iudicium vocabuntur" (ibid.) A precise statement of the content of the *maiestas* law follows. Cicero says that Antony's proposed introduction of *provocatio* is disgraceful, and gives the following reason (1.9.21): "Quid enim turpius quam qui maiestatem populi Romani minuerit per vim, eum damnatum iudicio ad eam ipsam vim reverti, propter quam sit iure damnatur?" (italics mine). Cicero himself explains what this statement means when he says 'that Antony's purpose is to make prosecutions impossible under Caesar's *lex de vi* and his *lex maiestatis*, for neither accusers nor jurors will want to expose themselves to the violence of the hired mob in the Assembly (1.9.22). In other words, one who has been condemned for violence will again resort to violence,

1 Zumpt (2.2.476) notices Philippic (1.9.21), but simply takes it as further proof that Caesar merely introduced a new penalty. Kytzler (118) discusses Philippic (1.21ff), but only in regard to the political implications. Pollack (199, 3) relies on Philippic (1.9.21,23) for the view that Caesar's *maiestas* provisions were included in his *lex de vi*.

for his appeal to the *comitia tributa* will, according to Cicero, inevitably be conducted in violent circumstances. It is suggested that Cicero here gives, although in an abbreviated form, the sole category which was laid down by Caesar's *maiestas* law, namely "*qui maiestatem populi Romani minuerit per vim*". It cannot be contended that Cicero here mentions only one of the categories of the *lex*, for he specifically links the violence which will attend the appeal to the violent diminution of *maiestas* which will form the subject-matter of the appeal. Furthermore, he has already said (1.9.21) that prosecutions under Caesar's *maiestas* law are unlikely, because "*armis gesta*" will probably never be brought to court.

It may be objected that Cicero (Phil. 1.9.21-2) does not attribute the *maiestas* law which he is discussing to Caesar, whereas he credits Caesar with the authorship of the laws which prescribed the penalty of '*aqua et igni interdictio*' for *vis* and *maiestas* (1.9.23). It may therefore be argued that the reference (1.9.21-2) is to a *maiestas* law of someone other than Caesar. The reasoning would be that Cicero makes two separate attacks. The first (1.9.21-2) culminates in the statement that Antony's law does not so much give a right of *provocatio* as destroy the *quaestio* and the *lex de vi*, and the *quaestio* and the *lex maiestatis*: "*Non igitur provocatio ista lege datur, sed duae maxime salutares leges quaestionesque tolluntur*". The criticism concludes with the assertion that the destruction of these two *quaestiones* will give free rein to "*furor tribunicius*" (1.9.22), that is, when the *comitia* hears the appeal. Cicero then seems to turn to a second criticism (1.9.23), starting with "*Quid, quod obrogatur ... interdicti?*" It is at this point that for the first time he assigns the laws which he is discussing to Caesar. He then dwells on the fact that *provocatio* will rescind the '*acta Caesaris*', by which he means '*leges Caesaris*' (1.9.23 - 10.25).

The answer to the objection seems to be that if Cicero (1.9.21-2) does not mean Caesar's *lex de vi* and *lex maiestatis* when he speaks of "*duae maxime salutares leges*", he must mean laws on these subjects by other authors. As far as *maiestas* is concerned, he would therefore be referring to an earlier law which laid down the category '*maiestas minuta per vim*'. This can only be the *lex Appuleia*. It would follow that Antony, for a reason which is not apparent, applied *provocatio* to the *lex Appuleia*, selected at random from the *maiestas* statutes. It seems clear, however, that the law which Antony selected was not the *lex Appuleia*, for there is a significant difference between the law under discussion and Saturninus' law. Cicero says (1.9.22) that the abolition of the "*duae maxime salutares leges*" will have the following result, among others: "*Quid est aliud hortari adulescentis, ut turbulentis, ut seditiosis, ut perniciosi cives velint esse?*" It follows that the "*salutary*" *maiestas* law applied to "*adulescentes*" as well as to others. But the *lex Appuleia* was probably restricted to magistrates and senators (pp. 99-100 above), and therefore is not the law to which Cicero refers. The application of the law to "*adulescentes*" also rebuts any suggestion that Caesar merely re-enacted the *lex Appuleia*, for it seems clear that Caesar introduced a new principle, by making his law applicable to all classes insofar as the category '*maiestas minuta per vim*' was concerned.¹

Furthermore, the subversive effect of *provocatio* on the law which prescribed the category '*maiestas minuta per vim*' is raised by Cicero at the heart of the attack on Antony

1 The position is no different if, as some authorities believe, the *lex Cornelia* was a "general" law of *maiestas* (pp. 78-9 above). In that event '*maiestas minuta per vim*' would have formed one, but only one, of the categories in Sulla's law. It would therefore have to be supposed that Antony restricted *provocatio* to a particular chapter of Sulla's law, which is perhaps even stranger than the random selection of the *lex Appuleia*.

for his nullification of Caesar's real 'acta', the 'leges Iuliae'. In this context it is not to be assumed that Cicero suddenly went off at a tangent and accused Antony of frustrating the *lex Appuleia* or part of the *lex Cornelia* - laws introduced by persons to whom Antony owed no allegiance, and whose 'acta' were not in dispute. Indeed Cicero makes it quite clear that the acts and laws of Sulla are not in issue. In support of his contention that Caesar's laws were his real 'acta' he says: "Quaere acta Gracchi; leges Semproniae profertentur; quaere Sullae; Corneliae."¹ Finally, the law granting provocatio is introduced with the words: "altera promulgata lex est ..." (1.9.21). This law being "altera", the other law promulgated by Antony concerned the third decuria, in which Cicero saw the rescission of Caesar's judiciary laws: "Quid? lege, quae promulgata est de tertia decuria, nonne omnes iudiciariae leges Caesaris dissolvuntur?" (1.8.19). It seems impossible to doubt that all the laws which were "overthrown" by Antony were 'leges Iuliae'. It is therefore found that Caesar's *lex Julia maiestatis* laid down the category "qui maiestatem populi Romani minuerit per vim"², and that it differed from the *lex Appuleia* in that it extended the scope of the crimen maiestatis, at least in its "violent" form, from magistrates and senators to all classes.

1 Phil. 1.7.18. The possibility that the law which dealt with 'maiestas minuta per vim' is an otherwise unsuspected *lex Pompeia maiestatis*, carried in conjunction with Pompey's known *lex de vi* of 52 B.C., cannot be maintained. Firstly, Pompey's *lex de vi* created only a special commission to try those concerned in the murder of Clodius and the resulting disturbances (Ascon. 37-9C). Secondly, Cicero refers to Pompey's laws in the passage which demonstrates that the 'acta' of Caesar's predecessors were their 'leges': "Quid? Pompei tertius consulatus in quibus actis constitit? Nempe in legibus".

2 And, in so doing, retained the technical concept 'maiestas populi Romani'. It is possible that Dio (44.49.3) refers to this maiestas law, and the accompanying *lex de vi*, in his version of Antony's funeral oration: ἄλλὰ οὐ μὲν, ὅπως μὴ δὲ οὕτως ἐκτρέφω τις φοβήσεται, κολλὰ ἐνομοθέτησά, σὲ δὲ οὕτως οὐκ ἐτρέφω ἀπέχεσθαι οἱ φίλοι. For the relationship between *vis* and *maiestas* see pp. 300-1 below.

It is suggested that events made the introduction of a law concerning 'maiestas minuta per vim' a matter of urgency. The year 47 B.C. witnessed an extraordinary outbreak of violence in Rome, during Caesar's absence in Egypt and the East. The tribunes Dolabella and Trebellius, representing the interests of debtors and creditors respectively, were attempting to settle their differences by gang warfare. Antony's decree that no private individual was to bear arms in the city having proved ineffective, the Senate gave him full powers for the maintenance of order, including the right to keep troops within the walls. But Antony had to go to Campania to deal with the mutinous veteran legions, and his deputy L. Cassar was unable to check the disturbances. When Antony returned he at first supported Dolabella, and prosecuted Trebellius for appropriating soldiers to his own use; but afterwards he gave secret assistance to Trebellius, allowing him to raise troops. Violence now reached the proportions of a military campaign,¹ with each side occupying vantage points in turn. The situation became so bad that the virgins removed the holy vessels from the temple of Vesta. When the Senate renewed the grant of full powers to Antony, Dolabella appointed a day for consideration of his bills concerning debts and rents. His partisans barricaded the Forum, and prepared to resist any attempt to frustrate the introduction of the bills. Antony thereupon brought a large force down from the Capitol, cut down the tablets advertising Dolabella's laws, and hurled some of the rioters from the Tarpeian Rock. But violence continued until Caesar arrived in October.²

Two major problems faced Caesar at this stage. He had to prepare for the African campaign, and he had to ensure

1 Cf. "armis gesta", Cicero (Phil 1.9.21).

2 Dio 42. 29.1 - 33.2; Cf. Bell. Alex. 65.1; Plut. Ant. 9.1-4; Cic. Att. 11.10.2; 11.23.3.

that while he was away Rome would not be plagued by a repetition of the recent seditious spree. The problem of the African campaign was mainly financial. The veterans in Campania, having been kept out of their promised rewards, were rioting and refusing to go to Africa. They dealt roughly with P. Sulla and Sallust, and marched on Rome, where Caesar was hard put to placate them.¹ Caesar resorted to extreme measures in order to raise funds. He persuaded Italian municipalities to donate crowns and statues and, under the guise of borrowing, imposed a levy on cities and individuals (Dio 42.50.2-3; Nepos Att. 7.3). Some contributions were paid as a form of "protection money". For example, Caesar pardoned P. Vestrius in Africa, "quod eius frater Romae pecuniam imperatam numeraverat" (Bell. Af. 64.2). The assets of Pompey, and probably of many of his supporters, were put up for auction (Cic. Phil. 2.26.64; Dio 42.51.2; Plut. Ant. 10.3). The problem of keeping the peace in Rome was partly resolved by measures designed to remove the reasons for the economic unrest (Dio 42.51.1-2), but it is suggested that an equally important solution was found in the law "qui maiestatem populi Romani minuerit per vim".

It has been said that Caesar's maiestas law was carried in 46 B.C.² But if the law was limited to the category 'maiestas minuta per vim', a date in 47 B.C. is to be preferred. There is no reason to believe that there was

1 Dio 42.52.1-55.3. See also Rice Holmes (Republic 3.232-4); Gelzer (242-3).

2 Levy (32); Siber (Analogie 22.66; Verfassung 290); Botsford (455); Rotondi (422); Rice Holmes (Republic 3.284-5). No Wein (515) finds it impossible to determine the date. No date is attempted by Fellack (199.3); Greenidge (Treason 234-5); Schiassi (132); Girard (Leges 321.1); Kibler (548); Traugott-Rutz (137). It should be noticed that even the authorities who postulate a substantive maiestas law of Caesar (cf. p.172 n.5 above) do not attempt to ascertain the possible content of the law. Their approach is simply that Caesar carried some sort of substantive maiestas law, and that it may be the 'lex Iulia maiestatis' which is attested by the juristic sources (pp. 285ff below.)

any noteworthy outbreak of violence in 46 B.C., but the events of 47 B.C. claim attention with the insistence of a neon sign. The dating of the law to 46 B.C. depends on Suetonius (Caes. 42.2): "Poenas facinorum auxit et cum locupletes eo facilius scelere se obligarent, quod integris patrimoniis exsultabant, parricidas, ut Cicero scripsit, bonis omnibus, reliquos dimidia parte multavit". Zumpt (2.2.478-9) says that "poenas facinorum auxit" means that the penalty of interdiction was introduced for certain crimes, but not all; confiscation was not introduced as an independent penalty, but as an incident of interdiction, and therefore applied only to those crimes for which interdiction was prescribed; interdiction was introduced for parricide, vis, and maiestas, and therefore it was only in those cases that the additional penalty of confiscation was imposed, of the whole property for parricide, and a half for vis and maiestas. Zumpt concludes that Suetonius (loc. cit.) refers, inter alia, to the same laws as those which, according to Cicero (Phil. 1.9.23), introduced interdiction for vis and maiestas. As Suetonius places the events which he relates in Chapter 42 after Caesar's fourfold triumph in 46 B.C. (Caes. 37), it would presumably follow that the maiestas law was carried that year. This argument would be valid if it were possible to rely on Suetonius' chronology in Chapter 42. But Rice Holmes (Republic 3.234.4 - although his dates are rather garbled) has shown that 46 B.C. cannot be inferred as the date of the measure which made loans repayable at pre-war values, merely because Suetonius (Caes. 42.2) mentions it at this point, for the evidence of Dio (42.51.1-2) clearly establishes

1 It is not possible to accept the view (Rein 515; Greenidge, Treason 235) that interdiction was the prescribed penalty for maiestas under the lex Cornelia, and that therefore Caesar merely restated that penalty, his only innovation being the addition of confiscation. See Levy (30,33, and particularly 34-9) for the proof that the prescribed penalty under Sulla's law was an actual death sentence, however infrequent its execution may have been as a result of voluntary exile; when 'aqua et igni interdictio' was introduced as an actual penalty, it meant a specific sentence of exile, instead of a death sentence.

47 B.C. as the date.¹ The possibility that Suetonius also errs in the same passage in regard to the date of Caesar's penal provisions² cannot be excluded, and there is indeed evidence to support this possibility.

Dio (43.25.1) introduces his account of the legislation of 46 B.C. with the observation that he will omit most of it, mentioning only the most noteworthy laws. It follows that he had a full record of the year's legislation before him, for otherwise he would not have said that he had made a selection. There is no mention in what follows (43.25.1-26.3) of Caesar's introduction of the penalty of interdiction and confiscation, nor of his laws concerning 'maiestas minuta per vim' or vis. But Dio knew of the latter statutes, and attached great importance to them, for he portrays Antony as making a striking point of them in the funeral oration (p.177 n. 2 above). It is therefore reasonable to suppose that Dio found no record of a maiestas law among the laws of 46 B.C. Furthermore, a feature of Suetonius' method should be noticed. His account of the Civil War (Caes. 30-36) is confined to military matters, ignoring domestic affairs in Rome.³ After discussing the fourfold triumph, rewards to veterans, and public shows (37-39), Suetonius takes up domestic reforms in Chapters 40-44. He had quite a backlog to overtake, for civil administration had scarcely been dormant from 49 to 46 B.C. Suetonius' method obliged him to compress events of different years into a brief résumé, whose position in the work has induced the erroneous belief that all the events

1 The logical date, it may be added, in view of the economic distress which underlay the violence of that year.

2 On which Rice Holmes is not consistent. He dates the maiestas law to 46 B.C. (Republic 3.284-5), and the increase of penalty attested by Suetonius (Caes. 42.3) to 45 B.C. But as Rice Holmes' evidence for the maiestas law is only Philippi (1.9.23), he clearly fails to identify the penal provisions attested by Cicero with those stated by Suetonius.

3 Except for a brief reference to Caesar's visit to Rome in 49 B.C. (Caes. 34).

to which it refers were contemporaneous.

It has been postulated that the evidence for Caesar's substantive maiestas law is not Philippic (1.9.23), but Philippic (1.9.21-2). This proposition should now be re-examined, for it is necessary to identify the laws to which Cicero refers in Philippic (1.9.23). These were either mere penal sections in Caesar's judiciary laws, as Mommsen has contended (p.172 above), or they were independent laws which included substantive categories. In the latter event they were the same laws as those de vi and maiestatis attested in Philippic (1.9.21-2), for there is no reason to assume a second pair of Caesarian laws on the subject of vis and maiestas. It would follow that Cicero discussed the substantive part of the lex Julia maiestatis in Philippic (1.9.21-2), and the sanction in (1.9.23). It has already been suggested (pp. 175-7 above) that the two criticisms which Cicero puts forward, namely in (1.9.21-2) and (1.9.23), are both criticisms of the effect of provocatio on Caesar's laws de vi and maiestatis. It should now be pointed out that there is a significant difference in the nature of the two criticisms. In the first criticism (1.9.22) Cicero's point is that the practical effect of provocatio will be the abolition of "duae maxime salubres leges quaestionesque", for no accuser or juror will care to expose himself to violence in the Assembly. In the second criticism (1.9.23) he poses a legal consequence, for he uses the technical term 'obrogatio'. Why was provocatio subversive of the substantive law (1.9.21-2) in a merely rhetorical sense, but of the sanction (1.9.23) in a technical sense? The answer seems to be that provocatio would not, in law, have disturbed the quaestio's function, which was to hand down a verdict on the merits only. The praetor could pronounce only "fecisse videtur" or "fecisse non videtur", depending on how the jurors voted; if the pronouncement was "fecisse videtur" the penalty followed by operation of law, in accordance with the prescription of

the enabling statute (p. 76 n.1 above). Antony's innovation did not alter the function of the *quaestio*, which continued to pronounce "*fecisse videtur*" or "*fecisse non videtur*". That is why Cicero, when summarising the substantive category of the law (1.9.21-2), levels only a rhetorical criticism at provocatio. The technical criticism - "*obrogatur*" (1.9.23) - relates to the technical effect of Antony's innovation, which was concerned with what happened after condemnation by the *quaestio*. Instead of the penalty following by operation of law, the matter went to the Assembly. It follows that the statutory provision "*qui (aliquid) fecit feceritve aqua et igni interdicatur*" no longer applied, for if it had there would have been no room for the intervention of the Assembly; the penalty would have become enforceable as soon as the *quaestio* pronounced a condemnation, and the accused would have found himself in exile before his appeal was heard. In order to defer execution of the sentence pending consideration by the Assembly, Antony included some provision in his law which led to the necessary inference that the lawgiver intended to repeal the earlier provision "*qui (aliquid) fecit feceritve aqua et igni interdicatur*". In this setting "*quid, quod obrogatur ...*" (1.9.23) does not mean that Cicero turned to a different set of laws, but to the sanction of the laws which he had already discussed in (1.9.21-2).¹

1 Mommsen's belief that the laws mentioned in (1.9.23) were mere penal sections in Caesar's judiciary laws can also be met by another argument. Before turning to the laws of *vis* and *maiestas*, Cicero disposed of Caesar's judiciary laws entirely, for Antony's introduction of the third decury rescinded "*omnes iudicariae leges Caesaris*" (Phil. 1.8.19). After these laws it was the turn of the *lex de vi* and the *lex maiestatis* (1.9.21-3), and it is unlikely that in (1.9.22) Cicero returned to the judiciary laws in order to add a postscript to the epitaph which he pronounced in (1.8.19). Furthermore, when Cicero intended to refer to the judiciary laws he did so expressly - "*iudicariae leges Caesaris*" (1.8.19) - and it should not be assumed that "*leges Caesaris quaelibet ...*" (1.9.23) is a circumlocution for "*leges iudicariae*."

The sanction of the lex, as attested by Philippi (1.9.3) read with Suetonius (Caes. 42.3), agrees well with the circumstances under which the law was introduced. The substantive category of the lex would assist in maintaining order during Caesar's absence in Africa, while the sanction, by including half-confiscation, would contribute to the solution of Caesar's acute financial problems. Finally, it should be pointed out that there can be no suggestion that the law merely established a special court to deal with the disturbances of 47 B.C. Cicero, in the course of his criticisms of Antony's measures, describes the *lex de vi et maiestatis* as "*populi iussa perpetuasque leges*" (Phil. 1.7.15).

It is possible that another *lex maiestatis* can be attributed to Caesar. In 48 B.C., after Pharsalus, Caesar prohibited Pompeians from returning to Italy, "*nisi quorum ipse causam cognovisset*" (Cic. Att. 11.7.2). These 'cognitiones' would have been conducted under the absolute discretion over Pompeians which was granted to Caesar. Dio (42.20.1-2), who attests this grant, is at pains to stress that the authority was granted by lex, in contrast to the *de facto* discretion which Caesar had previously exercised. It is known that there was a '*lex Hirtia*' dealing with Pompeians (Cic. Phil. 13.16.32); the law was carried in 48 B.C., if this was the year of Hirtius' tribunate.¹ The question is whether the law attested by Dio is the *lex Hirtia*.

Cicero (Phil. 13.16.32) cites an extract from Antony's letter to Hirtius and Octavian in April 43: "*Neminem Pompeianum, qui vivat, teneri lege Hirtia dictitatis*". Cicero's comment is: "*Quis, quaeso, iam legis Hirtiae mentionem facit? cuius non minus arbitror latorem ipsum quam eos, de quibus*

¹ See Broughton (2.285.3) for the controversy as to the date.

lata est, paenitere. Omnino mea quidem sententia legem illam appellare fas non est; et, ut sit lex, non dehemus illam Hirti legem putare". This passage would seem to refute the identification of the lex Hirtia with Dio's law, unless it is assumed that Dio correctly postulates a lex, but either errs as to its terms, or does not purport to give them. Shortly after the Ides of March Antony introduced a law abolishing the dictatorship, and after the abrogation of Antony's legislation Pansa carried a similar law.¹ Antony criticised Hirtius and Octavian for treating the lex Hirtia as a dead letter, but it would necessarily have fallen away if it had granted powers exclusively to Caesar, either 'eo nomine' or as dictator. Therefore Dio's $\alpha\lambda\lambda\epsilon\ \delta\ \epsilon\iota\ \kappa\alpha\tau'\ \epsilon\upsilon\ \delta\epsilon\iota\kappa\eta\sigma\iota\varsigma\ \delta\epsilon\delta\omicron\tau\alpha\iota$ (42.20.1) cannot be a fair summary of the law's terms,² but at best an indication of its practical effect. It follows that Hirtius' law would not have directly granted powers to Caesar. Its general effect was that any Pompeian who returned without authority would be punished. In practice the decision rested with Caesar, possibly acting under a senatusconsultum which supplemented the lex. But Antony would not have raised the question of the law's continued application after Caesar's death, unless it was in terms sufficiently general to admit of its enforcement otherwise than by Caesar personally.

The law, although directed against Pompeians, would not have used the vague term "Pompeiani". In accordance with the usual language of a criminal statute it would have struck at "qui (aliquid) fecit fecerit". Is it possible to expand this to "qui arma contra populum Romanum tulerunt" (cf. Dig. 48.4.1.1), and so to postulate a lex Hirtia

1 Dio 44.512; Cic. Phil. 1.3; 5.4.10. Cf. Rotondi 434; Broughton (2. 316, 335).

2 It is not suggested that a grant to Caesar personally was impossible. A lex had given Sulla similar powers: *quillo, de quo legem populus Romanus iusserat ut ipseius voluntas ei posset esse pro lege* (Cic. Verr. 2.3.38.82). But the point is that such a law would have lapsed on Caesar's death.

maiestatis? The proposition is feasible if the MSS reading of Philippic (13.16.32) is retained: "Neminem Pompeianum ... teneri lege Hirtia dignitatis"¹ A "lex Hirtia dignitatis" looks rather like a lex maiestatis. But Orelli's emendation "dictitatis" has been generally accepted.² Orelli was presumably influenced by the absence of a principal verb in the MSS, but as "teneri" may also be corrupt,³ it may be thought that "tenetis - teneri (e)" is at least as probable as "dictitatis - dignitatis (-tes)". Even with "dignitatis", however, it is possible that Hirtius dealt with something like "bearing arms against the Roman People".

What of Cicero's "et, ut sit lex, non debemus illam Hirti legem putare" (Phil. 13.16.32)? This may simply mean that the law should be attributed to Caesar, who instigated it, rather than to Hirtius, who proposed it. But Focock (161-8; cf. *Mommsen*, *Staf* 654 and n.2) argues persuasively that some of Caesar's laws in 59 B.C. were proposed by Vatinius, and were known indifferently as Julian laws and laws of Vatinius; he goes on to propound the general principle that a consul might employ a tribune to introduce a law, but might himself take so active a part in the proceedings that the law was credited either to the tribune or the consul. If a similar position is assumed for a dictator and a tribune - an assumption which is not necessary, for Caesar was in any event consul in 48 B.C. - Cicero's meaning may be that the lex Hirtia should really be known as a lex Julia.

1 Codd. quidam: dignitates.

2 A.C. Clark, *M. Tulli Ciceronis Orationes*, Oxford 1900;
G. Long, *M. Tulli Ciceronis Orationes*, Vol. 4, London 1858;
W.C.A. Ker, *Cicero: Philippics*, Loeb ed. 1926.

3 Codd. quidam: tenere.

PART THREE

MAIESTAS IN THE AUGUSTAN PRINCIPATE

CHAPTER X

"RERUM NOVARUM INITIA CONIURATIONESQUE COMPIURES"

A. LEX PEDIA (MAIESTATIS)

"Qui parentem meum interfecerunt, eos in exilium expuli, iudiciis legitimis ultus eorum facinus" (Res Gestae 2). The 'iudicia legitima' to which Augustus refers were conducted before a quaestio created by the lex Pedia, which was proposed by Q. Peditius, Octavian's fellow-consul in 43 B.C.¹ The penalty was interdiction² and confiscation - apparently total (Dio 46.48.4). The lex appears to have made express provision for trials 'in absentia'³ and for rewards to accusers (Dio 46.49.3). Mommsen⁴ says that the crime comprehended by the lex was perduellio. Although most of the sources emphasise that the law was intended to punish Caesar's murderers,⁵ Plutarch (Brut. 27.3) seems to have had a clearer understanding of the legal position: δῆλας ῥέδνου κατὰ τὸν περὶ τὸν ῥοῦρον εἰσῆγεν ἄνθρωπα κρῖτον ἐν ἀρχαῖς τοῖς μεγάλαις ἀνθηρηκότων ἔκριτον - a reasonably accurate statement of a maiestas charge under Digest (48.4.1.1): "cuiusve opera consilio malo consilium initum erit quo quis magistratus populi Romani quive imperium potestate habet occidatur". This Digest passage expresses the characteristic feature which made murder maiestas, namely the fact that the victim was a magistrate; it also expresses the

1 Vell. 2.69.5; Suet. Nero 3.1; Galba 3.2; Livy Per. 120; Appian B.C. 3.14.95; Plut. Brut. 27.3; Dio 46.48.2-3; But see p. 302 below.

2 Res Gestae 2; Vell. 2.69.5; Suet. Nero 3.2.

3 Livy Per. 120; Suet. Aug. 10; Appian B.C. 3.14.95; Plut. Brut. 27.3; Dio 46.48.3.

4 Straf. 199.3; cf. Levy 33; Volkman 26.

5 Livy Per. 120: "in eos quorum opera pater occisus est"; Vell. 2.69.5: "qui Caesarem patrem interfecerant"; Suet. Nero 3.1: "conscios Caesarinae necis"; Appian B.C. 3.14.95; ῥέδνου δῆλας ἐπὶ Καίσαρι; Res Gestae 2; Dio. 46.48.2-3;

typical maiestas provision whereby 'socii criminis' were liable. The sources particularly notice a similar provision of the lex Pedia: τοὺς μὲν αὐτοδχείρας τοὺς δὲ συνεγνω-
 χέναι μόνον (Appian B.C.3.14.95); ὅχ' ἕκασ' οἱ τε
 αὐτοδχείρας ... καὶ οἱ συνωμῶντες ὄρισιν, ἀλλὰ καὶ
 ἄλλοι πολλοὶ, ὅχ' ὅτι μὴ ἐπιβουλευσάντες ... ἀλλ'
 οὐδὲ ἐν τῇ πόλει τότε γε ὄντες (Dio 46.48.3). Appian
 (loc. cit.) also says that the category of accomplices in-
 cluded some who were not in Rome when Caesar was murdered.
 A striking case is the conviction of L. Domitius, merely be-
 cause he went to join Brutus and Cassius (Suet. Nero 3.1);
 but this may have been a doubtful extension of the lex, for
 he alone of those convicted under the lex Pedia was subse-
 quently allowed to return, and was fully reinstated (Suet.
 Nero 3.2).¹

Despite the legitimate basis claimed by Res Gestae (2),
 punishment was not always confined to interdiction, for after
 Actium Cassius Parmensis, "ultimus ... ex interfectoribus
 Caesaris", was executed at the order of Octavian (Vell. 2.87.
 3). In the same passage Velleius says that Trebonius had
 been the first of Caesar's murderers to suffer the death penal-
 ty; the reference is to Dolabella's execution of Trebonius in
 Asia in March 43.² Syme (172) believes that the charge was
 "high treason", arising out of the assistance given by Trebo-
 nius to Brutus and Cassius. But the event took place before
 Octavian's consulship, and therefore before the lex Pedia.
 It may be that the Caesarians were already experimenting with
 legal principles on which to base proceedings against the
 "liberators". This suggestion receives some support from

1 The lex Pedia was enforced more strictly than the pro-
 scriptions. The treaty of Misenum with Sex. Pompey allowed
 the proscribed to return, but excluded those condemned under
 the lex Pedia. Appian B.C. 5.72; cf. Vell. 2.77.2. See
 also Volkmann 27.

2 Cicero (Phil. 11.1-4) who suggests some sort of trial.
 Appian (B.C. 3.3.26) and Dio (47.29.3) attest a summary exe-
 cution, but Cicero is probably more accurate. Cf. Minzer
 (RE 6A, 2281).

Suetonius (Aug. 10), who asserts that Octavian, immediately on his arrival in Rome from Apollonia, decided "Brutum Cassiumque ... legibus adgredi reosque caedis absentes deferre": there was perhaps much debate as to the "leges" which could be invoked. The lex Appuleia would not have served, for even the murder of Saturninus himself had had to be prosecuted 'apud populum' (pp. 35-7 above). The lex Cornelia de sicariis et veneficiis was no doubt available, but a more imposing tag than common law murder was needed. But it is not certain that any form of maiestas was the pretext for Trebonius' execution. The only charge mentioned by Cicero (Phil. 11.2.5) is extortion in connection with Trebonius' governorship of Asia: "quaestionem habuit pecuniae publicae". The reference is probably to the funds which Trebonius had supplied to Brutus and Cassius (Münzer, RE 6A.2281). This would have made Trebonius a 'socius criminis' under the subsequent lex Pedia, and the Caesarians may have already had such a principle in mind. The difficulty is that Cicero does not mention the far more obvious complicity of Trebonius by his detention of Antony while Caesar was being murdered; but perhaps the events of the Ides of March were something on which Cicero did not care to dwell. Appian (B.C. 3.3.26) makes good Cicero's omission; Dolabella's soldiers mutilated Trebonius' body because he had taken part in the murder of Caesar by detaining Antony in conversation.

In 43 B.C. the praetor Q. Gallius, a brother of Antony's lieutenant M. Gallius, approached Octavian to ask for the command of Africa, and used the opportunity thus offered to plot against him. His colleagues removed him from office, the multitude destroyed his house, and ἡ πούλη κυρεῖν ὁδὸν αὐτοῦ. Octavian ordered him to go to his brother. He boarded a ship and was never seen again (Appian B.C. 3.14.95). Suetonius (Aug. 27) gives two versions of this case. He first says that Gallius, while making a 'salutatio' to Octavian, clutched writing-tablets under his robe.

Octavian suspected that he had a sword, but did not have him searched at once, in case he was mistaken. But shortly afterwards Gallius was arrested by troops while presiding over a court - "raptum e tribunali" - and tortured. Although he admitted nothing, Octavian himself tore out his eyes and ordered him to be executed. This version, which was apparently derived from an anti-Augustan source,¹ is followed by the second version, that of Octavian himself,² to the effect that Gallius, having sought an audience, treacherously attacked him, whereupon he was arrested. Octavian then sentenced him to interdiction - "urbs interdicta" - and sent him away. Gallius perished by shipwreck or at the hands of pirates.

The problems concern the nature of the crime and the means by which it was punished. The hostile tradition alleges summary coercion, which is quite feasible, for Octavian was already consul.³ Appian and Octavian himself report a trial,⁴ but only Appian says it was in the Senate. Volkmann (31-2) rejects an exercise of coercion, and considers whether Octavian's apparent failure to mention the senatorial trial, which would have tended to exonerate him, is due to falsification by Suetonius, or whether Appian's assumption of a senatorial court in this period is an anachronism. Volkmann's conclusion is that although the Senate had already voted a "last decree" in favour of Octavian earlier in 43, and although he retained his powers under the decree when he became consul, he preferred to consult the Senate again on this specific case, as Cicero had done in the case of those involved in the conspiracy of Catiline.

1 "In eadem hac potestate multiplici flagravat invidia" (Suet. Aug. 27).

2 Presumably in the lost "de vita sua". Appian B.C.3.14.95.

3 This appears from Appian (B.C.3.14.95), who reports this case as having taken place at the same period as the trials under the lex Pedis.

4 It is not clear how Mommsen (Straf 406.1) extorts from Suetonius the information that Octavian denied on oath that Gallius was tortured.

The difficulty is the allegation in Suetonius' first version that there was an interval between the attempt and the subsequent arrest while Gallius was presiding over a court. The hostile tradition really amounted to this: "A praetor", while discharging the duties of his office, was unlawfully seized by troops, unlawfully tortured, and unlawfully put to death. The pretext was that he had attempted to murder Octavian. But no action was taken at the time of the alleged attempt - clearly because there never was one." The anti-Octavian tradition had a contemporaneous origin in the pleasantries exchanged between Antony and Octavian from 44 B.C. onwards (Carcopino, Cicero 391-5), and it is unlikely that an allegation so easily verifiable as the arrest of a praetor "e tribunali" would have been contemporaneously circulated if it had been untrue. But the hostile tradition, minus the embellishments, is only partly accurate, for it does not suggest an alternative to attempted murder as the basis of the proceedings against Gallius. It is significant that Octavian found it necessary to attend the *Peditum quaestio* with his troops in order to encourage the jurors, and even then there was a dissentient vote by P. Silicius Corona.¹ Corona did openly what many others would have done but for the presence of the troops (Dio 46,49,5), and although no immediate action was taken against him, he was afterwards proscribed and executed (Dio 46,49,5; App. B.C. 3.14,95). The praetor presiding over the *quaestio*² may well have had something to do with the jurors' reluctance to see the light, and Gallius was a praetor, and well-qualified for an anti-Caesarian role. Another Q. Gallius, praetor in 65 B.C., presided over the *maiestas* trial of the 'popularis' C. Cornelius (v.d.Mihl, RE 7,672). M. Gallius, brother of the present Q. Gallius, fought with Antony at Mutina; Tiberius, adopted by him in his will, refused the name "Gallius" as

¹ Plut. Brut. 27.3; Dio 46,49,4-5; Appian B.C. 3.14,95; 4,427.

² McFayden (236) believes that Octavian presided as consul.

being that of an opponent of Augustus (v.d.Mühl, RE 7.672). It should also be noticed that Appian (B.C. 3.14.95) indicates a close connection between the Pedian quaestio and Gallius, when he discusses the latter's crime immediately after¹ his report of the proceedings before the Pedian court and the proscription of Corona.

If Gallius presided over the Pedian court, his real offence was his association with those who strove for an acquittal. But as this was not indictable, an alternative had to be found. An alleged assassination attempt had two advantages. Men's minds would be diverted from the show of force which had accompanied the trials, and there were interesting prospects of extensive interpretation. The *lex Pedia* may originally have referred only to Caesar's murderers, but it was now sought to extend it to any conspiracy "*quo quis magistratus populi Romani occidatur*".² This is where the assistance of the Senate was invoked. It is probable that prior to the Principate the Senate was no more than a *consilium* to the consuls,³ but in this capacity it had the power to interpret laws, including the extension of their scope.⁴ It is therefore possible that the senatorial "death sentence" on Gallius which Appian attests was an interpretative decree extending the *lex* to any attempt to murder a magistrate.

1 τὰ τὸς τὰς ἀνδράς

2 Cf. Digest (48.4.1.1). It was probably in this extended form that the *lex* was known to Plutarch (Brut. 27.3). cf. p.187 above.

3 Mommsen (Staat 2.1.124.2; Straf 252); cf. Gaudemet 336; McFayden 243; Marsh (Tiberius 118-9); Hammond 172; Jones (Jurisdiction 480-1). Some authorities believe that the case of the Catilinian conspirators was a precedent for the exercise by the Senate of a judicial (Dessau 1.140; Lengle, Straf 61) or a quasi-judicial (Volkman 95-6) function. Siber (Verfassung 290) holds that the Senate's jurisdiction in *maiestas* cases derived from Caesar's *maiestas* law, which has no foundation if Caesar's law has been correctly reconstructed (Chapter IX). Jones (Jurisdiction 481-4) finds the origin of the Senate's jurisdiction in the *lex Julia de vi publica*, which means a date well in the Augustan Principate - unless the *Julian laws de vi* were Caesarian.

4 Krüger (25 and n.9); Girard (Leges 321.1); Gaudemet 337, 339; Jones (Jurisdiction 481); Marsh (Tiberius 118).

The rule attested by Digest (48.4.1.1) would then be the *lex Pedia* as extended by the Senate. Appian was not always clear as to the distinction between interdiction and a death sentence followed by voluntary exile (cf. p.104 above), so that his ἡ βουλὴ κατεψήφισκε θάνατον (B.C. 3.14.95) need not be taken literally. Octavian, fortified by the *senatusconsultum*, and at large to prosecute Gallius as a result of his removal from office (Appian B.C. 3.14.95), may have charged him with *maiestas* 'lege Pedia', and secured a sentence of interdiction.

Q. Salvidienus Rufus, a friend of Octavia's youth, played a prominent part in the fighting of 42-1 B.C., was given the governorship of Gaul in 40, and was designated as consul, although he had not held the lower offices (Hinz RE 1A.2019-20). His close relationship with Octavian appears from the fact that he and Agrippa were Octavian's advisers in Apollonia (Vell. 2.59.5), while Cicero was able to ask: "Quid inter Salvidienum et eum (sc. Caesarem) interest? (Brut. 1.17.4). According to Appian (B.C. 5.7.66), Antony disclosed to Octavian, after the pact of Brundisium, that Rufus had secretly negotiated with him with a view to taking the Gallic legions over to him. Dio (48.33.1) says that he was suspected of having plotted against Octavian, while he is referred to by Livy (Per. 127) as "*consilia nefaria adversus Caesarem molitum*", and by Suetonius (Aug. 66.2) as "*res novas molientem*"; Velleius (2.76.4) attests his "*scaelesta consilia*".

Appian (B.C. 5.7.66) says that Octavian summoned Rufus from Gaul on a pretext, and on his arrival confronted him with the evidence and executed him; as his army was suspect it was transferred to Antony. A trial in the Senate is attested by Suetonius (Aug. 66.2) - "*dammandum senatui tradidit*" - and by Dio (48.33.3). Dio (loc. cit.) attests his execution ὡς πολέμιος ἔκλεινον καὶ τοῖς θεμοῖς παντὶ, followed by a thanksgiving and a "last decree" in favour of the triumvirs. But Livy (Per. 127) says that after his crime was revealed

"iudicio suo", he was condemned and committed suicide.

The real difficulty is the nature of the crime. If Appian's version gives the whole story, Rufus' offence was a secret approach to Antony, with a view to deserting Octavian and taking the army of Gaul over to him. Rufus presumably held Gaul as Octavian's legate (Dio 46.55.3), but it was only by the pact of Brundisium that Gaul was allocated to Octavian (Dio 48.28.4), whereas Rufus perpetrated his treachery before this. It may well be that Octavian was 'de facto' master of Gaul from July 40, but even if he held it from that date under a legal title recognised by his triumviral colleagues it would be difficult to bring a legate's breach of trust under the crime of *maiestas*, for by deserting Octavian for Antony Rufus would merely have gone from one limb of the constituent authority to another. It does not help to suppose that Rufus' crime was leaving his province '*iniussu populi aut senatus*', for in the first place he did not leave, but only thought of doing so, and *maiestas* by intent, without an overt act, was still far in the future;¹ secondly, on Appian's version the proposed crime would have been departure '*iniussu Caesaris*', the authority of People or Senate being irrelevant.

The similarity of the language used in regard to the trials of Rufus and of Libo Drusus in 16 A.D. is striking. Where Rufus was guilty of "*consilia nefaria*" (Livy Per. 127) and "*scelerata consilia*" (Vell. 2.76.4). Libo was charged with "*nefaria consilia*"² and "*scelerata consilia*" (Vell. 2.130.3). Rufus is reported as "*res novas molientem*" (Suet. Aug. 66.2), Libo as "*moliri res novas*" (Tac. Ann. 2.27.1; cf. Vell. 2.129.2). Rufus aspired to a position "*ex quo infra se et Caesarem videret et rem publicam*" (Vell. loc.cit); Libo is described as "*maiora sperans quam illo saeculo quisquam sperare poterat*"

1 For the '*lex quisquis*' of 397 A.D. see Kibbler (554-B).
2 Fanti Amerlini, cited by Furneaux (1.316.12).

(Seneca Ep. 70.10). In both cases guile was used to trap the suspect. Octavian summoned Rufus urgently, giving out that he would return him to his army immediately after consulting him (Appian B.C. 5.7.66); Tiberius played cat and mouse with Libo (Tac. Ann. 2.28.2-4); cf. Suet. Tib. 25). The downfall of both Rufus (Dio 48.33.3) and Libo (Tac. Ann. 2.32.3-4; Dio 57.15.5) was marked by a thanksgiving. A "last decree" of the Senate followed the condemnation of Rufus (Dio 48.33.3), and it is probable that the Senate also declared Libo a 'hostis' and gave plenary powers to the consuls (Marsh, Tiberius 120; McFayden 244). Libo's consultation of astrologers in regard to his future greatness (Tac. Ann. 2.27.2, 30.1) is of a similar order to the flame which issued from Rufus' head in his youth (Dio 48.33.2). Libo was guilty of a serious attempt against the State¹, and there seems little doubt that Rufus' crime fell in the same category. The information which Antony gave to Octavian was probably not the only evidence on which the indictment was based. There was probably a conspiracy, which may have had widespread popular support, for Appian (B.C. 5.7.66) says that Antony incurred general unpopularity as a result of his disclosure. That the plot came very close to success is not only shown by the last decree and the thanksgiving, but is also suggested by the strong implication of a catastrophic fall in Dio's ἄλλ' οὐδέ τι γὰρ τῶν ἀνδορῶν βέβαιον ἔστι (48.33.3). It is not impossible that the reconciliation between Octavian and Antony at Brundisium was prompted by the need to meet the threat posed by Rufus.

Vollmann (33) believes that in Rufus' case the Senate's function was very close to that of the later senatorial court. He argues that, whereas previously there was a decree followed by legal proceedings, now there was first a prosecution and then a decree and thanksgiving. This appears to be the sequence given by Dio (48.33.3), but Dessau (1.23.140; cf.

1 Marsh (Tiberius 120, 292); Rogers (Trials 12, 14, 18, 18-20.)

Lengle 62) seems to understand Dio differently when he finds an exact parallel between the case of Rufus and that of the Catilinian conspirators; this is to assume a "last decree" before, and not after, the execution. The main argument against a senatorial trial of Rufus is that, unlike Q. Gallius, his removal from office is not attested, so that no trial of any sort would have been competent. It is possible that this case is another example of a *senatusconsultum* giving an extensive interpretation, but not a judgment. The conspiracy undoubtedly included a plot to kill Octavian. The Senate having declared that this fell under the *lex Pedis*, it was clear to Rufus that a trial before the *quaestio maiestatis* would be a mere formality. He chose the alternative of suicide, which may well be the true manner of his death, although it is attested only by Livy (Per. 127).

B. CONSPIRACIES IN THE AUGUSTAN PRINCIPATE.

The execution of M. Aemilius Lepidus, son of the *triumvir*, in 31 B.C.¹ or 30 B.C.,² seems to have been a summary matter. Velleius (2.88) says that Lepidus had conspired to murder Octavian when he returned to Rome. Maecenas, who was "*urbis custodis praepositus*", unearthed the plot with quiet efficiency, and without any public upheaval crushed the "*immane novi ac resurrecturi belli civilis ... initium*". Lepidus was executed, and his wife Servilia committed suicide by swallowing live coals.³ In view of Velleius' insistence on Maecenas' smooth handling of the matter, Appian (B.C. 4.50,217) is probably wrong when he says that Maecenas sent Lepidus to Octavian, who executed him at Actium. None of the sources⁴ suggests a trial, and indeed Velleius' "*mira celeritate*"

1 Vollmann 13; Rhoden (RE 1.1.561); Syme 298; McFayden 237.

2 Sattler (29 and n.67), referring - probably correctly - to Velleius 2.88.1, 87.1.

3 Sider (Verfassung 266) misunderstands Velleius (2.88.3) to mean that Lepidus was burnt alive.

4 Vell. 2.88; Appian B.C. 4.50,216-8; Livy Per. 133; Suet. Aug. 19; Lio 54.15.4; Sen. Clem. 1.9.6; Brev. Vit. 4.5.

nul্লাque cum perturbatione aut rerum aut hominum oppresso Lepido" (2.88,3) is positive evidence of summary coercion.

The fall in 26 B.C. of the great Roman knight, C. Cornelius Gallus, the first prefect of Egypt, is the subject of an extensive, but not always clear, tradition.¹ Volkmann (115-9) traces two stages in the catastrophe. In the first stage there were proceedings in Augustus' domestic tribunal. The allegation, according to Dio (53.23,5) was *ſpēc*, manifested in participation in idle gossip about Augustus (cf. Ovid Trist. 2.445-6), the setting up of statues of himself throughout Egypt, and the inscription of his deeds on the pyramids.² Suetonius (Aug. 66) attests his *"ingratus et malivolum animum"* and, more specifically (De Gramm. 5 (16), his friendly reception of Caecilius, who had made an attempt on the chastity of Agrippa's wife, the daughter of Caecilius' paternal, Atticus. The punishment inflicted by Augustus was, in general terms, *"remunſtatio amicitiae"*.³ In Gallus' case this meant exclusion from the emperor's house and the imperial provinces (Suet. Aug. 66; Dio 53.23,6). The normal result of *"remunſtatio"* was *"domo interdicti"*, which in Gallus' case was extended to *"provincia suis interdicti"* (Suet. Aug. 66; cf. Dio 53.23,6).

In the second stage (Volkmann 116-9) there were criminal proceedings against Gallus, but neither the charge nor the forum is clear. Suetonius (Aug. 66) says that Gallus was driven to suicide by the denunciations of accusers and by decrees of the Senate. His meaning can be gathered from

¹ Dio 53.23,5 - 24,1; Suetonius Aug. 66; De Gramm 5 (16); Ammianus 17.4,5; Servius ad Georg. 4,1; ad Eclog. 10,1; Ovid Trist. 2.445-6; Amores 3.9,63-4.

² Syme draws attention to ILS 8995, 11. 4ff: *"exercitu ult. . . . eſtarhaeten tranſducto, in quem locum neque populo Romano neque regibus Aegypti antea sunt prolata, Thebaide, communi omnium regum forſidine, subacta"* - achievements which Dessau (2.2.647) describes as *"nicht gerade ausserordentlichen Heldentaten"*.

³ Volkmann 106, 116; Syme 309; McFayden 237.

Dio (53,23,6-7) who, after saying that the "renuntiatio amicitiae" by Augustus was followed by numerous indictments, continues: καὶ ἡ γενομένη δακρυὰ διήλυσε καὶ αὐτῶν ἐν τοῖς δικάστοις καὶ φέρειν τῆς αἰτίας σπερμύβητα ... ἐφημέσιοι, καὶ ὁ μὲν περιπαλῆρας ἐπὶ τοῖς δακρύοις ποτακτοῦσθαι.

This passage has been taken by some authorities to mean a trial and condemnation by the Senate,¹ but others² have rightly detected that ἐν τοῖς δικάστοις is against that view. Volkmann (117-9), asking how the Senate could decide that the accused be condemned by a quaestio, suggests that only senatorial magistrates could be brought before the quaestio de repetundis (cf. pp. 99-101 above). As Gallus was a knight the quaestio did not have jurisdiction, and therefore the Senate intervened and tried the case. This view is based on the assumption that the criminal case was 'de repetundis', for which the only evidence is Ammianus (17,4,5), and his evidence should be received with caution (Stein, RE 4,1345). Dio (53,23,6), whose account is the most detailed of all the sources, attests ὡσαύτως καὶ αὐτοὺς πολλὰς after the domestic proceedings, without specifying the charges: Servius (ad Eclog. 10,1) says that Gallus, an intimate of Augustus, "cum venisset in suspicionem quod contra eum coniuraret, occisus est". Sattler (11) rejects Servius, arguing that a conspiracy by Gallus is not otherwise attested, and his name does not appear in the lists of conspirators in Seneca (Brev. Vit. 4,5; Clem. 1,9,6) or in Suetonius (Aug. 19,1). This argument is not conclusive, for Seneca expressly says that his lists are not complete (Clem. 1,9,6; Brev. Vit. 4,5), while Suetonius (Aug. 19,1) omits known conspiracies, such as that of Cn. Cornelius Cinna (p. 210-15 below.)

A possibility which does not seem to have been explored is that the judgment of Augustus in his domestic tribunal was not a final judgment, so that condemnation there

1 Stein (RE 4,1345); Sattler 11; Mommsen (Staat 2,1,113,4).
2 Dessau 1,140; Hammond 174; Syme 309; McFayden 237.

did not entitle the accused to plead 'res iudicata' when charged on the same facts in a public tribunal. It was a recognised principle that absolution by a paterfamilias, or person in an analogous position, did not prevent a subsequent prosecution in a State tribunal (Strachan-Davidson 1.30-1), and there is nothing against a similar rule when the domestic court condemned. That the criminal proceedings were based on the same facts as the domestic trial seems to follow from Augustus' "complaint" that while the zeal of the Senate was to be commended, it was regrettable "quod sibi soli non liceret amicis quatenus vellet irasci" (Suet. Aug. 66). It is therefore possible that the "numerous charges" against Gallus included the acts of arrogance for which Augustus had already punished him privately. If this is so, it is possible that in the case of Gallus, as in the case of Salvidienus Rufus, the Senate did not try the case, but gave an extensive interpretation. The Senate may have been called upon to say that what Gallus had done in Egypt could be adjudicated upon by the *quaestio maiestatis*. The principle involved may have been that enunciated in Digest (48.4.3): "quive privatus pro potestate magistrature quid sciens dolo malo gesserit". Gallus can properly be described as a 'privatus', for he was appointed by and responsible to Augustus alone (Dessau 2.2.644; cf. Syme 330); and what he did may well have been interpreted as a usurpation of his master's functions. Gallus, like Rufus, committed suicide when the Senate's interpretation made condemnation by the *quaestio maiestatis* inevitable. If the case was brought within the ambit of *maiestas*, the layman Servius may well have failed to detect the subtle distinction between conspiracy and other forms of the crime.

Two cases in the *quaestio maiestatis* can conveniently be taken together, namely the trial of Marcus Primus and

that of Fannius Caepio and Varro Murena.¹ According to Dio (54.3.2-4), the sole source for Primus, the charge was that as governor of Macedonia he left his province to make war on the Thracian Odrysae. His defence was that he had acted with the authority of Augustus, alternatively of Marcellus.*

Augustus went to court of his own accord, was asked by the praetor if he had ordered the accused to make war, and denied it. Murena, who defended Primus, insolently asked Augustus what he was doing there, and who had summoned him, to which the reply was simply: ὁ δῆμοσιος. Although Dio does not expressly attest a conviction, it seems to follow from his assertion that quite a number of jurors voted for an acquittal.² In the case of Caepio and Murena there was a conspiracy against Augustus, led by Caepio, with Murena accused of complicity (Dio 54.3.4). The plot was disclosed by one Castricius (Suet. Aug. 56.4), and Tiberius prosecuted (Suet. Tib. 8.1). The accused did not appear, were condemned 'in absentia', and were executed soon afterwards. Murena's brother Proculus and his brother-in-law Maecenas were unable to save him. A thanksgiving was voted (Dio 54.3.5,8).

The crucial problem is the date of these trials. Dio (54.1.1; 54.3.2-5) assigns both to the consulship of M. Marcellus and L. Arruntius, that is, 22 B.C. His date would never

1 Grant (84.6) believes that the trial of Primus was in the Senate. For the correct view that it was in the quaestio malestatis see Volkmann 53,55; Atkinson 440; Jones (Jurisdiction 487); Kelly 46; Sattler 62; Hammond 174. Hanslik (Murena 286) and Sattler (64) believe that the Senate tried Caepio and Murena. If the majority view that it was the quaestio malestatis - Volkmann 56; McFayden 237; Atkinson 464 and n.116; Kelly 14; Jones (Jurisdiction 487); Fluss (RE 5A. 709); Des-sau 1.50; Siler (Review of Vittinghoff 227) - needs any corroboration, it is furnished by Dio's statement (54.3.6) that because some jurors voted for acquittal a law was introduced prohibiting secret voting when the accused was not present; there was never any question of secret voting in the Senate.

2 Cf. Volkmann 56.1; Syme 333; Hanslik (Murena 285); RE 22.2.1896; Sattler (62 and n.151); Atkinson 444; Rogers (Treason 92). Chilton (75) believes that there was an acquittal.
* τὸς μὲν τῇ τοῦ Ἀυγούστου τὸς δὲ τῇ Μαρκελλίου
γνώμῃ τοῦτο κέκοιτ'ἔναι

have been doubted were it not for the fact that the *Fasti Capitolini*¹ record that in 23 B.C. A. Terentius Varro Murena was consul with Augustus, and that something which is not clear from the fragment happened to him in office, with the result that Cn. Calpurnius Piso became 'consul suffectus' in his stead. The vital part of the inscription is that which has been reconstructed by Mommsen to read "in mag (istratu) mort(uus) est", but which other authorities² read as "in magistratu damnatus est". Those who accept the latter reading³ argue that the consul of 23 B.C. is to be identified with the conspirator who was tried and executed with Fannius Caepio. It would follow that this trial would have to be dated to 23, and as the trial of Primus preceded that of Caepio and Murena (Dio 54.3,2-4), he would also have been tried in 23. This raises a particularly serious difficulty in the case of Primus, for it would mean that his Odrisian war was waged before the new constitutional settlement, which took effect when Augustus resigned the consulship on the 1st July 23. If, therefore, the settlement of 27 B.C. was still in force, how could a charge of leaving his province and making war 'iniussu populi aut senatus' be met, in relation to the senatorial province of Macedonia, by the plea of 'iussum Augusti aut Marcelli'? Augustus would clearly not have taken the trouble to appear and deny having given authority, unless his authority, if given, furnished a valid defence in law. And in 23 the "Marcellus" in question would have been M. Claudius Marcellus, the nephew and son-in-law of Augustus (Syme 378,389; Atkinson 441), which raises the question as to how his authority could have been an answer to the charge.

The correct approach has been found by Atkinson (443-52), who sets out to demonstrate that Dio's date is probably

1 CIL I (2).1.441 (as cited by Hanslik, Murena 283 and others.)

2 For the references see Vollmann 52; Hanslik (Murena 284); Atkinson 462.

3 Vollmann 52-3; Syme 325,5; Siber (Verfassung 279.3).

correct. Her argument is that, for the trial of Caepio and Murena, Dio (54.3) and Suetonius (Aug. 19.1; 56.3; Tib. 8.1) had a common source, which was well-informed on judicial matters, but was rather in the early period of Tiberius than contemporary;¹ the ultimate source, however, was the 'acta publica', which makes Dio's date probable. The fact that a number of jurors acquitted Primus, despite Augustus' testimony, means that there was something else to support them, namely the alternative plea of 'iussu Marcelli', the 'Marcellus' in question being M. Claudius Marcellus Aeserninus, consul in 22 B.C.² Primus left for his province in the spring of 23, fought the Odrisian war early in 22, and was tried in the latter part of that year. The authority of Augustus would not have been in writing, for in that case it could not have been denied.³ It was a verbal authority given before Primus left for his province. Early in 22 he received written instructions from the consul Marcellus. The position in regard to warfare by a governor was still, in terms of Sulla's *maiestas* law, that it could not be conducted 'iussu populi aut senatus'.⁴ In the late Republic the Senate instructed a governor through one or both consuls, so that the orders to Primus could have been described as 'iussu senatus ex auctoritate Marcelli', corresponding to τῷ Μαρκελλοῦ γνῶμῃ in Dio (54.3.2). Primus' defence was therefore 'iussu senatus', conveyed verbally by Augustus in 23, and in writing by Marcellus in 22. The defence failed because Primus had misunderstood the scope of his orders.

1 Her suggestion (444.20) that the source was Velleius Paterculus is untenable. Velleius knew a rescript of Hadrian (Dig. 48.19.15) and his dates are probably even later, for his style is unclassical (Schulz, *Legal Science* 256).

2 Atkinson 444-5, 450. Hanslik (Murena 285), who also dates the trial to 22, holds that it was Marcellus the son-in-law, Primus having raised his authority because he was no longer alive to rebut it.

3 Atkinson 441. But Augustus did not hesitate to forestall the production by Cn. Piso of Tiberius' written instructions in regard to Germanicus (Tac. Ann. 3.16.1).

4 Atkinson 447. But her suggestion that 'populi' had been deleted by Caesar, leaving the sole discretion with the Senate, gives a larger scope to Caesar's *maiestas* law than it is possible to accept (cf. pp. 172-84 above.)

Sulla's law had included a prohibition against war on a client kingdom, which the Odrysae had been since the second triumvirate. From 27 B.C. client kingdoms were 'de facto' part of Augustus' provincia, and in 23 he gave Primus a general authority to protect Macedonia by operations in Thrace. Primus either misconceived the limits of his discretion (452; cf. Hanslik, Murena 285), or deliberately ignored them in order to secure a triumph.¹

Atkinson's hypothesis carries conviction up to the point where she shows that Augustus and Marcellus, as the premier consuls in their respective years, were the instruments for the conveyance of the Senate's instructions to Primus. In support of her reasoning it can be urged that Dio's date should not be rejected unless the alternative compels acceptance. When Dio says that in the consulship of Marcellus the accused pleaded the authority of Marcellus, it is sounder to accept this evidence at face value, rather than to make the unobvious assumption that he means the son-in-law Marcellus who died in 23 (Dio 53.30.4). This assumption, apart from the inherent difficulty in explaining why this Marcellus had pre-eminent auctoritas,² seems to be invalidated by Dio himself (53.31.4) when he attributes Augustus' failure to make Marcellus his successor to the fact that οὐδένα τῶν τοῦ μετὰ τοῦ γάμου ἀσέβηται. If Grant (84) rightly understands γάμος as 'auctoritas' in Dio (54.3.2), it should be given the same meaning in (53.31.4). If, therefore, Dio is at pains to say that Marcellus did not have the auctoritas required of Augustus' successor, he would surely have commented caustically on a claim by Primus that he acted on the authority of this Marcellus. Atkinson is inconsistent when she postulates a 'de facto' control of client kingdoms by Augustus, for if "de facto control" means

1 Atkinson 452. Hanslik (Murena 285; RE 22.2.1996) believes that Primus prejudiced Augustus' policy of maintaining the Odrysae as a bulwark against the North.

2 A difficulty which is not adequately met by Grant (84).

anything at all it would follow that the authority which Augustus gave Primus would not have derived from the Senate, and the consul Marcellus would have had nothing to do with it. Atkinson presumably evolves the client kingdom hypothesis in order to explain why Dio (54.3.2) does not attest Marcellus as also giving evidence, but on her own showing the reason was, in contradiction of her main hypothesis, that his evidence was irrelevant. It is preferable to suppose that, Augustus having given a clear indication of his wishes in regard to the outcome of the trial, Marcellus found it convenient to be elsewhere during the proceedings.

The problem of dating the trial of Caepio and Murena can be approached with the knowledge that the trial of Primus furnishes a strong probability in favour of 22. But if this date is to be retained something has to be done about the suggestion that the consul A. Terentius Varro Murena who died or was condemned in 23 was the conspirator who was tried with Caepio. It has to be shown either that the consul was not the conspirator, or that the consul neither died nor suffered condemnation in 23. Dessau (L.50.1; cf. Fluss RE 5A. 709), doubting the identification of the consul with the conspirator, draws attention to the failure of Dio (54.3.4-5) and Velleius (2.91.2) to notice the unprecedented trial and execution of a consul in office. It can even be urged that Velleius' oversight is particularly significant, for he takes the trouble to comment on the conspirator's previous history: "sine hoc facinore potuit videri bonus"; something more specific might have been expected if the condemned man had been a consul.

The only clear piece of evidence about the consul, apart from the fact that something happened to him in his year of office, is that he was probably the Terentius Varro whom Augustus sent against the Salassi in 25 (Syme 325.5;

Hanslik Murena 282). The conspirator, perhaps as befits his trade, goes by several names. He was "Licinius Murena" if, as seems probable (cf. Hanslik, Murena 282; contra Atkinson 460), the *Ἀντίπλοκ Μουρηνός* who defended Primus and was so free with his tongue (Dio 54.3.3) is the *Μουρηνός* whose outspokenness involved him in the prosecution for *maiestas* (Dio 54.3.4). Velleius' conspirator (2.91.2) is "L. Murena", while Suetonius' man (Aug. 19.1; Tib. 8.1) is "Varro Murena". Elsewhere he is simply "Murena" (Strabo 14.670; Sen. Clem. 1.9.6) or "Varro" (Tac. Ann. 1.10.3). He was probably "Varro Licinius Murena", but his identification with the consul cannot be taken much further, although the case for identification is considerably advanced by the reading "magistratu motus est" proposed by Hanslik (Murena 283-4;] this, by assigning the removal from office to 23 and the trial to 22, avoids the awkward trial in office. Hanslik (Murena 282-3; 286-7) proceeds to identify A. Terentius Varro Murena with the "Licinius" of Horace (Carm. 2.10; contra Atkinson 460). The argument is that "Licinius" was a man who, having fallen from high estate, was enjoined by Horace to abandon arrogance and ambition, and Licinius Murena the conspirator was generally unpopular because of his malicious tongue (Dio 54.3.4). Hanslik contends that A. Terentius Varro (Licinius) Murena, as sole consul during Augustus' illness in the early part of 23, incurred such universal disfavour that he was removed from office. On that occasion Proculeius and Maecenas managed to avert further action, but his insolence to Augustus at the trial of Primus rankled, and there was a settlement of accounts with him when he became involved in the conspiracy of Caepio. A serious objection to this theory is Velleius' assertion that the conspirator was "bonus" apart from his crime (above), and it may be wiser to abandon the attempt to equate the consul and the conspirator. Atkinson (469-71) argues that as Athenaeus, the Greek from Cilicia, was tried with Murena, the latter was the Varro who

was a legate in Syria in 25; therefore he is not the Terentius Varro who routed the Salassi in 25, and therefore not the consul of 23, but his cousin. But this theory is greatly weakened by Atkinson's bald assumption (472) that Murena's offence was the use of troops without the authority of Augustus. This is not what Velleius (2.91.2) means by "cum inissent occidendi Caesaris consilia". Even Dio (54.3.4), who suggests that Murena was falsely charged with complicity because of his immoderate language, says that the allegation against him was *συνομιχόμενα*. Perhaps in the last resort Hanslik (Murena 287; cf. Kappelmacher, RE 6.2.1993) adduces the surest corroboration of Dio's date when he notices Velleius' observation (2.93.1) that the conspiracy of Caepio and Murena was approximately three years before the plot of Egnatius Rufus at the end of 19 B.C.

The execution of Caepio and Murena (Dio 54.3.5; Vell. 2.91.2) raises a problem. Mommsen (Straf 334.3; 936.2) assumes a sentence of interdiction, a breach of it - presumably by returning from exile - and a consequent execution. Volkmann (57), pointing out that Caepio was pursued immediately after his condemnation (Macrobi. Sat. 1.11.21), and that the capture of Murena's friend Athenaeus in flight (Strabo 14.5.4 p. 670) justifies a similar assumption for Murena himself, holds that Augustus seized them before they could reach a place of exile. The letter of the law was observed in the imposition of the statutory sentence of interdiction, but the possibility of actual execution always inherent in the outlawry of the accused in Rome and Italy was exploited by Augustus to "reintroduce" the death sentence by the back door.¹ But this implies a curious sequence of events. Although the accused did not appear at the trial, it would have to be supposed that they remained in Rome, making no attempt to escape until they were condemned.

¹ Cf. Flors (RE 5A, 709). Chilton (75) holds that the executions were illegal, but he also seems to believe (76) that Caepio and Murena made good their escape into exile.

As the period between a 'nominis delatio' and a trial was at least 10, and possibly 30 days,¹ it is not clear why they did not leave as soon as the 'nominis delatio' was lodged, if their intention was not to appear in any event. Perhaps Murena was awaiting the outcome of the representations made to Augustus by Proculeius and Maecenas, and Caepio hoped to be included in any indemnity which might be granted. Augustus may have deliberately delayed his decision in order to keep them in Rome.

The principal source for the conspiracy of Egnatius Rufus in 19 B.C. is Velleius, who says that during his aedileship Egnatius won such favour by supplying his own fire brigade that he was elected praetor immediately after his aedileship (2.19.3; cf. Dio 53.24.4-5). Thereafter he stood for the consulship, but the consul C. Sentius Saturninus would not allow him to seek election, saying that even if he were elected he would not return him (2.91.3; 92.4). Egnatius gathered others of his own kind - "adgregatis simillimis sibi" - and resolved to murder Augustus, and then to die himself (2.91.3). The plot was detected, Egnatius was imprisoned with his accomplices, and "mortem dignissimam vita sua obiit" (2.91.4). The only other pieces of evidence directly in point are supplied by Dio, who says that Egnatius' election as praetor made him so contemptuous of Augustus that he issued a proclamation to the effect that he had handed over the city to his successor ἑθροναστον καὶ ὁδόκληρον (53.24.5). Augustus took no action against him at the time, but ἐκείνον μὲν ἐξεδόξαι οὐκ ἐκ μακρόν ἐμελλε τὸ μὴ ἔπερ τοὺς πολλοὺς εἶναι (53.24.6).

McFayden (238) dates the case to 25 B.C., because of his acceptance of 26 as the year of Egnatius' aedileship (Dio 53.24.4). Dio is not necessarily wrong as to the date of

¹ Mommsen (Straf 396-7). The longer period estimated by Atkinson (465-8) seems excessive.

the aediles¹, but the error is to assume that Egnatius canvassed for the consulship immediately after his praetorship. Dio (53.24.6) says only that Augustus soon taught him a lesson, and Velleius (2.91.3) observes: "mox (sc. post praeturam) etiam consulatum petere ausus". It is clear that the trial of Egnatius was much later than 25. Seneca (Clem. 1.9.6) places Egnatius after Caepio, while Velleius (2.93.1) dates his crime to some three years after Murena and Caepio. The date when his criminal attempt began can be fixed with precision in 19, for C. Sentius Saturninus, who as consul threatened to frustrate Egnatius' election (Vell. 2.92.4), held the consulship in 19 B.C. (Dio 54.10.1). McFayden (238 and n.164) believes that Egnatius was tried by the *quaestio maiestatis*. If so, the back door which Augustus opened for Caepio and Murena (p.206) must have swung off its hinges, for Egnatius seems to have been cast into the Tullianum and strangled immediately after his condemnation (Vell. 2.91.4), without even a pretence of allowing him to start his journey into exile. It is, however, by no means certain that Velleius implies a trial at all; "abditus carceri" (2.91.4), in regard to Egnatius, is a much less explicit indication of a trial than "oppressi auctoritate publica" in the immediately preceding account of Caepio and Murena (2.91.2).

Sentius was sole consul in 19, and the election of a colleague, to fill the vacancy which Augustus had refused, was attended by violence and murder (Dio 54.10.1). This leads Volkmann (99) to the conclusion that the conspiracy of Egnatius took place during the pre-election rioting, and that he was executed under Sentius' consular coercion, with the approval of Augustus. But this view cannot be right. During the electioneering disturbances Augustus was still absent from Rome (Dio 54.10.2; Vell. 2.92.1), and Sentius was succeeded as

1 Despite Volkmann (52.4), Gruenertstein (113) and Grosz (RE. 5.2.1999). Syme (371) accepts Dio's date.

consul by M. Vinucius before Augustus' return (Sattler 87). There would not have been a plot to kill Augustus before it was known that he proposed returning, and his decision to do so was taken only when the Senate sent envoys to inform him of the disturbances (Dio 54.10.2). As Augustus had a hand in the destruction of Egnatius (Dio 53.24.6), the conspiracy must have been detected after his return to Rome, and therefore when Sentius was no longer consul. It therefore seems that the conspiracy was formed after the election troubles. Egnatius probably began his preparations to assassinate Augustus when the latter's decision to return became known. As Augustus entered Rome on the 12th October, 19 B.C. (Grogg, RE 5.2.2000), the execution of Egnatius, if it took place that year, cannot have been preceded by a trial in the *questio*, for a '*nominis delatio*' could not be lodged later in the year than the 1st September (Atkinson 465). If Valkmann's hypothesis of an execution under consular co-ercitio is to be retained, it would have been carried out by the suffect consul M. Vinucius, or by Q. Laceretius Vespillo, whom Augustus had appointed as consul to fill the vacancy for which Egnatius had canvassed (Dio 54.10.2), and not by Sentius.

It is not certain, however, that 19 B.C. was the year of Egnatius' death. In 18 B.C., after the '*lactio senatus*', there were many accusations of plotting against Augustus and Agrippa, and Augustus ἄλλους μὲν τινας ἐβίβλωσεν (Dio 54.15.1,4). Dio seems to have had some trouble with his source at this point, for he inserts a short excursus as to the difficulty of obtaining accurate knowledge of treason trials, and the method by which he proposes to meet it (54.15.2-3). This difficulty appears in the anonymity of ἄλλους τινας, the only name which he managed to find being that of Lepidus (the former triumvir) who, in contrast to the unnamed victims, was not prosecuted. The mention of

Lepidus in the same sentence as the victims suggests, however, that Lepidus was implicated in the plot.¹ It is not without significance that Seneca (Brev. Vit. 4.5) has the sequence: "Marenas, Caepiones, Lepidi, Egnati ... in eum mucrones acuebantur". It is also noteworthy that Dio, having anticipated Egnatius' fate when discussing his aedileship (53.24.6), makes no reference to it among the events of 19 B.C. (54.10). His closest approach to a return to the subject is the condemnation of *ἄλλοις τιμὰς* in 18 B.C. The conspiracy provoked by the 'lectio senatus' would have been of some magnitude. Yet if the case of Egnatius has no connection with it, the "rogues' galleries" (Suet. Aug. 19.1; Clem. 1.9.8; Brev. Vit. 4.5) and Velleius have overlooked a major plot. The conspiracy of Egnatius undoubtedly started in 19 B.C., and probably with the support of the anti-Augustan faction in the Senate. Egnatius, smarting under the rebuff administered by Sentius, and embittered because of the appointment of Vespillo to the post which he had coveted, was financially ruined by his election campaign (Vell. 2.91.3), and was a ready tool for the Republican faction. The strength of the conspiracy which he mounted can be gauged from the fact that when Augustus returned to Rome in 19 B.C. he went in such fear of assassination that he wore a thorax even in the Senate (Dio 54.12.3; Suet. Aug. 35). It was not possible to suppress the conspiracy until 18 B.C. when, with the 'lectio senatus' behind him, Augustus was able to deal with Egnatius and his associates. As far as the time factor is concerned, therefore, there would have been no obstacle to a regular trial in the *quaestio maiestatis*.

The conspiracy of Cornelius Cinna raises an acute chronological problem. The facts are that a plot was disclosed to Augustus, who summoned a "*consilium amicorum*" (Sen.

¹ Although Lepidus was not excluded from the Senate, Augustus lost no opportunity of humiliating him (Dio 54.15.5-6), and threatened to punish the juriconsult Antistius Labeo for having included Lepidus among those to be elected (Dio 54.15.7).

Clem. 1.9.2-3). Augustus, being uncertain what to do with Cinna, consulted Livia (Dio 55.14.1-3; Sen. Clem. 1.9.3-6), who tendered him some advice (Dio 55.14.4 - 21.4; Sen. Clem. 1.9.6). Augustus dismissed his consilium (Sen. Clem. 1.9.7), addressed a long homily to Cinna (Dio 55.22.1; Sen. Clem. 1.9.8-10), and let him go (Dio 55.22.1; Sen. Clem. 1.9.11). Subsequently Cinna reached the consulship (Dio 55.22.1; Sen. Clem. 1.9.12), and there were no further plots against Augustus (Dio 55.22.2; Sen. Clem. 1.9.12). Except for the fact that Dio does not mention the consilium, the accounts of Seneca and Dio are so close that a common source seems probable.¹ For example, they correspond even in attributing the identical simile of the physician to Livia (Dio 55.17.1; Sen. Clem. 1.9.6). It is therefore difficult to understand the glaring discrepancy between their dates. Dio dates the conspiracy to 4 A.D., while Seneca (Clem. 1.9.2) says that it was "cum (sc. Augustus) annus quadragesimus transisset et in Gallia moraretur". The authorities consulted,² presumably because Augustus was in Gaul from 16 to 13 B.C. (Dio 54.19-25), take Seneca to imply a date in that period. This discrepancy is bad enough, but there is also an internal inconsistency in Seneca. As Augustus was born on the 23rd September, 63 (Sprenger 278) he reached his fortieth year in 23, and would therefore have been in his late forties, and not merely "past his fortieth year", during his sojourn in Gaul. The other serious difference concerns the name of the conspirator, whom Dio (55.14.1) knows as Ch. Cornelius, a son of Pompey's daughter. Seneca's man (Clem. 1.9.2,6) is L. Cinna, also a grandson of Pompey (Clem. 1.9.3).

As Seneca (Clem. 1.9.6) places Egnatius before Cinna in his catalogue of conspirators, Cinna's plot would seem to

¹ Cf. Grogg (RE 4.1268). Speyer (277, 280) believes that Seneca was the original source, and that Dio referred directly to him.

² Grogg (RE 4.1268); Vollmann 84; Syme 414.1; Speyer 278; Kelly 42. McPayden (240) does not assign a date.

have been not earlier than 18 B.C. Therefore, of the known sojourns of Augustus in Gaul,¹ the only possibilities would be 16-13 B.C., 10 B.C., and 8 B.C. But the consular fasti do not attest a Cornelius Cinna as consul in any appropriate year following these sojourns. Dio's date has the merit of being immediately followed, in 5 A.D., by the consulship of Cn. Cornelius Cinna Magnus, who is said to be the conspirator.² The argument would be that L. Cornelius Cinna, praetor in 44 B.C. and an enemy of Caesar (Münzer, RE 4.1287), was the husband of Pompey's daughter, Pompeia, and had two sons - Cn. Cornelius Cinna Magnus by Pompeia, and L. Cornelius Cinna by an earlier marriage (Syme 269 and n. ; 279,3). The elder son, L. Cinna, was appointed suffect consul by Octavian in 32 B.C. (Grogg, RE 4.1282; Syme 279), and would therefore not have been the conspirator. But Magnus is said to have fought with Antony against Octavian (Grogg RE 4.1288; Syme 269), and would therefore qualify, insofar as the conspirator was twice pardoned by Augustus: "Vitam, inquit, tibi Cinna iterum do, prius hosti nunc insidiatori ac parricidae" (Sen.Clem. 1.4.11). But there are objections to Magnus. The more serious is that Seneca's conspirator was "adulescens" (Clem. 1.9.3,5), an epithet which may have been applicable in 16-13 B.C., and possibly even in 10 B.C., to a man who had fought with Antony, but which was impossible of application in 4 A.D. (cf. Fitzler-Seeck, RE 10, 370). Secondly, no sojourn of Augustus in Gaul is known for 4 A.D. Furthermore, there is no advantage in seeking to date the conspiracy to 4 A.D., merely in order to reconcile its date with the assertions of Seneca (Clem. 1.9.12) and Dio (95.22.2) that it was the last conspiracy against Augustus, for there was a substantial conspiracy in 6 A.D. (pp.279-80 below.)

¹ 27 B.C.; 25-4 B.C.; 16-13 B.C.; 10 B.C. (Fitzler-Seeck, RE 10, 370), to which Speyer (278) adds 8 B.C.
² Grogg (RE 4.1288); Syme 414.1; Speyer 280.

Fitzler-Seeck (RE 10. 370-1) find the inconsistencies irreconcilable. They point out that Cinna's conspiracy is not mentioned by Velleius, Livy or Suetonius (cf. Speyer 280-1), and that Seneca's other reference to Cinna (Ben. 4.30.2) does not notice the conspiracy. They therefore doubt the historicity of the entire episode, and regard it as an invention of Seneca for the instruction of Nero. But Seneca (Clem. 1.9.11) seems to have seen a verbatim account of Augustus' homily to Cinna: "ne totam eius orationem repetendo magnam partem voluminis occupem (dintius enim quam duabus horis locutum esse constat ...)". And it would surely not have been wise to level a false accusation of maiestas at a recent historical personage. Men still living would have remembered the consul of 5 A.D., or would have heard from their fathers of the conspirator of 16-13 B.C.

The correct approach may be to assume that Cn. Cornelius Cinna Magnus was too young to serve under Antony against Octavian. His mother Pompeia cannot have married his father, L. Cornelius Cinna, before late 46 or early 45 B.C., for during the second intercalary month of 46 B.C. she was commended to Cicero as a wife in place of Terentia (Miltner, RE 21.2264). Magnus would therefore not have been born before late 45 or early 44 B.C., which would have made him some 12 or 13 years old when war broke out between Octavian and Antony. It is therefore suggested that Seneca's L. Cinna was the elder half-brother, L. Cornelius Cinna (Junior), who was consul suffectus in 32 B.C. Seneca (Clem. 1.9.8; cf. Ben. 4.30.2) reports Augustus as saying that he had found Cinna in the enemy camp, and had allowed him to retain his father's property. Not only was L. Cinna the only brother qualified by age to be with Antony, but it is also more reasonable to suppose that the elder brother was the one who claimed the property and was allowed to keep it. Furthermore, it is clear from Seneca (Ben. 4.30.2) that there was an appointment as consul soon

after Cinna was found in the enemy camp: "Cinna murex quae res ad consulatum recepit ex hostium castris ...?" This seems to mean the suffect consulship of L. Cinna in 32 B.C. And Seneca's assertion, at the end of his account of the conspiracy (Clem. 1.9.12), that the conspirator achieved the consulship, is so worded as to suggest a suffect rather than an eponymous consul: "Post hoc detulit ultro consulatum questus quod non auderet petere". Magnus, however, was consul ordinarius in 5 A.D.

L. Cornelius Cinna (Senior) had a record as an anti-Caesarian (Münzer, RE 4.1287-8), and it may be supposed that his elder son was an opponent of Octavian quite independently of the Pompeian connection which his father contracted. He may have been a supporter of Antony in the confused situation prevailing in 32 B.C. When the consuls Cn. Domitius and C. Sosius fled to Antony (Dio 50.2.8), others in turn went over from Antony to Octavian (Dio 50.3.1), and L. Cinna may well have been one of them. His reward was the suffect consulship and the release of his father's property.

It is suggested that the incorrect date and the wrong person are those attested by Dio. If Seneca was Dio's source, the latter's difficulties are obvious. Seneca, in order to give Nero a striking precedent, distorted the sequence of events so as to achieve the climax of a pardon and a consulship. But his distortion was only partial, for his language lets it appear that the conspirator had been only consul suffectus. Dio, not noticing this, took the consulship at face value, and therefore searched for a Cinna who had been consul ordinarius. Finding only Magnus in 5 A.D., he assumed that he was the conspirator and dated the conspiracy to 4 A.D. It is also worthy of note that Dio says very little about the conspirator himself. In the whole of his long narrative (55.14.1 - 22.2) his sole references to Cinna are that he was

the son of Pompey's daughter (55.14.1), that he was *ἐγγυητὴς* *καὶ ὄνομαστικός* (55.21.1), and that he became consul (55.22.1). Dio was not happy with Seneca's account, as he understood it, and jettisoned accuracy, leaving it to rhetoric to bolster up his version.

It remains, however, to explain why Seneca dates the conspiracy to Augustus' 41st year,¹ at a time when he was in Gaul. It is possible that there was a sojourn in Gaul in 22 B.C. In that year Augustus restored Gallia Marbonensis to the Senate's jurisdiction (Dib 54.4.1), and this event, which Dio reports immediately after the conspiracy of Caepio and Murena, may have been given considerable publicity, in order to counteract the odium which Augustus had incurred when he authorised a thanksgiving for the suppression of the conspiracy of Caepio and Murena (Dio 54.3.8). If it is supposed that Augustus went to Gaul in order to publicise the handing over, the inconsistency in Seneca is resolved, for Augustus was in his 41st year in 22 B.C. The Gallic sojourn of 16-13 B.C., apart from not being in his 41st year, is open to another criticism. The debate between Augustus and Livia (Dio 55.14.2 - 21.4; Sen. Clem. 1.9.6) would not have been conducted by correspondence, despite Suetonius' assertion (Aug. 84) that Augustus habitually communicated with Livia in writing on important matters. But Livia would not have been with Augustus in Gaul in 16-13 B.C., for Dio (54.19.3) suggests that the real reason which then took Augustus to Gaul was the desire to live with Terentia.

1 Speyer (278, 281-2) maintains that Seneca (Clem. 1.9.2) should not be taken literally, and suggests that he means merely that Augustus was past his *ἐκπῆ*. On the argument here put up, however, Seneca can be taken to mean what he says.

CHAPTER XI

"SUA DOMUSQUE SUAE MAIESTAS"

A. "ADMISSOS GREGATIM ADULTEROS, PERERRATAM NOCTURNIS COMMISSIONIBUS CIVITATEM"

In 2 B.C. Augustus, who had previously suspected the morals of his daughter Julia, but had not had sufficient information to convert suspicion into belief, learnt of her dissolute life and communicated the matter to the Senate, as a result of which Julia was relegated to the island of Pandateria; of her paramours some prominent persons, including Antony's son Iullus Antonius, were put to death, and the rest were relegated to islands (Dio 55.10.12-15). Velleius (2.100.3-5) says that Antonius committed suicide, and that Quintus Crispinus, Appius Claudius, Senpronius Gracchus, Scipio, and others of less note were punished under Augustus' adultery law. One of Velleius' "alii minoris nominis" (2.100.5) seems to have been a certain Demosthenes (Macrob. Sat. 1.11.17). Seneca (Ben. 6.32.1-2), apparently citing the indictment against Julia (Syme 426.7), attests droves of adulterers, nocturnal debauches in the Forum, and common prostitution: "Divus Augustus ... flagitia principalis domus in publicum emisit: admissos gregatim adulteros, pererratam nocturnis comissionibus civitatem, forum ipsum ac rostra, ex quibus pater legem de adulteriis tulerat, filiae in stupra placuisse, cotidianum ad Marsyam concursum, cum ex adultera in quaestuarium versa ius omnis licentiae sub ignoto adlexo peteret".

The detection of the scandal induced an uncontrollable rage in Augustus.¹ His communication to the Senate was made in his absence by a letter read by his quaestor (Suet. Aug. 65),

¹ Dio 55.10.12,14; Seneca (Ben. 6.32.2) - who says that Augustus afterwards regretted his impulsive dislosure; Suet. Aug. 65.

and is probably the letter referred to by Pliny (N.H. 21.9). As Pliny there mentions Julia's habitual presence at the statue of Marsyas, and as Seneca (Ben. 6.32.1) attests this as one of the charges, the letter may have been in the form of an indictment. Suetonius (Aug. 65) says that after sending the letter Augustus avoided men's society, which may mean that he left Rome for a while (Fitzler RE 10.902). He commended Phoebe, Julia's freedwoman and accomplice, for having committed suicide (Dio 55.10.16; Suet. Aug. 65), prescribed harsh treatment for Julia on Pandateria (Suet. Aug. 65), and rejected all requests that she be allowed to return (Suet. Aug. 65; Tib. 11; Dio 55.13.1; 56.32.4), but transferred her after five years to Rhegium on the mainland (Suet. Aug. 65), where she died in 14 A.D. (Tac. Ann. 1.53.1). Julia was treated as no longer belonging to Augustus' family, did not benefit under his will, and was not allowed interment in his mausoleum (Fitzler, RE 10.903).

If this were all, the case might not warrant consideration in a study of *maiestas*. But several passages in the sources suggest that the matter went further than mere adultery. Dio (55.10.15) says that Antonius' adultery was alleged to be linked to designs on the Principate: *ὅς καὶ ἐκ τῆς μοιχαλίας τοῦτο πρῆξεν*. Pliny (N.H. 7.45.189) speaks of "*adulterium filiae et consilia parricidae palea facta*". Tacitus (Ann. 3. 24.2-3) says that Augustus acted illegally: "*Ut valida divo Augusto in rem publicam fortuna, ita domi inprospera fuit ob inopudicitiam filiae ac neptis, quas urbe depulit adulterosque earum morte aut fuga punivit. nam culpam inter viros ac feminas vulgatam gravi nomine laesarum religionum ac violatae maiestatis appellando clementiam maiorum suasque ipse levas egrediebatur*". Even Velleius (2.100.5) finds it a matter for comment that Crispinus, Claudius, Gracchus and Scipio "*quas cuiuslibet uxore violata poenas pendissent, pependere, cum Caesaris filiam et Neronis violassent coniugem*". On the other hand, adultery alone is discussed in some passages

(Sen. Ben. 6.32.1-2; Clem. 1.10.3; Macrob. Sat. 1.11.17), while Seneca (Clem. 1.10.3) stresses Augustus' clemency: "Quoscumque ob adulterium filiae suae damnaverat, adeo non occidit ut, dimissis quo tutores essent, diplomata daret".

Syme (#26-7) believes that Julia's misconduct was used as a pretext for political reasons. Augustus was prepared to sacrifice her, for by cutting the link with Tiberius he might secure the succession of Gaius and Lucius. Alternatively, there was a conspiracy;¹ although Gracchus is the official scapegoat, the ringleader was probably Antonius, who may have aspired to supplant Tiberius as the stepfather of Gaius and Lucius. This view is open to several objections. Despite Seneca's apt "filia et tot nobilis iuvenes adulterio velut sacramento adacti",² it was a strange conspiracy which restricted admission to those who had attended a qualifying course 'apud Iuliam'. Pliny's "consilia parricidae" is not corroborated by other sources. Velleius, who is generally not slow to detect "scelerata consilia", makes no such suggestion in his fairly full notice of Antonius, saying only that he was "violator eius domus" (2.100.4; cf. Tac. Ann. 3.18.1). Seneca does not mention the paramours in his account of Julia's disgrace (Ben. 6.32.1-2). Elsewhere (Clem. 1.10.3) he says that they were convicted "ob adulterium Iuliae", in a passage immediately following his assertion that L. Cinna's conspiracy was the last against Augustus. Suetonius (Aug. 19.1) omits Antonius and the other adulterers from his list of conspirators, although in the same chapter (19.2) he notices the plot of Audasius and Epicadus to rescue Julia from exile. Dio (55.10.15) says that the adulterers

¹ Cf. Groag (RE 2A.1373); Dessau (L.466-7); Groebe (RE 1.2584).

² Brev. Vit. 4.5. No less neat is Groag's observation (RE 2A.1371) that the dependence of the nobility on one man meant "dass sie ihre Kräfte statt im Kampf der Parteien im Kampf um die Weiber verausacht".

included a tribune who was not punished until after his year of office.¹ If this tribune had been a conspirator he would not necessarily have received the same scrupulous treatment, for Augustus had enough precedent for the removal of a conspirator from office for the purpose of a prosecution (pp. 189, 193, 205, above). Furthermore, there is no evidence of the customary *senatusconsultum* decreeing a thanksgiving when a conspiracy had been suppressed. Finally, the name of Antonius, who was consul in 10 B.C. (Groebe, RE 1.2584), was not expunged from the *Fasti* (Tac. Ann. 3.13.1). If the crime to which Augustus reacted so violently had been a conspiracy, he would surely not have stopped short of a '*memoriae damnatio*'.

The crucial passage is Tacitus (Ann. 3.24.2-3; p. 217 above). Tacitus says, firstly, that Augustus was fortunate in public affairs, but unfortunate in his domestic affairs because of Julia's conduct; this contrast seems to suggest that there was no conspiracy, for if there had been Augustus would not have been "fortunate in public affairs". Secondly, Augustus relegated Julia and punished the adulterers by death or exile. Thirdly, when he imposed these punishments Augustus gave the names of impiety and *maiestas* to the common crime of adultery, and thereby departed from traditional clemency and exceeded the ambit of "*suas leges*". Which law was it whose limits he exceeded, the *lex Julia de adulteriis coercendis*, or the *lex maiestatis*, or both? If it is held that it

1 As Sempronius Gracchus was exiled a year later than Julia (Tac. Ann. 1.53.6), it has been suggested (Furneaux 1.250.4) that he was the tribune. Groag (RE 2A.1373) objects that the Sempronii Gracchi of the Principate were patricians. But Tacitus (Ann. 1.53.8) notices Gracchus' relationship to the great tribunes of the second century B.C. Perhaps the most likely tribune in 2 B.C. was the paramour Scipio T., as Groag (RE 4.1427) believes, he was the son of P. Scipio, consul in 16 B.C. This would make him appreciably younger than the others, of whom Crispinus was consul in 9 B.C. (Groag, RE 4.1719), and Appius Claudius was a senator in 25 B.C. (Münzer, RE 3. 2668).

was the adultery law,¹ then Tacitus means that the charge was brought under the *lex*, but a sentence not lawfully impossible for adultery was secured by introducing allegations of *maiestas*,² on this view Tacitus' criticism goes to the legality of the sentence. If it was the *lex maiestatis*,³ Tacitus' point is that there was an unlawful extension of the substantive law, in that an offence which should have been charged '*lege Iulia de adulteris*' was prosecuted '*lege maiestatis*'.

Much of the evidence suggests that the prosecutions were based on the adultery law. By sending Julia a repudiation in the name of Tiberius (Suet. Tib. 11) Augustus fulfilled a condition precedent to a prosecution for adultery, which could not be brought against either the woman or the paramour until the marriage had been dissolved.⁴ The prescribed penalty for adultery was '*relegatio in insulam*', accompanied in the case of the woman by forfeiture of half the *dos* and confiscation of a third of her property, and in the case of the adulterer by confiscation of half his property.⁵ Relegation was precisely the sentence imposed on Julia,⁶ and forfeiture of half her *dos* also seems to have followed, for the waiver which Tiberius voluntarily made (Suet. Tib. 11.4) probably related to that part of the penalty: "*officii duxit ... utcumque maritae, quidquid unquam dono dedisset, concedere*".

1 Furneaux (I.419,15); Syme 426; Mommsen (Straf 587,1); Hartmann (RE 1.434); Fitzler (RE 10.902).

2 It may be felt that the aggravation of punishment, on a prosecution for crime X, by leading evidence that the accused also committed crime Y, was possible on the analogy of the position postulated by Henderson in the case of extortion (pp. 97-8 above). But Henderson's thesis is not acceptable, and in any event it will be suggested that Tacitus' probable meaning is quite different.

3 Dessau (I.467); Kelly 36-7; Chilton 75; Rogers (Trials 27); Cicero (266 and n.3).

4 Dig. (48,5,12,10); cf. Mommsen (Straf 697 and n.3); Hartmann (RE 1.433).

5 Paul Sent. 2,26,14; cf. Mommsen (Straf 698); Hartmann (RE 1.434); Fitzler (RE 10.902).

6 It is not clear why Dessau (I.466) and Syme (426) hold that Julia's punishment went beyond the *lex*. See Fitzler (RE 10.902).

The adulterers, apart from Antonius, were also relegated (Vell. 2.100.5), and Seneca (Clem. 1.10.3) suggests that Augustus assisted them to go into voluntary exile. Dio (53.10.15) says that certain other notables did with Antonius, but Velleius is emphatic, Dio names only Antonius, and Sempronius Gracchus is known to have survived until 14 A.D. (Tac. Ann. 1.53.5-9). The procedure which was followed is not very clear. Some authorities believe that Julia was punished by Augustus in his domestic tribunal, outside the ambit of the public criminal law,¹ and that the same tribunal dealt with the paramours,² but it is not certain that this view is correct. There would be no point in Tacitus' "*suas leges egrediebatur*" if Augustus had not purported to act under the laws at all. Fitzler (RE 10.902) points to the absence of evidence of any legal proceedings against Julia, and to the desire of Augustus, in his first flush of rage, to execute her summarily.³ Fitzler argues that although the letter to the Senate must have been written after an enquiry conducted by Augustus, no source places the letter after her condemnation. On the contrary, Dio (55.10.4) says that she was relegated as a result of the communication to the Senate. It is suggested that a similar inference can be drawn from Suetonius (Aug. 65), whose sequence is: the letter to the Senate; the withdrawal from men's society; the impulse to execute her; and the relegation. A condemnation is attested by Suetonius, in language which does not suggest a domestic tribunal: "*ob libidines atque adulteria damnata*" (Tib. 11.4; cf. Sen. Clem. 1.10.3). Dio (55.10.16), immediately after discussing the cases of Julia and the paramours, says that as a result many other women were accused of similar

1 That is, the "P-usgericht" or domestic tribunal proper, as opposed to the "Kaisergericht" or imperial court of public criminal jurisdiction. Mommsen (Straf 587.1; 974.2); Lengle (Straf 75); Dessau (1.416); Volkman 81; Kelly (7.10-1.35); Ciaceri 266.

2 Vollmann 121; Kelly 10-1 - although elsewhere (36-7) he says it was the imperial criminal court.

3 Suet. Aug. 65. Augustus could not do this under his own adultery law, as the adultery had not been discovered in his own house (cf. Dig. 48.5.24 (23)).

conduct, but Augustus $\delta\sigma\sigma\alpha\varsigma$ $\tau\alpha\varsigma$ $\delta\iota\chi\alpha\varsigma$ $\dot{\epsilon}\delta\dot{\epsilon}\chi\alpha\tau\omicron$. Kelly (35-6) considers that the proceedings contemplated here were in the *questio de adulteriis*, as $\dot{\epsilon}\delta\dot{\epsilon}\chi\alpha\tau\omicron$ means not "accepted" but "approved"; and indeed it does not seem that Augustus would have been prepared to try a whole batch of cases himself.

It is postulated that Augustus did not breach the adultery law as far as the penalty was concerned, but that there was a possible breach of a different kind. Dio (55. 10.16) says that Augustus laid down a period of prescription for adultery prosecutions, and allowed all the other women to benefit by it, but not Julia. There was a prescriptive period of five years for all forms of the crime (Dig. 48.5.30. 5-7), and this rule was clearly a term of the *lex Julia de adulteriis*: "hoc quinquennium observari legislator voluit" (Dig. 48.5.30.6). Dio therefore errs in dating the prescriptive rule to 2 B.C., as the adultery law was passed in 18 B.C. (Mommsen, *Straf* 691) or 17 B.C. (Hartmann, *RE* 1.433). A shorter period of prescription also seems to be attested (Dig. 48.5.30.5), whereby action against the woman had to be instituted within six months of divorce, but this rule was laid down in a post-Augustan rescript (Dig. 48.5.30.5). The question is whether the paramours committed adultery with Julia at approximately the same time, namely in or about 2 B.C., or at different periods. At least one adulterer began his relationship with her well outside the five years' prescriptive period. Sempronius Gracchus, the "pervicax adulter", first corrupted her when she was the wife of Agrippa (who died in 12 B.C.), and continued the association after her marriage to Tiberius, inciting her against Tiberius and composing a letter attacking him, which Julia sent to Augustus (*Pac. Ann.* 1.53.5); Gracchus may have been the father of Agrippa Postumus, who was born after Agrippa's death (Hanslik, *RE Supp.* 9A.1.1268). Despite Syme's assertion (427) that Gracchus was only a scapegoat for Antonius, there

is no evidence that any other paramour had an association with Julia in any way comparable, in point of duration or intensity, to that of Gracchus. It is difficult to accept Groag's suggestion (RE 2A,1373) that Gracchus participated in a movement to marry Antonius to Julia; any possible advantage to Gracchus would surely have been outweighed by the ignominy of being supplanted in her affections. If anyone had aspirations ἐπὶ τῇ μοιρασίᾳ, why was it not the entrenched Gracchus rather than the newcomer Antonius? The answer may be that Gracchus had fallen out of favour with Julia prior to the events of 2 B.C., and perhaps long enough before to justify the supposition that his adultery with her was more than five years old when he was prosecuted. This view finds some support in Tacitus' statement (Ann. 1.53.6) that Gracchus was relegated - "igitur amotus" - because of his actions referred to in Annals (1.53.5), the last of which was the letter attacking Tiberius. This would have been before Tiberius' secession in 6 B.C., and may have been some time before. If, therefore, Gracchus' crime was prescribed in 2 B.C., his prosecution is rightly described as exceeding "suas leges", as far as the adultery law is concerned. But *maiestas*, which never became prescribed (Mommson, Straf 698), furnished a way around the difficulty.

The charge against Iulius Antonius was undoubtedly some form of *maiestas*. The evidence that he was executed is not conclusive, but the decisive fact is that he died, whether by execution or suicide. Kelly (36) believes that ἀσθὲν in Dio (55.10.15) is used in a passive sense, and this may well be Dio's meaning, for when he cites a clear case of suicide in the same chapter (55.10.16), namely that of Phoebe, he uses the expression *ἑαυτὴν ἐκείνην*. Tacitus' "morte ... punivit" (Ann. 3.24.2) may well mean actual execution,¹ but this does not necessarily mean the

¹ Rogers (Treason 92). Cf. "interfectus ... Iullos" (Ann. 1.10.3) and Iulio Antonio ... morte puniō" (Ann. 4.44.5).

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