

XVIII.—A Criminal Trial of A.D. 70 (Tacitus, *Histories*, 4.44)

ROBERT SAMUEL ROGERS

DUKE UNIVERSITY

This paper relates certain of the Senate's proceedings at the turn of the year 69–70 to their legal basis, in particular discussing the case of Sagitta and Sosianus, and interpreting the phrase of Tacitus, "sermone molli et tamquam rogaret."

After the overthrow and death of Vitellius there was a short-lived effort by some of the senators to prosecute certain of their fellows for the practice of delation under Nero. Gaius Musonius Rufus achieved the conviction of Publius Egnatius Celer for false witness against Barea Soranus in A.D. 66.¹ This indictment was brought evidently under the *Lex Cornelia de Falsis* as extended in A.D. 16, by the *Senatusconsultum Libonianum*, to comprehend the acceptance of money for testimony leading to the conviction of innocent persons.² The penalty was total confiscation and deportation.³ Helvidius Priscus tried to resume his similar attack upon Titus Clodius Eprius Marcellus, which he had initiated under Galba but abandoned, dissuaded by fellow-senators and the uncertain attitude of the Emperor.⁴ Junius Mauricus demanded that access be afforded to the imperial archives on the Neronian trials, but the presiding praetor, Domitian, reserved that question to Vespasian.⁵ When the senators then took oath that they had not engaged in delation, several members of the House were denounced for perjury.⁶ Finally Marcus Aquilius Regulus was bitterly assailed by Curtius Montanus and defended by Vipstanus Messalla.⁷ These bickerings and recriminations occupied, it seems fairly clear, three separate

¹ Tac. *Hist.* 4.10, 40; cf. *Ann.* 16.32.2 f., especially "emptus ad opprimendum amicum . . . avaritiam ac libidinem occultans; quae postquam pecunia reclusa sunt. . . ."

² *Dig.* 48.10 (De lege Cornelia de Falsis et de Senatus Consulto Liboniano) 1.1: "Item <qui> ob instruendam advocationem testimoniave pecuniam acceperit pactusve fuerit societatem coierit ad obligationem innocentium, ex senatus consulto coercetur"; cf. 48.10.20. For the date of the SC cf. Mommsen, *Strafrecht*, 671.

³ *Dig.* 48.10.1.13.

⁴ Tac. *Hist.* 4.6–8, 43; *Dial.* 5.

⁵ *Hist.* 4.40.

⁶ *Hist.* 4.41.

⁷ *Hist.* 4.42.

meetings of the Senate in December of 69 and January of 70 and produced considerable dissension and discord in the House.⁸

If Tacitus' account of the meetings is full, and it seems from the abundance of detail that it may well be so, these three sessions would be: the first, a special meeting called just after the death of Vitellius (20 December); the second, as is specifically stated, the regular meeting of 1 January 70; the third, apparently, the regular meeting of the Ides of January.⁹ If this is correct, the next following session would be that of the Kalends of February, and the trial we are about to discuss could be assigned to that exact date.

At this next meeting¹⁰ Domitian again presided as praetor, and put the question of a general amnesty for all that had happened under Nero: "de abolendo dolore iraque et priorum temporum necessitatibus." Then Mucianus spoke at length in defense of the Neronian prosecutors; "simul eos qui coeptam, deinde omissam actionem repeterent, monuit sermone molli et tamquam rogaret." The clause "qui . . . repeterent" has particular reference to Helvidius Priscus (above). Now the *Senatusconsultum Turpilianum* of A.D. 61,¹¹ which dealt with *tergiversatio*, allowed the withdrawal of a prosecution under certain conditions, but in such case forbade the bringing of the same charge against the same defendant by the same prosecutor at any later date.¹² Mucianus was reminding Priscus and the rest by rhetorical question, "tamquam rogaret" (and herein was his address "mollis," for he might have used blunt and categorical statement) that any indictment now of Eprius Marcellus by Priscus was inadmissible.¹³ The "liberal" senators abandoned their independence and submitted.

⁸ *Hist.* 4.3-10, 39, 40-43. But certainty on the number of meetings is hardly possible. E.g., is "eo senatus die quo de imperio Vespasiani censebant," 4.6 *ad fin.*, the same as the session recorded in chapter 3? I believe it is. Is "quo die senatum ingressus est Domitianus," 4.40 *init.*, identical with "Kalendis Ianuariis," 4.39 *init.*? I believe it is not.

⁹ Cf. Suet. *Aug.* 35.3.

¹⁰ Tac. *Hist.* 4.44.

¹¹ *Dig.* 48.16; cf. Mommsen, *Strafr.* 498-501; Taubenschlag in *RE.*, and L'Ecrivain in *DS.*, s.v. "tergiversatio."

¹² *Dig.* 48.16.4.1; *Cod.* 9.9.16.2; 9.1.6; 9.45.3.

¹³ *Rogaret* in this passage is interpreted by Gerber and Greef, *Lexikon Tacileum*, and by the translators generally, in the sense of "entreat." But the commentators have not previously, to the best of my knowledge, discerned the connection of the *SC Turpilianum* with the incident; unaware of that, one is pretty well driven to understand *rogaret* as "beseech" to give the passage satisfactory sense, though he should feel some astonishment at encountering Mucianus in the role of pleader. The interpretation here offered takes account of the historical background of the episode, and better accords with Mucianus' disposition.

But Mucianus wished to make some ostensible concession to their recent sentiments, not to appear to ignore their judgment and grant impunity to everything that had been done under Nero. He therefore moved the conviction, and the return to their former places of exile, of two defendants before the Senatorial Court, Octavius Sagitta and Antistius Sosianus. Tacitus briefly summarizes the original cases, which he was subsequently to narrate in some detail in his *Annals*. Octavius had been convicted of the murder of his paramour, Pontia Postumina, in A.D. 58; his property had been confiscated and he had been deported.¹⁴ Antistius had been convicted of libel against Nero, that is, *maiestas*, in 62, and deported also.¹⁵ From his exile Antistius had returned temporarily in 66 as state's witness against Publius Anteius and Marcus Ostorius Scapula, whom he denounced for high treason.¹⁶ This presumably explains Tacitus' characterization of him as "pravitate morum multis [*sic*] exitiosus,"¹⁷ for there is hardly basis for it in the earlier episode of Antistius' career, his rather unruly tribunate.¹⁸

Following this résumé, Tacitus writes: "Ambo gravi senatusconsulto damnati pulsique, quamvis concesso aliis reditu, in eadem poena retenti sunt." The first half of this sentence is frequently understood as referring to the original trials and convictions. This is surely erroneous. Octavius had been convicted of murder in 58, Antistius of *maiestas* in 62. It is quite impossible that Tacitus' singular "gravi senatusconsulto," more especially in immediate juxtaposition to "ambo," could refer to two convictions on different charges four years apart. The first part of the sentence, equally with the last, must refer to the present episode in the year 70.

On what charge were Octavius and Antistius now condemned? Tacitus says of them "egressos exilium" and, in comment on their sentence, "quamvis concesso aliis reditu." It is, then, evident that they, as well as others whose identity we do not know, had left their exiles during the disturbances of the civil wars, in anticipation and expectation, presumably, that some sort of amnesty was

¹⁴ Tac. *Ann.* 13.44.

¹⁵ *Ann.* 14.48 f.; 16.14. There is much that is suspect in this trial, and I shall discuss it elsewhere; but the questions do not affect the present problem.

¹⁶ *Ann.* 16.14. It is clear from the sequel that Antistius was not restored as a reward for his testimony, but was returned to his exile; for he could not be punished in 70 for breaking exile (see below) if he had been recalled by imperial clemency in 66.

¹⁷ *Hist.* 4.44.

¹⁸ *Ann.* 13.28.

going to be granted to offenders under the *ancien régime*. In similar manner Cicero had considered leaving his exile to return to Rome in dependence on an *auctoritas senatus* simply, and he had actually reached Dyrrhachium on his way back when he learned of the vote of the centuriate assembly authorizing his return.¹⁹ There was more recent precedent in the case of Gnaeus Cornelius Dolabella; banished to Aquinum by Otho, he had returned to Rome on hearing of Otho's death.²⁰

The unidentified other persons either were not indicted for breaking exile, or, if indicted, were acquitted, their sentences thus being revoked and their return condoned. But Octavius and Antistius became the victims of Mucianus' politic attempt to mollify the senators, and the scapegoats of the prosecutors whom Helvidius Priscus and the others had so vehemently hoped to condemn. Nor were these latter placated in the issue; for they regarded Octavius and Antistius as insignificant nobodies ("viles") whose return home would not have mattered anyway.

Finally their case is of interest in the history of the penalty imposed for the crime of breaking exile. Tacitus states that there was no aggravation of the penalty under which they already lay: "in eadem poena retenti sunt." In the Ciceronian period clearly the punishment was death; and apparently the same obtained under Augustus.²¹ Hadrian established that the offender should be liable to a punishment one degree more severe than that previously imposed upon him. "In exulibus gradus poenarum constituti edicto divi Hadriani, ut qui ad tempus relegatus est, si redeat <in perpetuum relegetur, qui in perpetuum relegatus est, si redeat> in insulam relegetur, qui relegatus in insulam <insula> excesserit, in insulam deportetur, qui deportatus evaserit, capite puniatur."²² Thus Octavius and Antistius, both in the earlier period and, since they were already under a sentence of *deportatio*, later, after Hadrian's edict, would have been liable to the death penalty.

¹⁹ Cic. *Att.* 3.26; 4.1.4.

²⁰ Tac. *Hist.* 2.63; cf. 1.88.

²¹ Mommsen, *Strafr.* 936 and notes 1 and 2. Dolabella (above) had been executed, but he had compounded his offense by committing high treason.

²² *Dig.* 48.19.28.13 (the bracketed insertions are Mommsen's); cf. 48.19.4.