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THE LEGAL ISSUE IN CICERO, *PRO BALBO*

In 56 L. Cornelius Balbus, a native of Gades, was charged with having usurped the Roman citizenship. Most scholars have held on the basis of Cicero's speech in his defence that the charge was unjustified. This orthodoxy was challenged in 1966 by H. Braunert:[1] in his view Balbus' enfranchisement was illegal because the consent of Gades had not been obtained. More recently H. Galsterer has deduced from this premise the further conclusion that in the second century the Latin *ius migrationis* was restricted by a rule that no migrant could become a Roman citizen without the consent of the city of his origin.[2] It is my aim to rehabilitate the orthodox view and to show that there is no warrant for Galsterer's thesis.

It was an accepted fact at the trial that Balbus had been given the citizenship by Pompey purporting to act under the powers conferred on him by the *lex Gellia Cornelia* of 72 to bestow it on foreigners 'de consili sententia singillatim' (*Balb.* 19). He was probably enrolled in one of the urban tribes, but later secured registration in Clustumina as a reward for securing the conviction of an unnamed person under the law of *ambitus*; he also had himself adopted by another *protégé* of Pompey whom Pompey had enfranchised, Theophanes of Mitylene, from whom he hoped to inherit. These actions provoked opprobrious comment (57). However, Balbus had attracted the favour of Caesar as well as of Pompey, serving him as *praefectus fabrum* in his praetorship and consulship (63); he was of course to become ever more notorious as one of Caesar's most trusted agents and advisers. His very wealth provoked envy, all the more as he had acquired property that had once belonged to L. Crassus and Q. Metellus (56). The insinuating foreigner who surpassed so many Romans of high pedigree in riches and influence was torn to pieces 'in conviviis et circulis'. Many would naturally have been well pleased to see the ruin of the favourite of Pompey and Caesar (57 f.). In 56 another Gaditane, who had himself obtained the Roman citizenship and been deprived of it by judicial process (32), charged Balbus apparently under the *lex Papia* of 65 B.C., which not only provided for the expulsion of certain foreigners from Rome but evidently set up a procedure for determining if citizen rights had been usurped.[3] Pompey and Crassus appeared for the defence (17), and Pompey impressed Cicero for the same cause (4). The trial came on probably in September 56, when Caesar was campaigning in Brittany (64), certainly after Cicero had already been obliged to move various honours to Caesar in the summer, and in his speech *de provinciis consularibus* to resist the proposals made in the senate that any of Caesar's provinces should be assigned to the next consuls (61). Balbus was acquitted.

Cicero of course published versions of only a few of the forensic and deliberative speeches that he delivered. His aim in publication was to leave to posterity memorials of his art, or to influence contemporary opinion, or to do both. It seems to me unlikely that he would freely have chosen to perpetuate either his *de provinciis consularibus* or his *pro Balbo*. He was not proud of his role as a spokesman for the 'triumvirs' (*Att.* 4. 5; *Fam.* 1. 7. 10). It was probably they who pressed him to give further publicity to the eulogies on their achievements which these speeches contain. But neither he nor they had any interest in making out to the reading public that the *legal* case for Balbus

[1] *Der altsprachliche Unterricht* 9 (1966), 51–73.

[2] *Herrschaft u. Verwaltung im republikanischen Italien* (1976), pp. 162 ff.

[3] *Arch.* 10; *Balb.* 52; *Bobb. Schol.* 175 St.; *MRR* 2, 158.

was stronger than it could be made to appear to the jury; it was enough that the verdict had upheld Balbus' rights. I see no reason then to think that the published version of our speech, so far as it concerns legal issues, had been reworked or differed in substance from what Cicero actually said in court.

Only the central part of the speech (19–37) concerns these issues; even the recital of precedents for the grant of citizenship by generals to foreigners who had been valiant in Rome's service (46–51), and for enfranchisements in quite different circumstances (52–55), hardly touches the prosecution's case, and there is much eulogy of Pompey and Caesar, which should have had no effect at all on a jury intent on finding a verdict in accordance with the pertinent facts and law. The peroration (64 f.), though Cicero does assert that his case is 'certain and clear', relies almost entirely on such irrelevant material and dispenses with any summary of his arguments on the law. Braunert suggests that this in itself indicates that they were unsound. Likewise it is for him sinister that Pompey and Crassus as well as Cicero found it necessary to interpose their *gratia* and *auctoritas* on Balbus' behalf. But these suspicions rest on a misunderstanding of Roman forensic practice. Modern legal criteria of relevance did not apply.

The task of the advocate was threefold: he had to prove the truth of his case, to win the favour of the jury and to work on their passions.[4] All that we should consider proper to a court hearing came under the first head: the production of the relevant evidence and legal rules and their application by reasoning to the case in hand.[5] However, this process of 'instruction' was less important at Rome than methods for winning the favour of the court and working on the emotions of the jury: 'for men far more often reach their verdicts under the influence of hatred or love or greed or anger or sorrow or joy or hope or fear or error or from some emotion than from truth or ordinance or any legal rule or judiciary formula or statutory provisions'.[6] The orator is entirely concerned with beliefs and not with knowledge: he speaks to the ignorant of matters of which he is ignorant himself; juries give contradictory decisions, just as counsel take contradictory briefs; advocates have to lay traps for men's errors.[7] M. Antonius, into whose mouth Cicero puts these and other such *dicta*, which no interlocutor in his dialogue *de oratore* challenges, does not make any exception for cases in which the advocate has truth on his side, and he expatiates far longer on devices for influencing the jury by appeals to what we should regard as irrelevant considerations, and to mere emotion, than on the technique of 'instruction'. It is a fair conclusion that even if Balbus had a cast-iron defence, as I believe, the jury might have convicted him out of prejudice, unless Cicero had countered it by dwelling on matters extraneous to the legal issue, and unless Pompey and Crassus had exerted their influence on his behalf.

In this connection it seems to me probable that it was against Balbus himself that their prejudice was to be apprehended. If the jury had consisted mainly of men hostile to the 'triumvirs', the appearance of Pompey and Crassus, Cicero's laudations of Pompey and Caesar, and his contention that conviction would be a grievous slight to those patrons of Balbus, would all have been no more than irritants. Cicero refers but briefly to the envy and dislike felt for Balbus personally (56 f.), but this was

[4] e.g. *de orat.* 2. 115; 310.

[5] ibid. 116–19; there follows a long discussion of the *topoi* that can be used in 'instruction' (130 ff.) that has very little to do with the proofs or legal arguments acceptable to a modern court. Cf. Brunt, *JRS* 62 (1972), 169.

[6] ibid. 178. Discussion of the second and third heads runs on to 214, cf. also 32, 72–4, 82, 324, 332.

[7] ibid. 30.

probably because there was little he could say to mitigate it; indeed he may well have passed over much that the prosecutor had said in (irrelevant) abuse of his client, to which an answer might not readily have been forthcoming. On the other hand, he clearly thought it effective to enlarge on Balbus' connection with Caesar, whose great deeds and liberality had doubtless enhanced his influence, and more particularly with Pompey. In his very last words he emphasizes that the validity of the benefit that Pompey had conferred on Balbus is at stake.

Let us concentrate our attention on what we can discover about the legal issues in Balbus' trial. Of course our only evidence consists in Cicero's *ex parte* statements. We must certainly not forget that Cicero himself recommends the advocate through the lips of Antonius to pass over lightly, or ignore altogether, any points in the adversary's case to which he could make no convincing answer, in the hope that they would then slip from the recollections of the jury, a practice that was the more efficacious for defending counsel at Rome, since they spoke after the prosecutor, and there was no summing-up by a judge.[8] On the other hand, Antonius also says that it is imprudent for the advocate to say anything 'aperte falsum';[9] this means *inter alia* that he could not sensibly assert anything that had been clearly disproved, and that there were limits to the extent that he could actually distort what his adversary had just said and what could not so quickly have been forgotten. If Cicero did not rework his actual treatment of the legal issues (*supra*), it must follow that he has not explicitly attributed to the prosecutor claims that he did not make, nor expressly denied that the prosecutor produced facts or arguments which he had produced. He might have deliberately omitted or obscured cogent arguments to which there was no possible reply, but in fact it is hard to conjecture what these arguments could have been. Analysis will suggest that it was the prosecution that pinned its hopes simply on sheer prejudice against an unpopular defendant.

It was the case of the prosecution that in enfranchising Balbus Pompey had exceeded his powers under the *lex Cornelia Gellia*, in that he had contravened the treaty between Rome and Gades (8 and 14); the *lex* gave him authority only in so far as he did nothing to violate anything 'sacrosanctum' (32), but a treaty was 'sacrosanct', and under the treaty Pompey was not entitled to confer Roman citizenship on a citizen of Gades without the sanction of Gades, which had never been obtained (19).

The whole argument is subverted if Cicero is right in contending that the treaty was not 'sacrosanct', because it had never been ratified by the people.

Gades had surrendered to Roman forces in 206 (Livy 28. 37. 10) and had then made a 'treaty' with L. Marcius Septimus (cf. 32. 2. 4). Cicero calls him a senior centurion of the first rank (34), but there is good reason to think that in 206 he had obtained the post of legate.[10] Braunert suggests that Cicero was deliberately depreciating Marcius' status, but there is no sign that he was attempting to correct a contradictory description by the prosecutor, or that the factual error invalidated his legal argument. Braunert is no doubt right that (whatever his status) Marcius was acting 'ductu auspicioque' of P. Scipio (Livy 28. 38. 1), but Cicero's argument would have been just the same if the treaty had been concluded personally by the pro-magistrate. In 78 at the request of the Gaditanes the treaty was 'renewed or made' by the senate: 'renewed' if the pact with Marcius had any validity, 'made' for the first time if it had none. According to Cicero the Gaditanes procured this decree of the senate because they had become aware that the pact with Marcius did not bind the Roman people

[8] ibid. 294.
[9] ibid. 306.
[10] *RE* 4, 1260 ff. (Münzer).

'aliquo publico vinculo religionis' (34). However, they failed to achieve their purpose, since confirmation by the senate was still insufficient to make the treaty sacrosanct, in the absence of ratification by the people (35). This contention agrees with statements by Polybius (6. 14) and Sallust (*BJ* 39) that only the people could make treaties and alliances, and is supported by many texts in Livy. Unquestionably historical cases of the ratification of such treaties by the people go back to 264.[11] The annalists conceived that the rule already held good in the fourth century.

Of course the people could act only on the initiative of a magistrate. The magistrate would normally seek the prior approval of the senate before submitting a treaty to the *comitia*. This explains why the senate could declare in 109 that the commander in the field had no right to make a treaty without authority from both senate and people (Sallust, *BJ* 39). If the senate did not approve of a treaty on the terms proposed, it would normally never come before the people at all.[12] When negotiations took place at Rome, they were conducted by the senate. Polybius remarked that many Greeks and kings erroneously supposed that the senate had sovereign power (6. 13). It would therefore have been quite natural if foreigners were often unaware of the legal rule that a treaty had no binding force on Rome unless confirmed by the people. This will explain why the Gaditanes in 78 were satisfied with a decree of the senate. Mommsen cited cases in which the status of 'friendship' with Rome was granted in the second century by decrees of the senate, but these decrees did not make treaties.[13] Normally they would be respected by Roman generals and governors. Indeed agreements made by commanders in the field, like Marcius, might equally be honoured in practice; thus in 198 the Gaditanes succeeded in a plea that no prefect should be installed in their city contrary to the terms of the pact with Marcius.[14] The senate had no incentive to procure the formal ratification of its decisions by the people, unless this were demanded by the other contracting party, especially as this would tie its hands for the future. It was no part of Cicero's case that the treaty made in 206 and renewed in 78 should not be respected at all – that Roman governors, or the senate, might freely disregard it. Only it was not binding on the Roman people in such a way that it could nullify any part of a subsequent enactment made by the people itself.

Braunert none the less contends (*a*) that it was not until the second century that the rule was recognized that a commander in the field could not make a treaty binding on the people, and (*b*) that in the post-Sullan era the senate had acquired the same right as the people to ratify a treaty. On this view the treaty with Gades was doubly sacrosanct, since both Marcius, acting for Scipio, and the senate were entitled to bind Rome by a solemn, religious obligation. Braunert appeals to Mommsen's conception that in the early Republic the magistrates, like the kings before them, could make permanently binding treaties on their own responsibility.[15] This necessarily rested on the phraseology of annalists writing of a period for which no good evidence was available to them. However, they were not consistent: Mommsen had to set aside their

[11] Polyb. 1. 11. Cf. Mommsen, *StR*[3] 3, 343–5.

[12] Thus the draft treaty negotiated by M. Claudius Marcellus, *cos.* 152, with certain Celtiberian peoples, was rejected by the senate alone – whereupon Marcellus simply accepted their *deditio in fidem* on precisely the same terms! See Appian, *Iber.* 49 f., cf. Polyb. 35. 2–4.

[13] *StR*[3] 3, 1172 obscures this. Cf. A. Heuss, *Die Völkerrechtlichen Grundlagen der röm. Aussenpolitik* (1963), esp. ch. 1.

[14] Livy 32. 2. 5. *Balb.* 35 seems incompatible with this provision being part of the *foedus*.

[15] *StR*[3] 1. 246 ff. It is of course beyond doubt that a commander could accept *deditio* (unconditional surrender), which might be followed by a treaty, could grant an armistice, and make a settlement, normally by advice of senatorial *legati*, in an area which had come under Roman control. But all the dispositions of a commander could be altered by the senate, and a mere *SC* could be overridden by a *lex*.

equally clear testimony (for what it was worth) that treaties were submitted to the people in the fourth century, and that the 'Caudine treaty' made by the consuls was repudiated on the plea that the prior sanction of senate and people had not been obtained, just as the treaty made with Numantia by Mancinus in 137 was repudiated on the same basis.[16] The magistrates who had sworn oaths to a treaty with the enemy without authorization were held to be solely responsible to the gods by whom they had sworn, and the Roman state could disavow them without incurring divine wrath by the device of surrendering the oath-takers to the vengeance of the enemy. This procedure is said to have been adopted in 236 as well,[17] and even if the story of the Caudine treaty is invention derived from later constitutional practice, the incident of 236 will hardly be fictitious. Moreover, in 242 the Roman commander, in making terms with Hamilcar, had introduced the proviso that they must be ratified by the Roman people,[18] and several cases are reliably recorded, earlier than the treaty with Gades, in which treaties were so ratified.[19] Hence, whether or not Mommsen was right that the magistrate had once been able to bind the people without consulting them, there is no warrant for the view that he still retained this right to the end of the third century B.C.

Braunert says that Cicero does not deny that Marcius swore to the treaty with Gades. I rather think that he does deny it in one obscure and corrupt passage.[20] But be this as it may, Marcius could have done no more than invoke curses on himself if the treaty were broken: neither he nor Scipio himself could have bound the people. Alternatively, if commanders in the field had then possessed the right to bind the people, this was no longer recollected in the first century. The prosecutor had obviously not tried to ascribe that right to them, or Cicero would have sought to rebut his case, at worst with easily found sophistries. Nor would Gades have felt it necessary to obtain confirmation of a pact whose validity was beyond doubt.

It is also impossible to accept Mommsen's view that the rule stated by Polybius was no longer recognized in the post-Sullan era.[21] An unwritten constitution like the

[16] App., *Iber.* 80; 83 cf. A. E. Astin, *Scipio Aemilianus* 130–2 with further evidence and bibliography (add E. Täubler, *Imperium Romanum*, 1913, pp. 137 ff.), cf. Livy 9. 5 and 8–11.

[17] Val. Max. 6. 3. 3; Dio fr. 45. [18] Polyb. 1. 62. 8, on which see Täubler (n. 16), pp. 106 ff.

[19] See also Polyb. 1. 11. 2 (264); Livy 29. 12. 15 (205); 30. 44. 13 (201).

[20] 'Quid fuit in rogatione ea quae de Pompeio a Gellio et a Lentulo consulibus lata est, in qua ('quo' *Pantagathus*) aliquid sacrosanctum (*secl. Madvig*) exceptum videretur? Primum enim sacrosanctum esse nihil potest nisi quod populus plebesve sanxisset ('sanxit' or 'sanxerit' *edd.*); deinde sanctiones † sacrandae sunt aut genere ipso aut obtestatione et sacratione legis aut poenae, † cum caput eius qui contra fecerit consecratur. Quid habes igitur dicere de Gaditano foedere eius modi? utrum [a] capitis consecratione an † obtestatione legis † sacrosanctum esse confirmas? Nihil omnino umquam de isto foedere ad populum neque legem neque poenam † gratam (or 'gratam vel ratam') esse † dico. De quibus igitur etiam (or 'etiam igitur') si latum esset † nihil ad plebem latum esse † ne quem civem reciperemus, tamen id esset quod postea populus iussisset ratum (cf. n. 23) nec quicquam illis verbis SI QUID SACROSANCTUM ESSET esse ('EST' or 'EST esse', *edd.*) exceptum videretur, de iis, cum populus Romanus nihil umquam iusserit, quicquam audes dicere sacrosanctum fuisse.' Various deletions, transpositions and emendations of the obelized passages have been tried, none of which produces very clear sense or eliminates all strange expressions; there may well be manuscript corruptions, perhaps substantial omissions, beyond the reach of conjectural skill, and no theory can be safely founded on any modern recension of this section 33. It is only plain that if there was an exception of anything 'sacrosanctum' in the *lex Gellia Cornelia*, Cicero denies that it covers the Gades treaty, as it was not brought before the people or plebs; in the last sentence he probably asserts that a mere *lex* that had forbidden the reception of foreigners as citizens could be repealed by any later *lex* that authorized it.

[21] *StR*[3] 3. 1165 ff. The practice under Caesar and the emperors is irrelevant; they had the right to make treaties, but could take the advice of the senate.

Roman can be modified either by statute or by the evolution of practice. No one has ever pretended that Sulla conferred the treaty-making power on the senate by statute, and new conventions cannot spring up like mushrooms, but can only develop from precedent to precedent. The Gaditane treaty actually constituted Mommsen's only evidence from the Republic. Conceivably its confirmation by the senate, without reference to the people, may have had pre-Sullan precedents. But if Mommsen were right, Cicero could never have categorically asserted that a treaty did not bind the people unless it had been approved by the people, without even attempting to meet the objection, which the prosecutor had obviously not raised, that a clearly recognized convention already subsisted whereby senatorial decrees sufficed to give a treaty binding force. His assertion in the speech for Balbus is not isolated. Addressing the people in 63, he had referred to a 'treaty' made by the agency of C. Cotta, consul in 75, under which certain lands had been granted to Hiempsal, king of Numidia, evidently by the senate; since it had not been confirmed by the people, Hiempsal was apprehensive that its validity might be challenged; in the senate too Cicero alluded to the doubts that existed on the point (*leg. agr.* 2. 58, cf. 1, 10 f.). No such doubts could have been entertained, if the treaty-making power of the senate was now acknowledged to be constitutional. In fact treaties continued to be approved by the *comitia*.[22]

Thus Cicero refuted the case of the prosecutor simply by showing that the treaty with Gades was not sacrosanct, and that a saving clause in the *lex Gellia Cornelia*, which would have made that law inoperative if it involved any violation of what was sacrosanct, had no relevance to the enfranchisement of Balbus. It may be that in the obscure passage cited earlier (n. 20) he went further, and contended that there was in fact no such saving clause in the *lex*, and that in consequence the *lex* would have been operative to the extent of overriding a treaty ratified by the people. But I feel no certainty that this is the claim which is at best adumbrated in a sentence that may be incurably corrupt. In any case he makes little of it, and I suspect that it would not have been sound; the general rule of the Twelve Tables[23] 'ut quodcumque postremum populus iussisset, id ius ratumque esset' would hardly have applied to the extent of justifying the abrogation of 'anything sacrosanct', even though no saving clause had been inserted in the later statute.

Supposing, however, that Cicero was wrong in arguing that the treaty with Gades was not sacrosanct, he still had a second argument that the enfranchisement of Balbus was no violation of the treaty: like the old treaties with Camerinum and Iguvium (47), it contained no clause, such as was found in those concluded with the Cenomani, Insubres, Helvetii and Iapudes, and some Gallic peoples, which forbade the grant of Roman citizenship to any of their nationals,[24] and the absence of such a prohibition implied that the enfranchisement of a Gaditane was allowed (32).

[22] e.g. by Vatinius (*Vat.* 29) and Clodius (*Domo* 129) as tribunes in 59 and 58. Under the triumvirs Aphrodisias was given treaty privileges by *SC* and *lex* (Sherk, *Roman Documents from the East*, p. 28A, cf. F. Millar, *JRS* 63 (1973), 57). Cf. n. 24.

[23] Livy 7. 17. 12.

[24] The treaties with the Cenomani and Insubres presumably followed their subjugation in 197 and 194, that with the Iapodes the victory over them of C. Sempronius Tuditanus, *cos.* 129. Caesar mentions no treaty with the Helvetii, and it must have been the result of his campaign of 58. (We need not assume that it was ratified by the people, since Cicero does not scruple to give the name of *foedus* to the pact with Gades.) It is puzzling that this clause was inserted in any of these treaties. At whose instance? The Romans had no reason to tie their own hands, and the 'barbarians' could hardly have expected Rome to make a practice of enfranchising their nationals. But perhaps some deserters to Rome had been given the franchise, and Rome conceded that there would be no more such grants.

Cicero reinforced this argument by appealing to the clause that did stand in the Gaditane treaty, though not in all treaties, requiring Gades 'maiestatem populi Romani comiter conservare' (35).[25] He rightly construed this to mean that Gades was placed in an inferior position to Rome and had to subordinate her will to that of Rome. The prosecutor had evidently felt that this clause made a difficulty for his case and had sought to remove it by maintaining that 'comiter' meant 'communiter', an absurdity that Cicero refutes (36). Cicero urges that Gades could not have fulfilled her duty to uphold the greatness of Rome if she had debarred Rome from encouraging Gaditanes to serve Rome by grants of the citizenship (37). Of course this argument could have had no force if any clause in the treaty had expressly made them conditional on the sanction of Gades. But Cicero denies that there was such a clause (35), and he could not have denied it if the prosecutor had cited it. And his appeal to the 'maiestas' clause would at least have been powerful if the prosecutor contended, as Maschke[26] (followed by Galsterer) dogmatically asserts, that it was implicit in the relationship between two sovereign states that neither could unilaterally confer its own citizenship on a national of the other. I do not know whence Maschke derived this principle of ancient international law, which certainly does not obtain in modern international law, and which would have seemed very strange to Cicero, who expatiates on the right of Romans to accept offers of citizenship made to them by other states; by acceptance they forfeit their Roman citizenship, but they do not require the sanction of Rome (28 ff.). In any case the 'maiestas' clause certainly implies that Gades was not on a parity with Rome and was not a fully sovereign state.

Cicero's second argument seems no less conclusive than his first. Not only did the treaty with Gades lack that quality of sacrosanctity in virtue of which it would have overridden a Roman statute, but it contained no provision whereby, even if sacrosanct, it would have invalidated the grant of Roman citizenship to a Gaditane.

The prosecutor had in fact relied on an argument which is not quite the same as Maschke's but has some analogy to it. He had contended that no citizen of a community with which Rome had a treaty could obtain Roman citizenship under a Roman law unless his community had become 'fundus' of that law,[27] i.e. had adopted and applied the law to its own citizens (29).

Cicero begins his reply to this by observing that the right to adopt a Roman law in this way belonged not merely to a foreign community which had a treaty with Rome but to any free people; for instance Latin cities (most of which had had no treaties with Rome, being colonies established by Roman charters) had adopted Roman laws, such as laws that modified rights of succession. This meant that when Rome passed a law like the *lex Voconia* (to take one of his examples), which restricted the rights of *cives Romanae* to take under wills, a Latin colony like Beneventum could of its own free will pass a law which simply made the terms of the Roman statute apply to the inheritance rights of Beneventan women (21). No one can contest Cicero's reliability here. Of course it follows that the sanctity and precise terms of the Gaditane treaty are no longer crucial to the case. Even though the treaty was not binding on Rome, and even though it did not specifically ban the grant of Roman citizenship to a Gaditane without the prior consent of Gades, it could still be true that that consent was required, since Gades was a free community, provided that there was a general

[25] Walbank in Polyb. 21. 32. 3 argues that this clause (for which cf. *Dig.* 49. 15. 7. 1) belongs to a form of the treaty revised in 78. 'Comiter' means 'with good will'.

[26] *Zur Theorie u. Gesch. der röm. Agrargesetze*, pp. 28 ff.

[27] On this term see M. Hammond, *HSCPh* 60 (1951), 159 ff.

rule accepted by Rome that no Roman law could affect the citizen of a free community until it had been adopted by that community.

According to Cicero this would be a complete misconception of the practice under which Italian communities had adopted Roman laws. It was one thing to permit them to apply to their own citizens rules made at Rome for Roman citizens, and quite another to suggest that any limitation on Roman sovereignty was involved. Rome was entitled to legislate as she pleased (subject no doubt to her obligations under binding treaties), especially in regard to her own citizens. Under Roman law a man could not be a citizen both of Rome and of a foreign community (27–9). If a foreigner received Roman citizenship by a grant that was valid under Roman law, he ceased *eo ipso* to be a citizen elsewhere and therefore was no longer subject to the laws of his original state.[28] It would have been an entrenchment on Roman sovereignty if the Roman law by which he received Roman citizenship had required the sanction of that state, since in the very act of receiving it he ceased to be under the state's jurisdiction. It would be no objection to this, as Braunert supposes, if the law of Gades did not include the Roman rule against dual citizenship. The case of Balbus was being tried under Roman law, not Gaditane, and he was outside the jurisdiction of Gades. Let us take a modern analogy. Suppose that Ruritanian law, for instance, makes it illegal for a Ruritanian to become a citizen of another country; and suppose that the citizenship of a Ruritanian, perhaps a political refugee, who claimed to have been naturalized in the United Kingdom were challenged. The Ruritanian law could not support that challenge, though there might be other grounds in English law for arguing that the naturalization was invalid. Thus even if Gaditane law forbade a citizen of Gades to accept citizenship elsewhere without consent of Gades, and there is nothing to suggest that it did, it had under Roman law no relevance to the case of a former Gaditane who had become a Roman citizen. To impugn Balbus' Roman citizenship, it was necessary to show that it had been conferred on him in contravention of Roman law.

Cicero's arguments are obviously technicalities. But so was the contention of the prosecutor. He was unable to say that Balbus' enfranchisement was contrary to the wishes of Gades. It was of evident advantage to Gades that one of her natives had acquired not only Roman citizenship but influence with the most powerful men at Rome. No doubt his influence explains, as Cicero says, why Caesar as governor of Further Spain had already conferred benefits on Gades (43) and why he was later to grant the Roman franchise to the whole community.[29] Many years before the trial Gades had entered into a formal relationship of *hospitium* with Balbus, which of course implied recognition that he was now a Roman, not a Gaditane; Cicero could produce the document of attestation. The city had also sent ambassadors to plead in his favour (41). All that the prosecutor could claim was that the formal sanction of the city had not been obtained *before* he was enfranchised. Equity was therefore on the side of the defence, but it was also possible to refute the prosecution in terms of strict law. It is a very curious distortion of the truth when Braunert writes (p. 64) as if Cicero was opposing the claims and interests of the Gaditanes.

Perhaps the prosecutor thought that his contention would be plausible, because the most celebrated and probably the last Roman law adopted by other communities, some of which had treaties with Rome, was the *lex Julia* of 90, which enacted that

[28] No doubt this rule was in Cicero's time falling into desuetude (cf. 30), though carefully observed by Atticus (Nepos, *Att.* 3): I believe that it was not applied to Latins who obtained Roman citizenship *per magistratum* (*JRS* 55 (1965), 90 n. 4), and it was abandoned under Augustus, as shown in the letters to Rhosus and the third Cyrene edict (EJ nos. 301 and 311).

[29] Dio 41. 24. 1.

the citizens of all the then loyal Italian communities were to become Roman citizens provided that those communities adopted the law. This might have suggested that the enfranchisement of foreigners by Rome required the consent of the communities to which they belonged. However, this provision in the *lex Julia* concerned the grant of citizen rights not to individuals who could accept it personally for themselves alone but to whole communities, whose separate existence as states was to be extinguished, with the result that all their citizens would become Romans, whether or not they had individually consented; in this case therefore the consent of the communities was to be obtained, given that it was the purpose of the law to reward and maintain their loyalty and that it would thus have been absurd for Rome to have imposed their incorporation in the Roman state:[30] Rome was making an offer, which they were free to reject and which two cities nearly did reject (21).

The *lex Julia*, like the *lex Gellia Cornelia*, also authorized commanders to enfranchise individual foreigners for valour in Roman service.[31] Cicero cites numerous instances of individual grants of citizenship by Roman generals, not all of which had been made in accordance with such authorization by law (46–51). He also referred to the procedure whereby Latins had obtained the citizenship under the provisions of a *lex Servilia* for bringing successful prosecutions of *repetundae* (53 f.); for our purpose it does not matter whether he had Caepio's law or Glaucia's in mind.[32] The Latins he names were from Tibur, one of the few Latin cities which had a treaty with Rome; no doubt he selected these instances to point the analogy with Gades.[33] Yet, he observes, the Latin cities had never adopted the *lex Servilia* or other Roman laws, which offered the citizenship as a reward. What these laws were we cannot surmise, unless they were previous *repetundae* laws, like that preserved in part on the tabula Bembina, the fragments of which certainly do not reveal that the reward was conditional on the sanction of the city to which the prosecutor belonged. Moreover, Cicero roundly states that no one had ever been accused of usurping the Roman citizenship on the grounds that his people of origin had not adopted the Roman law under which he had supposedly acquired it, or that he was debarred from acquiring it by treaty (52). This statement may or may not be true, but it could never have been made if the prosecutor had already cited precedents directly contradicting it.

[30] Rome could and did unilaterally grant citizenship to the rebel communities after their *deditio*, as she had done in the past to communities incorporated in the Roman state after conquest (M. Humbert, *Municipium et Civitas sine Suffragio*, 1978, chs. IV and V).

[31] *ILS* 8888.

[32] 'Quod si acerbissima lege Servilia principes viri... hanc Latinis, id est foederatis, viam ad civitatem populi iussu ('as the people had ordered') patere passi sunt ('bore with equanimity'), neque iis est hoc reprehensum Licinia et Mucia lege, cum praesertim genus ipsum accusationis et nomen et eius modi praemium quod nemo adsequi posset nisi ex senatoris calamitate neque senatori neque bono cuiquam nimis iucundum esse posset...' (54). (I read 'neque iis' with *b*: other MSS have 'his': Madvig and modern editions 'ius', but cf. J. S. Reid's edition, p. 108.) In my view 'acerbissima' should not be a dark and irrelevant allusion to any other provision of the *lex Servilia*, but is explained by the 'cum praesertim' clause. 'Neque... lege' seems to mean that the citizenship of prosecutors under this law was not impugned by the *lex Licinia Mucia*; the authors of that law, 'principes viri', had not sought to repeal the provision, and the fact that it had not been adopted by the Latin *foederati* was no basis for prosecution in the court it set up. It should then be that *lex Servilia* which was in force in 95, viz. Glaucia's, that Cicero has in mind: it did not matter to him if the provision had stood in earlier laws.

[33] cf. Brunt, *JRS* 55 (1965), n. 119; Sherwin-White, *JRS* 62 (1972), 96 f. 'Latinis, id est foederatis' does not of course imply that all Latins were *foederati* but means 'Latins, in this case *foederati*'. Convictions for *repetundae* were not common, and conceivably the two Tiburtines Cicero names were the only allied prosecutors rewarded of whom Cicero knew: for other possibilities see Sherwin-White and M. Griffin, *CQ* n.s. 23 (1973), 124.

Galsterer (p. 162), ignoring this statement, says that early in the second century Rome had made it a rule that if an Italian obtained citizenship without the sanction of his home community, that community could 'reclaim' him; he supposes that this rule was embodied in the treaties with the Insubres and Cenomani in 197 and 194 (though Cicero represents them as absolutely barring enfranchisements) and 'was probably extended to all the allies'. How could such a rule have been made? By a Roman *lex*, of which there is no record? The prosecutor would surely have cited it, and we could expect Cicero to reply that it had been 'obrogated' *eo ipso* by any later *lex* like the *lex Gellia Cornelia*. Or by new treaties with every ally? Again, there is no evidence of such treaties, but there was certainly no provision in the so-called treaty with Gades.

Cicero does refer to two specific cases in which the usurpation of the Roman citizenship was alleged. That of Matrinius offers no support to Galsterer, since we are told specifically that Marius had granted him the citizenship under the *lex Apuleia*, which entitled him to enfranchise foreigners who were to take part in colonies to be founded under that law, and that he was prosecuted, without success, solely on the ground that the grant was null because the colonies had not been founded (48 f.). Galsterer relies on the equally unsuccessful prosecution of M. Cassius, who was 'reclaimed' by his home community under the *lex Papia* ('Mamertinis repetentibus', 52). He finds a parallel in the case of M. Perperna, father of the consul of 130,[34] whom 'nihil ad se pertinentia civis Romani iura complexum Sabelli iudicio petitum redire in pristinas sedes coegerunt' (Valerius Maximus 3. 4. 5) and who was condemned also under the *lex Papia*. That law was passed generations later; Perperna was Etruscan,[35] not 'Sabellian', and his descendants continued to enjoy the citizenship; the testimony of Valerius Maximus is a tissue of falsehoods. Presumably some truth that we cannot discover lies behind it. Let us then grant that there were at least two cases, and perhaps more, in which foreign communities as such prosecuted their members for usurping citizenship at Rome (whereas Balbus was prosecuted by an individual Gaditane). Probably the communities acted because those who dominated them hated the defendants. We certainly cannot infer that the legal ground for the prosecution was their failure to obtain the prior sanction of those communities for their acquisition of Roman citizenship. No doubt it is true that an allied city might be impoverished if a citizen of substance thereby escaped liability to local *munera*; it might also like Gades be amply compensated by the influence he could exert at Rome on its behalf.

We know that in 187, 177 and 172 checks were imposed at Rome on abuses of the Latin *ius migrationis*,[36] but our evidence does not hint that they included a new rule that Latins could obtain Roman citizenship by migration only with the consent of their home towns. Rome then acted on representations from the Latins, who still had to provide undiminished quotas of troops to Rome's armies, even though emigration was reducing the number of men available. Galsterer supposes that the expulsion law of Pennus in 126 was also passed at the instance of the Italians. This enactment is indeed a mystery (n. 35), but Cicero at least, who regarded it as 'inhumanum' (*Offic.* 3. 47), must have been unaware of the reason discerned by Galsterer. For Galsterer even the *lex Licinia Mucia* of 95 was designed to accommodate the desire of the Italian

[34] *RE* 19. 893 f. (uncritical on the point at issue).

[35] W. Schulze, *Gesch. Lat. Eigennamen*, p. 88. Mommsen, *StR*[3] 200 n. 1 conjectured that Perperna was charged under Pennus' law of 126, but Cic., *de offic.* 3. 47, if correct, excludes the possibility that it provided for charges of usurpation of the citizenship: it simply expelled foreigners from the city of Rome. The fragment of C. Gracchus' speech on the law (*ORF*[2] 180) is enigmatic.

[36] Livy 39. 3; 41. 8 f.; 42. 10. 3.

communities to prevent their citizens securing the Roman franchise. If this were true, it would imply that the hypothetical rule that their prior sanction was required had fallen into desuetude. But of course his view contradicts the testimony of Cicero and Asconius that the law was bitterly resented by the Italian *principes*,[37] and Galsterer can find no support except for a fragment of Sallust of which the text is corrupt; other scholars have emended it to make it conform to the evidence, Galsterer to fit his own hypothesis.[38] But the evidence, which should in any case be respected, is coherent with the attitudes of the Italians, rebels and loyalists alike, in 91 and in the war that followed, and Galsterer's theory makes the course of events unintelligible.

Eduard Meyer once wrote of Cicero's speech for Sulla that it is so thoroughly mendacious that we can always assume the very opposite of what he asserts in it to be true. No one will contest that Cicero's speeches are full of exaggerations, half-truths and downright lies. He was entirely unscrupulous in employing every device that lay to hand for influencing his audience or readers. None the less Meyer's exaggerated observation betrays an abnegation of critical method.[39] We cannot properly operate on the basis that since Cicero is often untruthful any statement that he makes in a speech can be rejected if it happens not to agree with what we should like to believe: we must consider not only whether in the particular instance a deviation from the truth would have suited Cicero's case, if it had been credited, but also whether it would not have been readily detected as false. He was the most persuasive and successful orator of his day. He could not have swayed his audiences by appealing to sentiments that had no potency on men's minds. His speeches are thus always good evidence for the prevailing emotional and intellectual attitudes of his audiences. If he makes or implies a generalization about political life or constitutional practice, it may admit of exceptions, he may even have converted exceptions into a rule, but what he says is likely to have been plausible, or at any rate incapable of immediate disproof.[40] Statements on particular facts, including statements on what his adversaries had actually alleged, or what witnesses had testified, are another matter. He could safely deny or distort the truth when it was not in the knowledge of those he addressed, or when there was no chance that he would be refuted before the decision he sought had been taken. He could rely on the shortness of men's recollections even of events not very remote in time[41] and probably on vast ignorance of the more distant past. He could twist what counsel or witnesses had said, at least if his opponent had no right of reply. But *patent* mendacity could only damage his own cause. If we are to evaluate critically the reliability of the evidence he furnishes in his speeches, we must always bear in mind, as Braunert did not, the limits within which he could practise deception.

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[37] Ascon. 67C, quoting Cic., *pro Cornelio*.

[38] *Hist.* 1. 20: 'citra Padum omnibus lex Licinia fratra (fraudi *Casselius*, frustra *Wagner*, taetra *Dietsch*, ⟨in⟩grata *Maurenbrecher*, grata *Galsterer*) fuit'.

[39] *Caesars Monarchie u. das Prinzipat des Pompeius*², 20 n. 3.

[40] Thus *Sulla* 11 (disbelieved by C. E. Stevens, *Latomus* 22 (1963), 401 f.) shows at least that a man like Cicero, perhaps almost any candidate for the consulship, could be expected to hold himself aloof from political wrangles, so that he might be all things to all men; in my view it proves that Cicero did so conduct himself. Cicero's frequent allusions in the *Philippics* to widespread enthusiasm for the Republican cause probably illustrate the exaggerations (not altogether without foundation) which it was hard to expose as such.

[41] As did Demosthenes and Aeschines of transactions in 346; not only do they contradict each other, but their versions in 330 are not the same as those of 343.

ADDENDUM

This essay was written before there appeared in *Athenaeum* 68 (1980) 360–9 an article by V. Angelini in which, without reference to Braunert's views, he argues on different grounds that Cicero has distorted the prosecution's case. Balbus, he contends (perhaps rightly), served Pompey as an individual, but the *lex Gellia Cornelia* empowered Pompey, or so the prosecution maintained, only to enfranchise those who served in contingents supplied by their communities. (He might have adduced the enfranchisement of the *turma Salluitana* under the *lex Iulia* of 90, *ILS* 8888.) No passage he cites from Cicero's speech seems to me to lend any colour to this thesis. He appears to suggest that if the term *socii* stood in the relevant clause, it would have referred to such contingents, but its employment in legal documents whether in regard to Italians (*SC de Bacch.* 8; *lex agraria* 21) or provincials (*lex de Termessibus* 7), as in Cicero's writings, does not bear this out. Of course if Pompey's powers had been so limited *expressly*, Cicero would have had no case, and the prosecution need not have resorted to the arguments he refutes, but if the prosecution relied on a dubious construction of the statute, we should have expected Cicero to answer them, as he could easily have done. It is absurd to suppose that he simply refutes a case they never made. Nor can one see why any such limitation should have been made. Grants to individuals *virtutis causa* had certainly been made in the past (*Balb.* 46 ff.), and were made under the similar *lex Munatia Aemilia* of 42 B.C. (*FIRA* I² 55, cf. 68 III), and to those who disliked extension of the citizenship were marginally less objectionable than collective grants. There is nothing to be said for Angelini's thesis.