

Oratores, Iurisprudentes and the «*Causa Curiana*»

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I

In Roman legal science today a clear distinction is made between the *oratores* and the *iurisprudentes*. The *oratores* were the court speakers, the *advocati*. The current view among Romanists is that these *oratores* had only an elementary knowledge of the law; they knew just enough to conduct a case. The *oratores* however were very well trained in rhetoric, a discipline taken over from the Greeks, and were responsible for the subsequent popularity of rhetoric in Roman law. The *iurisprudentes*, by contrast, were the legal experts; they had made a thorough study of Roman law and were specially skilled at giving advice on juridical problems. For instance, they would recommend how a particular clause in a contract or a will should be worded.

According to the prevailing view therefore, the *oratores* and *iurisprudentes* had very different approaches to law. The *oratores* were out to win a case: their primary aim was to convince the judges. Their manner of arguing was imbued with Greek philosophical ideas such as the idea of *aequitas*, fairness. The main aim of the *iurisprudentes* was to make the law clear and lucid. They were strong supporters of the laws and rules which they themselves had formulated, since these were worded unambiguously and in fact had to be obeyed to the letter. The *iurisprudentes* did appear as *advocati* in lawsuits, but they

did so reluctantly because then they too were forced to use oratorical devices.

Schulz in his *History of Roman Legal Science and his Principles of Roman Law* was a firm supporter of these views⁽¹⁾. I have an idea that these views originated earlier and that they were first expressed by Mommsen in connection with Cicero. Mommsen writes about this great Republican orator in the third part of his *Römische Geschichte*⁽²⁾. It could well be that the picture which later generations of scholars obtained of orators was coloured largely by the negative picture which Mommsen painted of Cicero. Whatever the facts of the matter, the result has been that many of the so-called non-juridical sources that contain references to Roman law, but were written by an orator, are considered by modern Romanists as not being reliable sources of information about Roman law. As examples I would mention the oratorical works of Cicero and the Letters of Pliny the Younger.

In my opinion this distinction between *oratores* and *iurisprudentes* is fundamentally wrong. One of the tasks of a budding Roman politician was to appear as an *advocatus* in a lawsuit⁽³⁾. In his subsequent career as magistrate, governor of a province and finally as a member of the Roman senate considerable demands were made on both his oratorical and on his juridical skills. Therefore every young Roman who wanted to make his career in politics received a suitable training, namely one which included law and oratory⁽⁴⁾.

(1) See F. SCHULZ, *Principles of Roman Law*, Oxford 1936, 129 and particularly F. SCHULZ, *History of Roman Legal Science*, Oxford 1946, 43 sq. and 108 sq.

(2) Th. MOMMSEN, *Römische Geschichte* III, Berlin 1933, 619 sqq.

(3) This is illustrated very well in Pliny's Letter VI 29. 1-3.

(4) See H.I. MARROU, *Geschichte der Erziehung im klassischen Altertum*, Freiburg im Breisgau 1957, 343 sq., 352 sq., 369 sq. and 420 sqq. See also S.F. BONNER, *Education in Ancient Rome*, London 1977, 65 sqq. and 288 sqq. There was a historical development. There were schools of rhetoric in Cicero's day but as yet no law schools. In Pliny's day there were both schools of rhetoric and law schools. Cicero probably still received his training in law and rhetoric privately, whereas Pliny is

As a result of my study of the Roman law of succession in the Letters of Pliny the Younger — who was looked upon by his contemporaries as the greatest orator of his time — I have come to the conclusion that Pliny's sole aim in his Letters was to write a literary work, and not to indulge in oratory; in my view the Letters show that Pliny was fully acquainted with the law of his day; moreover his attitude to juridical problems was in complete accordance with that of the *iurisprudentes* of his time. So with regard to Pliny, Schulz's opinion has proved to be wrong⁽⁵⁾. About Cicero Schulz writes: «In later life he showed a certain elementary knowledge of the law, but also a thorough dislike and lack of understanding of the higher aspects of jurisprudence»⁽⁶⁾. This is surely untrue as well. We know that the young Cicero was taught jurisprudence by experts like the two Scaevolae⁽⁷⁾. Furthermore, his oratorical works, such as *De inventione*, *Topica*, *De oratore* and *Brutus*, do not show Cicero as an orator pleading a case but they consist of a description of the *ars oratoria*⁽⁸⁾.

My paper focuses on the classic example of an encounter between an *orator* and a *iurisprudens*, the so-called *causa Curiana*, which is known to us from Cicero's oratorical works. On the basis of the description which Cicero gives of this lawsuit I shall show that this source cannot be appreciated properly if one assumes that *oratores* and *iurisprudentes* — at least as far as Roman law was concerned — were opposite extremes and had entirely different occupations⁽⁹⁾.

thought to have attended a school of rhetoric. We do not know how Pliny obtained his juridical knowledge.

(5) J.W. TELLEGEN, *The Roman Law of Succession in the Letters of Pliny the Younger* I, Zutphen 1982.

(6) F. SCHULZ, *History of Roman Legal Science*, Oxford 1946, 44.

(7) See K. BÜCHNER, *Cicero*, Heidelberg 1964, 25 sqq., who states on page 69 that Cicero obviously had a thorough command of the law. See also note 4.

(8) Regarding Cicero's oratorical works see K. BÜCHNER, *Römische Literaturgeschichte*, Stuttgart 1968, 183 sqq. and K. BÜCHNER, *Cicero*, Heidelberg 1964, *passim*.

(9) I am indebted to Prof. Dr. H.L.W. NELSON of Utrecht who was

II

The *causa Curiana* was, as we know, a sensational lawsuit which came before the court of the *centumviri* in 92 B.C. We can obtain a vivid picture of what actually happened from the account that Cicero gives at various places in his oratorical works. According to Cicero⁽¹⁰⁾ a certain M. Coponius had designated his son as his heir in his will; in fact, when he drew up his will he had no son but he took account of the possibility that he might have one later, even that after his death there might be a *postumus*. Coponius had also added to his will a substitution in favour of a certain Curius in case his son should die before reaching adulthood. By the time Coponius died and the will was opened no son had been born to him. Curius received the inheritance because it was assumed that the condition concerning the coming into operation of the substitution had been fulfilled. The heir upon intestacy of Coponius thought however that the condition had not been fulfilled at all and that he was entitled to Coponius' inheritance. He sued for its return with the *hereditatis petitio*, before the court of the *centumviri*. The plaintiff, Coponius, was represented by Q.M. Scaevola, the defendant, Curius, was represented by L. Licinius Crassus.

Scaevola's plea is summarized by Cicero in *Brutus*, 193-197; the most important part is to be found in 195 and 196, and runs as follows:

- 195 *Cum is hoc probare vellet, M. Curium, cum ita heres institutus esset, si pupillus ante mortuus esset quam in suam tutelam venisset, pupillo non nato heredem esse non posse,* When he sought to prove that Manius Curius, because he was designated to be heir if the son were to die before he came of age, could not be an heir because no son had been born,

kind enough to read a draft version of this article and make critical comments.

(10) The following passages should be mentioned particularly in this connection: *De oratore*, I 180, II 142; *Brutus*, 193-198; *De inventione*, II 122; *Pro Caecina*, 18, 53; *Topica*, 44.

196 *quid ille non dixit de testamentorum iure, de antiquis formulis? quem ad modum scribi oportuisset, si etiam filio non nato heres instituere-tur? quam captiosum esse populo, quod scriptum esset negligi et opinione quaeri voluntates et interpretatione disertorum scripta simplicium hominum pervertere? Quam ille multa de auctoritate patris sui, qui semper ius illud esse defenderat? quam omnino multa de conservando iure civili? ...*

what did he not say then about the law of testamentary succession, ancient formulas, about how the will should have been worded if Curius were also to have been instituted as heir if no son had been born? How deceitful it was for the people that what had been written was ignored and that the intentions were sought by guess-work and that what had been written by simple people could be twisted by persons with a ready flow of words. How much did he not say about the authority of his father who had always defended that interpretation of the law? How much did he not say in general about the observance of the *ius civile*? ...

Crassus' plea is summarized by Cicero in *Brutus*, 197-198, where Cicero writes:

197 *At vero, ut contra Crassus ab adolescente delicato, qui in litore ambulans scalnum repperisset ob eamque rem aedificare navem concupivisset, exorsus est, similiter Scaevolam ex uno scalmo captionis centumvirale iudicium hereditatis effecisse — ... Deinde hoc voluisse eum, qui testamentum fecisset, hoc sensisse, quoquo modo filius non esset, qui in suam tutelam veniret, sive non natus sive ante mortuus, Curius heres ut esset; ita scribere plerosque et id valere et valuisse semper. ...*

But Crassus in reply began to speak about the slender boy who while walking on the beach found a thole-pin and was so keen to construct a boat around it; he maintained that Scaevola, in a similar way, building on a thole-pin of deceit, had prepared a case about an inheritance for the court of the *centumviri* — ... Thereupon he said that the person who had made the will had wished and intended Curius to be heir in all cases where there was no son who came of age, either because he had not been born or because he had died too early.

He maintained that most people wrote in this way and that this was valid and had always been valid. ...

198 *Deinde aequum bonum, testamentorum sententias voluntatesque tutatus est: quanta esset in verbis captio cum in ceteris rebus tum in testamentis, si neglegerentur voluntates; quantam sibi potentiam Scaevola assumeret, si nemo auderet testamentum facere postea nisi de illius sententia.*
...

Thereafter he pleaded for reasonableness and fairness, for the observance of the intentions and expressions of will in testaments: how much deceit there was in words, in other things as well as in wills, if intentions were ignored; what tyrannical power Scaevola was assuming for himself if no one subsequently would dare to draw up a will unless it corresponded with his idea. ...

The court of the *centumviri* decided in favour of Curius and therefore gave the victory to Crassus.

III

Some years ago Wieacker described the *causa Curiana* in his article entitled "The *causa Curiana* and the Contemporary Roman Jurisprudence" (11). In this article Wieacker examines and refutes the contention of Stroux for whom the *causa Curiana* represents the triumphant victory of Greek rhetoric over the old-fashioned formalism of the Roman jurists. From this alleged victory Stroux drew the far-reaching conclusion that the jurists were able to find true justice merely through rhetorical education (12). According to Stroux the only sound solution came from Crassus, who did not interpret the substi-

(11) F. WIEACKER, *The causa Curiana and Contemporary Roman Jurisprudence*, *The Irish Jurist* 2 (1967) 151 sqq.

(12) J. STROUX, *Summum ius summa iniuria*, in: *Festschrift P. Speiser-Sarasin*, Leipzig-Berlin 1926, now also in *Römische Rechtswissenschaft und Rhetorik*, Potsdam 1949, from which I quote; STROUX writes on the *causa Curiana* on page 42 sqq.

tution-clause literally but interpreted it in terms of the testator's intention. Stroux thought that the *centumviri* were right to support this solution.

According to Wieacker, Stroux failed to understand the juridical aspect of the case. In Wieacker's view the testator's intent here was not his real intent but was his hypothetical intent. The important thing therefore was not the dichotomy between *verba* and *voluntas*, what mattered was which was the correct interpretation. Wieacker thinks that the verdict of the *centumviri* was incorrect; allowing the hypothetical will of the testator to prevail is not necessarily just on every occasion. According to Wieacker this verdict did not herald the beginning of a new era where the *jurisprudentes* paid less attention to the literal interpretation and more attention to the intent: the decision of the *centumviri* in the *causa Curiana* had no effect on future developments. It was not until much later that decisions were taken in the style of the *causa Curiana*. Wieacker concludes that what is so significant about the *causa Curiana* is the way in which the jurist Scaevola pleaded and argued his case. Scaevola "did not oppose an exegesis according to the actual intent of the testator, but he was against a disregard for the literal sense of the words for reasons of mere presumption". According to Wieacker, Scaevola "indicated how Coponius must have had to express himself if he had really wanted to appoint Curius as vulgar substitute; for that Scaevola could refer to the older clause in which this was explicitly stated". By "older clause" Wieacker means the older wording in which vulgar and pupillary substitution were combined, an example of which is to be found in Gaius' Institutes, 2.179. According to Wieacker, Scaevola's way of thinking may already have been practised more generally during the Republic. In his view the *causa Curiana* is of importance not so much because it would show the influence of rhetoric on law but because it showed the continuity of problems and juridical argumentation from Republican jurisprudence to the time of later classical jurisprudence.

IV

I find Wieacker's analysis very penetrating as far as certain details are concerned and totally correct concerning certain sections, but I do not agree with some of the broader aspects of his analysis. Wieacker says that in the lawsuit against M. Curius Q. Mucius Scaevola was "the most outstanding lawyer of the epoch" and M. Licinius Crassus was "the most celebrated court orator of the time" and he describes their dispute as a "symptomatic encounter" (13).

Wieacker ignores the fact that Scaevola and Crassus are both legal experts who even have analogous literary ambitions. Scaevola is known to have been the first to arrange the civil law *generatim*. In his treatise on the *ius civile* Scaevola used the methods of Greek scholarship to bring order into Roman law (14). Crassus too apparently planned to write a similar treatise on the *ius civile*, "unless someone else beat him to it!" (15). If "someone" had not beaten him to it, Crassus rather than Scaevola might have gone down in history as the father of jurisprudence!

Wieacker also overlooks the fact that Scaevola and Crassus both performed the same role in that they appeared as *advocati*. The fact that Scaevola supported the case of the plaintiff Coponius, and Crassus the case of the defendant Curius naturally determined the nature of their individual pleas. Scaevola had to claim that the words of the substitution had to be interpreted literally, whereas Crassus, for his part, had to see to it that the words were interpreted according to their intent. Wieacker asserts that the skilled jurist Scaevola found himself

(13) F. WIEACKER, *The causa Curiana and Contemporary Roman Jurisprudence*, *The Irish Jurist* 2 (1967) 153.

(14) Pomp. D. 1.2.2.41. Scaevola was therefore the first to apply the dialectic method, which had been imported from Greece. See P. STEIN, *Regulae Iuris*, Edinburgh 1966, 36 sqq.

(15) Cicero, *De oratore*, I 190. It is not clear why F. SCHULZ, *History of Roman Legal Science*, Oxford 1946, 69 doubts whether the words of Crassus, as quoted by Cicero, should be taken seriously.

in an uncomfortable position when opposing the famous orator Crassus in the trial and suggests that Crassus made the public laugh at Scaevola in his quality as a jurist. In fact Crassus was mocking Scaevola's plea — a device commonly used by lawyers to strengthen their own case — but he deliberately refrained from casting aspersions on his dignity⁽¹⁶⁾. Crassus calls Scaevola his "*aequalis et collega*", thus indicating that he was his peer⁽¹⁷⁾; he calls Scaevola "*iuris peritorum eloquentissimus, eloquentium iuris peritissimus*"; according to Wieacker this is a dubious compliment, but in my opinion it is a sincere one: I think Scaevola's discourse was very clever and ingenious⁽¹⁸⁾.

As I said before, Wieacker calls the *causa Curiana* a « symptomatic encounter ». He thereby suggests that Scaevola's plea is characteristic for a jurist and Crassus' plea for an orator⁽¹⁹⁾. Wieacker however does not seem to perceive fully which oratorical devices Scaevola uses. According to Wieacker, Scaevola begins his plea in an oratorical manner; he refers in this connection to Cicero's *Brutus*, 196. Thereafter the real Scaevola, Scaevola the jurist, breaks through; for this Wieacker refers to Cicero's *Brutus*, 195 sqq.! Furthermore, when Scaevola spoke of "*antiquis formulis*", he must in Wieacker's opinion have been referring to a substitution worded in the style of Gaius' Institutes, 2.179, that is a substitution that combines

(16) Cicero, *De oratore*, II 221.

(17) In *Brutus*, 193 Crassus calls Scaevola « orator »!

(18) Cicero, *De oratore*, I 180. Cicero gives a variation of this compliment in *Brutus*, 145: « *ut eloquentium iuris peritissimus Crassus, iuris peritorum eloquentissimus Scaevola putaretur* ». Here Cicero is not putting emphasis on the fact that the one was an orator and the other was a jurist, but he is stressing the point that in *this* trial Crassus' plea was excellent in a juridical sense and that Scaevola's plea was an oratorical masterpiece. It is incorrect to interpret this compliment in a general way, as has been done by e.g. A. WATSON, *Narrow, rigid and literal interpretation in the Later Roman Republic*, TR 37 (1969) 365.

(19) In Cicero, *De oratore*, I 180 Crassus however says: « *num destitit uterque nostrum in ea causa, in auctoritatibus, in exemplis, in testamentorum formulis, hoc est in medio iure civili, versari?* »

vulgar and pupillary substitution; this formula would be older and better than simple pupillary substitution: Coponius ought to have used the older form if he had wanted Curius to be heir even if no son were born. In my view Scaevola would have contradicted himself if he had proposed the use of this form, because a substitution in the style of Gaius' Institutes, 2.179 did not relate to a *postumus*. Finally, Wieacker states that Scaevola argued "... from the sense which the reasonable usage of the language (the *sermo communis*) must give to the word so long as the context does not suggest another individual meaning of the word"; however, *sermo communis* does not mean "reasonable usage of the language" but it means normal use of the language and that was certainly not the basis of Scaevola's argument!

With regard to Crassus' pleading Wieacker sees clearly that Crassus' most important argument is a juridical one⁽²⁰⁾;

(20) So does G. GANDOLFI, *Studi sull'interpretazione degli atti negoziali in diritto romano*, Milan 1966, 291 sqq. Different views are expressed by H.J. WIELING, *Testamentsauslegung im römischen Recht*, Munich 1972, 65, as well as by U. WESEL, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen*, Cologne-Berlin-Bonn-Munich 1967, 32 sqq., U. WESEL, *Zur Deutung und Bedeutung des Status scriptum et sententia*, TR 38 (1970) 351 sq., B. VONGLIS, *La lettre et l'esprit de la loi, dans la jurisprudence classique et la rhétorique*, Paris 1968, 126 sq. and implicitly also by B. VONGLIS, *Droit romain et rhétorique*, TR 37 (1969) 253; these authors assume that Crassus' plea is an oratorical one. The fact that they call the *orator* «rhetor», whereas the Romans probably used the term only in a pejorative sense, is characteristic for the confusion that exists surrounding this topic, cfr C.T. LEWIS-C. SHORT, *A Latin Dictionary*, New York 1879 (re-printed Oxford 1960) 1592 sq. and the *Oxford Latin Dictionary*, Oxford 1980, 1651. The discussion that WESEL and VONGLIS had about whether the *causa Curiana* should be regarded as the beginning of Greek influence on Roman law could not yield much fruit. They both wrongly assume from the outset that there was a fundamental distinction between *oratores* and *iurisprudentes* and on that basis they apparently assume that in the *causa Curiana* Scaevola defended the traditional juridical view whereas Crassus with his rhetorical argument was introducing something new. In the rest of my argument I shall show that the reverse was the case and that the question about the significance of the *causa Curiana* for Roman law must be approached in a different way.

Crassus bases his interpretation of the substitution on the *sermo communis*, the normal use of the language, and on a wealth of precedents. Wieacker thinks that the argument of the *sermo communis* is more of a plea against Crassus and for Scaevola. In Wieacker's view Crassus contradicts himself by claiming that according to the normal use of the language a pupillary substitution is taken to imply a vulgar substitution. According to Wieacker, however, it was a general custom to add an explicit vulgar substitution to a pupillary substitution. I do not find this view convincing. There is nothing in the texts to indicate that Crassus was of the opinion that in this case a vulgar substitution was implicitly included in the pupillary substitution. There is also nothing in the texts to support the view that it was customary in those days to include a double substitution in such cases. Lastly it is not clear how Crassus could refer to precedents if the testator had broken with traditional *ius civile* by including in his will one single pupillary substitution.

In the light of the arguments set out above, Wieacker's view — namely that the verdict of the *centumviri* was incorrect — strikes me as dubious. It is not clear to me either whether the verdict served as a precedent later, because the constitution of Marcus Aurelius, to which Wieacker refers, makes no reference to the special case of a *postumus* who had not been born⁽²¹⁾.

It should be evident from the foregoing that I find Wieacker's interpretation of the *causa Curiana* confusing; in my view Wieacker's interpretation is not borne out by the words that Cicero uses.

(21) Mod. D. 28.6.4 pr. The purpose of this constitution was to allow a single substitution (vulgar or pupillary) to take effect not only if a pupil, who, having become an heir, died before reaching adulthood but also if he died later. In my view this has nothing to do with substitution for a *postumus*.

V

In my opinion the *causa Curiana* has to be interpreted differently; the interpretation should be based on what the sources say and not on certain preconceived ideas about *oratores* and *iurisprudentes*. How was the substitution actually worded in the disputed will of Coponius, how was this substitution interpreted by Scaevola and Crassus and what value should be attached to the verdict of the *centumviri*?

In order to evaluate the substitution correctly it has to be considered in conjunction with the institution of the heir. On the basis of Cicero, *De inventione*, II 122 and Cicero, *De oratore*, II 142 the institution of the heir and the substitution can be reconstructed as follows:

Si mihi filius genitur unus pluresve is mihi heres esto; si filius ante moritur quam in tutelam suam venerit tum mihi M'. Curius heres esto.

The institution of the heir seems to be couched in rather general terms: Coponius seems to have left several possibilities open: either one or more sons would be born, or a son would still be born during his life or after his death⁽²²⁾. The pupillary substitution is formulated in the customary manner.

The purpose of Scaevola's plea, the broad lines of which can be reconstructed on the basis of Cicero, *Brutus*, 193-196, was to prove that Curius as substitute had no right to the inheritance because no son had been born and therefore the condition for his becoming an heir had not been fulfilled. Scaevola began to speak about the law of testamentary succession in

(22) There is no reason to assume, as does F. WIEACKER, *The causa Curiana and Contemporary Roman Jurisprudence*, *The Irish Jurist* 2 (1967) 154 note 11, that the testator did not consider the possibility that no son would be born. See also A. WATSON, *The Law of Succession in the Later Roman Republic*, Oxford 1971, 95 note 2 on the basis of Cicero, *De Inventione*, II 122. In the same vein W. STROH, *Taxis und Taktik*, Stuttgart 1975, 83 note 15, contra WESEL. The institution of a *postumus* with regard to a grandson, however, is a real possibility, cfr. Gallus in Scaev. D. 28.2.29.

general and about old formulations in particular. In my opinion the “*antiquis formulis*” which Scaevola talked about are the institution of the heir, the vulgar substitution and the pupillary substitution in normal cases and probably also in cases where an unborn child has been instituted as heir. It is just possible that Scaevola also mentioned the formulation for a *postumus*, which has come down to us in Pomponius’ commentary on Sabinus: “*sive vivo me sive mortuo natus fuerit, heres esto*” (23).

Next Scaevola indicated how Coponius should have worded the substitution for Curius. In my opinion Scaevola must have taken the institution of the heir in the will of Coponius as a starting point and proposed the following:

...; *si filius non genitur sive ante moritur quam in tutelam suam venerit tum mihi M. Curius heres esto.*

It is inconceivable, though generally accepted (24), that the words “*si heres non erit sive*” had to precede the pupillary substitution. In such a formulation no account is taken of the possibility that the instituted heir might be a child who perhaps would never be born. The verb “*erit*” contains the supposition that a son *will* have been born after the testator has died (25).

(23) Pomp. D. 28.2.10 in his commentary on Sabinus. It is doubtful whether this wording was ever actually used; see O.E. TELLEGEN-COUPERUS, *Testamentary Succession in the Constitutions of Diocletian*, Zutphen 1982, 76 in connection with Diocl. C. 6.29.2.

(24) See e.g. M. KASER, *Das römische Privatrecht* I, Munich 1971², 690; H.J. WIELING, *Testamentsauslegung im römischen Recht*, Munich 1972, 11.

(25) A similar argument is to be found in Afr. D. 28.6.33.1. In this text Africanus reproduces the opinion of the late Republican jurist and pupil of Q.M. Scaevola, Aquilius Gallus. Gallus takes the view that if a vulgar substitution for a *postumus* is included in a will and the *postumus* is not born, then the substitute is excluded from inheriting. The words «*omnimodo, id est etiam si nepos natus non fuerit*» are regarded as having been interpolated, see *Index Interpolationum* II, Weimar 1929, 200; in my view they have not been interpolated.

Scaevola then gave a literal interpretation of the substitution, as included in the will of Coponius⁽²⁶⁾. He maintained that Curius could only be heir if the son died before he came of age and that this son could not have died because he had not been born. According to Scaevola this literal interpretation was the only correct interpretation, because otherwise the testator's words could be twisted. In my opinion this plea is correct in as much as it is theoretically possible that Coponius had only intended to appoint Curius as pupillary substitute, for instance as a reward for acting as a guardian of the son who was under age and it is possible that if no son was born Coponius wanted the inheritance to go to the agnates. On the other hand Coponius may not have wanted his inheritance to go to the agnates at all. In his plea Scaevola gave the impression that he was interpreting the testator's words literally, whereas in fact he was interpreting them in accordance with a possible intention of the testator: he chose the first of the two above-mentioned possibilities; this choice was dictated by his position in the lawsuit: i.e. he defended the interests of the agnates.

In the end Scaevola adopted the same attitude as his father, who had also always been in favour of literal interpretations. However, one should not deduce from this that Scaevola was following current legal practice.

The aim of Crassus' plea, the broad lines of which can be reconstructed on the basis of Cicero, *Brutus*, 197-198, was to demonstrate that the fact that no son had been born was not relevant and that the condition of the substitution should be regarded as having been fulfilled. After a humorous introduction in which Crassus poked fun at the main point of Scaevola's argument Crassus tackled the question of what Coponius

(26) An interpretation of this kind was not typical for Scaevola, because he was a *iurisprudens*; on another occasion he does interpret a testament according to its intent rather than the words; see for instance D.34.2.33 and on this text A. WATSON, *The Law of Succession in the Later Roman Republic*, Oxford 1971, 96.

had really intended. According to Crassus, Coponius meant that Curius would have to be heir in case there was no son who came of age (whether a son had been born or not was irrelevant). In my opinion it is very possible that Coponius did mean that, in view of the fact that the institution of the heir in his will does seem to point clearly to possible young children. Apparently Coponius only took account of the possibility that he might have children and — following that train of thought — that something might happen to them.

Next Crassus argued that wills should be interpreted with reasonableness and fairness⁽²⁷⁾: if one disregarded the obvious intention of what had been written down there was a danger that the written words would be interpreted in a way that contradicted the intention. According to Crassus the only correct interpretation was not one based on the grammatical construction but one based on normal use of the language, the *sermo communis*. In my view this argument is basically valid. If one chooses the first of the above-mentioned possible interpretations (the one in favour of the agnates), then one gives a particular interpretation to the substitution which might then be contrary to the testator's intention⁽²⁸⁾; it is however also very difficult to prove with absolute certainty that the testator wanted the second of the two possible interpretations. Crassus maintained that his interpretation kept closely to the words of the testament, i.e. he interpreted according to the obvious intention of the testator; in fact, however, he was interpreting the testament in accordance with the best interests of his client Curius.

(27) An interpretation of this kind is not typical for Crassus, because he was an *orator*; on another occasion he could defend an interpretation according to the wording of, for instance, a contract; see in this connection Cicero, *De oratore* I, 178.

(28) According to F. WIEACKER, *The causa Curiana and Contemporary Roman Jurisprudence*, *The Irish Jurist* 2 (1967) 156 the real meaning will never be known but can only be guessed at. According to Wieacker a pupillary substitution did not imply that a vulgar substitution was intended as well; the testator may only have intended the pupillary substitution as a reward for the guardian.

In order to show that his interpretation was in accordance with the normal use of the language Crassus declared that there were large numbers of precedents and in this way he won the lawsuit. Unfortunately Cicero does not mention which precedents Crassus drew upon. In another connection Cicero mentions a similar case; in *De inventione*, II 21.62, Cicero mentions a case where a testator had instituted his young son as his heir, but the son had died before coming of age. A discussion arose about whether the substitute appointed for the son also had a right to the property that the pupil had received from the inheritance of a third party. According to Cicero this discussion was summed up in the following legal problem: Could a *pater familias* make a will concerning the entire estate of his son who was not yet of age or only concerning the part which his son would inherit from him (the father). This legal question, which incidentally is not answered, is an indication that the notion that the pupillary substitute had to be regarded as the son's heir (a notion found in Gaius' Institutes, 2.180) had still not become accepted and established at the time of Cicero⁽²⁹⁾. Whatever the truth of the matter, Crassus could in any case have pointed out that the pupillary substitute was an heir of the testator and not of the pupil and that the fact, emphasized so much by Scaevola, that the pupil had not been born was not relevant.

Finally, by mentioning precedents Crassus falls back on tradition and from this it can be deduced that an interpretation

(29) In my view the fact that the word «*mihī*» appeared at the end of the substitution indicates that Coponius regarded Curius as *his* potential heir and not as heir of a son of his who might be born and die. Since this word does not appear in this position in Gaius' Institutes 2.179, it could be that the jurists' view on this matter had altered. In a different vein P. Voci, *Diritto ereditario romano* II, Milan 1963, 172. He wrongly asserts that the word «*mihī*» in this context had no meaning. By so doing he fails to recognize the historical development of this legal device. In my view the texts by Julian and Modestinus, which he mentions in note 9, point to the fact that the original interpretation of pupillary substitution had not disappeared entirely in the classical period.

according to the intent antedates the *causa Curiana* and was not first introduced by Crassus.

It is difficult to assess the true value of the verdict of the *centumviri*. In the *causa Curiana* the *centumviri* were confronted with a difficult case. The point at issue was the institution, as heir, of a child who had not yet been born, combined with a pupillary substitution. The fact that no child was born highlighted the fact the testator had not worded the substitution clearly. It is however doubtful whether Coponius can really be criticized for not choosing the correct wording, for he probably did not have an expert like Scaevola to advise him. Since the wording of the testament was deficient the true intent of the testator could not be ascertained unambiguously. The series of precedents might well have given a general idea of what the testator had really intended. But since these precedents have not come down to us it is impossible to judge whether the verdict of the *centumviri* was correct or not. I feel I cannot go as far as Wieacker⁽³⁰⁾ who maintains that the verdict was unjust.

VI

The starting point for this article was my contention that the distinction that many Romanists make between *oratores*

(30) F. WIEACKER, *The causa Curiana and Contemporary Roman Jurisprudence*, *The Irish Jurist* 2 (1967) 153 thinks: "I personally regard the judgement of the *centumviri* as not quite convincing; not, at any rate, as a judgement in a point of law, even if it was a triumph of Crassus' advocacy art of persuasion". H.J. WIELING, *Testamentsauslegung im römischen Recht*, Munich 1972, 65 writes: "Wenn der Wille in dem hier untersuchten Zeitraum keineswegs im Vordergrund der Auslegung stand, so ist es erstaunlich, daß die *causa Curiana*, der erste bekannte Auslegungsfall, mit einem Sieg des Willens endet. Zunächst ist aber zu beachten, daß die Entscheidung in dieser Sache nicht der Jurisprudenz anzulasten oder als ihr Erfolg anzusehen ist. Die *Centumviri* waren Geschworene, also Laien, keine Juristen. Es ist verständlich daß Laien den Worten der Rhetoren zugänglicher waren als die Juristen mit ihrer eigenen, überlieferten Lehre". Were the *centumviri* really laymen?

and *iurisprudentes* is unjustified. Because of this distinction the true value of certain sources is not recognized, since they were written by someone who was known as an orator, e.g. the oratorical works of Cicero and the Letters of Pliny the Younger, whereas in fact they contain valuable information about Roman law. The purpose of this article was to show that the famous *causa Curiana*, which has come down to us mainly in the oratorical works of Cicero, can only be understood fully if the traditional distinction made between *oratores* and *iurisprudentes* is abandoned.

The *causa Curiana*, in which Q.M. Scaevola and M.L. Crassus served as opposing *advocati*, was not a typical trial in which an *orator* faced a *iurisprudens*. The course of the lawsuit was determined by the *status* « *verba - voluntas* »⁽³¹⁾. Scaevola maintained that the text of the will should be interpreted literally, whereas Crassus insisted that the text should be interpreted according to the intention of the testator; both Scaevola and Crassus tried in this way to defend their client's interests; in another lawsuit they could perhaps adopt a different approach if their clients' interests were different. In my opinion both Scaevola and Crassus were thoroughly trained in law and oratory, as befitted men of their standing in Rome, and their speeches contained both juridical and oratorical elements. There does not seem to be any difference in their methods of approach.

The *causa Curiana* is an important source of our knowledge of Roman law, because the pleas of Scaevola and Crassus show what efforts Republican jurists made to find and develop correct and aptly worded formulations, in this case for wills. Wills had to be clearly worded so that they would be useful for legal practice⁽³²⁾. These jurists tried to interpret the

(31) In the same vein M. FUHRMANN, "Summum ius summa iniuria", St. Volterra II, Milan 1971, 61 sqq. contra BÜCHNER. In my opinion the *causa Curiana* shows the influence of Greek philosophy and science in the plea of both Scaevola and Crassus. F. WIEACKER in *Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie*, IURA 20 (1969) 448 sqq. takes a different view.

(32) See for instance the attempts of Aquilius Gallus to formulate

wording of such texts in accordance with Roman juridical principles such as *aequitas* ⁽³³⁾. The description which Cicero gives of the famous *causa Curiana* allows us to see how the law was practised in a period of Roman jurisprudence when the foundations were being laid for later classical Roman law. One can only properly appreciate what Cicero writes about the *causa Curiana* if one rids oneself of the preconceived notion that *oratores* and *iurisprudentes* in general and that Crassus and Scaevola in particular represented two quite different "species", poles apart in both training and approach.

institutions in favour of *postumi* in Scaev. D.23.2.29.2 and 13; in connection with these problems the *Lex Iunia Vellaea* was proclaimed in the year 28, cfr G. ROTONDI, *Leges publicae populi romani*, Hildesheim 1966, 465 sq.

(33) M. FUHRMANN, « *Summum ius summa iniuria* », St. Volterra II, Milan 1971, 69 sqq. is, I think, correct in maintaining that in connection with the *causa Curiana* no difference should be made between *aequitas*, i.e. "Gerechtigkeit", and the Greek concept ἐπιείκεια, i.e. "Billigkeit". Of course this does not mean that the concept of *aequitas* must be of Greek origin. Th. MAYER-MALY, in *Der kleine Pauly*, Munich 1971, 97 sq. is probably right in stating that the concept of *aequitas* in Roman legal thinking is much older than the philosophical concept of *aequitas* as it occurs e.g. in the writings of Cicero.