

# ***Nihil Hoc ad Ius, ad Ciceronem***

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## *1. Introduction*

According to Cicero, the jurist Aquilius Gallus spoke the words ‘Nihil hoc ad ius, ad Ciceronem’ when he was asked to give his opinion on a matter of facts. Gallus refused to deal with this question because it had nothing to do with the law, and he referred the matter to Cicero. His words have acquired a slogan-like quality in Romanist literature and are used to demonstrate the alleged antagonism between jurists and orators, between legal science and rhetoric. However, in our view, there was no such antagonism.

The concept of legal science, *Rechtswissenschaft*, is a modern concept invented by the 19<sup>th</sup> century scholar Friedrich Carl von Savigny. Rhetoric, on the other hand, originated in Greek Antiquity and was introduced in Rome in the 2<sup>nd</sup> century BC, in the time of the later Republic. In the 11<sup>th</sup> century, when Roman law was rediscovered, rhetoric was rediscovered too; it acquired a prominent place in education and, as from the 12<sup>th</sup> century, it was used in the teaching of law<sup>1</sup>. Therefore, the supposed antagonism between legal science and rhetoric in ancient Rome is anachronistic and leads to a great deal of confusion. Seven years ago, we demonstrated this for the phrase ‘Nihil hoc ad ius, ad Ciceronem’, more recently we did the

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<sup>1</sup> See J.J.MURPHY, *Rhetoric in the Middle Ages. A History of Rhetorical Theory from St. Augustine to the Renaissance*, Berkeley-Los Angeles-London 1974, 112. See also J.A.BRUNDAGE, ‘Legal Learning and the Professionalization of Canon Law’, *Law and Learning in the Middle Ages*, H.VOGT and M.MÜNSTER-SWENDSEN (eds), Copenhagen 2006, 19-21; and A.WINDROTH, ‘The Teaching of Law in the Twelfth Century’, *idem* 44-45.

same for the famous *causa Curiana*<sup>2</sup>. In this paper, we will renew our dealings with Gallus' famous words.

There are two reasons for taking the matter up again. First, the paper was published in Dutch, and is therefore not accessible to the average Romanist. Second, we have slightly changed our minds about the interpretation of Cicero's text. Our conclusion, however, still holds, and on better grounds. We still think that Gallus' words do not prove any antagonism between jurists and orators, but we are now also able to explain them in terms of a dissension among jurists.

Cicero quoted Gallus' famous statement 'Nihil hoc ad ius, ad Ciceronem' in his work *Topica*, in section 51. He wrote this booklet at the request of his friend Gaius Trebatius Testa who was and still is known as an expert in Roman law<sup>3</sup>. He quoted Gallus' words in connection with the *topos ab adjunctis*, but he did not specify the legal problem which had prompted Gallus to make his statement. However, he did refer to an earlier passage in his book where he had discussed the same *topos*. In this passage, *Topica* 18, Cicero stated that a will made by a woman who had never undergone *capitis deminutio* was invalid in praetorian law. The question we will discuss is how Gallus' answer 'Nihil hoc ad ius, ad Ciceronem' can be explained in this connection.

It is remarkable that in Romanist literature no connection has been made between *Topica* 51, where Cicero quotes Gallus' famous words, and *Topica* 18. However, in discussing *Topica* 18, Romanists have referred to another passage from Cicero, namely a letter from Cicero to his friend Trebatius, usually quoted as *Ad familiares* 7.21. This letter dates from the same time as *Topica*-the early summer of 44 BC-and in the letter Cicero discusses the same subject as in *Topica* 18: the validity of a will drawn up by a woman. The first Romanist to make

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<sup>2</sup> See O.E.TELLEGGEN-COUPERUS and J.W.TELLEGEN, 'Nihil hoc ad ius, ad Ciceronem', *Een Rijk Gerecht. Opstellen aangeboden aan prof. mr. P.L. Nève*, B.C.M.JACOBS and E.C.COPPENS (eds), Nijmegen 1998, 431-456. For the *causa Curiana*, see J.W.TELLEGEN and O.E.TELLEGGEN-COUPERUS, 'Law and Rhetoric in the *causa Curiana*', *Orbis Iuris Romani* 6 (2000) 171-202; and J.W.TELLEGEN, 'The Reliability of Quintilian for Roman Law: on the *causa Curiana*', *Quintilian and the Law, The Art of Persuasion in Law and Politics*, O.E.TELLEGGEN-COUPERUS (ed), Leuven 2003, 191-200.

<sup>3</sup> See W.KUNKEL, *Herkunft und soziale Stellung der römischen Juristen*, 2<sup>nd</sup> edition, Graz-Vienna-Cologne 1967, 28; M.D'ORTA, *La giurisprudenza tra Repubblica e Principato. Primi studi su C. Trebažio Testa*, Naples 1990.

the connection between *Topica* 18 and *Ad familiares* 7.21 was Huschke. In his paper *De causa Siliana* (1824), he assumed that Cicero, in his letter to Trebatius, agreed with him that such a will could very well be regarded as valid, whereas in *Topica* 18, Cicero argued that such a will was invalid. Cicero supposedly contradicted himself in these two passages. In this connection, Huschke also referred to two passages from the newly discovered *Institutes* of Gaius, *Institutiones* II 118-119.

In our view, Gallus' words 'Nihil hoc ad ius, ad Ciceronem' in *Topica* 51 can only be properly understood in connection with the three sources discussed by Huschke: *Topica* 18; Cicero's letter to Trebatius; and Gaius' *Institutiones* II 118-119. In the following, we will first explain the context of *Topica* 51. Then, we will try to identify the legal problem that was put before Gallus, by making the link between *Topica* 51 and *Topica* 18. The next step will be to find out how Cicero applied the *topos ab adjunctis* in that particular case. Since in his letter to Trebatius, Cicero dealt with a similar problem, we will then analyse the opinions of Trebatius and two other jurists who were involved, Servius and Ofilius. The text from Gaius' *Institutes* will help us to put the discussion of the validity of a will drawn up by a woman in a historical perspective. In the end, we will show that Gallus' words can only be explained against the background of the changes in the legal and social position of women in the first century BC. Cicero quoted Gallus' words within a framework, not of antagonism, but of cooperation between jurists and orators!

## 2. *Topica* 51 in Context

Before dealing with *Topica* 51, we will have to explain the nature of Cicero's *Topica* as a book on legal heuristics<sup>4</sup>. Cicero's *Topica* is a short work which, as the name implies, is about *topoi*, in particular *topoi* that are relevant to legal issues. Cicero wrote the *Topica* at the request of his friend Trebatius, who had noticed that Cicero had Aristotle's *Topika* in his library. He asked Cicero if he would explain

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<sup>4</sup> The most recent publication on this work is *Marcus Tullius Cicero, Topica*. Edited with a Translation, Introduction, and Commentary by Tobias Reinhardt, Oxford 2003, with an extensive bibliography.

the work to him. Cicero's *Topica* was an answer to this request<sup>5</sup>. Although it was certainly inspired by Aristotle's *Topika* and *Rhetorika*, and possibly based on one or more works of later authors, it was essentially a completely new work.

Cicero's *Topica* consists of three parts. In the first part, Cicero gives a fairly systematic review of approximately thirty *topoi* explaining how they can be used in a particular case. Most of these cases concerned the law of succession, which was a normal feature of Roman juridical literature. In the second and largest part, he relates these thirty *topoi* to the status doctrine of Hermagoras of Temnos, a teacher of rhetoric in the second century BC. The term 'status' in this connection relates to the position the defendant's lawyer could occupy in criminal proceedings. The correct status had to be determined methodically before a *topos* could be found and standard arguments could be produced. The status doctrine of Hermagoras therefore involved a search for the correct *topos*. In the third and final part, Cicero deals with general propositions, again in connection with Hermagoras' status doctrine<sup>6</sup>.

The main characteristic of a *topos* in a trial is that it is the source of arguments that can be used for and against the defendant. The Hermagoras' status doctrine was an integral part of both rhetoric and law in the first century BC and it still plays a role in modern argumentation theory<sup>7</sup>. It is more than likely that Cicero with his eclectic combination of Aristotle's *Topika* and *Rhetorika*, Hermagoras' status doctrine, and some other works of later authors geared to the needs of the lawyers among his friends and acquaintances<sup>8</sup>.

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<sup>5</sup> Thus Cicero, *Topica*, 1-5. In section 4, Cicero mentions that Trebatius in his turn had written various works for him and his colleagues. Unfortunately, none of these works has survived.

<sup>6</sup> It is not quite clear how this third part connects to the rest of the work. For a discussion of this question, see REINHARDT (note 4), 6-7 and 346-350.

<sup>7</sup> Several papers in *Topik und Rhetorik. Ein interdisziplinäres Symposium*, Th.SCHIRREN and G.UEDING (eds), Tübingen 2000 deal with this subject.

<sup>8</sup> In this sense, also, M.FUHRMANN, 'Cicero's *Topica*', *Koninklijke Nederlandse Academie van Wetenschappen*, Vol. 62, no. 10, Amsterdam 2000, 6. According to F.HORAK, *Rationes decidendi*, Aalen 1969, 48, however, Cicero's *Topica* was much less systematic than Aristotle's *Topika*, and he suspects that Trebatius was just as perplexed by Cicero's *Topica* as by Aristotle's *Topika*. We think that Fuhrmann's interpretation is correct.

*Topica* 51 contains the quotation of Gallus' words and belongs to the second part of the book. Cicero quoted Gallus in connection with his explanation of the *topos ab adiunctis* which he started in section 50. For a proper understanding of section 51, it is necessary to read it in combination with section 50. The two passages run as follows:

*Topica* 50 - 51

[50] *Ab adiunctis autem posui equidem exemplum paulo ante, multa adiungi, quae suscipienda essent si statuissemus ex edicto secundum eas tabulas possessionem dari, quas is instituisset cui testamenti factio nulla esset. Sed locus hic magis ad conjecturales causas, quae versantur in iudiciis, valet, cum quaeritur quid aut sit aut evenerit aut futurum sit aut quid omnino fieri possit.* [51] *Ac loci quidem ipsius forma talis est. Admonet autem hic locus, ut quaeratur quid ante rem, quid cum re, quid post rem evenerit. 'Nihil hoc ad ius; ad Ciceronem,' inquiebat Gallus noster, si quis ad eum quid tale rettulerat, ut de facto quaereretur. Tu tamen patiere nullum a me artis institutae locum praeteriri; ne, si nihil nisi quod ad te pertineat scribendum putabis, nimium te amare videare. Est igitur magna ex parte locus hic oratorius non modo non iuris consultorum, sed ne philosophorum quidem.*

[50] I gave an example of argument from adjuncts (corollaries) a little while ago, saying that there were many corollaries which would have to be admitted if we decided that possession of an inheritance could be given by the praetor's edict in accordance with the terms of a will made by one who did not have testamentary capacity. But this topic is of more value in conjectural issues which come up in trials, when it is a question of what is true or what has occurred, or what will happen, or what can happen at all. [51] Such indeed is the bare outline of the topic. It suggests, particularly, that one should inquire what happened before an event, what at the same time, and what afterward. Our friend Gallus used to say 'This is not a matter for the law but for Cicero' when any one brought to him such a case which turned out on a question of fact. You, however, will allow me to omit no part of the text-book which I have begun, lest you appear to be selfish if you think that only matters of interest to you should be included. As I was saying, this topic is of value largely to orators, and is not only not used by jurisconsults, but not even by philosophers<sup>9</sup>.

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<sup>9</sup> This and other translations of *Topica* texts in this paper are based on H.B.HUBBELL, Cicero. *De inventione, De optimo genere oratorum, Topica*, London-Cambridge (Mass.) 1949, repr. 1976, 419.

At the beginning of § 50, Cicero states that the *topos ab adiunctis* was a normal feature of ‘coniecturales causas’, factual matters. The term *coniecturales* refers to the *status conjecturalis*, one of the four *status rationales*. In criminal proceedings, this *status* would have concerned the question of whether the accused had actually committed the crime of which he was accused. In the inheritance case under consideration an argument can be derived from the question relating to the current situation or the past situation or relating to what might happen in the future or what might happen in general.

In section 51, Cicero stresses the factual character of the *topos*. He then refers to Gallus who, when asked a question about the Roman law of succession—a subject in which he, as a jurist, was well versed—referred the question to his friend Cicero. The *ius-factum* antithesis used by Gallus reflects the distinction between the *status rationales* and the *status legales*, as developed by Hermagoras of Temnos. According to Cicero, this *topos* was suitable for orators but not for jurists such as Gallus and Trebatius<sup>10</sup>. Nevertheless, it must not be omitted because Cicero’s aim was to present an overview of the *topoi*.

It may be clear that the *ius-factum* antithesis made by Gallus does not reflect the antagonism between orators and jurists<sup>11</sup>. However, the question remains why Gallus refused to deal with a legal problem even though it involved the validity of a will.

### *3. The Legal Question Put to Gallus*

What was the question which caused Gallus to make his famous statement? A beginning of an answer to this question can be found in *Topica* 51. The clue is the word *tale*, ‘such a case’. With this word, Cicero refers to what he wrote in section 50 in connection with the *topos ab adiunctis*. The case concerned a will which someone had

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<sup>10</sup> According to Cicero in *Topica*, 41, this was also the case for the *topos similitudo*. We will return to this *topos* later.

<sup>11</sup> According to F.SCHULZ, *History of Roman Legal Science*, Oxford 1946, 44, this antithesis reflects the contrast between jurists and orators. In the same vein, J.E.SPRUIT, *Cunabula. Elementen van het Romeinse privaatrecht*, 2<sup>nd</sup> edition, Deventer 2003, 23. However, Schulz’s contemporary V.A.GEORGESCO, ‘Nihil hoc ad ius, ad Ciceronem’, in *Mélanges de philologie, de littérature et d’histoire anciennes, offerts à J. Marouzeau*, Paris 1948, 194 doubted whether there was such a simple division of roles between jurists and orators. In the same vein, F.WIEACKER, *Römische Rechtsgeschichte I*, Munich 1988, 667 and R.C.H.LESAFFER, *Inleiding tot de Europese rechtsgeschiedenis*, Leuven 2004, 79-80.

made although not entitled to do so. Cicero had already described this *topos* in the first part of *Topica*, in section 18. We will attempt to reconstruct the legal problem on the basis of this text.

*Topica* 18

*Ab adiunctis: Si ea mulier testamentum fecit quae se capite nunquam deminuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari. Adiungitur enim, ut secundum servorum, secundum exsulum, secundum puerorum tabulas possessio videatur ex edicto dari.*

An argument from corollaries: If this woman who has never undergone *capitis deminutio* has made a will, then it appears that possession cannot be granted by virtue of the praetorian edict in accordance with that will. For the corollary is that it would appear that possession is given by virtue of the edict according to the wills of slaves, exiles, and boys.

A woman had made a will. According to Cicero, no *bonorum possessio secundum tabulas* should be granted by virtue of praetorian law. The reason Cicero gives is that the legal position (the civil status) of the woman has never changed. Normally, a woman who had never changed civil status would have been either under the *patria potestas* of her *pater familias* or under the *manus* of her husband and not yet been emancipated. However, then she would have been *alieni iuris*, she would have had no property of her own, and she would have been absolutely unable to make a will. Therefore, the civil status of the woman in question must have been a different one. The only other situation we can think of is that she was a *postuma*, a woman who had been born after the death of her *pater familias*. A *postuma* was in fact *sui iuris* from birth, that is to say, without ever changing status, and she would acquire *testamenti factio* on reaching adulthood.

Why, according to Cicero, would such a woman not have *testamenti factio* on reaching adulthood? We suspect that this has to do with the *tutela mulierum*, guardianship for women, for that was the only means that, according to *ius civile*, could restrict the *testamenti factio* of women<sup>12</sup>. However, there is no indication in the text that the woman concerned actually had a guardian. Therefore, it is likely that the woman had made a will without the support of a guardian, either because she had no guardian or because she had ignored her guardian.

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<sup>12</sup> So Gaius, *Inst.* II 118.

The jurist Gallus could therefore have been asked whether a *postuma*, a woman *sui iuris* who had reached adulthood, could make a will without the assistance of a guardian.

Before he could give an answer, he had to ascertain how the question should be interpreted juridically. According to rhetorical theory, this meant that Gallus had to find out what *quaestio* was involved. Undoubtedly he would have used Hermagoras' status doctrine which was very popular at the time. He would have asked himself the following questions:

- 1 Is this a *quaestio civilis*, a social question? He was able to answer this question in the affirmative.
- 2 Is this a *quaestio finita* (a definite subject) or a *quaestio indefinita* (an indefinite subject)? The following words serve as criteria for a *quaestio finita*: *quis* (who); *quid* (what); *quando* (when); *ubi* (where); *cur* (why); *quem ad modum* (how, in what way); *quibus adminiculis* (by what means). In this case, such questions could be asked, so that the subject could be qualified as a *quaestio finita*.
- 3 Does the *quaestio* have status? Can a judge give a decision in the case? Gallus must have based his assessment on a *krinomenon* scheme. This question could also be answered in the affirmative: the *quaestio* has status.
- 4 To what category does the status belong? The answer depended on the precise nature of the *quaestio*. If the *quaestio* was: 'Is it possible for this woman *sui iuris* to make a valid will?', then the *quaestio* was whether there was a legal ruling concerning the *testamenti factio* for women. In that case, the *quaestio* would come under the *status rationales*. But if the *quaestio* was: 'Is it allowed for this woman *sui iuris* to make a valid will?', then the *quaestio* would have concerned the interpretation of a legal ruling on the way in which a woman could make a will. In that case, the *quaestio* would fall into the category of *status legales*. Gallus must have concluded that there was no uncontested legal ruling that restricted the *testamenti factio* of women. The *quaestio* therefore must have been: 'Is it possible for this woman *sui iuris* to make a valid will?', and must have belonged to the category of *status rationales*<sup>13</sup>.

- 5 The *status rationales* are divided into four groups: *coniectura*, *definitio*, *qualitas*, and *translatio*. To which of these four groups does

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<sup>13</sup> Apparently the words *de facto* in *Topica* 51 refer to this category.

the status belong? From the second sentence of *Topica* 50 and in particular from the use of the term *coniecturales* we conclude, as we stated earlier, that the status involved was the *status coniecturalis*. This status was used to investigate the current position. Here the *tutela mulierum* probably came in, so that the *quaestio* was whether the woman concerned could make a valid will without the help of a guardian.

We suspect that Gallus did not give a direct answer to this question because he could not think of any good juridical arguments pro or con. He did not succeed in finding a suitable *topos*. It could be argued that Gallus, in saying ‘Nihil hoc ad ius, ad Ciceronem’, used the term *ius* in a rhetorical sense, referring to the *status legales*. The guardianship for women was a question that belonged to the *mores maiorum* which was not regulated by any law, ‘it had nothing to do with the law’. He referred the question to Cicero because he apparently believed that Cicero, as an experienced orator, was better equipped to find an argument for or against the unrestricted *testamenti factio* of women.

#### 4. Cicero’s Plea

It is evident from Cicero’s works that, on several occasions, he spoke out against the unrestricted *testamenti factio* for women<sup>14</sup>. It is impossible to conclude that this was also his personal view, because all these statements were made in the context of forensic speeches. How could he justify the view that a grown-up woman *sui iuris* could only make a will with the consent of a guardian when legislation offered no support for this position? What could be a suitable *topos* in such a case? *Topica* 18 shows that, in constructing his plea, Cicero probably also used Hermagoras’ status doctrine. He therefore found a suitable *topos* in a methodical manner. Cicero began where Gallus had stopped.

5 Like Gallus, Cicero probably considered that the casw belonged to the *status rationales*. Within that group he could also have opted for the *status coniecturalis*; however, he opted for the *status qualitatis*

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<sup>14</sup> For instance, Cicero, *Pro Flacco*, 38.84; *Pro Murena*, 12.27. On Cicero’s polemic against a too liberal application of *tutela mulierum*, see E.HÖBENREICH/G.RIZZELLI, *Scylla. Fragmente einer juristischen Geschichte der Frauen im antiken Rom*, Vienna-Cologne-Weimar 2003, 43-44.

because that offered more possibilities. The question now was, how the issue could be qualified.

6 According to rhetorical theory, the *status qualitatis* was subdivided into four types: something could be qualified as useful (*status deliberativus*), honourable (*demonstrativus*), lawful (*iuridicalis*), or practical (*negotialis*). Of these, only the *status iuridicalis* has been developed further, and this was the status Cicero chose.

7 The *status iuridicalis* is split into two types: *absolutus* and *assumptivus*. If he were to choose the *status absolutus*, his plea would revolve round the following *quaestio*: ‘Is the will of a woman *sui iuris* which has been drawn up without the support of a guardian absolutely against the law?’ If he were to chose the *status assumptivus*, he would refer to similar cases and then his plea would revolve around the following *quaestio*: ‘In view of other cases in which a will is considered invalid, should this will also be regarded as invalid?’ Apparently, Cicero opted for the *status assumptivus*.

8 The *status assumptivus* is subdivided into four types: comparison (*comparatio*), counter accusation (*relatio criminis*), passing on the crime to someone else (*remotio criminis*), and admission of the crime (*concessio*). In this case, no crime was involved, so Cicero chose the *status comparationis*. This involved weighing the advantage of unrestricted *testamenti factio* for women against the disadvantage of women making a will in an unwise manner.

9 It only makes sense to define the status if it is linked to suitable *topoi*; there are several *topoi* for comparisons, the most obvious being the *topos similitudo* (similarity) and the associated *topos ab adiunctis* (from corollaries)<sup>15</sup>. It is clear that Cicero opted for the latter.

How did he actually work this out? *Topica* 18 shows how Cicero argued:

*Si ea mulier testamentum fecit quae se capite nunquam deminuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari.*

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<sup>15</sup> According to REINHARDT (note 4), 285-286, the *topos similitudo* may have been derived from Aristotle. It is not clear where Cicero found the *topos ab adiunctis*- perhaps he invented it himself. Unfortunately, the overview of the *topoi* in Hermagoras’ system has not survived.

*Adiungitur enim, ut secundum servorum, secundum exsulum, secundum puerorum tabulas possessio videatur ex edicto dari.*

If this woman who has never undergone *capitis deminutio* has made a will, then it appears that possession cannot be granted by virtue of the praetorian edict in accordance with that will. For the corollary is that it would appear that possession is given by virtue of the edict according to the wills made by slaves, exiles, and boys.

The comparison between wills made by women and those made by slaves, exiles, and boys is based on the concept of *capitis deminutio*. It was not necessary to mention it explicitly in connection with the slaves, exiles, and sons because the audience (or readership) was familiar with the concept and the connection. However, something strange is going on here because in our view the real question is whether a woman can make a will without the assistance of a guardian. And yet, Cicero does not even mention the *tutela mulierum*. We think he deliberately does not do so. In his time, the question whether a woman *sui iuris* could make a will independently was controversial<sup>16</sup>. Therefore, Cicero could not refer to a generally felt opinion. He would undermine his plea if he were to argue openly that women can only make a will with the assistance of a guardian. In rhetoric, this way of not saying what one means is known as the stylistic figure of *emphasis*<sup>17</sup>.

In this case, Cicero made use of the woman's particular position in that she had never undergone *capitis deminutio* because, as a *postuma*, she had been *sui iuris* from birth<sup>18</sup>. It allowed him to compare her position with that of three categories of persons none of whom could make a will without a form of *capitis deminutio*<sup>19</sup>. There were three variants of *capitis deminutio*:

<sup>16</sup> This question was also the main issue in the *causa Siliana* which we will discuss later.

<sup>17</sup> In Latin rhetoric, the most extensive treatment of this subject is offered by Quintilian in his *Institutio oratoria* 9.2.72-74. On this passage, see Chr.CRAIG, 'Quintilian on Not Saying What One Means (*Inst. 9.2.73.-74*)', *Papers on Rhetoric* VI, edited by L.CALBOLI MONTEFUSCO, Rome 2004, 101-115 with bibliography.

<sup>18</sup> See M.KASER, *Das römische Privatrecht*, I, 2<sup>nd</sup> edition, Munich 1971, 272-273. On *capitis deminutio*, see KASER, 68.

<sup>19</sup> W.W.BUCKLAND, *A Text-book of Roman Law from Augustus to Justinian*, 3<sup>rd</sup> edition revised by P.STEIN, Cambridge 1975, 135 assumes that Cicero here only refers to *capitis deminutio minima* and ignores that slaves, exiles, and boys are

- a. *capitis deminutio maxima*: change in the *status libertatis*;
- b. *capitis deminutio media*: change in the *status civitatis*;
- c. *capitis deminutio minima*: change in the *status familiae*.

Slaves could only make a will if they had been liberated (*capitis deminutio maxima*). Exiles could only make a will if they had regained their civil rights (*capitis deminutio media*). Sons who were *alieni iuris* could only make a will after emancipation or after the death of the *pater familias* (*capitis deminutio minima*). With regard to this category, however, Cicero does not refer to sons (*filiorum*) but to boys (*puerorum*). We will come back to this later.

We have shown that two *topoi* could be used in connection with the *status comparationis*: the *topos similitudo* and the *topos ab adiunctis*. Evidently Cicero did not opt for the *similitudo*. Why is that? With regard to this *topos*, Cicero writes:

*Topica* 41-42

[41] *Similitudo sequitur, quae late patet, sed oratoribus et philosophis magis quam vobis. Etsi enim omnes loci sunt omnium disputationum ad argumenta suppeditanda, tamen aliis disputationibus abundantius occurunt aliis angustius. Itaque genera tibi nota sint; ubi autem eis utare, quaestiones ipsae te admonebunt.* [42] *Sunt enim similitudines quae ex pluribus collationes perveniunt quo volunt hoc modo: Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator. Haec ex pluribus perveniens quo vult appellatur induc[t]io, quae Graece ἐπάγωγή nominatur, qua plurimum est usus in sermonibus Socrates.*

[41] Similarity comes next. This is an extensive topic but of more interest to orators and to philosophers than to you jurists. For although all topics can be used to supply arguments in all sorts of debate, still they occur more frequently in some debates and more rarely in others. Well then, know the types of argument; the case itself will instruct you when to use them. [42] For example, there are certain arguments from similarity which attain the desired proof by several comparisons, as follows: If honesty is required of a guardian, a partner, a bailee, and a trustee, it is required of an agent. This form of argument, which attains the desired proof by citing several parallels is called induction, in Greek ἐπάγωγή; Socrates frequently used this in his dialogues.

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connected by *capitis deminutio* (*maxima*, *media*, and *minima*) as well. FUHRMANN (note 8), 22 mistakenly assumes that *capitis deminutio* here refers to restriction of the woman's civil status.

In order to use this *topos*, Cicero would have to draw three comparisons concerning the *testamenti factio*: between women *sui iuris* on the one hand and slaves, exiles, and *filiis familias* respectively on the other<sup>20</sup>. Since this *topos* is a form of induction, the three comparisons should logically induce the rule that a will could only be made by someone who was free, had Roman citizenship, and was *sui iuris* as well as adult. If a Roman woman was *sui iuris* then she would satisfy the criteria and the argument that she could not make a will would not apply. By mentioning only male slaves, exiles, and boys, Cicero would suggest that the aforementioned rule would have to be restricted by the addition of the phrase ‘provided they are male’. That, however, would have been contrary to the Roman law of succession. For that reason, Cicero could not use the *topos similitudo*.

Cicero could and did use the *topos ab adiunctis*, because here the comparison could be made more loosely. Generally speaking, the position of a woman *sui iuris* was basically different from that of slaves, exiles, and boys. She could have a guardian, but there was no law saying that she had to have one. It was all a matter of custom. In Romanist literature, it has been suggested that Cicero, in referring to *capitis deminutio*, meant that the woman in question was *sui iuris* but had to undergo a *coemptio fiduciaria* in order to acquire a guardian with whose assistance she could then make a will<sup>21</sup>. The *coemptio fiduciaria* was an old form of contracting a marriage which would bring the woman under the *manus* of her husband and thus make her undergo a *capitis deminutio*<sup>22</sup>. In our view, there are two reasons why this explanation is not convincing. The first reason is that, by this

<sup>20</sup> See on this *topos*, REINHARDT (note 4), 285-286.

<sup>21</sup> Thus Ph.E.HUSCHKE, *De causa Siliana. Ad Cic. Epist. ad divers. VII 21*, Rostock 1824, also in *Studien des römischen Rechts*, Breslau 1830, 1-24, pp. 18-20 in particular. It is clear that Huschke, in interpreting *Topica* 18, was influenced by the newly discovered copy of Gaius' *Institutes*. In *Inst. I* 115a, Gaius stated that *olim* women could only make a will after having performed a *coemptio fiduciaria*. In the same vein, P.VOCI, *Diritto ereditario romano I*, 2<sup>nd</sup> edition, Milan 1967, 393; P.ZANNINI, *Studi sulla tutela I*, Turin 1976, 158-161 with literature; and, more recently, FUHRMANN (note 8), 22-23 and in ‘Die zivilrechtliche Beispiele in Ciceros Topik’, *Topik und Rhetorik, Ein interdisziplinäres Symposium*, eds. Th.SCHIRREN and G.UEDING, Tübingen 2000, 64-65.

<sup>22</sup> On the *coemptio*, see A.WATSON, *The Roman Law of Persons in the Later Roman Republic*, Oxford 1967, 24-25.

time, the *coemptio fiduciaria* had become completely obsolete<sup>23</sup>. The second reason is the use of the word *numquam*, ‘never’, in this connection. According to Cicero, the woman in question had ‘never’ undergone *capitis deminutio*. If the *capitis deminutio* referred to acquiring a guardian in order to draw up a will, there would be no point in relating this to ‘all her life’. The word ‘never’ only makes sense if it is used to indicate that the woman in question was a *postuma* who had never undergone *capitis deminutio*<sup>24</sup>.

It will be clear that the *capitis deminutio* this woman had ‘never’ undergone was the same as the *capitis deminutio minima* a *filius* had to undergo in order to become *sui iuris*. The difference was that, as a *postuma*, she already was *sui iuris*, and he was not. Cicero makes use of the minimal similarity in order to compare her restricted ability to make a will with that of slaves, exiles, and boys, and to create an *argumentum ad absurdum*. Slaves were not free and had no property, although some had a *peculium*. They could make a will about their *peculium*, but it would be absurd to regard that as valid in Roman law<sup>25</sup>. Exiles were free but they did not have Roman citizenship: they could have property and they could dispose of it in a will, but it would be absurd to regard that as valid in Roman law. *Filiis familias* were in a situation comparable to that of slaves: to be sure, they were free and had Roman citizenship, but they had no property except perhaps a *peculium*. In this respect, their position was comparable to that of slaves. That is why Cicero does not mention *filiis* but, instead, refers to *pueri*, boys.

As long as a boy was under the *potestas* of his *pater familias*, he would have the same position as an adult *filius familias*. When he became *sui iuris* before having reached the age of fourteen, he would be put under the care of a guardian and, with his assistance, could

<sup>23</sup> See O.E.TELLEGGEN-COUPERUS, ‘Livy and Gaius on the Making of Wills by Women’, *Bulletino del Istituto di Diritto Romano* 27 (1985) 373-381.

<sup>24</sup> REINHARDT (note 4), 230 suggests that ‘the wording *numquam* instead of *non* might stress that the woman, having never undergone *c.d.*, was still under the *potestas* of her father and that hence there was certainty as to her inability to make a will’. Above, we explained that, in that case, her inability would have been absolute and could not have been the subject of discussion.

<sup>25</sup> From his letter VIII 16, we know that Pliny the Younger was willing to acknowledge as valid the wills in which his slaves divided up their *peculium* among their fellow-slaves. On this letter, see J.W.TELLEGEN, *The Roman Law of Succession in the Letters of Pliny the Younger* I, Zutphen 1982, 143-144.

perform legal acts. However, there was one exception: a boy could not make a valid will, not even with the assistance of his guardian<sup>26</sup>. Therefore, it would be absurd to regard a boy's will as valid in Roman law. By referring to boys, Cicero introduces the concept of guardianship, but only indirectly. At the same time, his comparison between the will of a woman and the wills of slaves, exiles, and boys acquires momentum. If a woman could make a valid will without a guardian, then the will of a slave, an exile, and even a boy should also be regarded as valid, and that would be absurd.

With the help of the *topos ab adiunctis* Cicero tries to construct an argument that is convincing both rhetorically and juridically. His reasoning contains two elements.

First of all, it revolves around the concept of *capitis deminutio*, because the case in question concerned a *postuma*. As far as this element is concerned, it could be said that Cicero was in fact using an *argumentum ad absurdum*<sup>27</sup>. This is not only a rhetorical argument, it is also an argument that Roman jurists often used<sup>28</sup>. Secondly, Cicero's argument revolves around the concept of *tutela*. He draws a comparison between a boy who is *sui iuris* and a woman who is *sui iuris*. A boy *sui iuris* came under the *tutela impuberum* which was based on the Law of the Twelve Tables. Cicero applies this rule to adult females, *i.e.* he puts the *tutela mulierum* – which was not regulated by law – on a par with the *tutela impuberum* – which was. In this way, he reinforces the effect of the *argumentum ad absurdum*.

With this example, Cicero is demonstrating the status doctrine to Trebatius and is explaining to him how a particular *topos* can provide the jurist with both rhetorical and juridical arguments. At the same time, he shows that rhetorical arguments barely differ from juridical arguments.

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<sup>26</sup> So Gaius, *Inst.* II 113. Otherwise, such a will would clash with a pupillary substitution in the will drawn up by the boy's *pater familias*.

<sup>27</sup> In the same vein, REINHARDT (note 4), 229, but he adds: 'though without all steps being fully developed'. In our view, Cicero deliberately did not develop all steps; see above, at note 17.

<sup>28</sup> See F.HORAK, *Rationes decidendi: Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo*, Aalen 1969, 267ff.

*5. Cicero's Letter to Trebatius*

Our interpretation of *Topica* 18 hinges on the assumption that, in Cicero's day, guardianship of women had become controversial. Some people thought women could perform legal acts only with the assistance of a guardian, others thought they were perfectly capable of doing so by themselves. That there was such a controversy can, in our view, be inferred from a letter Cicero wrote, in June 44 BC, to his friend Trebatius Testa. It is now time to discuss this letter.

*Ad familiares* 7.21

*Silius causam te docui. Is postea fuit apud me. Cum ei dicerem, tibi videri sponzionem illam nos sine periculo facere posse, "Si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dederit", negare aiebat Servium, tabulas testamenti esse eas, quas instituisset is, qui factionem testamenti non habuerit; hoc idem Ofilium dicere; tecum se locutum negabat, meque rogavit, ut se et causam suam tibi commendarem. Nec vir melior, mi Testa, nec mihi amicior P. Silio quisquam est, te tamen excepto. Gratissimum igitur mihi feceris, si ad eum ultro veneris eique pollicitus eris; sed, si me amas, quam primum. Hoc te vehementer etiam atque etiam rogo.*

I have explained Silius' case to you. Well, since then he has called upon me. When I told him that in your view we can safely make that stipulation "If the Praetor, Q. Caepio, has granted me the possession of Turpilia's estate in accordance with his edict, etc." he said that Servius denied that this is a deed of a will, that was made by someone who had not the legal right to make a will; and that Ofilius said the same. He (Silius) said that he had not talked it over with you, and asked me to commend him and his case to you. There is no better man, my dear Testa, and I have no better friend than P. Silius, with the exception indeed of yourself. You will therefore greatly oblige me by going to him without an invitation and promising to do what he wants. But, as you love me, do so as soon as possible. This I earnestly beg of you, and I reiterate my request<sup>29</sup>.

The following facts can be deduced from the letter. A certain Turpilia had made a will. However, there were doubts about the validity of her will. Several persons claimed her inheritance, one of them being Publius Silius, a friend of Cicero. The praetor, Q. Caepio,

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<sup>29</sup> This translation is based on the one given by W. GLYNN WILLIAMS in Loeb Classical Library, *Cicero XXVI. Letters to his Friends*, Cambridge (Mass.)-London 1983, 65.

had granted *bonorum possessio* on the basis of this will<sup>30</sup>. A *sponsio* was to be made on the validity of the *bonorum possessio*. Silius came to ask Cicero for advice. Cicero in turn discussed the problem with his legal friend Trebatius Testa who was of the opinion that Silius could safely make the *sponsio*. Later, Silius called on Cicero again and told him that the jurists Servius and Ofilius had been less positive. Cicero then asked Trebatius to go and see Silius and promise to help him<sup>31</sup>.

To modern readers, this letter is not quite clear because some factual information is missing. Cicero did not have to include all the facts because Trebatius was well versed in the subject. However, we would like to know why there were doubts about the validity of Turpilia's will. What was wrong with her *testamenti factio*? Who asked *bonorum possessio*? Who proposed the *sponsio*? What was Silius' position of in this case?

The answers to these questions, as they can be found in Romanist literature, were first formulated by Huschke who, in 1824, published an article (in Latin) on the so-called *causa Siliana*<sup>32</sup>. According to Huschke, Turpilia had instituted Silius as heir<sup>33</sup>. The praetor had granted him *bonorum possessio secundum tabulas* and Silius claimed the inheritance from the intestate heirs by means of the *interdictum quorum bonorum*. He intended to start proceedings by offering a *sponsio* to his opponent(s). As he did not feel certain of his case, he had turned to Cicero and to several other experts for advice. Cicero, who had consulted Trebatius, said he could safely make the *sponsio*. However, the jurists Servius and Ofilius were less confident. They felt

<sup>30</sup> In 44 BC, Q. Caepio Brutus was praetor. Actually, he was M. Brutus, one of Caesar's assassins, who had been adopted by Q. Servilius Caepio, an uncle from his mother's side.

<sup>31</sup> From Cicero, *Ad Atticum*, XV 22 and 24, it appears that Cicero also discussed Silius' case with Atticus.

<sup>32</sup> See note 21. In the same vein, F.C.VON SAVIGNY, 'Beitrag zur Geschichte der Geschlechtstutel, Nachtrag 1849', in *Vermischte Schriften*, Berlin 1850, I 289-290, and E.COSTA, *Cicerone giureconsulto*, Bologna 1927, I 69. More recently, A.WATSON, *The Law of Succession in the Later Roman Republic*, Oxford 1971, 73-75; ZANNINI (note 21), 166 note 1; and L.PEPPE, *Posizione giuridica e ruolo sociale della donna romana in età repubblicana*, Milan 1984, 54.

<sup>33</sup> HUSCHKE (note 21). 2 observed that the names Turpilia and Silius do not make it probable that they were relatives and that Silius was her heir upon intestacy. Since Cicero calls each with only one of the three names Romans usually had, this argument does not call for further discussion.

he might lose the *sponsio* because Turpilia did not have *testamenti factio*. They must have meant, Huschke suggests, that Turpilia had made her will without undergoing *capitis deminutio*, that is to say, without performing a *coemptio fiduciaria*. Huschke's interpretation rests on two assumptions:

1. The formulation of the *sponsio* as quoted by Cicero-and the word *mihi* in particular-shows that Silius had been given *bonorum possession secundum tabulas*.
2. Servius and Ofilius state that Turpilia's will was invalid because she did not have *testamenti factio*.

We think both assumptions are incorrect. In our view, Silius was heir upon intestacy and Trebatius supported him by stating that Turpilia's will could be regarded as invalid. Servius and Ofilius, on the other hand, were not so sure; they stated that the will might be regarded as valid. This dissension was caused by the fact that there was no clear rule on this matter.

In order to support our hypothesis, we will first deal with the matter of the *sponsio* and then with the *responsum* by Servius and Ofilius. Finally, we will try to explain the reference to the *testamenti factio* in this letter in connection with Gaius' *Institutes* and *Topica* 18.

#### a) The *sponsio*

Cicero quotes the first part of the *sponsio* as follows: 'Si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dederit', 'If the praetor Q. Caepio has granted me possession of Turpilia's estate in accordance with his edict'. According to Huschke, the word *mihi* refers to Silius himself. The question is whether this is necessarily so. Huschke rightly observed that the *sponsio* refers to the *interdictum quorum bonorum*<sup>34</sup>. In this interdict, the praetor ordered that the goods belonging to the deceased's estate be handed over to the claimant (A) who had a grant of *bonorum possessio ex edicto*. If the possessor of these goods (B) claimed to be *heres* himself and refused to turn them over, a procedure followed which took place by

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<sup>34</sup> On the *interdictum quorum bonorum*, BUCKLAND (note 19), 389; M.KASER and K.HACKL, *Das römische Zivilprozessrecht*, 2<sup>nd</sup> edition, Munich 1995, 420.

means of mutual *sponsiones*<sup>35</sup>. A asked B to promise a certain sum, a penalty, if he had been wrong by acting contrary to the praetor's order and not turning over the goods (*spondesne...?*). B would then answer that he so promised (*spondeo*). Next, B would ask A to promise a similar sum if he had acted wrongfully by invoking the praetor's order against B, and A would promise to do so. A and B would subsequently bring actions against each other in the regular way. The question to be decided by the judge was of course the same in both cases: had the praetor granted *bonorum possessio ex edicto*, that is to say, on valid grounds? The person who lost the case had to pay the penalty to the winner. If B was the loser, a third action followed before the same judge, who was instructed to condemn B to pay the value of the inheritance unless he restored it to A.

In this case, Turpilia had made a will, and it is therefore likely that the praetor had granted *bonorum possessio* on the basis of this will, *secundum tabulas*. The praetor usually granted the *interdictum quorum bonorum* to the person to whom he had also granted *bonorum possessio*. Consequently, the *sponsio* quoted by Cicero had been requested by the testamentary heir. The word *mihi* refers to the person who had asked the question '*spondesne ...?*'. This could have been Silius as well as his opponent.

There are two reasons why we think the *sponsio* as quoted by Cicero may have been requested by his opponent. They are both to be found in the sentence in which Cicero introduces the *sponsio*: '*... sponsionem illam nos sine periculo facere posse*', 'that ... we can safely make that stipulation'. First, the words *sponsionem facere* mean 'to do a *sponsio*, to promise, to say *spondeo*'. They suggest that Silius was the one who had to answer the question and that the *mihi* in the *sponsio* as quoted by Cicero was his opponent. Cicero used the words *sponsionem facere* in the same way in his *Pro Caecina* and in his oration against Verres<sup>36</sup>. However, this is not conclusive because,

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<sup>35</sup> On this procedure, see H.F.JOLOWICZ and B.NICHOLAS, *Historical Introduction to the Study of Roman Law*, 3<sup>rd</sup> edition, Cambridge 1972, 231 and 253-255.

<sup>36</sup> *Pro Caecina*, 80: '*... is cum se restituisse dixit, necesse est male fecerit sponsionem*', 'he must inevitably have made a bad wager in answering that he had restored him'. *In Verrem* III 135: '*facta est sponsio HS V*', 'the challenge was accepted for 50 sesterces'.

in the latter oration, he also used them in the opposite sense of ‘to challenge, to ask’<sup>37</sup>.

Another indication may be found in the words *sine periculo*, ‘without risk, safely’. The word *periculo*, of course, refers to the risk of losing the penalty and, indirectly, the trial. Someone who is about to start a trial would not be expected to be afraid of losing; that would be more appropriate for the person to whom the challenge has been issued. If Silius had acquired *bonorum possessio* as testamentary heir and, on that basis, claimed the corporeal assets from the intestate heirs, he could only gain. In that case, he would not have possession of the inheritance, and if he could prove that Turpilia’s will was valid, he would obtain the estate. The only thing he could lose was the sum promised in the *sponsio*, but that was usually only a small sum. If, on the other hand, Silius was an intestate heir and in possession of the inheritance and if his opponent had acquired *bonorum possessio* on the basis of Turpilia’s will and was now challenging him to prove that the will was invalid, then he certainly had reason to be afraid of losing not only the penalty but also the inheritance.

Our conclusion is that Cicero’s words do not prove, as Huschke and others seem to think, that Silius was the testamentary heir and that he was claiming Turpilia’s inheritance from her heirs upon intestacy. On the contrary, they rather suggest that he was heir upon intestacy and had to defend himself against the claims of the testamentary heir(s). The main question was: could Turpilia’s will be regarded as valid?

#### b) The *responsum* by Servius and Ofilius

According to Huschke, Silius had consulted not only Cicero and Trebatius on the question of Turpilia’s inheritance, but also Servius and Ofilius. The latter two had given as their opinion that Turpilia’s will was not valid because she did not have *testamenti factio*. In Huschke’s view, they meant that Turpilia had not undergone a *capitis deminutio*. Since their opinion was contrary to that of Trebatius,

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<sup>37</sup> *In Verrem* III 135: ‘Cum eodem Apronio postea P. Scandilius ... eandem sponzionem de societate fecit quam Rubrius facere voluerat ...’, ‘Publius Scandilius subsequently issued to this same Apronius the same challenge as Rubrius had meant to issue before’.

Huschke assumed that, according to Trebatius, it was not necessary for a woman making a will to undergo a *capitis deminutio*.

However, Huschke deduced from *Topica* 18 that Cicero considered undergoing *capitis deminutio* necessary for a woman when making a will<sup>38</sup>. Cicero wrote his *Topica* shortly after the *causa Siliana* had been at issue, and Huschke concluded that, by then, Cicero had come to regard the opinion of Servius and Ofilius in the *causa Siliana* as a rule of law. Huschke even wondered whether Cicero, in his *Topica*, wanted to stimulate Trebatius to change his mind and agree with Servius.

We do agree with Huschke that there was dissension among the three jurists in the *causa Siliana* about the validity of Turpilia's will. Servius' and Ofilius' view differed from Trebatius'. However, we do not agree with his analysis of which jurist held which view. We will take another look at the sentence in which Cicero renders the opinion of Servius on the question of whether Silius can safely make a *sponsio: negare aiebat Servium, tabulas testamenti esse eas, quas instituisset is, qui factionem testamenti non habuerit*. Huschke does not translate this sentence literally but interprets it: Servius regarded Turpilia's will as invalid because she did not have *testamenti factio*. The four translators that we have been able to check do the same. Glynn Williams, for instance, in his translation for Loeb Classical Library has: 'He said that Servius maintained that a will, made by one who had not the legal right to make a will, was no will at all, ...'<sup>39</sup>. However, when this passage is translated literally, it says exactly the opposite: 'He said that Servius DENIED that this was the deed of a will which someone had made who did not have *testamenti factio*.' In other words, Servius had no reason to think that Turpilia's will was

<sup>38</sup> See note 21.

<sup>39</sup> W.GLYNN WILLIAMS (note 29), 65. The German translation by H.KASTEN in *M. Tulli Ciceronis, Epistularum ad familiars libri XVI*, 3<sup>rd</sup> edition, Munich 1980 has: '... erklärte er, Servius behauptete, das sei keine Testamentsurkunde, da jemand sie errichtet habe, der überhaupt nicht das Recht gehabt habe, ein Testament zu machen'; In the same vein, *Cicéron. Correspondance* tome IX, texte établi, traduit et annoté par J.BEAUJEU, Paris 1988, 202: 'et lui affirmait que, au dire de Servius, les dispositions adoptées par une personne qui n'a pas la capacité de tester n'étaient pas un texte testamentaire'; see also his commentary on p. 171. In the undated French translation for Librairie Garnier Frères, *Cicéron. Correspondance*, tome XV, P.CHARPENTIER has: 'selon Servius, un testament fait par quelqu'un qui n'a pas le droit d'en faire n'était pas un véritable testament'; see also his commentary on p. 480.

invalid, or, to put it positively, in his view, and that of Ofilius, her will could be regarded as valid. Since Trebatius disagreed with them, we must assume that, in his view, Turpilia did not have *testamenti factio* and her will should be regarded as invalid.

This translation allows us to draw two conclusions. First, we can now determine Silius' position in this case: he must have been interested in the invalidity of the will, and so he must have been heir upon intestacy to Turpilia. Second, in his *Topica*, Cicero did not have to convince Trebatius to adopt a different view: in both cases, he agreed with Trebatius that a woman who did not have *testamenti factio* could not make a valid will. That leaves one question unanswered: what did they mean by *testamenti factio* in this case?

### c) The *testamenti factio* of Turpilia

It is clear, as Huschke also stated, that the words *testamenti factio* cannot refer to the three regular requirements for *testamenti factio*: the testator must be free, a Roman citizen, and *sui iuris*. In his view, Trebatius cannot have been so foolish as to think that the praetor would grant *bonorum possessio* on the basis of Turpilia's will if she did not meet these requirements<sup>40</sup>. So *testamenti factio* must have a special meaning here.

Huschke assumes that, since the case involves a woman as testator, *testamenti factio* must refer to the assistance of a guardian<sup>41</sup>. There were two rules: (1) as long as a woman had a *familia* and agnatic relatives, she could not make a will at all, not even with the assistance of a guardian; and (2) women could only make a will with the assistance of a guardian. Women could circumvent the first rule by *capitis deminutio*, that is to say, by performing a *coemptio*, so as to sever her ties with her family and agnatic relatives. She could then make a will with the assistance of her newly acquired guardian.

Next, Huschke wonders whether the praetor would give *bonorum possessio* without further questions when the inheritance of a woman was claimed on the basis of a will sealed by seven witnesses. Would he require the woman to have undergone *capitis deminutio* and to

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<sup>40</sup> HUSCHKE (note 21), 16: 'Tam insipidam et stultam opinionem tanto Icto [i.e. iurisconsulto, T-C] attribuere, fateor mihi religioni est, quanquam in hac interpretatione omnes fere interpres conspirasse video.'

<sup>41</sup> HUSCHKE (note 21), 18.

have made the will *tutore auctore*? First, he deals with the requirement of *auctoritas tutoris*. In this connection, he refers to two texts from Gaius' *Institutes*. Since they are important in this connection, we will quote them as Huschke did, namely, section 118 in full and less than a third of section 119:

[118] *Observandum praeterea est, ut si mulier, qua in tutela sit, faciat testamentum, auctoribus iis, quos tutores habet, facere debeat: alioquin inutiliter iure civili testabitur.* [119] *Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti bonorum possessionem pollicetur ...*

[118] Moreover, it must be noted that, if a woman who is under guardianship makes a will, she should do so with the authorisation of those persons who she has as guardians; otherwise, the will is not effective by *ius civile*. [119] Yet if the will is sealed with the seals of seven witnesses the praetor promises *bonorum possessio* in support of the will to the heirs appointed in it;<sup>42</sup>;

Huschke concludes from these texts that it was absolutely certain that the praetor did not require *tutoris auctoritas* for a will made by a woman *sui iuris*. Indeed, it would be absurd to think so, because even Gaius himself declared that, in his time, *tutela mulierum* did not make sense at all<sup>43</sup>.

Next, Huschke deals with the requirement of *capitis deminutio*. In his view, it is not clear whether the praetor would require a woman to have undergone *capitis deminutio*. This, he concludes, must have been the nucleus of the conflict between Trebatius and Servius/Ofilius: according to Trebatius, *capitis deminutio* was less important than the authority of a guardian, and therefore he did not hesitate to answer that, when the praetor had granted *bonorum possessio* on the basis of such a will, he had done so in accordance with his edict. However, Servius (and Ofilius) regarded *capitis deminutio* as completely separate from *auctoritas tutoris* but as linked with the *testamenti factio* in general.<sup>44</sup> Turpilia had made a will without undergoing

<sup>42</sup> The translation is based on *The Institutes of Gaius*. Translated with an introduction by W.M.GORDON and O.F.ROBINSON, London 1988, 179.

<sup>43</sup> Gaius, *Inst.* I 190.

<sup>44</sup> Otherwise, it could be said that the praetor might also grant *bonorum possessio* on the basis of a will made by an infant, a lunatic or a slave. These people could make a valid will when they became adults, sane or free.

*capitis deminutio*, that is to say, without making a *coemptio fiduciaria*, and therefore her will was completely null and void in praetorian as well as civil law. Huschke then refers to *Topica* 18 where Cicero also mentioned *capitis deminutio* in connection with the *testamenti factio* of a woman.

We cannot agree with this interpretation of Turpilia's *testamenti factio*. There are very few sources on the *testamenti factio* of women, probably because the *tutela mulierum* disappeared in the later Roman Empire and the compilers of the Digest did not think it necessary to include references. The most important source is Gaius' *Institutes*, but even Gaius' remarks are sometimes obscure and contradictory. In *Inst. I* 115a, he states that *olim*, 'formerly', women did not have the right to make a will unless they had performed a *coemptio*, had been remancipated and had been manumitted. Huschke suggests that *coemptio* was necessary for women to sever the bonds with her *familia* and agnatic relatives. The reference to a woman's *familia* having claims on her inheritance does not make sense at all. That agnatic relatives did have certain claims on the inheritance of women is correct. We will come back to that later. However, it seems unlikely that a woman herself could undermine such claims by making a *coemptio*. Moreover, in the late Republic, the *coemptio fiduciaria* had become completely obsolete. Finally, Cicero's *Topica* 18 does not support Huschke's interpretation either. Not only does he not mention the word *coemptio*, but if by mentioning the words 'capite deminuit' Cicero would have referred to a *coemptio*, his comparison would not make sense: in no way could *coemptio* refer to slaves, exiles, and boys.

We feel that this line of reasoning demonstrates that there are no sources to confirm Huschke's hypothesis that *coemptio* was a requirement for women making a will. Therefore, his conclusion that the dissension between Trebatius and Servius/Ofilius had been caused by their different views on *coemptio* as a requirement for women making wills must be rejected.

That leaves the *tutoris auctoritas* as the cause of dissension between Trebatius and Servius/Ofilius. We will once more turn to the most relevant text in this connection, Gaius' *Institutes* II 118 and 119. This time, we will quote both passages in full:

[118] *Observandum praeterea est, ut si mulier, qua in tutela sit, faciat testamentum, auctoribus iis, quos tutores habet, facere debeat: alioquin inutiliter iure civili testabitur.* [119] *Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti bonorum possessionem pollicetur: et si nemo sit, ad quem ab intestato iure legitimo pertineat hereditas, velut frater eodem patre natus aut patruus aut fratri filius, ita poterunt scripti heredes retinere hereditatem: nam idem iuris est et si alia ex causa testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit.*

[118] Moreover, it must be noted that, if a woman who is under guardianship makes a will, she should do so with the authorisation of those persons who she has as guardians; otherwise, the will is not effective by *ius civile*. [119] Yet if the will is sealed with the seals of seven witnesses the praetor promises *bonorum possessio* in support of the will to the heirs appointed in it; and if there is no one with a statutory title to the inheritance on intestacy, such as a brother born of the same father or a paternal uncle or a brother's son, the appointed heirs will thus be able to keep the inheritance. The law is the same even if the will is invalid for some other reason, such as that the property was not sold or that the testator did not speak the words of the declaration.

We would like to make two remarks about these passages<sup>45</sup>. First, it is striking that Gaius does not state here that, according to *ius civile*, all women who want to make a will need the assistance of a guardian. All he says is that those women who have a guardian should make a will with his assistance. Therefore, it would seem that women who did not have a guardian could make a will by themselves. As far as we know, there was no law obliging them to call on a guardian's assistance when drawing up a will<sup>46</sup>. It may have been *mos maiorum*, custom, to do so. Therefore, it would be premature to assume, as is

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<sup>45</sup> Note that this passage forms part of a section in which Gaius deals with the formal requirements regarding the contents of a will.

<sup>46</sup> Probably in 210 BC, the *lex Atilia* made it possible for women who did not have a guardian and wanted one, to go and ask for one from the praetor and half of the tribunes. The classic example of a woman who did so is the famous Hispala who helped disclose the Bacchanalian conspiracy, as Livy tells us in *Ab urbe condita*, 39, 8-19.

usually done in Romanist literature, that women could only make a will *tutore auctore*<sup>47</sup>.

Our second remark is that, in the first century BC-whether or not regulated by *ius civile*-the praetor granted *bonorum possessio* to heirs who had been instituted by a woman in a will she had drawn up without a guardian. Only agnatic relatives could successfully claim her inheritance contrary to the will. This form of interaction between *ius civile* and *ius honorarium* brings to mind another, much better known form: the praetor would protect the possessor of a corporeal object against all claims except of those who could prove ownership in accordance with *ius civile*. This form of protection originated in the praetor protecting the person to whom a *res mancipi* had been transferred by means of *traditio* instead of *mancipatio*. The guardianship of women may have seen a similar development, in that whatever the law or custom may have dictated, the praetor created his own rules allowing women to make their own wills but keeping intact the claims of certain agnatic relatives<sup>48</sup>.

It is not clear when this development took place, but it may very well have been in the second century BC. At that time, Roman society, and particularly family life, was rapidly changing. Marriages *cum manu* had become obsolete and, consequently, the position of women within the family had changed drastically. In this situation, the guardianship of women was no longer a matter of course. Some people welcomed these changes, others wanted to return to the old ways. It seems that the praetor Caepio belonged to the former category, that Cicero and Trebatius belonged to the latter, and that the jurists Servius and Ofilius actually dodged the question by suggesting that such a will did not seem to be invalid.

Our conclusion is that the *testamenti factio* mentioned in the *causa Siliiana* should be explained in terms of Turpilia not having had the assistance of a guardian when drawing up her will. The praetor had granted *bonorum possessio* to the heir (or heirs) instituted in her will, and they claimed the inheritance from Silius, the heir upon intestacy.

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<sup>47</sup> For instance, KASER (note 18), 324; VOCI (note 21), 393; and J.GARDNER, *Women in Roman Law and Society*, London-Sydney 1986, 19.

<sup>48</sup> According to O.E.TELLEGEN-COUPERUS, ‘Tutela mulierum, une institution rationnelle’, to be published in *Revue d’Histoire du Droit*, the praetor also recognised the transfer of *res mancipi* by women without a guardian’s assistance.

It is not likely that he was an agnatic relative because then he would have been able to keep the inheritance contrary to the will. He may have been her husband, or a cognatic relative. At all events, Silius had to find another argument to invalidate the will, and it seems he did so by invoking the fact that Turpilia had made the will without the assistance of a guardian. It is clear, however, that the jurists did not agree on whether the praetor had been right in granting *bonorum possessio*.

#### 6. Conclusion

In the introduction we stated that Gallus' words 'Nihil hoc ad ius, ad Ciceronem' in *Topica* 51 could only be properly understood in connection with the three texts discussed by Huschke: *Topica* 18; Cicero's letter to Trebatius; and Gaius' *Institutiones* II 118-119.

From *Topica* 18, we deduced that the question put to Gallus must have been whether the will drawn up by a woman *sui iuris* was valid in praetorian law, when she had done so without a guardian's assistance. Cicero used this question to demonstrate to Trebatius the working of the *topos ab adjunctis*: by introducing the concept of *capitis deminutio* he is able to compare the will of a woman *sui iuris* with wills drawn up by slaves, exiles, and boys, and by mentioning boys instead of sons he indirectly refers to a guardian's assistance and puts the *tutela mulierum* on a par with the *tutela impuberum*. If a boy *sui iuris* cannot even make a will with a guardian, it would be absurd to assume that a woman can do so without a guardian's assistance. In other words, all comparisons lead to an *argumentum ad absurdum*.

Gaius' *Institutiones* II 118-119 show that, in the second century AD, it was common practice for praetors to grant *bonorum possessio* to the heir(s) instituted in a will drawn up by a woman without the assistance of a guardian. They were allowed to keep the inheritance unless a brother by the same father, a paternal uncle or a brother's son claimed the inheritance.

Finally, Cicero's letter to Trebatius makes it clear that, in 44 BC, the praetor Q. Caepio granted *bonorum possessio* to the heir instituted by Turpilia, but that there was dissension among the jurists Trebatius, Servius, and Ofilius whether he was right in doing so. Servius and Ofilius assumed that the will could not be regarded as invalid because the document did not show that the testator lacked *testamenti factio*. According to Trebatius, the will was invalid; the reference to

*testamenti factio* can only mean that Turpilia had drawn up the will without a guardian assisting her.

There are three conclusions to be drawn from this analysis. First, the jurists did not, as jurists, refrain from dealing with the question whether a woman *sui iuris* could draw up her will independently. Second, they disagreed about the answer to this question. In the *causa Siliana*, Trebatius was explicit in his opinion that such a will was invalid, Servius and Ofilius argued to the contrary more cautiously. Only Gallus refrained from giving an opinion, answering that such a question could not be dealt with by using strictly legal arguments, and referred the matter to Cicero. His demonstration of the *argumentum ab adjunctis* makes it clear that he really was a master of rhetoric and law. Third, we have reaffirmed that in cases such as the *causa Siliana* the relationship between jurists and orators was based not on antagonism but on cooperation.