

Cicero and Ulpian, Two Paragons of Legal Practice

Olga TELLEGEN-COUPERUS

(*Université de Tilburg*)

1. Introduction

Justinian's Digest are generally regarded as containing the bulk of classical Roman legal science. However, legal science presupposes the existence of a system of norms, including theories of the legal concepts of which the system is made up¹. This system is supposed to provide the means of solving legal problems by deductive reasoning, that is, by using logic. However, in the Roman sources, there is no such system and little deductive reasoning. The argument that Roman law is case law and, therefore, different does not hold because, in a case-law system too, there must be a context of justification. The form of legal reasoning that is most commonly found in the Roman sources is that based on induction. Reasoning by analogy, for instance, seems to have been rather popular. However, analogy is based on similarities and probabilities, not on logic. It is a dubious but practical way of solving legal problems. The question, therefore, is whether it is right to qualify the Digest texts as belonging to legal science, to legal theory². In this paper, I do not want to discuss the more general

¹ Thus, for instance, F.HORAK, *Rationes decidendi* I, Aalen 1969, pp.23-44.

² Although N.BENKE, *In sola prudentium interpretatione. Zu Methodik und Methodologie römischer Juristen, Norm und Entscheidung. Prolegomena zu einer Theorie des Falls*, B.FELDNER and N.FORGÓ (eds.), Vienna-New York 2000, pp.30-65 describes the way Roman jurists worked as *procedere ad similia* (reasoning from examples) and (68-78) admits that the sources hardly contain references to legal principles and methodology, he still claims that the Roman jurists created a legal science. In the same year, a different view on this question was presented by

question whether law is a science³, but I do want to suggest that Roman law as laid down in the Digest was not the result of legal theory but of legal practice.

Cicero's forensic orations are generally considered the example *par excellence* of legal practice. They are usually referred to as non-legal sources and are regarded as valuable but not quite reliable because, intentionally or unintentionally, Cicero sometimes neglects or even distorts essential data of Roman law in order to defend his client's interests⁴. Moreover, Cicero's extant speeches deal with a random range of topics. In my view, however, Cicero's pleas have more to offer than information on legal rules. They also show how he went to work in building his case, what reasoning he applied. That kind of information may help to understand how law in practice worked, and may even clarify the relationship between the Roman jurists and legal practice.

In this paper, I want to compare Cicero's way of reasoning with that of one of the classical jurists, Ulpian. The majority of their texts as included in Justinian's Digest deal with private law, so it seems appropriate to turn to the four pleas of Cicero that do so too. Two of them, the *Pro Tullio* and the *Pro Caecina*, address the same legal device, namely the *interdictum de vi armata*⁵. It is therefore interesting to see how they compare to the Digest texts in the Title D.43.16 *De vi et de vi armata*. This title contains twenty texts, most of which were taken from Ulpian's commentary *ad edictum*. For Cicero, I will focus on his oration *Pro Caecina*. Is his way of reasoning basically different from that used by Ulpian? If so, then I must conclude that jurists and advocates worked in different realms of the law. If not, it will be possible to conclude that both Cicero and Ulpian wrote for legal practice.

J.W.TELLEGEN and O.E.TELLEGEN-COUPERUS, *Law and Rhetoric in the Causa Curiana*, in OIR 6 (2000), pp.184-193.

³ The question of law being a science is hotly debated. See J.SCHRÖDER, *Recht als Wissenschaft. Geschichte der juristischen Methode vom Humanismus bis zur Historischen Schule (1500-1850)*, Munich 2001. For the Netherlands, see, for instance, C.H.VAN RHEE, *Geen rechtsgeleerdheid, maar wel rechtswetenschap!*, *Rechtsgeleerd Magazijn Themis* 2004, pp.196-201.

⁴ Thus, for instance, M.KASER, *Das römische Privatrecht*, 2nd edition, Munich 1971, p.189.

⁵ The other two deal with the contract of *societas* (*Pro Quinctio*) and the *contractus litteris* (*Pro Roscio Comoedo*).

I will begin by summarily describing the *Pro Caecina* case and the question that was to be decided in the lawsuit (section 2). Secondly, I will – also summarily – discuss the text of the two interdicts *de vi* and *de vi armata* on which the trial turned (section 3). As the two advocates – Cicero and Piso – interpreted the interdicts in different ways, I will summarize their pleas (section 4), and then compare their interpretations with Ulpian’s commentary (sections 5 and 6).

2. The case of Cicero’s plea for Caecina

The dispute in which Cicero acted as advocate for Caecina concerned the property of a piece of land in Etruria. It had once belonged to a Marcus Fulcinius, a banker from Rome. He had been married to Caesennia, who, like him, hailed from the town of Tarquinii. They had one son, also called M. Fulcinius. The dispute in question arose from their three wills.

- a) Fulcinius had made a will in which he instituted his son as his heir and in which he left a usufruct over all his property to his wife Caesennia so that she would enjoy it along with their son Marcus. This property included a country estate, the Fulcinian farm. Fulcinius senior died.
- b) Marcus Fulcinius, the son, made a will in his turn in which he instituted P. Caesennius as his heir and left a large sum of money to his wife; he also bequeathed the largest part of his property to his mother, Caesennia. Marcus Fulcinius junior died too. His property was auctioned so that the proceeds could be divided up. At the auction, Aebutius, a business relation of Caesennia’s, bought the Fulcinian farm. Cicero claimed that Aebutius was acting on behalf of Caesennia, but he could not prove it. Moreover, there was no evidence that Aebutius had also transferred this farm to Caesennia. Aebutius maintained that he had bought it for himself.
- c) In the meantime, Caesennia remarried. She then made a will in which she instituted her second husband, Aulus Caecina, as her heir for 23/24th; Marcus Caesennius, a freedman of her first husband, for 1/36th; and Aebutius for 1/72nd. In due course, Caesennia died too.

The conflict that then arose between Caecina and Aebutius concerned the Fulcinian farm: Caecina claimed that it was part of the inheritance under Caesennia’s will, but Aebutius asserted that he had bought it for himself, not for Caesennia. Because Caesennia’s account books were missing and because there was no public registration of changes in the ownership of land, neither party could prove their point. They decided to take the matter to court.

In preparing the trial, they were to use a procedure of which we know practically nothing, the *vis ac deductio moribus*: it implied that Aebutius would formally expel Caecina from the Fulcinian farm, after which the judge would decide who had the better title to the property⁶. However, things took a different turn. When, on the appointed day, Caecina together with some friends approached the farm, they were met by Aebutius and a large band of armed men who barred their way and prevented them from entering. Caecina decided to avoid a conflict and returned to Rome. He obtained from the urban praetor an *interdictum de vi armata* against Aebutius. In the trial that followed, Cicero appeared on behalf of Caecina and C. Calpurnius Piso defended Aebutius. The trial was adjourned twice and at the third and final session Cicero delivered the speech that has come down to us. The central question was: could Aebutius' act of preventing Caecina from entering be interpreted as driving out in the sense of the interdict?

3. The interdicts *de vi* and *de vi armata*

The political instability of the early 1st century BC caused a rising use of armed violence, not only in Rome but also in the countryside. The common people were terrorized, particularly by gangs of slaves (*familiae*). The existing procedure to protect possession against the use of violence, the *interdictum de vi*, did not offer sufficient help. In 76 BC, the praetor *peregrinus* introduced a new device to curb this form of violence by allowing a *iudicium* against the owners of such gangs. The urban praetor probably included this action known as the *interdictum de vi armata* almost at once into his edict too⁷.

The trial between Aebutius and Caecina took place in 69 BC, on the basis of the *interdictum de vi armata*. In the advocates' speeches,

⁶ On this much debated procedure, see J.PLATSCHEK, *Überlegungen zur "vis ac deductio"*, *Studii in onore di Luigi Labruna*, Naples 2007, VI, pp.4395-4422, and id., *Bemerkungen zur Ciceros Rede für Caecina*, *Antike-Recht-Geschichte, Symposion zur Ehren von Peter E. Pieler*, both forthcoming, with literature.

⁷ For a historic overview of these two interdicts, see B.W.FRIER, *The Rise of the Roman Jurists*, Princeton 1985, pp.52-57.

both interdicts are compared and interpreted, so it is necessary to begin by quoting their texts as they have been reconstructed by Lenel⁸.

Interdict *de vi* (on force)

Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi deiecisti, cum ille possideret, quod nec vi nec clam nec precario a te possideret, <eo restituas>.

Whence you or your slaves or your agent have within this year driven out by force this man or his slaves or his agent, at a time when he possessed what he possessed neither by force nor by stealth nor on grant from you, thereto shall you restore him.

Interdict *de vi armata* (on armed force)

Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius vi hominibus coactis armatisve deiecisti eo restituas.

Whence you or your slaves or your agent have driven out this man or his slaves or his agent by force with men assembled or armed, thereto shall you restore him.

Both interdicts were granted against persons who through violence, secrecy, or *precarium* (with revocable permission of the rightful possessor) had taken possession of land belonging to someone else and now refused to hand it over to that person. The first interdict deals with ‘regular’ violence: it allowed the ejector to defend himself by claiming lawful possession. If he could prove that the plaintiff himself had acquired possession in an unlawful manner, then the plaintiff’s claim would be denied and the ejector would not have to restore possession to the plaintiff. The interdict on armed violence, however, does not allow any defence. The fact that he had used armed violence weakened the defendant’s position in the trial.

4. The pleas of Piso and Cicero

In the trial of Caecina vs Aebutius, Cicero had to prove that Aebutius and his supporters had taken up arms against Caecina and his friends and had prevented them from entering the Fulcinian farm, thereby acting contrary to the interdict *de vi armata*. Piso on the other hand had to deny that the interdict was applicable. Because Piso as

⁸ O.LENEL, *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*, 3rd edition, Leipzig 1927 (reprint Aalen 1956 and 1974), p.462 and p.467. English translation based on FRIER (see note 7), pp.53-55.

advocate for the defendant determined the status of the conflict, I will begin by summarizing his plea⁹.

It was clear that the facts of the case could not be denied, so Piso had to resort to interpreting the interdict. In terms of classical rhetoric, he opted for one of the *status legalis*, and particularly for the interpretation according to *verba/voluntas*. From Cicero's speech, it can be deduced that Piso put forward two arguments. First, he focused on the verb *deicere* as used in the interdict: there is only 'driving out' (*deicere*) when the ousted person was driven out of some place. Caecina had not been driven out of the Fulcinian farm but had only been prevented from entering, so according to the letter the interdict did not apply. Second, he argued that the interdict was only applicable if the expelled person had had possession, even though it did not say so explicitly. Caecina had never had possession of the Fulcinian farm; indeed, as a citizen of Volaterra he could not even inherit from a Roman citizen, so for this reason too the interdict was not applicable. It seems that, here, Piso interpreted the interdict according to its intention¹⁰.

There was very little Cicero could say against Piso's second argument, because he could not prove that Caecina had had possession of the Fulcinian farm. Of course, as usufructuaries, Caesennia and her son had had a kind of possession of the farm, but whether she had really bought it at the auction after his death depended on circumstantial evidence. Cicero therefore focused on Piso's first argument, the meaning of *deicere*.

Cicero arranged his plea as follows. After a long *exordium* (1-9) and an even longer *narratio* (10-23), he put forward his first argument, in which he gave a detailed description of Aebutius using armed violence against Caecina and in which he claimed that the intention of the interdict was to protect citizens against the use or

⁹ I base my reconstruction on J.W.TELLEGEN, *Savigny's System and Cicero's Pro Caecina*, *Orbis Iuris Romani* II 1996, pp.91-106. For a detailed analysis of the argumentation, see L.FOTHERINGHAM, *Repetition and Unity in a Civil Law Speech: The Pro Caecina*, Cicero the Advocate, J.POWELL and J.PATERSON (eds), Oxford 2004, pp.253-276.

¹⁰ In Romanist literature (Savigny, Nicosia, Stroh), it is assumed that Piso first argued that Caecina could not use the interdict because he was not a possessor, and then stated that there was no expulsion but only prevention of entry. However, it seems more likely that his first defence was based on the wording of the interdict, particularly on the word *deiecisti*, and the second defence on its intention.

threat of the use of armed force (24-64). In an intermezzo, Cicero ridiculed Piso's literal interpretation of *deicere*, sang the praises of Roman law, and stressed the importance of legal security for citizens (65-85). Then, in the second argument, he compared the words of the interdict *de vi armata* with those of the interdict *de vi* and concluded that, for the latter, possession is a condition, but for the former it is not (86-93). This interpretation was true from both a literal and an intentional perspective on the interdict: when the forefathers had formulated the interdict on armed force, they had wanted it to apply in all cases of armed force being used. He concluded with an argument *extra causam* claiming that Caecina had indeed had possession (94-95) and that, as a citizen of Volaterra, he had been able to acquire Caesennia's inheritance (95-102). A short peroration concludes the plea (103-104).

For the purpose of this paper, Cicero's arguments to support his first contention are particularly relevant. He first dwelt on the armed violence used by Aebutius and his supporters but also anticipated on the central question of the trial, namely the meaning of the word *deiecisti* in the interdict *de vi armata* (37). Then, he brilliantly showed that life would be impossible if the texts of laws, senatorial decrees, contracts, wills, etc., were to be taken literally (51-54). He concluded by discussing word for word the *formula* of the interdict *de vi armata*, showing that the relevant words should not be taken literally (55-64).

The word *familia* meant household, but the interdict was also applicable if only one single slave had effected an expulsion by means of armed force (55).

The word *procurator* stood for agent, but was also used for a person's tenant, neighbour, client, or freedman, or anyone else who acted at your request or in your name (57-58).

The words *hominibus coactis* referred to men assembled, but also to men who had not assembled but who had come together of their own accord or who just habitually frequented the place before the contested event occurred for the purpose not of using force but of tillage and pasturage (59).

The word *armatisve* ('or armed men') was generally used for men who had been provided with swords and spears, but could also be used for those who threw sticks and stones, and clods and turf (60).

Finally, Cicero quoted Aebutius' answer to the interdict: *non deieci, non enim sivi accedere* - 'I did not drive him out of the farm

for I never let him reach it' - and stated that he would be at a loss if he had to maintain that a man who had been put to rout and to flight had not been driven out (64). Something so self-evident did not need any further comment.

We do not know who won this trial: Caecina or Aebutius. However, it is possible to check whether the points of view maintained by both parties were included in Roman juridical literature. The most likely source to check is Title D.43.16 that is dedicated to the interdicts *de vi* and *de vi armata*.

5. The interdicts *de vi* and *de vi armata* in the Digest

Most of the twenty texts in D.43.16 *De vi et de vi armata* stem from the late classical jurist Ulpian. In book 69 of his commentary on the Edict, Ulpian deals with the interdicts *de vi quotidiana* and *de vi armata* separately, and with two special cases in which similar interdicts were applied¹¹. First, Ulpian quotes the interdict *de vi*¹² and then, in the following 48 sections, he discusses the interpretation of the relevant words. Then, ten texts on the interdict *de vi armata* follow. The compilers of the Digest included the first group in D.43.16.1 and the second in D.43.16.3, with a text of the jurist Paul in between.

In D.43.16.1, Ulpian mentions two topics that were also at stake in the trial between Caecina and Aebutius. The first is the word *familia*, in D.43.16.16 and 17:

(16) *Familiae autem appellatio servos continet: (17) Sed quaeritur, quem numerum servorum contineat, utrum plurium an vero et duum vel trium. Sed verius est in his interdicto, etiamsi unus servus vi deiecerit, familiam videri deiecisse.*

(16) The term *familia* includes slaves; (17) but what number of slaves does it include? Two or three or more? The better opinion is that under this interdict, even if one slave has driven out by force, the *familia* is held to have driven out¹³.

¹¹ O.LENEL, *Palingenesia iuris romani*, Leipzig 1889 (reprint Graz 1960), pp.814-819.

¹² In Justinian's time, the two interdicts were merged, and the defence of unlawful possession was no longer valid. For these reasons, the wording of the interdict *de vi* in the Digest differs considerably from that reconstructed by LENEL (see above, note 6).

¹³ The translation of this and the following Digest texts is based on those by T.BRAUN in *The Digest of Justinian*. Latin text edited by Theodor MOMMSEN with the aid of

Just as Cicero, did Ulpian interpret the word *familia* in the interdict as meaning any number of slaves, even one. As is common practice in the Digest, the argumentation is missing, whereas Cicero referred to the principles of law, the force of the interdict, the purpose of the praetors, the design and intention of wise men¹⁴ as well as to the Latin language to support his claim that the word *familia* should be interpreted according to the purpose of the interdict.

The second topic is the question whether the interdict *de vi* is applicable only when the ejected person had had possession. Ulpian dealt with it in D.43.16.1.23:

(23) *Interdictum autem hoc nulli competit nisi ei, qui tunc cum deiceretur possidebat, nec alius deici visus est quam qui possidet.*

(23) This interdict lies in favour of no one but the person who was in possession at the time he was driven out, and no one is held to be driven out except the person in possession.

According to Ulpian, there is no doubt: possession is required. The same point of view was defended by Piso in his second argument against Cicero. This defence was quoted by Cicero (90): *illa defensio, eum deici posse qui tum possideat: qui non possideat nullo modo posse* ('this defence that a man can be driven out if in possession at the time, but cannot possibly be so if not in possession'). Ulpian's words seem to suggest that, on this point, Piso was put in the right¹⁵, but that is by no means certain or inevitable. In his second argument, Cicero did not deny that possession was required for the interdict *de vi*, he only argued that it was not required for the interdict *de vi armata*. He based this argument on the fact that the interdict on force contains the phrases *cum ille possideret* and *quod nec vi nec clam nec precario possideret*, which are missing from the interdict on armed force. Ulpian did not mention this difference in his commentary on the Edict, at least not in the version that is included in the Digest. However, the compilers of the Digest removed the defence of unlawful possession from the interdict *de vi*, and it is likely that, if

Paul KRÜGER. English translation edited by Alan WATSON, Philadelphia 1985, Vol. 4, *ad locum*.

¹⁴ 'Of wise men' is a literal translation of *hominum prudentium*, which is generally understood to refer to jurists.

¹⁵ Earlier, I thought so too, cf. O.E.TELLEGEN-COUPERUS, *C. Aquilius Gallus dans le discours Pro Caecina de Cicéron*, TR 59 (1991), p.45.

Ulpian had mentioned this defence in his commentary on the interdict *de vi armata*, they would have removed that as well. For that reason, it is not possible to conclude who was put in the right on this point.

D.43.16.3 contains part of Ulpian's commentary on the interdict *de vi armata*. Here too he included a number of topics that were dealt with in the Caecina-Aebutius trial. First, Ulpian commented on the words *armis deiectum*. In D.43.16.3.2-3 he stated:

(2) *Armis deiectum, quomodo accipimus? Arma sunt omnia tela, hoc est et fustes et lapides, non solum gladii hastae frameae, id est romphaeae. (3) Plane et si unus vel alter fustem vel gladium tenuit, armis deiectus possessor videtur. (4) Plus dicitur, et si inermes venerant, si in ipsa concertatione qui inermes venerant eo processerunt, ut fustes aut lapides sumerent, vis erit armata.*

(2) How do we define driving out by arms? Arms are all weapons, that is, not only swords, spears, and lances, but also sticks and stones. (3) Plainly if one or another held a stick or sword, the possessor is considered to have been driven out by arms. (4) One must go further and say that even if they came unarmed, but got to the point of taking up sticks and stones, it will be armed force.

In *Pro Caecina* 60-61, Cicero gave a similar interpretation of the word *armatisve*: those who are provided with shields and spears as well as those who use clods, sticks, or stones. He added: 'You [Piso] would doubtless establish your point that those who threw stones picked up from the ground were not armed men'¹⁶. In a trial over the word 'arms' those points can be put forward, but in a trial over law and equity no judge will accept the term 'an armed man' only in the sense 'suitable to a military arms-inspection'¹⁷.

Next, Ulpian described a number of cases where fear of weapons being used drove people out: in some cases that was enough for them to be regarded as having been driven out by arms¹⁸. He concluded this

¹⁶ Cicero, *Pro Caecina* 60: ... *Vinces profecto, non fuisse armatos eos qui saxa iacerent, quae de terra ipsi tollerent, ...*

¹⁷ Cicero, *Pro Caecina* 61 ... *tamquam si arma militis inspiciunda sint.*

¹⁸ D.43.16.3.5 Those who came armed but did not use arms for the driving out, yet did drive out, are held to have done so with armed force. For terrorising by arms is enough to be held as driving out by arms. (6) If someone on the sight of armed men going elsewhere grew so frightened that he fled for fear, he is not held to have been driven out, because the armed men had no such intention but were on the way to somewhere else. (7) And so if on hearing armed men come he abandoned his

passage with a situation in which someone has been prevented from entering by armed violence:

(8) *Si autem, cum dominus veniret in possessionem, armati cum prohibuerunt qui evaserant possessionem, videri eum armis deiectum.*

(8) But if, when the owner was entering his possession, armed men who had broken in prevented him from possession, he is held to have been driven out by arms.

The situation described by Ulpian in this text is slightly different from that leading to the trial of Caecina vs Aebutius, because here it is the owner-possessor of the land who is held to have been driven out, whereas in the case of Caecina it was not yet certain whether he as heir to Caesennia had become the owner of the land. However, Ulpian did state that using arms to prevent someone from entering is regarded as driving out by arms. This is exactly the point Cicero wanted to make in his plea for Caecina, so it seems likely that in this respect Cicero was put in the right.

6. Comparison

It is clear that Cicero and Ulpian not only interpreted the interdict in the same sense, they also applied the same way of reasoning: both used analogy to justify their opinion. There was no explicit norm stating that using armed force to prevent someone from entering a house or piece of land was not allowed. They therefore had to assume that there was a hidden norm saying so, in which case they were reasoning from probability. For reasoning from logic, it is necessary to have a certain major premise (e.g., all men are mortal). In this case, as in many legal problems, there is no such explicit norm. So, neither of them could apply deductive reasoning.

Of course, Cicero and Ulpian were involved in legal practice in different ways, as advocate and jurist respectively. An advocate assisted a person who had a legal problem all through the trial: first in obtaining a proper formula from the praetor and then in giving a speech on behalf of his client before the judge(s)¹⁹. The jurist was the

possession from fear, then, whether he got a true or false impression, he is to be said not to have been driven out by arms, unless possession was first taken over by them.

¹⁹ It is generally taken for granted that the advocates were only active in the second phase of the trial, *apud iudicem*. However, in *De oratore*, I 166 and 168 Cicero showed that they were also involved in the first phase, *in iure*.

expert who could be asked for advice: not only the client and his advocate could turn to him but also the praetor and the judge. The advice of jurists was not binding on the judge, because different jurists could give different opinions. In the Republic, the dividing lines between advocate, judge, and jurist were very thin. For instance, the jurist P. Mucius Scaevola was judge in the case of Licinnia against the heirs of her late husband, Gaius Gracchus, and the jurist Q. Mucius Scaevola was advocate in the *causa Curiana*²⁰.

The judgments were not published. However, in two ways publicity could be given to a particular trial: advocates could publish their speeches and jurists could publish their opinions. In his *De oratore*, Cicero related how Cato and Brutus (2nd century BC) published the *responsa* they had given: they also used to mention the names of the parties involved²¹. However, he was glad that that custom had not lasted. Later jurists just mentioned the case and the answer they and/or earlier jurists had given. It would seem that jurists published their opinions as samples or models for public use because the state did not do so²².

The advocates, in their turn, also used to publish their speeches. Obviously, Cicero himself did so, but he was not the only one. In his *Brutus*, he writes that his friend Servius Sulpicius Rufus (whom we now know as jurist) had published three speeches of which he was very proud²³. When, in 52 BC, Milo stood on trial for the murder of Clodius, M. Brutus wrote and published a plea in his defence although he did not even deliver it²⁴. In his *Institutio oratoria*, Quintilian mentioned the publication of his forensic speeches; he was an advocate before becoming a famous teacher of rhetoric²⁵. Sometimes

²⁰ P. Mucius Scaevola is mentioned in D.24.3.66pr. On this case, see my paper *The Role of the Judge in the Formulary Procedure*, *The Journal of Legal History* 22 (2001), pp.5-10. Q. Mucius Scaevola's appearance as advocate in the *causa Curiana* is attested in several works of Cicero, for instance in his *Brutus* 145.

²¹ *De oratore*, II 142. In his letter *Ad Fam* 7.22, Cicero told Trebatius that he consulted a book with *responsa* by Aelius Catus (consul in 198 BC).

²² As jurists seldom mentioned the name of the judge and the date of the lawsuit (an exception being Iav. D.24.3.66pr., see above, note 18), what these published opinions do not tell us is whether they had been used in an actual lawsuit, and if so, whether they had been successful.

²³ Cicero, *Brutus*, 150-157.

²⁴ So Asconius, 41 and Quintilian, *Inst. or.* 3.6.93.

²⁵ Quintilian, *Inst. or.* 7.2.24.

political speeches were published, such as the orations of Pliny the Younger in honour of the emperor Trajan²⁶.

The purpose of publishing a speech was essentially different from that of publishing *responsa*. The former was meant to serve as an example for students of rhetoric, the latter to facilitate legal practice. But both will have been intended to inspire admiration and to enhance the author's reputation!

More than thirty years ago, Kaser wrote that the jurists were not at all interested in judgments²⁷. I would rather say that they were not interested in legal theory, and that is why there is no reason to qualify the works of Roman jurists in the Digest as legal science.

²⁶ Cf. *Plinius der Jüngere, Panegyricus, Lobrede auf den Kaiser Trajan*, Herausgegeben, übersetzt und mit Erläuterungen versehen von Werner Kühn, Darmstadt 1985.

²⁷ M.KASER, *Römische Rechtsquellen und angewandte Juristenmethode*, Vienna-Cologne-Graz 1986, p.59.