

# Chapter 3

## *Artes Urbanae: Roman Law and Rhetoric*

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### 1. INTRODUCTION

Modern Romanists generally assume that Roman law was completely separate from rhetoric. Whereas Roman law was a science, rhetoric was not. Rhetoric was a skill developed by the Greeks that was used by advocates to pervert the truth. The Roman jurists did not need rhetorical arguments to support their case: *stat pro ratione auctoritas*. They never wanted to have anything to do with rhetoric.<sup>1</sup>

In the twentieth century, this view has been challenged several times. First Johannes Stroux and later Theodor Viehweg argued – be it in different ways – that Roman law was closely connected to rhetoric.<sup>2</sup> Their ideas triggered much discussion, but failed to convince the majority of Roman law scholars. Over the past ten years or so, we have also tried to demonstrate that Roman law and rhetoric were closely connected, but so far, our work has not changed the commonly held view either.<sup>3</sup> The reason may be that we have not yet addressed the basic assumption that Roman law was a science and rhetoric was not. We will do so now.

The assumption that Roman law was a science is based on another supposition: that the concept of science, including legal science, already existed in classical Antiquity. However, it was only in the sixteenth century that legal science as we know it now came into being.<sup>4</sup> It originated in the minds of the French legal humanists, for example Donellus. In the words of Peter Stein, ‘he assumed that Justinian’s law must be logical even though it did not appear to be so, and applied himself to identifying what he conceived

<sup>1</sup> Cf. Schulz (1946), p. 54. A more differentiated approach is in Crook (1995), pp. 40–1.

<sup>2</sup> Johannes Stroux, ‘Summum ius summa iniuria, Ein Kapittel aus der Geschichte der interpretatio iuris’ intended for the *Festschrift P. Speiser-Sarasin*, Leipzig 1926, which never appeared in its entirety. The work was reprinted in *Römische Rechtswissenschaft und Rhetorik* (1949), pp. 9–66. Viehweg (1974).

<sup>3</sup> For instance, in Tellegen-Couperus and Tellegen (2000), pp. 171–202; Tellegen-Couperus and Tellegen (2006), pp. 381–408; Tellegen-Couperus and Tellegen (2007), pp. 231–54. It all began with Tellegen (1982).

<sup>4</sup> Cf. Feldman (2009), pp. 109–20; remarkably, she does not refer to Roman law or rhetoric at all.

to be its underlying rational structure'.<sup>5</sup> In the seventeenth and eighteenth centuries, various orderings of the civil law were made, showing the influences of natural law and the Enlightenment. In some countries, for example Austria and France, they resulted in codifications. The last step was made by the founder of the German Historical School, Friedrich Carl von Savigny. Focusing on the works of the second-century classical jurists, he tried to ascertain the central principles of Roman law and created the new scientific system of present-day Roman law.<sup>6</sup>

When the codifications of the nineteenth and twentieth centuries turned Roman law into a historical phenomenon, scholars – now called Romanists – began to apply this legal system to Roman law as well. Because classical Roman law was regarded as the basis of modern private law, it was supposed to share the same rules and principles. However, some of these rules and principles did not belong to classical Roman law. At the same time, Roman legal practice was familiar with rhetoric, but rhetoric was excluded by modern legal science. Consequently, problems arose when legal sources like Gaius' Institutes and Justinian's Digest were studied. These problems were sometimes 'solved' by adapting the text to the theory, for instance, by declaring words or sentences in the Digest to be sixth-century interpolations.<sup>7</sup> Sometimes, however, they were not solved at all because the rhetorical aspects of, for instance, the controversies in the Institutes of Gaius were ignored. Problems also arose when so-called rhetorical sources like the pleas of Cicero were studied. These problems were solved by regarding the references to legal practice as biased and therefore as unreliable. As a result, a Roman law was (re)constructed that was not always in accordance with the sources.

In this chapter, we will first discuss the theories put forward by Stroux and Viehweg, adding our comment. Then we will deal with the role of rhetoric in Gaius' Institutes and in Justinian's Digest. We hope to make it clear that Roman law was not a science in the modern sense and that law and rhetoric belonged together as two sides of the same coin: legal practice.

## 2. THE THEORIES OF STROUX AND VIEHWEG

Johannes Stroux (1886–1954) was a German classicist and historian. In 1926, he published a paper entitled '*Summum ius summa iniuria*, ein Kapitel aus der Geschichte der *interpretatio iuris*'. In the introduction to the paper, Stroux described the various stages of legal development in Greek and Roman society.<sup>8</sup> Originally, there was only the oral tradition of law. In both cultures,

<sup>5</sup> Stein (1999), p. 80.

<sup>6</sup> Stein (1999), pp. 104–27.

<sup>7</sup> Stein (1999), pp. 128–9.

<sup>8</sup> Stroux (1949), pp. 9–12.

this stage was followed by that of recording law in order to protect it against arbitrariness and distortion, as well as against time. Its being unchangeable seemed to guarantee the essence of the law, and the interpretation of the law necessarily had to serve that purpose. Over time, however, the words of the law hardened whereas life went on and society changed. Neither the interpretation of the law by judges nor its application by others could provide the much needed innovation. Then, next to the law came equity. In Rome, the praetorian edict became the instrument to make *aequitas* a fundamental legal principle. According to Stroux, the aphorism *summum ius summa iniuria*, ‘the greatest right is the greatest wrong’, is like a war cry indicating that positive law without equity is no law. As such, it was first formulated by Cicero, but the idea originated in Greek culture. One could even say that it belongs to all times and all places.

Stroux suggested that it was through Hellenistic philosophies and rhetoric that Rome was influenced by the idea behind the aphorism *summum ius summa iniuria*. Here, however, the contrast between strict law and equity was incorporated into legal practice and, in that way, had stimulated legal development.<sup>9</sup> Rhetoric provided the means for implementation, particularly the so-called *status* doctrine.

We know the *status* doctrine because it is described by Cicero in his *De inventione* but it may have been developed in the second century BCE by the Greek rhetorician Hermagoras.<sup>10</sup> It basically deals with the question of how to defend oneself against an accusation: by focusing on the facts or on the law. The latter category is particularly interesting when the words of the law are not clear and have to be interpreted. This can happen if the words are ambiguous, if the words of the law do not seem to reflect the intention of the lawgiver, if there are two applicable laws that contradict each other, or if the words of a law do not refer to a particular case but can be interpreted by analogy so that they do. According to Stroux, this system did not only apply to the interpretation of laws, but also to wills, stipulations, and other ‘formal gefasste rechtsgeschäftliche Willensäußerungen’.<sup>11</sup> Stroux presented two examples to illustrate how the aphorism *summum ius summa iniuria* worked in legal practice: the famous *causa Curiana* and Cicero’s speech *pro Caecina*.<sup>12</sup> In both cases, the *status* of *verba – voluntas* was applied. In both cases, the jurists argued for an interpretation according to the *verba*, the orators for the *voluntas*. In both cases, equity won.

Stroux noticed that Roman jurisprudence then also changed into a legal science, and he wondered whether this happened under the influence of rhetoric as well. In his time, it was generally assumed that the scientific approach

<sup>9</sup> Stroux (1949), p. 20.

<sup>10</sup> Stroux (1949), pp. 23–40.

<sup>11</sup> Stroux (1949), p. 33.

<sup>12</sup> Stroux (1949), pp. 42–8.

to law was provided by Hellenistic philosophy, and particularly by the Stoa. Stroux admitted that Stoic philosophy was very influential in Rome, but not its dialectic. He assumed that rather the New Academy and the Peripatetic School supported the development of Roman legal science. Again, rhetoric provided the means, as is shown by the methodological work called *Topica* which Cicero wrote for his friend, the jurist Trebatius. By drawing up an abstract *Topica* – that is, a scientific theory of argumentation – the orators offered the jurists a means to systematise their casuistic opinions.<sup>13</sup> Stroux concluded that the fact that Justinian's *Corpus Iuris* does not contain a comprehensive theory of *interpretatio iuris* does not prove that such a theory did not exist in classical Roman law, but that Justinian, in his new codification, wanted to exclude all signs of interpretation: he even wanted to make interpretation superfluous.<sup>14</sup>

There are two comments we would like to make on Stroux's theory. First, we think that Stroux made an important contribution to the rediscovery of classical Roman law by connecting rhetoric to law, but we are surprised to notice that he still regarded the jurists and the orators as thinking in completely different ways: the jurists focused on form and the orators focused on justice. Second, Stroux was right in assessing that Cicero's *Topica* is a methodical work that could be helpful to jurists, but he still adhered to the idea that the jurists of the late Republic developed a legal science, a '*Methodenlehre*'. It was Viehweg who, several decades later, questioned exactly this point, whether law could really be organised as a systematic science.

Theodor Viehweg (1907–88) was Professor of Philosophy and Sociology of Law at the Johannes Gutenberg University at Mainz, Germany. His approach to the relationship between law and rhetoric was very different from that of Stroux. In his book *Topik und Jurisprudenz*, Viehweg 'contrasted the deductive systematic intellectuality that has been influential since Descartes and the more contextual problem oriented style inherited from classical rhetoric'.<sup>15</sup> On the basis of examples drawn from two millennia of legal history, he concluded that the rhetorical or topical approach is more suitable for law. In the context of this chapter, we will focus on the first part of his book, where Viehweg dealt with Greek and Roman Antiquity.

Because the concept of *topica* was practically unknown in his time, Viehweg first wanted to discover its meaning and therefore turned to the works of Aristotle and Cicero on this subject (§2). He noticed that Aristotle did not present his *Topica* as part of logic but as belonging to dialectics. In this work, Aristotle offered a catalogue of ways of reasoning that could help in a discussion of any problem whatsoever to draw conclusions from sentences that were probably true. Cicero, in his *Topica*, did not add this

<sup>13</sup> Stroux (1949), pp. 51–2.

<sup>14</sup> Stroux (1949), pp. 65–6.

<sup>15</sup> Cf. the blurb of the English translation of Viehweg (1993).

philosophical context but only created a catalogue of arguments that were based on probability and that could be used in daily life. Viehweg concluded that *topica* can be described as a *techne* of problem-oriented thinking that had been developed by rhetoric.

Next, Viehweg analysed the concept of *topica* (§3). He assumed that a problem is any question that seems to allow more than one answer, and that only relevant questions need to be answered. The problem is brought into the context of a more or less explicit and extensive deduction from which the answer is inferred. This context can be called a system. In short, solving a problem involves classing it into a system. If an attempt is made to solve a problem by focusing on system A, then only some problems can be solved, the others cannot: they will no longer be regarded as real problems. If, on the other hand, an attempt is made to solve a problem by focusing on the problem, systems A, B, C and so on may be taken into consideration. *Topoi* are points of view that can help when choosing a particular system or way of reasoning. Some *topoi* can be used to solve all sorts of problems; others are particularly suited to solving legal problems.

Viehweg then turned to the Roman *ius civile*. 'It is well known', he wrote, 'that *ius civile* [Roman law] is rather disappointing to deductive systematizers' (§4). The texts in the Digest, for instance, belong to contexts that are problem-oriented rather than system-based. Consequently, the concepts and rules developed by the *ius civile* cannot be readily systematised; they must be understood to form part of topical thinking. *Topica* tends to collect points of view and summarise them in catalogues. *Ius civile* did the same, for law. The jurists proceeded to formulate propositions that could be used as *topoi*. According to Viehweg, the so-called *regulae* provide a good example of such propositions. At times, they were collected and summarised. Viehweg thought that the last section of the Digest, book D.50.17, constituted such a catalogue.

Can Roman law be problem-oriented and still be qualified as a science? Viehweg used the Aristotelian distinction between *techne* (art) and *episteme* (science) to answer this question; he concluded that the Roman jurists themselves regarded *ius* as an art. In his view, jurists and orators applied the same method of working which derived from Aristotle's dialectics. Viehweg stressed that the latter had nothing to do with Stoic dialectics which were closely connected to the mathematic intellectuality of Antiquity: in the structure of the *ius civile*, no trace of the Stoic Chrysippus can be found.<sup>16</sup>

Viehweg went several steps further than Stroux in connecting law and rhetoric. In our view, he demonstrated convincingly that Roman law was characterised by a problem-oriented way of working, and that the jurists and the orators applied the same topical approach. However, we have two

<sup>16</sup> Viehweg may not have noticed that Cicero, in *Topica* 54, refers to the Stoic dialectics; see the comment by H. M. Hubbell in his translation of Cicero's *Topica* (1976), p. 422.

points of criticism; both regard his connecting *topica* and Roman law. First, Viehweg did not see that Cicero's *Topica* cannot really be compared to that of Aristotle, let alone be qualified as inferior. As Robert Gaines has demonstrated, it contains various ways of finding arguments ordered in a systematic way meant for legal practice.<sup>17</sup> Secondly, Viehweg was wrong in qualifying the *regulae* as *topoi* of Roman law. They are concrete precedents rather than abstract ways of reasoning.<sup>18</sup> In our view, it is certainly possible to find *topoi* in legal sources like Gaius' Institutes and Justinian's Digest. In the following two sections, we will apply Viehweg's theory to these sources.

### 3. LEGAL SCIENCE AND RHETORIC IN GAIUS' INSTITUTES

If the Roman jurists had created a legal science that was independent from rhetoric, it must be possible to find traces of a scientific system in the legal literature of the classical period. However, this is not so simple. Our main source of information for classical Roman law is Justinian's Digest, but the framework of that source does not really correspond to what in modern times is regarded as a system. We will return to the Digest in the next section. There is, however, another source that did seem to reflect the system of Roman law and to exclude rhetoric: the Institutes of Gaius.

Gaius' Institutes, an elementary textbook of Roman law, was written in the second century.<sup>19</sup> It was structured in a simple way, dividing the law into 'persons', 'things' and 'actions'. About the author, Gaius, we know next to nothing. The textbook must have been popular because various later editions have been published and because sections have been quoted in the *florilegia* of the fourth and fifth centuries and in Justinian's Digest of the sixth century. It was even used as a model by the Byzantine law professors when Justinian ordered them to compose a new textbook, the (Justinianic) Institutes. However, for many centuries after the fall of the Roman Empire, the work itself was not available.

The first complete manuscript of Gaius' Institutes was discovered in Verona in 1816, by B. G. Niebuhr. Before that time, Roman law had been studied for more than six centuries on the basis of Justinian's Digest, Codex, and Institutes.<sup>20</sup> As was pointed out in the introduction to this chapter, the sixteenth century had witnessed the rise of legal science based on the *Corpus Iuris Civilis*. The rediscovery of Gaius' Institutes, therefore, took place

<sup>17</sup> Gaines (2002), pp. 445–80, particularly pp. 469–76.

<sup>18</sup> For instance, the *regula* about expenses and assets of something (D.50.17.10) (Paul. 3 ad Sab.): *Secundum naturam est, commoda cuiusque rei eum sequi, quem sequentur incommoda* may form a proposition in a specific form of reasoning, whereas *topoi* as presented by Cicero contain general points of view like the argument of time, cause and effect, authority, and so on.

<sup>19</sup> See Gordon and Robinson (1988), pp. 7–13.

<sup>20</sup> As of the fifteenth century, these books came to be called *Corpus Iuris Civilis*, as opposed to the *Corpus Iuris Canonici*.

after, in countries like France and Austria, the new codifications had been introduced and, in the German *Länder*, Savigny had just begun to create ‘*das heutige römische Recht*’. It will be clear that the rediscovery of Gaius’ Institutes caused a shock among the Romanists. The text was partly familiar to them through the Institutes of Justinian. However, it was also partly new because it referred to legal concepts and procedures that no longer existed in the sixth century and that had been left out of Justinian’s Institutes. Therefore, Gaius’ Institutes provided a lot of new information on Roman law and its history.

There were two major issues in Gaius’ Institutes that puzzled the Romanists. First, the system of Roman law that had been developed over the centuries and that was based on the division of rights *in rem* (*dominium* and *iura in re aliena*) and rights *in personam* (obligations) could not really be recognised in the work of Gaius. And yet, it should be there. Secondly, throughout his textbook, Gaius mentioned approximately twenty controversies between leading Roman jurists which referred to as many unsolved legal problems. If the Roman jurists had created a system that could provide the one correct solution for every legal problem, there could not have been controversies, let alone in a law textbook. In the following, we will first analyse how the Romanists have tried to solve the system-related problem and give our comment. Then we will discuss the problem of the controversies and show that it can be solved by connecting it to rhetoric.

### ***The system of Roman law in Gaius’ Institutes***

In his *Römische Rechtsgeschichte*, Max Kaser, one of the leading Romanists of the twentieth century, described the essence of legal science. In his view, it was the development of legal concepts that are well determined as to content and clearly separated from each other, and that are ordered and linked together in a logical system.<sup>21</sup> Under the influence of the Greek dialectical method, the Roman jurists had developed such concepts and such a system, but their way of working had remained casuistic. The one exception to this rule was Gaius. In his Institutes, he divided the subject matter into *personae* and *res*, that is, into legal subjects and legal objects, or, into the law of persons (including family law) and the law of property (*Vermögensrecht*). The subdivision of things into *res corporales* and *res incorporales* gave the first impulse to dividing the law of property into things, inheritance and obligations. This first step towards a system can still be traced in the codifications of our day, according to Kaser.

It is clear that the essential element for Gaius’ Institutes is the subdivision of things into *res corporales* and *res incorporales*. In 2.13, Gaius describes

<sup>21</sup> Kaser (1967), p. 164: ‘Zum Wesen einer solchen gehört die Entwicklung inhaltlich genau bestimmter und von einander abgegrenzter juristischer Begriffe und ihre Ordnung und Abstimmung aufeinander in einem von der Sachlogik bestimmten System’.

corporeal things as tangible things, such as land, a slave, a garment, gold, silver, and so on. In the next section, Gaius describes the incorporeal things:<sup>22</sup>

Incorporeal are things that are intangible, such as exist merely in court, for example an inheritance, a usufruct, obligations however contracted. It does not matter that corporeal things are comprised in an inheritance, or that the fruits gathered from land (subject to a usufruct) are corporeal, or that what is due under an obligation is commonly corporeal, for instance land, a slave, money; for the rights of inheritance, usufruct, and obligation themselves are incorporeal [ . . . ]

In modern Romanist literature, it is assumed that the word *res* and therefore also the distinction between *res corporales* and *res incorporales* refers to legal objects. However, this distinction is commonly regarded as illogical. The *res corporales* would be legal objects, that is, objects of ownership. However, ownership is a right. Therefore, the right must be identified with the object, and ownership must be regarded as a *res corporalis*. The *res incorporales* should be legal objects, too, but then it would be unclear what the objects were. This problem was solved by regarding the *res incorporales* as (subjective) rights.<sup>23</sup> Consequently, the phrase ‘*quae in iure consistunt*’ in the first line of Inst. 2.14, is translated by most scholars as ‘that exist in a right’.<sup>24</sup> With the distinction between *res corporales* and *res incorporales*, Gaius was supposed to have referred to the distinction between *dominium* and *iura in re aliena*. In other words, he had done a bad job.

In our view, this interpretation is rather far-fetched.<sup>25</sup> It goes wrong at the

<sup>22</sup> Inst.Gai. 2.14: *Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae [in] iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae. Nec ad rem per[tin]et quod in hereditate res corporales con]tinentur, et fructus, qui ex fundo percipiuntur, corporales sunt, et quod ex aliqua obligatione nobis debetur, id plerumque corporale est veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruenti et ipsum ius obligationis incorporale est:* text edition by David (1964), p. 36. Our translation is based on that by de Zulueta (1946), p. 69. The main difference is the translation of *in iure* in the first line as ‘in court’. In the following, we will explain why we prefer this translation.

<sup>23</sup> It is interesting to see how, in the past 100 years, this distinction has been dealt with in textbooks of Roman law. They all interpret *res incorporales* as (subjective) rights, but all have problems explaining the distinction. See, for instance, Salkowski (1898), p. 204; van Oven (1948), p. 138; Arangio Ruiz (1960, repr. 1978), pp. 162–3; Jolowicz and Nicholas (1972), p. 412; Villers (1977), p. 253; Kaser (1989), p. 90; Borkowski and du Plessis (2005), pp. 153–4, (2010, 4th edn), pp. 151–2). Some think it originated in Greek grammar and/or philosophy. Two do not mention the distinction at all, namely Schulz (1951) and de Francisci (1968).

<sup>24</sup> Some scholars translate it as ‘that exist in law’. This phrase caused a lot of discussion, particularly because it is not quite certain that the phrase contained the preposition ‘in’. According to David and Nelson (1954–68), p. 240, it did. For an overview and renewed discussion, see Nicosia (2009), pp. 821–35.

<sup>25</sup> In this vein, see Tellegen (1994), pp. 35–55. According to Bretone (1999), p. 284, this interpretation is ‘*fantasiosa*’. For us, however, it would be fanciful to explain that *res* means something other than ‘things’, let alone that Gaius would use it to refer to ‘legal objects’ as well as ‘subjective rights’.

very beginning, with the assumption that the concepts *personae* and *res* are to be interpreted as referring to legal subjects and legal objects, respectively. We think they do not. In the first book of his Institutes, Gaius describes the three categories of *status* that refer to persons (freedom, citizenship and family) and how a person's *status* can change. He does not describe the capacity of a person to perform a legally valid act or to have property. Consequently, the word *personae* cannot mean 'legal subjects' but only 'persons'.

In the second and third books, Gaius deals with the *res*. At the beginning of book II, he mentions a number of distinctions of things, all the time explaining why a particular distinction is relevant. He does not describe what qualifies as a legal object. Gaius defines the *res corporales* as things that can be touched, and the *res incorporales* as things that cannot be touched but that exist *in iure*. The relevance of this distinction is explained in Inst 2.28: incorporeal things cannot be transferred by tradition, the informal way of transferring property, but only by means of *in iure cessio*. This legal concept, however, originated in the law of procedure. For a proper understanding of the distinction between *res corporales* and *res incorporales*, it must be borne in mind that, in his Institutes, Gaius did not only deal with *personae* and *res*, but also with *actiones*. In our view, this distinction can only be explained in its context, that is, in connection with the *in iure cessio* as part of the Roman law of procedure.

The *in iure cessio* begins like a normal procedure *per formulas* before the praetor, when the plaintiff claims the usufruct (or another *res incorporalis*) from the defendant. This phase of the procedure is called '*in iure*'. The praetor asks the defendant whether he also claims the usufruct. The defendant may keep silent or indicate that he does not do so. Then the praetor will assign the usufruct to the plaintiff and a transfer of the usufruct will have taken place. The defendant can also indicate that he does want to claim the usufruct; then the praetor may grant a *formula*, and a regular trial (*apud iudicem*) may follow. In short, *res incorporales* can be the object of a transfer and of a procedure.

The procedure to claim the usufruct makes it clear that, in this connection, the word *res* cannot be taken to mean 'rights'. The *formula* of a *vindicatio ususfructus* was based on that of the *reivindicatio* (to claim *dominium*, property) but it was slightly adapted. Let us compare both *formulae*. According to the reconstruction of Lenel, the *formula* of the *reivindicatio* ran as follows:<sup>26</sup>

X must be judge. If it appears that the thing at stake belongs to Aulus Agerius according to the *ius Quiritium*, and if this thing has not been restituted by the order

<sup>26</sup> Lenel (1927), pp. 185–6. 'Iudex esto. Si paret rem qua de agitur ex iure Quiritium Auli Agerii esse neque ea res arbitrio iudicis Aulo Agerio restituatur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito'. In the pattern *formula*, the name of the plaintiff is always given as Aulus Agerius, and that of the defendant as Numerius Negidius. The translation of this *formula* is our own.

of the judge to Aulus Agerius, then the judge must condemn Numerius Negidius to pay so much money to Aulus Agerius as this thing is worth. If it does not appear, then he must absolve him.

The formula of the *vindicatio ususfructus* is:<sup>27</sup>

X must be judge. If it appears that Aulus Agerius has the right of usufruct on that land that is at stake and if this thing has not been restituted to Aulus Agerius, then the judge must condemn Numerius Negidius to pay so much money to Aulus Agerius as this thing is worth, if it does not appear then he must absolve him.

In the first part of the *reivindicatio*, the thing that is claimed is referred to as *res*, a *res corporalis*. In the *vindicatio ususfructus*, however, the thing that is claimed is referred to as *ius*, that is, the right of usufruct that rests on someone else's land. In the latter part of the *formula*, the word *res* is used, but then it indicates the thing at stake, the *res incorporalis*. Apparently, the words *ius* and *res* are used as synonyms. By adapting the *formula*, it became possible to claim a usufruct in court. Consequently, the word *res* in Gaius Inst. 2.12–14 cannot be taken to mean 'rights'.

Now the meaning of the phrase '*quae in iure consistunt*' becomes clear: it refers to the first part of the formulary procedure, before the praetor, which is called *in iure*. The *res incorporales* only exist *in iure*, 'in court'. Gaius did a good job when he added this explanation: it helped to clarify a simple distinction which he made for his elementary textbook.

The fundamental mistake made by modern Romanists is their assumption that Gaius is dealing with subjective rights. This concept was unknown to Gaius; it originated only between the fourteenth and sixteenth centuries.<sup>28</sup> Gaius, and the other Roman jurists for that matter, had a completely different way of thinking than present-day civil-law jurists. It must be concluded that Gaius' Institutes did not reflect the system of subjective rights of modern civil law and that the system that was used does not qualify as legal science in the modern sense.

### ***The controversies in Gaius' Institutes***

The second issue that puzzled the Romanists was the twenty or so controversies mentioned in Gaius' Institutes. These controversies existed between the two law schools that had emerged in Rome in the early Principate, the

<sup>27</sup> Lenel (1927), p. 190: 'Iudex esto. Si paret Aulo Agerio ius esse eo fundo qua de agitur uti frui neque ea res arbitrio iudicis Aulo Agerio restituatur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvito'.

<sup>28</sup> Villey (1946–7), pp. 201–27. According to the same author, it was William of Ockham who first introduced the concept of subjective right. Feenstra (1989), pp. 111–22 suggests it was Donellus.

Sabinian or Cassian school and the Proculian school.<sup>29</sup> The leaders of these schools defended opposite positions over several points of private law. How could they do so, if there was only one correct solution to a legal problem? Moreover, the jurists in question gave arguments to support their opinions. Why would they do so if they normally did not because, according to Schulz, *stat pro ratione auctoritas*? The leaders of the schools may have had the *ius respondendi ex auctoritate principis* and will have had a lot of authority. Finally, some of these controversies were solved by a compromise, a *media sententia*. How could such a solution be fitted into a system that allowed only one correct solution?

Ever since the discovery of the manuscript of the Institutes, dozens of scholars have tried to solve the problem of the controversies. Most of them did so from a dogmatic perspective on Roman law, trying to find one overall interpretation that could bring the controversies within the system of Roman law. However, they did not succeed in finding one interpretation that could explain all the controversies. They have not adapted their way of working until recently.

A few years ago, Tessa Leesen wrote a monograph about the controversies in Roman law.<sup>30</sup> She suggested that they could be explained by connecting them to rhetoric. Her main thesis was that jurists, like orators and lawyers, made use of the art of rhetoric, and of its argumentative theory, the *topica* as developed by Cicero and Quintilian, to make their opinions persuasive. By analysing the twenty-one controversies in Gaius' Institutes, she was able to demonstrate how, in these cases, the jurists used topical arguments to support their view. There was not one correct solution, but the opinions of both jurists could be defended without one of them losing his integrity. We will give one example that is discussed by Leesen, namely, that of the controversy on *specificatio* mentioned in Gaius, Inst. 2.79:<sup>31</sup>

On a change of *species* also, we have recourse to *naturalis ratio*. If, therefore, you have made wine, or oil, or grain from my grapes, olives, or ears of corn, the question is asked whether this wine, oil, or grain is mine or yours. In like manner, if you have made some vase of my gold or silver or if you have constructed a boat, or a cupboard, or a bench from my planks. In like manner, if you have made a garment from my wool or if you have made mead from my wine and honey or if you have a plaster or an ointment from my drugs, the question is asked whether what you have thus made from my material is yours or is mine. Some think that the material and the substance have to be taken into consideration, that is, the manufactured article is considered to belong to the owner of the material. And

<sup>29</sup> In modern literature, the very *raison d'être* of the law schools is also controversial, cf. Stein (1999), p. 17, but see also Tellegen-Couperus (1990), pp. 95–7.

<sup>30</sup> Leesen (2010).

<sup>31</sup> Leesen (2010), pp. 70–90. For the Latin text here and in the following, see <http://www.TheLatinLibrary.com> (accessed 13 February 2012) under *Ius Romanum*.

this opinion is above all preferred by Sabinus and Cassius. Others, however, think that the object belongs to him who created it; this is the view held above all by the authorities of the other school. However, they also think that he who owned the material and the substance has the *actio furti* against him who stole it and also a *condictio* against the same person because, although it is no longer possible to bring a *vindicatio* when things have perished, they may be the object of a *condictio* against thieves and certain other possessors.

The text forms part of a discussion on the different means of acquisition of ownership based on *naturalis ratio*. The first example has become classic: When somebody (A) makes wine by processing the grapes of somebody else (B) without mutual agreement, a problem of ownership arises: does the owner of the grapes (B) or the maker of the wine (A) become owner of the wine? The owner of the grapes will claim ownership of the wine from the maker who is in possession, and he will do so by means of a *reivindicatio*. The Sabinians supported B's claim, the Proculians defended the view that A had become the owner.

Gaius does not explicitly mention the arguments used by the Sabinians and the Proculians, but they have come down to us via the Digest in the second book of the so-called *Res Cottidiana sive aurea*, a fourth-century version of Gaius' Institutes. The relevant text, D.41.1.7.7, runs as follows:

When someone has made for himself something from another's material, Nerva and Proculus think that the maker owns that thing, because what has been made previously belonged to no one. Sabinus and Cassius rather think that the *naturalis ratio* requires that the person who has been the owner of the material also becomes the owner of what is made from his material, since nothing can be made without the material: if, for example, I make some vase from gold, silver or bronze, or a garment from your wool, or mead from your wine and honey, or a plaster or an ointment from your drugs or wine, oil or grain from your grapes, olives or ears of corn. Nevertheless, there is also a *media sententia* of those who correctly think that, if the thing can be returned to its material, the better view is that propounded by Cassius and Sabinus. If it cannot be returned, Nerva and Proculus are sounder. Thus, for example, a finished vase can be returned to its raw mass of gold or silver or bronze. It is not possible, however, to return wine, oil or grain to grapes and olives and ears of corn. Neither can mead be returned to honey and wine or plasters or ointment to drugs. It seems to me, however, that some have said correctly that there should be no doubt that the grain, shaken from someone's ears of corn, belongs to him whom the ears of corn have come from. For since the grain, that is contained in the ears of corn, has its own perfect form, the one who has shaken out the ears of corn does not make a new form. But he uncovers what already exists.

This text shows that both schools base their claim on the *naturalis ratio*, so there is no fundamental difference.

In the course of time, various explanations of this controversy have been offered. The most typical one is that based on philosophy: it has been argued that the Sabinians were influenced by the Stoa and the Proculians by Aristotle and the Peripatos. Other scholars explained it by the conservative-progressive antithesis, some stating that the Sabinians were conservative and the Proculians progressive, others that it was the other way around.

According to Leesen, both the Proculians and the Sabinians used topical arguments. Cicero's *Topica* and particularly Quintilian's *Institutio oratoria* helped her find the relevant *topoi* or, in Latin, *loci*. She reconstructed the reasoning of the Proculians with the *locus ab adiunctis*:

- What has been made did previously not belong to anyone.
- Therefore what someone never had, he has not lost.
- B is the owner of the material, i.e. the grapes.
- Therefore, B cannot vindicate the *nova species*, i.e., the wine.

The Sabinians used the *locus ex causis* to support their argument:

- Since nothing can be made without the material,
- the ownership of a *nova species* (e.g. wine, oil, or grain) must be granted to the owner of the *materia* (i.e. to the owner of the grapes, olives, or ears of corn).
- B is the owner of the material.
- Therefore, B is the owner of the *nova species*.

In D.41.1.7.7, the *media sententia* is mentioned that was supposed to be a compromise between the two positions. If a thing has been made from some material but cannot be reduced to its material, then the opinion of the Proculians must be followed and the thing be regarded as belonging to the maker. However, this compromise is not very convincing because it is equally reasonable to state that the material is still present in the *nova species* and that therefore the wine belongs to the owner of the material. Yet it was this *media sententia* that was approved by Justinian and was included in his Institutes (Inst 2.1.25).

In this and other controversies, the leaders of the Sabinian and the Proculian schools defended two opposite positions on a legal problem with arguments offered by rhetoric, that is, with topical arguments. Both positions were reasonable. The controversies were included by Gaius in his elementary textbook on Roman law. For him, and for his students, the relationship between Roman law and rhetoric was a matter of course.

#### 4. LEGAL SCIENCE AND RHETORIC IN JUSTINIAN'S DIGEST

Justinian's Digest is generally regarded as reflecting the culmination of Roman legal thought. It contains fifty books divided into titles. Each title consists of texts taken from the work of one or more jurists who lived in a period ranging from about 100 BCE to 250 CE. In these texts, the jurists

summarise legal problems and indicate how they should be solved, sometimes also referring to other jurists who do or do not hold the same opinion. The works of the classical jurists have not been preserved; we know them because they were included in collections made between the fourth and sixth centuries, the most important one being the Digest.

On 15 December 530, Emperor Justinian I ordered his Minister of Justice, Tribonian, to make a compilation of classical Roman law.<sup>32</sup> In the Byzantine Empire, the writings of the classical jurists were still used to support or deny legal claims but the content and authenticity of the texts were often dubious. The new collection, the Digest, was intended to solve that problem. Tribonian and a dozen experts were given wide powers: they were allowed to select texts that were suitable for inclusion, to delete superfluous and outdated elements, and to solve contradictions. To structure the collection, they used the same order that had been used by the classical jurists themselves, that of the praetorian edict.

Since the second century BCE, when the new praetor *urbanus* started his year of office, he published an edict in which he announced for what types of claims he would allow a procedure, and how such claims and possible defences could be worded in a *formula*.<sup>33</sup> In the course of time, the edicts had grown into a body of law that was ordered more or less according to the formulary procedure. No edict has come down to us, but from the time of S. Sulpicius Rufus, a prominent jurist of the late Republic, the jurists used the edict as a frame of reference to order their opinions. They published their collections under the title *Digesta, Responsa, Quaestiones*, and the like.<sup>34</sup> In the third century, the formulary procedure was replaced by imperial jurisdiction, but the substantive law remained applicable. Therefore, it made sense for Tribonian and his compilers to use the structure of the edict for ordering the opinions of the classical jurists.

As we described in the previous section, the jurists of modern times preferred the structure of Gaius' Institutes to create a new system of Roman law. However, Roman law as described in Justinian's Digest was regarded as the high point of Roman legal science. The question then arose how it could be established that Roman law was a science. This is the subject of the famous monograph by Franz Horak, *Rationes decidendi*, published in 1969.<sup>35</sup> In this book, Horak discusses some 300 texts in order to ascertain whether Roman law was a science. Horak adheres to the commonly held view that rhetoric is irrelevant in this context.

In the following, we will first summarise Horak's view, adding our

<sup>32</sup> See Tellegen-Couperus (1990), pp. 141–4.

<sup>33</sup> On the formulary procedure and the activities of the jurists, see Tellegen-Couperus (1990), pp. 53–62.

<sup>34</sup> On the basis of these works, Lenel (1927) has been able to reconstruct the praetorian edict.

<sup>35</sup> Horak (1969). The second part has never been published.

comments. Then we will discuss a Digest text that, in his view, ‘proves’ the scientific character of Roman law. We will demonstrate that it does not do so and that it can only be properly explained by connecting it to rhetoric.

### *Legal science in Justinian’s Digest*

Whereas Kaser in his definition of legal science only mentioned the existence of a dogmatic system, Horak also required a context of justification (*Begründungszusammenhang*). He described justification as a combination of sentences that are connected in such a way that one is considered explicitly as a logical consequence of the other. This connection may exist because a conclusion is drawn from a premise, or because one sentence is connected with another, argumentative one. Horak took into account only those motivations that were explicitly qualified as such. In his view, there is a constant interaction between the system and the justification.

According to Horak, it was essential to distinguish the context of justification from the context of discovery. The latter concept serves to find an argument, and particularly requires intuition. The former serves to prove a logical reasoning to be correct. For legal science, only the context of justification is relevant. Nowadays, however, there is a tendency to involve facts and values in legal reasoning, for instance by using analogy, so that law can only partially be regarded as a science. In this connection, Horak discussed Viehweg’s book.

There are various reasons why Horak disagreed with Viehweg. One of them is that Viehweg does not distinguish between the context of justification and the context of discovery. As a result, he applies *topica* to an indiscriminate range of cases and veils the contrast between legal understanding and normative legal policy. According to Horak, Aristotle’s *Topica* and its historical derivations hardly contribute to scientific understanding as a method to find an argument, and do not do so at all as a method to prove a logical argument to be correct or not.

The main part of Horak’s book consists of the analysis of about 300 texts dating from the late Republic that contain some form of argumentation. They are divided into two groups. In the first group, the argumentation consists of deduction from a certain premise, for instance the application of a general or individual legal norm, the conclusion from a legal rule, or deduction from a certain legal concept. In the second group, the argumentation is not so clear. Here, for instance, the premise is uncertain or the deduction is not compelling like arguing from analogy. Only for the first category can the *rationes decidendi* be qualified as scientific. Therefore, Roman law can only partially be regarded as a science. Although Horak does not want to draw a general conclusion from texts that only belong to the late Republic, he suggests that the Roman jurists reached the same scientific level as jurists of our day.

We would like to make a few comments on Horak's monograph. First, Horak regarded two elements as essential requirements for establishing the existence of a legal science: a kind of system and a context of justification; he analyses the texts as to the context of justification, but he does not specify the system of Roman law. Second, we doubt whether it really makes sense to distinguish between the context of justification and the context of discovery in connection with *topoi*; the *topos* is relevant not only to law-finding but also to justify a decision, a rule or a subsumption.<sup>36</sup> Third, just like Viehweg, Horak dramatically underestimated Cicero's *Topica*. In the previous section, we demonstrated that the controversies described in Gaius' *Institutes* could only be explained by connecting them to topical argumentation.

In the following, we will try to assess whether Horak's conclusion about the scientific character of Roman law is correct. Horak dealt with the 300 or so texts in an order beginning with the one that provides the best evidence of the scientific character of Roman law, and ending with the one that is least fit to do so. In the context of this chapter, we want to discuss one of his texts. It seems to make sense to focus on the very first one.

### **Legal reasoning in D.43.19.3pr**

The first category of texts discussed by Horak consists of those that include justifications by applying a legal norm. Horak qualified this category as the most obvious way of justification for the modern lawyer, since it is a simple subsumption under a general or individual norm. In the late Republic, there were not as many laws as there are today, so the Roman jurists did not have much to do in the way of justification by simple subsumption. Consequently, this first category includes but a few texts and has hardly anything attractive to offer as to law.

For the first category, justifications by applying a general norm, Horak admits that it has been difficult to find suitable texts. Indeed, there is only one that qualifies: D.43.19.3pr:<sup>37</sup>

Ulpian in book 70 Edict. Hence, also Labeo writes as follows: If you have rightfully been having the use of a road from me, and I sell the farm through which the road you used went, and then the buyer prohibits you, then even if you are held to have used it by stealth from him (for whoever uses a road when prohibited, uses it by stealth), the interdict is still available to you within a year, because in this year you will have used it not by force or stealth or *precarium*.

Digest title D.43.19 deals with the edictal clause about the private right of way in person and with cattle. It consists mainly of texts taken from the 70th book of Ulpian's commentary on the praetorian edict. In this text, Ulpian

<sup>36</sup> In the same vein, Wieacker (1970), pp. 339–55, particularly p. 352; Honoré (1973), p. 59.

<sup>37</sup> Translation from Watson (1985).

quotes Labeo, a jurist who lived at the time of Emperor Augustus. The facts are relatively simple. Plaintiff A claims to have a right of way through his neighbour's land. The previous neighbour has sold the land to B, probably without telling him about the servitude. When B sees A walking on his land, he forbids him to do so. A turns to the praetor and asks him to grant the interdict *De itinere actuque privato*. It is granted, but the new neighbour does not comply, and a trial follows.

The *interdictum De itinere actuque privato* was a praetorian remedy prohibiting interference with rights of way. It protected anyone who, in the year before the interdict was issued, had used the way not by force or stealth or *precario*.<sup>38</sup> In the opening text of title D.43.19, it is formulated as follows:<sup>39</sup>

The Praetor says: I forbid the use of force to prevent you from using the private right of way in person or with cattle that is in question, which you have used this year not by force or stealth or *precario* from him.

According to Horak, the interdict posed a general norm and the only thing the jurist Labeo had to do was subsume the facts under this norm. The only condition for applying the interdict would be that the plaintiff had used the right without force, stealth or *precario* during the previous year, even if he had done so only during a short time. Later wrongful use did not exclude the interdict. This is Horak's interpretation of the case.

In our view, this is not simply a case of subsumption. If so, it would not have been necessary to interpret the wording of the interdict. However, the wording is not clear. When is someone acting *clam*, with stealth? How is the time limit of one year to be understood? Labeo admits that someone who is using the servitude after the owner has prohibited him from doing so is acting *clam*. Still, he argues that the interdict should protect that person. The time limit of one year is vague but Labeo does not specify whether even a short time within that year is sufficient. Here, Horak refers to Ulpian who, in another text, argued that even a short time like thirty days would be sufficient. Apparently, the words 'with stealth' and 'in this year' were subject to discussion.

In the procedure, both parties would have presented arguments to support their views. A claimed that B should stop hindering him from using the right of way because, in the past year, he had used it *nec vi nec clam nec precario*. B could put forward two arguments. First, he could deny that the interdict was applicable because, after he had forbidden A to use the road

<sup>38</sup> *Precarium* was a contract consisting of the gratuitous grant of the enjoyment of land or movables, the grantor being able to terminate the arrangement at any time. Cf. Borkowski and du Plessis (2005), p. 309, (2010, 4th edn), p. 308.

<sup>39</sup> D.43.19.1pr: 'Praetor ait: Quo itinere actuque [privato], quo de agitur, [vel via] hoc anno nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto'. Translation based on Watson (1985).

through his farm, A had still done so and therefore had acted with stealth. Second, he could state that the interdict should not be taken literally. During the previous year, A had hardly used the road or not at all and it would be unreasonable to let him be protected by the interdict. The purpose of the interdict was to protect the use of a servitude on a regular basis.

A could reply to the second argument that the interdict does not specify a minimum time limit for using the interdict, and that it therefore should be applied in his case. Moreover, what is 'a minimum'? A could refer to the paradox of the *sorites* introduced by the Greek philosopher Eubulides;<sup>40</sup> it was not until 200 years later that Ulpian fixed it at thirty days. It was more difficult for A to refute B's first argument; even Labeo himself had to admit that. However, Labeo succeeded to convince the judge that the words of the interdict allowed it to be granted to A.

From the above, it is clear that the interdict in question does not provide a certain premise and that Labeo's text does not present a case of subsumption. The interdict was interpreted by one party according to the letter, by the other party according to the intention. In terms of the status theory of rhetoric, the status *scriptum – sententia* was used. The text therefore does not present a case of legal science.

## 5. CONCLUSION

If we are right to suppose that Roman law was not a science in the modern sense and that it was closely connected to rhetoric, then new fields of research open up. The accepted method of researching Roman law will change. It is no longer necessary to (re)construct the system of Roman law as has been done over the past five centuries or to try to accommodate opinions of jurists that seem to deviate from the regular pattern. It is no longer necessary to try to explain why the same jurist had a different opinion in another, similar case. It is no longer necessary to keep Cicero out of the way.

What remains is the notion that the Roman jurists reached a remarkably high level of sophistication in creating law. However, it will now be interesting to discover how they argued legal problems from both sides; in the Digest, there are a number of texts showing such discussions. It will be interesting to see whether so-called rhetorical sources can contribute to understanding the development of Roman law. Unfortunately, it will hardly be possible to assess whether the actual presentation of a point of view in a trial influenced the outcome: a bad *actio* could completely undermine a good legal argument, and vice versa.

It will be necessary to acquire some knowledge about the various rhetorical systems that were taught to young Romans belonging to the upper class,

<sup>40</sup> Döring (1998), p. 211. The *sorites* paradox is mentioned by Cic. *Acad.* 2.49: '[B]y adding a single grain at a time they make a heap'.

some of whom we now know as jurists. Here is a problem, for there is not much literature on classical rhetoric, particularly not on rhetoric in a legal context.<sup>41</sup> But a problem can be regarded as a challenge, and we hope this chapter may inspire scholars to take it up and study Roman law from a legal and rhetorical perspective.

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<sup>41</sup> Frost (2005) has some interesting chapters on the history of rhetoric, but does not make any reference to Roman law at all. Tellegen-Couperus (2003) contains some twenty-five papers dealing with the twelve books of Quintilian’s *Institutio Oratoria* from a legal and a rhetorical point of view.

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