

BRUCE W. FRIER

The Rise of the Roman Jurists

Studies in Cicero's Pro Caecina



PRINCETON LEGACY LIBRARY

THE RISE
OF THE ROMAN
JURISTS



THE RISE
OF THE ROMAN
JURISTS

Studies in Cicero's
pro Caecina

BY BRUCE W. FRIER

PRINCETON UNIVERSITY PRESS



Copyright © 1985 by Princeton University Press
Published by Princeton University Press, 41 William Street,
Princeton, New Jersey 08540
In the United Kingdom: Princeton University Press, Guildford, Surrey

All Rights Reserved

Library of Congress Cataloging in Publication Data will be found
on the last printed page of this book

ISBN 0-691-03578-4

Publication of this book has been aided by a grant from The
Andrew W. Mellon Foundation.

This book has been composed in Linotron Janson

Clothbound editions of Princeton University Press books are printed
on acid-free paper, and binding materials are chosen for strength
and durability. Paperbacks, although satisfactory for personal collections,
are not usually suitable for library rebinding.

Printed in the United States of America by Princeton University
Press, Princeton, New Jersey

For John and Teresa D'Arms

More even than in Europe, here
The choice of patterns is made clear
Which the machine imposes, what
Is possible and what is not,
To what conditions we must bow
In building the Just City now.
—W.H. Auden

Contents

<i>List of Tables and Figures</i>	ix
<i>Preface</i>	xi
<i>List of Abbreviations</i>	xix
I. THE LITIGANTS: AULUS CAECINA AND SEXTUS AEBUTIUS	3
Tarquinius and Rome	4
Caesennia's Heirs	20
The Problem of Litigiousness	27
II. THE URBAN PRAETOR: P. CORNELIUS DOLABELLA	42
The Praetor and His Law	44
Accessibility: The Capabilities of Law (I)	57
Law and Custom: <i>Deductio Quae Moribus Fit</i>	78
Appendix: Urban Praetors from 81 to 60 B.C.	92
III. THE ADVOCATES: M. TULLIUS CICERO AND C. CALPURNIUS PISO	95
The Political Issue: Volaterrae and Arretium	97
The Earlier Speeches	104
Cicero's Strategy in the <i>pro Caecina</i>	115
Advocates View the Law: Agonistic Law	127
IV. THE JURISTS: C. AQUILIUS GALLUS AND <i>Ignotus</i>	139
C. Aquilius Gallus: <i>Illud Suum Regnum Iudiciale</i>	140
The Heritage of Q. Mucius Scaevola	155
The "Correct" Interpretation of the Interdict <i>de Vi Armata</i>	171
Jurists View the Law: The Ambiguities of "Autonomous Law"	184

Contents

V. THE <i>Recuperatores</i>	197
The Court of the <i>Recuperatores</i>	199
Relating Rules to Cases: The Capabilities of Law (II)	212
Deciding Cases: The Problem of Legal Indeterminacy	225
VI. THE <i>Corona</i>	235
Legitimation through Procedure	236
On the Road to Classical Roman Law	252
VII. CONCLUSION: THE PROFESSIONALIZATION OF LAW	269
<i>Index of Passages Cited</i>	289
<i>General Index</i>	303

Tables and Figures

TABLES

1. The Relations of Caesennia	7
2. The Main Lines of the Late Republican Juristic Tradition	146

FIGURES

1. Map of Southern Etruria during the Late Republic	5
2. The Countryside around Castellum Axia	10
3. Plan of the Late Republican Forum	58
4. The Roman Forum in Its Present State	60

The map and the plan were both drawn by Jackie Royer; the plan of the late Republican Forum is after that in G. Lugli, *Itinerario di Roma Antica* (1975) 210. Theodore Peña took the photograph of the countryside around Castellum Axia, and the view of the Roman Forum today was provided courtesy of the Fototeca Unione at the American Academy in Rome.

Preface

I HAVE TWO stories to tell. The first is the story of a lawsuit brought more than two millennia ago, and of the remarkable speech delivered during it; the second is the story of how, in the decades preceding and following this lawsuit, the legal profession originated and first rose to influence. My conviction, upon which this book is based, is that these two stories are interlinked, though not in a direct causal way; they are interlinked because neither story is completely comprehensible without the other.

Cicero's speech *pro Caecina* was delivered during the third and final hearing of a lawsuit brought by Aulus Caecina probably in 69 B.C. Caecina, who had been named the principal heir of his late wife Caesennia, attempted to enter a farm allegedly within her estate. However, his way onto the farm was barred by Sextus Aebutius, who had organized a band of armed men to defend the farm's perimeter. Caecina then brought suit against Aebutius under the interdict *de vi armata*, in order to "recover" possession of the farm. Throughout the ensuing trial Cicero spoke on Caecina's behalf; and he later published, perhaps in a somewhat altered form, his final speech for his client.

I have long been interested in the *pro Caecina*. First of all, this speech, which is probably Cicero's last effort before the civil bar, is exceptionally fine; Cicero himself regarded it as a masterpiece of its kind, and later critics both ancient and modern have shared that judgment. It is therefore a pity that, because of its subject matter, the speech is so little known among most students of Roman literature. Further, the *pro Caecina* is the only one of Cicero's four surviving private orations that is also complete, and no private oration by any other Roman orator comes down in more than small fragments. This

Preface

fact alone gives the *pro Caecina* a considerable historical importance.

The speech is interesting in other respects. By the third hearing of Caecina's suit, the advocates for plaintiff and defendant had reached general agreement about events previous to the trial, the "facts of the case," or at least what could be proved. But they disagreed radically concerning the legal interpretation of these events. For this reason, the advocates mooted issues of great interest for a legal historian: the proper way to interpret the Praetor's Edict, the weight to be accorded to jurists' rulings on law, the role of *aequitas* in civil litigation, indeed the very nature and purpose of private law in Rome. The *pro Caecina* therefore provides an unusually good basis for discussing the social operation of late Republican law; and in the present book I use the *pro Caecina* for this purpose. On one level, my book reconstructs Caecina's lawsuit, from its origins to its decision, insofar as reconstruction is possible; on another level, I also treat the trial as "representative" in considering the Roman judicial system's effectiveness.

My decision to write a book on this subject was stimulated in part by the interesting chapter on the *pro Caecina* in Wilfried Stroh's *Taxis und Taktik* (1975). Stroh, who is mainly concerned with rhetorical technique and not with law, argues that in his speech Cicero deliberately falsifies the known sense of the interdict *de vi armata*, extravagantly misrepresents the argument of his opponent, and violently twists both facts and law in favor of his client. Although Stroh offers an especially well argued version of a view widespread in modern scholarship, I find that by and large I cannot agree with him. In particular, as to the central legal issue treated by Cicero, Stroh relies heavily on Giovanni Nicosia's *Studi sulla "Deiectio"* vol. I (1965), a justly praised book which, however, in treating the *pro Caecina* overlooks some important evidence that decisively refutes the central view Nicosia advances. If Nicosia is wrong, Stroh's arguments on this speech also founder; and to the extent that Stroh's position is today the prevailing view, it seems apparent that a reexamination of the speech is required. Fur-

Preface

ther, in my opinion such a reexamination must reach not just the issues raised by Nicosia and Stroh, but also much deeper issues that touch on the operation of the Roman judicial system during the years when Cicero served as a private advocate (81-69 B.C.) and during the remainder of his life.

We know that in the late Republic, more or less during Cicero's lifetime, Roman legal science made important advances. During the second and early first century B.C., the stability of the Roman judicial system had been shaken by two important events: the introduction of important procedural reforms, mainly through the Praetor's Edict, and the emergence of rhetorical advocacy in pleadings. Both events tended to increase legal insecurity. The juriconsults, Rome's unofficial legal experts, at first reacted slowly and rather tentatively to these challenges. At last, however, in the early first century B.C. a small group of juriconsults (Q. Mucius Scaevola and his students) sought to counter disintegrative influences on law by reconstructing their ancient craft as a more autonomous and intellectual discipline. Their aim was evidently to secure for themselves and for law a more commanding presence within the Roman judicial system and Roman society generally. In essence, they ceased to be juriconsults only, and became jurists as well, with major consequences for subsequent Western law. Through these men the legal profession walked for the first time onto the stage of history; the late Republican jurists were already "professionals" in that they possessed and exploited specific knowledge and skills which were inaccessible to laymen, and in that they also had at least rudimentary forms of regularized intercommunication, work autonomy, specialist literature, colleague "control," organized education, and even ethics.

In 69 B.C., as the *pro Caecina* shows (and much other evidence confirms), it was far from clear that the jurists' strategy would succeed. Yet by the early Empire the strategy had succeeded. The Roman jurists accomplished what earlier Mediterranean civilizations had not; they created an effective science of secular law. The crucial word is "effective." No one would deny the precociousness of late Republican juristu-

Preface

dence; but the brilliance of the Roman jurists is not sufficient to explain their eventual success. In this book, I attempt to find further explanations in the external form of jurisprudence, the dynamics of the Roman judicial system, and the enormous changes in Roman society during the late Republic. My argument throughout this book, particularly in its later portion, is that in the late Republic the Roman judicial system was transformed from what we may call the "Ciceronian court" (still dominated by rhetorical advocacy) to the judicial system presupposed by classical Roman law, in which "questions of law" are settled mainly through reference to juristic *responsa*. I believe that this transition was largely complete even before the end of the Republic, and that it is not, save in some important details, an achievement of the Empire. In a general way, the *pro Caecina* serves to mark the transition; although in most respects it still partakes of the older era, in others it presages the impending change.

As has often been observed, substantive law is a system of rules, while procedural law is a system of roles. My book is organized in accordance with this sagacious observation. My first chapter is concerned with litigants and social sources of litigation. Chapter II discusses the Praetor's Edict and the opening (*in iure*) stage of trials. Chapter III is about the nature and effects of rhetorical advocacy within the second (*apud iudicem*) section of trials. The fourth chapter deals with the role of the jurists in the late Republican judicial system. Chapter V concerns the judge and the process of reaching a verdict. Chapter VI deals with popular attitudes toward law and with the shifting sources of judicial legitimacy during the late Republic. My conclusion sets out the main historical reasons for the rise of the Roman jurists in this period.

This is not, therefore, a general book about the law of the later Republic; indeed, such a book would be superfluous. Alan Watson's five books on the substantive law of the period already say most of what is worth saying; Franz Horak's *Rationes Decidendi* vol. I (1969) gives a good analysis of the characteristic modes of juristic reasoning in the late Republic; and Max Kaser's *Das Römische Zivilprozessrecht* (1966), now being

Preface

revised, remains the best modern treatment of procedure. The aims of my book are both more limited and more consciously sociological, and so I have dealt with details of substantive and procedural law only as they impinge rather directly on my central theme. It is my hope that the present book, for all the apparent complexity of its levels of argument, will nonetheless help fill out the picture described by Watson, Horak, and Kaser, by setting the rise of the Roman jurists within its social context. My intent is to describe the internal and external conditions that made that rise possible, if not inevitable.

Finally, a word about "autonomous law." In a recent book, Sir Moses Finley has noted with repugnance "the survival of the old mystique about the law as something that stands above and outside society and its realities, with its own essence, its autonomous logic, its independent existence." Much of my own scholarly work (especially *Landlords and Tenants in Imperial Rome*, 1980) has been devoted to demonstrating the numerous lines of interrelationship between Roman private law and Roman society; that is clearly one purpose of the present book as well. But it is an error to consider the doctrine of "autonomous law" merely a frivolous "mystique." As I will try to show, "autonomous law" is an ideology central to the origin of the legal profession in the West. To such an extent is this true that we owe to "autonomous law" our very concept "lawyer"; for it is this doctrine that initially defines the legal profession's special competence as well as its claims with respect to society. The doctrine of "autonomous law," which appears for the first time in Cicero's *pro Caecina*, was to remain the guiding ideology of the legal profession for some two millennia, through all vicissitudes of social and economic circumstance.

In the twentieth century, to be sure, the doctrine of "autonomous law" is in shreds, the victim of relentless assaults upon it from numerous intellectual quarters. But caution is required before it is simply cast aside as a "mystique." First of all, for many centuries the doctrine was an article of faith among lawyers and non-lawyers alike, and as such it had profound influence both on how lawyers understood their work

Preface

and on how their work was perceived by others; historians who neglect the doctrine risk losing contact with the very reality they are seeking to explain. Second, as E.P. Thompson pointed out in *Whigs and Hunters* (1975), even today it is far from clear that the doctrine can be abandoned without endangering another fundamental tenet of the Western tradition, namely the rule of law. Indeed, the very capacity of modern legal systems to operate effectively without a doctrine of "autonomous law" is, at the least, still open to question; and some scholars, such as the sociologist Niklas Luhmann and the legal philosopher Bruce Ackerman, have called, in my opinion rightly, for the revival of "autonomous law" in a more sophisticated activist form. All of this is simply to say that "autonomous law" may not be quite so dead as it appears to be. The pendulum may swing back once more.

The doctrine of "autonomous law" serves also as a cornerstone for the venerable, if now increasingly inconvenient, division of labor between Roman historians and Roman legal historians. While I favor putting an end to this division of labor, I also favor doing so cautiously, lest the enormous independent achievements of Roman legal historians be submerged and rendered incomprehensible to future generations. At a minimum I would urge modern scholars to respect the values of pluralism in scholarly research.

The first two chapters of this book were written in Ann Arbor during the summer of 1980; the remaining chapters were written during the first seven months of 1983, partly in Ann Arbor and partly at the Institute for Advanced Study, Princeton. During the intervening period, thanks largely to an informal seminar with several graduate students in 1981, I revised my plan for the book; some slight inconcinnities in perspective may remain between the two portions of the book, though I have tried to remove them. Scholarship reaching my attention after August 1983 has been incorporated very sparingly.

Here at the University of Michigan I have been uncommonly lucky in my students and colleagues, both in the Department of Classical Studies and in the Law School; often

Preface

even the briefest conversation with one of them has clarified a nagging mystery. In particular, Professor Richard Lempert, a sociologist of law, has often discussed with me the intricacies of his field; although he may perhaps find much to disagree with in my approach and conclusions, he has deeply influenced this book. Professor James B. White also read my manuscript and offered many acute suggestions.

My stay at the Institute for Advanced Study was underwritten by the Institute and my home university, and proved amazingly helpful. I received much excellent advice from scholars in other historical and social fields, in particular some trenchant and salutary skepticism from Professor Gerhard Thür, a Greek legal historian from Munich.

Finally, I am grateful for this renewed opportunity to thank Princeton University Press and its Executive Editor, Joanna Hitchcock, who have encouraged and supported my work. Charles B. Purrenhage skillfully edited the manuscript for publication.

The debt I owe the dedicatees of this book is of a special kind. My friendship with John and Teresa D'Arms reaches back nearly two decades, and has meant very much to me. In a sense, John and Teresa also represent the poles about which I had intended this book to revolve: John with his deep and realistic understanding of Roman social life, Teresa with her keen practical grasp of what lawyering involves. For numerous reasons they were both much on my mind as I was completing this book, and I am glad now to offer it to them both.

July 1984

Abbreviations

THE FOLLOWING abbreviations are used in citations throughout my footnotes. I also abbreviate citations of legal and literary sources; the fuller forms can be found in my index of passages cited.

ACIR	<i>Atti del Congresso Internazionale di Diritto Romano</i> , Rome 1933, 2 vols. (Pavia 1934)
ACIV	<i>Atti del Congresso Internazionale di Diritto Romano e di Storia del Diritto</i> , Verona 1948, 4 vols. (Milan 1953)
AG	<i>Archivio Giuridico "Filippo Serafini"</i> (Milan)
AJPb	<i>American Journal of Philology</i> (Baltimore)
ANRW	<i>Aufstieg und Niedergang der Römischen Welt</i> , 3 vols., ed. H. Temporini (Berlin-New York, since 1972); cited by volume and fascicule
Bauman, R.A., <i>Lawyers</i>	Richard A. Bauman, <i>Lawyers in Roman Republican Politics: A Study of the Roman Jurists in Their Political Setting, 316-82 B.C.</i> (Münchener Beiträge zur Papyrusf. und Ant. Rechtsg. 75, 1983)
Bethmann-Hollweg, M.A., <i>Civilprozess</i>	M.A. von Bethmann-Hollweg, <i>Der Römische Civilprozess</i> , 3 vols. (Bonn 1864-1866; repr. Aalen 1959)
Bögli, H., <i>Beiträge</i>	Hans Bögli, <i>Beiträge zur Lehre vom Ius Gentium der Römer</i> (Bern 1913)
Bögli, H., <i>Rede</i>	Hans Bögli, <i>Ueber Ciceros Rede für A. Caecina</i> (Burgdorf 1906)
Boulanger, A., <i>Discours</i>	André Boulanger, <i>Cicéron, Discours</i> vol. VII (Paris 1929)
Bretone, M., <i>Tecniche</i>	Mario Bretone, <i>Tecniche e Ideologie dei Giuristi Romani</i> (Naples 1971)

Abbreviations

<i>Bull.</i>	<i>Bullettino dell' Istituto di Diritto Romano</i> (Rome, since 1940 Milan)
Costa, E., <i>Cicerone Giur.</i>	Emilio Costa, <i>Cicerone Giureconsulto</i> (Bologna 1916, 2d ed. 1927)
Costa, E., <i>Orazioni</i>	Emilio Costa, <i>Le Orazioni di Diritto Privato di M. Tullio Cicerone</i> (Bologna 1899)
<i>CQ</i>	<i>Classical Quarterly</i> (Oxford)
D'Ors, A., <i>Defensa</i>	Alvaro D'Ors Pérez-Peix, <i>Cicerón: Defensa de Aulo Cecina</i> (Madrid 1943)
<i>FIRA</i>	<i>Fontes Iuris Romani Anteiustiniani</i> 2d ed. vol. I (<i>Leges</i> ; ed. S. Riccobono, 1941/1968), vol. II (<i>Auctores</i> ; ed. I Baviera and I. Furlani, 1940/1964), vol. III (<i>Negotia</i> ; ed. V. Arangio-Ruiz, new ed. with appendix 1968)
Frier, B.W., <i>LTIR</i>	Bruce W. Frier, <i>Landlords and Tenants in Imperial Rome</i> (Princeton 1980)
<i>Fs. Flume</i>	<i>Festschrift für Werner Flume</i> , 2 vols. (Cologne 1978)
<i>Fs. Schulz</i>	<i>Festschrift Fritz Schulz</i> , 2 vols. (Weimar 1951)
<i>Fs. Schwind</i>	<i>Festschrift Fritz Schwind</i> (Vienna 1978)
<i>Fs. Steinwenter</i>	<i>Festschrift Artur Steinwenter</i> (Graz-Cologne 1958)
Gruen, E., <i>Last Generation</i>	Erich S. Gruen, <i>The Last Generation of the Roman Republic</i> (Berkeley-Los Angeles-London 1974)
Harris, W.V., <i>Etruria</i>	William V. Harris, <i>Rome in Etruria and Umbria</i> (Oxford 1971)
Harris, W.V., <i>Imperialism</i>	William V. Harris, <i>War and Imperialism in Republican Rome</i> (Oxford 1979)
Horak, F., <i>Rationes</i>	Franz Horak, <i>Rationes Decidendi</i> vol. I (Aalen 1969)
<i>IGRRP</i>	R. Cagnat <i>et al.</i> , <i>Inscriptiones Graecae ad Res Romanas Pertinentes</i> , 4 vols. (Paris 1911-1927; repr. Chicago 1975)
<i>ILLRP</i>	Attilio Degrassi, <i>Inscriptiones Latinae Liberae Rei Publicae</i> , 2 vols. (2d ed.; Florence 1965 and 1963, respectively)

Abbreviations

<i>ILS</i>	Hermann Dessau, <i>Inscriptiones Latinae Selectae</i> , 3 vols. (Berlin 1892-1916; often reprinted)
Jordan, C.A., <i>Oratio</i>	Carolus Adolphus Jordan, <i>M. Tullii Ciceronis Oratio pro A. Caecina</i> (Leipzig 1847)
Jörs, P., <i>Rechtsw.</i>	Paul Jörs, <i>Römische Rechtswissenschaft zur Zeit der Republik</i> vol. I (Berlin 1888)
<i>JRS</i>	<i>Journal of Roman Studies</i> (London)
Kaser, M., <i>RPR</i> ²	Max Kaser, <i>Das Römische Privatrecht</i> , 2 vols. (2d ed.; Munich 1971-1975)
Kaser, M., <i>RZ</i>	Max Kaser, <i>Das Römische Zivilprozessrecht</i> (Munich 1966)
Keller, F.L., <i>Sem.</i>	Friederich Ludwig von Keller, <i>Semestrium ad M. Tullium Ciceronem</i> vol. I (Turici 1842-1850); paginated continuously
Kelly, J.M., <i>Judicature</i>	John Maurice Kelly, <i>Studies in the Civil Jurisdiction of the Roman Republic</i> (Oxford 1976)
Kelly, J.M., <i>Litigation</i>	John Maurice Kelly, <i>Roman Litigation</i> (Oxford 1966)
Kunkel, W., <i>Herkunft</i> ²	Wolfgang Kunkel, <i>Herkunft und Soziale Stellung der Römischen Juristen</i> (2d ed.; Graz-Vienna-Cologne 1967)
Lenel, O., <i>EP</i> ³	Otto Lenel, <i>Das Edictum Perpetuum</i> (3d ed.; Leipzig 1927; repr. Graz 1960)
Lenel, O., <i>Pal.</i>	Otto Lenel, <i>Palingenesia Iuris Civilis</i> , 2 vols. (Leipzig 1889; repr. Graz 1960)
<i>Lineam.</i>	M. Talamanca et al., <i>Lineamenti di Storia del Diritto Romano</i> (Milan 1979)
Lombardi, L., <i>Saggio</i>	Luigi Lombardi, <i>Saggio sul Diritto Giurisprudenziale</i> (Milan 1967)
<i>MAL</i>	<i>Memorie della Classe di Scienze Morali e Storiche dell' Accademia dei Lincei</i> (Rome)
<i>MDAI(R)</i>	<i>Mitteilungen des Deutschen Archäologischen Instituts, Röm. Abt.</i> (Mainz)
<i>MEFR</i>	<i>Mélanges d'Archéologie e d'Histoire de l'École Française de Rome</i> (Paris)

Abbreviations

<i>Mél. de Visscher</i>	<i>Mélanges Fernand de Visscher</i> , = <i>RIDA</i> 2-5 (1949-1950)
<i>Mél. Girard</i>	<i>Mélanges Paul Frédéric Girard</i> , 2 vols. (Paris 1912)
Mommsen, T., <i>Staatsrecht</i>	Theodor Mommsen, <i>Römisches Staatsrecht</i> vols. I-II (3d ed.; Leipzig 1887), III (Leipzig 1888); all repr. Darmstadt 1971
<i>MRR</i>	T. Robert S. Broughton, <i>The Magistrates of the Roman Republic</i> , 2 vols. (New York 1951), <i>Supplement</i> (New York 1960); cited usually by year and magistracy
<i>Mus. Helv.</i>	<i>Museum Helveticum: Revue Suisse pour l'Étude de l'Antiquité Classique</i> (Bale)
Nicolet, C., <i>Ordre</i>	Claude Nicolet, <i>L'Ordre Équestre à l'Époque Républicaine</i> , 2 vols. (Paris 1966-1974)
Nicosia, G., <i>Deiectio</i>	Giovanni Nicosia, <i>Studi sulla "Deiectio"</i> vol. I (Milan 1965)
Nörr, D., <i>Rechtskritik</i>	Dieter Nörr, <i>Rechtskritik in der Römischen Antike</i> , = <i>Bayerische Akad. der Wiss., Phil.-Hist. Kl., Abh.</i> 77 (Munich 1973)
<i>Not. Scav.</i>	<i>Notizie degli Scavi di Antichità</i> (Rome)
<i>NRHD</i>	<i>Nouvelle Revue Historique du Droit Français et Étranger</i> (Paris)
<i>PBSR</i>	<i>Papers of the British School at Rome</i> (London)
Pflüger, H.H., <i>Besitzklagen</i>	Heinrich Hackfeld Pflüger, <i>Die Sogennanten Besitzklagen des Römischen Rechts</i> (Leipzig 1890)
Pugliese, G., <i>Processo</i>	Giovanni Pugliese, <i>Il Processo Civile Romano</i> , 2 vols. (Rome 1961-1962 and Milan 1963, respectively)
<i>RE</i>	<i>Paulys Realencyclopädie der Classischen Altertumswissenschaft</i> , ed. G. Wissowa et al. (Stuttgart); cited by article and column number
<i>Rec. F. Géný</i>	<i>Recueil d'Études sur les Sources du Droit, en Honneur de François Géný</i> (Paris 1934)
<i>RH</i>	<i>Revue Historique du Droit Français et Étranger</i> (Paris; 4th series since 1922; succeeds <i>NRHD</i>)
<i>Rb. Mus.</i>	<i>Rheinisches Museum für Philologie</i> (Frankfurt)

Abbreviations

- RIDA*³ *Revue Internationale des Droits de l'Antiquité* (Brussels; 3d series since 1954)
- RIL* *Rendiconti dell' Istituto Lombardo di Scienze e Lettere* (Milan)
- Roby, H.J., *Private Law* Henry John Roby, *Roman Private Law in the Times of Cicero and of the Antonines*, 2 vols. (Cambridge 1902)
- Schiavone, A., *Nascita* Aldo Schiavone, *Nascita della Giuriprudenza: Cultura Aristocratica e Pensiero Giuridico nella Roma Tardo-Repubblicana* (Rome-Bari 1976)
- Schiller, A.A., *Mechanisms* A. Arthur Schiller, *Roman Law: Mechanisms of Development* (The Hague-Paris-New York 1978)
- Schmidlin, B., *Rechtsregeln* Bruno Schmidlin, *Die Römischen Rechtsregeln* (Cologne-Vienna 1970)
- Schmidlin, B., *Rek.* Bruno Schmidlin, *Das Rekuperatorenverfahren* (Freiburg 1963)
- Schulz, F., *Legal Science* Fritz Schulz, *History of Roman Legal Science* (Oxford 1946)
- Schulz, F. *Principles* Fritz Schulz, *Principles of Roman Law* (Oxford 1936), trans. from *Prinzipien des Römischen Rechts* (Munich-Leipzig 1934)
- Scr. Ferrini Mil.* *Scritti in Onore di Contardo Ferrini Pubblicati in Occasione della Sua Beatificazione*, 4 vols. (Milan 1947-1949)
- SDHI* *Studia et Documenta Historiae et Iuris* (Rome)
- St. Biondi* *Studi in Onore di Biondo Biondi*, 4 vols. (Milan, 1965)
- St. Bonfante* *Studi in Onore di Pietro Bonfante*, 4 vols. (Milan 1930)
- St. Grosso* *Studi in Onore di Giuseppe Grosso*, 6 vols. (Turin 1968-1974)
- St. Volterra* *Studi in Onore di Edoardo Volterra*, 6 vols. (Milan 1971)
- Stroh, W., *Taxis* Wilfried Stroh, *Taxis und Taktik: Die Advokat. Dispositionskunst in Ciceros Gerichtsreden* (Stuttgart 1975)

Abbreviations

<i>Synt. Arangio-Ruiz</i>	<i>Syntelesia Vincenzo Arangio-Ruiz</i> , 2 vols. (Naples 1964)
SZ	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte</i> , Romanist. Abt. (Weimar)
TAPbA	<i>Transactions and Proceedings of the American Philological Association</i> (Cleveland)
TR	<i>Tijdschrift voor Rechtsgeschiedenis</i> = <i>Revue d'Histoire du Droit</i> = <i>The Legal History Review</i> (Haarlem, since 1950 Groningen)
Vonglis, B., <i>Lettre</i>	Bernard Vonglis, <i>La Lettre et l'Esprit de la Loi dans la Jurisprudence Classique et la Rhétorique</i> (Paris 1968)
Watson, A., <i>Law Making</i>	Alan Watson, <i>Law Making in the Later Roman Republic</i> (Oxford 1974)
Watson, A., <i>Obligations</i>	Alan Watson, <i>The Law of Obligations in the Later Roman Republic</i> (Oxford 1965)
Watson, A., <i>Persons</i>	Alan Watson, <i>The Law of Persons in the Later Roman Republic</i> (Oxford 1967)
Watson, A., <i>Property</i>	Alan Watson, <i>The Law of Property in the Later Roman Republic</i> (Oxford 1968)
Watson, A., <i>Succession</i>	Alan Watson, <i>The Law of Succession in the Later Roman Republic</i> (Oxford 1971)
Watson, A., <i>XII Tables</i>	Alan Watson, <i>Rome of the XII Tables: Persons and Property</i> (Princeton 1975)
Wenger, L., <i>Quellen</i>	Leopold Wenger, <i>Die Quellen des Römischen Rechts</i> (Vienna 1953)
Wieacker, F., <i>Recht</i> ²	Franz Wieacker, <i>Vom Römischen Recht</i> (2d ed.; Stuttgart 1961)
Wiseman, T.P., <i>New Men</i>	T.P. Wiseman, <i>New Men in the Roman Senate, 139 B.C.—A.D. 14</i> (London 1971)
WS	<i>Wiener Studien: Zeitschrift für Klassische Philologie und Patristik</i> (Vienna)

THE RISE
OF THE ROMAN
JURISTS

II

The Litigants: Aulus Caecina and Sextus Aebutius

magna . . . alea est, litem
ad interdictum deducere
—Frontinus

THE TRIAL began with the death of a wealthy matron named Caesennia, from the city of Tarquinii in Etruria. She died probably in late 70 B.C., or early in 69.¹ Her will divided her estate into three very unequal shares:² $\frac{23}{24}$ of the entirety (or about 95.8%) to her second husband, Aulus Caecina; $\frac{1}{36}$ (or about 2.8%) to Marcus Fulcinius, a freedman of her first husband; and $\frac{1}{72}$ (or about 1.4%) to a friend of hers named Sextus Aebutius.

Within a few weeks or months of Caesennia's death, two of her heirs were in court: the principal heir, A. Caecina, was suing the minor heir, Sex. Aebutius, the ground for the suit being that the defendant Aebutius had used a band of armed men forcibly to prevent Caecina from entering a farm that allegedly formed part of Caesennia's estate. The board of "recoverers" (*recuperatores*), who had been named by the Urban Praetor P. Cornelius Dolabella to decide this case, required three hearings before they could reach a verdict. Virtually our only source for the case is Cicero's *pro Caecina*, the published

¹ Cicero's *pro Caecina* dates to 69 B.C.; for argument, see Chapter II, at notes 9-15.

² Cicero, *Caec.* 17. Save as indicated, I cite the *pro Caecina* by section number only (e.g., 17) from A.C. Clark's Oxford text (1905).

The Litigants

version of an oration delivered on the plaintiff's behalf during the third and final hearing (*Caec.* 6).

In this chapter, I reconstruct the circumstances that led to Caecina's suit against Aebutius, and then discuss the historical and social background of this lawsuit.³

TARQUINII AND ROME

Most of the events leading up to the trial took place either at Rome or in Tarquinii (see Figure 1). The Fulcinian farm, the object of the dispute, was located *in agro Tarquiniensi* (11, 15), "in the territory of Tarquinii." This ancient Etruscan city, once one of the most powerful in Italy, was in Cicero's day becoming a small rural town of minor economic significance. Tarquinii lay on an eroded bluff of tufa, from which it looked out across a narrow alluvial plain to the Tyrrhenian Sea; Rome was less than a hundred kilometers to the south by the trunk road, the *via Aurelia*. Behind the city, the *ager Tarquiniensis* extended inland, within the watershed of the river Marta, as far as the Lago di Bolsena (Vitruv. 2.7.3; Pliny, *NH* 2.209) and the *via Cassia*, the consular highway bisecting the breadth of Etruria. Apparently ever since the settlement of 281/280 B.C., Tarquinii and its territory had been effectively subject to Roman rule, and in 90 B.C. its residents had become citizens of Rome, as had most other Italians.⁴ By the later Roman Republic, Tarquinii's time in the sun was over.

Caesennia and her first husband, M. Fulcinus, were both members of the native upper classes in Tarquinii (10); the Caesennii and Fulcinii are attested among the numerous

³ All modern recountings of the background to the *pro Caecina* ultimately derive from F.L. Keller's exhaustive *Semestrium ad M. Tullium Ciceronem* vol. I.2 (1841) 273-538 and stress legal above social aspects. H.J. Roby, *Private Law* vol. II 510-535, is exceptionally keen on the psychological interplay. W.L.F. Felstiner *et al.*, *Law and Society Review* 15 (1980/1981) 631-654, stress the importance of analyzing the early stages of legal disputes.

⁴ On the status of Tarquinii, see M. Torelli, (cited below n.6) 187, preferable to E. Ruoff-Väänänen, in *Acta Inst. Rom. Finl.* 5: *Studies in the Romanization of Etruria* (1975) 52-55. The latter book is referred to in this chapter as *SRE*.

Tarquinius and Rome

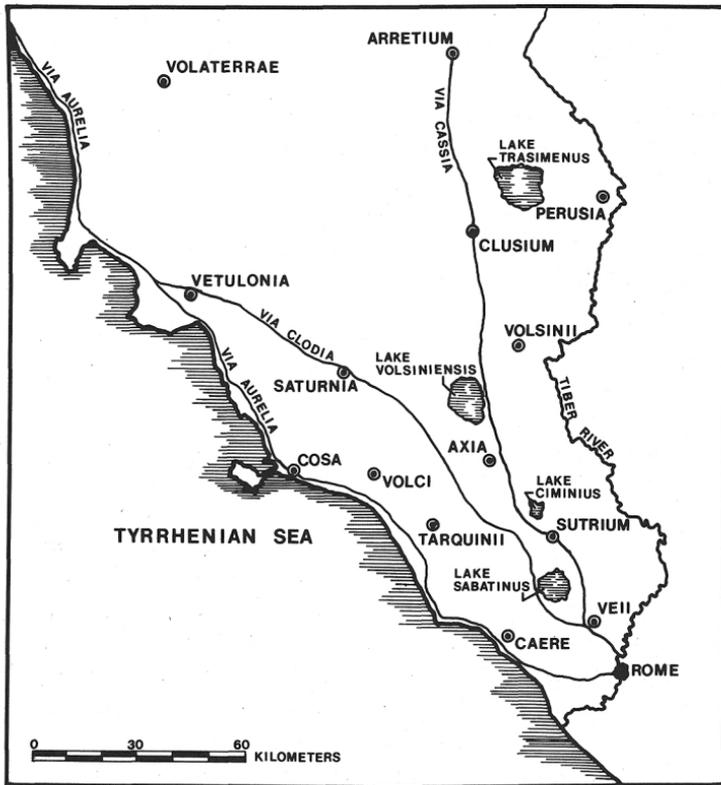


FIGURE 1. Southern Etruria during the late Republic. Most of the old Etruscan cities were linked to Rome by the great consular highways. The territory of Tarquinii ran inland, up to the Lago di Bolsena and the *via Cassia*, and included Castellum Axia, a fortlet near the site of the Fulcinian farm. The three lakes along the lower *via Cassia* are all in the craters of extinct volcanoes.

Etruscan-language funerary inscriptions from that city,⁵ and M. Fulcinus still owned ancestral land there (11). The temper of this native aristocracy has been movingly depicted in To-

⁵ Fulcinii: cf. the HVLXNIE (*Corpus Inscriptionum Etruscarum* 5357, 5358, 5388) with M. Cristofani, *MAL* 14.4 (1969) 253. The Caesennii are, of course, far better known: Cristofani, 251 (CEISINIE). The subsequent history of the Caesennii is discussed by R. Syme, *JRS* 67 (1977) 38-49, esp. 44-45, with other references.

The Litigants

relli's recent study,⁶ which discusses a series of monumental inscriptions set up during the Julio-Claudian period by Tarquinii's leading Etruscan families, whose main aim was to record the quasi-mythical grandeur of their distant ancestors. But these families were not, despite appearances, nostalgically fixated on the past; most of them had survived, where their former peers at Tarquinii had failed, by coming to terms with the rising might of Rome and transferring their hopes to alliances with the Roman aristocracy. In this way they were being slowly absorbed into what would emerge as the refashioned Italian aristocracy of the early Empire.⁷

The void these families left behind at Tarquinii had been filled, under rather mysterious circumstances,⁸ by a new municipal upper class largely of Latin or Italic origin: investors, probably, who had made their fortunes in the great imperialistic expansion of the second century B.C. and had then aggressively bought up farm land on the cheap from declining Tarquinian aristocrats.⁹ In the first centuries B.C. and A.D. the newcomers dominated the rolls of municipal officeholders, all but excluding the older Etruscan families.¹⁰ It is likely that they brought with them to Tarquinii the capital-intensive, slave-based system of agriculture that had been recommended in the elder Cato's treatise on farming; this system was in general use at Tarquinii by the time of Caecina's lawsuit.¹¹ Despite their differences from the native Etruscans in speech and manner, there is no evidence of serious social friction between

⁶ M. Torelli, *Elogia Tarquiniensia* (1975), esp. 185-197. At pp. 137-142 and 192, Torelli discusses monuments of the Caesennii.

⁷ On this, see M. Torelli, *Dialoghi di Archeologia* 3 (1969) 312 ff.

⁸ The Gracchan colony at Tarquinii, referred to in the *Libri Colonialium* 219.1 L, is very doubtful, cf. W.V. Harris, *Etruria* 205; E. Ruoff-Väänänen, in *SRE* (cited n.4) 38; M. Torelli, (cited n.6) 191.

⁹ On the process, see W.V. Harris, *Imperialism* 93-104. For other "investors" at Tarquinii, see below, notes 32, 64; also M. Torelli, (cited n.6) 187-191. And note Q. Flavius, a Tarquinian who killed a slave (Cic. *Rosc. Com.* 32); also Q. Fulvius Lippinus, owner of a 40-iugera deer park (Varro, *RR* 3.12.1), who had senatorial relatives, cf. T.P. Wiseman, *New Men* 261.

¹⁰ Cf. M. Torelli, (cited n.6) 187-189.

¹¹ See below, at notes 29-31.

Tarquinius and Rome

Table 1
The Relations of *Caesennia*

M. Fulcinus Banker, d. 77?	=	(1) <i>Caesennia</i> (2) = (2) A. <i>Caecina</i> (1) = ? d. 70/69 <i>Eques</i>	=	
		M. Fulcinus d. 74/73		A. <i>Caecina</i>

these two groups, whose interests were perhaps largely complementary: the surviving Etruscan families busied themselves with the society and politics of Rome, while the newcomers settled down to enjoying a privileged place in a municipal backwater. Yet as we shall see below, some latent hostility between them and the older families may have remained.

M. Fulcinus and *Caesennia* married within their class (see Table 1). Only one child, a son named for his father, seems to have survived to adulthood; since this son was capable of both marrying and writing his own will as of about 74 B.C. (12), and hence was 14 years or older by then,¹² his parents were presumably married by 89 B.C. at the latest, probably somewhat earlier. *Caesennia* came to the marriage with a substantial dowry, at least part of which was in cash (11). While this dowry was doubtless provided by her family, she was not under a father's *potestas* when her first husband died, since she then took back the dowry into her own hands (15).

Fulcinus is described by Cicero (10) as a man of the first rank at Tarquinii, who in Rome ran a "not dishonorable banking establishment" (*argentariam non ignobilem*); his wife, by contrast, "was born in the highest station and was of most upright character" (10: *summo loco natam et probatissimam feminam*). It is hard to recapture the social tone of these remarks,

¹² As to marriage, cf. A. Watson, *Persons* 39 (citing Servius in D. 12.4.8); as to wills, see Gaius 2.113 *et al.* The marriage between Fulcinus and *Caesennia* is likely to have been *cum manu*, since she later had the power to write a will (*Caec.* 17); on this, see A. Watson, *Persons* 152-154 and *Succession* 22-23, 73-75.

The Litigants

but Cicero appears to suggest that the match was a better one for Fulcinus than for his wife.¹³ The Roman banking community, which mainly financed various kinds of loans, offered one standard profession for new men to make their way upward in Roman society;¹⁴ but banking had an unsavory reputation. Cicero's scathing reference later in the speech (27) to the *argentarius* Sex. Clodius Phormio, a witness for the defense, is typical of negative comments on *argentarii* in ancient writings.¹⁵ As it happens, yet another witness for the defense, the discreditable Senator C. Fidiculanus Falcula, who had twice narrowly escaped in trials for judicial corruption some years before (28-29), was also linked to Rome's banking community.¹⁶ A gentleman did not willingly pursue banking as a profession.

The banking establishment run by Fulcinus perhaps came into existence before his marriage, in the turbulent years leading up to the outbreak of the Social War in 91 B.C. But Fulcinus' ancestors may well have been established at Rome even earlier; scholars have suggested a relationship with Fulcinia, the paternal grandmother of the great captain C. Marius¹⁷—if so, a valuable but politically risky connection. In any event, during the ensuing years Fulcinus, his son, and his wife appear fully at home with Roman legal rules and procedures,

¹³ On terminology, see J. LeGall, in *Recherches sur les Structures Sociales* (ed. C. Nicolet, 1970) 275-286, at 279. Claude Nicolet, who considered Fulcinus an *equus* in *Ordre* vol. I 364, evidently thought better of the idea; Fulcinus is omitted from the prosopography in vol. II. On Caesennia, B. Rantz, *RIDA* 29 (1982) 265-280, is highly inaccurate.

¹⁴ See T.P. Wiseman, *New Men* 77-89. On the activities of *argentarii*, see G. Thielmann, *Die Römische Privatauktion* (1961); J. Andraeu, *Les Affaires de Monsieur Jucundus* (1974); C.T. Barlow, *Bankers, Moneylenders, and Interest Rates in the Roman Republic* (Diss. North Carolina, 1978). All cite further bibliography. On ancient (esp. Greek) banking, see R. Bogaert, *Banques et Banquiers dans les Cités Grecques* (1968).

¹⁵ Cf. C. Nicolet, *Ordre* vol. I 362-363.

¹⁶ See *ILLRP* 1027, 1030: *tesserae nummulariae* of C. Fidiculanus (a freedman?), dating to 62 and 61 (?) B.C. On Fidiculanus, contrast Cicero's complete exoneration of him in *Cluent.* 103-104, 108, 112-113, during a trial in 66 B.C.; and see below, note 64.

¹⁷ *Plut. Mar.* 6.3. Cf. T.P. Wiseman, *New Men* 55; at p. 189 he conjectures, less confidently, a connection with L. Fulcinus, a Quaestor in 148 B.C.

Tarquinius and Rome

just as one might expect of a banker's family; no doubt they were even "more Romanized than most at Tarquinius."¹⁸ Fulcinius must have moved his family to Rome almost at once after his marriage.

But the bank did not prosper. Cicero refers to "times when payment of debt was very difficult" (11: *temporibus illis difficilimis solutionis*). This is almost surely a reference to the collapse of credit which followed the invasion of the Roman province of Asia by the forces of Mithridates in 89.¹⁹ The crisis was aggravated by the lingering effects of the Social War in Italy, and then prolonged by the civil wars between the partisans of Sulla, Marius, and Cinna from 88 to 81. The immediate consequence of the credit collapse was a general call-in of debts, which led to a riot in 89 during which an Urban Praetor who had been sympathetic to debtors was murdered by a mob of angry creditors led by a plebeian Tribune;²⁰ and then to a series of measures for debt relief undertaken during the next several years.²¹ Outright debt relief could hardly have helped the stability of Rome's banking community. Fulcinius, impelled by his need for liquid assets, "sold" a farm he owned in Tarquinius to his wife, in exchange for part of her cash dowry (11), essentially trading his own land for her cash; Cicero praises the financial advantages of this transaction for both parties (since land prices were doubtless artificially depressed), but the "sale" was plainly a device of convenience for him.²² The dowry *fundus* lay near the fortlet

¹⁸ W. V. Harris, *Etruria* 284.

¹⁹ Cic. *Leg. Man.* 19, with E. J. Jonkers, *Social and Economic Commentary on Cicero's de Imperio Cn. Pompeii* (1959) *ad loc.*; cf. Cic. *Leg. Ag.* 2.83. This great economic depression lies behind many of Cicero's early speeches, including the *pro Quinctio* and even the *pro Roscio Comoedo* (33, 37).

²⁰ The fullest sources are Val. Max. 9.7.4 and Appian, *BC* 1.54.232 ff.; cf. also Livy, *Per.* 74.

²¹ T. Frank, *AJPb* 54 (1933) 54-58; C. T. Barlow, *AJPb* 101 (1980) 202-219. On lowered land prices caused by insecurity, see Cic. *Rosc. Com.* 33 (referring to Tarquinius, cf. 32).

²² So most commentators. This transaction is not irregular in later law, provided that worth is given: Julian, *D.* 23.4.21; Scaev., *D.* 23.4.29 pr.; Modest., *D.* 23.3.26. However, Cicero's wording is ambiguous, and B. Kübler, in *Mél. Girard* vol. II 43-61, thought, with some justice, of a *fiducia* or

The Litigants



FIGURE 2. The countryside around Castellum Axia. The view is along a valley, at the end of which the site of Castellum Axia is marked by the remains of a square medieval tower. The landscape was formed primarily by beds of compacted ash laid down by surrounding volcanoes; in time these beds eroded to form steep bluffs interspersed with long and fertile alluvial valleys. In one of these valleys the Fulcinian farm will have lain.

Castellum Axia (20), in the extreme eastern part of the *ager Tarquiniensis*.²³ (See Figure 2.)

Eventually, perhaps in expectation of the chaos let loose by Sulla's invasion of 83 B.C. (and perhaps also in fear of Sulla

a sale with right of repurchase; H. Bögli, *Beiträge* 71-73, of a return of dowry through repurchase (cf. Paul, D. 23.3.73.1). In any case, I shall refer to this *fundus* as "the dotal farm."

²³ See G. Colonna, in *The Princeton Encyclopedia of Classical Sites* (1976) 132, with bibliography; M. Torelli, *Etruria* (Guide Archeologica Laterza no. 3, 1980) 229-233. The site is today accessible only from Viterbo, about 8.5 km. distant; it contains substantial Etruscan remains, but little from after 50 B.C. In antiquity the *via Casia* would have been used to reach it. See also note 64.