

GAIUS MEETS CICERO: LAW, LEGAL PRACTICE, AND RHETORIC IN GAI., 4.114

T.G. LEESEN⁵³⁹
O.E. TELLEGEN-COUPERUS⁵⁴⁰

SUMMARY: 1. Introduction. - 2. Gai. 4.114: Text and Controversy.- 3. The Controversy in Gai., 4.114: Modern Theories. - 4. Ratiocinatio in Gai., 4.114.- 5. Controversy decided. - 6. Conclusion.

1. Introduction

In the early Roman Principate, two law schools existed in Rome, the Sabinian or Cassian school and the Proculian school. Nearly all the prominent jurists of that time belonged to either the one or the other. The representatives of these law schools defended opposite positions over several points of private law, which are known in modern literature as the school controversies. The main sources that mention these school controversies are Gaius' *Institutiones* and Justinian's *Institutiones*, *Digesta*, and *Codex*.

The two law schools and the controversies that existed between them are one of the more contentious issues in the field of Roman law. The subject raises questions, such as 'What is the *raison d'être* of these law schools?'; 'Why

and how did the controversies between the Sabinians and the Proculians arise?' and 'What exactly were the jurists of these schools engaged in?' So far, modern scholars have never been able to answer these questions in a convincing manner. Most authors regarded the two schools as academic associations in which jurists discussed legal problems of a theoretical nature. They believed that the controversies developed because of a fundamental difference that existed between the two schools and explained the opposition between the schools as a confrontation between two internally consistent conceptions of law. The study of the controversies would disclose the nature of this fundamental difference. While some authors maintained that the schools were influenced by two different philosophical currents (e.g., Stoa versus Peripatetics),⁵⁴¹ others believed that the antagonism between the schools can be explained in terms of conservative versus progressive.⁵⁴² Furthermore, it has been suggested that the two schools held different views

⁵³⁹ Ph.D. (2009) in Roman Law, Tilburg University, is researcher at the Tilburg School of Humanities. In 2010, she published a monography about the controversies between the Sabinians and the Proculians, 'Gaius Meets Cicero: Law and Rhetoric in the School Controversies'.

⁵⁴⁰ Associate professor for Roman law and legal history at Tilburg University, the Netherlands. A lot of her publications deal with the close connection between Roman law and rhetoric.

⁵⁴¹ An adherent of this theory is P. SOKOŁOWSKI, *Die Lehre von der Specification*, SZ 17 (1986), pp. 252-311.

⁵⁴² Whereas M. VOIGT, *Römische Rechtsgeschichte*, II, Stuttgart 1889 (repr. Aalen 1963), pp. 222-241, argued that the Sabinians were conservative and the Proculians progres-

about methodology.⁵⁴³ Some modern scholars even believed that the Sabinians and the Proculians were influenced by distinctly political doctrines.⁵⁴⁴

From this perspective, however, it appeared impossible to explain the nature of the schools and the controversies in a satisfactory manner. Modern jurists have never succeeded to identify a fundamental difference and to single out one particular theory that could have been at the root of every controversy. A substantial number of modern scholars contented themselves with forwarding a general theory which applied to only one or a few controversies.⁵⁴⁵ Moreover, they have never been able to demonstrate that the legal opinions of each school were internally consistent.

Several reasons can be advanced for this failure. The modern debate about these schools and the controversies was and still is strongly influenced by some persistent conceptions of classical Roman law and the role Roman jurists played in the early Roman Principate. By and large, modern scholars perceive of classi-

cal Roman law as a systematic and autonomous legal science and pay little if any attention to the historical context in which it arose and developed. This traditional and dogmatic approach to Roman law assumes that the Roman jurists were theoreticians who wanted to mould the law into a scientific system. The one-sided approach to Roman law as a scientific system caused modern legal historians to underestimate the connection and interaction between jurisprudence and legal practice.⁵⁴⁶ This conception of law also influenced the study of the schools and the controversies. Modern scholars have always assumed that the controversies arose because of theoretical problems. They simply did not take into account the possibility that the controversies could also have arisen because of problems that were related to legal practice. The connection between jurisprudence and legal practice is one of the two keys to solve the riddle of the controversies.

Like most Roman jurists of their time, the Sabinians and the Proculians were first and foremost practitioners. Their most important activity was *respondere*, i.e., giving legal advice or *responsa* in court cases and legal disputes.⁵⁴⁷ In the late Republic and the Principate, it was common practice that citizens, whenever they were confronted with a legal problem, approached jurists and asked them for advice. In his *De Oratore*, Cicero indicates that it was not uncommon for a jurist to give an advice that served the cause of the citizen who consulted him.⁵⁴⁸ Most probably, the controver-

sive, O. KARLOWA, *Römische Rechtsgeschichte*, I, Leipzig 1885, pp. 663-666, who studied the same texts as Voigt, came to the exact opposite conclusion. In his view, the Proculians were conservative and the Sabinians progressive. More recently, G.L. FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, also explained the controversies in terms of conservative versus progressive.

⁵⁴³ See, for example, P. STEIN, The Two Schools of Jurists in the Early Roman Principate, *CLJ* 31 (1972), pp. 8-31; M.G. SCACCHETTI, Note sulle differenze di metodo fra Sabiniani e Proculiani, in: A. BISCARDI (ed.), *Studi in onore di Arnaldo Biscardi*, V, Milano 1984, pp. 369-404.

⁵⁴⁴ About the political explanation, see, for example, C. DEMANGEAT, *Cours élémentaire de droit romain*, I, 3rd edn., Paris 1876, pp. 97-98. However, the theory that the Proculians were opponents of the imperial regime and the Sabinians its supporters is outdated, cf. V. SCARANA USSANI, *L'ars dei giuristi: considerazioni sullo statuto epistemologico della giurisprudenza romana*, Torino 1997, pp. 94-95.

⁵⁴⁵ See, for example, P. SOKOŁOWSKI, *Die Lehre von der Specificatio*, *SZ* 17 (1986), pp. 252-311, who studied the controversy about *specificatio* in Gai., 2.79 and drew, on the basis of that single controversy, conclusions about the nature of the schools in general.

⁵⁴⁶ In this article, we use the term 'jurisprudence' not in the Anglo-American sense of legal philosophy but in the civil law sense of 'Jurisprudenz' or legal science.

⁵⁴⁷ Cic., *De or.*, 1.212. In this text, Cicero stated that jurists performed three activities: *respondere*, *agere* and *cavere*. See F. WIEACKER, *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*, I, München 1988, pp. 557-563; O.E. TELLEGEN-COUPERUS, *A Short History of Roman Law*, London-New York 1993, pp. 94-98.

⁵⁴⁸ Cic., *De or.*, 1.239-240.

sies between the Sabinians and the Proculians arose when the representatives of both schools were consulted by two conflicting parties and when they gave opposing advices. However, there was an important difference between the school controversies, on the one hand, and controversies between individual jurists, on the other. Some twenty years ago, Tellegen suggested that the fundamental difference between these two categories of the controversies was that the school controversies were of greater importance, because their leaders held the *ius publice respondendi ex auctoritate principis*.⁵⁴⁹ This meant that they could give advice under the public authority of the emperor and that, as a consequence, their *responsa* were binding for the court. If, therefore, the heads of the Sabinian and of the Proculian schools gave conflicting *responsa* about a specific dispute, the judges were bound by either advice and a so-called school controversy arose.

The dogmatic approach to Roman law has influenced the modern views on the Roman jurists as well. They are not seen within their historical context, but are set as theoreticians against the orators who acted as advocates but had little knowledge of Roman law. It is generally held that, by the 1st century BC, there was a virtually complete separation between jurists and advocates and that they treated one another with mutual contempt.⁵⁵⁰ We agree that jurisprudence and advocacy were indeed two distinct activities, but in our view there was no sharp and absolute distinction between the persons involved. Roman jurists belonged to

the same elite and moved in the same circles as advocates and orators. Roman jurists were mainly involved in legal practice and found inspiration in rhetoric. Whenever jurists formulated advices, they were in need of adequate arguments. For this purpose, rhetoric was an excellent methodological instrument. Because the traditional, dogmatic approach always assumed that there was a fundamental difference between jurisprudence and legal practice (including rhetoric), the influence of rhetoric on jurisprudence has consistently been underestimated. This explains why legal historians never made a connection between the controversies on the one hand and rhetoric on the other. Nonetheless, the connection between jurisprudence and rhetoric offers the second key to solve the riddle of the controversies.

Recently, one of us, Tessa Leesen, published a monograph in which she analyzed almost all the school controversies that are mentioned in Gaius' *Institutiones* in order to demonstrate that there was a connection between jurisprudence and legal practice and, more specifically, between the controversies and rhetoric.⁵⁵¹ Olga Tellegen was very much involved in Tessa Leesen's work. One controversy, the one mentioned in Gai., 4.114, was left out because the text has not been well preserved: it seems to contain only one side of the school controversy. In this paper, we will deal with this last controversy together. We want to see whether it fits in with the other twenty-one controversies mentioned in Gaius' *Institutiones*.

The controversy in Gai., 4.144 is about a defendant who satisfied the plaintiff after the *litis* contestation, but before the judge had passed a judgment on the case. In the first part of this article, Gaius' text, the legal question and the two opposing opinions are being discus-

⁵⁴⁹ This has been convincingly demonstrated by J.W. TELLEGEN, *Gaius Cassius and the Schola Cassiana in Pliny's Letter VII 24.8, SZ 105* (1988), pp. 263-311.

⁵⁵⁰ The most representative adherent of this view is F. SCHULZ, *History of Roman Legal Science*, Oxford 1946 (repr. 1967), pp. 43-45, 108-109. Recently, also T. REINHARDT, *Marcus Tullius Cicero. Topica*, Oxford 2003, pp. 53-72, assumed that there was a clear distinction between jurists and advocates. For a critical and alternative view, see O.E. TELLEGEN-COUPERUS - J.W. TELLEGEN, *Nihil hoc ad ius, ad Ciceronem*, RIDA 53 (2006), pp. 381-408.

⁵⁵¹ T. G. LEESEN, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies*, Boston-Leiden 2010.

sed. In the second part, the modern literature on the topic will be critically assessed. In the third part, it is demonstrated that the legal problem can be connected to legal practice and that the arguments were born from rhetoric. The fourth part, finally, is about the way in which the controversy was decided upon.

2. *Gai., 4.114: Text and Controversy*

Superest ut dispiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciatur actori, quid officio iudicis conveniat, utrum absolvere, an ideo potius damnare, quia iudicii accipiendi tempore in ea causa fuerit, ut damnari debeat. Nostri praeceptores absolvere eum debere existimant, nec interesse cuius generis sit iudicium; et hoc est, quod vulgo dicitur Sabino et Cassio placere omnia iudicia absolutoria esse de bonae fidei iudiciis autem idem sentiunt, quia in eiusmodi iudiciis liberum est officium iudicis. Tantundem et de *in rem* actionibus putant, quia *formulae verbis* id ipsum exprimitur quibus petentur et ad interdum enim sunt etiam in personam tales actiones in quibus exprimitur actori qu paratus ad actoris actum fuerit.⁵⁵²

It remains for us to examine what befits the office of the judge when the person against whom an action is brought satisfies the plaintiff before a judgement has passed on the case,

but after acceptance of the legal proceedings, whether he should absolve him or rather condemn him because, at the time of the *litis contestatio*, he was in such a position that he had to be condemned. Our teachers think that he has to absolve him, irrespectively of the kind of action. And this is because it is commonly said that Sabinus and Cassius think all actions are absolutory. ... in regard to *bonae fidei iudicia*, they hold the same view, because in cases of this kind the office of the judge is discretionary. In regard to *actiones in rem* as well, they hold the same view, because this is expressly stated in the words of the *formula* ... there are *actiones in personam* of this kind as well in which this is stated ...

The text has been rendered here according to Baviera's edition. It is clear that particularly the second part of the text contains considerable lacunae. Several suggestions have been made to partially complete them. However, too many letters are missing to provide an emendation with any degree of certainty. In the following, we will cite the additions proposed by Krüger because they have been included in a note by Baviera as well. To avoid misinterpretations, the bare text as it is cited by Studemund in his *apographum* will be taken as the starting point of our analysis.⁵⁵³

'*Diversae scholae auctoribus de stricti iuris iudiciis contra placuisse*', de bonae fidei iudiciis autem idem sentiunt, quia in eiusmodi iudiciis liberum est officium iudicis. Tantundem et de *in rem* actionibus putant, quia *formulae verbis* id ipsum exprimitur, '*ita demum reum condemnandum esse, nisi arbitrato iudicis rem restituerit.*' ... sunt etiam in personam tales actiones in quibus exprimitur '*ut arbitretur iudex, quomodo reus satisfacere debeat actori quominus condemnetur.*'

⁵⁵² For the text, see *Fontes iuris Romani anteiustiniani, II: Auctores*, eds. I. BAVIERA - I. FURLANI, Firenze 1940 (repr. Firenze 1964), p. 176. The translation of this and other texts are our own.

⁵⁵³ G. STUEMUND, *Gaii Institutionum. Commentarii Quattuor*, Osnabrück 1874 (repr. 1965), pp. 226-227.

The authorities of the other school have a different opinion in regard to *iudicia stricti iuris*, but in regard to *bonae fidei iudicia*, they hold the same view, because in cases of this kind the office of the judge is discretionary. In regard to *actiones in rem* as well, they hold the same view, because this is expressly stated in the words of the *formula*, that the defendant be condemned unless he will return the thing according to the judge's finding. ... there are *actiones in personam* of this kind as well in which this is stated that the judge gave an arbitral finding as to how the defendant must satisfy the plaintiff if he is to avoid being condemned.

The text forms part of the fourth book of Gaius' *Institutiones*. In this book, Gaius covers the law of actions. In the paragraphs Gai., 4.103-114, the different ways in which actions could expire are discussed. The text in question is situated at the end of this part, as already suggested by the words 'superest ut dispiciamus'.

Before discussing the text, a few words must be said about the procedure in a civil law trial of the time.⁵⁵⁴ In the late Republic and the early Empire, the regular civil law trial took place in a procedure *per formulas*. This procedure consisted of two distinct stages, the stage *in iure* and the stage *apud iudicem*. When a plaintiff wanted to bring an action against someone, he had to summon him to appear as defendant before the magistrate so that they both entered the stage which was called *in iure*. In this stage, the relevant action was chosen and the *formula* devised. Subsequently, the magistrate could give his consent to bring the case before the judge ('iudicium dare'). Both parties formally had to accept the legal proce-

dings so that the issue was joined ('*litis contestatio*') and the parties could enter the second stage of the procedure. In the stage before the judge, called *apud iudicem*, both parties could defend their cases and the judge had to pass judgement.

The legal question, addressed in Gai., 4.114, is the following: "If a defendant satisfies the plaintiff after the *litis contestatio*, but before the judge has passed a judgement, does the judge have to absolve or condemn him?" The legal question gave rise to two different opinions. Unfortunately, only the Sabinian opinion has completely come down to us. The Sabinians ('*nostri praeceptores*') maintained that the judge had to absolve such a defendant in all legal proceedings without distinction. The argument in support of this view was that it was commonly said that Sabinus and Cassius maintained that all actions contained the possibility of an absolution ('*omnia iudicia absolutoria esse*').

Although the text conveying the other point of view is lacunary, we may assume that it does reflect the opinion defended by the Proculians. Whenever Gaius used the indication '*nostri praeceptores*' in his *Institutiones*, he always referred to the authorities of the other school as well, usually indicating them as '*diversae scholae auctores*'.⁵⁵⁵ Therefore, we may conclude that Gai., 4.114 mentions a school controversy and that, at least in this regard, the editorial emendation is correct.

The Proculians seem to a large extent to have agreed with the Sabinian point of view. In regard to *bonae fidei iudicia*, they held the

⁵⁵⁴ O.E. TELLEGEN-COUPERUS, *A Short History of Roman Law*, London-New York 1993, 53-59; M. KASER - K. HACKL, *Das römische Zivilprozessrecht*, 2nd edn., München 1996, pp. 220-382.

⁵⁵⁵ See the controversies in Gai., 1.196; Gai., 2.37; Gai., 2.123; Gai., 2.200; Gai., 2.216-222; Gai., 3.87; Gai., 3.98; Gai., 3.103; Gai., 3.141; Gai., 3.167a; and Gai., 4.78. In Gai., 2.195, '*nostri praeceptores*' is juxtaposed to '*Nerva vero et Proculus ceterique illius scholae auctores*'. Gai., 2.231 juxtaposes '*nostri praeceptores*' and '*Labeo and Proculus*'.

same view as the Sabinians and prescribed the acquittal of the defendant who had satisfied the plaintiff after the *litis contestatio* and before the judgment. The Proculians took this view because, in these kind of actions, the discretion of the judge was unfettered. The words of the *formula* allowed the judge to condemn a defendant to whatever he was bound to give or do on account of the *bona fides* ('quidquid ... dare facere oportet ex fide bona'). If the defendant had already satisfied the plaintiff, his condemnation would be a violation of the *bona fides*, even though he had only done so after the *litis contestatio*. Therefore, the judge had to absolve him.

In regard to *actiones arbitrariae*, including all *actiones in rem* and some of the *actiones in personam*, the Proculians shared the same view as the Sabinians as well.⁵⁵⁶ These actions included in their *formula* a clause of restitution: 'neque ea res restituetur' or 'unless the defendant will return the thing'.⁵⁵⁷ This clause offered the defendant the possibility to evade a condemnation by returning the thing. The future sense in the clause implies that the restitution could be carried out after the *litis contestatio*. The Proculians maintained that, in this kind of actions, a defendant who had satisfied the plaintiff after the *litis contestatio* had to be absolved, because this possibility was explicitly included in the words of the *formula*.

Although the rest of the text is so lacunary that the true nature of the controversy bet-

ween the Sabinians and the Proculians remains obscure, it is certain that there had existed a difference of opinion. The Sabinian argumentation 'nec interesse cuius generis sit iudicium' and 'omnia iudicia absolutoria esse' seems to imply that there were other jurists who did not agree with it. The Sabinians maintained that a defendant had to be absolved without making any distinction between the different kinds of actions, because all actions were absolutory. This argumentation implies that the opposing jurists did make such a distinction. For the Proculians, the words of the *formula* formed the criterion to make this distinction. If the words of the *formula* allowed the judge to absolve the defendant, he had to do so. In all other cases, the judge had to condemn the defendant, because, at the time of the *litis contestatio*, the defendant was in such a position that he had to be condemned ('quia iudicii accipiendi tempore in ea causa fuerit ut damnari debeat'). Gaius mentions this reasoning in the first lines of the text where he summarizes the controversy. We believe that it is part of the Proculian argumentation. Admittedly, the words are separated in the text from the rest of the Proculian point of view. However, the Proculians who argued that the judge had to condemn a defendant unless the words of the *formula* ordered him otherwise, were in need of an additional, positively formulated, argument in support of their opposing view. In this way, the Proculian argumentation is reconstructed without relying on the editorial emendations.

3. *The Controversy in Gai., 4.114: Modern Theories*

The majority of the modern scholars who attempt to explain the school controversy in Gai., 4.144 make use of the antithesis conservative versus progressive. Many authors, including Karlowa, Betti, Biscardi, Kaser, and Falchi, maintain that the Proculian opinion was traditional, whereas the Sabinian opinion was

⁵⁵⁶ Regarding *actiones arbitrariae*, see M. KASER – K. HACKL, *Das römische Zivilprozessrecht*, 2nd edn., München 1996, pp. 335–339.

⁵⁵⁷ In such litigations, the judge would, after the *litis contestatio*, declare in an interlocutory judgement, called a *pronuntiatio*, whether all premises for a condemnation had been fulfilled. If they were, the judge would order the defendant to proceed to a restitution. If the defendant refused to do so, the judge would condemn him to pay a disproportionate amount of money (the *litis aestimatio*) which was determined under oath by the plaintiff as the value of the thing.

innovative.⁵⁵⁸ Only Stein explains the controversy in another way. This article focuses on the most recent theories, namely those of Kaser, Falchi, and Stein.

The starting point of Kaser's theory was the apparent discord between the Sabinian opinion in Gai., 4.114 that a defendant who had satisfied the plaintiff after the *litis contestatio* had to be absolved and what was stated in Gai., 3.180. In the latter text, it was stated that, in a *iudicium legitimum*, the obligation 'dare oportere' was extinguished by the effect of the *litis contestatio* and replaced by a new obligation 'condemnari oportere'. Kaser elaborated that thought and argued that, although the original obligation was discharged by the consuming effect of the *litis contestatio*, the defendant's responsibility or "Einstehenmüssen" continued to exist. When the defendant satisfied the plaintiff after the *litis contestatio*, this responsibility was brought to an end. According to Kaser, the satisfaction of the plaintiff after the *litis contestatio* was a kind of *datio in solutum*, since the original obligation did no longer exist.⁵⁵⁹ The *datio in solutum* had also given rise to a school controversy. In Gai., 3.168, the question was raised whether a debtor who performed something else instead of what he owed (with the creditor's consent) was released *ipso iure* or *ope exceptionis*? According to the Proculians, a *datio in solutum* liberated a debtor *ope exceptionis*. In case of a satisfaction after the *litis contestatio*, an *exceptio*

could no longer be integrated in the *formula*. Therefore, the Proculians maintained that, in *iudicia stricti iuris*, the judge had to condemn the defendant. The Sabinians, on the other hand, maintained that, in case of a *datio in solutum*, the debtor was released immediately and at civil law. Kaser suggested that the Sabinians may have introduced this innovative reform with regard to a *datio in solutum* in order to enable the judge to release a defendant who had satisfied the plaintiff after the *litis contestatio* as well.

Kaser's theory is not convincing for several reasons. First, there is no demonstrable connection between Gai., 3.168, 3.180 and 4.114. These texts are all in totally different places in Gaius' *Institutiones* and discuss different legal issues. According to Gai., 3.168, a *datio in solutum* took place when the defendant gave something else instead of what was agreed upon in the contract (with the creditor's consent). In the case, as described in Gai., 4.114, the defendant did not satisfy the plaintiff in any other way than agreed upon, but he did so after the *litis contestatio* instead of before. Therefore, the legal problem in Gai., 3.168 and Gai., 4.114 are totally different. Second, the arguments in support of the Sabinian and Proculian opinions that are mentioned in Gaius' *Institutiones* are not taken into account by Kaser. Instead, Kaser adduces new arguments that find no basis in the text.

The most recent theory is that of Falchi which already dates back to 1981. Whereas, in his opinion, the Proculians supported a more traditional conception of the trial procedure, the innovative Sabinians abandoned this traditional legal structure of the trial procedure and gave a more pragmatic interpretation to it. According to Falchi, the Proculians maintained that the obligation 'dare oportere' was extinguished definitely and immediately by the effect of the *litis contestatio* and replaced by a new obligation 'condemnari oportere'. Since

⁵⁵⁸ O. KARLOWA, *Römische Rechtsgeschichte*, I, Leipzig 1885, p. 664; E. Betti, *Diritto romano, I: Parte generale*, Padova 1935, pp. 612-616; A. Biscardi, *Lezioni sul processo romano antico e classico*, Torino 1968, pp. 173-176, 346-353; M. Kaser, *Restituere als Prozessgegenstand. Die Wirkungen der litis contestatio auf den Leistungsgegenstand im römischen Recht*, München 1968, pp. 177-190; G.L. Falchi, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, pp. 183-199.

⁵⁵⁹ More than a decade earlier, H. PIETSCH, *Satisfaction nach der Litis Contestatio*, SZ 69 (1952), pp. 427-439, had already suggested that there was a connection between the Proculian opinion in Gai., 4.114 and their opinion about *datio in solutum*, as stated in Gai., 3.168.

the original obligation had been extinguished by the *litis contestatio*, the Proculians argued that the satisfaction by the defendant after the *litis contestatio* was pointless so that the judge had to condemn him. Falchi maintained that the Proculian opinion was influenced by the position of the *veteres* in Gai., 3.180 (see *supra*) and by the position of Servius Sulpicius Rufus about *novatio*. The view of Servius Sulpicius Rufus was expressed in Gai., 3.179 together with the opinion of the classical jurists. Servius Sulpicius Rufus maintained that a *novatio* was effected immediately ('statim') even if the second obligation was invalid (because of a failing condition). According to Falchi, the Proculian argumentation and that of Servius Sulpicius Rufus were very similar because, in both cases, the original obligation had been extinguished, respectively by a *litis contestatio* and by *novatio*. The classical jurists, on the other hand, maintained that a *novatio* was brought about only if the second obligation was valid and efficient. The Sabinians had followed the opinion of the classical jurists and stated that the obligation 'dare oportere' continued to exist until the moment the judge passed a judgment on the case. According to Falchi, this explains why the Sabinians held it possible for a defendant to fulfil the obligation even after the *litis contestatio* and maintained that the defendant had to be absolved in all kinds of actions.

Falchi's theory is not convincing either. First, there is a lack of support for his view in the sources. Nowhere in the sources, it is stated that the Proculians held the same opinion as Servius Sulpicius Rufus in regard to *novatio*, nor that the Sabinians held the same view as the classical jurists. In Gai., 3.179, the opinion of Servius Sulpicius Rufus and of the classical jurists is mentioned without any reference whatsoever to the law schools. The same holds for Gai., 3.180. This text mentions the opinion of the *veteres* without any reference to the Proculians. Second, like Kaser, Falchi

does not take into account the arguments in support of the Sabinian and Proculians opinions that are mentioned by Gaius. Finally, one more critical remark can be raised against each and every theory that explains the controversies in terms of conservative and progressive. The labels conservative and progressive are modern labels. Whenever they are used to denote and explain phenomena and movements in Antiquity, these terms are used anachronistically.⁵⁶⁰

Stein, finally, did not explain the controversy by means of the antithesis conservatism/progressiveness. He qualified the controversy as a dispute concerning the interpretation of words ('interpretatio verborum'), particularly the words of the *formula* in question. The Sabinians interpreted the words of a *formula* broader than the Proculians who favoured a more strict and literal interpretation. This difference explains why the Sabinians maintained that the judge could absolve a defendant who had satisfied the plaintiff after the *litis contestatio* in all kinds of actions. The Proculians, on the other hand, agreed only as far as *bonae fidei iudicia* and *actiones in rem* with a *clausula arbitraria* were concerned, because the words in their *formulae* authorized the judge to absolve a defendant. Since the words of the *formula* of *iudicia stricti iuris* did not grant the judge this right, and "since all his powers derived from the *formula*, the Proculians held that in such actions he could not formally absolve the defendant (although they would not, of course, have allowed the plaintiff to claim a second payment)".⁵⁶¹

Stein was correct in stating that the conflict at the root of the controversy concerned a problem of *interpretatio verborum*, i.e., of

⁵⁶⁰ Cf. H. BUTTERFIELD, *The Whig Interpretation of History*, London 1931 (repr. New York 1978).

⁵⁶¹ P. STEIN, *The Two Schools of Jurists in the Early Roman Principate*, *CLJ* 31 (1972), p. 18.

the interpretation of the words of the *formula*. However, he failed to recognise that the Sabinians had built up a reasoning by analogy and the Proculians a reasoning *a contrario* (see *infra*). Instead, he used the antithesis *verba* and *voluntas* to explain their opposing opinions. However, this antithesis can only be applied when the meaning of a text admits of more than one interpretation and this was not the case. The legal problem only arose when the words of the *formula* did not state anything about the discretionary power of the judge. In that case, the legal question arose what befitted the office of the judge.

4. *Ratiocinatio in Gai., 4.114*

Two parties had been involved in a litigation, probably in a *iudicium stricti iuris*. After they had formally accepted the legal proceedings and had joined the issue, the defendant (B) decided, for one reason or another, to satisfy the plaintiff (A) and the question arose whether the judge had to absolve or condemn him. Evidently, the defendant claimed to be acquitted because he had satisfied the plaintiff. The latter, on the other hand, maintained that the judge had to condemn the defendant. The praetor usually granted a *iudicium stricti iuris* when an obligation was at stake that had been created by a *stipulatio*. The object of a *stipulatio* could be a *dare* or a *facere*. If, in this case, the obligation would have consisted in a *dare*, a giving of money or a particular thing, the judge would condemn the defendant to give that sum of money or the value of that particular thing. For the plaintiff, there would be no difference whether he received it before or after the *litis contestatio*. If, however, the obligation consisted of a *facere*, it would make a difference for the plaintiff. He could have asked another person to perform the particular activity for him or he could have incurred some kind of liability as a result of the non-performance by the first person. Therefore, it is like-

ly that, in this case, the obligation that gave rise to the procedure consisted in performing some activity and the *formula* was that of an *actio ex stipulatu*. This hypothesis is supported by the fact that in Paul, D. 45.1.84 reference is made to the same controversy in a case where the defendant had promised to build an *insula* and had discharged this promise after the plaintiff had joined issue (see *infra*, § IV).

The question addressed in the litigation was no longer whether or not the defendant was accountable for what he was accused of. The new legal question that had to be answered was whether or not the defendant who had satisfied the plaintiff after the *litis contestatio* had to be absolved. The defendant probably consulted the Sabinians who gave a *responsum* to his advantage. They held the opinion that the judge had to absolve him. The plaintiff, on the other hand, may have addressed the Proculians. They maintained that the judge had to condemn the defendant. Since the stage *apud iudicem* lent itself perfectly for argumentations in order to convince the judge, the Sabinians and the Proculians had to substantiate their opinions in a convincing manner.

In order to build up a convincing argumentation, the jurists of the law schools made use of rhetoric. In his *Topica*, Cicero (*Top.*, 17.66) confirms that the jurists were acquainted with rhetoric and topics. He asserted that a careful study of the topics of arguments would enable orators, philosophers and also jurisconsults to argue fluently about questions on which they had been consulted.

For jurists, the main information on rhetoric and topics was contained in Cicero's *Topica* and Quintilian's *Institutio Oratoria* and, to a lesser extent, in Cicero's *De inventione*.⁵⁶²

⁵⁶² Aristotle's *Topica* are of use only to a minor extent, since Aristotle focuses on dialectical topics rather than on rhetorical topics.

The former work was written by Cicero in 44 BC for his friend Trebatius, who was a jurist. The significance of Cicero's *Topica* is that it was not primarily composed for dialecticians or advocates, but for jurists and that its examples pertained to private law so that the theory of *topoi* was adapted to the jurists' needs. The *Institutio Oratoria*, on the other hand, is a textbook for students that was published in 94 or 95 AD and covers the entire study of rhetoric. *De inventione*, finally, is an early work by Cicero about rhetorical *inventio*, i.e., about the method that is used for the systematic discovery of arguments. In this work, Cicero refers to the system of *inventio*, which is ascribed to Hermagoras of Temnos and dates from the middle of the 2nd century BC.⁵⁶³ The cornerstone of Hermagoras' system seems to be the *status* theory. Hermagoras determined that a conflict could either relate to facts or to the interpretation of a law or a written text. If the discussion turned on the interpretation or the application of a written text, one of the following four *status legales* was pertinent: 1) *scriptum et voluntas*; 2) *leges contrariae*; 3) *ambiguitas*; or 4) *ratiocinatio*. Although Cicero (*De or.*, 1.5) seems to have been ashamed of the schoolish, overtly systematic, and immature nature of his *De inventione*, the treatise provides useful information on the four *status legales* and on the ways of argumentation whenever a controversy turned upon written texts.

1) The Sabinian View

The Sabinians maintained that the judge had to absolve the defendant irrespectively of the kind of action ('*nec interesse cuius generis*

sit iudicium') because it was commonly said that Sabinus and Cassius thought all actions were absolutory ('*omnia iudicia absolutoria esse*'). How did the Sabinians find this argumentation?

The Sabinians built up their argumentation by using an analogous reasoning. Since the conflict involved the interpretation of the word of a *formula*, one of the four *status legales* was pertinent. It was a matter of *ratiocinatio* (i.e., a reasoning in terms of analogy and reasoning *a contrario*) when one party maintained that the case was not provided for by a rule, whereas the other party wanted to subsume the case under an already existing rule for analogous cases.⁵⁶⁴

In regard to *bonae fidei iudicia* and *actiones arbitrariae*, there was a common agreement that a judge had to absolve a defendant who had satisfied the plaintiff between the *litis contestatio* and the judgement, for the words of the *formulae* of these actions allowed the judge to do so. By analogy with these two kinds of procedures, the Sabinians maintained that that all actions contained the possibility of an absolution ('*omnia iudicia absolutoria esse*').

We can now reconstruct the argumentation, which the Sabinians have used in support of their view:

- Since the words of the *formulae* of *bonae fidei iudicia* and of *actiones arbitrariae* allow a judge to absolve a defendant who had satisfied the plaintiff after the *litis contestatio*,
- all actions contain the possibility of absolution in such a case.
- The defendant had satisfied the plaintiff after the issue was joined and before judgement.
- Therefore, the judge had to absolve the defendant.

⁵⁶³ About Hermagoras' *status* theory, see, among others: A.C. BRAET, The Classical Doctrine of *status* and the Rhetorical Theory of Argumentation, *Philosophy and Rhetoric* 20 (1987), pp. 79-93; A.C. BRAET, Variationen zur Statuslehre von Hermagoras bei Cicero, *Rhetorica* 7 (1989), pp. 239-259; V. LANGER, *Declamatio Romanorum*, Frankfurt 2007, pp. 50-54.

⁵⁶⁴ Regarding *ratiocinatio*, see Cic., *De inv.*, 2.148-153.

2) *The Proculian View*

Unlike the Sabinians, the Proculians maintained that the judge had to condemn the defendant because, at the time of the *litis contestatio*, the defendant was in such a position that he had to be condemned. As suggested above, the *status* of the conflict was that of *ratiocinatio*. According to the Proculians, the Sabinian reasoning *per analogiam* did not make sense. In the part about *ratiocinatio* in *De Inventione*, Cicero discussed some of the *topoi* that could be used by litigants who opposed an analogous reasoning. The relevant text is Cic., *De inv.*, 2.151:

Contra autem qui dicet, similitudinem infirmare debet; quod faciet, si demonstrabit illud, quod conferatur, diversum esse genere, natura, vi, magnitudine, tempore, loco, persona, opinione; ...

Against him who says this, he will have to invalidate the similarity. This he will do if he demonstrates that what is brought together for comparison differs in kind, nature, meaning, importance, time, place, person or opinion; ...

If the Proculians wanted to defend their opinion against the Sabinians, they had to invalidate the similarity. The Proculians could do so by demonstrating that there was a difference between *bonae fidei iudicia* and *actiones arbitrariae*, on the one hand, and other actions, on the other. The distinction between these groups of actions was that they had different *formulae* with different ranges. The words of the *formula* of *bonae fidei iudicia* ('quidquid ... dare facere oportet ex fide bona') attributed an ample discretion to the judge and empowered him to absolve the defendant who had satisfied the plaintiff after the *litis contestatio*. In the same vein, the *formulae* of *actiones in rem* and *actiones in personam* with a clause of restitution, explicitly authorised the judge to absolve such a defendant. Other kinds of

formulae, like those of an *actio ex stipulatu* ('quidquid ... dare facere oportet'), did not attribute an ample discretion to the judge. On the basis of the words of the *formula*, the judge was not allowed to take this decision and absolve the defendant who had satisfied the plaintiff after the *litis contestatio*.

Baviera acknowledged that the Proculians built up their argumentation by underlining the difference between *bonae fidei iudicia* and *actiones arbitrariae*, on the one hand, and *iudicia stricti iuris*, on the other.⁵⁶⁵ The procedure of the former two kinds of actions allowed the judge more freedom to take his decision. Therefore, it would have been illogical to condemn the defendant who had already satisfied the plaintiff. In *iudicia stricti iuris*, however, the judge did not have this kind of liberty and needed to observe the praetor's *formula*. Baviera did notice the influence of rhetoric in the arguments, mentioned by Gaius. However, biased as he was by the dogmatic paradigm, he refrained from pursuing this point and disregarded the possibility that the Proculians actually used rhetoric to find these arguments.

To make their opinion more convincing, the Proculians may also have used the *locus a tempore*.⁵⁶⁶ The judge had to condemn the defendant in a certain number of cases because, at the moment of the *litis contestatio*, he was in such a position that he had to be condemned. They stressed that the moment that had to be taken into account by the judge to decide whether or not the defendant was guilty, was the *litis contestatio*. If, therefore, a defendant satisfied the plaintiff after that crucial moment, this could not be taken into account.

The following reconstruction of the Proculian argumentation can be made:

⁵⁶⁵ G. BAVIERA, *Le due scuole dei giureconsulti romani*, Firenze 1898 (repr. Roma 1970), p. 94.

⁵⁶⁶ About the *locus a tempore*, see Quint., *Inst.*, 5.10.42-48.

- Since there is a difference between the words of the *formulae* of *bonae fidei iudicia* and *actiones arbitrariae*, on the one hand, and those of other actions, on the other, as far as the discretion of the judge is concerned,
- not all actions allow the judge to absolve the defendant who satisfied the plaintiff after the *litis contestatio*.
- At the time of the *litis contestatio*, the defendant was in such a position that he had to be condemned.
- Therefore, the judge had to condemn the defendant, even though he had satisfied the plaintiff after the *litis contestatio* and before judgment.

5. *The Controversy Decided*

It is not clear how this case was solved. Gaius may have mentioned it in the part of *Inst.*, 4.114 that is missing. However, in Justinian's Digest, there is one text that deals with the same legal problem, Paul, D. 45. 1.84:

PAULUS libro septuagensimo secundo ad edictum. Si insulam fieri stipulatus sim et transierit tempus, quo potueris facere, quamdiu litem contestatus non sim, posse te facientem liberari placet: quod si iam litem contestatus sim, nihil tibi prodesse, si aedifices.

PAUL, book 74 ad edictum. If I have made a *stipulatio* for the construction of an *insula* and the time in which you could have made it passed, as long as I have not joined issue, it is decided that you can be discharged by doing so. But if you build it when I have already joined issue, this is of no help to you.

This text demonstrates that, in the early third century, the Proculian opinion was still circulating. Not the so-called innovative view of the Sabinians but the "traditional" opinion

of the Proculians seems to have prevailed in the time of Paul.

In Justinian's time, the formulary procedure had long been obsolete and had been replaced by the *cognitio extraordinaria*. This procedure took place in one stage before an imperial judge. There was no *litis contestatio*, only a 'iudicium accipere', an 'accepting proceedings'.⁵⁶⁷ Therefore, a legal problem, as described in Gai., 4.114, could no longer exist. Still, Justinian deemed it necessary to solve this controversy. The relevant text is *Inst.*, 4.12.2:

Superest ut admoneamus; quod si ante rem iudicatam is cum quo actum est satisfaciatur actori, officio iudicis convenit eum absolvere, licet iudicii accipiendi tempore in ea causa fuisset, ut damnari debeat: et hoc est, quod ante vulgo dicebatur omnia iudicia absolutoria esse.

It remains for us to notice that if someone against whom an action is brought satisfies the plaintiff before judgement, it befits the office of the judge to absolve him, even though, at the time he accepted proceedings, he was in such a position that he had to be condemned. And this because it used to be said that all actions are absolutory.

In this text, Justinian indirectly states that the opinion of the Sabinians has prevailed without explicitly referring to this school or to the school controversy.

⁵⁶⁷ This phrase, which is used in *Inst.* 4.2.12, has been translated in various ways. Some have: 'at the time that proceedings began' e.g., J.A.C. THOMAS, *The Institutes of Justinian. Text, Translation and Commentary*, Oxford 1975, pp. 312-314; others have 'at the time issue was joined', e.g., *Justinian's Institutes, Translated with an Introduction* by P. BIRKS and G. MCLEOD, Ithaca NY 1987, p.139. In our view, the German translation by C.E. Otto, B. SCHILLING, and C.F.F. Sintenis, *Das Corpus juris civilis in's Deutsche übersetzt, I*, Leipzig 1839, p. 194 is to be preferred: 'wenn er gleich zur Zeit, da er sich auf den Process einliess...

6. Conclusion

In this article it is demonstrated that also the controversy mentioned in Gai., 4.114 can be explained by connecting jurisprudence and legal practice on the one hand, and jurisprudence and rhetoric, on the other. The controversy is special because a large part of the text is missing and because, as a result, it contains only one side of the controversy. The legal problem that gave rise to the school controversy in Gai., 4.114 has been reconstructed as follows: "If a defendant in an *actio ex stipulatu* satisfies the plaintiff after the *litis contestatio*, but before the judge has passed a judgement on the case, does the judge has to absolve or condemn him?" Someone had promised to another person to do something for him within a certain time. However, he failed to keep his promise and the other person procured an *actio ex stipulatu* from the praetor. After the two parties had joined the issue, the defendant decided to satisfy the plaintiff. As a result, it became unclear whether the judge had to absolve the defendant because he had done what he had promised to do, or to condemn him because he had done so after the *litis contestatio*, i.e., too late. The two parties may have turned to the Sabinians and the Proculians for advice. According to the Sabinians, the judge had to absolve the defendant in all legal

proceedings without distinction because all actions contain the possibility of an absolution. In order to make their advice convincing for the judge, they applied a rhetorical reasoning by analogy (called *ratiocinatio*). In regard to *bonae fidei iudicia* and *actiones arbitrariae*, there was a common agreement that a judge had to absolve the defendant, because the words of the *formulae* of these actions allowed the judge to do so. By analogy with these two kinds of procedures, the Sabinians maintained that that all actions contained the possibility of an absolution. The Proculians agreed with the Sabinians in so far as the words of the *formulae* allowed the judge to absolve the defendant. However, they stressed the difference between these kinds of *formulae* and those that did not give liberty to the judge by means of a rhetorical reasoning *a contrario*. In order to reinforce their argumentations, they added an argument of time, namely that the judge had to condemn to defendant because, at the time of the *litis contestatio*, he was in such a position that he had to be condemned. It may be clear now that also this controversy has originated in legal practice, because the leaders of both schools have defended contradictory views in the second stage of a trial, and that also in this controversy rhetorical arguments have been used to support these views.

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