CRASSUS’ PLEA FOR LEGAL KNOWLEDGE IN CICERO’S DE ORATORE I 179

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1 Introduction

Cicero’s De oratore is one of those works that traditionally belong to the field of classics but is today beginning to be claimed (again) as belonging to Roman law as well. In this book, Cicero gives his mature views on rhetoric, oratory, and philosophy. Casting it in the form of a dialogue, Cicero allows his two main speakers, Crassus and Antonius, to illustrate their arguments with examples from legal practice. Both were outstanding politicians and both acted as advocates in many important trials.

Works like the De oratore tend to fall between two disciplines. The examples which Crassus and Antonius employ form an obstacle to modern translators and commentators who are not well acquainted with Roman law. They often have problems in understanding them and, consequently, in translating them properly. It seems they do not realise that they require assistance from specialists in Roman law.1

Unfortunately, Romanist literature itself will not be really helpful. In the nineteenth and early twentieth centuries, Romanists paid attention to oratorical works but tended to adapt the texts to their dogmatical approach. In contrast, modern Romanists tend to ignore Cicero’s works because they regard them as belonging to rhetoric and philosophy and as such as not relevant for a study of Roman law. So far, it still seems to be generally accepted that rhetoric and law were two disciplines that were kept strictly apart.2 As a result, translators and commentators do not find much there to aid them.

1 Also in the literary work by Pliny the Younger, the translations of references to Roman law tend to go wrong. See J.W. Tellegen, The Roman Law of Succession in the Letters of Pliny the Younger, Zutphen 1980, 66 (IV 2), 92 (V 1), 125 (VII 1), and 146 (VIII 16).

2 See, however, T.G. Leesen, Gaius Meets Cicero, Tilburg 2009.

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However, modern Romanists are not justified in ignoring this kind of work. All members of the Roman upper class, including the persons we know as jurists, were taught rhetoric and rhetoric was taught by using legal disputes. In fact, such works may be valuable for the study of Roman law since they have not been manipulated by Justinian’s compilers. Moreover, De oratore dates from 55 BC but the dialogue is situated in 91 BC, so that it contains information about the state of Roman law at a time of which our knowledge is very limited.

In this contribution to the Festschrift for Philip Thomas, we would like to draw the attention to an almost forgotten text in Cicero’s De oratore, I 179. It deals with a legal problem which, in our view, has not been interpreted properly in modern translations and commentaries. In the nineteenth century, it was discussed in Romanist literature, but today it is hardly ever mentioned and, when it is, the interpretation is inadequate. In our view, the text has never been explained in its proper context.

According to Cicero, or rather Crassus, the case mentioned in De oratore I 179 is comparable to that in I 178. The issue is the extent to which they are comparable. It is generally assumed that both texts deal with easement or, to use the Roman legal term, servitudes. On that basis, I 179 has been interpreted in various ways. In our view, only the first text deals with servitude, the second does not. I 179 must be interpreted differently and the connection between the two texts must be another one altogether.

We will begin by summarising the modern interpretations of both De oratore I 178 and I 179. Then we will focus on I 179, critically discussing these interpretations and offering an alternative. In the last section we will explain how, in our view, I 179 is connected with I 178 and what point Crassus wanted to make.

2 Modern interpretations of De oratore I 178 and 179

The modern interpretation of De oratore I 179 is based on its connection with I 178. Therefore, it is necessary to begin with the latter. De oratore I 178 reads:

Quid? Nuper, cum ego C. Sergi Oratae contra hunc nostrum Antonium iudicio privato causam defenderem, nonne omnis nostra in iure versata defensio est? Cum enim M. Marius Gratidianus aedis Oratae vendidisset neque servire quandam earum aedium partem in mancipi lege dixisset, defendebamus, quicquid fuisset incommodi in mancipio, id si venditor scisset neque declarasset, praestare debere. (And again, not long ago, when I appeared on behalf of gaius Sergius Orata in a civil suit before a single judge, the opposing counsel being my friend Antonius here, wasn’t my entire plea centred around the law? As you know, Marcus Marius Gratidianus had sold a house to Orata without stating in the terms of the sale that a certain part of the house was subject to an easement. I argued that the seller was obliged to take responsibility for any defect if he had been aware of it at the time of the sale but had failed to indicate it.)

3 For the text of this and the other text from De oratore, the Teubner edition by K. Kumaniecki, Leipzig 1969, was used. The translation is by May and Wisse in Cicero, On the Ideal Orator, (Translated with Introduction, Notes, Appendices, Glossary and Indexes by James M. May & Jakob Wisse), New York-Oxford 2001, 98-99.
The legal problem in this case seems to be rather straightforward: the seller of a house, someone called Marius Gratidianus, had sold his house to a certain Sergius Orata, but had failed to tell him about a servitude that rested on the house. When Orata discovered this, he sued Gratidianus. From another source, De officiis 3.16.67, we know that the case was more complicated. In fact, it appears that, a few years earlier, Orata had sold the same house to Gratidianus. Crassus, now acting for Orata, urged the law and claimed that the seller, who knew about the servitude but had not mentioned it, should pay damages on the basis of the contract. In contrast, Antonius, who acted for Gratidianus, argued the case on the basis of equity: He claimed that Orata must have known about the servitude and therefore that it had not been necessary for Gratidianus to mention it. In modern literature, this text has given rise to a discussion about the question whether Orata was allowed to rely on the *actio empti* or whether this action had been available for this situation in Cicero’s day.4

Now we come to the main text of this contribution, De oratore I 179. It reads as follows:

Quo quidem in genere familiaris noster M. Buculeius, homo neque meo iudicio stultus et suo valde sapiens et ab iuris studio non abhorrens, simili [in re] quodam modo nuper erravit: nam cum aedis L. Fufio venderet, in mancipio lumina, uti tum essent, ita recepit. Fufius autem, simul atque aedificari coeptum est in quadam parte urbis, quae modo ex illis aedibus conspici posset, egit statim cum Buculeio, quod, cuicumque particulae caeli officeretur, quamvis esset procul, mutari lumina putabat. (In this same sphere, one of my acquaintances, Marcus Buculeius, no fool in my opinion, and a mighty sage in his own, a man with no distaste for the study of law, somehow went wrong in a similar case not long ago. For when selling a house to Lucius Fufius, he concluded in the terms of sale a clause mentioning the lights ‘such as they are now’. Then Fufius, the moment that some construction work was begun in a part of the city that was only barely visible from the house in question, immediately filed suit against Buculeius. For, in his opinion, the lights were being altered if any tiny part of the sky was obstructed, no matter how far away it was.)

In the early nineteenth century, this text was discussed by several German Romanists and in the second half of that century by Roby.5 Because of the words “in this same sphere” and “in a similar case”, it has generally been assumed that the legal problem in I 179 also concerned servitude. However, interpretations differed as to the mistake Buculeius had made. For the early Romanist literature, we will concentrate on Roby’s view.

Roby was the first to focus on the words “in mancipio … recepit”. In his view, they mean “he reserved from the conveyance”. Roby suggests that Buculeius had inserted in the conveyance a general reservation of “the lights as they now are” or “for all who

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5 H.J. Roby, *Roman Private Law in the Times of Cicero and of the Antonines*, I, Cambridge 1902 in an appendix on “Recipere applied to servitudes”, 534-543 which had been published in the Journal of Philology XV (1886). On 537, Roby refers to older literature: Rein, *Civil-Recht, Griesinger, De servitute luminiun (1819) 128-154 and M. Voigt, *Ius naturale* III 306. We have not been able to check these works.
have lights according to their present condition”. Apparently, he assumed that the house he sold was to be the servient tenement. Roby offers several possible explanations why Buculeius inserted this clause; from excess of caution, in order to show his knowledge of legal formulae; or to protect his own light or the light of some neighbouring house against Fufius. He may have made an erroneous use of a common general form. Fufius, however, ignoring the technical sense of “recipitur”, chose to take it as a guarantee of his own light against the world. Consequently, he assumed that the house he had bought was the dominant tenement. Roby qualifies this reaction as doubly wrong, because (1) in such formulae, “recipitur” did not mean “a promise is given” but “a right is reserved”, and (2) Fufius would have to show not merely that some portion of the sky which was previously visible from his house was now obscured by the new building, but that his light was thereby reduced.

More recently, Watson discussed *De oratore* I 179 in the context of the Roman law of servitudes. Unlike Roby, he thinks that “the reported declaration in the *mancipatio, uti tunc esset, ita receptit*, corresponds to a standard clause in a *mancipatio uti nunc sunt, ut ita sint* which had the meaning that a certain servitude was due from a neighbour. In this particular instance, the purchaser, L. Fufius, interpreted the clause as meaning that any new building in any part of the city which could be seen from his house amounted to a breach of the seller’s warranty”. According to Watson, Cicero “may merely mean that such a clause which apparently implies that what appear to be exercised as servitude rights are in fact servitude rights is inappropriate for *lumina* and is easily capable of being misinterpreted by a purchaser”.

Nelson disagreed with Roby’s interpretation. He also assumed that the problem is about the servitude of light, but he differed from Roby in that it was caused by the word *recipere*. In law and business, this word was commonly used in the sense of “sich vorbehalten, klausulieren”, so that it could not have been ambiguous. In the deed of conveyance, Buculeius had included the clause “harum aedium emptioni accesserunt lumina ita, uti nunc sunt”, in other words, he had guaranteed that the right to light came with the sale of the house. His mistake was that he chose a formulation that was too general so that Fufius could apply it not only to a small circle of neighbours but also to people living much farther away.

May and Wisse, finally, add in a footnote to their translation of I 179 that the case is not entirely clear, but that Buculeius probably meant to indicate that the house he was selling was subject to easements. The latter qualification is confusing, for it suggests that the house sold by Buculeius was the servient tenement whereas, in their translation, May and Wisse indicated that it was the dominant tenement.


7 According to Nelson (note 4) 67, Watson followed Roby, but we do not think he did. Not only does he not refer to Roby, but he also gives a different interpretation of Buculeius’ mistake.

8 May & Wisse (note 3) 99 note 140. In this note, they refer to note 131 and their comment on *De oratore* I 173. There they describe the servitude of light as the right to construct a window looking out on a neighbour’s land.
From the above, it may be concluded that all authors assume that in *De oratore* I 179, *lumina* refers to a servitude of light but that they disagree about the meaning of “recipere”: Some think it means “to guarantee” a right to the buyer, while others maintain that it means “to reserve” a right for the seller. Also, the mistake made by Buculeius is interpreted in different ways. In the following section, we will comment on existing interpretations and propose one of our own.

3 Old and new views of *De oratore* I 179

The discussion of *De oratore* I 179 seems to turn on the sentence “Nam cum aedis L. Fufio venderet, in mancipio lumina, uti tum essent, ita recepit”, and, particularly, on the words “lumina”, “recepit” and “mancipio”.

First, we will discuss the meaning of the word *lumina*. Sutton and Rackham translate it as “rights to light”, followed by Van Rooijen-Dijkman and Leeman with the Dutch equivalent “lichtrechten”.9 Apparently, they assume that a servitude of light is meant. Courbaud has “les vues et les jours”. Because he translates the beginning of I 179 as “[d]ans une autre affaire de servitude”, it is more than likely that he also interprets *lumina* as a servitude of light.10 Only May and Wisse translate it as “lights”. In our view, the latter translation is correct. There are several reasons why we think I 179 does not deal with servitudes.

First and foremost, terminology poses a problem. When, in the Digest, the word *lumen* or *lumina* is used in connection with a servitude, it is always connected with the word *servitus* or *ius*.11 However, it is also used in other contexts, for instance in D. 7.1 in connection with usufruct and in D. 19.2 in connection with *locatio conductio*: in both cases, *lumina* just means “windows”.12 In I 179, only *lumina* are mentioned, not *iura luminum*. Therefore, it seems that *De oratore* I 179 is not about a servitude of light but about light *tout court*.

There are also reasons of substantive law that make it unlikely for servitudes to be intended. The right to light is one of the principal urban servitudes. The owner of the servient tenement has to refrain from building in such a way as to interfere with the light of the dominant tenement. If he does, the owner of the dominant house can sue him with a *vindicatio servitutis*. The servitude of light is a real right; it does not end when the house is sold. It is clear that, like all servitudes, the right to light can exist only between neighbouring houses. This is also confirmed in texts by Gaius and Paul.13

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10 *Cicéron, De l'orateur, livre premier*, (Original text and translation by Edmond Courbaud), Paris 1922 (reprint 1967) 63-64.

11 See Paul D. 8.2.4; Ulp. D. 8.2.15 and 17.


13 See Gai. Inst. II 14 and Gai. D. 8.2.2.
In *De oratore* I 179, Crassus does not mention either a dominant or a servient tenement; he only says that Fufius assumed he had acquired a house with the guarantee that the light would remain as it was. Moreover, even if there had been a servitude of light, this guarantee would have been completely superfluous because the servitude neither could nor would in any way be influenced by the sale of the house. Finally, Fufius would not have sued Buculeius to maintain his right, but the person whose building was blocking his view. Therefore, also according to substantive law, *lumina* cannot mean a servitude of light but must be translated as “light”.

The second word to be discussed is “recepit”. It has been translated as “to make something the subject of a reservation” and as “to give an assurance that something is or will be the case”. The first translation cannot be correct because there is nothing in the text to indicate that Buculeius was involved in another neighbouring house for which he would want to make this reservation. But the second one can be correct.

In classical law, *recipere* was used in a number of situations. The praetorian edict knew the *recepta*, undertakings or informal promises by an arbitrator, or a banker, or by a carrier by sea, an innkeeper, or a stable keeper. They belonged to the so-called *pacta praetoria*, that is, they were protected by special praetorian remedies. The *receptum* of a sea carrier, for instance, was made as a guarantee that “everything would be safe” and was added to the underlying contract of *locatio conductio operis* (here that of carriage by sea). It created an obligation *stricti iuris* and was protected by an *actio de recepto*. The variety of cases in which in classical law these promises were protected, suggests that, originally, they were not restricted to the five instances mentioned, but were generally applicable. In other words, it could also be inserted as an additional agreement to a contract of sale.

That brings us in the third place to the words “in mancipio”. It has been translated in two different ways: Twice as “conveyance” referring to the conveyance of the property of the house to Fufius, and also twice as “the terms of sale”. In the previous text, I 178, the clause *in mancipio lege* has been translated three times as referring to sale and once to conveyance. Of course, *mancipium* has different meanings. In legal texts, it is often used in the sense of *mancipatio*, the conveyance of *res mancipi* according to *ius civile*. Also Nelson interprets “in mancipio” as conveyance, explaining that it means *in lege mancipi*. He translates the relevant phrase as follows: “er liess in die...

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14 By Roby (note 5), Watson (note 6) and Nelson (note 7) respectively.
16 Labeo in D 4.9.3.1 was the first to allow an exception for *force majeure* against an *actio de recepto*.
17 Conveyance: Sutton & Rackham (note 9) and Van Rooijen-Dijkman & Leeman (note 9); terms of sale: May & Wisse (note 3). Courbaud (note 10) translated “in mancipio recepit” as “il garantit à l’acheteur”, thus also implying that the words “in mancipio” refer to the sale.
18 Sale: Courbaud (note 10), Sutton & Rackham (note 9) and May & Wisse (note 3). Conveyance: Van Rooijen-Dijkman & Leeman (note 9).
The purport of De oratore I 179

The questions that now have to be answered are in which way De oratore I 179 is connected to I 178 and what Crassus meant in these two sections. Let us begin with the latter question and look at the context of I 178 and 179.

The first book of Cicero’s De oratore contains a discussion between L. Licinius Crassus, Q. Mucius Scaevola Augur, and M. Antonius about what an ideal orator should know: should he command a vast knowledge of all the arts and sciences or should he focus on being an eloquent speaker? According to Crassus, the true orator knows all the noble arts. Later on in the same book, Crassus argues that orators should command a thorough knowledge of the civil law (I 166-203). Civil disputes are often not about facts, but about law and equity. In those cases, one cannot help one’s clients without a thorough legal knowledge. In some of those cases, Crassus himself had been involved as an advocate, for instance in the one mentioned in I 178 and in the famous causa Curiana described in I 180. In other cases, as in I 179, it is not clear whether or not there was an advocate involved.

In I 178, Crassus argues that the seller of a house must mention the existence of a servitude even if he could assume that the buyer, having owned the house before, knew about it. In I 179, he stresses the fact that the seller of a house should not engage in sales talk because the buyer may regard it as a legally binding promissum and keep him to his word.23 With the words “quo quidem in genere”, Crassus indicates that this new case is also about the sale of a house. The words “simili [in re] quoquo modo” refer to

20  Nelson (note 4) 66.
21  Watson (note 6) 194.
22  See H. Merguet, Handlexikon zu Cicero, Leipzig 1905-1906, 397. Other meanings are: “Kaufvertrag”, “Besitz”, “Sklave”.
23  These two examples fit in very well with the next one, the causa Curiana. There, a will had been worded in an ambiguous way which led to a dispute about the interpretation according to the intention or according to the letter. In that case, Crassus, thanks to his legal knowledge, won the case with his plea in favour of the testator’s intention! See on this cause célèbre, J.W. Tellegen and O.E. Tellegen-Couperus, Law and Rhetoric in the causa Curiana, OIR 6 (2000) 171-202.
the mistake both protagonists had made: they had erred in the *dicta et promissa* made in connection with the sale.

Why have Romanists stuck to the idea that 179 was about a servitude even though the text does not say so? We think the reason is the all pervading spirit of the Historical School. According to Savigny, legal knowledge is legal science, and legal science presupposes a dogmatic system. Because Crassus insists that an orator must have sufficient legal knowledge, modern authors assumed that this legal knowledge must be taken to mean legal dogmatism. In *De oratore* I 178, the Romanists were happy to recognise a servitude problem, and they automatically assumed that a similar problem in I 179 would also be about a servitude. They did not realise that Crassus was discussing the requirements for an ideal orator in general and not the requirements of the Roman law of servitudes. Instead, they interpreted *lumina* as *iura luminum* and *in mancipio* as *in lege mancipi*.

When *De oratore* I 179 is read as it was written, it is clear what Crassus meant with his plea for legal knowledge: if an orator wants to be involved in legal business, he must be on his guard against lay talk. The way the Romanists have read this text reminds us of a verse in the poem *Awater* by the Dutch poet Martinus Nijhoff: “Lees maar, er staat niet wat er staat”.24