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Neue Folge · Band 10

On a singular book
of Cervidius Scaevola

By

David Johnston



DUNCKER & HUMBLLOT / BERLIN

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Preface

Nihil aequè in causis agendis ut brevitatis placet. This essay is short, but longer all the same than the work on which it comments. How can this be justified? If at all, because it is not just an analysis of one work. It is also an attempt, using the detail of one work as a model, to draw broader conclusions about the activities and preoccupations of the post-classical law schools.

Roman legal history is largely about the interpretation of texts; much turns on the textual-critical position adopted towards them. The line taken in this essay may seem to many too radical. The 'Interpolationenjagd' of the twenties and thirties gave textual criticism a bad name, but now it is so far out of fashion that the texts are treated in a manner which is not just conservative but often wholly uncritical. Yet if the arguments of the following chapters are right, then it is clear that this approach is not good enough. It would be wrong to revert to hyper-criticism. But it is essential to recognise that in a society whose law is evolving the textual transmission of legal writings is highly complex. The changes wrought by Justinian's legislation are regularly acknowledged. But it is unjustifiable to ignore the extent to which texts may have been transformed by the more subtle editing of his post-classical predecessors. Even a singular work may show traces of a plurality of hands.

Almost all of this essay was written between September 1985 and March 1986 during a visit to the Institut für Rechtsgeschichte und geschichtliche Rechtsvergleichung of the University of Freiburg. I have three main debts to acknowledge: first, to Professor Joseph Georg Wolf for inviting me to Freiburg, for generous help and hospitality, and for valuable discussion; second, to the Gerda Henkel Stiftung, not only for liberal support of my stay in Freiburg but also for a substantial contribution towards the publication costs; third, to the staff of the Institut and to the students who attended Professor Wolf's legal history seminar, in which many texts of Scaevola were examined.

In Freiburg I also had the benefit of discussing several points with Professor Detlef Liebs and particularly Karen Bauer. In London a sketch of the argument was presented to a seminar in the Faculty of Laws, University College: on the vigorous reaction of the participants, especially Professor Tony Honoré, followed much rethinking and (I hope) improvement. To all of these people I am grateful; agreement with my arguments is not to be presumed of any of them.

Christ's College, Cambridge
February 1987

D.E.L.J.

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Abbreviations and short titles

ANRW	Aufstieg und Niedergang der römischen Welt (ed. H. Temporini)
BIDR	Bullettino dell'istituto di diritto romano
CDJ	Concordance to the Digest Jurists (ed. T. Honoré and J. Menner)
LSQPT	<i>liber singularis quaestionum publice tractatarum</i>
Pal.	<i>O. Lenel, Palingenesia iuris civilis</i> (Leipzig, 1889)
RHD	Revue historique de droit français et étranger
SDHI	Studia et documenta historiae et iuris
VIR	Vocabularium iurisprudentiae romanae
<i>W. W. Buckland, Textbook</i>	A textbook of Roman law ³ , revised by Peter Stein (Cambridge, 1963)
<i>M. Kaser, RP</i>	Das römische Privatrecht ² I (1971) II (1975) (Munich)
<i>M. Kaser, RZ</i>	Das römische Zivilprozessrecht (Munich, 1966)
<i>P. Krueger, Geschichte</i>	Geschichte der Quellen und Literatur des römischen Rechts ² (Munich-Leipzig, 1912)
<i>F. Schulz, Geschichte</i>	Geschichte der römischen Rechtswissenschaft (Weimar, 1961)
<i>F. Schulz, History</i>	History of Roman legal science (Oxford, 1946)

Other abbreviations may be found at the beginning of *Kaser RP I*.

I. Introduction

Nine fragments of Scaevola's *liber singularis quaestionum publice tractatarum* are preserved in the Digest. This is an attempt to draw from them some conclusions about the original contents and character of the book, about its passage through post-classical times and the hands of the compilers.

Verdicts on the book have already been pronounced, unfavourably. *Beseler*: 'Diese Schrift ist ein nachklassischer paraphrastisch erweiterter Auszug aus Scaevolae's Quästionen, zu denen sie sich ähnlich verhält wie der Gaius von Autun zu Gaius'¹. *Schulz* in 1935: 'Insbes. wird zu prüfen sein, ob nicht, wenn von demselben Autor über dieselbe Materie ein liber singularis und ein mehrere Bücher umfassendes Werk vorliegt, der liber singularis eine nachklassische Epitome ist'². But ten years or so later he abandoned such circumspection: 'A work known only from a few extracts in the Digest; these seem to come from a post-classical epitome, the author of which has added remarks of his own. They certainly contain considerable post-classical, pre-Justinian, work'³.

The disadvantage of these verdicts is that they are based on evidence which is not recounted (*Schulz*) or which is presented in lapidary and laconic form (*Beseler*). The verdict reached at the end of this study will offer at least one advantage: that it is based on conclusions drawn expressly from an examination of the form, language and content of the LSQPT.

Difficulties begin with the title, which is unique. Legal and literary works fail to offer a compelling parallel. Writers who were not content to call their works simply *quaestiones* mostly opted either for a more illuminating title (*quaestiones naturales*⁴) or for a less prosaic one (*quaestiones epistolicae*⁵; *quaestiones Plautinae*⁶; or, more intriguing still, *quaestiones confusae*⁷). Scaevola's title however falls neither into one of the familiar moulds nor among the exotica⁸: the

¹ SZ 44 (1924) 359.

² 'Überlieferungsgeschichte der *responsa* des Cervidius Scaevola', Symbolae Lenel (Leipzig, 1935) 226n2.

³ History 233 (= Geschichte 295).

⁴ Seneca; Apuleius *Apologia* 36.

⁵ Varro: Gellius NA 14.8.2; Cato: Gellius 6.10.2 (although Lipsius emends *Catonis* to *Varronis*).

⁶ Varro.

⁷ Julius Modestus (Gellius NA 3.9.1); cf. RE X.680- (1917) s.v. Julius 363 (Tolkiehn).

⁸ For some good examples, Gellius NA *praefatio* 5-9. Among juristic works it is sufficient to refer to the *libri membranarum* of Neratius Priscus and the *libri coniectaneorum* of Alfenus Varus (cited by Gellius NA 7.5.1).

description *quaestiones publice tractatae* is neither illuminating nor very inspiring. Before what public were the questions treated⁹? Whether the title reflects a peculiarity of content or form is a problem which must wait until the individual texts have been discussed¹⁰.

That the work is a *liber singularis* offers further difficulty. They are rare until the Severan period¹¹, before which the only writer who produced more than one is Gaius. Further, they generally have specific themes, especially in the area of administrative or public law. Often they take the form of commentaries on individual *senatusconsulta*. Their purposes are practical¹². Yet a *liber singularis quaestionum* is a mixture of two genres, of practical monograph and problematic work. It is worth mentioning briefly the very few other works for which the same can be said. It is not possible here to discuss them fully or draw conclusions as to their authenticity.

(1) Julian *liber singularis de ambiguitatibus*. While the work has been thought to be a post-classical abridgement of Julian's *digesta*, more recent studies argue in favour of its classicality¹³. There is no doubt that the title is well-suited to the contents, which are concerned exclusively with verbal ambiguity, some of it admittedly not very perplexing.

(2) Gaius *liber singularis de casibus*. The subject matter is diverse, largely problematic, but not invariably of great interest¹⁴.

(3) Modestinus *liber singularis de enucleatis casibus*. In spite of its title, the work does not appear to have a problematic character: the surviving fragments are concerned largely with public law. The private-law problems are neither of great difficulty nor of particular interest. It seems necessary to conclude with Schulz that the work makes 'an unfavourable impression' and may be postclassical¹⁵.

⁹ Is there a link with public *disputatio*? Cf. C9.41.11.1 (AD 290) *Domitius Ulpianus in publicarum disputationum libris*.

¹⁰ Cf. the suggestion of *Beseler*, Beiträge III 160 on Pal. 187.1 'Oder hat Sc das Stenogramm seines Vortrages drucken lassen?'

¹¹ This formulation is to be preferred to that of *Schulz*, History 257 (= Geschichte 330) that 'classical jurisprudence produced hardly any monographs'. Cf. the strictures of *F. Wieacker*, Textstufen 60n13 (61).

¹² *Wieacker*, Textstufen 389-.

¹³ *Schulz*, History 230 (= Geschichte 291); contra *J. Miquel*, SZ 87 (1970) 103- on D34.5.13.2-cf. *A. Torrent*, *Salvius Julianus liber singularis de ambiguitatibus* (Salamanca, 1971) but with the unenviable review of *F. Horak*, SZ 90 (1973) 411-421.

¹⁴ *D. Liebs*, ANRW II.15 (1976) 338 describes it as a 'Sammlung von eher sonderbaren als praktischen Fällen'.

¹⁵ *Schulz*, History 242 (= Geschichte 308).

(4) *Modestinus liber singularis de heurematicis*. Most of this is problematic, some of it rather recherché (like its title whose origin and significance remain obscure¹⁶). Some of it has the character of giving practical advice¹⁷.

Intructions should raise but not prejudge problems. This one has limited itself to pointing out that the origin and purpose of the LSQPT are unclear; its title unusual and uninformative; the genre a hybrid and the format rare. This may raise doubts (and some have had them), but a balanced judgement requires more evidence. Chapter II examines each surviving text of the work in detail. The third chapter draws this detailed evidence together with more general reflections, and the fourth pronounces a verdict.

¹⁶ *Schulz, ibid.* But a work *ἐρημάτων* is mentioned by Gellius NA *praefatio* 6.

¹⁷ Especially Pal. 73 and 79.