Cicero's Law

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1. INTRODUCTION

A recurring topic of discussion, both in Roman antiquity and in modern times, is the connection between philosophy, rhetoric and law. Of the many philosophers and their schools that existed in Roman antiquity there are two that may have been particularly relevant to the development of Roman law: the Hellenistic schools of Stoicism (Middle Stoa) and the New Academy. In the second century BC, the Roman military conquest of Greece led to the Greek cultural conquest of Rome, introducing Greek philosophy and, in its wake, rhetoric. In that very same century, the praetor was put in charge of jurisdiction, legal procedure was innovated with the formulary procedure, and many new legal institutions were introduced. It is now generally assumed that there was a connection between the rise of Roman law and the arrival of Greek philosophy and rhetoric in Rome. However, the question which of the two philosophical schools was most relevant to the development of Roman law has not yet been answered satisfactorily.¹

In attempting to answer this question, we will use the concept of voluntas testatoris as a case study. We will first briefly consider to what extent the sources – mainly Justinian’s Digest and the rhetorical and philosophical works of Cicero – can be of use (section 3.2). Next, we will summarily explain the modern views on the voluntas testatoris and the knowledge theories of the Stoa and the New Academy in antiquity (section 3.3). We will then describe the modern interpretation(s) of the causa Curiana (the first case in which the voluntas testatoris is mentioned), relate it to Stoic epistemology, and compare it with the rhetorical sources (section 4). Finally, having analysed four responsa from the Digest that are generally assumed to deal with the voluntas testatoris (section 5), we will conclude (section 6) that even though the Roman jurists did not develop a blanket theory of voluntas testatoris, if they did follow a particular philosophical school when solving legal problems like those caused by an unclear will, it would more likely have been the New Academy rather than the Stoa.

¹ For a clear and differentiated overview, see Wieacker 1990: 618–21.
2. THE SOURCES AND THE DEBATE

In trying to determine which of the two schools had the greater impact on the development of Roman law, we submit as an initial observation that the guidance or direction offered by the sources is relatively sparse. True, the early Roman works on philosophy and rhetoric, of which those written by Cicero in the first century BC are the most important ones, do contain references to law. In his De Legibus, Cicero describes law as ‘the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite’, using ideas and concepts that are typical of the Stoa. Yet in his Academica, Cicero argues against the knowledge theory (epistemology) of the Stoa. Then again, in this context he does not refer to law. In De Oratore, Cicero describes the ideal orator as being well versed in philosophy and law, and in the context of inventio – the first duty of the orator – he shows that the New Academy is much more useful for inventing legal arguments than the Stoa (2.157–9). His other works on rhetoric too, such as the Partitiones Oratoriae and the Topica, are clearly linked to the Academy. The upshot is that Romanists tend to view Cicero as an eclectic and, more to the purpose of our argument, believe that his works on philosophy and rhetoric cannot reliably help ascertain which philosophical school held sway in the evolution of Roman law.

How about specifically legal sources? Whether the Roman jurists referred to philosophy in their opinions on legal problems we simply cannot know, because the original opinions have not come down to us. We know them mainly through the sixth-century collection of Justinian’s Digest, in which they were probably included in a much shortened form. These excerpts contain hardly any references to philosophy at all, the well-known exception being Marcian’s reference to the once famous Stoa leader Chrysippus (D. 1.3.2). In sum, the legal sources do not appear to offer tangible, usable clues about the prevailing philosophical influence on Roman law either.

The middle of the nineteenth century saw the beginning of the debate on the indebtedness of Roman law to philosophy. It was argued and assumed that Stoicism had been very influential on, for instance, the concepts of ius naturale, ius gentium, and ratio naturalis, and that Cicero and the Roman jurists alike would have known something that is comparable to the modern concept of human rights. To this day this view has its adherents, but it has also been disputed; while opponents admit that the

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3 So Gaines 2002: 475. In his early treatise De Inventione, Cicero was still struggling how to find a place for philosophy in rhetorical theory; thus Corbeill 2002: 40.
4 For an overview of the discussion, see Crifó 2005: 240–69. See also Mantovani and Schiavone 2007 and Giltaij 2011.
Roman jurists would have been well acquainted with the various philosophical schools, they are adamant that the Roman jurists, when giving opinions about legal problems, would have done so without heeding philosophy.\(^5\)

In the course of the twentieth century, the debate on the influence of philosophy on Roman law extended to other topics, such as the method the Roman jurists used. A particular bone of contention was (and is) whether they applied Stoic logic; this was much debated. A large number of prominent Romanists have assumed that they did.\(^6\) In his recent book *The Invention of Law in the West*, Schiavone argues that jurists like Q. Mucius Scaevola integrated Stoic logic into Roman law, thereby creating ‘a new way of conceiving law, which would transmute its protocols into those of a science without equal in antiquity, no less compact and conceptually dense than the great classical philosophy’. There was no room for rhetoric.\(^7\) Nonetheless, the Roman jurists themselves do not explicitly call themselves adherents of Stoicism, and so the question remains whether Stoic theory and lifestyle really did help shape Roman jurisprudence.\(^8\)

It is remarkable that in this debate it is Stoicism that has virtually monopolised attention. Whether the New Academy has had any influence on the development of Roman law has hardly been investigated.\(^9\) This lopsidedness may have something to do with the Romanists’ view of Roman law as a science, that is, as an organic system based on logic.\(^10\) The scientific character of Roman law is usually explained by connecting it with the dialectical method that was introduced by Plato and that was also practised by the Aristotelian and Stoic schools. To Plato, this method meant the study of forms (*genera* and *species*) and was to lead to the discovery of principles governing the forms and explaining individual cases.\(^11\)

What is usually not explained is that as a form of logic the dialectical method is based on two principles: the *principium contradictionis* – two contradictory statements cannot both be true in the same sense at the same time – and the *principium tertii exclusii* – of two contradictory propositions one must be true, the other false: there is no third alternative. Stoicism used these two principles within the framework of its knowledge theory. Not only were these principles not generally accepted, they were in fact fiercely opposed by the adherents of the New Academy. Stripped down to its essence, the debate between the two schools turned on the question of whether it is possible

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\(^5\) Thus, for instance, Van der Waerdt 1990.

\(^6\) See Wieacker 1990: 630–9.

\(^7\) Schiavone 2012: 186. Elsewhere, 198, he adds that there was no room for rhetoric.

\(^8\) Thus Bund 1980: 145.

\(^9\) Formigoni 1996 is an exception.

\(^10\) On this topic, see Tellegen and Tellegen-Couperus 2013.

\(^11\) Thus Schulz 1953: 62–3. There are, however, no sources to prove that the Roman jurists used the dialectic method to construct a legal system.
to know anything for certain: according to the Stoa it was, according to the New Academy it was not.12

The question whether any knowledge can be certain may also be relevant in a legal context. An almost archetypal case in point is when someone has made a will that is unclear or that may not hold in the light of changed circumstances. In Romanist literature, it is assumed that Roman jurists, when interpreting such a will in accordance with the testator’s intention, wanted to ascertain the testator’s real, or at the very least presumed, intention. Consequently, and inevitably so, it is also assumed that in the jurists’ view it was possible to know that intention. Since infallible knowledge was at the heart of the debate between the Stoa and the New Academy, attempting to find out whether the jurists really held that view is a worthwhile pursuit. In this way, we may learn more about the relationship between Roman law, rhetoric and the Hellenistic schools of philosophy.

3. INTERPRETATION OF THE VOLUNTAS TESTATORIS AND EPISTEMOLOGY

In this section we will briefly outline modern views on the interpretation of the *voluntas testatoris* and the knowledge theories of the Stoa and the New Academy.

The concept of *voluntas testatoris* is related to the law of succession. When someone has made a will that is unclear or that may not hold in the light of changed circumstances, the question arises how the will should be interpreted. In Roman antiquity, textbooks on rhetoric like Cicero’s *De Inventione* provided various answers to that question. Similarly, the *responsa* of the Roman jurists contain many examples of the interpretation of unclear or ambiguous wills. In modern Romanist literature, both types of sources have been used to study the concept of *voluntas testatoris*.

Over the past century or so, the interpretation of wills in Roman law has generated a variety of views.13 Around 1900, it was generally assumed that the classical jurists interpreted unclear wills in accordance with the wording of the will, that Justinian favoured an interpretation based on the testator’s intention, and that the compilers adapted the classical texts accordingly. However, in 1926, Johannes Stroux argued that as early as the late Republic the Roman jurists had begun to interpret unclear wills on the basis of the testator’s intention and that they had done so by using the *status* theory of rhetoric and particularly the *status verba-voluntas* as introduced by the Greek rhetorician Hermagoras (second century BC). Stroux’ view triggered a lively discussion, which resulted in a wide variety of opinions, but on one issue most scholars agreed: there was no connection between law and rhetoric.

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Today, the view most commonly held is that the Roman jurists originally interpreted wills literally, that in the late Republic they also used other criteria, such as definition, the *voluntas testatoris* and the *favor heredis*, but that in Justinian law the *voluntas* prevailed.

The only Romanist to provide an elaborate explanation of the *voluntas testatoris* and its interpretation is Voci. In Chapter 4 of his handbook on the Roman law of succession, Voci discusses the *voluntas* in the dispositions *mortis causa* and particularly the relationship between declaration and intention. In this context, he argues that they are of equal importance, the declaration being instrumental to the intention. If the declaration does not correspond with the intention, the clause is invalid. If the declaration and intention differ only partially, the declaration must be interpreted on the basis of language or logic.\(^\text{14}\) In Chapter 5, Voci discusses the interpretation of dispositions *mortis causa*: when interpreting a will, one should try to discover the testator’s intention. Difficult though it may be to probe the testator’s mind, it can be done, because the testator is assumed to have been a reasonable human being who can be assumed to have made a reasonable will.\(^\text{15}\)

According to Voci, the interpreter must first try to discover the testator’s real intention on the basis of historical, thus provable facts (the *volontà effettiva*). If that proves impossible, the interpreter can use the criterion of reasonableness to attribute a presumed intention (the *volontà induttiva*) to the testator. Voci distinguishes two forms of presumed intention: the *volontà verosimile* (it is likely that the testator will choose the most reasonable and opportune of two possible results) and the *volontà implicita* (it is assumed that the testator implicitly means to include a certain disposition in his will). The only time the criterion of reasonableness cannot be applied is when the testator’s intention appears to be *contraria*.\(^\text{16}\)

Moving on to the second topic of this section – the knowledge theories of the Stoa and the New Academy – what we know of them mainly stems from two sources, Cicero’s *Academica* dating from 45 BC and the second-century works of Sextus Empiricus. Both sources deal with Stoic epistemology in the light of the criticism that Arcesilaos (New Academy, third century BC) levelled against the views of Zeno, the founder of the Stoa, and of the objections Carneades (second century BC) raised against the views of Chrysippus. The debate between the Stoa and the New Academy on the question of the certainty of knowledge belongs to the history of Greek philosophy. Since


\(^{15}\) Idem: 885–989.

\(^{16}\) In this context, Voci 1963: 887 and 894 refers to Cic. *Inv. rhet.* 2.123 twice, namely when introducing the real intention and when introducing the implicit intention. In this section, Cicero states that an advocate who pleads *contra scriptum* will sometimes show that the writer always had the same end in view and sometimes that the writer’s purpose has to be modified to fit the occasion as a result of some act or event. He does not refer to the writer’s real or implicit intention.
our interest is in the history of Roman law, we will only address this debate insofar as it is relevant to our argument.

For our purpose, two issues or questions in this debate are relevant: ‘what can we know?’ and ‘how do we know the world?’ Both issues belong to the sphere of philosophy that was called Physics, the study of the physical world. Regarding the first question, the Stoa held that the kosmos is not the result of chance; it is a living organism. All things in the kosmos consist of an active, divine principle (pneuma, breath) and a passive principle (hule, matter), and the tension between these two principles (tonos) varies. The soul, for instance, has a very refined form of pneuma, being at the same time rational and corporeal. Only these things exist, that is, they can act and be acted upon. Other things are incorporeal, such as time, place and emptiness.

The second question (‘how do we know the world?’) was the central issue in the debate between the Stoa and the New Academy. In the Stoic theory of knowledge, the main concept is impression (phantasia). According to the Stoics, our senses receive constant impressions that pass from objects through the senses to the mind. The mind can judge whether an impression gives a true representation of reality or a false one. Some impressions contain such a strong guarantee of reality that they force our mind to ‘assent’; they then become a kataleptic, that is, recognisable, presentation of reality. The crux of the controversy between the two schools was this concept of katalepsis, recognition.

The question was whether perception by means of katalepsis was true. In his Academica, Cicero summarises the discussion as follows. According to the Stoics, he says, dialectica was invented to serve as a ‘distinguisher’ or judge between truth and falsehood (2.91). Cicero, however, echoing Carneades’ criticism, brings two arguments to refute this statement. First, he states that dialectica as such is unable to provide certainty. As an example, he describes the so-called sorites: when from a heap of corn the grains are taken away one at a time – at what point does the heap cease to be a heap? (2.92). The second argument against the use of dialectica for judging what is true or false is the weakness of the principle that every proposition is either true or false. Cicero demonstrates this with the famous liar paradox: if you say that you are lying and you say it truly, are you lying? If such a disjunctive proposition (consisting of two contrary statements) can be false, neither is true (2.95–7).

According to Cicero, Stoic dialectica will not help settle the question of the certainty of knowledge. It is better to hold, with Carneades, that some presentations can be qualified as probable and others as not probable. Probability comes in degrees. In order to qualify a particular presentation as probable it is essential that it be unhindered by anything. Thus the wise man

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18 See Rist 1969: 133–51.
will make use of whatever probable presentation he encounters, if nothing presents itself that is contrary to that probability (2.99).

When comparing Voci’s theory of the *voluntas testatoris* with the theories of knowledge developed in Hellenistic philosophy, we cannot help but notice a certain similarity between Voci’s ideas and Stoic epistemology: where the Stoics regarded all things that exist as consisting of breath and matter, Voci considered the will as consisting of the document and the intention. Whatever one may think of this equation, it does inspire the question whether the way in which Romanists interpret the *voluntas testatoris* has a parallel in Stoic epistemology. Asking the question is easy: answering it, alas, may not be as straightforward, but in the following two sections, on the *causa Curiana* and four responsa from Justinian’s Digest respectively, we will attempt to do just that.

4. THE CAUSA CURIANA

In Roman oratory as well as in Romanist literature, the textbook example of the interpretation of unclear wills is the *causa Curiana*. Details of this lawsuit, which was tried in about 92 BC, have come down to us in the works of Cicero. Certain passages in Cicero’s *De Oratore* and *Brutus* give the following specifics.19 A man called M. Coponius drew up a will in which he instituted any son(s) that might be born to him as his heir(s). Coponius added a *substitutio pupillaris* stipulating that a certain M. Curius was to inherit the estate if his, that is, Coponius’, son(s) should die before reaching adulthood. Coponius died without issue and when his will had been opened and read, the inheritance passed to Curius, because it was assumed that the condition relating to the substitution had been fulfilled. However, the heir by intestacy, who was also called Coponius, denied it had and claimed the inheritance. In the trial that followed, Quintus Mucius Scaevola, speaking for this Coponius, argued in favour of a literal interpretation of the will, whereas Marcus Licinius Crassus, speaking for Curius, defended an interpretation that relied on the testator’s intention. Crassus won.

In antiquity, the *causa Curiana* was a cause célèbre for reasons of rhetoric. It is also famous today, but for a different reason: it is regarded as having introduced an important innovation into the Roman law of succession, that is, the idea of the testator’s ‘presumed intention’. It is for that reason that

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19 *De or.* 1.180, 238, 242–5; 2.24, 140 and 220–2; *Brut.* 143–5, 194–8, and 256. Also references in *Top.* 44 and *Caecin.* 53, 67 and 69. In *Inv. rhet.* 2.122, Cicero describes a similar case but does not add any names. These sources do not give a completely uniform description of the case, for instance, only in *De Inventione* is the testator said to have had a spouse, in *Topica* is the son said to be born within ten months, and in *Caecin.* 53 is the son called a *postumus*. Since these additions are irrelevant to the legal problem, we prefer to omit them in our description of the case.
Romanists tend to direct their gaze towards the *voluntas testatoris* and, by extension, Crassus’ plea. A good example of this orientation is Voci’s analysis of this case.

Voci regards the discussion in the *causa Curiana* as an important moment ‘per la ricerca induttiva della volontà’.\(^{20}\) He summarises Scaevola’s argument on behalf of the heir by intestacy as follows: the will is invalid because of the inefficacy of the pupillary substitution and the non-existence of the vulgar substitution. The latter is the institution of a second or further heir in case the institution of the heir is or becomes invalid.\(^{21}\) Rebutting Scaevola’s argument, Crassus is said to have stated that the testator must be understood to have implied the vulgar substitution, because he who presupposes to appoint any son of his own as his heir and appoints a substitute for him, does all the more want a substitute for himself. In his plea, Crassus contrasts strictness with *aequitas*, written words with *voluntas*, *verba* with *res*. Voci explains the word *res* as the objective situation that by itself imposes the solution on the reasonable man: the testator can be supposed to be a reasonable man. In this connection, *res* is one and the same thing as *voluntas*. According to Voci, the practical value of Crassus’ defence was that it led to the recognition of the implicit intention and more in general of the presumed intention; theoretically, it sired the twin ideas of the presumed intention as the testator’s intention and of the testator as a prudent person.

Many scholars have adopted Voci’s interpretation, although they do not always mention the implicit vulgar substitution.\(^{22}\) The most recent example is the explanation of the *causa Curiana* offered by Schilling.\(^{23}\) He suggests that – according to Crassus – the ‘testator had erroneously assumed that he would have a descendant. He had not anticipated that he could die without issue. Had he considered this possibility, he would probably have appointed Curius as heir’.

How do these theories relate to Stoic epistemology? Although neither Voci nor Schilling (nor any other scholar for that matter) refers to any philosophical school, their way of reasoning strongly recalls Stoic epistemology. Let us first examine Voci’s comment on Crassus’ plea and particularly the implicit vulgar substitution. Voci tries to reconstruct the presumed intention of testator Coponius by means of logical reasoning. The major premise is that Coponius was a reasonable man who wanted his will to be valid. The minor premise is that Coponius could prevent his will from failing by adding a vulgar substitution to the pupillary one. Voci’s conclusion is that Coponius must have intended to include a vulgar substitution


\(^{21}\) For an example, see Gai. Inst. 2.174.


\(^{23}\) Schilling 2014: 316.
even though he did not literally do so. What is clear from Voci’s argumentation is that he used Stoic philosophy in two ways: one, by assuming that the intention of the testator was a *res* that exists and that can be known for certain by means of *katalepsis*, and two, by constructing a line of reasoning based on logic.

Schilling’s reasoning also comes close to Stoic epistemology. He distinguishes two possible situations:

1. The testator had considered the possibility that he could die without issue.
2. The testator had not considered the possibility that he could die without issue.

It is impossible for both possibilities to be true at the same time, Schilling argues, so either (1) or (2) is true. According to Schilling, possibility (1) can be ruled out because, if the testator had considered this possibility, he would probably have appointed Curius as his heir. So possibility (2) must be true. Schilling then constructs Coponius’ intention as follows: he wanted the substitute Curius to be his heir. His reasoning brings to mind one of the principles of Stoic *dialectica* referred to, that of the excluded third (any proposition is either true or false).

This summary of the modern views on the *voluntas testatoris* in the *causa Curiana* and their comparison to Stoic epistemology prompt the question whether these views are borne out by the sources. We think they are not, for two reasons. First, Voci’s assumption that a vulgar substitution formed part of the discussion in the *causa Curiana* is not supported by any of the sources describing this case. Nor did Scaevola qualify Coponius’ will as invalid because of the non-existence of a vulgar substitution, and nor did Crassus argue that Coponius had implicitly included such a substitution. Second, Voci’s premise that a *substitutio vulgaris* would have saved the will is not true. Both types of substitution presuppose the existence of a primary heir. Coponius, however, had added a condition to the *institutio heredis* (‘if a son is born, he must be heir’). Scaevola’s argument (‘in order to die, one first has to be born’) would therefore also hold against a *substitutio vulgaris*. Even if a *substitutio vulgaris* had been added, the testator’s intention would have been equally unclear.

Schilling’s interpretation is not based on the sources either. He reasons that there were two situations Coponius could have taken into account, that is, that he would have children and that he would not have children. However, the wording of the will leaves open various possibilities. The conditional wording of the *heredis institutio* as quoted by Cicero (*si mihi filius genitur unus pluresve, is mihi heres esto*) indicates that he did not know whether he would have one or more children or none at all. The fact that he did not explicitly provide for the situation that he would have no children does not
mean that he did not consider this possibility. Maybe he assumed that the substitutio pupillaris would apply in that case as well, because as Crassus’ reference to common practice suggests that had happened before. In short, the wording of the will is such that the possibilities (1) and (2) mentioned by Schilling can in fact both be true and that it is unfeasible to reliably reconstruct the voluntas testatoris by means of dialectical logic.

In fact, if Crassus had used any reasoning suggested by modern Romanists, not he but Scaevola may well have won the trial. Our point is that logic of any kind would not have been helpful in this case. Carneades’ criticism would still hold: there is no criterion for establishing the truth and dialectics do not help. It is virtually impossible to ascertain either the testator’s real or his presumed intention.

What is more, the dispute between Scaevola and Crassus was not about the voluntas testatoris but about the interpretation of the words in Coponius’ will. The pleas of both advocates make this clear. Scaevola referred to the words of the will, and particularly to the wording of the substitutio pupillaris: in combination with the conditional institution of the heir, it was invalid. Crassus did not deny that the wording of the pupillary substitution was inadequate, but he referred to common practice showing that for want of a better one this wording had been long accepted. He then added that this was what the testator wanted.

Crassus’ plea is a perfect example of the strategy used by the speaker who is attacking the letter of the will, as described by Cicero in his De Inventione, 2.138: he will first of all argue the equity of his case. After that, he will use other arguments, such as stating that the author having risen from the dead would approve of this act or interpretation. Crassus did not found his plea on the testator’s intention in the sense of his ‘real’ or ‘presumed’ intention; he only used the voluntas in the sense of probable, presumable intention and he did so to support his main argument of equity. In other words, if any Hellenistic school of philosophy were relevant here, it would be that of the New Academy.

5. VOLUNTAS TESTATORIS IN JUSTINIAN’S DIGEST

In Justinian’s Digest, hundreds of texts concern the law of succession but only sixty mention the voluntas testatoris. Most of them date from the second century. In modern literature it is assumed that in the early Empire some jurists began to use the concept of the testator’s presumed intention that had first been recognised in the causa Curiana. According to Schilling,
these jurists were not interested in subdividing the testator’s real and presumed intention in the abstract so as to develop proper technical terms. Only Papinian used the term *coniectura voluntatis* – and he did so twice – to describe the construction based on the testator’s presumed intention. In addition to the cases in which the *voluntas testatoris* is actually mentioned, a large number of other responsa in the Digest are today explained in terms of the testator’s intention, even if they do not mention it.

Do the latter responsa support the commonly held view that when interpreting an unclear will the Roman jurists aimed at ascertaining the testator’s real or presumed intention? And did Papinian really develop a theory of the testator’s presumed intention? Of course, a discussion of all of these responsa falls well beyond the scope of this chapter. We selected four to begin answering these questions. The first two are responsa that Romanists link to *voluntas* even though the word is not used in them. The other two texts are the responsa in which Papinian used the words *coniectura voluntatis*.

5.1 D. 32.62

The first responsum we will discuss is D. 32.62. It stems from the second-century jurist Salvius Iulianus (Julian).

Julianus, liber singularis de ambiguitatibus. Qui duos mulos habebat ita legavit: ‘mulos duos, qui mei erunt cum moriar, heres dato’: idem nullos mulos, sed duas mulas reliquerat. Respondit Servius deberi legatum, quia mulorum appellacione etiam mulae continentur, quemadmodum appellantione servorum etiam servae plerumque continentur. Id autem eo veniet, quod semper sexus masculinus etiam femininum sexum continet.

Julian, *Ambiguities*, sole book: A man who had two mules left a legacy as follows: ‘Let my heir give two muli which shall be mine when I die.’ He left no muli but two mulae. Servius replied that the legacy was due, for mulae are included under the term muli, just as servae are generally included under the term servi. This may be caused by the fact that the male sex always also includes the female.

In this responsum, Julian quotes Servius Sulpicius Rufus (Servius), a contemporary and friend of Cicero’s, and the most prominent jurist of his day. It is important to note that this responsum was selected by the compilers from Julian’s *liber singularis de ambiguitatibus*; it is included in book D. 32 entitled *De legatis et fideicommissis*. D. 32.62 deals with a *legatum per damnationem* in which the testator bequeathed two mules with the additional remark *qui mei*

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27 Schilling 2014: 317–20 lists opinions of Labeo (D. 33.2.41), Celsus pater (D. 31.29 pr.), Celsus filius (possibly as advisor of Emperor Hadrian, in Paul. D. 5.2.28), Africanus (D. 32.64), and Q. Cerv. Scaevola (D. 31.89.1). However, in none of these texts can the testator’s intention be regarded as a presumed intention.

28 The translations of this and the following Digest texts are based on those in Watson 1985.
erunt cum moriar, ‘which shall be mine when I die’. When he wrote his will, he owned two he-mules. When he died, he owned two she-mules. The question arose whether the bequest of the mules was owed. Servius said it was, because she-mules are regarded as having been included under he-mules. He underpins his opinion by comparing this case with female slaves, who are usually understood to be included in the word slaves. Julian agrees with Servius and rephrases his responsum in a general sense: ‘This may be caused by the fact that the male sex always also includes the female.’

The last sentence of this responsum has evoked a considerable amount of comment in modern Romanist literature.29 We will look at the observations of two scholars who interpreted it referring to the testator’s intention: Wieling and Harke. In his book on the interpretation of wills in Roman law, Wieling analyses this responsum in the context of interpretation by means of definitions and grammar.30 He states that definitions were often used by Roman jurists to ascertain the meaning of concepts. In all these cases, the point in question is whether a particular word is defined in a strict sense or whether the intention of the testator may have influenced the meaning of the concept. A number of such definitions suggest that they have an absolute meaning, as in the last sentence of D. 32.62, where Julian states that the male sex always includes the female. Wieling, however, argues that there cannot have been such a general view: it is easy to think of examples in which this view would lead to preposterous outcomes and in which Julian would certainly decide otherwise. Even so, Wieling thinks it is clear that Julian did not allow the testator’s intention to influence the meaning of the word muli and that Julian conceivably abided by this decision as long as it did not clearly lead to results that are ‘unsachgemäss’ (wrong).

Harke, on the other hand, thinks that Julian did allow the testator’s intention to influence the interpretation of the word muli.31 In his view, Julian assumed that the testator’s experience in life would determine what could be expected to be the testator’s intention regarding the mules. This view forms part of Harke’s theory that verba and voluntas were supplementary, not competitive, criteria.

We disagree with Wieling’s comment on D. 32.62, because, in our view, the legal problem in this case does not turn on definition. Cicero describes definition as a phrase that explains what the thing defined is (quid sit).32 In this case, however, neither Servius nor Julian explains what a mule is; they merely explain that the word mulus is used in various ways. The legal problem, then, is caused by the vague, imprecise use of this word in the will in question. In

29 See Fiuris (Archivio elettronico per l’interpretazione delle fonti giuridiche romane: CD-ROM by Pierangelo Catalano and Francesco Sitzia) ad loc.
30 Wieling 1972: 120–1.
31 Harke 2012: 64.
32 Cicero, Top. 26.
other words, the legal problem turns on ambiguity, which may well be pre-
cisely why Julian included this case in his book *De ambiguitatibus*. He solved
the problem by referring to the general usage of the word.33 Julian did not in
any way consider the testator’s intention, presumed or otherwise.

Harke’s comment does not seem very convincing either; Julian does not
refer to the testator’s experience in life, let alone to his intention, and we
therefore cannot accept that this *responsum* supports Harke’s theory about
the use of *verba* and *voluntas* in Roman law.

We think Julian’s opinion can best be explained by means of Cicero’s
description of the rhetorical *status ambiguitas* in his *De Inventione*. In 2.116,
he begins to describe the controversies that turn upon written documents,
that is, when some doubt arises from the nature of the writing. Such doubt
comes from ambiguity, from the letter and intent, from conflict of laws,
from reasoning by analogy and from definition. A controversy arises from
ambiguity when there is doubt as to what the writer meant because the
written statement has two or more meanings. After giving an example of
such a controversy, Cicero offers various arguments that can be useful:

> Primum, si fieri poterit, demonstrandum est non esse ambigue scriptum, prop-
terea quod omnes in consuetudine sermonis sic uti solent eo verbo uno pluri-
busve in eam sententiam in quam is qui dicet accipiendum esse demonstrabit.

In the first place it should be shown, if possible, that there is no ambiguity in the
statement, because in ordinary conversation everyone is accustomed to use this
single word or phrase in the sense in which the speaker will prove that it should
be taken.34

When we compare Julian’s approach of the *mulae* problem with this instruc-
tion, it is clear that Julian did exactly what rhetorical theory as described
by Cicero suggested. No reference is made to the testator’s intention; the
problem turns on the ambiguous wording of the will and is solved with a
reference to customary language.

5.2 D. 34.5.28

The second text that lacks the word *voluntas* but that Romanists regard as
referring to the testator’s presumed intention stems from Javolenus: D. 34.5.28:

> Javolenus libro tertio ex posterioribus Labeonis. Qui habebat Flaccum fullonem
et Philonicum pistorem, uxor Flaccum pistorem legaverat: qui eorum et num
uterque debetur? Placuit primo eum legatum esse, quem testator legare sensis-

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that the Stoics would have called this case an example of simple homonymy.
34 Translation of this and the two following sections by Hubbell 1976.
Javolenus, *From the Posthumous Works of Labeo*, Book 3: A man who owned a fuller called Flaccus and a baker called Philonicus legated: ‘Flaccus the baker’ to his wife. Is only one of them to be delivered and, if so, which one? Or are both to be delivered? It was decided that in the first instance that slave was legated whom the testator thought he was legating, but that if this was not clear, the first thing to consider was whether the owner knew the names of his slaves. If he did, then it is the slave who is named that should be delivered, the error being supposed to lie in the description of his trade. But if he did not, then it is the baker who should be deemed to have been legated just as if no name had been given to him.

Javolenus’ third book on Labeo’s posthumous work deals with legacies. The responsum has come down to us in D. 34.5 De rebus dubiis. The case is fairly straightforward, but is complicated by what looks like an unfortunate mix-up. Someone had two slaves: Flaccus who was a fuller and Philonicus who was a baker. In his will, the testator left the baker Flaccus to his wife. Almost inevitably, the question arose which of the two slaves was owed, or perhaps whether both were.

To date, this text has been explained in terms of the testator’s intention. By way of example, we will look at Voci’s comment. He deals with D. 34.5.28 in the context of falsa demonstratio, the problem that arises when the testator has added a wrong description to a person or thing mentioned in his will, for instance in a legacy. Does such a falsa demonstratio invalidate the legacy? According to Voci, it does when the description is essential, and it does not when the description is only accessory; it is the testator’s intention that determines whether the description is essential or accessory. Voci refers to D. 34.5.28 to make his point. Does it support his conclusion?

According to Voci, the question to be decided in this case is which of the two slaves has been validly bequeathed. He begins his analysis by stating that the responsum contains a distinction that links up with a general rule of interpretation: first, one has to ascertain the testator’s real intention, and if that is not possible one can try to assess what the testator can most likely have wanted. Voci recognises this distinction in D. 34.5.28. As to the first part of the responsum (‘eum legatum esse, quem testator legare sensisset’), he discusses several situations in which it is clear what the testator meant. Here, the testator’s real intention determines whether the falsa demonstratio
is essential or accessory. In the second part of the text, dealing with the situation in which it is not clear which slave was meant, Javolenus offers a double criterion based on the common practice that an owner did not always know his own slaves: whatever he knew – the name or the profession – should be essential. Here, the testator’s presumed intention determines whether the falsa demonstratio is essential or accessory.

In our view, Javolenus referred neither to the testator’s real nor to his presumed intention. Not a single word in the responsum supports this conclusion. It is even questionable whether the rule ‘falsa demonstratio non nocet’ is applicable here: the question to be decided in this case is whether only one slave is owed, and if so which one, or both. The validity of the legacy itself was not at stake. This being so, Javolenus’ responsum cannot be relied on to support Voci’s conclusion.

The problem in this case is not what the testator thought, but what he wrote down. In other words, this responsum does not turn on the voluntas testatoris but on the ambiguous wording of the legacy. That Javolenus and/or Labeo very likely thought so too becomes clear if we again compare this responsum with Cicero’s discussion of ambiguitas in his De Inventione. After the introduction (2.116), which was mentioned in connection with the muliae text, Cicero continues as follows (2.117):

Deinde, qua in sententia scriptor fuerit ex ceteris eius scriptis et ex factis, dictis, animo atque vita eius sumi oportebit, et eam ipsum scripturam, in qua inerit illud ambiguum de quo quaeretur totam omnibus ex partibus pertemptare, si quid aut ad id apposito sit quod nos interpretemur, aut ei quod adversarius intellegat, adversetur. Nam facile, quid veri simile sit eum voluisse qui scripsit ex omni scriptura et ex persona scriptoris atque eas rebus quae personis attributae sunt considerabitur.

In the next place, one ought to estimate what the writer meant from his other writings, acts, words, disposition and in fact his whole life, and to examine the whole document which contains the ambiguity in question in all its parts, to see if anything is apposite to our interpretation or opposed to the sense in which our opponent understands it. For it is easy to estimate what it is likely that the writer intended from the complete context and from the character of the writer, and from the qualities which are associated with certain characters.

In this entry, the writer’s intention is mentioned twice. When we apply Cicero’s discussion to linguistic ambiguity in legal cases, do his comments imply that the testator’s real intention should be discovered? We think they do not; the words sententia and voluisse only refer to the crux of the problem. As Cicero says in 2.116, a controversy arises from ambiguity when there is doubt as to what the writer meant because the written statement has two or more meanings. When that happens, the advocate can try to solve the problem by examining the writer’s other writings, acts, and so on. In line
with these instructions, Javolenus/Labeo examines the testator’s habits with regard to his slaves. He does not pretend to discover the testator’s real or presumed intention, but to assess what the testator probably meant and so solve the problem of the ambiguous wording of the legacy. The compilers most likely also thought he did, for they included this responsum in title 34.5 De rebus dubiis, on ambiguous cases.

5.3 D. 31.78.1

The other two texts we will discuss are the responsa in which Papinian used the words coniectura voluntatis. The first one is D. 31.78.1:

Papinianus libro nono responsorum. Cum post mortem emptoris venditionem rei publicae praediorum Optimus Maximusque Princeps noster Severus Augustus rescindi heredibus pretio restituto iussisset, de pecunia legatario, cui praedium emtor ex ea possessione legaverat, coniectura voluntatis pro modo aestimationis partem solvendam esse respondi.

Papinian, Responsa, Book 9. When after the death of the buyer our best and greatest Emperor Severus Augustus ordered that a sale of public property should be rescinded and the price restored to his heirs, I replied in the matter of this money that following the conjectured intention of the testator the appropriate part of the value should be paid to the legatee to whom the buyer had made a legacy of part of the public land possessed in this way.

Book 9 of Papinian’s Responsa addresses fideicommissa. The compilers included the responsum in D. 31 de legatis et fideicommissis. The case is rather complicated. Around the year 170, someone bought public land. Later, he drew up a will in which he left part of this land to a legatee. When in due course he died, his heirs accepted the inheritance and the legatee became owner of the land. Sometime later, the Emperor Septimius Severus decided to rescind the sale of the land and to pay back the purchase price. The land became public property again and the heirs as successors to the buyer received the purchase price. The legatee who had lost his legacy claimed part of the price from the heirs. Papinian was asked for advice and his reply was that the testator would probably want the heirs to pay the legatee an equivalent of the value of the land that had been bequeathed to him.

This responsum has attracted very little attention from modern Romanists. Recently, Schilling referred to it in his paper on coniectura voluntatis. He states that:

38 Lenel 1889: I 923 (no. 614).
39 Fiuris reports six references, all in footnotes only.
the testator could not have foreseen what had happened at the time of the succession and so Papinian asked what he would have wanted. He explicitly construed the will according to the presumed intention of the testator (coniectura voluntatis) and contrary to the clear wording of the will.40

In his comment, Schilling does not address the legal problem involved and that is why we wonder if this responsum can really demonstrate that Papinian ‘established a theoretical understanding and technical formulation of our subject-matter’.41 What was the legal position of the legatee and how did Papinian safeguard his interests? Only when we know the answers to these questions can we assess the meaning of the words coniectura voluntatis.

Since the legacy concerned the ownership of land, we suppose that it was formulated as a legatum per vindicationem. The legatee had acquired ownership upon the heirs’ acceptance of their inheritance, only to lose it when the emperor nullified the sale.42 Apparently (as seems likely), the legatee heard of the purchase price having been returned to the heirs and he wanted to claim part of it to make up for his loss. But how could he set about that? He could not use the legatum per vindicationem, because, unlike the legatum per damnationem, this type of legacy could be used only to claim one’s own property and the land now belonged to the state. Two ways for Papinian to solve the problem spring to mind: to convert the legacy into a legatum per damnationem or to convert it into a fideicommissum.

At the initiative of the Emperor Nero, a senatorial decree had been issued that made it possible for an invalid legatum per vindicationem to be converted into a valid legatum per damnationem.43 The paying over of such a legacy could be claimed from the heirs with an actio ex testamento. If the bequeathed object was a certum, as in the case in question, then the formula would contain the clause ‘quantae ea res est’: if the judge were to decide that the claim was justified, he would condemn the heirs to pay the value of the res to the legatee. In the case of the rescinded sale, however, a conversion like this would not help. It was meant for cases in which the legatee had been unable to acquire his legacy from the outset. Here, the legatee had acquired the land but had lost it later, so the heirs could successfully deny his claim. For this reason it is unlikely that Papinian would have used this strategy.

But the invalid legatum per vindicationem could also be converted into a valid fideicommissum. This was a request made by a testator to one or more persons who would benefit from his inheritance to do something for or give something to a third party.44 It was originally used in cases where the ius civile would not

41 Idem: 319.
42 The land will have been delivered by means of traditio, cf. Kaser 1971: 415. When the causa of the traditio lapsed, the delivery became invalid.
43 Gai. Inst. 2.197; see also Voci 1963: 225–8.
44 Gai. Inst. 2.246–89; see also Voci 1963: 231–4.
allow a legacy, for example, to benefit someone who was not a Roman citizen. There were no formal requirements for a *fideicommissum*; it could be made in any way, even by means of a nod. The *fideicommissum* had been in use since Republican times, but at that time the beneficiary would not have had recourse to legal remedies to enforce performance. The emperor Augustus introduced a special *praetor fideicommissarius* who was authorised to judge claims based on *fideicommissa*, and in the second century, legacies that for some formal reason were null and void could be qualified as a valid *fideicommissum*.

Although the *responsum* as we know it does not say so, there are two reasons to assume that Papinian opted for converting the invalid *legatum per vindicationem* into a valid *fideicommissum*. The first is quite uncomplicated: Papinian included this *responsum* in a book on *fideicommissa*. The second is more elaborate: Papinian used the words *coniectura voluntatis* to support his view that the heirs should indemnify the legatee. For a *fideicommissum* to be valid it sufficed that the testator’s intention had been clearly expressed. In this case, the testator had clearly expressed his intention to leave part of the public land he had bought and possessed to the legatee. Unfortunately, the legacy had become invalid. Following the testator’s conjectured intention, Papinian regarded this invalid legacy as a valid *fideicommissum*. While the *fideicommissum* is not mentioned, the *coniectura voluntatis* is.

Papinian did not construe the will in accordance with the testator’s presumed intention (*coniectura voluntatis*) and contrary to the clear wording of the will, as Schilling suggested. Rather, Papinian used the clear wording of the will, particularly that of the *legatum per vindicationem*, to convert the invalid legacy into a valid *fideicommissum*. In other words, there is no reason to conclude from this *responsum* that Papinian ‘established a theoretical understanding and technical formulation’ of *coniectura voluntatis*. All he did, and all he had to do, was avail himself of the options Roman law placed at his disposal.

### 5.4 D. 31.77.8

The second *responsum* in which Papinian used the words *coniectura voluntatis* is D. 31.77.8. The text runs as follows:

Papinianus libro octavo responsorum. Evictis praediis, quae pater, qui se dominum esse crediderit, verbis fideicommissi filio reliquit, nulla cum fratribus et coheredibus actio erit: si tamen inter filios divisionem fecit, arbiter coniectura voluntatis non patietur eum partes coheredibus praelegatas restituere, nisi parati fuerint et ipsi patris iudicium fratri conservari.

Papinian, *Responsa*, Book 8. When a son is evicted from lands which his father, believing himself to be the owner, had left to him by the terms of a *fideicommissum*, there will be no action against the brothers and co-heirs. If, however, he made a division among the sons, the arbitrator will – upon conjecture of the father’s
intention – not allow this son to re-establish the parts that have been bequeathed to the co-heirs to be taken in advance, unless they too are prepared to hold up their father’s decision in favor of their brother.\footnote{This translation is based on that in Watson 1985, but the latter part differs considerably.}

Like Book 9, the eighth book of Papinian’s \textit{Responsa} deals with \textit{fideicommissa} and like the former \textit{responsum}, this one was included by the compilers in Book 31, \textit{De legatis et fideicommissis}.\footnote{Lenel 1889: I 917 (no. 599).} The words \textit{coniectura voluntatis} belong to the second part of the \textit{responsum}. What do they mean in this context? We again quote Schilling’s comment:

In the second case, a testator had left particular pieces of land, of which he thought he was the owner, to one of his sons and gave the rest of his lands to his other sons. It transpired that the particular pieces of land did not belong to the testator, such that the disposition was void and the son would receive nothing. This was an outcome the father obviously would not have wanted. Papinian held that according to the testator’s presumed intention (\textit{coniectura voluntatis}), the other sons should purchase the particular pieces of land for their brother or alternatively they should pay him an equivalent.\footnote{Schilling 2014: 320. On the \textit{divisio inter liberos}, see Voci 1963: 476–8.}

Schilling’s description seems to be based on Wieling’s.\footnote{Wieling 1972: 181–2. However, Schilling does not refer to Wieling.}

In our view, Schilling (and, for that matter, Wieling) explains the words \textit{coniectura voluntatis} in a way that is not backed by the text. These words do not refer to what the testator would want his heirs to do for their evicted brother, but to what he would want the arbiter to do for his heirs. The case may be more complicated than Wieling and Schilling suppose. For a proper understanding of the text and particularly of the words \textit{coniectura voluntatis} it is necessary to reconstruct the case, to assess the legal problem, and to analyse Papinian’s reaction.

The case: a father had left some pieces of land to one of his sons by means of a \textit{fideicommissum}. He also divided his estate among his sons by means of \textit{praelegata}, that is, legacies left to heirs in addition to their portion. Since legacies and prelegacies had to be included in a will, the father must have drawn up a will and he must have instituted his sons as heirs. The father died and the son who had received the \textit{fideicommissum} took possession of the lands. However, he was evicted, because somebody else turned out to be the real owner. The evicted brother wanted his brothers to compensate him for his loss but he could not make them do so. Probably, it was then that an arbitrator was asked to divide the inheritance. The evicted son made a request to the arbitrator but, unfortunately, it is not clear what he asked.

His question is hidden in Papinian’s opinion on what the arbiter should
do. The relevant sentence is ‘arbiter . . . non patietur eum partes cohereditibus praelegatas restituere’. It has been translated in various ways, none of which is satisfactory. 49 The main problem is the verb restituere, which usually means ‘to restore’, or ‘to return’. However, it cannot have that meaning here because the subject of restituere is eum, that is, the son, and he cannot return what had been bequeathed to his co-heirs. Moreover, it is not clear to whom he should return it. Restituere can also be translated as ‘to re-establish’, that is, the parts that had been assigned as prelegacies to his co-heirs. 50 In our view, this is the only translation that makes sense. The evicted son asked the arbitrator for permission to bring the fideicommissum into the undivided inheritance in order to secure the value of the land he had lost.

The legal problem in D. 31.77.8 is caused by the fact that the land from which one of the sons had been evicted had been left to him by means of a fideicommissum. If it had been left by means of a legatum per damnationem, things might have been different. When a testator had made a legatum per damnationem of someone else’s property, the heirs charged with paying over the legacy were obliged to buy the land or, if that was not possible, to pay the value of the land to the legatee. About fideicommissa of someone else’s property, however, jurists held different opinions: according to Gaius, some held that such a fideicommissum should be dealt with as if it were a legatum per damnationem; others thought that if the owner did not want to sell, the fideicommissum became invalid. 51

In this case, the son had had possession of the land on the basis of the fideicommissum, but he had been evicted. His situation was comparable with that of someone to whom something had been bequeathed by means of a fideicommissum which had from the outset belonged to someone else. Therefore, the main question in this case was whether the heirs should regard the fideicommissum as a legatum per damnationem and pay to their brother the value of the land (it is not likely that the successful evictor would want to sell the land), or whether they could regard it as invalid. A second, related question was whether the evicted son could make the arbiter include the fideicommissum in the division made by the father.

Papinian divided his responsum into two parts. First, he dealt with the validity of the fideicommissum: he did not agree with those who wanted to regard a fideicommissum of someone else’s property in the same way as a legatum per damnationem, but instead regarded it as invalid. Second, Papinian

49 Watson 1985: ‘the arbitrator . . . will not allow him to restore to the co-heir (but: cohereditibus) the part (but: partes) bequeathed to be taken in advance’; Otto et al. 1831: ‘so wird der Schiedsrichter . . . nicht zugeben dass jener Sohn die den Miterben zum Voraus vermachten Antheile sollte herausgeben müssen’; Spruit 1997: ‘zal de scheidsman . . . niet toelaten dat die zoon aan de mede-erfgenamen de hun bij prelegaat vermaakte porties afgeeft.’


51 Gai. Inst. 2.262. According to Voci 1963: 254 fn.17, only D. 32.30.6 and D. 32.14.2 respectively by Labeo and Gaius testify to the view first mentioned by Gaius.
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dealt with the division that the father had made in his will. There is no reason to assume - like Wieling and Schilling do - that the evicted son had been excluded from this division. The *fideicommissum* may have been an extra bonus. Because Papinian regarded it as invalid, he gave as his opinion that the arbiter should not consider it when dividing the inheritance. By dealing separately with the validity of the *fideicommissum*, Papinian prevented a situation in which the testator’s intention in the *fideicommissum* could be used against his intention in the division.

Let us now return to the main question: what do the words *coniectura voluntatis* mean in this *responsum*? Papinian used them as an argument for the arbiter not to consider the *fideicommissum* when dividing the inheritance; the father had made a division by means of *praeflegata* indicating how he wanted his property to be divided among his sons. For one son, he had also included a *fideicommissum*. He probably would not want his division to be upset by the fact that this *fideicommissum* turned out to be invalid. The words *coniectura voluntatis* were not meant to compensate the evicted son, but to protect the portions assigned to the other sons. It seems rather far-fetched to qualify this view as a ‘theoretical understanding and a technical formulation’ of the testator’s presumed intention.

5.5 Hellenistic epistemology revisited

How do these *responsa* and their modern-day interpretations compare to Hellenistic epistemology? Romanists interpret these *responsa* in terms of the testator’s real or presumed intention, whether or not it is mentioned by the jurist in question, and from this interpretation they deduce the solution to the legal question they believe to be correct. The assumption that it is possible to know the testator’s intention meshes remarkably well with the ideas of Stoic epistemology. Yet, while the Roman jurists, following suggestions in rhetorical handbooks, do sometimes refer to the testator’s intention, they only appear to do so in the sense of probable intention and as an argument to support a desirable resolution of the legal issue. There is not even a hint of a suggestion that it is the testator’s real or presumed intention they are after. If the influence of any epistemology can be traced in the jurists’ argumentation, it is that of the New Academy.

6. CONCLUSION

We have attempted to show that there is a discrepancy between the Romanists’ interpretation of *voluntas testatoris* and the way the Roman jurists used these words. The former interpret them so that they fit their theory on the testator’s intention: by regarding him as a reasonable person who is supposed to have made a reasonable will, they can reconstruct his real or presumed intention. In the *causa Curiana*, this reconstruction generated the
hypothesis that the testator would have included a vulgar substitution in his will, and in the four responsa it led to rather complicated exegeses of two simple cases (D. 32.62 and D. 34.5.28) and to rather simplified exegeses of two complicated cases (D.31.78.7 and D. 31.77.8).

We on the other hand believe that, like Cicero, the Roman jurists used the words voluntas testatoris in the sense of probable intention, sometimes in the context of the status verba-voluntas, sometimes in another context, but always as an argument to support an opinion. In the fourth responsum (D. 31.77.8) both parties would have used the testator’s intention to support their claim: the son by referring to the fideicommissum and his brothers by referring to the division made by their father. Clearly, in such a case, it is impossible to know the testator’s real or presumed intention. There is no single correct solution based on logical reasoning. The same holds for the other three responsa and for the causa Curiana.

In the introduction we raised the question of which philosophical school was most relevant to the development of Roman law, the Middle Stoa or the New Academy. We think they can both claim predominance, but in two different periods. The New Academy was most relevant to le droit romain, while the Stoa is most relevant to das heutige römische Recht. The Roman jurists referred to the voluntas testatoris in the sense of the testator’s probable intention, assuming that it is impossible to know something for certain. The Romanists, however, tend to interpret responsa about unclear wills on the basis of the testator’s real or presumed intention, assuming that it is possible to read a dead man’s mind. As Schilling has pointed out, this theory is closely related to modern German law and it is therefore tempting to qualify this theory not only as Pandectism, but – since Romanists try to design a modern theory on the interpretation of wills in the Roman sources – as ‘retro-Pandectism’. Of course, the philosophical basis of modern legal science belongs to our time, but it seems to share some fundamental elements with the Middle Stoa. In Roman antiquity, on the other hand, jurists facing the challenge of interpreting texts may more readily and successfully have turned for support to the New Academy. Cicero showed the way.

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