

CICERO ON PRAETORS WHO FAILED TO ABIDE BY THEIR EDICTS

Cicero, *pro Cornelio*, fragments 37 and 38 (Schoell, Puccioni) = Asconius, p. 74 (Clark):

Non Cn. Dolabella C. Volcacium, honestissimum virum,
communi et cotidiano iure privasset . . .
Non denique homo illorum et vita et prudentia longe
dissimilis, sed tamen nimis in gratificando iure liber,
L. Sisenna, bonorum Cn. Corneli possessionem ex edicto
suo P. Scipioni, adulescenti summa nobilitate, eximia
virtute praedito, non dedisset.

Cicero, after a discussion of the value of Cornelius' bill about *privilegia*,¹ is clearly here dealing with the bill, 'ut praetores ex edictis suis perpetuis ius dicerent' (cf. Asconius, 59 C). The pluperfect subjunctives suggest that he is arguing that notorious unjust judgements of previous years would not have happened,² if Cornelius' bill had been then in force.

The first sentence carries little meaning or implication for us. With no help from Asconius, we do not even know which Dolabella is the subject, the consul of 81 B.C. or the *praetor urbanus* of 81, although the latter is more probable simply because he is attested as *praetor urbanus*, and the period of Sulla's dictatorship would have provided a suitable background.³ The second part of the fragment shows that Dolabella and at least one other man were treated as thoroughgoing rogues and ignorant of the law ('illorum et *vita et prudentia* longe dissimilis') by comparison with Sisenna, the historian, who combined the urban and peregrine praetorship in 78.⁴ The latter, however, was over-inclined to make a present of his legal decisions.

What in fact did Sisenna do? K. Kumaniecki in his recent commentary on the speeches for Cornelius⁵ argued that the repeated 'non' was pleonastic and that Sisenna granted *bonorum possessio* to P. Scipio, later Q. Caecilius Metellus Pius Scipio Nasica,⁶ 'ed edicto suo'. Yet, what could be improper about this, and how could Cornelius' bill have *prevented* a praetor acting according to his own edict? It is far more plausible to infer that the 'non . . . non' is a double negative producing a positive meaning: if Cornelius' bill had been law at that time, Sisenna could not have failed to grant *bonorum possessio ex edicto* to P. Scipio; as it was, he did not so grant, in order to please someone else.

¹ Frs. 32–6 (Schoell, Puccioni); Asc. 72–4 C, cf. 57–9 C; Dio 36.39, on which see now M. Griffin, *JRS* 63 (1973), 196 ff.

² Cf. Asc. 59 C; Dio 36.40.1–2. Evidence of Verres' disregard of his urban and provincial edict may be found in *Verr.* 2.1.119; 2.2.90.

³ Muted strictures on Dolabella's partiality and lack of legal acumen in Cic. *Quinct.* 30–1.

⁴ *CIL* 1².ii.589.

⁵ 'Les Discours égarés de Cicéron pro Cornelio', *Mededelingen v.d. Koninkl. Vlaamse Acad. van België* xxxii, no. 4, 1970, p. 24.

⁶ *RE Caecilius*, no. 99, invoked by Cicero also in *Rosc. Am.* 77, *Verr.* 4.79 ff. Cf. Münzer, *Römische Adelsparteien*, pp. 314 ff.

What kind of *bonorum possessio ex edicto* was in question? We cannot entirely rule out the possibility that Cn. Cornelius was a debtor who had failed to meet his obligations and Scipio was seeking a *missio in possessionem* as creditor. Cicero's *pro Quinctio* (§60; 84) shows that the relevant clauses already existed in the edict of the urban praetor. Cn. Cornelius might have been 'qui fraudationis causa latitarit', 'cui heres non exstabit', 'qui exsili causa solum verterit', or 'qui absens iudicio defensio non fuerit'.⁷ Sisenna's failure to grant this demand would have been a favour to Cn. Cornelius himself or his friends. However, P. Scipio is being presented as a sympathetic victim of injustice, and a creditor is not an ideal choice as an object of universal sympathy. It is perhaps easier to assume that Scipio was seeking an inheritance, perhaps by means of a request for *bonorum possessio si tabulae testamenti non proferentur*.⁸ The praetor's rule, when no written will in proper form was produced, was 'uti quemque potissimum heredem esse oporteat, si is intestatus mortuus sit, ita secundum eum possessionem dabo'.⁹ Possession went to the man who would have succeeded in case of intestacy. Asconius does not attempt to identify the Cn. Cornelius mentioned here, nor indeed does Cicero, who has just referred to Cn. Dolabella by his *praenomen* and *cognomen*, in his usual fashion when mentioning people with common gentile names. It is probable that this Cornelius was a comparatively humble man, who might well have been a freedman and client of the Scipionic family. If so, P. Scipio could have been seeking the rights of a patron and his family, when one of their freedmen had died intestate.¹⁰ There is a further possibility. The praetor's edict at some point before 75 B.C. granted to the patron *contra tabulas testamenti partis dimidia bonorum possessio*, when the freedman had no natural children and had not made this provision himself in his will.¹¹ If this was the ground of Scipio's claim, the example would have been very apt for Cicero's purpose since Sisenna as praetor would have disregarded an innovation made according to the *ius honorarium* of the praetor and publicized in his edict. A tempting speculation is that Sisenna had done this to gratify another powerful man who had been named in the freedman's will.

Praetorian inconsistency and corruption in the years preceding 67 would thus have lain not only in creating *ad hoc* new legal actions and rules, as Verres did, but in disregarding established innovations—perhaps on the alleged ground that

⁷ The last clause or something very similar must clearly be supplemented in *Quinct.* 60.

⁸ Cf. Cic., *Verr.* 2.1.114; 117. On these passages see A. Watson, *Law of Succession in later Roman Republic*, pp. 71 ff. For the general phraseology used to describe the praetor's action, cf. *Fam.* 7.21—'si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dedit', where it is argued that this phrase did not apply if the praetor had acted improperly. It is possible that Scipio was requesting *bonorum possessio secundum tabulas* (*Verr.* 2.1.117) but Cicero does not say that Sisenna disregarded the *tabulae* as well as his edict.

⁹ Cf. Cic. *Verr.* 2.1.114; Gaius 2.119 ff.

¹⁰ Cf. Gaius 3.39 ff.; *Dig.* 38.2.1.2 on which see Watson, *Law of Succession*, pp.

185 ff., *Law of Persons*, pp. 232 ff.

¹¹ Gaius 3.41; Cic. *Verr.* 2.1.125 ff. Gaius merely shows that this innovation was in the praetor's edict before the *lex Papia Poppaea*. Watson, cited in note 10, has argued that the Cicero passage shows that the rights of patrons and their families under the XII tables had been reformed under the edict by 75 B.C., so that women (without special aid from Verres) could not inherit through the patron. The innovation by which the patron and his male descendants had a right to half the property against all but the freedman's natural children was also probably in force. Watson's basic conclusions are accepted by S. Treggiari, *Roman Freedmen during the late Republic*, pp. 78 f.

they conflicted with the old *ius civile*. Cornelius' plebiscite would thus have played an important part in stabilizing the reforms which now appeared in the edict.

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