STUDIES IN THE CIVIL JUDICATURE OF THE ROMAN REPUBLIC

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PREFACE

I WOULD like to acknowledge here, with deep gratitude, the very considerable help I received from Professor Wolfgang Kunkel of Munich, Professor Max Kaser of Salzburg, and Mr. J. A. Crook, President of St. John's College, Cambridge, who read the entire manuscript and went to extraordinary pains in making suggestions for its improvement. My best thanks are due also to the Deutscher Akademischer Austauschdienst, whose very generous support made possible for me several quiet weeks of study at the Institut für geschichtliche Rechtswissenschaft in Heidelberg, to whose Director, Professor Karl-Heinz Misera, I am deeply obliged for an unfailingly kind and helpful reception.

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January 1975

ABBREVIATIONS

Behrends, *Geschworenenverfassung*	Okko Behrends, *Die römische Geschworenenverfassung*, Göttinger Rechtswissenschaftliche Studien, Bd. 80; Göttingen, 1970.
Kaser, *RPR*	Max Kaser, *Das römische Privatrecht*, i (2nd edition); Munich, 1971.
Kaser, *RZPrR*	Max Kaser, *Das römische Zivilprozessrecht*; Munich, 1966.
Kunkel, *Kriminalverfahren*	Wolfgang Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, Abhandlungen der bayerischen Akademie der Wissenschaften (Phil.-hist. Klasse, Heft 56); Munich, 1962.
RE	Pauly-Wissowa, *Realenzyklopädie der classischen Altertumswissenschaft.*
Schmidlin, *Rekuperatorenverfahren*	Bruno Schmidlin, *Das Rekuperatorenverfahren: eine Studie zum römischen Prozess*, Arbeiten aus dem juristischen Seminar d. Universität Freiburg/Schweiz; Freiburg, 1963.
VIR	*Vocabularium Iurisprudentiae Romanae*; Berlin, 1894–.
Watson, *Persons*	Alan Watson, *The Law of Persons in the Later Roman Republic*; Oxford, 1967.
Watson, *Property*	Alan Watson, *The Law of Property in the Later Roman Republic*; Oxford, 1969.
Watson, *Succession*	Alan Watson, *The Law of Succession in the Later Roman Republic*; Oxford, 1971.
ZSS	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Romanistische Abteilung*).

CONTENTS

I

The *Centumviri*

THE purpose of these essays is to present the different parts of the civil judicature of the Roman Republic in such a way as to give reasons for their separate existence.

The types of judicial instance which are evidenced in the Roman sources are strikingly different from each other in mode of composition and, in large measure, in their spheres of competence. While this fact is naturally recognized and documented in the many textbooks and monographs on Roman civil procedure, and explanations sometimes given for the origin of individual jurisdictions, there has not yet appeared a complete and organic account of the coexistence of several jurisdictions with an adequate explanation of the social or political or legal reasons behind their special characteristics.

Two examples of this lack—one from the major modern textbook, one from a fairly recent and striking monograph—will sufficiently make this point. Kaser's *Römisches Zivilprozessrecht*, published in 1966, describes in consecutive sections[1] the functions of the *centumviri* and *decemviri*, so far as they are known, in the *legis actio* period; then the function of the single judge (*iudex* or *arbiter*); but with no discussion of why, in some kinds of case, a collegiate rather than a one-judge court was used, or vice versa; and this treatment is repeated later in the section on the judges of the formulary procedure.[2] The *centumviri* and *decemviri* survived into this age, and this survival might seem in need of explanation, but none is offered. Kaser, it is true, does offer a reason for the special jurisdiction of the *recuperatores*,[3] but the addition of this jurisdiction—already well in existence, incidentally, before the formulary procedure became generally

[1] 37 ff. [2] 138 ff.
[3] 142–3; following Schmidlin, *Rekuperatorenverfahren*.

established—only intensifies the need to give an orderly account of the factors which, for example in the age of Cicero, had produced the coexistence of *unus iudex*, *recuperatores*, and *centumviri*.

The more recent monograph of Okko Behrends, *Die römische Geschworenenverfassung* (1970), might have raised, through its title, an expectation that this question would be faced and answered, but this does not happen. The author's main theme is his view of the mechanism—in particular the timing—of the Roman judicial engine, and all the problems of the total, variegated Roman judicature are subordinated to, and somewhat obscured by, the presentation of the *unus iudex* as the central and original figure—something which is itself problematical—and by treating all the other jurisdictions in a series of short sections as subsidiary phenomena ('Die Richter neben dem *iudex unus*'). Behrends does indicate possible justifications for them individually, but they seem inadequate to explain the total judicial structure whose very variety is its most conspicuous feature.

Any particular approach to this theme may be open to objection on the grounds of method, but it seems to me defensible to take as a starting-point the two jurisdictions which exhibit the strongest mutual contrast in point of composition and procedure: the *unus iudex* and the *centumviri*. If it is possible to isolate factors which explain the latter, these very same factors will throw light, by their absence, on the nature of the former. If we then add a consideration of the third main jurisdiction in the period, that of *recuperatores*, and can find special factors here too, this will round out and nearly complete our understanding of the *unus iudex* as a social no less than a legal phenomenon.

The first knot to be disentangled is accordingly the nature of, and the reasons for, the centumviral jurisdiction. This jurisdiction has been for many years a subject of controversy, partly on account of the difficulty of delimiting its competence with certainty, partly on the question of its antiquity; and these matters concerning its external nature must be discussed before

trying to elucidate the reason for the court's existence in the first place.

Perhaps even a prior question is that of the composition of the court. The name *centumviri* implies that it consisted of 100 members. Yet the only texts which give clear information on the size of the court mention numbers of which neither is exactly 100.

Festus[1] reports that the court in fact consisted of 105 members, a number reached by the election of three members each by the thirty-five *tribus*. This slight numerical discordance need not throw doubt on the mode of composition reported by Festus, because Festus himself describes the name *centumviri* as one of convenience, and moreover we have the express testimony of Varro[2] that a conventional number need not be exactly used in practice; to illustrate this he points out that we do not mean it literally when we speak of the thousand ships that sailed to Troy or of the hundred-man court at Rome (*sic numerus non est ut sit ad amussim, ut non est, cum dicimus mille naves isse ad Troiam, centumvirale esse iudicium Romae*).

La Rosa[3] believes that the court of the *centumviri* was originally identical with the primitive Roman Senate of 100, and is therefore obliged to get rid somehow of the evidence of Festus. Her attempt in this direction is two-pronged. Firstly, she objects that if the original court in fact contained 105, and not 100 members (as Festus implies) it would not have been called *centumviri* at all. The Romans, she points out, could be exact in such a context, and she instances the XXVIvirate. She suggests that if in fact at some stage the court was reformed and enlarged to 105, the original name of *centumviri* might well have been *retained* for reasons of convenience. But she does not consider what might have motivated such a numerically trivial increase, nor the form which this reformation might have taken. Another consideration which must weaken La Rosa's objection is this: the word *centuria* was used in the Republic in at least three

[1] Paul. ex Fest. 54 (Mueller). Kunkel (*Kriminalverfahren*, 118 n.) thinks this text is certainly abbreviated from the original, and possibly also distorted.

[2] *Res rusticae* 2. 1. 26.

[3] 4 *Labeo* (1958) 14 ff., 34.

different senses (a voting unit, a military unit, and a division of a trade-guild),[1] but it is highly unlikely that in any one of these senses it could ever have been meant to mean a collection of exactly one hundred persons. La Rosa's argument based on the numerical discordance is, therefore, insufficient to invalidate Festus' report of the *centumviri* being an elected body formed from the *tribus*; though Kunkel[2] is ready to assume that the *centumviri* need not necessarily from the beginning have consisted of the same number of members, and of course, even assuming election from the *tribus*, the number of members per tribe must have been correspondingly greater at the time when there were fewer *tribus* than the 35 mentioned by Festus.

La Rosa's other argument against the *tribus*-election system is at first sight more substantial. It is this: if (as she holds)[3] the *centumviri* were an archaic judicial organ, going back to the earliest period of Rome's history, then it must be wrong to suggest that the members were elected by the *tribus*, because this would have given both plebeians and patricians a voice in the election, and this she finds a democratic element which seems, in relation to an archaic period, to be an anachronism. (Her own theory, whereby the *centumviri* were originally simply the Senate, meets no such difficulty.) But perhaps the difficulty is exaggerated. Even though power and influence played a great part in the practical working of the Republican constitution, it was still substantially a democracy. If there was no obstacle to the plebeians taking part in the various *comitia*—even though they could not, at first, occupy the magistracies whose incumbents presided over them—it is hard to see anything which would *a priori* exclude the possibility of a court of 100 being formed on a similar footing.

Apart from this general consideration, it may be appropriate to mention here the theory of Kunkel[4] that the composition of the court from as wide a base as possible—viz. from all the *tribus*—may have served the purpose of spreading responsibility for the court's decisions as thinly as possible among as many

[1] *RE* 3. 1952 ff. (Kübler, v. Domaszewski).
[2] *Kriminalverfahren*, 118.
[3] Op. cit. 29.
[4] Op. cit. 119.

different groups as possible, thus making it difficult for the defeated party or his supporters to commit acts of revenge on the judicial organ responsible for his defeat. Looked at in the light of this (admittedly unprovable) theory, the inclusion of plebeians as well as patricians in the court would become even more natural, since the 'division of responsibility' motive would be better served the wider the political and social spectrum of the court's membership.

Accordingly, it seems best to stick for the moment to the association of the *centumviri* with the *tribus*; and, as will be seen, this very association may provide a valuable hint of the *raison d'être* of the court itself.

Opinions on the date of the court's origin have been very divided. Among the earlier writers, of whom Bethmann-Hollweg[1] may serve as an example, the *centumviri* were regarded as a most ancient institution. A reaction against this point of view set in with Francesca Bozza;[2] her main objection to the thesis that the *centumviri* had a very early origin is based on the *argumentum ex silentio* that they are nowhere mentioned in early Republican sources, whether legal or secular. The XII Tables, however, do not describe the composition of the Roman judicature, but take it for granted; and the occasional reference to *iudex* might as easily be interpreted as applying to a member of the *centumviri* as to any other judicial organ, e.g. the rule providing the death penalty for a judge who takes bribes.[3] Bozza further argues that in Plautus *Men.* 580 ff., where (she says) the various Roman judicial organs are enumerated, the *centumviri*, had they existed, ought to have been mentioned, but Plautus does not mention them. This argument is of no force at all. The passage in question deals with swindling, and reads:

> Qui neque leges neque aequom bonum usque colunt,
> Sollicitos patronos habent.
> Datum denegant quod datum est, litium pleni, rapaces
> Viri, fraudulenti,

[1] *Der römische Civilprocess*, i. 56 ff.
[2] *Sulla competenza dei centumviri* (1928).
[3] Aulus Gellius, *Noctes Atticae* 20. 1. 7.

Qui aut faenore aut periuriis habent rem paratam,
Mens est in quo lis est.
Eis ubi dicitur dies, simul patronis dicitur,
[Quippe qui pro illis loquantur, qui male fecerint;]
Aut ad populum aut in iure aut apud aedilem res est.

A matter of this kind would not, on any hypothesis of the competence of the *centumviri*,[1] have come before their court. If, in fact, Plautus *had* mentioned the *centumviri* here, it would have been more than strange.

As against these negative considerations, two more recent writers—La Rosa[2] and Kunkel[3]—have returned to the standpoint of Bethmann-Hollweg, and have decided in favour of a very early date for the *centumviri*, in my view rightly. Both of them regard as significant the fact that the procedure used in centumviral litigation was always the *legis actio*.[4] Bozza assigns the origin of the *centumviri* to the late second century B.C., and La Rosa and Kunkel naturally find it incredible that, just at the time when the *legis actio* was beginning to give way to the formulary system, a new court could have been created to which this obsolescent procedure was attached for good. On the contrary, the association of *legis actio* with *centumviri* must point to a more ancient origin; and indeed the well-known passage of Aulus Gellius on the mysterious *lex Aebutia*[5] might well suggest that the centumviral jurisdiction, even if not mentioned in the surviving fragments of the XII Tables, does in fact go back to that statute or beyond it: *omnisque illa duodecim tabularum antiquitas, nisi in legis actionibus centumviralium causarum lege Aebutia lata consopita est.* A plausible, even if not a necessary interpretation of this passage might see it as implying that the *legis actio* procedure in centumviral cases was in fact prescribed, implicitly if not expressly, by the XII Tables themselves, and that the *centumviri* were therefore of at least that age.

[1] i.e. even on the broadest interpretation of Cicero, *De oratore* 1. 173 (to be discussed below, pp. 9 ff.); the passage in question omits all reference to the whole law of contract and delict.

[2] Op. cit.

[3] Op. cit. 115 ff.

[4] Gaius, *Inst.* 4. 31, 95; Gellius, *N.A.*, 16. 10. 8.

[5] Loc. cit.

Kunkel draws[1] a further and, for him, confirmatory argument from the research of Alföldi,[2] which goes to show that the spear (*hasta*)[3] customarily set up at sittings of the *centumviri*, and which is often used in literature as a metaphor for the court itself, was an extremely archaic symbol of state power. He concludes that the *centumviri* must be assigned to the earliest phase of the Roman state, but accepts the possibility that the court known in historical times as that of the *centumviri* may originally have borne some quite different name.[4]

Behrends,[5] more recently, returns to the theory which sees in the *centumviri* a relatively modern innovation. His main objection to Kunkel's view seems of small substance. According to him, the *centumviri* can hardly be earlier than 241 B.C., because before that date there were only 33, not 35 *tribus*, so that with three members from each tribe one would be left with only 99 judges, which he thinks less likely to have carried the title *centumviri* than 105. Apart from the fact that the passage from Varro cited above would be an answer just as cogent for 99 as for 105, there is the additional possibility that if one counts the presiding magistrate as well, one gets an exact 100 even before 241 B.C. Moreover, Behrends's argument gets no stronger through being applied to even earlier periods, since no matter how small the number of *tribus* in existence at any time, some multiple (if not 3, then 4 or 5 or 6) will produce roughly 100.

What is essential in the report of Festus is not the arithmetic,

[1] Op. cit. 117.

[2] 63 *Am. J. Arch.* (1959) 1 ff. Alföldi's conclusions are rejected by Behrends, op. cit. 104 n. 64.

[3] Gaius, *Inst.* 4. 16.

[4] J. A. Crook has privately commented on the failure of Gaius to list *centumviralia iudicia* among the *iudicia legitima*; this, he thinks, must tell against the extreme antiquity of the court. But if Gaius does not describe the *centumviralia iudicia* as *legitima*, neither does he list them as *imperio continentia*. It is true that, on the definition of *iudicium legitimum* in Gaius 4. 104, a *iudicium centumvirale* ought, by exclusion, to rank as *imperio continens*; yet in the definition of *iudicium imperio continens* in the very next section, the *centumviri* are not mentioned. It seems to me that this question is best dealt with by saying that the distinction *legitimum/imperio continens* is being described here by Gaius only in the context of the formulary system; he has previously disposed of the *legis actiones*, to which procedural world the *centumviri* belong. See Kaser, *RZPrR* 116 n. 76; Broggini, *Iudex Arbiterve* 211.

[5] Op. cit. 103 ff.

but the concept of a large court deliberately representative of subdivisions of the people.[1]

Equally controversial with the question of the date of the court's origin is the question of its competence; but the latter is of perhaps greatest importance in approaching the social reasons for the court's existence at all. There is, however, at least one point at which the questions of date of origin and of competence overlap; this is a consequence of Bozza's theory[2] that the *centumviri* were formed as a court as a direct consequence of the rise of freedom of testamentary disposition, which theory, if correct, would place the court's emergence in the later rather than in the earlier Republic. Perhaps this had better be cleared out of the way before we consider the question of competence from the beginning.

According to Bozza, with freedom of testamentary disposition litigation about wills became so frequent, and cases became so full of incidental questions of importance, that they could not be left to a single judge. Admittedly there is no trace of the *unus iudex* in succession cases in the Republic. But Bozza's theory, apart from its lack of positive supporting evidence, that the volume and importance of succession cases suddenly justified their removal (presumably) from the field of the *unus iudex* to that of a court with 100 members, is unconvincing. Were there not plenty of *iudicia privata*—arising e.g. from contracts between large capitalists and merchants—whose 'importance' might have justified the same step? She explains that the state must have intervened, by creating the *centumviri* as an exception from the general regime of the *unus iudex*, in order to put an end to corruption. But it is impossible to accept the implication that corruption was necessarily more widespread or more dangerous in succession cases than in others; and, while obviously it is harder to bribe 100 judges than to bribe a single one, collegiate courts were not immune to the influence of money or power, as the history of the *quaestiones* towards the end of the Republic fully demonstrates.[3] Bozza's view on the motive behind the

[1] Festus, loc. cit. [2] Op. cit. 15–16.
[3] Kelly, *Roman Litigation*, 33 ff.

creation of the *centumviri* thus adds nothing to her view on the date of their origin; and no other author has ventured an opinion on this question, vital though it might seem to any hypothesis which would place this origin any later than the beginnings of the Roman legal order, i.e. which would regard the creation of the centumviral jurisdiction as a reformation or innovation.

On the competence of the court, there is a wide variety of opinion. At one extreme, Bozza believes[1] that the *centumviri* had a jurisdiction which was absolutely limited to questions of succession; at the other extreme, Wlassak[2] was led by the apparent identity of the *hasta* with the *festuca* to speak of a general competence in *vindicationes*. Kunkel[3] and Kaser[4] occupy intermediate positions.

The most important text in this connection, and the one which has been given the most diverse interpretations, is Cicero *De orat.* 1. 173. It is a passage in which Cicero comments on the impertinence of inexperienced and ignorant orators, who have the presumption to appear and plead in different courts, particularly that of the *centumviri*, in which a huge range of legal institutions may be in issue:

> Nam volitare in foro, haerere in iure ac praetorum tribunalibus, iudicia privata magnarum rerum obire, in quibus saepe non de facto, sed de aequitate ac iure certetur, iactare se in causis centumviralibus, in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum aut ratorum, ceterarumque rerum innumerabilium iura versentur, cum omnino, quid suum, quid alienum, quare denique civis aut peregrinus, servus aut liber quispiam sit, ignoret, insignis est impudentiae.

Anyone coming fresh to this text, knowing that virtually all the centumviral cases mentioned in Roman literature are (where

[1] Op. cit. 24 ff.

[2] *RE* 3. 1940 ff.

[3] Op. cit. 119 n. 437; he believes that the court handled other *vindicationes*, particularly those concerning ownership of land, as well as those arising in inheritance disputes.

[4] Op. cit. 38–9; he thinks the court's competence extended to the *hereditatis petitio*, the *querela inofficiosi testamenti*, *vindicatio* of land, and certain disputes about status.

the subject-matter is clear beyond doubt) in fact succession cases of one kind or another, would assume at once that the *centumviri* had a very wide competence indeed, and might conclude that any dispute arising from the various matters enumerated was automatically and generally within the centumviral jurisdiction. Bozza, however, argued[1] that the passage is perfectly consistent with the restriction of the centumviral jurisdiction to inheritance cases only.

She reached this position by, first of all, consigning the words *cum omnino . . . ignoret* to a footnote, with the explanation that they were no more than a general measure of legal ignorance, equally applicable to the *in iure* and *iudicia privata* parts of the passage (a view shared by Behrends),[2] and, secondly, arguing that every one of the other matters mentioned after *in causis centumviralibus—usucapio, adluvio* etc.—occurs in the text only to denote questions which might arise in a preliminary or marginal way in the course of an action about an inheritance. Thus, according to her, if Cicero mentions a servitude in the context of the *centumviri*, it is only because a dispute over an inheritance can require the investigation of such matters, e.g. in order to establish just what does belong to the inheritance.

Her method was to take, one by one, the areas in which Wlassak had asserted a centumviral competence (apart from inheritance cases) and demonstrate that the evidence in each area is extremely thin; and in my view, despite the critical review of her thesis by Koschaker[3] and the carefully weighed judgment of Kaser,[4] she was in the right.

Both Wlassak and Kaser think a centumviral jurisdiction existed in litigation purely about status—in the main, *causae liberales* would be here in question. Yet the texts on which this conclusion rests will not, in my opinion, support it. There is, for instance, the combined weight of Cicero *De orat.* 1. 181 and 238; the former passage adverts to the case of one Mancinus, whose revived citizenship through *postliminium* was denied by P. Rutilius, a *tribunus plebis*, and Mancinus' situation is used by Cicero to illustrate the statement that *capitis nostri saepe potest*

[1] Loc. cit. [2] Op cit. 106 n. 69. [3] 50 *ZSS* (1930) 679 ff. [4] Loc. cit.

accidere ut causae versentur in iure. In the latter passage, Cicero comes back to the same case, this time saying it had been one of the *maximae centumvirales causae*. Bozza's objection to treating the case as evidence of jurisdiction in cases where status, and no more, was in issue is that, so far as the text goes, the determination of Mancinus' status might quite easily have been incidental to a question of inheritance, and indeed, as I hope to show later, such a problem was all too likely to be a component of an issue which primarily was one of succession. This consideration, moreover, is quite independent of the further difficulty that a well-established jurisdiction in *causae liberales* as such already existed and was vested in *decemviri*,[1] so that to take these passages as proving a status competence, independent of inheritance questions, on the part of the *centumviri* introduces the complication of a concurrence of jurisdictions, which in turn would call for explanation.

According to Wlassak,[2] further evidence of centumviral competence in *causae liberales* is provided by two Digest passages, D. 42. 1. 38 (Paulus) and D. 40. 1. 24. pr. (Hermogenianus). The former reads: *Inter pares numero iudices si dissonae sententiae proferantur, in liberalibus quidem causis, secundum quod a divo Pio constitutum est, pro libertate statutum optinet, in aliis autem causis pro reo*. The latter: *Lege Iunia Petronia, si dissonantes pares iudicum existant sententiae, pro libertate pronuntiari iussum*. Bozza[3] denies that either of these texts shows a centumviral competence in *causae liberales*, her reason being that if either the centumviral court consisted of 105 members, or one of its divisions consisted of 45 members,[4] the envisaged situation of an even number of votes on each side could not result; accordingly, the *iudices* in question here must be some body other than the *centumviri*. This argument is not very strong, as Koschaker[5] pointed out; we have no really firm information on the size of the divisions in which the *centumviri* may have sat, and, if these divisions themselves were at all numerous, as the assignation of *decemviri* to them as presidents might

[1] See below, pp. 67 ff. [2] Loc. cit. [3] Op. cit. 62.

[4] This is implied by Pliny's reference (*Ep.* 6. 33. 3) to a joint session of four *consilia* making up a centumviral court of 180 members.

[5] Op. cit. 685–6.