
SOME PERIPHERAL ASPECTS OF THE SPEECH

PRO CLUENTIO

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The trial of Cluentius, Aulus Cluentius Habitus (or Avitus) junior, an *equus* from Larinum, on a charge of poisoning¹ Statius Abbius Oppianicus senior, also an *equus* from Larinum, in about the year 72 BC, took place in 66 BC before the *quaestio perpetua de sicariis et veneficiis*. His real accuser was Statius Abbius Oppianicus junior, who was very properly motivated by the desire for vengeance, although the formal prosecutor was one Titus Attius.² (I shall usually refer to the son as Oppianicus junior, and the father simply as Oppianicus.) Cicero's defence was essentially that Oppianicus was such a villain, and so deservedly convicted in 74 BC of attempting to poison Cluentius, that Cluentius had no motive to murder Oppianicus, by then his stepfather. Of course, Romanists have always cited passages from *pro Cluentio* to illustrate the law of family and succession in the Later Roman Republic. I want, however, to aim for a more focussed picture of law and society in an Italian town in the post-Sullan period.³ It is the background I want to examine, not the question of Cluentius' guilt or innocence, but it is necessary to give an outline of the crimes Cicero alleged against Oppianicus, since they relate to this background.

Oppianicus was not, said Cicero, guilty simply of the attempted poisoning of Cluentius; his wickedness was manifest from the range of other crimes and misdoings attributed to him. They are summarized at one stage of Cicero's speech:

Oppianicus was the man who was convicted of falsifying with his own hand the public records of his town, who forged a will, who by fraudulent personation secured the seals and signatures of witnesses to a sham will, who murdered the man in whose name it had been signed and sealed, who put to death his own son's uncle when a slave and a captive, who secured the proscription and death of his own fellow-townsmen, who then married the widow of a man he had killed, who gave a bribe to procure an abortion, who murdered his mother-in-law, murdered his wives, murdered at one and the same time his

1 As *Clu* 1.1 makes quite clear.

2 I follow S Rizzo, ed *Pro Cluentio* (Mondadori 1991) and MC Alexander, *The Case for the Prosecution in the Ciceronian Era* (Ann Arbor 2002) in preferring the form Abbius to Albius, and Attius to Accius.

3 Larinum is some 125 miles from Rome, on the Adriatic coast.

brother's wife with her expected children and his brother himself, and finally murdered his own children, and who, intending to give poison to his step-son was taken in the act [not Oppianicus himself but his tool, Scamander], and when haled to judgment after the conviction of his tools and accomplices bribed a juror to tamper with the other jurors' votes.⁴

One must remember that, as for example in the case of Germanicus, it was very easy to allege that someone had been poisoned, since the Romans had no adequate knowledge of internal diseases. On the other hand, while we do not have to believe that Oppianicus did actually poison so many of his kin, it is clear that Cicero could put forward these allegations without arousing ridicule; one must not ignore the cheapening of life and the coarsening of sensibility brought about by the Social Wars and the period of the proscriptions.

Cluentius' father, Aulus Cluentius Habitus senior, had been the leading man in Larinum and its surrounding district;⁵ he had died in 88 BC, leaving a widow, Sassia, a son, the present defendant, who was then fifteen, and a daughter of at least twelve, Cluentia, for she soon afterwards married her cousin, Aulus Aurius Melinus.⁶ However, Sassia fell in love with and seduced Aurius Melinus; there was a divorce and, two years after her daughter's marriage, mother-in-law married son-in-law.⁷ This was clearly a shocking affair. A union between a mother-in-law and son-in-law was later counted incestuous even when only an engagement,⁸ and *a fortiori* after marriage, but probably this was not true at this period, since the relationship as such involved no blood tie. Moreover, we are told that Aurius Melinus was Cluentia's *consobrinus*, which in the strict sense would mean he was the son of Sassia's sister; in this event, his marriage to Cluentia, his first cousin, was entirely permissible. But marriage to his aunt would undoubtedly be incestuous, *iure gentium*, surely for Latins as much as Romans. Hence it seems that *consobrinus* is being used more loosely:⁹ Aurius Melinus might well have been the son of Sassia's sister's husband, Aurius, by another wife, or even possibly, on the paternal side, the son of Cluentius

4 *Clu* 44.125, based on the Loeb translation.

5 This claim is confirmed by the wide range of testimonials in support of Cluentius junior – *Clu* 69.195-198.

6 *Clu* 5.11. Cluentia may, of course, have been more than 12, but probably not older than her brother, since Roman upper-class girls seem on average to have married around 14 – see MK Hopkins, "The age of Roman girls at marriage", 18 *PopSt* (1965), 309-327. It is highly probable that the very proper match – *nuptiae plenae dignitatis* – had been approved by her father.

7 *Clu* 5.12 - 6.15. He is described as *adulescens*, but this term was regularly applied up to the age of 30; so there need not have been any great gap in age between him and Sassia.

8 *D* 23.2.12.1-2, Ulpian.

9 See *D* 38.10.10.15, Paul, citing Trebatius, a late Republican jurist.

senior's sister, Cluentia the elder.¹⁰ In these cases too, classical law held the union incestuous, but, again, there would not have been a blood relationship. In the Republic therefore it must have been merely immoral, not criminal. For Sassia cannot technically have been criminally guilty of incest, or Cicero must have mentioned this; instead he deplors the re-use of the marriage-bed and the bridal chamber. Further, Cluentia would surely not have felt it sinful to complain about her mother's actions, and Cluentius junior might have done more than cut off all filial communication with his mother.¹¹ This was the origin of the breach between son and mother, so Cicero says; this seems quite credible, on the assumption that these were notorious facts.

The actual *casus* which had led to Cluentius' prosecution of Oppianicus remains somewhat obscure. Cicero tells us that at Larinum there were men called *Martiales*, public slaves of Mars, consecrated to the god by the ancient religious customs of the citizens of Larinum. There were a considerable number of these men there and, like the large numbers of *Venerii* in Sicily in the service of Venus,¹² they were counted as the property of the god. However, Oppianicus began to maintain that they were all free men, indeed Roman citizens. The decurions of Larinum and all its citizens took this badly. Presumably they would have to buy, and train, new slaves, and many of them, at considerable cost, if this allegation were true. And then, given the background, they might even find themselves being accused of kidnapping. It was certainly the case that the troubles of the Social War and the period of the proscriptions had led to confusion over status, and records lost or destroyed. It is a curious case to bring if Oppianicus had not believed in it,¹³ why should he commit calumny by making a vexatious claim? The citizens of Larinum begged Cluentius to undertake the defence of this case on their behalf in the public interest. The case was heard in Rome, before the Praetor, because it involved the question of free status. There Cluentius and Oppianicus argued the issue with great determination over many days; the year was presumably around 75 BC.

It has been argued that Cluentius probably lost his case, since Cicero says nothing of the outcome,¹⁴ although in that case the sharpened hostility seems strange. For it was then, says Cicero, that to prevent Cluentius continuing to

10 She was wife, perhaps his first, certainly the first we hear of, to Oppianicus senior, but she could have had a prior husband from among the Aurii family.

11 *Clu* 5.13; 6.16.

12 See H Habermehl in *RE*, VIII A1 (1955), 701-702, *sv venerii servi*.

13 In which case, perhaps he was outraged by the refusal of Cluentius, his own step-son, to believe in the men's misfortune. Cicero must have mentioned any underhand benefit to Oppianicus from their freedom.

14 Alexander, *op cit*, 181 & n 21.

defend the *status quo*, Oppianicus and Sassia plotted to put him out of the way by poison. It strengthened their resolve that they knew that Cluentius had not made a will, and that if he died intestate, his estate would pass to his mother. Not having made a will when nearly thirty years old was perhaps somewhat unusual in a *sui iuris* member of the upper classes, but it was not unprecedented.¹⁵ Stranger is the fact that his mother was his intestate heir. The only explanation of this surprising statement must be that Sassia had married Cluentius Habitus senior with *manus*, and had not married her subsequent husbands in this way, so that she remained in Cluentius' agnatic family in the legal relationship of a sister to him.¹⁶ (In this case, she might well have had the *querela inofficiosi testamenti* if Cluentius had made a will and excluded her.¹⁷) This also indicates that Cluentius had no living (legitimate) children, for any *sui* would have taken precedence over agnates (and that, if he had a wife, it was in a free marriage). If his sister was still alive, and had not married Aurius Melinus with *manus*,¹⁸ Sassia would have to share the estate with her, but Cluentia junior had already shown herself unable to stand up to her mother. Anyway, it was thus as the only way to save his own life, says Cicero, that Cluentius decided to prosecute Oppianicus.¹⁹ Cicero therefore gives us his version of the many misdeeds illustrating Oppianicus' character.

The first allegation, referring to events that almost certainly had taken place more than thirty years earlier, was that Oppianicus had given a cup of something to drink to his (first, as far as we know) wife, Cluentia senior, Cluentius' aunt. In the act of drinking she cried out that she was dying in dreadful pain, and indeed she expired on the spot. And in addition, says Cicero, all the usual indications and traces of poison were found on her body;²⁰ the rhetorical "all" rather gives the game away, since different poisons show different symptoms, that is, when there are external symptoms, but Cicero is wanting to stress Oppianicus' tendency to use poison. I think we must call this charge "not proven".

Oppianicus' second wife, and mother of Oppianicus junior, was Magia, daughter of a woman called Dinaea by one Magius; Dinaea also had a son,

15 *Clu* 15.44-45. See D Daube, "The preponderance of intestacy at Rome", 39 *TuLLR* (1965), 253-262. Cicero's explanation was that he could not bear to leave his mother anything, but also could not bring himself to omit her. Alexander, *op cit*, 180, finds this somewhat implausible, since Cluentius was willing to prosecute his mother's husband on a capital charge, but his emotions might have been confused.

16 A Watson, *The Law of Succession in the Later Roman Republic* (Oxford 1971), 178 n 3.

17 Watson, *op cit*, 69-70.

18 This seems unlikely in view of the situation leading to her divorce.

19 *Clu* 7.19-20.

20 *Clu* 10.30: *omnia praeterea quae solent esse indicia et vestigia veneni in illius mortuae corpore fuerunt.*

Gnaeus Magius. Dinaea's first husband seems to have been another member of the Aurius clan, for she had by him two sons, Marcus Aurius and Numerius Aurius. Marcus had been taken prisoner during the Social War (91-87, but most of the fighting ended in 89), and ended up in the *ergastulum* of Quintus Sergius, so he was one of many of the "disappeared". Numerius died, presumably in the early 80s at much the same time as Cluentius senior, leaving his half-brother as his heir, for his brother was still missing. On the assumption that he had no surviving children, this was a very proper disposition. Magia, wife of Oppianicus, died thereafter of natural causes, and then so did Gnaeus. Gnaeus left his estate, which may have included something from Magia as well as Numerius' property, to Oppianicus junior, his nephew, ordering him to share it with his grandmother, Dinaea.²¹ Gnaeus had also established that his wife, Papia, was pregnant, and requested her to live after his death with Dinaea, then her mother-in-law, until after her confinement, and left her a conditional legacy should she bear him a son.²² Despite Cicero, there was nothing odd in Gnaeus leaving his pregnant wife in the care of his mother, and no strong reason to appoint his brother-in-law tutor to the putative child. The birth of a *suus heres* would have invalidated any previous will, so one must suppose that Oppianicus junior was a substitute heir. Even so, it is interesting that Gnaeus should leave his estate to somebody presumably in paternal power – if Oppianicus junior had been emancipated surely Cicero would have mentioned it? – meaning that any acquisition for Oppianicus junior would in law become the property of Oppianicus senior.²³ One cannot, however, feel too secure about the law as described by Cicero; he is probably telescoping the legal facts to fit the outcome. For again, why would Gnaeus order the estate to be shared with Dinaea when at this period such a trust could not be legally enforced? It would have been simpler to leave her a usufruct, a well-established institution, which would have been valid whoever the heir.

It was at this point that a reliable informant came to Dinaea with news that Marcus was alive but enslaved in the *ager Gallicus*, an area up the Adriatic coast some way to the north of Larinum. Dinaea called on her relations and friends to track down Marcus, but she fell ill, and made a will leaving her grandson, Oppianicus junior, her heir, with a legacy of 400,000 sesterces to Marcus. (Marcus, of course, had at this period no claim on his mother's estate, and no right to contest the will.) It is noteworthy that Cicero takes for granted here, as later with Sassia, that a woman would have free disposal of her

21 *Clu* 7.21.

22 *Clu* 12.33.

23 *G* 2.86; but it would probably have been counted as part of his *peculium*.

estate.²⁴ Making her grandson, her only grandchild at this point, her heir was a very proper course of conduct, although there is still the quirk of his being in paternal power. She shortly died,²⁵ but some of her relatives set out, with the informant, to rescue Marcus.²⁶ However, Oppianicus, at modest cost, arranged for the removal and killing of Marcus, and he also bribed the informant to hinder the rescue party, a fact which its members realised, and reported in a letter to the rest of the family at Larinum. This letter was read out publicly in the forum by one Aulus Aurius,²⁷ who added that he would prosecute Oppianicus if Marcus had been murdered. Then the rescue party returned with the bad news, so Oppianicus fled Larinum and took refuge in the camp of Quintus Metellus, one of Sulla's lieutenants, probably in 88/87.²⁸ He was presumably the richer by Dinaea's entire estate, since the legacy will not have been claimed. When Oppianicus did return in the period of the Sullan proscriptions, perhaps in 81, he and his friends, with Sulla's authority, replaced the existing municipal magistrates and had proscribed and killed, among others, the Aulus Aurius who had threatened him with prosecution, and a second Aurius, Aulus Aurius Melinus, Sasia's husband, and his son, Lucius Aurius, whose mother's identity we do not know.²⁹ The killings thus included several close relatives of Cluentius, but they were also close connections of Oppianicus himself through his second, third and fifth wives.

This flight amounted to a confession, says Cicero. It seems probable, however, that he did return to Larinum before coming back in triumph after Sulla's victory in 82, for Cicero has further allegations of his criminal behaviour which must have taken place in the meantime. In particular, he alleges that Oppianicus paid Papia the equivalent of the conditional legacy in return for an abortion, and then married her within five months of Gnaeus' death. Ten months was the normal period of mourning for a widow, to allow time for any child of the previous marriage to be born with certainty as to its paternity. It is possible that there was an attested still-birth here,³⁰ rather than the abortion alleged, in

24 There was no need for him to mention that she must have undergone *capitis deminutio* to have powers of testation, and that she will also have needed the consent of her tutor.

25 Cicero was to allege (*Clu* 14.40) that it was through the ministrations of a doctor hired by Oppianicus. Further, he alleged (*Clu* 14.41) that Oppianicus had smoothed out (other) legacies with his finger, and then transcribed the whole, forging the seals; this seems to be painting the lily.

26 *Clu* 7.21-22.

27 His relationship to the other Aurii so far mentioned is unspecified, but he can hardly have been Dinaea's first husband.

28 *Clu* 8.23-24. Metellus went into exile in Africa in 87, after Sulla's departure from Rome, but the events at Larinum may have been occurring in the months while Sulla was in the ascendant; Metellus rejoined Sulla on the latter's return in 83 from the East, but this seems too late to fit.

29 *Clu* 9.26; 66.188; any son of Cluentia's, let alone Sasia's, would seem to have been too young.

30 Midwives (*obstetrices*) were regularly found as expert witnesses, as in *D* 25.4.1*pr*,

which case the rationale for the delay would be absent, but it was still an over-hasty wedding. The marriage did not last long, "for the bond between them was not the holy estate of matrimony but companionship in crime", but it sufficed for the birth of a son, whose personal name (he was of course also Oppianicus) we never learn.³¹ After their divorce, his mother had effective custody, for we learn that he was being brought up by his mother at Teanum in Apulia, some eighteen miles from Larinum. He lived there normally, but came to visit his father at the times of the games and at other festivities. A visit to Larinum at an unaccustomed time, and when Oppianicus had gone off to Tarentum, allows Cicero to allege that his death was murder; he was seen in perfect health in the afternoon but was dead before nightfall, and cremated before dawn. Cicero does not even bother to mention poison explicitly. Oppianicus had married a fourth wife, Novia, and they had an infant son. Novia, who does not seem to have been related to anyone featuring in this history, appears to have died naturally. This boy too died, within ten days of his brother, says Cicero.³² Oppianicus, thus freed from the encumbrance of his younger sons, married Sassia for her money, perhaps in 76 or 75 BC, some ten years after her marriage to Aurius Melinus. Cicero tries to make it appear that it followed close on the Sullan proscriptions and the death of Aurius Melinus, but the other events demand that some time had elapsed.

Oppianicus was also, Cicero alleges, guilty of the murder of his brother, Gaius Oppianicus. Gaius was married to an Auria, and she was pregnant and near her time. Oppianicus poisoned her first, so that his brother should be without an heir, and then poisoned his brother, who died in the very act of attempting to alter his will.³³ Oppianicus senior had to kill mother and unborn child, for his right as his brother's heir, whether by will or as nearest agnate, would have been voided by the birth of a *suus heres*. But Cicero's failure to be a comprehensive legal source is illustrated by his again not making this point.

There were various relatively trivial allegations against Cluentius,³⁴ but towards the end of his speech Cicero finally came round to the charges of poisoning.³⁵ Cluentius was accused of poisoning C Vibius Capax³⁶ (perhaps a relation of the Sextus Vibius involved in the search for Marcus Aurius, and subsequently

Ulpian.

31 *Clu* 12.34-35.

32 *Clu* 9.27-28. Later in the speech – 62.174 – when the converse suited his purpose, Cicero derided the notion that a sudden death was in itself suspicious.

33 *Clu* 10.30 - 11.31.

34 Including another reference to a seeming kidnapping in the Social War – *Clu* 59.162.

35 Under ch 5 of the *lex Cornelia*; PS 5.23.1; *Coll* 1.3. See D Nörr, "*Causam mortis praeberere*", in P Birks & N MacCormick (eds) *The Legal Mind: Essays for Tony Honore*, (Oxford 1986), 203-217.

36 *Clu* 60.165.

proscribed). The allegation that Cluentius was his heir was wrong; Vibius died intestate and the possession of his estate passed, under the praetorian rules of succession, to his sister's son, Numerius Cluentius, a respectable young man of equestrian status.³⁷ This man must have been Vibius' nephew. He cannot possibly have been our Cluentius' son, since in that case there would have been no intestate claim on Cluentius' estate by a nearest agnate (his mother, as we saw), but he may well have been some sort of cousin.³⁸ In court, and presumably willing to give evidence, even if he had not been formally called as a witness, was Lucius Plaetorius, a senator in whose house Vibius had been staying under the ties of hospitality, where he had fallen ill, and died. Secondly, Cluentius was accused of attempted murder, trying to poison young Oppianicus at the latter's wedding breakfast, a large party, as was the custom at Larinum.³⁹ (His bride was SASSIA's daughter by AURIUS MELINUS.⁴⁰) It was alleged that Cluentius had prepared a cup of poisoned *mulsum*, but one Balbutius had drunk it by mistake and instantly died. But quite apart from the difficulties of explaining Cluentius' motivation and his methods, the young man's father had made a statement that Balbutius was already suffering from stomach pains, that he had over-indulged at the party, had fallen ill and died several days later.⁴¹ As for the main charge that Cluentius had administered poison in a piece of bread given to Oppianicus senior through one Asellius, Cicero denied that there was any motive for such a murder. He alleged that Asellius was Oppianicus' friend – a man with no connection with Cluentius – and asked why Oppianicus junior had not prosecuted him to strengthen his case against Cluentius, derided the use of bread as an agent for poisoning, and denied that Oppianicus had died suddenly.⁴² There had apparently been no allegation by the prosecution that Cluentius had consulted any doctor or other specialist in the use of drugs.⁴³

Oppianicus, after his condemnation in 74 BC, had been subject by the penalty of the statute to exile, enforced by *aquae et igni interdictio*.⁴⁴ It is possible that formal *interdictio* was not immediately pronounced – it may have been an

37 *Unde legitimi*, which in effect meant nearest agnate, when there were no children; the Edict did not as yet extend to *unde liberi* or *unde cognati* – Watson, *op cit*, 183.

38 A child of Cluentius in the period since 74 BC would be much too young to be called *adulescens*. He cannot have been Cluentia junior's son, since names went through the male line.

39 *Clu* 60.166-68.

40 *Clu* 64.179, so kin equally to accuser and accused.

41 A deposition, presumably sealed by those who had witnessed its making, was valid evidence, but the presence of Balbutius' father can only have strengthened its force.

42 *Clu* 61.169-62.173. It is evident that the Romans understood poison as something quick-acting; cf Livy 8.18, the model for stories of poisoning.

43 Scamander acquired poison from a doctor, a knowledgeable source.

44 It is fairly clear that after the Social War interdiction covered all citizen Italy, not just the old Roman city-state – *lex Iulia municipalis*, v 118; Cic. *Pro Milone* 38.104; cf JL Strachan Davidson, *Problems of the Roman Criminal Law* (Oxford 1912), II 34ff & 69.

annual event – and citizenship therefore not technically lost. Perhaps there would have been public sympathy for someone generally believed to have been convicted by bribery; certainly Cicero never makes the suggestion that Oppianicus could have been lawfully killed as an outlaw, a clear contrast with that possibility in the defence of Sextus Roscius. Anyway, Oppianicus was still living in Italy, staying in Campania with one Gaius Quinctius, perhaps a relation of his unsuccessful defence counsel, L Quinctius, the former tribune. There he fell seriously ill; although Cicero jibingly remarks that Sassia behaved with one Sextus Abbius (presumably a cousin of Oppianicus) as though she was no longer required to behave with the chastity of a wife, the marriage seems to have subsisted.⁴⁵ When Oppianicus became better, he preferred to move away and came to the neighbourhood of Rome, where he rented lodgings outside the gates; he died actually within Rome, as a consequence, it was said, of a fall from his horse.

Further, Oppianicus junior seems to have inherited his estate. A slave, Nicostratus, who had been with Oppianicus senior in his wanderings, was in the possession of Oppianicus junior when Sassia began her inquiry into her husband's death and demanded him from her step-son so that he could be put to the question, and it was to Oppianicus that he was returned.⁴⁶ The jurist Alfenus, consul in 39 BC, held that in intestate succession to those who had lost their citizenship, the agnates excluded the children because the agnatic claim depended not on the exile himself but on their common family.⁴⁷ But might a *suus* just take the estate and hope to be unchallenged?

Nicostratus was to be handed over again for Sassia's second inquiry, when she (according to Cicero) enforced her will on a reluctant Oppianicus junior by threatening to remove from him his wife, her daughter Auria – a power normally associated with *patria potestas* rather than with a mother – and also to alter her will.⁴⁸

Marriages and hatreds linked the leading families in our story. Most of our characters had had several marriages, and doubtless knew many secrets. The agnatic family was important; the praetor had not yet completed his reforms to intestate succession, which seems to have occurred with some regularity. Yet women of character could exercise more authority than legal power allowed

45 *Clu* 62.175.

46 *Clu* 63.176-78; 66.187.

47 *D* 48.22.3.

48 *Clu* 64.181; 66.190. It is difficult to see how she could have undergone *capitis deminutio*; but Cicero's concern was her dominant role, not the legal facts.

them. (One must remember that Cicero was forced by his wife and daughter to assent to his daughter's marriage to Dolabella.) In a period lacking in safety and stability, the consequences of war and proscription could threaten the most prosperous. Lack of medical knowledge might account for unexplained deaths and high infant mortality, but rumour looked to the worse construction. Larinum society appears to have functioned as an incestuous extended family worthy of the pen of Tennessee Williams.