

Scholars continue to debate how primitive or modern the Roman economy was, and to what extent Romans engaged in rational and commercial economic activity (Erdkamp, 2005; Kehoe, 1997; Saller, 2002; Tchernia, 2005). This paper contributes to the debate through a re-interpretation of Cicero's account of a lawsuit involving G. Sergius Orata, M. Marius Gratidianus, and a piece of real estate near Baiae (Cic. *Off.* 3.67 and *de Orat.* 1.178). Orata claimed that he had been misled about the water rights on the property and, consequently, that the sale should be rescinded. A proper understanding of this lawsuit and Cicero's treatment of it suggests that Cicero and his fellow Romans understood the economic value of water rights, knew how to use legal institutions to protect them, and approved at least in some cases of the systematic exploitation of water rights in the pursuit of profit.

The story begins several years before the case came into court, when Orata sold an estate to Gratidianus. Subsequently, he bought back the same land from Gratidianus. Then, Orata brought suit, claiming that he had not been told about a servitude (or easement) on the property and, for this reason, that Gratidianus should refund the sale price (*de Orat.* 1.178). Because Orata had owned the property himself already and was therefore in a position to know about the legal status of the property, his claim seemed fraudulent to some, including Cicero who describes Orata and litigants like him as too 'modern' and too clever (*non placuisse maioribus nostris astutos*, *Off.* 3.67). Yet it is likely that Orata won his suit on a strict interpretation of the law (Rodger 1983, 1994; contra Dyck, 1996). Cicero grudgingly acknowledges Orata's legal and economic success through his careful neutrality. In *de Oratore*, the suit is cited by Crassus to show how he used his knowledge of law to his client's advantage, implying Orata's victory. In both accounts, Cicero omits the moralizing characterization of fish farmers and greedy entrepreneurs that colors the other sources on Orata. Even in *de Officiis*, he focuses on the philosophical problem of the conflict between the letter and the spirit of the law rather than on Orata's choices and motives.

Orata is perhaps best known as the inventor of artificial oyster beds, built to raise shellfish for the market (Val. Max. 9.1.1 and Pliny, *NH.* 9.169, with D'Arms, 1970 and Fiorentini, 1996). He purchased property adjacent to the Lucrine Lake at Baiae, planning to build oyster ponds, but when he was opposed by local fishermen, he brought suit to recoup his losses (Dyck, 1996; Münzer *RE* 2A2, 1923). The property was valuable not simply for its own sake but also for the profits that Orata expected to make from farming oysters (cf. DeNeeve, 1985). His claim about the servitude may have been genuine and relevant, if it affected access to the lake or a right to fresh water (because oyster ponds need fresh water as well as salt to create brackish conditions: Higginbotham, 1997; Lafon, 1981). But even if his claims were fraudulent, Orata's lawsuit was a rational strategy that reflects his attempts to calculate the cost of his investment and lost profits.

Orata's investment in the property and his lawsuit represent the most aggressively commercial side of Roman agriculture. His strategy is recognizably rational: private property rights, including the right to water, are a "critical feature of productive market economies" (Getzler, 2004). The treatment of private water rights in the sale of land is an indicator of systematic, rational strategies in real estate deals and more generally in farming. The sale of land provided an occasion for landowners to create a right to channel or draw water or to negotiate terms for existing water-sharing arrangements. They used legal mechanisms to secure the resources that they needed to make their land productive and to plan ahead for changes in cultivation or even investment in infrastructure (e.g. building oyster beds). Cicero may not have liked Orata's ethics, and his account may play into the moralizing rhetoric about fish farmers, but he appreciated the importance of water rights and knew that their value could be enhanced by investment (Cic. *Q. Fr.* 3.1.3 and *Fam.* 16.18.2-3). Cicero's ambivalence is typical (compare the playful tone of Ovid's merchant's prayer, *ablue praeteriti periuria temporis* . . . Ovid, *Fasti* 5.681ff.). Orata may have taken more risks than the typical Roman landowner in his investment and legal strategies, but Cicero's acceptance shows that Orata's methods were familiar and perhaps not so exceptional as they might at first appear.

