USE AND ABUSE OF THE LAW: THE EMULATIVE ACTS

Fabiana Tuccillo[1]

SUMMARY

Living honestly, civilizing, behaving without harming others, *alterum not laedere*, were needs strongly felt in the Roman juridical experience. In neighbourhood relations, *aequitas* and *utilitas* criteria played a special role in considering the exercise of a right as normal and lawful. In these pages we try to verify if the Romans ever elaborated a theory on the abuse of the law, or if the forms of reaction to unfair behaviour, and to the socially unwelcome ones simply fell within the rules of good neighbourliness.

Sommario

Vivere onestamente, *civiliter modo*, comportarsi senza arrecare danno ad altri, *alterum non laedere*, erano esigenze fortemente avvertite nell'esperienza giuridica romana. Nei rapporti di vicinato giocavano un ruolo particolare l'*aequitas* e l'*utilitas* criteri tesi a considerare normale e lecito l'esercizio di un diritto. In queste pagine si cerca di verificare se i Romani elaborarono mai una teoria sull'abuso del diritto, o se le forme di reazione a comportamenti iniqui, e a quelli socialmente sgraditi rientrassero semplicemente nelle regole di buon vicinato.

РЕЗЮМЕ

Да живеем честно, цивилизовано, да се държим без да наранявам другите, *alterum not laedere*, са силно вплетени в римското юридическо преживяване. В отношенията на съседство критериите *aequitas* и

[1] Fabiana Tuccillo, Professore associato, Università di Napoli Federico II, fabiana.tuccillo@unina.it

utilitas изиграят особена роля при разглеждането на упражняването на правото като нормално и законосъобразно. В тези страници се опитваме да проверим дали римляните някога са разработвали теория за злоупотребата със закона или формите на реакция на нелоялно поведение и на социално неприятните просто попадат в правилата на добросъседството.

KEY WORDS:

Use of property; Alterum non laedere; Abuse of law property; Intolerable inputs

The history of property law is still related to the events of the Roman *dominium*, which continues to serve as a model for defining the structural features of the property law in general. From antiquity to primitive people, there was an idea of collective property or Naturvölker, in which, however, magical-religious aspects prevailed. A property that created a kind of thing-to-person incorporation according to certain things, weapons, work tools.

In ancient Rome, for military and economic needs, the careful preservation of the peasantry- warrior class was appropriate, expressing its organizational structure within the family, encarded in *domus*. This arrangement impressed to the concept of belonging coinciding with the ancient power of the *mancipium* a character of sovereignty. Roman law research is today conditioned by comparison with an abstract and unified model of *dominium*. The *dominium* in the ancient history of land relations has never been considered as unitary and compact. The *dominus* had unlimited faculties in its belonging *res mobiles* and *res immobiles* so much that it is said to be *ius utendi fruendi abutendi*[2], right to use, to exploit and

[2] This is a definition of medieval period, Hotmann, F. *Novum Commentarius de verbis iuris* (Basileae 1563) 117: *dominium est ius ac potestas in re propria tum utendi, tum abutendi quatenus iure civili permittitur*. About it see Piccinelli, F. *Studi e ricerche intorno alla definizione dominium est ius utendi et abutendi re sua quatenus iurs ratio patitur* (Firenze 1886, rist Napoli 1980) 42 ss.; Solidoro Maruotti, L. *Esperienze giuridiche a confronto: aspetti del diritto pubblico e privato dall'età romana alle configurazioni moderne. Lezioni* (Napoli 2001) 197 s. and nt. 24 supposes this definition is obtained through the forced interpretation of D. 5.3.25.11 (Ulp. 15 *ad ed.*), Romeo, S. *L'appartenenza e l'alienazione in diritto romano. Tra giurisprudenza e prassi* (Milano 2010) 69 e ntt. 142, 143; Martín Minguijón, A. Nemo damnus facit, nisi qui id fecit, quod facere ius non habet, in *Principios jurídicos. Antecedentes históricos de los Principios Generales del derecho Español y de la Unión Europea. Acta del micro*

even to abuse until it is destroyed. For the principle of verticality, the real estate *dominus* was held within the confines of the faculty land extended *usque ad coeleum, usque ad inferos*. Excluding any other domain. The real estate domain was also exempt from any kind of real tax, both under *tributum* and *stipendium*, and was subtracted from any expropriation for public utility. If the land was free from limited property rights it was called *fundus optimus maximus*[3].

It was an absolute right, full and tendentially not limitable. However, the postulate of full and exclusive property is shaken by numerous testimonies of the constraints and limits imposed since the archaic age to the situations of belonging to avoid discomforts and conflicts arising from the proximity of the lands (for example the *limes*, and the *ambitus*). In neighborly relations it was necessary to live honestly, *civiliter modo*[4], to behave without causing harm to others (*alterum non laedere*)[5]; the *aequitas* and the *utilitas* criteria played a special role in considering the exercise of a right to be normal and lawful.

If on one hand tolerance in mutual relations was clearly encouraged to make the best and fully use of property rights on a property, on the other hand, all the socially harmful behaviors were relevant for reasons of moderation and solidarity in relations with the neighborhood. It is argued if the Romans ever developed a theory about the abuse of the right. In fact, in some cases that will be examined soon, it is clear the manifestation of reaction's forms against unfair and socially disadvantaged behaviors.

Let's analyze some of the cases in which the historiographical debate has been particularly heated, from which at least the interest of the jurists tends to make the exercise of the property right compatible with the rights of neighbors and to prohibit the harmful conducts connoted by an *animus*

symposium. Principios jurídicos» 27-28 de junio de 2013, ed. F. Reinoso-Barbero, A. Martín Minguijón (2013) 179 ss.

[3] See about *fundus optimus maximus* Magdelain, A. Praetor maximus et comitatus maximus, in *Iura* 20 (1969) 272 s.; Sacchi, O. *Regime della terra e imposizione fondiaria nell'età dei Gracchi: testo e commento storico-giuridico della legge agraria del 111 a.C.* (Napoli 2006), p. 365 s.; about the *legata* of *fundi optimi maximi* see Gardini, M. *Ricerche in tema di usufrutto. L'usufrutto del fondo* (Parma 2012) 100 e nt. 91; Ligios, M.A. *Nomen negotiationis. Profili di continuità e di autonomia della negotiatio nell'esperienza giuridica romana* (Torino 2013), p. 124 ss.

[4] D. 8.1.9 (Cels. 5 *dig.*). *Si cui simplicius via per fundum cuiuspiam cedatur vel relinquatur, in infinito, videlicet per quamlibet eius partem, ire agere licebit, civiliter modo* …

[5] D. 1.1.10.1 (Ulp. 1 *reg.*). *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*…

nocendi. Celso, dealing with the constitution of servitude in which the indication of the *locus servitutis* was lacking, puts a limit on the free exercise of *servitus*, represented by the exercise of *civiliter modo*, as if in the constitution of the servitude had been tacitly excluded the possibility of endless exercise (*in infinito*).

> D. 8.1.9 (Cels. 5 dig.): Si cui simplicius via per fundum cuiuspiam cedatur vel relinquatur, in infinito, videlicet per quamlibet eius partem, ire agere licebit, civiliter modo: nam quaedam in sermone tacite excipiuntur. Non enim per villam ipsam nec per medias vineas ire agere sinendus est, cum id aeque commode per alteram partem facere possit minore servientis fundi detrimento. Verum constitit, ut, qua primum viam direxisset, ea demum ire agere deberet nec amplius mutandae eius potestatem haberet: sicuti Sabino quoque videbatur, qui argumento rivi utebatur, quem primo qualibet ducere licuisset, posteaquam ductus esset, transferre non liceret: quod et in via servandum esse verum est[6].

Celso argues that if you constitute *simplicius*, through *in iure cessio* or a legacy, a servitude of *via* without determination of the *locus servitutis*, then it will be allowed to pass and pass with cattle and unlimited wagons. That is for any part of the found, as long as *civiliter modo*, when the servitude is constituted, some modes of exercise are tacitly excluded.

In fact, you cannot allow passage through the same villa or in the vineyards, when you can do this in an equally comfortable way on other parts of the land, with less damage to the serving found. Moreover –

[6] [Suppose a man is granted or bequeathed a *via* without reservation over another's estate. He may walk and drive across it without restriction, that is to say, across any part of the estate he chooses, so long as he does so in a reasonable manner; for a general mode of expression is always subject to some tacit reservation. He need not be suffered to walk or drive through the homestead itself, or amid the vineyards, as he could just as conveniently have gone another way with less damage to the servient estate. Indeed, it is settled that he ought to walk or drive only along the route he decided on at the outset and that he does not have the discretion to change it thereafter. Sabinus himself was of this opinion. He argued on the analogy of a watercourse which, he said, a man might lead where he pleased at the outset, but whose course he could not change once it had been determined. It is clear that this rule should also be observed in the case of *via*. *The Digest of Justinian*, tr. ed. A. Watson I (Philadelphia 1985) 250-251]. See Möller, C. *Die Servituten. Entwicklungsgeschichte, Funktion und Struktur der grundstückvermittelten Privatrechtsverhältnisse im römischen Recht. Mit einem Ausblick auf die Rezeptionsgeschichte und das BGB* (Göttingen 2010) 264 ss.; Cursi, M.F. Il divieto degli atti di emulazione: le contestate origini romane di un principio moderno, in *Principios generales del derecho. Antecedentes históricos y horizonte actual*, ed. F. Reinoso-Barbero (Madrid 2014) 621 ss.

continues Celso – in the place where the path has been traced for the first time, there must continue to practice servitude without being able to change. This also seems to be the idea of Sabinus about the *rivus*: for the *aquaeductus* it was established that the first waterworks could be made anywhere, but once built the *rivus* could no longer be transferred. The testimony falls consistently within a series of texts concerning the *locus servitutis* in the hypothesis where it was not specified. In response to the possibility of passing where one wanted on the land of others – the faculty that the decemviral rule of the *via* had already foreseen as a sanction for the failure of *munitio* – the late-republican jurisprudence begins to put restrictions on the freedom to exercise servitude[7]. At the first place, setting a limit to the possibility of modifying the layout of the path, once the choice was made; than, with the respect of the way the servitude was used, indirectly orienting indirectly the choice of the *locus servitutis*. The exercise *civiliter modo* of the servitude (that is, respecting that sense of measure, fairness and good faith, principles that underline social coexistence) limits the possible choices, excluding for example the passage through the villa or the vineyard.

The concern to exercise servitude according to the parameters of correctness emerges as a common fact to several jurists, which are reported in different areas. Quintus Mucius (D. 8.3.15) admits operations to modify the exercise of the *aquaeductus* servitude, provided that (unless) it does not worsen the management for the owner of the land. Similarly, Labeon (D. 43.21.2), with a conservative position, believes that the *servient* estate's owner can not intercept the channel to which the owner of the *servient* estate to water the animals and draw water, not to reduce his *commodum*. The change in the exercise of servitude could not, therefore, make the neighbor's condition worse. Much discussed by modern historiography is Ulpiano's text related to a specific case of the introduction of smoke coming from a cheesemaker's shop in an overlying building. Case of great importance if it is considered that, according to the Roman custom, the cheeses were dried by a smoking process from which, inevitably, resulted fumes that propagated to the upperbuildings.

> D. 8.5.8.5 (Ulp. 17 ad ed.)[8]: Aristo Cerellio Vitali respondit non putare se ex taberna casiaria fumum in superiora aedificia iure

[7] See Cursi, M. F. «*Modus servitutis. Il ruolo dell'autonomia privata nella costruzione del sistema tipico delle servitù prediali*» (Napoli 1999) 53 ss.

[8] It is very interesting the interpretation and lecture of this text by Wolff, H.J. Zur frühnachklassischen Kommentierung der Klassikerschriften, in *Iura* 3 (1952) 135 ss.

> immitti posse, nisi ei rei servitutem talem admittit. Idemque ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. Alfenum denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. Dicit igitur Aristo eum, qui tabernam casiariam a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere. Ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum videtur Aristo probare. Sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti[9].

Cerellio Vitale rented a room from the town of Minturno to make a dairy farm from which evidently come out a certain stink. The neighbors could complain when the smoke used to smoke the dairy products began to penetrate beyond the boundaries of their properties. The businessman asks whether the owners of the above-mentioned housing could have forced him to stop the exhalations and if in the event of a interruption of activities or difficulties in the exercise of his business, he could have

[9] [Aristo states in an opinion given to Cerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese shop onto the buildings above it, unless they are subject to a servitude to this effect, and this is admitted. He also holds that it is not permissible to discharge water or any other substance from the upper onto the lower property, as a man is only permitted to carry out operations on his own premises to this extent, that he discharge nothing onto those of another; and he adds that one can discharge smoke just as well as water. Thus, the owner of the upper property can bring an action against the owner of the lower, asserting that the latter does not have the right to act in this way. Finally he notes that Alfenus tells us that an action can be brought, alleging that a man does not have the right to hew stone on his own land in such a way that broken pieces fall on the plaintiff's ground. Hence Aristo holds that the man who leased a cheese shop from the authorities of *Minturnae*, can be prevented from discharging smoke by the owner of the building above it, but that the authorities of *Minturnae* are liable to him on the lease. He adds that in the action against the man who is discharging the smoke, the allegation that can be made is that he had no right to do so. Thus, on the other hand, an action will lie in which the plaintiff may allege that he has a right to discharge smoke; this also has Aristo's approval. Further, the interdict for the possession of land may be employed, if a man is prevented from using his own land in the way he wishes. *The Digest of Justinian*, tr. ed. A. Watson I (Philadelphia 1985) 269]. The glossators formulated the general principle of the prohibition of emulative acts, emphasizing the subjective element, the *animus nocendi*. See Gl. *facere licet ad* D. 8.5.8.5: *in suo facit quod vult quilibet non in alieno* …

recouped his losses on the landlord, so on the city. Aristone, without hesitation, clarifies it was not possible to enter the smoke into the building above, unless there was a specific servitude on that the building of above. In this case, the building would have had to sustain the entry[10]. For the smoke coming from the primordial industrial activity, such as the practice of a dairy product, the *actio confessoria* and *negatoria* were recognized to assert or deny the existence of servitude.

Furthermore, from the above building it is not allowed to enter water or anything else into the lower building, as long as in your property you can do anything until nothing enters into the property of others (*in suo enim alii hactenus facere licet*)[11]. The jurist, therefore, seems to qualify as inputs those smoke and water, and he seems to forbid them. The solution proposed in case of emissions is the power of the nearest neighbor to act judicially against the lower one claiming that he has no right to do so. Aristone, reporting Alfeno's opinion, concludes by stating that if someone had broken stones in his property, the splinters could not end up on the neighbor's ground. Only the gripes against the abuses of the powers by the owner will report the violation of the socially permissible norms. It seems therefore that in Roman law the emissions had elements destined to characterize the modern figure. If someone is forbidden to use his property at his own discretion, the interdict that contains the words 'how do you possess' may also take place. According to De Martino[12], the final passage in which the interdict *uti possidetis*[13] is granted, is the work of a glosser who had interpreted the *per contrarium agi poterit ius esse fumum immittere*[14] as a concession of the real action to reject trouble[15].

---

[10] See Möller, C. (2010) 281 ss.; Longchamps de Bérier, F. *L'abuso del diritto nell'esperienza del diritto privato* (Torino 2013) 193 ss.; Martín Minguijón, A. (2013) 184 ss.

[11] D. 8.5.8.5 (Ulp. 17 *ad ed.*).

[12] *D. 8.5.8.5: i rapporti di vicinanza e la tipicità delle servitù*, in *SDHI.* 8 (1942) 137 ss. [= *Diritto, economia e società nel mondo romano* I (Napoli 1995) 521 ss.].

[13] Bonfante, P. *Corso di diritto romano* III. *Diritti reali* (Milano 1933) 370, thinks that the reference to the *interdictum uti possidetis* in D. 8.5.8.5 it is not connected with the legal protection of *servitus fumi immittendi*. See at least Labruna, L. *Vim fieri veto. Alle radici di una ideologia* (Napoli 1971, rist. Napoli 2017) 97 ss., 224 ss.; Falcone, G. Ricerche sull'origine dell'interdetto uti possidetis, in *AUPA.* 44 (1996), p. 58 ss.

[14] D. 8.5.8.5 (Ulp. 17 *ad ed.*).

[15] In Pomponio it is read (D. 8.5.8.6, Ulp. 17 *ad ed.*) that it is lawful to emit *fumum non gravem* because smoke, as part of the necessities of everyday life, falls into the normal use of the property, just like the fire, or use of the bathroom. We are in an attitude of tolerance towards ordinary life emissions following a normal exercise of the property:

However, it is not easy to understand the *discrimen* for intolerable inputs. But for part of the historiography[16] Aristone and Alfeno did not even think about the possibility of discussing whether the emissions of smoke *ex taberna casiaria* were lawful, and indeed they just assumed the wrongfulness of it, looking for the procedural remedy[17].

Starting from a passage of Macro and other fragments of *Digesta*, sometimes interpreted by mistake, the medieval jurists have built the prohibition of emulative acts considering the *aemulatio* as the intention of the actor, who would normally be included in the exercise of its own right, without its own usefulness or with minimal usefulness, with the purpose of harming others[18]. From this misunderstanding, an entire theory of prohibition of emulation acts would be developed in the legal tradition, first confined by relations between buildings, then analogously extending to other domains. And this doctrine would have been transposed by modern codes.

> D. 50.10.3 (Macer 2 de off. praesid.). Opus novum privato etiam sine principis auctoritate facere licet, praeterquam si ad aemulationem[19] alterius civitatis pertineat vel materiam seditionis praebeat vel circum theatrum vel amphitheatrum sit[20].

In Macro's fragment, an *opus novum* of public utility could be realized by a private person without the permission of the emperor, except in the case where the building was born from an imitative attitude of what was realized by another city, so to function as creating a conflicting challenge

tolerance dictated by solidarity in neighborhood relations.

[16] Scialoja, V. s.v. «*Aemulatio*», in *Enc. giur. it.* I (Napoli 1884) 439 ss. [= *Scritti giuridici* III (Roma 1932) 414 ss.]; Id., Degli atti d'emulazione nell'esercizio dei diritti, in *Foro italiano* 1 (1878) 481 ss. [= in *Studi giuridici* III cit. 194 ss.].

[17] Perozzi, S. Il divieto degli atti di emulazione e il regime giustinianeo delle acque private, in *AG.* 53 (1894) 350 ss. [= *Scritti giuridici* I. *Proprietà e possesso* (Milano 1948) 371 ss.]; Riccobono, S. La Teoria dell'abuso di diritto nella dottrina romana, in *BIDR.* 5 (1939) 37 ss.; E.H.J. Schrage, *Aemulatio.* Über die historische Rechtsvergleichung und das Rechtsmissbrauch, in *Studia Prawno-ekonomiczne* 150 (2016) 136 ss.

[18] For Scialoja, V. s.v. (1884) 427 ss., the fact that individual acts of emulation were forbidden (to some extent) does not seem to justify the construction of a theory on the prohibition of acts of emulation.

[19] According to Scialoja, s.v. «*Aemulatio*» cit. 426 s., in this fragment, the term *aemulatio* is used by the jurist in the neutral meaning of 'challenge'.

[20] [A private individual may undertake a new project even without the permission of the emperor, except if it is to outdo another citizen or causes sedition or is a circus, theater or amphitheatre. *The Digest of Justinian*, tr. ed. A. Watson IV (Philadelphia 1985) 439]. See Martín Minguijón, A. (2013) 189 ss.; M.F. Cursi, (2014) 604 s.

with another city or offering the occasion of public disturbances or being in the vicinity of a theater or an amphitheater. It was a restriction inspired by public order and public peace.

From this text, it would be possible to obtain the inhibition of elevating fortresses and castles, but not the rules for private law, since the permission of the emperor for the construction of public utility buildings by a private would be linked to the attempt for disincentive the competition between cities. But there are other interpretations. For example, it has been hypothesized that the *aemulatio* expression may have the negative meaning of 'malice, envy, rivalry, enmity, hatred, anger, aversion' or indicate unfair use of the law that caused prohibitive or compensatory reactions, not only in relations of land contiguity but also in legal relationships especially of neighborhoods[21].

It is not difficult to attribute a negative meaning, precisely in terms of rivalry, to this use in the passage of Macro, that is to say, the competition established between cities in the hypothesis where a private person accepts the costs of a public building with an emulative intent. Moreover, the necessity of imperial permission in this specific circumstance confirms the negative character of the emulation that the Emperor intends to control and thereby disincentive[22].

However, with respect to the theory put forward by Scialoja, a number of juridical texts may be read in support of the prohibition on what modern historiography places in the category of emulative acts already in the Roman experience. In the Celso's fragment, this is the legal position of the possessor of good faith (*imprudens*) subject to eviction, who in the belief of being a possessor has made expenses, buildings or plantations in the land

[21] Riccobono, S. (1939).

[22] The same impression is derived from reading of the text of the imperial constitution of Valente, Graziano and Valentiniano at 376 d.C.: CTh. 1.6.7. Impp. Valens, Gratianus et Valentinianus AAA. ad Rufinum pf. u. (a. 376): *Apparitores urbanae praefecturae annonario officio se non inserant, sed apparitorum aemulatione secreta ministerio suo annonae praefectura fungatur*. [The office of the prefect of annona shall regulate its own functions, provided that, in accordance with the custom of the ancients, when the prefect of the city proceeds through the public, a distribution of bread shall be held in recognition of his rank and position. *The Theodosian Code and Novels and the Sirmondianae Constitutions*, tr. by Cl. Pharr (New Jersey 2001) 18]. The provision prohibits the intrusion of employees into an office in the business of other office to avoid conflicts between employees. Even in this case, the ban imposed by the emperors obviously forms part of pernicious competitions and rivalries for the administration. Emulation is not a mere compete but with obvious negative outcomes. Beyond this interpretation, it seems to me that we can not go.

of others. These works, in harmony with the principle *superficies solo cedit*[23], move in favor of the owner of the property.

> D. 6.1.38 (Cels. 3 dig.): In fundo alieno, quem imprudens emeras, aedificasti aut conseruisti, deinde evincitur: bonus iudex varie ex personis causisque constituet. Finge et dominum eadem facturum fuisse: reddat impensam, ut fundum recipiat, usque eo dumtaxat, quo pretiosior factus est, et si plus pretio fundi accessit, solum quod impensum est. Finge pauperem, qui, si reddere id cogatur, laribus sepulchris avitis carendum habeat: sufficit tibi permitti tollere ex his rebus quae possis, dum ita ne deterior sit fundus, quam si initio non foret aedificatum. Constituimus vero, ut, si paratus est dominus tantum dare, quantum habiturus est possessor his rebus ablatis, fiat ei potestas: neque malitiis indulgendum est, si tectorium puta, quod induxeris, picturasque corradere velis, nihil laturus nisi ut officias. Finge eam personam esse domini, quae receptum fundum mox venditura sit: nisi reddit, quantum prima parte reddi oportere diximus, eo deducto tu condemnandus est[24].

[23] Wenger, L. Superficies solo cedit, in *Philologus* 88 (1933) 254 ss.; Maschi, C.A. La proprietà divisa per piani, superficie e l'estensione ai provinciali del principio «superficies solo cedit», in *Studi in onore di V. Arangio-Ruiz nel XLV anno di insegnamento* IV (Napoli 1953) 135 ss.; Solazzi, S. *La «superficies» nel diritto giustinianeo*, in *AG.* 146 (1954) 24 ss. [= *Scritti di diritto romano* V (Napoli 1972) 533 ss.]; Meincke, J.P. «Superficies solo cedit», in *ZSS.* 88 (1971) 136 ss. Sitzia, F. *Studi sulla superficie in epoca giustinianea* (Milano 1979) 36 ss.; Gagliardi, L. La tutela prevista dal diritto romano per i superficiari: dalle azioni 'in personam' alle azioni 'in rem', in *Actio in rem e actio in personam. In ricordo di M. Talamanca* II (Padova 2011) 5 ss.; Zaera García, A. *La superficies en derecho romano* (Madrid 2017) 80 ss. Cimma, M.R. *Norma giuridica ed effettività del diritto: alcune osservazioni in tema di superficie*: seminar held as part of the seminars of Associazione internazionale di Studi tardoantichi on March 23, 2010.

[24] [You inadvertently bought land belonging to another, built or planted on it, and then were evicted by the owner; the good judge's order will vary according to the persons involved and the facts of the case. Suppose the owner would have done the same as you. In that case, in order to get his land back, he must pay your expenses to the extent that the value of the land has been increased or if the increase in value is more than expenses, then only the amount you expended. Suppose the owner is a poor man who, if made to pay such a sum, would have to give up his household gods and ancestral graves. In that case, it is enough that you be allowed to take away what you can from the building materials, so long as the land is not thus put in a worse condition that it would be in, if there had been no building. Our decision is that if the owner is prepared to pay the possessor as much as he would have if he took the materials away, he should have the power to do so. There must be no indulgence to malice. If, say, you want to scrape off plaster which you have put on walls, and deface pictures, that will

The *dominus*, even if he is not obliged to repay anything to the possessor, should precisely for reasons of *aequitas* provide for the loss suffered by the possessor in consideration of the evident advantage of the owner. The problem is the identification of criteria for the refunding of the expenses incurred by those who have built or sown on a land which is considered to have been imprudently purchased, if the owner of the land acts in the claim. The solutions are different depending on the people and the circumstances that are hypothesized below but all refer to the equity of the *iudex bonus* called to judge, presumably about the *exceptio doli*. The case begins with the hypothesis in which the *dominus* would have made the same things on the land, apparently of a nature that would not be subject to discretion: to recover the land he must repay the owner of the expenses incurred, for an amount equal to the increased value of the land; if the increase exceeds the cost of the expenses, he just needs to return the amount of the expense. If the *dominus* is poor, it is enough to balance the situation, allowing those who have invested in the land to take away the added things to it, unless the land is not deteriorated with respect to its original configuration. From the mixture of these two cases, the jurist obtains a new criterion: it is recognized to the *dominus*, when he is in the condition of exercising it, the *potestas* to pay the equivalent of what the possessor would have obtained by taking things away. However, since what is established could favor malicious behavior, that is to say, behaviors not to obtain an advantage but only to cause damage to the claimant (*neque malitiis est indulgendum, nihil laturus nisi ut officias*)[25]. Celso warns he does not abandon himself to such practices, making the example of the possessor who, for the only purpose of damaging the *dominus*, wants to scrape away the stucco or frescoes he has made. In the event that the owner intends to sell the land as soon as he has recovered it, if he does not pay to the holder the expenses incurred according to the criterion

serve no purpose but no annoy. Suppose the owner is someone who wants to sell the land as soon as he gets it back; unless he pays what we said should be paid in the first case, then the judgment against you is reduced by that amount. *The Digest of Justinian*, tr. ed. A. Watson I (Philadelphia 1985) 207]. Recently Carvajal, P.-I. Celso, D. 6,1,38. Una interpretación desde la retórica, in Inter cives necnon peregrinos*.* in *Eassays in honour of Boudewijn Sirks* (Göttingen 2014) 155 ss., proposed a critical lecture and some changes to the original text.

[25] D. 6.1.38 (Cels. 3 *dig.*). See Schrage, E.H.J. (2016) 136 s.; Longchamps de Bérier, F. (2013) 189 ss.; Cursi, M.F. (2014) 606 ss. For a comparison of this text with German and Austrian Civil Code see: Hausmaninger, H. Gamauf, R. *A Casebook on Roman Property Law* (Oxford 2012) 179 ss.

described in the first part of the passage, such expenses will be deducted from the *condemnatio* charged to the possessor.

The most important phrase of D. 6.1.38 is the one containing the warning of non-indulgence in response to iniquity: the possessor of what is invested as a loss in the property wants the owner to enrich himself as little as possible at his expense and therefore tries to destroy or reduce the value of what has been increased with the investments made. Celso's assertion 'there can be no indulgence towards evil' (*neque malitiis indulgendum est*) is the typical figure for the cases solutions for Roman jurists. The loss is felt more strongly than it does not console the enrichment for the investments found. The malice or wickedness of the latter appears, therefore, irrational, useless and socially harmful. The jurist blames the person who performs an act which, although legitimate, has the sole effect of the harm of others. So this text seems to express clearly the idea of a protest against socially useless behavior that indicates a bad exercise of its faculties.

There may be some hypothesis: that the owner is not in a position to refund anything; or that the works carried out, being of a volunteer nature, were not refundable but only removable by those who had made them. Alternatively, that the possessor had removed the paintings before the owner could repay the value. The first two cases, although starting from different assumptions, converge on the fact that the *dominus* is not required to repay: the former is configured as an application of the criterion set by Celso and is based on the owner's indigence; the second assumes a differentiation between expenses, which it is not possible to find in the passages, but we can not exclude that it has influenced the jurist to believe that the costs for the paintings, as voluntary, were not refundable.

The last case, however, seems extremely unlikely because it does not connect with the perspective from which Celso deals with the issue, which is to give the holder a fair recognition of what he has done on the land: it does not matter to the owner that the possessor takes away his things, provided that this does not damage the land, excluding *a priori* the possibility of redemption. If, therefore, the *dominus* is not required to refund the expenses incurred by the possessor, the removal of the paintings is a limit in the prohibition of deterioration of the original condition of the land. The warning of the jurist, not present in a ban, suggests that the damage to the land is not such as to worsen the initial condition of the land itself.

Now, let draw some conclusions. The idea of Scialoja that only intermediate doctrine would have created the legal form of emulative acts can be, to a small

extent, revised[26]. If we look at the phenomenon of emulative acts in historical perspective, we realize that the intermediate historiography has developed the premise contained in the Roman sources through the creation of a dogmatic of the prohibition of emulative acts that eventually came to modern codes. It is a clear sign that despite the differences between the so-far-time juridical experiences, the social conception of property has remained constant, underlying the history of abuse of rights and of emulative acts. The sentences: *neque malitiis indulgendum est* (D. 6.1.38), *civiliter modo* (D. 8.1.9), *non quid aliud immitat liceat* (D. 8.5.8.5) all seem to allude at the necessary legitimacy of the inputs and behaviors of the neighbors, therefore, to prohibit conduct and works made exclusively for the purpose of causing damage[27]. The *prudentes* adopt different solutions, but all of them were trying prevent the emulative act: some invite them to not abandon themselves at mischievous practices (... *neque malitiis indulgendum est*)[28], or to practice it in less invasive forms for the neighbor if the same advantage is obtained (... *id aeque commode per alteram partem facere possit minore serventis fundo detrimento*)[29]. The variety of solutions depends on the fact that the emulative act is located in a border zone between the lawful and the illicit act. The activity that is being carried out is lawful, to the extent that it is not expressly forbidden, but it is not permissible when it is scientifically directed to damage the other's interest without corresponding personal gain.

Quoted Literature

Bonfante, P. *Corso di diritto romano* III. *Diritti reali* (Milano 1933) 370.

Carvajal, P.-I. Celso, D. 6,1,38. Una interpretación desde la retórica, in Inter cives necnon peregrinos*.* in *Eassays in honour of Boudewijn Sirks* (Göttingen 2014) 155 ss.

[26] See recently Sarti, N. *Inter vicinos praesumitur aemulatio. Le dinamiche dei rapporti di vicinato nell'esperienza del diritto comune* (Milano 2002) 99 ss.

[27] The more mature ideas, which denote a complete theory of the prohibition, are found in the glosses that combine two elements, the objective and the subjective. In the gloss *Novum ad* D. 50.10.3 is stated the principle that it is not lawful what harms others without being useful (*non licet si ad aemulationem pertinet; etiam ad aemulationem quia in suo potest quilibet facere quod vult*).

[28] D. 6.1.38 (Cels. 3 *dig.*).

[29] D. 8.1.9 (Cels. 5 *dig.*).

Cimma, M.R. *Norma giuridica ed effettività del diritto: alcune osservazioni in tema di superficie*: seminar held as part of the seminars of Associazione internazionale di Studi tardoantichi on March 23, 2010.

Cursi, M. F. «*Modus servitutis. Il ruolo dell'autonomia privata nella costruzione del sistema tipico delle servitù prediali*» (Napoli 1999) 53 ss.

Cursi, M.F. Il divieto degli atti di emulazione: le contestate origini romane di un principio moderno, in *Principios generales del derecho. Antecedentes históricos y horizonte actual*, ed. F. Reinoso-Barbero (Madrid 2014) 621 ss.

De Martino, F. I rapporti di vicinanza e la tipicità delle servitù, in *SDHI.* 8 (1942) 137 ss. [= *Diritto, economia e società nel mondo romano* I (Napoli 1995) 521 ss.].

E.H.J. Schrage, *Aemulatio.* Über die historische Rechtsvergleichung und das Rechtsmissbrauch, in *Studia Prawno-ekonomiczne* 150 (2016) 136 ss.

Falcone, G. Ricerche sull'origine dell'interdetto uti possidetis, in *AUPA.* 44 (1996) 58 ss.

Gagliardi, L. La tutela prevista dal diritto romano per i superficiari: dalle azioni 'in personam' alle azioni 'in rem', in *Actio in rem e actio in personam. In ricordo di M. Talamanca* II (Padova 2011) 5 ss.

Gardini, M. *Ricerche in tema di usufrutto. L'usufrutto del fondo* (Parma 2012).

Hausmaninger, H. Gamauf, R. *A Casebook on Roman Property Law* (Oxford 2012) 179 ss.

Hotmann, F. *Novum Commentarius de verbis iuris* (Basileae 1563).

Labruna, L. *Vim fieri veto. Alle radici di una ideologia* (Napoli 1971, rist. Napoli 2017) 97 ss., 224 ss.

Ligios, M.A. *Nomen negotiationis. Profili di continuità e di autonomia della negotiatio nell'esperienza giuridica romana* (Torino 2013), p. 124 ss.

Longchamps de Bérier, F. *L'abuso del diritto nell'esperienza del diritto privato* (Torino 2013) 193 ss.; Martín Minguijón, A. (2013) 184 ss.

Magdelain, A. Praetor maximus et comitatus maximus, in *Iura* 20 (1969) 272 s.

Martín Minguijón, A. Nemo damnus facit, nisi qui id fecit, quod facere ius non habet, in *Principios jurídicos. Antecedentes históricos de los Principios Generales del derecho Español y de la Unión Europea. Acta del micro symposium. Principios jurídicos» 27-28 de junio de 2013*, ed. F. Reinoso-Barbero, A. Martín Minguijón (2013).

Maschi, C.A. La proprietà divisa per piani, superficie e l'estensione ai provinciali del principio «superficies solo cedit», in *Studi in onore di V. Arangio-Ruiz nel XLV anno di insegnamento* IV (Napoli 1953) 135 ss.;

Meincke, J.P. «Superficies solo cedit», in *ZSS.* 88 (1971) 136 ss.

Möller, C. *Die Servituten. Entwicklungsgeschichte, Funktion und Struktur der grundstückvermittelten Privatrechtsverhältnisse im römischen Recht. Mit einem Ausblick auf die Rezeptionsgeschichte und das BGB* (Göttingen 2010).

Perozzi, S. Il divieto degli atti di emulazione e il regime giustinianeo delle acque private, in *AG.* 53 (1894) 350 ss. [= *Scritti giuridici* I. *Proprietà e possesso* (Milano 1948) 371 ss.];

Piccinelli, F. *Studi e ricerche intorno alla definizione dominium est ius utendi et abutendi re sua quatenus iurs ratio patitur* (Firenze 1886, rist Napoli 1980).

Riccobono, S. La Teoria dell'abuso di diritto nella dottrina romana, in *BIDR.* 5 (1939) 37 ss.

Romeo, S. *L'appartenenza e l'alienazione in diritto romano. Tra giurisprudenza e prassi* (Milano 2010).

Sacchi, O. *Regime della terra e imposizione fondiaria nell'età dei Gracchi: testo e commento storico-giuridico della legge agraria del 111 a.C.* (Napoli 2006).

Sarti, N. *Inter vicinos praesumitur aemulatio. Le dinamiche dei rapporti di vicinato nell'esperienza del diritto comune* (Milano 2002) 99 ss.

Scialoja, V. s.v. «*Aemulatio*», in *Enc. giur. it.* I (Napoli 1884) 439 ss. [= *Scritti giuridici* III (Roma 1932) 414 ss.]; Id., Degli atti d'emulazione nell'esercizio dei diritti, in *Foro italiano* 1 (1878) 481 ss. [= in *Studi giuridici* III cit. 194 ss.].

Sitzia, F. *Studi sulla superficie in epoca giustinianea* (Milano 1979) 36 ss.

Solazzi, S. La «superficies» nel diritto giustinianeo, in *AG.* 146 (1954) 24 ss. [= *Scritti di diritto romano* V (Napoli 1972) 533 ss.];

Solidoro Maruotti, L. *Esperienze giuridiche a confronto: aspetti del diritto pubblico e privato dall'età romana alle configurazioni moderne. Lezioni* (Napoli 2001).

The Digest of Justinian, tr. ed. A. Watson I (Philadelphia 1985) 207].

The Theodosian Code and Novels and the Sirmondianae Constitutions, tr. by Cl. Pharr (New Jersey 2001) 18].

Wenger, L. Superficies solo cedit, in *Philologus* 88 (1933) 254 ss.

Wolff, H.J. Zur frühnachklassischen Kommentierung der Klassikerschriften, in *Iura* 3 (1952) 135 ss.

Zaera García, A. *La superficies en derecho romano* (Madrid 2017) 80 ss.