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Scritti di diritto romano e giusantichistici

A cura di
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e Marco A. Fenocchio

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Indice

Massimo Miglietta

Emblematic Cases of «Logical Conflict» between «Quæstio» and «Responsum» in the «Digesta» of Publius Alfenus Varus*

1.1. In a fascinating page of *Brutus*[1], Cicero remembers how, in his youth, he and his friend Servius Sulpicius Rufus refined their dialectical skills at the famous school of Apollonius of Rodhes[2]. Dialectics, when applied to juridical interpretation[3] – this, Cicero says, could be throughly made only by

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* In honour of my friend Pierluigi Zannini I publish here the English translation of a paper of mine, which already appeared in «Studi in onore di Antonino Metro».

1 I am referring to Cic., *Brut.* 40.150–42.156.

2 Apollonius of Rodhius, called Apollonius of Alabanda, or Apollonius of Molon (known also as ὁ μαλακός), was the celebrated founder and master of the Rhodian rhetorical School, which was visited by Scaevola, in 121 a.C., and by M. Antonius, in 98 a.C.: see Cic., *de orat.* 1.75, and already O. Karlowa, *Römische Rechtsgeschichte*, I, Leipzig, 1885, p. 483. About the influence of the greek philosophy and rhetoric on the education of the Roman jurists, I refer to the brief, but at the same time poignant, essay of G. Santucci, *Retorica e diritto: un primo approccio circa l'esperienza giuridica romana*, in «La retorica fra scienza e professione legale. Questioni di metodo», *cur.* G.A. Ferrari, M. Manzin, Milano, 2004, p. 213 ff., as well as, more in general, I would mention the essay of C. Venturini, *L'argomentazione giuridica: dalla retorica classica alla moderna argomentazione*, in «L'argomentazione e il metodo nella difesa», *cur.* A. Mariani Marini, F. Procchi, Pisa, 2004, p. 13 ff.; for a wider bibliography, see also G. Sposìto, *Il luogo dell'oratore. Argomentazione topica e retorica forense in Cicerone*, Napoli, 2001, *passim* (and p. 123 ff.).

3 As for the acquisition of the so-called dialectical method from Servius see F. Schulz, *History of Roman Legal Science*, Oxford, 1946, p. 62 ff. = Id., *Geschichte der römischen Rechtswissenschaft*, Weimar, 1961, p. 73 ff. = Id., *Storia della giurisprudenza romana*, Firenze, 1968, p. 119 ff. As for the implications deriving from the concept of 'juridical interpretation' I cannor but refer, among all the others, to L. Lantella, *Pratiche definitorie e proiezioni ideologiche nel discorso giuridico*, in A. Belvedere – M. Jori – L. Lantella, *Definizioni giuridiche e ideologiche*, Torino, 1979, p. 5 ff.

Servius[4] – seems to be built up around a list of logical operations, rhytmically enumerated in the following terms:

Cic., *Brut.* 41.152: rem universam tribuere in partis, latentem explicare definiendo, obscuram explanare interpretando, ambigua primum videre, deinde distinguere, postremo habere regulam qua vera et falsa iudicarentur et quae quibus propositis essent quaeque non essent consequentia[5].

Thus, dialectics extends itself, according to this pattern, on two levels[6].

A first – and an immediate one, so to say – level asks the interpreter to proceed with the '*partitio*', that is, to divide a complex issue in consequent segments (*rem universam tribuere in partis*)[7].

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4 See on this point, among the others, the fundamental reflections of F. Bona, *L'ideale retorico ciceroniano ed il 'ius civile in artem redigere'*, in «SDHI.» XLVI, 1980, p. 282 ff. = Id., *Cicerone tra diritto e oratoria. Saggi su retorica e giurisprudenza nella tarda Repubblica*, I, Como, 1984, p. 61 ff. = Id., *Lectio sua*, II, Padova, 2003, p. 717 ff. About such important essay I refer to the recent «review» of F. Cuena Boy, *Das Ideal der Rhetorik bei Cicero und das 'ius civile in artem redigere'* [german trans.: Ch. Baldus – M. Miglietta], in «RDR.», VI, 2006, web page. See also *infra*, n. 27 (and reference text).

5 In order to offer an easier approach to the reader, I reported in footnotes the (most widely known) English translations of the Latin textes quoted in this work. Unfortunately, it was impossible to do the same for the Latin textes quoted in the same footnotes, as the number of pages of this paper would have grown beyond any reasonable measure. The translation of Cic., *Brut.* 41.152 comes from G.L. Hendrickson, *Cicero. V. Brutus. Orator*, London-Cambridge (Massachussets), 1939, rist. 1952): «… (that art which teaches) the analysis of a whole into its component parts, sets forth and defines the latent and implicit, interprets and makes clear the obscure; which first recognizes the ambiguous and then distinguishes; which applies in short a rule or measure for adjudging truth and falsehood, for determining what conclusions follow from what premises, and what do not».

6 About these profiles I refer again to Miglietta, *Intorno al metodo dialettico della scuola serviana*, *passim* (and, more in general, to Id., *'Servius respondit'. Studi intorno a metodo e interpretazione nella scuola giuridica serviana*, I, cap. I – whose publication is imminent) (See now M. Miglietta, *'Servius respondit'. Studi intorno a metodo e interpretazione nella scuola giuridica serviana*, Trento, 2010).

7 See, specifically, D. Nörr, *Divisio und Partitio. Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie*, Berlin, 1972, *passim* and M. Talamanca, *Lo schema 'genus-species' nelle sistematiche dei giuristi romani*, in «Colloquio italo-francese 'La filosofia greca e il diritto romano'», II, Roma, 1977, p. 14 ff. (also about the relationships between '*divisio*'-'*partitio*', '*res infinita*' and '*res finita*' – cf. Cic., *top.* 8.33 – and, respectively, between *genera* and *species*: see expecially, p. 15 and 20). Cf., then, Cic., *de orat.* 3.115: *cum res distribuitur in partes, ut …*, et rell., which is a text mentioned, among others, by L. Calboli Montefusco, *La dottrina degli 'status' nella retorica*

Then, we have to operate the '*definitio*', which has as its aim, literally, in this specific context[8], to 'draw the exact borders' of the question (*de-finire*), in order to «loose the folds» of the argument (ethymologically: '*ex–plicare*')[9], to pin down what is there hiding (*latens*): as Cicero observs, we have to '*latentem explicare definiendo*'.

Eventually we reach the '*interpretatio*', which lets us «logically» tread on everything – while making it «flat» (*ex-planare*) – that is '*res obscura*': '*obscuram explanare interpretando*'[10].

A second level relates – on the contrary – to those *res* that seem to be *ambiguae*: when, in other words, the interpreter must face objects that, differently from the above mentioned *res* (those that we have called «first level»), are not simply «concealed» or «far from light» – but that, at the same time, can be easily singled out. When we deal with enigmatic or, better, not univocal (*ambigua*)[11] data, we need to make a more complex operation,

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greca e romana, Hildesheim – Zürich - New York, 1986, p. 82.

8 Such specification is necessary because the meaning of '*definire*' as «the setting of boarders» (about which cf. V. Messana, *Sui 'libri definitionum' di Emilio Papiniano. 'Definitio' e 'definire' nell'esperienza giuridica romana*, in «AUPA.», XLV, 2, 1998, p. 169 ff.) does not exaust the possible meanings of the word inside the ciceronian language: see on this point R. Martini, *'Definitio' come 'delimitazione della fattispecie'?*, in «Labeo», XLV, 1999, p. 464 (that refers, for instance, to Cic., *de inv.* 1.8.11). See also F. Cavalla, *Retorica giudiziale, logica e verità*, in «Retorica, processo, verità», Milano, 2007, p. 53 f.

9 Cf. A.Walde, J.B. Hofmann, *Lateinisches etymologisches Wörterbuch*[5], Heidelberg, II, 1982, p. 323, *sub* '*Plico*'.

10 About the relationships between '*obscuritas*' e '*ambiguitas*' see, recently, S. Masuelli, *Interpretazione, chiarezza e oscurità in diritto romano e nella tradizione romanistica*, Torino, 2005, p. 133 ff. (p. 138 f. n. 37, specifically). In the text now examined, the two concepts are kept separated – the *obscuritas* belongs to what we have called a «first level» operation (*obscuram explanare interpretando*), while the *ambiguitas* is implied in the «second level» hermeneutical operations (*ambigua primum videre* ..., et rell.). But this cannot lead us to argue that some kind of «opposition» exists between the two concepts: Cicero keeps their (strict) correlation always in mind, so that, in Cic., *de inv.* 2.40.116 – about which see *infra*, in this essay – what seems to be ambiguous, it is so because (*scl.* also) of the *obscuritas* of what the *scriptor* wrote ('*ex ambiguo nascitur controversia, cum, quid senserit scriptor, obscurum est, quod ...*', etc.). About the theorical profiles see A. Guzmán Brito, *Historia de las normas en el derecho romano*, Santiago de Chile, 2000, p. 82 ff., and L. Lantella, *Dall' 'interpretatio iuris' all'interpretazione della legge*, in «Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne», Torino, 1997, III p. 587 ff.

11 As Blair remarked in his successful treatize (see H. Blair, *Lectures on rhethoric and belles lettres,* Edinburgh, 1783, french trans. by P. Prevost *Cours de rhétorique et de belles-lettres*, Paris, 1821[2,] I, p. 233), «l'ambiguité peut provenir de deux causes: d'un mauvais choix de mots, ou d'un arrangement vicieux [the ambiguity can derive from two causes:

because these data have – textually – a multiple meaning, at least a «double» one (*amb-iguus*) – that is, they allow more than one interpretation – as it is elsewhere underlined by:

Cic., *de inv.* 2.40.116: 'In scripto' versatur 'controversia', cum ex scriptionis ratione aliquid dubii nascitur. Id fit 'ex ambiguo', 'ex scripto et sententia', 'ex contrariis legibus', 'ex ratiocinatione', 'ex definitione'. 'Ex ambiguo' autem nascitur controversia, cum, quid senserit scriptor, obscurum est, quod scriptum duas pluresve res significat[12] [13].

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from a bad choice of the words, or from an erroneous connection]», alluding, by this, to the literal ambiguity and to the syntactical (or logical) ambiguity. As to the first profile, and as to what regards the experience of the servian school, we can refer to the interesting texts contained in D. 50.16. 203 + D. 34.2.28 (Alf. 7 *dig. ab anon. epit.*) – cf. O. Lenel, *Palingenesia iuris civilis*, Leipzig, 1889, I, c. 44 n. 29 (Alf.) –, about the meaning of the expressions '*domum ducere*' e '*suo usu ducere*', contained in the *lex censoria portus Siciliae*. As to the second profile, beyond what we will remark *infra* about Cic., *de inv.* 2.41.121, Blair evokes (*op. cit.*, 241, but without saying where exactly the quoting comes from) the well known instance recalled by Quintilianus (it is in Quint., *inst. or.* 7.9.8, and cf. 7.9.11): '*Unde controversia illa: 'testamento quidam iussit poni statuam auream hastam tenentem'. Quaeritur, statua hastam tenens aurea esse debeat, an hasta esse aurea in statua alterius materiae?'*.

12 Translation from H.M. Hubbell, *Cicero. II. De inventione. Optimo genere. Oratorum topica*, London-Cambridge (Massachussets), 1949, rist. 1968: «A controversy turns upon written documents when some doubt arises from the nature of writing. This comes about from ambiguity, from the letter and intent, from conflict of laws, from reasoning by analogy, from definition. A controversy arises from ambiguity when there is doubt as to what the writer meant, because the written statement has two or more meanings.»

13 Such issue is an extention of the introductory part of the rhetorical treatise (see Cic., *de inv.* 1.13.17). Wherever Cicero analysed the '*status legales*' ('*controversiae*', *i.e.* the ζητήματα νομικά, of Ermagora: see M. Bretone, *Il giureconsulto interprete della legge*, in «Labeo», XV, 1969, p. 300 = Id., *Tecniche e ideologie dei giuristi romani*[2], Napoli, 1982, p. 313, and R.E. Volkmann, *Die Rhetorik der Griechen und Römer in systematischer Übersicht*[2], Leipzig, 1885, p. 90; A.E. Chaignet, *La rhétorique et son histoire*, Paris, 1888, *passim*; B. Riposati, *Studi sui 'Topica' di Cicerone*, Milano, 1947, p. 255; J. Stroux, *Römische Rechtswissenschaft und Rhetorik*, Postdam, 1949, p. 81 ff.; J. Himmelschein, *Studien zu der antiken Hermeneutica iuris*, in «Symbolae O. Lenel», Leipzig, 1935, p. 387 and n. 1, ff.; J. Santa Cruz, *Der Einfluß der rhetorischen Theorie der Status auf die römische Jurisprudenz, insbesondere auf die Auslegung der Gesetze und Rechtsgeschäfte*, in «ZSS.», LXXV, 1958, p. 91 ff. and 101 ff.; Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen* (Köln-Berlin-Bonn-München 1967) 24 f. and L. Calboli Montefusco, *Logica, retorica e giurisprudenza nella dottrina degli 'status'*, in «Per la storia del pensiero giuridico romano. Dall'età dei pontefici alla scuola di Servio», *cur.* D. Mantovani, Torino, 1996, p. 216-217 n. 14), he already wrote in advance: '*Nam tum verba ipsa videntur cum sententia scriptoris dissidere, tum inter se duae leges aut plures discrepare, tum id, quod scriptum est, duas aut plures res significare, tum ex eo, quod scriptum est, aliud, quod non scriptum est, inveniri, tum vis verbi quasi in*

This text from *de inventione* is immediately followed by an interesting instance, unusually regarding a juridical matter, which explains the above mentioned principle[14]: '*Paterfamilias, cum filium heredem faceret, vasorum argenteorum centum pondo uxori suae sic legavit: 'Heres meus uxori meae vasorum argenteorum pondo centum, quae volet, dato'. Post mortem eius vasa magnifica et pretiose caelata petit a filio mater. Ille se, quae ipse vellet, debere dicit*'[15] [16].

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definitiva constitutione, in quo posita sit, quaeri'. See, then, in general, Volkmann, *op. cit.*, p. 42; E. Balogh, *Der Urheber und das Alter der Fiktion des Cornelischen Gesetzes (nebst einigen einleitenden Bemerkungen über die Bedeutung des römischen Rechts für das moderne)*, in «Studi P. Bonfante», Milano, 1930, IV, p. 666; W. Kroll, '*Rhetorik*', in «PWRE.», Suppl. VII, Stuttgart, 1940, c. 1085 ff.; F. Schulz, *History of Roman Legal Science*, p. 76 and n. 7 = Id., *Geschichte der römischen Rechtswissenschaft*, p. 92 and n. 3 = Id., *Storia della giurisprudenza romana*, p. 145 and n. 2; M. Fuhrmann, *Philologische Bemerkungen zur Sentenz 'summum ius summa iniuria'*, in «Studi E. Volterra», Milano, 1971, II, p. 62 f. See also the reflections of S. Tafaro, *Il giurista e l' 'ambiguità'. Ambigere – ambiguitas – ambiguus)*, Bari, 1994, p. 15 ff.; Id., *Ambiguitas*, in «Atti del convegno internazionale 'Il latino del diritto'», *cur.* S. Schipani, N. Scivoletto, Roma, 1994, p. 102 f. n. 14 and p. 110 ff. (specifically), and, lately, S. Masuelli, *op. cit.*, p. 138 f. n. 37, who recalls, correctly, the texts of Cic., *top.* 25.96 ('*id autem contingit, cum scriptum ambiguum est, ut duae sententiae differentes accipi possint*'), and of Cic., *or.* 34.121 ('*nam si quando aliud un sententia videtur esse aliud in verbis, genus est quoddam ambigui quod ex praeterito verbo fieri solet, in quo quod est ambiguorum proprium res duas significari videmus*').

14 Such datum is probably the outcome of the ciceronian elaboration, but it is certainly meaningful that, with reference to ambiguity, Cicero uses an instance connected to the law world. On this text, see, in particular, P. Voci, *Diritto ereditario romano*, Milano, 1963², II, p. 930 ff.

15 Translation from Hubbell, *Cicero. II*: «A father, in making his son his principal heir bequeathed to his wife a hundred pounds of silver plate in the following terms: "Let my heir give to my wife a hundred pounds of silver plate as desired." After his death the mother asks her son for some magnificent examples of plate with costly chasing. He says that he is obligated to give her only what *he* desires» (italics are mine).

16 Such principle and instance case are also mentioned in a «passo più succinto dell'*Auctor ad Herennium* [briefer text of the *Auctor ad Herennium*]» (as E. Costa, *Cicerone giureconsulto*, I, Bologna, 1927, p. 246, already noticed), *i.e.* 1.12.20: '*Ex ambiguo controversia nascitur, cum res unam sententiam scripta, scriptum duas aut plures sententias significat, hoc modo: Paterfamilias cum filium heredem faceret, testamento vasa argentea uxori legavit [Tullius]: 'Heres meus [Terentiae] uxori meae* xxx *pondo vasorum argenteorum dato, qua<e> volet'. Post mortem eius vasa pretiosa et caelata magnifice petit mulier. Filius se, quae ipse vellet, in* xxx *pondo ei debere dicit. Constitutio est legitima ex ambiguo*'. See also Cic., *verr.* 2.4.45, for a lexical parallelism. It is interesting to note that the *Auctor* builds up a chiasmus, according to which *controversia nascitur,* '*cum res unam sententiam scripta, scriptum duas aut plures sententias significat*', thus it is underlined that, though one and only will is mentioned (written) (*res unam sententiam scripta*) – from the point of wiew of the writer – (in the piece of writing) actually different wills dissenting one to the other

The hermeneutical problem – connected to the *thema* of *ambiguitas* – comes out from the fact that the words '*quae volet*'[17], included in the last will, have no explicit subject, and, therefore, they can be referred both to *mulier* and to *filius* (thus, to the legatee or to the heir and to their possibly diverging wills)[18], because '*quid*

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emerge (or better, the only will can be interpreted in many ways, and means many *sententiae*: *scriptum – plures sententias significat*). See also the synthesis of *Auct. ad Her.* 2.11.16.

17 See Cic., *de inv.* 2.41.121, as referred *infra*, in the following note.

18 Such is the continuation of the suggestive ciceronian text – an instance of the adoption of the greek τόπος of the *verba* (*scriptum*) against the *voluntas* (*mens*, *aequitas*) (see Schulz, *loc. ult. cit.*, *supra*, n. 3) – that deserves to be fully quoted and commented: [40.116] '*Primum, si fieri poterit, demonstrandum est non esse ambigue scriptum, propterea quod omnes in consuetudine sermonis sic uti solent ex verbo uno pluribusve in eam sententiam, in quam is, qui dicet, accipiendum esse demonstrabit.* [117] *Deinde ex superiore et ex inferiore scriptura docendum id, quod quaeratur, fieri perspicuum. Quare si ipsa separatim ex se verba considerentur, omnia aut pleraque ambigua visum iri; quae autem ex omni considerata scriptura perspicua fiant, haec ambigua non oportere existimare. Deinde, qua in sententia scriptor fuerit, ex ceteris eius scriptis et ex factis, dictis, animo atque vita eius sumi oportebit et eam ipsam scripturam, in qua inerit illud ambiguum, de quo quaeretur, totam omnibus ex partibus pertemptare, si quid aut ad id appositum sit, quod nos interpretemur, aut ei, quod adversarius intellegat, adversetur. Nam facile, quid veri simile sit eum voluisse, qui scripsit, ex omni scriptura et ex persona scriptoris atque iis rebus, quae personis attributae sunt, considerabitur.* [118] *Deinde erit demonstrandum, si quid ex re ipsa dabitur facultatis, id, quod adversarius intellegat, multo minus commode fieri posse, quam id, quod nos accipimus, quod illius rei neque administratio neque exitus ullus exstet; nos quod dicamus, facile et commode transigi posse; ut in hac lege – nihil enim prohibet fictam exempli loco ponere, quo facilius res intellegatur: 'Meretrix coronam auream ne habeto; si habuerit, publica esto', contra eum, qui meretricem publicari dicat ex lege oportere, possit dici neque administrationem esse ullam publicae meretricis neque exitum legis in meretrice publicanda, at in auro publicando et administrationem et exitum facilem esse et incommodi nihil inesse.* [41.119] *Ac diligenter illud quoque adtendere oportebit, num illo probato, quod adversarius intellegat, res utilior aut honestior aut magis necessaria ab scriptore neglecta videatur. Id fiet, si id, quod nos demonstrabimus, honestum aut utile aut necessarium demonstrabimus, et si id, quod ab adversariis dicetur, minime eiusmodi esse dicemus. Deinde si in lege erit ex ambiguo controversia, dare operam oportebit, ut de eo, quod adversarius intellegat, alia in re lege cautum esse doceatur.* [120] *Permultum autem proficiet illud demonstrare, quemadmodum scripsisset, si id, quod adversarius accipiat, fieri aut intellegi voluisset, ut in hac causa, in qua de vasis argenteis quaeritur, possit mulier dicere nihil adtinuisse adscribi 'quae volet', si heredis voluntati permitteret. Eo enim non adscripto nihil esse dubitationis, quin heres, quae ipse vellet, daret. Amentiae igitur fuisse, cum heredi vellet cavere, id adscribere, quo non adscripto nihilominus heredi caveretur* [121] *Quare hoc genere magnopere talibus in causis uti oportebit: 'Hoc modo scripsisset, isto verbo usus non esset, non isto loco verbum istud conlocasset'. Nam ex his sententia scriptoris maxime perspicitur. Deinde quo tempore scriptum sit, quaerendum est, ut, quid eum voluisse in eiusmodi tempore veri simile sit, intellegatur. Post ex deliberationis partibus, quid utilius et quid honestius et illi ad scribendum et his ad conprobandum sit, demonstrandum;*

et ex his, si quid amplificationis dabitur, communibus utrimque locis uti oportebit. Ex scripto et sententia controversia consistit, cum alter verbis ipsis, quae scripta sunt, utitur, alter ad id, quod scriptorem sensisse dicet, omnem adiungit dictionem'. Here, of course, Cicero (willingly) limits himself to the rhetorical analysis, which takes the upper hand to the more strictly juridical profile: see, about the first, H. Coing, *Zur Methodik der republicanischen Jurisprudenz*, in «Studi V. Arangio-Ruiz», I, Napoli, 1952, p. 381 n. 78, and, about the second, P. Ciapessoni, *Sul Senatoconsulto Neroniano*, in «Studi P. Bonfante», III, Milano, 1930, p. 708 and n. 198 – with an abundance of textes, though read through a suffocating interpolationistic method – about the principle of classical law according to which, unless differently stated, «la scelta nel caso di legato generico spettava al legatario se il testatore l'aveva disposta con legato di proprietà, all'erede se con legato d'obbligazione [in case of generic legacy, the legatee had the choice if the testator used a real estate legacy, while the heir had the choice if the testator used an obligation legacy]»: so already C. Ferrini, *Studi sul 'legatum optionis'*, in Id., *Opere*, IV, Milano, 1930, p. 274 n. 1, p. 282 and 318; Costa, *Cicerone giureconsulto*, I, p. 246 f. and n. 1; more recently P. Voci, *Diritto ereditario romano*[2], II, p. 264 and n. 61. In the present case we should be in front of a legacy *per damnationem* ['*heres – dato*', cf. Gai., *inst.* 2.201] and, therefore, the choice should be up to the heir: but here the hypothesis seems to be the opposite (see § 120 and, correctly, Ferrini, *op. cit.*, 282 and 318; but not Ciapessoni, *op. cit.*, 708). In first place, however, the interested party shall (try to) demonstrate that there are no ambiguities, and that the wording – used, in our case, by the testator – is a common way to express oneself (of course '*si* [all this] *fieri poterit*', as the same Cicero observs). For such reason, the interpretation shall be carried on «contextualising» in the «whole» the discussed point. And here Cicero seems to show an astonishing methodological modernity; he observs that the operation (conscious or unconscious as it is) through which one separates from the context the object of discussion is, in itself, the real source of ambiguity, because there is not an expression that, out from its reference structure, gives no way to more than an interpretation (and cf., *e.g.*, D. 1.3.24 [Cels. 9 *dig.*]: '*Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere*' – a parallelism mentioned by J. Stroux, *Summum ius summa iniuria. Ein Kapitel aus der Geschichte der interpretatio iuris*, Leipzig-Berlin, 1926, p. 21 f., and n. 40 specifically [= Id., *Römische Rechtswissenschaft und Rhetorik*, p. 31 ff. and n. 40], about which E. Levy, Rew. to Stroux, *op. cit.*, in «ZSS.», XLVIII, 1928, p. 674 = Id., *Recht und Gerechtigkeit*, in *Gesammelte Schriften*, I, Köln-Graz, 1963, p. 25). Thus, all elements that are, so to say, «around» the will shall be identified: elements through and thanks to which it is possible to wholly «reconstruct» the will of the testator – as «others pieces of writing, relevant events, assertions, intentions (of course expressed), factual behaviour» (*ex ceteris eius scriptis, factis, dictis, animo atque vita eius*): cf. E. Betti, *Zur Grundlegung einer allgemeiner Auslegungslehre*, in «Festschrift E. Rabel», II, Tübingen, 1954, p. 102 n. 25*a*, while Voci, *op. cit.*, 931, speaks of a «descrizione chiarissima di quella che i giuristi chiamano *consuetudo testatoris* [a very clear description of what the jurists call *consuetudo testatoris*]»). To get back to the case in § 116, we can think to this hypotesis: the testator had expressed in several occasions his will, while also saying that «his wife» (or, alternatively, «his heir») could have choosen the single pieces of silverware that are the object of the legacy (we could say something similar, for instance, with reference to D. 35.1.27 [Alf. 5 *dig. ab anon. epit.*] – about which we will talk *infra*, § 4 – if we could, by chance, ascertain that the testator mentioned *verbatim* the exact model to be followed in order to build up the monument)

senserit scriptor'[19] cannot be univocally ascertained. All this brings forth an argument – an almost paradoxical one, thus, an argument that deserves examination – between mother and son, as the same Cicero describes: *vasa magnifica et pretiose caelata petit a filio mater* (!). Of course *post mortem eius* (that is, of the testator, husband of the woman and father of the heir), with a reply – symmetrical and opposite to his mother's claim – *ille* (scl. *heres*) *se, quae ipse vellet, debere dicit*.

1.2. Coming back to *Brutus*, the effort of the interpreter shall not be exhausted by a «unitary act», but it requires a list of operations which «necessarily» depend one from the preceding (as it is eloquently showed out by the consequential morphemes: '*... primum ... deinde ... postremo ...*'), operations expressed by the verbs '*videre*' and '*distinguere*', both aiming to

(§ 117). To this regard, we cannot omit to consider the further possibility that evidence of the opposite thesis (*i.e.* of the opposing party) could be found in such data ('*si quid aut ad id appositum sit, quod nos interpretemur, aut ei, quod adversarius intellegat, adversetur*': this is not explicitly said in the text, which mentions, instead, the way to find the arguments against the opposing party, but I think it can be inferred from the whole meaning of it and, textually, from the clause '*si quid ex re ipsa dabitur facultatis*'): the heir acquaints himself with the fact that – we are still considering the case presented in *de inventione* – the testator had many times mentioned the legatee woman as the one who should have choosen the silverware. Who is entitled to it shall then convince the hearers (or the judge: il «trattato di retorica presuppone sempre la controversia giudiziaria» [the «rhetorical treatise has always as its premise the lawsuit»] – so said sharply Voci, *op. cit.*, p. 931) the the solution proposed by his antagonist (unlike the solution he supports) cannot be applied – and here Cicero recalls another instance ('*nos quod dicamus ... 'meretrix coronam auream ne habeto; si habuerit, publica esto*': in which it can be demonstrated that not the *meretrix* but the gold crown that she wore against – so it seems – the *mores* can be the object of the auction) that is used to support the expressed principle (§ 118): in the instance of the *meretrix* ther is a clear reference to a «*lex ficta*», created by Cicerone, as he underlines (§ 118): see already J.K. Orelli, *M. Tullii Ciceronis opera*, VIII. *Onomasticon Tullianum*, Zürich, 1837, p. 402. Then, whenever the reasoning of the opposing party seems to be founded, its strenght can be possibly paralyzed through the objection that the solution is, in any case, dishonest, or unuseful or, again, not necessary (while the contrary will be proved with reference to the other solution) – and through the use, eventually, of some presumptions, for instance supposing that the testator would not have used such expressions, if the explanation given from the opposing party would have been admitted – *i.e.* supposing that the opposing party is recalling a different rule, which here cannot be applied (§ 120). Thanks to such remarks, the legatee (the *mulier-mater* of our case) will claim that the testator would not have added '*quae volet*' if he had referred to the heir, because this would have clearly resulted from a clause lacking such specification (§ 121) – and, as such, consistent with the *regula iuris* (already mentioned in D. 33.5.20 [Iav. 2 *post. ex Lab.*], probably coming from the *digestorum* books of Aufidius Namusa, pupil of Servius: cf. Lenel, *Palingenesia*, I, c. 75 n. 1 (Auf. Nam.), and c. 304 n. 179 (Iav.).

19 Notice the use of the latin verb '*sentire*', on which we will come back in the continuation of this work, with reference to D. 35.1.27 (Alf. 5 *dig. ab anon. epit.*): see *infra*, § 4.

the outcome of '*habere regulam*'.

Thus, considering what we have observed, the interpreter cannot confine himself to a superficial (that means «external») analysis of the reality.

Reality, in first place (*primum ...*), must be rigorously evaluated. If it comes out to be «ambiguous» (so, *duas pluresve res significat*), it must be observed (verb '*videre*') from every wiewpoint, in order to find all its possible meanings.

So (... *deinde ...*), every single part must be correctly marked ('*di-stinguo*' means «to dot», that is, «to mark»)[20]: in a strictly juridical perspective, we could argue that the verb '*distinguere*' acquires – in this specific context – the meaning of «to give to *res* the correct *nomen iuris*» (that is, to connect it to the right sector of the juridical system).

But we cannot forget that the interpreter goes through such activities in order to reach (to identify or, better, to create) the '*regula*', that is, the «evaluation standard»[21], through which he can determine what is true and

20 Cf. A. Walde, J.B. Hofmann, *Lateinisches etymologisches Wörterbuch*, I, Heidelberg, 1982[5], '*Distinguo*' – '*Instigo*', p. 357 and p. 706 f.: nor we can exclude that such verb referred also, as a consequence of its main meaning, to the operation of «separating» the *res* object of interpretation from other *res*, similar but with different profiles, in order to apply (or not to apply) analogically the *regula iuris*. Cf. L. Vacca, *Casistica giurisprudenziale e concettualizzazione 'romanistica'*, in «Atti Convegno Legge, Giudici, Giuristi (Cagliari 18-21 maggio 1981)», Milano, 1982, p. 83 ff. = Ead., *Metodo casistico e sistema prudenziale. Ricerche*, Padova, 2006, p. 29 ff.

21 The word '*regula*', *i.e.*, usually, the «rule» (meaning, firstly, the instrument, as well as '*norma*' means usually «square» or also «right angle») derives from architecture and has, therefore, a technical origin and nature: cf. Vitruv., *de archit.* 1.1.6 and 17 (in this second case, the same Vitruvius moves the word '*norma*' from the architectonic to the dialectical field while talking about '*norma artis grammaticae*'); 1.2.2; 1.6.6; 4.3.4-5 (opposed, also, to '*norma*': see *infra*); 5.10.3; 6.2.2; 7.1.3-4; 7.3.5; 7.4.5; 8.5.1; 8.5.3; 9 *praef.* 6 (here meaningfully the «rule» forms, with other similar elements, a triangular tool, *i.e.* a '*norma*'); 9.8.5-6; 10.2.8; 10.6.2; 10.8.1, 3-4 and 6; 10.10.3; 10.11.5-6 and 8. As to the '*norma*' — and to the expressions connected to it, as '*ad normam*' (hence the common italian expression «essere a norma» [«to comply with standards», or «to be within the norm (that states standards)»]) — cf. Vitruv., *de archit.* 1.1.4; 3.1.3 (with reference to the proportions — '*ad normam*' — of the modular canon of the human body, known as the «vitruvian man», made even more famous by the drawing of Leonardo da Vinci); 3.5.13-14; 4.3.5; 7.3.5; 8.5.1; 9 *praef.* 6 (see *supra*) and 9.7.2. See, *e.g.*, also Plin., *nat. hist.* 7.198 and 36.172. we can, therefore, argue that, in the field of the juridical semantics, the words '*regula*' and '*norma*' mean, in some way, respectively, the «evaluation standard», *i.e.*, «in senso metaforico, strumento idoneo a mostrare una conformità [in a metaphorical sense, the instrument apt to show a conformity]», or to «conform» (see L. Lantella, E. Stolfi, M. Deganello, *Operazioni elementari di discorso e sapere giuridico*, Torino, 2003, p. 183), and the «direction» (cf. the interesting *incipit* of the so called *Regula sancti Benedicti*: «'*regula appellatur*' *ab hoc quod oboedien-*

what, on the contrary, is not ('*ambigua primum videre, deinde distinguere, postremo habere regulam qua vera et falsa iudicarentur* ...')[22] and which consequences must be inferred – or, differently, must be excluded – if some premises have been stated ('*... et quae quibus propositis essent quaeque non essent consequentia*')[23] .

Cicero does not limit himself to going through this precious and elegant description, but, as he had already said in details, as major premise, he explains that the true reason why Servius dedicated himself – since he was young and with remarkable effort – to liberal arts, and particularly to dialectics, should not be placed in a wish to have a (merely) wider «academical knowledge», but in the intention to exploit – in the most «useful» way, pragmatically – the potential of such method in the interpretation of the juridical

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dum '*dirigat*' *mores* [the primes are mine]») and the «profoundity» of human behaviour.

22 It is not easy to identify which specific meaning of «truth» (and, by simmetry, of 'falsity') Cicero meant to allude to with reference to the operating of the *regula* (*iuris*). This is so true that all law scholars that dealt with Cic., *Brut.* 41.152 stoppedemselves at the (mere or less) literal translation of the text (see bibliography *infra*, in the following note). It is not to be excluded, though, that – beyond the clear rhetorical structure ('*qua vera et falsa iudicarentur*') – Cicero had already in mind the so called «probabilism» of the Academics, to which he will fully adhere in his maturity. «Probabilism» is a sort of «pragmatic skepticism», which, while it does not deny the existence of a truth beyond the phenomenic data, aims mainly to give us the chance of a probable knowedge; a knowledge that, what is more relevant to us, is useful to guide the activity of the interpreter (in this case) and functional to it. It is mostly illuminating, in this context, the ample and well known dialogue – that develops in a plot of hypothesis and replies – with Lucullus in Cic., *acad.* 2. Such issue does not fail to bring forth wide reflections (also) from modern scholars: I would mention, among the others, the stimulating reflections in «Processo e verità», *cur.* A. Mariani Marini, Pisa, 2005, *passim*.

23 On this point see: C. Ferrini, *Le scuole di diritto in Roma antica (discorso inaugurale)*, in Id., *Opere*, II, Milano, 1929, p 2; N. Abbagnano, 'Dialettica', in Id., *Dizionario di filosofia*, Torino, 1961, p. 217; C. Carcaterra, *Le definizioni dei giuristi romani. Metodo, mezzi e fini*, Napoli, 1966, p. 84 ff.; A. Watson, *Law Making in the Later Roman Republic*, Oxford, 1974, p. 159 f.; A. Guzmán Brito, *Dialéctica, casuística y sistemática en la jurisprudencia romana*, in «Revista de Estudios Historico-Juridicos», V, 1980, p. 22 n. 11; F. Gallo, *Synallagma e conventio nel contratto. Ricerca degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne. Corso di diritto romano*, I, Torino, 1992, p. 85 (and n. 28); M. Bretone, *Storia del diritto romano*[8], Bari, 2002, p. 205; A. Schiavone, *Giuristi e nobili nella Roma repubblicana*, Bari, 1987, p. 42-43 = Id., *Linee di storia del pensiero giuridico romano*, Torino, 1994, p. 55, and now, with some slight changing, Id., *Ius. L'invenzione del diritto in Occidente*, Torino, 2005, p. 167. For a synthesis of the concepts in Cic., *Brut.* 41.152, see, lastly, L. Vacca, *L' 'Aequitas' nella 'interpretatio prudentium'*, in «'Aequitas'. Giornate in memoria di Paolo Silli», *cur.* G. Santucci, Padova, 2006, p. 32.

matters (*ut ius civile facile posset tueri*)[24]:

Cic., *Brut.* 41.151: […] nam et in isdem exercitationibus ineunte aetate fuimus et postea una Rhodum ille etiam profectus est, quo melior esset et doctior; et inde ut rediit, videtur mihi in secunda arte primus esse maluisse quam in prima secundus[25].

In other terms, Servius would have preferred to reach a most preminent position in the juridical science, than to (face the danger to) belong (*rectius*: to belong *only*) to the second row of the rhetors. And, while pursuing this aim, Servius would have practiced, in an exclusive way, a true '*ars*', thus differing even from *pontifex maximus* Quintus Mucius Scaevola, who was considered the greatest jurist of the preceding generation, and who was teacher both of Servius and Cicero (qualified, by Cicero, as «very experienced in law», but nothing more)[26].

Cicero expresses his opinion – which is an opinion, first of all, on the «state of jurisprudence» at his age, not lacking of the hopes the writer dreamed about[27], thus an opinion that mirrors more what jurisprudence «should be», than what jurisprudence «truly is» – with a happy chiasmus: '*videtur mihi in secunda arte* [= ius civile] *primis esse maluisse quam in prima* [= eloquentia] *secundus*'[28].

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24 Cf. Cic., *Brut.* 40.150: […] '*Quia mihi et tu videris – inquit* [scl. *Brutus*] – *tantum iuris civilis scire voluisse quantum satis esset oratori, et Servius eloquentiae tantum assumpsisse ut ius civile facile posset tueri*'.

25 Translation from Hubbell, *Cicero. II*: «As young men we pursued the same rhetorical studies here, and afterwards he went with me to Rhodes to acquire a more perfect technical training. Returning from here he gave the impression of having chosen to be first in the second art rather than second in the first».

26 See the ideological premises emerging from Cic., *Brut.* 39.144 ff. (included §145, to which D. Nörr, *Pomponius oder 'Zum Geschichtsverständnis der römischen Juristen'* = Id., *Pomponio o della 'intelligenza storica dei giuristi romani'* [trad. it.: M. Fino, E. Stolfi], in «RDR.», II, 2002, p. 189, gives seemingly a positive interpretation, while Cicero praises – as it happens frequently – someone – in this case, Scevola – not to celebrate his qualities, but actually to make the relevance of what he wants to state about others – *i.e.*, in this case, Crassus – stronger).

27 Cicero alludes, by these expressions, to '*ius civile in artem redigere*', about which we refer again to the work of Ferdinando Bona, mentioned *supra*, n. 4, and, lastly, to M. Talamanca, *Il diritto romano fra modello istituzionale e metodologia casistica*, in «Diritto romano, tradizione romanistica e formazione del diritto europeo. Giornate di studio in ricordo di Giovanni Pugliese», *cur*. L. Vacca, Padova, 2008, p. 339.

28 Lastly, Biscotti, in A. Cenderelli, B. Biscotti, *Produzione e scienza del diritto: storia di un metodo*, Torino, 2005, p. 198, stresses that the assertion that Servius is «second» must

1.3. This description (so passionate as it is truly clear and refined) is the ground on which most modern scholars currently state that one of the most interesting profiles of the juridical school of Servius can be properly seen in the «dialectical method» as systematically applied on the analysis of case law[29].

The interpretation of Schultz, though very coincisely expressed, could be not far from truth, as he describes such analysis as charaterised by the use of distinctions or *differentiae*, on one side, and by «synthesis» operations, on the other[30].

Particularly, according to this interpretation[31], through the *digesta* of a

be actually referred, because of the « consueta presunzione [usual conceit]» of Cicero, not to the class of rhetors, but, implicitly, to the same Cicero. This, even if it would not be consistent with the external appearence of the text, would certainly adhere to the intentions of its author: see already in this sense F. Bona, *La certezza del diritto nella giurisprudenza tardo-repubblicana*, in «La certezza del diritto nell'esperienza giuridica romana», *cur*. M. Sargenti, G. Luraschi, Padova, 1987, p. 137 n. 74 = Id., *Lectio sua*, II, Padova, 2003, p. 953 n. 74, and G. Calboli, *Aspetti prosopografici nella cultura giuridica tardo-repubblicana*, in «Per la storia del pensiero giuridico romano. Dall'età dei pontefici alla scuola di Servio», p. 45, who inserts, between one line and the other, after having recalled the part of the text '*videtur – secundus*', the following note: «Cicerone difficilmente pecca di modestia, e non tace di ritenersi primo nell'arte retorica [Cicero rarely commits the sin of modesty, and he cannot keep silent about his considering himself the first in the rhetorical art]». See also G. Broggini, *Cicerone avvocato*, in «Jus», XXXVII, 1990, p. 143 ff. = Id., *Studi di diritto romano e storia del diritto*, Napoli, 2007, p. 133 ff.

29 On such issue see, specifically, L.Vacca, *Contributo allo studio del metodo casistico nel diritto romano*, Milano, 1982, *passim*; Ead., *Metodo casistico e sistema prudenziale*, *passim*, and Ead, *L'interpretazione analogica nella giurisprudenza romana*, in «Fides Humanitas Ius. Studii L. Labruna», VIII, Napoli, 2007, p. 5727 ff., and see J. Kirov, *Die soziale Logik des Rechts. Recht und Gesellschaft der römischen Republik*, Göttingen, 2005, p. 69 ff., and, for some hints, G.L. Falchi, *Introduzione ai fondamenti del diritto Europeo*, Roma, 2007, p. 105.

30 Cf. Schulz, *History of Roman Legal Science*, p. 62 = Id., *Geschichte der römischen Rechtswissenschaft*, p. 73 = Id., *Storia della giurisprudenza romana*, p. 119. Of course, the two sides are not to be confounded one with the other, because the «synthesis» shows a problem of rigid coherence: it turns around a ground element (a «key», so to say) and, therefore, it is not built up on differences and distinctions.

31 Leaving apart, in other words, the extreme, but not valid enough, hypothesis mentioned in C. Ferrini, *Intorno ai Digesti di Alfeno Varo*, in «BIDR.», IV, 1891, p. 8 and n. 1 = Id., *Opere*, II, 175 and n. 1, and dating back to Antonio Agostino (1516-1586), in Id., *De nominibus jurisconsultorum* 1.3, col. 17 n. *a* (and cf. P. Landau, '*Agustín (Augustinus), Antonio*', in «Juristen. Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert», *cur.* M. Stolleis, München, 1995, p. 21 and now, lastly, F. Cuena Boy, *'Antonio Agustín'*, in «Juristas universales, 2. Juristas modernos», *cur.* R. Domingo, Madrid-Barcelona, 2004, p.

pupil of Servius, Publius Alfenus Varus, which seem to have included the most relevant part of the experience and teaching of his master, it could be possible to understand properly the style – thus, particularly, the way the dialectic method was used – belonging to the school itself.

Beyond questions arising from the uncertainty of attribution of some texts to Alfenus himself – because of the two epitomes, one anonymous and one from Paul, by which part of his scientific heritage was transmitted[32] – about half of the seventy-four fragments that are part of it would preserve «lo spirito originale dell'opera» [«the original spirit of the work»] and, thus, «l'amabile semplicità del dettato, la straordinaria e quasi ciceroniana purità del sermone, il carattere arcaico dello stile, la minuta esposizione del caso pratico che dà origine al responso – tutto, insomma, […] farebbe credere di aver davanti un giurista degli ultimi tempi della repubblica» [«the amiable simplicity of the words, the extraordinary and almost ciceronian purity of the speech, the archaic style, the painstaking narrative of the law case from which the response arise – everything, in conclusion … would let us believe that we are in front of a jurist of the Late Republic]»[33].

As it is well known, the heritage of the law school founded by Servius is, directly or not, in recent time as in the past, much discussed; many are the substancial issues and the methodological profiles analysed and discussed by scholars[34].

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212 ff.) according to which the material collected by Alfenus – as well as by the other *auditores* – had to be (totally) servian.

32 Cf., respectively, Lenel, *Palingenesia*, I, c. 38-45 and 45-53. This is why F.P. Bremer, *Iurisprudentiae antehadrianae quae supersunt*, I Leipzig, 1896, p. 139 ff. inserts in the servian '*palingenesia*' a big part of the alfenian texts. Strangely – but this is to be remarked *incidenter tantum* – G.V. Gravina, *Originum juris civilis libri tres et de romano imperio liber singularis* [with notes from Mascovio], Venezia, 1792, p. 48, omitted to refer the existence of the anonymous epitome, mentioning the paulinian one (as it was the only survived).

33 So says the fundamental work of Ferrini, *Intorno ai Digesti di Alfeno Varo*, p. 3 [= Id., *Opere*, II, p. 170 f.], which is always valid; see also *infra*, n. 169 (with reference to the opinion of Watson).

34 See, among all the others and as for the most recent literature, F. Casavola, *'Auditores Servii'*, in «La critica del testo. Atti secondo Congresso internazionale della Società di Storia del Diritto», I, Firenze, 1971, p. 153 ff. = Id., *Giuristi adrianei*, Napoli, 1980, p. 127 ff. = Id., *Sententia legum tra mondo antico e moderno*, I. *Diritto romano*, Napoli, 2000, p. 29 ff.; R. Orestano, *'Alfeno Varo (P. Alfenus Varus)'*, in «Nuovo Digesto Italiano», I, Torino, 1937, p. 322; Id., *'Aufudio Namusa (Aufidius Namusa)'*, in *op. cit.*, p. 1154; Id., *'Ofilio Aulo (Aulus Ofilius)'*, in «Nuovo Dig. It.», XI, Torino, 1939, p. 32; Id., *'Servio Sulpicio Rufo (Servius Sulpicius Rufus)'*, in «Nuovo Dig. It.», XII.1, Torino, 1940, p. 142-143; Id., *'Servio Sulpicio Rufo'*, in «Nuovissimo Dig. It.», XVII, Torino, 1976, p. 99-100; A. Guarino, *Mucio e Servio*, Napoli, 1994 (ediction not for sale); O. Behrends, *Le due*

Nonetheless, in my opinion, there is still room enough to expound an interesting aspect – between the others –, quite unnoticed by the scholars (or that was, in any case, object of minor remarks)[35], connected to some alfenian

giurisprudenze romane e le forme della loro argomentazione, in «Index», XII, 1983-1984, p. 200 ff.; P. Stein, *The Place of Servius Sulpicius Rufus in the Development of Roman Legal Science*, in «*Festschrift Franz Wieacker zum 70. Geburtstag*», Göttingen, 1978, p. 176 ff.; Bretone, *Tecniche e ideologie*[2], 63 ff. and 89 ff. (specifically); R.A. Bauman, *Lawyers in Roman Transitional Politics. A study of the Roman jurists in their political setting in the Late Republic and Triumvirate*, München, 1985, p. 4 ff.; F. D'Ippolito, *Servio e le XII Tavole*, in «Per la storia del pensiero giuridico romano», p. 31 ff. (but see already Id., *Questioni decemvirali*, Napoli, 1993, p. 135 ff., and, in general, the wide exposition in Id., *Le XII Tavole: il testo e la politica*, in «*Storia di Roma*», I, Torino, 1988, p. 397 ff.); V. Scarano Ussani, *Tra 'scientia' e 'ars'. Il sapere giuridico romano dalla sapienza alla scienza, nei giudizi di Cicerone e di Pomponio*, in «Ostraka», II, 1993, p. 221 ff. = in «Per la storia del pensiero giuridico romano», p. 229 ff. = Id., *L'ars dei giuristi. Considerazioni sullo statuto epistemologico della giurisprudenza romana*, Torino, 1997, p. 3-57; Schiavone, *Linee di storia del pensiero giuridico romano*, p. 97 ff. (with Id., *Giuristi e nobili*, p. 25 ff.), and, lately, Id., *Ius. L'invenzione del diritto in Occidente*, p. 155 ff. (p. 167 ff., 218 ff., specifically); C.A. Cannata, *Per una storia della scienza giuridica europea*, I. *Dalle origini all'opera di Labeone*, Torino, 1997, p. 266 ff.; J. Paricio, *La vocación de Servio Sulpicio Rufo*, in «Iurisprudentia universalis. Festschrift T. Mayer-Maly», Köln-Weimar-Wien, 2002, p. 549 ff. = Id., *De la justicia y el derecho. Escritos misceláneos romanísticos*, Madrid, 2002, p. 89 ff.; T. Giaro, *'S*[ulpicius]. *Rufus, Servius'*, in «Der Neue Pauly», XI, Stuttgart-Weimar, 2001, c. 1102-1103; Castro, *Crónica de un desencanto: Cicerón y Servio Sulpicio Rufo a la luz de las 'cartas ad Ático'*, in «SDHI.», LXX, 2000, p. 220 ff. (specifically) and – included in the heavy work in four volumes created by «Juristas universales, I. Juristas antiguos», *cur.* R. Domingo, Madrid-Barcelona, 2004 – the «entry» of X. D'Ors, *'Servio Sulpicio Rufo (Servius Sulpicius Rufus) (ca. 106/105-43 a.C.)'*, 129 ff. See, besides, the brief, but accurate entries of G.E. Farquhar Chilver, *'Sulpicio [2] Rufo, Servio'*, in «Dizionario di Antichità Classiche di Oxford», II, Roma, 1981, p. 2019 and of F. Horak, *'Sulpicius*, 4. *Ser. f. Rufus'*, in «Der kleine Pauly. Lexikon der Antike», V, München, 1979, c. 428-429; A. Castro Sáenz, *Compendio histórico de derecho romano. Historia, recepción y fuentes*, Madrid, 2005, p. 218 ff. (with a specific attention to *'Quinto Mucio Escévola y Servio Sulpicio Rufo: historia de una rivalidad'*); A. Cenderelli, B. Biscotti, *Produzione e scienza del diritto*, p. 195 ff., and G. Mousourakis, *A Legal History of Rome*, London-New York, 2007, p. 64. Lastly, notice the interest showed by E. Gabba, *Per la biografia di Servio Sulpicio Rufo*, in «Athenaeum», LXXXXVI, 2008, p. 397-398. Again: H.-J. Roth, *Alfeni digesta. Eine spätrepublikanische Juristenschrift*, Berlin, 1999, and Miglietta, *Intorno al metodo dialettico della scuola serviana*, § 1.1.

35 Still recently, M. García Garrido, *Il linguaggio dei giuristi romani. L'impostazione dei casi*, in «Au-delà des frontières. Mélanges W. Wołodkiewicz» Varsovie, 2000, p. 235 ff., dealt with the «*forma della presentazione dei casi in Servio Sulpicio e Alfeno Varo* [form by which cases are presented in Servius Sulpicius and Alfenus Varus]» (p. 236-239, specifically), but he stopped himself at the texual analysis, while G. Negri, *Per una stilistica*

fragments.

In these, we can observe an attempt, of some smartness, made by the one who is asking the jurist to express his opinion, at driving him to some specific solution. A solution that should, in the intentions of the one who asked the *quaestio*, be favourable to him.

The interpretative effort of the jurist goes against such beguilement: he, as we will see, while starting from the words used by the asker[36] – that is, ex-

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dei Digesti di Alfeno, in «Per la storia del pensiero giuridico romano», p. 137, p. 138, p. 147 and p. 152, briefly underlined the «tendentiousness» or the «captiousness» or even the «provocativeness» of (some) of the questions coming from the askers (or, according to the author, even from the same *auditores Servii*): see *infra*, § 5.2, with reference to D. 39.2.43.2 (Alf. 2 *dig. ab anon. epit.*). See the following n.

36 «Un allievo o un privato mosso da un suo concreto interesse [a pupil or a private citizen who has a factual interest in it]»: so said M. Bretone, *La tecnica del responso serviano*, in «Labeo», XVI, 1970, p. 7-8 = Id., *Tecniche e ideologie*, 92. It is a long-lasting issue, if the alfenian *responsa* could have been originated by factual cases or, on the contrary, if they could have been the result of abstract cases created during the servian lessons: in this second hypothesis, the nature of such fragments should be totally artificial (see, for all the others, M. Talamanca, *Repliche*, in «Gli ordinamenti giudiziari di Roma imperiale. Princeps e procedure dalle leggi Giulie ad Adriano», cur. F. Milazzo, Napoli, 1999, p. 418 f.). An interesting contribution to our reflections is, in my opinion, among the others, the meaningful fragment saved in D. 33.7.16.1 (Alf. 2 *dig. a Paul. epit.*): '*Vinea et instrumento eius legato instrumentum vineae nihil esse Servius respondit: qui eum consulebat, Cornelium respondisse aiebat palos perticas rastros ligones instrumenti vineae esse: quod verius est*'. The peculiarity of the text is not in the servian decision (according to which the vineyard cannot be considered as including an *instrumentum* – because, clearly, the jurist thought that the sign *vinea* already included, *in re ipsa*, the different elements and tools here recalled, as poles, perch, rakes and hoes), but in the fact that his pupil, Alfenus, does not limit himself to refer his opinion, but he adds an unusual remark: '*qui eum* [= *Servium*] *consulebat, Cornelium respondisse aiebat ... instrumenti vineae esse*'. He refers, thus, that the asker replied to the jurist that another jurist, previous to Servius of one generation – *i. e.* Cornelius Maximus, master of Trebatius Testa (cf. D. 1.2.2.45 [Pomp. l.s. *ench.*]: see specifically W. Kunkel, *Römische Juristen. Herkunft und soziale Stellung*[2], Köln-Weimar-Wien, 2001, p. 24) – actually gave a totally opposite response ('*Cornelium respondisse – instrumenti vineae esse*'). A closing statement (discussed by the scholars) follows: '*quod verius est*', which seems to show how Alfenus appreciated the solution of Cornelius Maximus against the opinion of Servius. Of course, some scholar doubted about the final sentence '*quod – est*'), believing it, implicitly, to be a postclassical or Justinian interpolation or, may be with some reason, an interpolation deriving from the hand of Paulus (the epitomist of Alfenus): on this point cf. Bremer, *Iurisprudentiae antehadrianae quae supersunt*, I, p. 164; P. Krüger, *Geschichte der Quellen und Literatur des römischen Rechts*, München, 1912[2], p. 71 n. 54; L. De Sarlo, *Alfeno Varo e i suoi digesta*, Milano, 1940, p. 213 f. and U. John, *Die Auslegung des Legats von Sachgesamtheiten im römischen Recht bis Labeo*, Karlsruhe, 1970, p. 27 and

ploiting the syntactical structure of the *quaestio* – turns the premises upside down and comes to a solution opposite to the one, to which he should have come if he had consented to follow the track drawn up by the asker (a track which would have lead only to one response).

The alfenian fragments that can be object of such investigation (not many, but not less relevant for that)[37] show different forms of such way of proceeding. Therefore, they go – *e minore ad maiorem* – from the (more or less) simple «uprooting» of the position of the asker[38], to the need to twart the counterclaim of this latter[39], who has as his aim to avoid some unpleasant consequences deriving from the response itself[40]. The jurist does not even deny himself the chance to give us a lesson of juridical morals – and, in the end, of «legal ethics»[41]. We enter, thus, *in medias res*.

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n. 71, p. 33 f. (on the contrary, Roth, *Alfeni Digesta*, p. 23-24 and p. 63, does not get to the core of the issue). Anyway it is – and, personally, I do not see any reason why we should doubt about the text, as it was left to us (besides, neither «Index Interpolationum» – *cur.* E. Levy, E. Rabel –, II, Weimar, 1931, c. 285, subject the text to any criticism) – D. 33.7.16.1 seems to me interesting for the following reasons: firstly, though in such a brief text, there are two *responsa* in a technical sense one opposing the other; Alfenus contradicts (or at least he seems to) his old master and approves Cornelius Maximus; if it is so, from one side, it is difficult to believe these are pure «abstract cases», and, from the other side, and maybe the following remark is even more relevant, the logical conflict between *quaestio* and *responsum* is not «artificial»: the jurist (Alfenus) is willing to admit the reply of the asker (a reply that is, if we consider it alone, even a bit annoying), if such reply seems to be valid ('reasonable'). The point is, it cannot be easily doubted that the elements that are useful to the cultivation of the vineyard (their *dos*: cf. Colum., *de re rust* 3.3[8]) can be transferred by legacy, and separately from the vineyard, though these are, generally, connected to it (while Servius, as we can guess, seems to have assumed that the *vinea* included both plants and the instruments connected: cf. A. Dell'Oro, *Le cose collettive nel diritto romano*, Milano, 1963, p. 119 f., and, for a hypothesis showed as such from the same author, R. Astolfi, *Studi sull'oggetto dei legati in diritto romano*, II, Padova, 1969, p. 28 n. 85). Thus, it is not out of place to believe that Alfenus can have thought differently from his master (also because otherwise there would be no reason to report the opposite opinion of Cornelius Maximus; of course, we could suppose the different solution, which would have been deleted by Paulus and substituted with the incidental clause '*quod verius est*'; but in this case we would exert a (clearly methodogically incorrect) violence on the text).

37 See *infra*, § 7.

38 See *infra*, §§ 2-4, dedicated, respectively, to D. 18.6.12(11) (Alf. 2 *dig. ab anon. epit.*), to D. 33.8.14 (Alf. 5 *dig. ab anon. epit.*) and to D. 35.1.27 (Alf. 5 *dig. ab anon. epit.*).

39 See *infra*, § 5.2, in which D. 39.2.43.2 (Alf. 2 *dig. ab anon. epit.*) is analysed.

40 See *infra*, § 5.1, with reference to D. 39.2.43.1 (Alf. 2 *dig. ab anon. epit.*).

41 Cf. *infra*, § 6, in D. 10.4.19 (Alf. 4 *dig. a Paul. epit.*).

2. We find a first, suggestive instance of the phenomenon we are about to investigate, in its most immediate form[42], in a text in which, according to the opinion of some scholar, on the contrary, «nessuna tensione di carattere logico-argomentativo» [«no logic-argumentative tension»]» would show itself as «evidente» [«evident»][43]. I am referring to

D. 18.6.12(11) (Alf. 2 *dig. ab anon. epit.*)[44]: Si vendita insula combusta esset, cum incendium sine culpa fieri non possit, quid iuris sit? Respondit, quia sine patris familias culpa fieri potest neque, si servorum neglegentia factum esset, continuo dominus in culpa erit, quam ob rem si venditor eam diligentiam adhibuisset in insula custodienda, quam debent homines frugi et diligentes praestare, si quid accidisset, nihil ad eum pertinebit[45] [46].

42 I am alluding, in other words, to the 'simple' action of turning the premises stated in the question upside down.

43 So R. Cardilli, *L'obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano (II sec. a.C. – II sec. d.C.)*, Milano, 1995, p. 293. It must be said, actually, that the opinion of the author here recalled is limited to the, so to say, «normative» part of the fragment. But, as this part is the key of the logical-juridical structure of the text, such opinion cannot but involve the whole of D. 18.6.12(11). In it, for instance, already W. Knütel, *Die Haftung für Hilfspersonen im römischen Recht*, in «ZSS.», CXIII, 1983, p. 348 ff., found (at least) «drei unterschiedlichen Ausgangspunkten [three different start points]» (p. 348).

44 Cf. Lenel, *Palingenesia*, I, c. 40-41 n. 12 (Alf.).

45 Translation from A. Watson, *The Digest of Justinian*, II, Philadelphia, Pennsylvania, 1985: «What is the legal position if a tenement which has been sold is destroyed by fire, since there cannot be a blaze without fault on someone's part? The reply was: this can happen without fault on the part of the head of household, and a master is not automatically at fault, if the blaze was caused by the negligence of his slaves, and so the vendor will not be liable for any mischance if he shows, in keeping the tenement safe, the diligence which would be displayed by honest and careful men».

46 About this text cf., in particular, De Sarlo, *Alfeno Varo e i suoi digesta*, p. 135 f.; E. Betti, *Lezioni di diritto romano. Rischio contrattuale, atto illecito, negozio giuridico*, Roma, 1959, p. 22 f.; Id., *Istituzioni di diritto romano*[2], I, Padova, 1947, p. 242 and n. 35; Id., *op. cit.*, II.1, Padova, 1962, p. 398 and n. 12; I. De Falco, *'Diligentiam praestare'. Ricerche sull'emersione dell'inadempimento colposo delle 'obligationes'*, Napoli, 1991, p. 122 f. n. 27; F.M. de Robertis, *La responsabilità contrattuale nel sistema della grande Compilazione. Alle scaturigini della moderna teoria della responsabilità contrattuale*, I, Bari, 1983, p. 218 n. 184 (specifically); Id., *La responsabilità contrattuale nel diritto romano dalle origini a tutta l'età postclassica*, Bari, 1994, p. 60 f.; Cardilli, *L'obbligazione di 'praestare'*, p. 291 ff. (specifically); M. Talamanca, '*Vendita (diritto romano)*', in «Enciclopedia del dir.», XLVI, Milano, 1993, p. 447 n. 1492, p. 448 n. 1501 and p. 452 n. 1543; Id., *Considerazioni sul 'periculum rei venditae'*, in «Seminarios Complutenses de Derecho Romano», VII, 1995, p. 231 f. and Roth, *Alfeni Digesta*, p. 61 n. 138 and p. 62 n.

The case seems – at first sight – easy to be told: an *insula*, object of *emptio-venditio*, was burnt down in course of a tragic fire, before the transfer of ownership to the buyer was completed. This conclusion can be inferred, implicitly, from the description of the case, but, most of all, from the style of the *responsum*, which makes a distinction between a liability for the presence (or lack) of *culpa* that can be ascribed to *pater familias* (that is – we will see the reason for that – to the seller)[47], and a liability for '*diligentiam adhibere in insula custodienda*': a kind of *praestare*, however understood, which has as his logical premise that the thing object of sale was kept safe[48].

Quaestio iuris and *responsum* – almost jointed one to the other[49] – imply, on the contrary, more difficult profiles. As it emerged from the work of scholars, they could involve, at least in theory[50], both issues connected to the risk of loss of the thing object of sale (*periculum rei venditae*)[51] and –

149 (but only about some lexical issues).

47 According to Talamanca, '*Vendita*', p. 447 n. 1492, the text could be corrupted where it talks also about '*culpa*' (but such opinion seems to have been reversed in Id., *Considerazioni sul 'periculum rei venditae'*, p. 232).

48 In the opposite hypothesis, being *venditor* should have no relevance: either *res perit domino*, and, thus, '*culpa*' of the seller would not be a problem, or the seller would be liable according to the Aquilian responsibility (if the destruction is due to his behaviour or to the behaviour of his subordinates).

49 See *infra*, n. 54.

50 There is the datum – formalistic, but not irrelevant as such – of the insertion of D. 18.6.12(11) in the Digest' title '*de periculo et commodo rei venditae*'. In the edict, it goes under the title '*De bonae fidei iudiciis: Empti venditi*': cf. O. Lenel, *Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*[3], Leipzig, 1927, p. 299 (tit. XIX, § 110 [111]); in A.A.F. Rudorff, *Edicti perpetui quae reliqua sunt*, Leipzig, 1869, p. 124, the topic is, more sintetically, the following: '*Ex empto et vendito*' [§ 117].

51 Cf. already E. Rabel, *Gefahrtragung beim Kauf*, in «ZSS.», XLII, 1921, p. 554 ff.: for a bibliography and the discussions about this point (to which I am referring) see, lastly, P. Lazo, *En torno a la doctrina del* '*periculum rei venditae*' *en Alfeno Varo y Urseio Feroz*, in «Estudios de Derecho Romano D. Francisco Samper», Santiago de Chile, 2007, p. 459 ff. The possibility that, in this case, Alfenus founded his decision on the principle '*periculum est emptoris*' is, nonetheless, challenged by another palingenetic fragment, found in the paulinian epitome of the alfenian *digesta*, in which the jurist seems to resolve the issue through the opposite principle '*periculum est venditoris*'. See D. 18.6.13(12) and 15(14) (Alf. 3 *dig. a Paul. epit.*) – cf. Lenel, *Palingenesia*, I, c. 48 n. 52 (Alf.) –: 13. '*Lectos emptos aedilis, cum in via publica positi essent, concidit: si traditi essent emptori aut per eum stetisset quo minus traderentur, emptoris periculum esse placet.* – 15. *Quod si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit. Materia empta si furto perisset, postquam tradita esset, emptoris esse periculo respondit, si minus, venditoris: videri autem trabes traditas, quas emptor signasset*'. Besides, while in D. 18.6.13(12) and 15(14) '*traditio*' of the *res venditae*, '*mora*

preferably, as we will try to confirm – issues of liability for non-fulfillment, as the solution, dealing with the concepts of *diligentia* and *culpa*, seems to evidence[52]. It was also observed that this text can be the result of a «more or less conscious» intrusion of the anonymous epitomist[53]. Now, such inter-

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emptoris' in receiving the delivery of goods and, again, finally, '*periculum*' are explicitly and repeatedly mentioned, in D. 18.6.12(11) none of these technical terms – connected to the *periculum rei venditae* – makes an appearence. Even the bizantinian interpretation (cf. *Bas*. 19.6.5 and 6-9(8), Hb. II, 281 = BT. III, 935-936, corresponding to the texts we examined, but in a shorter version) distinguish throughly between the negligence of the slaves and responsibility of the *dominus* (cf. frg. 5), from one side, and *periculum* on the purchaser or on the seller (cf. frg. 6-8), on the other side. But also the thesis of G. Thielmann, *Traditio und Gefahrübergang*, in «ZSS.» CVI, 1989, p. 299 ff., according to which D. 18.6.13(12) and 15(14) are not in contradiction with the rule '*periculum est emptoris*', is to be rejected: cf. the remarks of E.C. Silveira Marchi, *'Periculum rei venditae' e 'periculum dotis aestimatae'*, in «Labeo», XLVII, 2001, p. 386 ff. See also the conciliative thesis of M. Sargenti, *Problemi della responsabilità contrattuale*, in «SDHI.», XX, 1954, p. 249 – who talks about «una serie di decisioni variabili secondo gruppi di casi [a series of decisions varying along with groups of cases]» against the hypothesis of «a rigid and exclusive criterion».

52 Cf. G. MacCormack, *Alfenus Varus and the Law of Risk in Sale*, in «LQR.», CI, 1985, p. 585 f. and, mostly, Talamanca, '*Vendita*', p. 447 n. 1492, p. 452 n. 1543 and Id., *Considerazioni sul 'periculum rei venditae'*, p. 232 – while De Falco, *'Diligentiam praestare'*, p. 122 n. 27, asserts, being her opinion equally distant from both the preceding authors, that in D. 18.6.12(11) Alfenus «si occupa […] di responsabilità e di *periculum rei venditae* [deals with […] responsibility and *periculum rei venditae*]» (but she seems to be inclined only to the first profile in Ead., *La responsabilità e il 'contenuto tipico' del contratto*, in «Labeo», XL, 1999, p. 472).

53 Cf. Talamanca, *Considerazioni sul 'periculum rei venditae'*, p. 232; A. Watson, *The Law of Obligations*, Oxford, 1965, p. 71, thinks that the text was preserved in its original version (and so already C. Alzon, *Problèmes relatifs à la location des entrepôts en droit romain*, Paris, 1965, p. 58 and n. 297, p. 69 and n. 362, and p. 145 and n. 698 and MacCormack, *Alfenus Varus*, p. 585) opinion to which also Cardilli, *L'obbligazione di 'praestare'*, p. 292 n. 146 and p. 293 n. 150, seems to adhere; cf. Knütel, *Die Haftung für Hilfspersonen im römischen Recht*, p. 348 and n. 28, 349. *Contra*, specifically, Haymann, *Textkritische Studien zum römischen Obligationenrecht*, in «ZSS.», XL, 1919, p. 345-346; W. Kunkel, *Diligentia*, in «ZSS.», XLV, 1925, p. 281, about which, though, cf. W. Buckland, *Diligentia paterfamilias*, in «Studi P. Bonfante», II, Milano, 1930, p. 100; Paris, *La responsabilité de la custodia en droit romain*, p. 240-241; M. Konstantinovitch, *Le periculum rei venditae en droit romain*, Lyon, 1932, p. 253; K.Visky, *La responsabilité en droit romain à la fin de la République*, in «RIDA.», III, 1949 («Mélanges F. De Visscher» II), p. 467, opinion still repeated in Id., *Bemerkungen zur Entwicklung des kontraktuellen Haftungssystem im antiken römischen Recht (Nachtrag zur Lehre des Prof. G. Marton)*, in «Acta Antiqua», XX, 1972, p. 382 and n. 32, and F.M. De Robertis, *La disciplina della responsabilità contrattuale nel sistema della Compilazione giustinianea*, I, Bari, 1966, p. 91 n. 12 and p. 227 n. 5; P. Krückmann, *Versicherungshaftung im römischen Recht*, in «ZSS. » XLIII, 1943,

vention is, of course, possible[54], though we must underline the strong inside coherence of the text[55], made stronger by some distinguished expressions of the alfenian language as '*quid iuris sit*'[56] and '*quam ob rem*'[57], which, moreover, are essential to the rhetorical structure of the fragment[58].

However, the text arises from the need to identify the rule to be applied ('*quid iuris sit?*')[59] and, consequently, the need to determine if the seller must be liable for the loss of the *res* (of course, if it is ascertained that such loss was caused on his responsibility)[60]. Thus, the solution to the case can be found in choosing the standards of *culpa*: the jurist, in other words, must pin down the elements of

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p. 17; Id., C*ustodia*, in «ZSS.», XLIV, 1944, p. 15, p. 21-22 and p. 42; P. Voci, *'Diligentia', 'custodia', 'culpa': i dati fondamentali*, in «SDHI.» LVI, 1990, p. 62 ff. (63, specifically). Other dissenting remarks on specific words in «Index interpolationum», I – *cur.* E. Levy, E. Rabel –, Weimar, 1929, c. 336 *ad h.l.*, to which add H.H. Pflüger, *Zur Lehre von der Haftung des Schuldners nach römischem Recht*, in «ZSS.», LXVI, 1947, p. 207 f. and E. Betti, *'Periculum'. Problema del rischio contrattuale in diritto romano classico e giustinianeo*, in «Studi in onore di P. De Francisci», I, Milano, 1956, p. 136 ff.

54 We can find evidence of a subsequent intervention in the fact that, though within certain limits, the fragment lost his original standard structure ('*casus*' – '*quaestio*' – '*responsum*'); the first two parts are, somehow, jointed one to the other (though this does not prove yet that such modification is substancial: actually, we could repeat, to this regard, what Negri, *Per una stilistica dei Digesta di Alfeno*, p. 146, with reference to D. 13.7.30 (Alf. 5 *dig. a Paul. epit.*) [= Lenel, *Palingenesia*, I, c. 52 n. 70 (Alf.)], observed: «… l'estrema concentrazione espressiva del frammento, che […] sembra difficil[ment]e [da] attribuire a tagli successivi, che solo per caso avrebbero potuto realizzare una simile coerenza stilistica, e che comunque sarebbe arbitrario supporre, sottintende la serie analitica caso-problema-soluzione [the extreme expressive concentration of the fragment, which […] can be difficultly ascribed to cuts, which only by chance could have realized such stilistic coherence, and which however it would be arbitrary to suppose, suggests the analytical succession case-problem-solution …]»).

55 Cf. *infra*, n. 63, with reference to the opinion of Emilio Betti.

56 About the peculiariety of such expression cf., lastly, Roth, *Alfeni Digesta*, p. 62 n. 149 (who remarks that the interrogative preposition refers to the verb '*quaerere*', as in D. 38.1.26 (Alf. 7 *dig. ab anon. epit.*) [= Lenel, *Palingenesia*, I, c. 43 n. 26 (Alf.)]) and see already, precedently, Voci, *'Diligentia', 'custodia', 'culpa'. I dati fondamentali*, p. 63, and Cardilli, *L'obbligazione di 'praestare'*, p. 292 and n. 145. See also García Garrido, *Il linguaggio dei giuristi romani*, p. 239 and p. 243.

57 For what concerns the use of '*quamobrem*' ('*ob eam rem*'), besides the servian language (cf. Aul. Gell., *noct. att.* 4.4.2 [= Lenel, *Palingenesia*, II, c. 321-322 n. 3 (Serv.)]), also in Alfeno, see the punctilious remarks of Ferrini, *Intorno ai Digesti di Alfeno Varo*, p. 11 [= Id., *Opere*, II, p. 177 f.]. Cf. also *infra*, n. 97 and 147.

58 See *supra*, n. 54.

59 See *supra*, n. 56.

60 Cf., on this point, Cardilli, *L'obbligazione di 'praestare'*, p. 293 n. 150.

culpa which the *iudex* will concretely use in order to settle the lawsuit[61].

Hence, the interesting structure of the text[62]: if its style ('*si vendita*' instead of '*si empta*' *insula*) seems to witness in favour of a question asked by *venditor* to the jurist, the way in which this latter brings his argument forth aims to reject a statement made by the asker that is dialectically dangerous, but persuading at first sight: '*cum incendium sine culpa fieri non possit*'[63].

If we carefully consider the words used, such conclusion seems to be expressed only in the interest of the buyer, because, if the *responsum* stated that the destruction of the *insula* happened, in some way, because of the seller, this alone would be enough to held him liable.

Under a logic profile, we are in the presence of a strong argument, which has the effect to reverse the burden of the demonstration, shifting it, in this context, from the one who is asking the jurist to the jurist himself.

Alfenus, though, does not let himself be deceived and he replies immediately – challenging the major premise contained in the question – that fire could be set even without any *culpa* from the *pater familias*. The reasoning of the jurist is supported by the following argument (opposite to the one to which the *emptor* refers): the cause of fire can lie inside facts that are not to

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61 According to some scholar, such response would have been asked «una volta instaurato il *iudicium*, quando cioè si fossero già acquisiti degli elementi di fatto della causa, in base ai quali era stato possibile accertare che l'incendio era stato prodotto da una condotta riprovevole [once the *iudicium* had begun, *i.e.* when the factual elements of the lawsuit were already acquired, by which it it had been possible to ascertain the fire was caused by a reproachable act]» (so Cardilli, *L'obbligazione di 'praestare'*, p. 292): though the interpretation of the fragment that I am trying to offer does not seemingly give evidence to (or, at least, it does not imply univocally) such supposition.

62 Strangely, F. Horak, *Rationes decidendi. Entscheidungsbegründungen bei älteren römischen Juristen bis Labeo*, I, Aalen, 1969, who discusses all the other alfenian fragments analysed in this paper, says nothing to this regard.

63 For a wide range of possible *sine culpa* events, see, specifically, D. 19.2.30.4 (Alf. 3 *dig. a Paul. epit.*) and D. 47.9.11 (Marcian. 14 *inst.*). For the reasons here expounded, I believe the opinion expressed by Watson, *The Law of Obligations*, p. 71, according to which the sentence '*cum incendium sine culpa fieri non possit*' is «one of the clauses most often held interpolated shows that the writer, whoever he was, was thinking of a fire which began inside the *insula*» to be the outcome of a unwhole comprehension of the fragment; in favour of a (possible) interpolation was also Betti, *Lezioni di diritto romano. Rischio contrattuale*, p. 23, who, nonetheless, with the usual brilliancy, guessed and made it explicit that the sentence could «anche […] essere considerata siccome esprimente il parere dell'interessato che si rivolse ad Alfeno [also be considered as expressing the opinion of the interested party who asked Alfenus for his advice]», remarking, thus, its deep dialectical relevance (but without considering the following sentence «*quia sine patris familias culpa fieri potest neque*», which the author thought to be a «semplice glossema [simple glosse]»).

be connected to human behaviour, as, for instance, the crash of a lightning or the even chance of a spontaneous combustion beyond control[64].

With regard to this last point, we can observe the interesting lexical parallelism between the way by which the *casus* is pinned down ('*cum incendium sine culpa | fieri non possit*') and, in eloquent simmetry, the expressions by which the *responsum* opens: '*quia* [sott. *incendium*] *sine patris familias culpa | fieri potest*'[65]. The first part is expressed in a deliberately generic way ('*sine culpa ... non possit*') – because it is not referred to any determined object[66] – while the second, on the contrary, deals explicitly with the *pater familias* ('*sine patris familias culpa ... potest*').

The jurist, supported by his first answer, goes further – perhaps trying to prevent other challenges[67] – and he verifies the possibility of another reconstruction of the facts[68]: that, even if a personal *culpa* of the *pater familias* is absent, he can be held responsible for some negligence committed by his subordinates[69].

The solution – which, in itself, does not remove this chance[70] – excludes

64 Nonetheless, these are all mere possibilties: therefore, I believe that the words of Visky, *La responsabilité en droit romain*, p. 468, according to which «l'incendie était une forme de manifestation notoire de la force majeure [fire is a notorious act of God]», are a sort of «absolutization», to which we cannot be fully agree; Cardilli, *L'obbligazione di 'praestare'*, p. 292, focuses instead his attention on the (borderline) case of the possible *culpa* of external people.

65 For the reasons showed in this work, critical doubts on the sentence '*quia sine patri familias – quam ob rem*' are to be totally rejected; on such doubts see De Sarlo, *Alfeno Varo e i suoi digesta*, p. 135 (who thought that such sentence was «indiscutibilmente [da] espungere [to be expunged without discussions]») on the basis of J. Vázný, *Custodia*, in «AUPA.», XII, 1926, p. 148 f. (who does not seem to have fully catched the rhetorical and juridical implications of the text, even when he remarks that «dopo una complicata analisi [*sic!*] si viene al risultato che il venditore non risponde '*si eam diligentiam – praestare*' [after a complicated analysis we get the outcome that the seller is not responsible '*si eam diligentiam – praestare*']») and of Paris, *La responsabilité de la custodia en droit romain*, p. 240 f.

66 Here we see the shrewdness of the asker: he does not mean to openly insinuate the evil doubt of the liability of the *venditor*, but he surely cannot let the opportunity slip to drive the jurist towards a profitable (for the asker himself) decision.

67 We could even think to a further counter-reply of the asker, here implicit (see *infra*, § 5.2, with reference to D. 39.2.43.2 [Alf. 2 *dig. ab anon. epit.*] where it is made explicit instead). Such hypothesis is here evidently mentioned for completeness, even if the textual data in the fragment should make us prefere, in my opinion, the first solution mentioned above.

68 Such dialectical operation is the '*distinctio*' (cf. Cic., *Brut.* 41.152: see *supra*, §§ 1.1 and 1.2).

69 Gothofredus mentioned also the case of damage caused '*culpa levissima inhabitantium*': cf. Gothofredus, *Corpus Iuris Civilis Romani*, I, Coloniae Munatianae, 1781, p. 369 n. 62 *ad h.l.* («*Levissima scilicet, & quidem inhabitantium, quod plerumque accidit*»).

70 Actually, the judge has the burden to verify if the *venditor* – factually – checked the work of his slaves; or if the way by which checkings were made can be in any way consi-

the *culpa* of the *pater familias* – here expressly called '*venditor*' – when this latter used '*eam diligentiam ... in insula custodienda, quam debent homines frugi et diligentes praestare*'[71], so '*continuo dominus* [not] *in culpa erit*'.

Again, we can observe how Alfenus, while starting from the words by which the question is expressed, shifts his attention from the '*pater familias*' (of whom the '*culpa*' is discussed), re-defining him as '*dominus*' (in the part of the text where the jurist verifies the possibility that some «mediate» *culpa* occurred), to end up calling him '*venditor*' (as the jurist concludes his response): this way, Alfenus emphasizes the solution here given in order to get to a general rule, because he moves from the original case to every case that can be subsumed under the rule itself[72].

The final sanction, as expressed in the response, wins definitely the challenge: '*si quid accidisset, nihil ad eum* [scl. *venditorem*] *pertinebit*'. Thus, no further reply is allowed.

The style of the jurist, who must give the *regula iuris* that should be applied[73], does not avoid to mention the possibility that, *apud iudicem*, a '*culpa*', direct or indirect, of the *venditor* can be ascertained – and then *venditor* can be held as liable – as well as, in the opposite case, such *culpa* could be excluded (even, in condictions as described [74], for *vigilantia* on his subordinates), and thus (even) '*si quid accidisset*'[75], to the *venditor* '*nihil*

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dered as adequate; or, if he did not pay any attention to such point.

71 Such '*diligentia*' corresponds, according to Betti, *Istituzioni di diritto romano*[2], I, p. 242, to the one adopted by the «tipo dell'uomo normale, ordinato e accorto nella gestione della sua azienda e, in generale, nel suo modo di contenersi relativamente al genere di attività che si deve prestare e di cui si tratta [kind of the ordinary man, precise and smart in managing his firm and, in general, in his way of behaving regarding the kind of activity he accomplishes and deals with]».

72 This corresponds to the (concluding) operation of '*habere regulam*', stressed by Cic., *Brut.* 41.152 (see *supra*, §§ 1.1 and 1.2). On this point, cf., in general, Negri, *Per una stilistica dei Digesti di Alfeno*, p. 144, who strongly emphasised the presence of the «procedimento di astrazione, che trae dalla soluzione del caso un principio generale [abstracting process, which deduces a general principle from the solution of the case]» (such opinion was expressd with reference to D. 10.3.26 (Alf. 2 *dig. ab anon. epit.*) [= Lenel, *Palingenesia*, I, c. 40 n. 8 (Alf.) 8]: '*Communis servus cum apud alterum esset, crus fregit in opere: quaerebatur, alter dominus quid cum eo, penes quem fuisset, ageret. Respondi, si quid culpa illius magis quam casu res communis damni cepisset, per arbitrum communi dividundo posse reciperari*').

73 Remember the question by which the part of D. 18.6.12(11), which connects, in some way, *casus* and *quaestio*, ends: '*quid iuris sit?*' (about which *supra*, n. 54).

74 Regarding these latter, see the sentence '*si venditor eam diligentiam – diligentes praestare*'.

75 *I.e.* though property is destructed.

pertinebit'[76].

3. A text regarding the interpretation of clauses of last will is similar in its structure to the case of the *insula vendita combusta*: its difficulties arise exactly from the *quaestio* that the heir proposed to the reasoning of the jurist. See

D. 33.8.14 (Alf. 5 *dig. ab anon. epit.*)[77]: Quidam in testamento ita scripserat: 'Pamphilus servus meus peculium suum cum moriar sibi habeto liberque esto'. Consulebatur, rectene Pamphilo peculium legatum videretur, quod prius quam liber esset peculium sibi habere iussus esset. Respondit in coniunctionibus ordinem nullum esse neque quicquam interesse, utrum eorum primum diceretur aut scriberetur: quare recte peculium legatum videri, ac si prius liber esse, deinde, peculium sibi habere iussus est[78].

As we infer from the fragment, the testator meant to manumit *testamento* his slave Pamphilus[79], and to leave him, beyond that, by a legacy *per vindicationem* – we deduce it from the words '*sibi habeto*'[80] – the *peculium* that he already gave him when he was alive.

The problem arises from the fact that the testator objectively inverted –

76 See *supra*, n. 70.

77 Cf. Lenel, *Palingenesia*, I, c. 42 n. 20 (Alf.). About the problems of interpretation referring to the order of the *mortis causa* clauses see also D. 33.8.15 (Alf. 2 *dig. a Paul. epit.*), about which *infra*, n. 91.

78 Translation from Watson, *The Digest of Justinian. III*: «A man had written in his will as follows: «when I die, let my slave Pamphilus have for himself his *peculium* and be free». He was asked whether the *peculium* appeared to have been correctly legated to Pamphilius, because he has been ordered to have his *peculium* before he was free. He replied that in conjoined provisions the order was of no account and that it made no difference which was uttered or written first; therefore, the *peculium* appeared to have been correctly legated, just as if he had been ordered first to be free and then to have his *peculium*».

79 This is, very probably, a toponimic (*i.e.* a noun used to denominate a *servus* coming from *Pamphilia*), so a «style» name used (also) by Servius: see D. 40.4.48 (Pap. 10 *quaest.*): cf. Lenel, *Palingenesia*, I, c. 832 n. 176 (Pap.); Lenel, *Palingenesia*, II, c. 330 n. 63 (Serv.)].

80 Gai., *inst.* 2.193: '*Per vindicationem hoc modo legamus Titio verbi gratia hominem Stichum do lego; sed et si alterutrum verbum positum sit, veluti do aut lego, aeque per vindicationem legatum est; item, ut magis visum est, si ita legatum fuerit sumito, vel ita sibi habeto, vel ita capito, aeque per vindicationem legatum est*'. About the (well known) disappearance of the *legatorum genera quattuor* in the Justinian age, see the important *constitutio* preserved in C.6.43.1 (Imp. Iustinian. A. Demostheni), whose content is repeated by *Inst.* 2.20.2 (but the content of the symmetric text in Theoph. Par. 2.20.2 is unusual: though following the imperial institutions, it does not avoid the temptation to mention as a premise the expressions required by the classical law and used by testators to choose between the different kinds of legacy).

it is not relevant if being aware or not of what he was doing – the order of his two clauses, stating «firstly» the legacy and «secondly» the liberty of Pamphilus[81].

This seems to be perfectly clear to the heir, who, from the painstaking performance of both clauses, would see his inheritance doubly diminished (because both the *peculium* and the economical value of the slave would be detracted from it)[82].

For such reason, he asks the jurist, trying to prove his point: *i.e.*, the first clause must be considered void – this is showed by the interrogative-negative sentence: '*rectene ... quod ...*'[83] – because, to hold both clauses as valid,

81 About the so called '*ratio dubitandi*' of the text, see *infra*, n. 85.

82 With reference to such profile, we can suppose that the slave we are talking about was of some worth, because he received a *peculium* and, thus, he knew how to manage an estate (though we cannot know how much this latter was concretely noteworthy): cf., for instance, D. 11.3.16 (Alf. 2 *dig. ab anon. epit.*). About the varying of market value of the slaves, in relation to their different socio-economical function, I allow myself to refer to M. Miglietta, *Logiche di giuristi romani e bizantini a confronto in materia di stima aquiliana delle 'causae corpori cohaerentes'*, in «La retorica fra scienza e professione legale», p. 254 ff. (with bibliography, to which *adde* A. Schiavone, *La storia spezzata. Roma antica e Occidente moderno*, Bari, 1996, p. 127 – an essay that I did not examine in that work – who believes the sum of seven hundred thousand sesterces payed for the purchase of the *servus grammaticus Daphnis* – see Plin., *nat. hist.* 7.39.40.128, and Suet., *de gramm. et rhet.* 3.5 – «un episodio eccezionale [an exceptional event]»; textes we surveyed about this subject [cf. Miglietta, *op. et loc. cit.*] show, in any case, that the market price of the *servi* could undergo, and usually it did undergo, relevant variations when these *servi* were trained or applied to accomplish qualified tasks or, again, they possessed intrinsic particular qualities).

83 Such form represents a clear position, though expressed with an interrogative sentence. About the abundant use of '*recte*' in Alfenus see Ferrini, *Intorno ai Digesti di Alfeno Varo*, p. 11 f. = Id., *Opere*, II, p. 178. About the dialectic value of the words '*recte*', '*rectius*', '*rectissime*' I refer to Bona, *La certezza del diritto nella giurisprudenza tardo-repubblicana*, p. 120 ff. = Id., *Lectio Sua*, II, p. 936 ff., in particular, and to M. Miglietta, *'Servus dolo occisus'. Contributo allo studio del concorso tra 'actio legis Aquiliae' e 'iudicium ex lege Cornelia de sicariis'*, Napoli, 2001, p. 313 and n. 89, and, lastly, to E. Stolfi, *Per uno studio del lessico e delle tecniche di citazione dei giuristi severiani*, in «RDR.», I, 2001, p. 351 (and n. 30), who talks about expressions including «un giudizio di 'correttezza' [a judgement of 'correctness']» such to imply «un apprezzamento del procedimento interpretativo posto in essere, che ha condotto a una disciplina in sé non sempre o del tutto nuova, ma tale da soddisfare le esigenze della fattispecie concreta nell'osservanza delle disposizioni preesistenti [the appreciating of the interpretative process, which drove to rules that are not always or not completely new, but such to satify the necessities of the case, while observing the preexisting dispositions]» (but this conceals a bit the relevance of the lexical progression, implied mostly by the comparative '*rectius*', which actually operates in an adversative function). Not much can be deduced from T. Honoré, *Ulpian. Pioneer of Human Rights*,

one should, firstly, manumit Pamphilus and, then, one should give him the legacy *per vindicationem* (‘*quod prius … iussus esset*’).

Such reasoning is subtle, because the idea that a hierarchy must exist, both logic and juridical, between the two clauses, drives us to believe that the slave – as such – cannot acquire the property of the *peculium* (while this should happen after the succession opened). In other word, the heir tries to keep for himself (at least) the properties that constitute the *peculium*, as he cannot acquire the *dominium* on the slave, who was manumitted – in any case, validly – by will of the testator.

Besides, this idea has not as its only basis a rhetorical argument, but it also finds grounds – as scholars correctly observed – in the formalism of the clauses of last will, as shown in the well-known archaical expression ‘*Stichus servus meus liber heresque esto*’[84], from which the school of Servius tried, however, to move away [85], maybe as a consequence of the principle known as *favor testamenti*. The outcome of the process of antiformalistic erosion, already carried out by the school of Servius, is finally shown, in this field, in

Gai., *inst.* 2.185-186: Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt. Sed noster servus simul et liber et heres esse iuberi debet, id est hoc modo: ‘Stichus servus meus liber heresque esto’, vel: ‘heres liberque esto’[86].

Oxford-New York 2002², p. 66, p. 73 and p. 190 f., where ‘*recte*’ and ‘*rectissime*’ are briefly analysed as connected to verbal forms (excluding the quick annotation, referred to the content of different imperial rescripts, «that it is ‘correct’ or ‘quite right’» [p. 190]).

84 Cf. Gai., *inst.* 2.185-186 (referred just after, in the present work) and D. 28.5.9.14 (Ulp. 5 *ad Sab.*): cf. Lenel, *Palingenesia*, II, c. 1030 n. 2464 (Ulp.); on such point see Horak, *op. et loc. ult. cit.*

85 Cf. De Sarlo, *Alfeno Varo e i suoi digesta*, 187 f., who justifies the alfenian solution as the emersion of an interpretative tendency having as its aim «un graduale sovvertimento [a gradual subversion]» of the «originaria regola indiscutibilmente formalistica [undoubtedly formalistic original rule]» (*i.e.* the rule stating that the *heredis institutio* should precede every other clause of last will), and who refers to C. Sanfilippo, *Studi sull’hereditas*, in «AUPA.», XVII, 1937, p. 144 (ff.); H. Coing, *Zur Methodik der republikanischer Jurisprudenz: Zur Entstehung der grammatisch-logischen Auslegung*, in «Studi V. Arangio Ruiz», I, Napoli, 1953, p. 386, actually does not go beyond the paraphrasis of the text («Aus den grammatisch Regeln über *conjunctio* folgert Alfenus Varus die Gültigkeit eines *Peculium*-Vermächtnisses an einen Sklaven, obwohl in dem Testament das Vermächtnis *vor* der Freilassung ausgesprochen ist [Alfenus Varus deduces from the grammatic rule about the *conjunctio* the efficacy of a legacy of a peculium to a slave, though in the last will such legacy is written before the manumission]»); Horak, *Rationes decidendi*, p. 179; A. Watson, *The Law of Succession in the Later Roman Republic*, Oxford, 1971, p. 157 f. and, lastly, Roth, *Alfeni Digesta*, p. 42.

86 Translation from E. Poste (revised by Whittuck), *Gai Institutiones or Institutes of*

Regarding these paragraphs, we must underline the presence of two possible wording, the first of which regards the clause of last will in its most ancient and rigid version ('*Stichus servus meus liber heresque esto*'), while in the second one – which is also correct and which produces the same effects – the relevant words are inverted: '*heres liberque esto*'.

Alfenus objects to the sophism[87] and cuts decidedly away the strong (even if only seemingly) argument of the *quaestio* stating that, between clauses wordly *coniunctae* – that is, that are one dependent from the other, on the basis of a syntactic relation – '*ordinem nullum esse*', that is, we cannot establish, just for this, a hierarchy of juridical effects one dependent from the other[88]: thus, in order to pin down the *voluntas* of the testator, there is no real difference if, between the clauses of the last will, one was pronounced or written before the other[89].

Therefore, such (asserted) «cause and effect» relation between *coniunctae* clauses [90] cannot be considered but merely putative[91].

Roman Law, Oxford, 1904[4]: «Not only freemen but slaves, whether belonging to the testator or to another person, may be instituted heirs. A slave belonging to the testator must be simultaneously instituted and enfranchised in the following manner: 'Stichus, my slave, be free and be my heir;' or, 'Be my heir and be free'».

87 We find, correspondently, a violent reaction of the jurist regarding attempts of '*ius civile calumniari*' and of '*verba captari*' in D. 10.4.19 (Alf. 4 *dig. a Paul. ep.*), about which we will talk *infra*, § 6. The fact that an antiformalistic principle is expressed – to which the solution contained in D. 33.8.14 is owed – both in the anonymous and in the paulinian epitome of the alfenian *digesta*, I think, carries us to the idea that the sentence '*sed – interesse*' in D. 10.4.19 cannot be ascribed, not even for the sake of argument, to an intervention of Paulus on the text of the Late Republican jurist. See also *infra*, n. 176-177.

88 Cf. Voci, *Diritto ereditario romano*[2], II, p. 807. It is the heir that creates, to his own advantage, such depending relationship, probably on the basis of the preceding jurispudence, that was much more subject to the fascination of the rhetorical *tópoi* (here represented by the concepts of «before» and «after»).

89 The binomious '*diceretur aut scriberetur*' is justified, properly, by the aspect of (general) *regula* of the assertion of the jurist, which must be valid even beyond the present case: see also Voci, *Diritto ereditario romano*, II, p. 66 and n. 14.

90 Such hypothesis was actually formulated by the heir, in the perspective we are examining in these pages.

91 Besides, a similar concept comes back, in the alfenian production – but, in this second case, inside the paulinian collection – in D. 33.8.15 (Alf. 2 *dig. a Paul. epit.*): '*Servo manumisso peculium legatum erat: alio capite omnes ancillas suas uxori legaverat: in peculio servi ancilla fuit. Servi eam esse respondit neque referre, utri prius legatum esset*'. Thus, in such case, though the husband left by legacy the women slaves to his wife, as a whole (*omnes ancillae*), this does not make void the other clause, by which (it is again a legacy) the manumitted slave obtains the peculium, even when this latter includes an *ancilla*. Such woman slave shall be given to the freedman – as a part of the peculium,

Once the rule is found[92], Alfenus goes on un-building the logical construction built up by the heir.

Thus, the sentence '*rectne Pamphilo peculium legatum videretur*' in the *quaestio* matches perfectly with '*quare*[93] *recte* [!] *peculium legatum videri*', where the absence of the interrogative particle '*-ne*' in the rhetorical question turns upside down (as we can guess) the meaning of the whole original sentence.

In the same way, as the heir stated '*quod prius quam liber esset, peculium sibi habere iussus esset*', Alfenus takes up again the same expressions, cutting the correlation '*quod ... quam ...*' out, and replacing it with '*ac si ...*' – an operation imposed by the above mentioned law principle – that requires the addiction of a meaningful '*deinde ...*', sign of the opposed opinion and solution, to which the response is aiming: '*ac si prius liber esse, deinde peculium sibi habere iussus est*'.

The *ratio* inspiring the alfenian solution comes out, therefore, from the need

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considered as a whole – apart from the order by which the two clauses are written in the testament. *I.e.*, notwithstanding the evident (conflict deriving from) «concorso di disposizioni testamentarie con oggetto parzialmente coincidente [contributory last will clauses with partially coincident object]» (so wrote Talamanca, *Lo schema 'genus-species'*, p. 284 ff. [the quotation comes from page 287, and n. 779], because, in the present case, '*species derogat generi*' *i.e.* '*pars toti*': cf. also the accursian gl. '*servi meam*', and the gl. '*servus*', of Vivianus Tosco, in *Infortiatum Pandectarum Iuris Civilis Tomus Secundus*, Lugduni, 1556, p. 548 *ad h.l.*). About this text, De Sarlo, *Alfeno Varo e i suoi digesta*, p. 214, remarked that, with the expression «*neque referre, utri prius legatum esset*», the jurist meant to exclude «l'idea astratta di un'eventuale *translatio* del legato della schiava dal legatario nominato prima a quello nominato dopo [the abstract idea of a possible *translatio* of the legacy concerning the slave from the legatee mentioned firstly to the legatee mentioned secondly]»). As to what concerns the syntactical profile, Pomponius remembers the univocally conjunctive value of the '*syllaba et*' (we should maybe repeat that in D. 33.8.14 [Alf. 5 *dig. ab anon. epit.*], about which we are discussing, there is the conjunction '*-que*', which links the two parts of the clause: the meaning is therefore the same: '*Quidam in testamento ita scripserat: 'Pamphilus servus meus peculium suum cum moriar sibi habeto liberque esto'*'): D. 28.5.67(66) (Pomp. 1 *ad Q.M.*): '*Si ita quis heredes instituerit: 'Titius heres esto: Gaius et Maevius aequis ex partibus heredes sunto', quamvis et syllaba coniunctionem faciat, si quis tamen ex his decedat, non alteri soli pars adcrescit, sed et omnibus coheredibus pro hereditariis portionibus, quia non tam coniunxisse quam celerius dixisse videatur*'. To this regard, though, it must be remarked that the author of the *enchiridion* identifies a *ratio* that can make the same principle operate differently, in this case, in matter of increase of the inheritance shares (because the *voluntas* of the testator must be reconstructed in the sense that he meant to express his thought syntetically, and not to reciprocally joint the legal destiny of the clauses regarding Gaius and Maevius, excluding Titius) – actually, from this remark it seems more correct to talk about a «clause», and not about some «clauses», referred to Titius, Gaius and Mevius).

92 Such rule keeps its value though the true juridical reasoning that drove to its creation is hard to be identified, because here «l'*auctoritas* del giurista copre la *ratio* [the *auctoritas* of the jurist covers the *ratio*]»: so G. Grosso, *'Rationes decidendi'. A proposito di F. Horak, Rationes decidendi* [1969], in «Index», II, 1971, p. 117 = Id., *Scritti storico-giuridici*, IV, Torino, 2001, p. 691.

93 *I.e.* with reference to the content of the sentence '*respondi – scriberetur*'.

to save the clause as valid through a logic argument ('*in coniunctionibus ordinem nullum esse*'), consisting in the intention of the testator, about which no doubt can arise, to select the slave as heir «and» to assign him the property of peculium, all in one. To such need the *littera* of the *mortis causa* clause must, therefore, be sacrificed – by which we can confirm our opinion, above mentioned, about the interpretation conforming to reality carried on by the servian school[94].

4. A third, unusual as well as interesting, text deserving a closer scrutiny comes out in matter of interpretation of last wills[95].

D. 35.1.27 (Alf. 5 *dig. ab anon. epit.*)[96]: In testamento quidam scripserat, ut sibi monumentum ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii, fieret: nisi factum esset, heredes magna pecunia multare et cum id monumentum Publii Septimii Demetrii nullum repperiebatur, sed Publii Septimii Damae erat, ad quod exemplum suspicabatur eum qui testamentum fecerat monumentum sibi fieri voluisse, quaerebant heredes, cuiusmodi monumentum se facere oporteret et, si ob eam rem[97] nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur. Respondit, si intellegeretur, quod monumentum demonstrare voluisset, is qui testamentum fecisset, tametsi in scriptura mendum[98]

94 See *supra* n. 85 (and reference text).

95 Such text was omitted, though, both from the work of De Sarlo, *Alfeno Varo e i suoi digesta*, and from the work of Roth, *Alfeni Digesta*, while the observations in Voci, *Diritto ereditario romano*, II, p. 622 f. (and n. 11 and 17), p. 827 n. 19, p. 849 n. 79 and, mostly, p. 929 f., are of some interest.

96 Cf. Lenel, *Palingenesia*, I, c. 42 n. 21 (Alf.).

97 About the servian-alfenian use of '*quamobrem*' ('*ob eam rem*') see *supra*, n. 57 and *infra*, n. 147.

98 This is the (absolutely) preferable interpretation, to the subcessive corrections ('*mentum*' and '*nondum*') that we read in the manuscript of the *Florentina*: cf. «Justiniani Augusti Pandectarum Codex Florentinus», *cur.* A. Corbino, B. Santalucia, II, Firenze, 1988, f. 100*r* (further, secondary variants – '*mundum*' and '*neum dum*' [codd. *W* and *Q*] – are mentioned by T. Mommsen, *Digesta Iustiniani Augusti*, II, Berlin, 1870, p. 186, criticism *ad h.l.*). On such specific point see also K. Visky, *La pena convenzionale in diritto romano all'inizio del principato*, in «Studi E. Volterra», I, Milano, 1971, p. 623 n. 71 (who seems to conform – though he shows a certain expressive ambiguity – to the prevailing solution). It must be remarked, besides, that the expression '*in scriptura mendum*' can be found, among the juridical sources, only in this text, while – as far as I know – only in D. 28.7.1 (Ulp. 5 *ad Sab.*) the substantive is used again, in the ablative form '*mendo*': '*Sub impossibili condicione vel alio mendo factam institutionem placet non vitiari*'. Nonetheless, and it is certainly meaningful – if we consider it in relation with the communion of life and science that existed between the teacher of Alfenus, Servius, and Cicero

esset, tamen ad id, quod ille se demonstrare animo sensisset, fieri debere: sin autem voluntas eius ignoraretur, poenam quidem nullam vim habere, quoniam ad quod exemplum fieri iussisset, id nusquam exstaret, monumentum tamen[99] omnimodo secundum substantiam et dignitatem defuncti exstruere debere[100, 101].

– who, in a letter addressed to Servius and conserved among the so called '*epistulae ad familiares*', the form '*mendum scripturae*' is used: cf. Cic., *fam.* 6.7.1: '*Qua quidem in re singulari sum fato: nam cum mendum scripturae litera tollatur, stultitia fama multetur, meus error exsilio corrigitur, cuius summa criminis est quod armatus adversario maledixi*'. The expression appears, once again with a meaning connected to the concrete act of writing, in Cic., *ad Att.* 13.23.2; *verr.* 2.42.104 (and cf. also *de inv.* 1.6.8); in Liv. 38.55.8; in Varro, *de ling. lat.* 9.61.106; in Gell., *noct. att.* 1.7 *capit.*; 1.7.3 and 5; 5.4.2; 18.9.4; in other meanings cf. Cic., *ad Att.* 2.7.5 and 14.22.2; Aul. Gell., *noct. att.* 5.4.1; Ovid., *rem. am.* 413; *amor.* 1.5.17 (meant as a defect of the body); *ars am.* 3.777; *epist. ex Ponto* 4.1.13; see also Flav. Caper, *de verb. dub.* 110; Fl. Charis., *artis gramm.* 91-92; Eutych., *ars de verb.* 473 and Beda ven., *de orthogr.* 280.9 and 13.

99 See *infra*, n. 131.

100 Translation from Watson, *The Digest of Justinian. III*: «A man wrote in his will that he wished to be erected to himself a monument like that of Publius Septimius Demetrius in the via Salaria: should this not be done, he imposed a large fine on his heirs. When it was discovered that there was no monument of Publius Septimius Demetrius but that there was one of Publius Septimius Dama, which it was suspected that the testator intended as the model of his own memorial, the heirs asked what sort of monument they should erect and, assuming that they erected none because they could not identify the intended model, whether they would incur the penalty. The reply was that if it could be discerned which monument the testator sought to identify, even though he misdescribed it, they should built on the model which he thought that he had identified; if, however, the testator's intention could not be ascertained, the penalty would be ineffective because the model never existed which he bade them to copy; still they would certainly have to erect a monument appropriate to the wealth and standing of the deceased»

101 For what concerns textual criticisms, I refer to «Index interpolationum», II, c. 308-309 *ad h.l.* See, in particular, C. Ferrini, *Teoria generale dei legati e dei fedecommessi secondo il diritto romano con riguardo all'attuale giurisprudenza*, Milano, 1889, p. 247 n. 2 (widely); A. Pernice, *Labeo. Römisches Privatrecht im ersten Jahrhunderte der Kaiserzeit*, III, Halle, 1892, p. 46 n. 4, who rejects the part of the text that goes from '*sin autem voluntas eius*' to the end, criticism to which, without further comments, some scholars conformed: see Bremer, *Iurisprudentiae antehadrianae quae supersunt*, I, p. 169; adhering, G. Segré, *Miscellanea esegetica*, in «Scritti B. Brugi», Palermo, 1910, p. 411 = Id., *Scritti giuridici*, II, Roma, 1938, p. 546 and E. Albertario, *La nullità dell'obbligazione per indeterminatezza della prestazione*, in *Studi di diritto romano*, III, Milano, 1936, p. 316, who rejects even the sentence '*tamen ad id quod ille se demostrare animo sensisset*', on the implicit presumption – which actually is a *petitio principii* (cf., in the opposite sense, W. Kalb, *Wegweiser in die römische Rechtssprache*, Leipzig, 1912, p. 45 and n. 2, who reports the recurring of such expression in the ciceronian writing) – that the word '*animus*' should derive from a later hand. Also E. Vernay, *Servius et son École. Contribution à l'histoire des idées juridiques à la fin de la Republique romaine*, Paris, 1909, p. 183 n. 3 (referring, *de facto*, to H. Appleton, *Des interpolations dans les Pandectes et des méthodes propres à les*

This case, whose details are quite intriguing to be read, describes a last will clause by which the testator imposed upon the *heredes* – under penalty of paying a *poena*[102], consisting in a relevant sum of money (‘*magna pecunia*’)[103]

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découvrir, Paris, 1895, p. 181, who thought that there were signs of intrusion «révélées par la fait que le fragment raisonne pour et conclut contre [revealed by the fact that the fragment reasons in favour of and ends against]»: an opinion deriving from his troublesome understanding of the dialectical dynamics implied in D. 35.1.27) conformed himself to the interpolationistic critics.

102 Such ‘*poena*’ is considered – by the content of the text and setting it up against Gai., *inst.* 2.235 – « in sé non illegittima, forse perché destinata al *publicum* [not illegitimate in itself, maybe because the sum was intended to go to the *publicum*]» by M. Talamanca, ‘*Pena privata (diritto romano)*’, in «Enciclopedia del diritto.», XXXII, Milano, 1982, p. 729 n. 142. Read also the interesting text saved in D. 35.1.6.pr. (Pomp. 3 *ad Sab.*), about some «limits» to the efficacy of a *multa* charged to the recipients of a last will clause, once again with reference to the building of a monument (about which see A. Berger, *Die Strafklauseln in den Papyrusurkunden. Ein Beitrag zum gräko-ägyptischen Obligationenrecht*, Leipzig-Berlin, 1911, p. 233 n. 2, for a bibliography). About the epigraphic textes on such *multae*, cfr.: «CIL.» XIII, 5708 = «FIRA.», III, *Negotia*, Firenze, 1969, p. 143-144, to which regard see the brief remarks of J. Murga Gener, *El testamento en favor de Jesucristo y de los Santos en el derecho romano postclasico y justiniano*, in «AHDE.», XXXV, 1965, p. 479 n. 68 and M. Kaser, *‘Unmittelbare Vollstreckbarkeit’ und Bürgenregreß*, in «ZSS.», C, 1983, p. 117 n. 136. M. Talamanca, *rew*. to D. Johnston, *The Roman Law of Trusts* (1988), in «BIDR.», XCII-XCIII, 1989-1990, p. 763, talks, to this regard, of «disposizioni di tipo, per così dire, modale [clauses of a, so to say, modal kind]» that «circolavano già da epoca repubblicana [were already diffused since the Republican age]».

103 In these cases the penalty consisted, normally, in a sum of money given to a temple. As to the present case, we can admit the suggestion of De Sarlo, *Alfeno Varo e i suoi digesta*, p. 26 n. 1, according to which the exact fulfillment of the *modus* was to be checked by the college of *pontifices*, and this on the basis of D. 5.3.50.1 (Pap. 6 *quaest.*): ‘*Si defuncto monumentum condicionis implendae gratia bonae fidei possessor fecerit, potest dici, quia voluntas defuncti vel in hoc servanda est, utique si probabilem modum faciendi monumenti sumptus, vel quantum testator iusserit, non excedat, eum, cui aufertur hereditas, impensas ratione doli exceptione aut retenturum aut actione negotiorum gestorum repetiturum, veluti hereditario negotio gesto: quamvis enim stricto iure nulla teneantur actione heredes ad monumentum faciendum, tamen principali vel pontificali auctoritate compelluntur ad obsequium supremae voluntatis*’ (of course for the age of Servius we can talk only of *pontificalis auctoritas*); cf. also «FIRA.», III, p. 257. The *ratio* in the assignation of the supervision *implendae condicionis gratia* to the most important Roman priesthood college could be explained – according to the mentioned opinion of De Sarlo, *loc. ult. cit.* – by the fact that the same college was the (possible) receiver of the sum object of the penalty and by the circumstance according to which «da un testatore, poi, non può essere comminata una penale a beneficio di un privato [a penalty for the benefit of a private citizen cannot be inflicted by any testator]» (*ibid.*): see also *supra*, preceding n. Such hypothesis can be indirectly confirmed by the power-duty conferred by Justinian to the bishops to supervise the fulfillment of last will clauses regarding the building up of churches, hospices for old

– to build up a monument to his memory[104], similar to the one that the testator

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people and for beggars, orfanages and hospitals; this could be interpreted as a sort of «historical substitution», though a very late one, of the ancient with the new *pontifices* (*i.e.* the ἐπισκόποι): cf. C.1.3.45(46).1b (*graece*, Imp. Iustinian. A. Iuliano). There is evidence that *multae* were inflicted regarding familiar graves «al fine di perpetuare la condizione della *res religiosa* quale voluta dal fondatore stesso [with the aim to preserve the condictions of the *res religiosa* as the founder wanted them]» and this in order to «contrasta[re] possibili eventi disturbanti [hinder possible disturbing events]» (cf. S. Lazzarini, *Sepulcra familiaria. Un'indagine epigrafico-giuridica*, Padova, 1991, p. 3: here a wide bibliography at p. 3-4 n. 1, to which *adde*, *e.g.*, the classical work of J. Merkel, *Über die sogenannten Sepulcralmulten*, in «Festgabe R. von Jhering», Leipzig, 1892, p. 79 ff.); the grounds of such '*multae*' are to be found in the field of the pontifical law, and they were supposed, according to circumstances, to go to the same supreme college (cf. «CIL.», VI, 13152); to the vestals (cf. *CIL.* VI, 5175; 10848; 13618); for both (cf. «CIL.», VI, 14672; 17965a); to the vestals and to the *aerarium* (cf. «CIL.», VI, 10848); to this latter together with the *pontifices* (cf. «CIL.», VI, 10219); to these and to the imperial *fiscus* (cf. «CIL.», VI, 8518); to the only *aerarium* (cf. J.K. von Orelli, *Inscriptionum latinarum selectarum*, Turici, 1828, n. 4424); to the *aerarium Saturnii* (cf. «CIL.», VI, 13028); to the *aerarium populi romani* (cf. «CIL.», VI, 1425; 7788; 9042; 13312; 15405; XIV, 1153); to the *fiscus* and to a town (in the specific case to the *fiscus* for whose who violates – opens or moves – the sarcophagus of the dead husband or wife: cf. «CIL.», IX, 5860); to a sanctuary or church (once again in order to protect the grave: cf. «CIL.», III, 2654; 2704; 6399); to a *civitas* (cf. *Testamentum civis romani gallicae nationis*, in «FIRA.», III, n. 49, p. 142-146); to a college (cf. «CIL.», III, 14250); to a *municipium* (*Puteoli* and *Ostiae*: cf. «CIL.», X, 2015; XIV, 850 – in this second case «DELATOR QUARTAS·ACCIPIET»); to the decuria of the owner of the grave (cf. «CIL.», III, 2107); directly to the informer of such violation (beyond «CIL.», XIV, 850 cf. «CIL.», III, 684; IV, 26609; V, 952; X, 6706; XIV, 166) and, lastly, to whom takes on the burden to prosecute the culprit for the *crimen* committed in damaging the grave (cf. «CIL.», V, 8305). About all this see, in particular, F. Fabbrini, *'Res divini iuris'*, in «Novissimo Digesto Italiano», XV, Torino, 1968, p. 559-560 and, once again, Lazzarini, *op. cit.*, p. 4-6 n. 2.

104 To such regard, Negri, *Per una stilistica dei Digesti di Alfeno*, p. 157, asserts, on the contrary, a theory according to which the '*sibi*' pronoun, contained in the clause ('*in testamento quidam scripserat, ut sibi monumentum ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii, fieret*'), is used to connect «il monumento, di cui si chiede la costruzione all'erede o al legatario, alla fisionomia stessa del testatore [the monument, whose building is asked to the heir or the legatee, to the looks of the testator]», because «fra l'altro [among other things]» we cannot forget – according to the author – «le tendenze dell'iconografia personale romana tardorepubblicana [trends in the Roman iconography of persons in the Late Republic]». In my opinion, though, such interpretation – at least with reference to D. 35.1.27 – could contrast with the subject of the '*exemplum*', *i.e.* of the model to be found, whose presence, possibility or absence, rule the *distinctiones* inside the *responsum*. This should be excluded, on the contrary, if the reference point were the looks of the testator. As to the use of (ideal) models for the carving of Roman memorial sculptures see, recently, though from a popular perspective, the interesting remarks of P. Zanker, *L'arte greca a*

mentioned as erected to some Publius Settimius Demetrius, by the *via Salaria* (‘*ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii*’).

The heirs, intuitively prompted by the (unwelcomed) chance to see (maybe) their inheritance diminished by the *multa*[105], try to identify the *exemplum* described by the testator, discovering that, while, with reference to such *monumentum*, ‘*nullum repperiebatur*’, on the contrary there is a herma to some *Publius Septimius Dama*.

Thus, the logical profile connected to the description of the case[106] rests on an option: the heirs observe that the sameness of *praenomen* and of *nomen gentilicium*, and the same location of the *monumentum* (by the *via Salaria*)[107], let them suppose that the testator would have mentioned the monument, but that he wrote one name for the other[108]. This is, perhaps, more a reasonable doubt – a doubt that a common man could have, *i.e.* a man endowed with some smartness – that a real hypothesis (‘*ad quod exemplum suspicabatur*

Roma, in «La forza del bello. L’arte greca conquista l’Italia», *cur.* M.L. Catoni, Milano, 2008, p. 168, «catalogue» of the remarkable art exhibition held in Mantua, at «Palazzo Te», from the 29th of March to the 6th of July 2008 (that I could visit thanks to my personal friendship with Cecilia Ruggerini, attorney at law in Mantua, and precious aide in Roman Law at the University of Trento).

105 Actually, the ‘*multa*’ seems to be charged to the personal estates of the heirs (though the text does not give the details of the penalty clause); but it cannot be denied that this means, indirectly, and factually, a minor economical increase coming from the inheritance. Besides, the other possibility of the logical alternative (*i.e.* that the *heredes* could be guided by good will) seems to be denied by the content of the *quaestio*, for reasons we are about to explain in this work.

106 To understand better the point, remember that the alfenian *responsa* follow – in general and, mostly, in the fragments contained in the anonymous epitome – a tripartition: ‘*casus*’ (case) – ‘*quaestio*’ (question of a juridical kind emerging from the case) – ‘*responsum*’ (from the jurist). On such point see already, implicitly, Ferrini, *Intorno ai Digesti di Alfeno Varo*, p. 3 ff. = *Opere*, II, p. 172 f. and Bretone, *La tecnica del responso serviano*, p. 7 f. = Id., *Tecniche e ideologie*, p. 98. See also, n. 49 (and text to which we are referring).

107 Though the text does not make it explicitly clear, the whole meaning of the description of the facts, and the correspondence of the verbal forms ‘*nullum repperiebatur*’ – ‘*sed ... erat*’, let us believe that the monument to P.S. Dama was found along the same via Salaria.

108 So Gothofredus, *Corpus Iuris Civilis Romani* I, p. 646 n. 7 *ad h.l.*, latinizing the greek word συνάλλαγμα» (but maybe the word took the place of παράλλαγμα»). P. Voci, *L’errore nel diritto romano*, Milano, 1937, p. 125, correctly remarks: «si può attribuire un falso nome a una persona, pur avendola bene identificata per altra via [a false name can be ascribed to a person, though we did rightly identify him in another way]».

eum qui testamentum fecerat[109] *monumentum sibi fieri voluisse*')[110]. From the opposite point of wiew, the different element (the *cognomen* '*Dama*' instead of '*Demetrius*') cannot be logically excluded: such element, in itself, could even lead us to conclude that what the testator '*sibi fieri voluisset*'[111]

109 We have to consider that the expression '*eum qui testamentum fecerat*' repeats, quite literally (excluding the changing of the verbal mode, though the verbal tenses are simmetric), the similar '*eum qui testamentum fecisset*' contained in D. 32.60.2 (Alf. 2 *dig. a Paul epit.*), and other interesting linguistic parallelisms can be found in Cic., *Brut.* 53.197 ('*... hoc voluisse eum, qui testamentum fecisset, hoc sensisset ...*'), about the so called *causa Curiana*: cf. P. Voci, *'Interpretazione del negozio giuridico (diritto romano)'*, in «Enciclopedia del diritto», XXII, Milano, 1972, p. 274 and n. 128 = Id., *Studi di diritto romano*, I, p. 617 and n. 128, and Id., *Il diritto ereditario romano dalle origini ai Severi*, in «ANRW.», II.14, Berlin, 1982, p. 441 and n. 272 = Id., *Studi di diritto romano*, II, Padova, 1985, p. 68 and n. 272 (with the following specification about the text we are dealing with: «Il testatore voleva: più precisamente, si riteneva avesse voluto [the testator wanted that; more specifically, it was believed that he wanted that]»); see again Voci, *Diritto ereditario romano* [2], II, p. 911 ff.

110 The jurist mentions such possibility maybe more for (reasonable) completeness that for some hint emerging from facts: the evidence could be that no *heredes* who *suspicabantur* are mentioned; the text uses instead the impersonal construction '*suspicabatur – voluisse*' (nor any allusion to such conjecture appears inside the *quaestio* asked by the heirs: '*quaerebant heredes – tenerentur*').

111 About the mistake on the name, the servian school (by the word of its founder) already expressed itself in a fragment preserved in the later writing (and considered genuine by the interpolation scholars: nothing is remarked by «Index Interpolationum», I, c. 70 and «Supplementum», I – *cur.* E. Levy, E. Rabel –, Weimar, 1929, c. 88). I am alluding to D. 5.1.80 (Pomp. 2 *ad Sab.*): '*Si in iudicis nomine praenomine erratum est, Servius respondit, si ex conventione litigatorum is iudex addictus esset, eum esse iudicem, de quo litigatores sensissent*' (about which see, though, the usual perplexities, lacking a real motivation, of G. Beseler, *Unklassische Wörter*, in «*ZSS.*» LVI, 1936, 69, rightly rejected – in favour of the «sostanza classica [classical essence]» of the text – by U. Zilletti, *La dottrina dell'errore mella storia del diritto romano*, Milano, 1961, p. 407 n. 140 and p. 421; see also P. Voci, *L'errore nel diritto romano*, p. 104. In this case, the exact reference can be found through the investigation (*i.e.* the '*sentire*') about the '*conventio litigatorum*', while, in the case of the monument, the'*voluntas testatoris*' is more difficult to ascertain (O. Lenel himself, *Palingenesia iuris civilis* II, Leipzig, 1889, c. 88 n. 6 *ad h.l.*, noted: «*Quid, si in heredis nomine praenomine erratum sit?*»; actually, the pomponian text should be also inserted under the title '*de testamentis*': cf. *op. ult. cit.*, p. 88, *ad rubr.*). A not unrelevant detail is the use of the verb '*sentire*', both in this text and in D. 35.1.27 (not very much to the point, though, seems to me the reference in Voci, entry *'Interpretazione del negozio giuridico'*, p. 272 and n. 120 = Id., *Studi di diritto romano* I, p. 613 and n. 120, to the incidental clause '*quod ille se demonstrare animo sensisset*', as an instance of the fact – and this can be surely admitted – that there was a «rinvio esplicito alla *mens dicentis* [explicit reference

to the *mens dicentis*]», but that such use was «normale nei giuramenti, ove si richiedeva che uno giurasse *ex sententia animi sui* [normal in oaths, where one was asked to swear *ex sententia animi sui*]», to which D. 35.1.27 explicitly refers (cf., on the contrary, the exact evocation in Cic., *de off.* 3.29.107-108). For what concerns the aspect of the choice of the *iudex*, see H. Levy-Bruhl, *Recherches sur les actions de la loi*, Paris, 1960, p. 134; D. Liebs, *Damnum, damnare und damnas. Zur Bedeutungsgeschichte einiger lateinischer Rechtswörter*, in «ZSS.», XCVIII, 1968, p. 239; Horak, *Rationes decidendi*, 226-227 (cf. also T. Honoré, *The Editing of the Digest Titles*, in «ZSS.», CIII, 1973, p. 286); R. Düll, *Zu Gaius veronensis, den iudicia der Legisaktionen und zum Vormularprozeß*, in «ZSS.», CVIII, 1978, p. 278; W. Simshäuser, *Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana*, in «ZSS.», CXXII, 1992, p. 184 n. 61; G. Gandolfi, *Lezioni sull'interpretazione dei negozi giuridici. Corso di esegesi delle fonti del diritto romano*, Milano, 1962, p. 112-113; P. Voci, '*Errore (diritto romano)*', in «*Enciclopedia del dir.*», XV, Milano, 1966, p. 230 n. 6 (who inserts the text of D. 5.1.80 among the cases of '*error in nomine*', together with D. 28.1.21.1 (Ulp. 2 *ad Sab.*): '*erraverat in nomine vel praenomine vel cognomine, cum in corpore non errasset*'; D. 37.11.8.2 (Iul. 24 *dig.*): '*Sed et cum in praenomine cognomine erratum est, is ad quem hereditatis pertinet etiam bonorum possessionem accipit*' and D. 41.2.34. pr. (Ulp. 7 *disp.*): '*nisi forte in nomine tantum erraverimus, in corpore consenserimus*' [and such incidental clause, though suspected, corresponds in facts to the content of the other fragments: cf. F. Eisele, *Beiträge zur Erkenntniss der Digesteninterpolationen*, in «ZSS.», 10, 1889, p. 318-319, to which regard cf. S. Solazzi, *Di alcuni punti controversi nella dottrina romana dell'acquisto del possesso per mezzo di rappresentanti*, in «Memorie dell'Accademia delle Scienze di Modena», XI, 1911, p. 230 n. 202 = Id., *Scritti di diritto romano*, I (Napoli 1955, p. 351 n. 202 (who remarked, quite brilliantly for his time, that «ciascun emblema deve essere dimostrato per se stesso [every interpolation must be demonstrated by itself]»); E. Seckel, '*Nisi*', in *Heumanns Handlexikon zu den Quellen des römischen Rechts*, Jena, 1926[2], p. 368; M. Lauria, *L'errore nei negozi giuridici*, in «Rivista di Diritto Civile», XIX, 1927, p. 340-341; E. Betti, *Esercitazioni romanistiche su casi pratici*, I, Padova, 1930, p. 80; P. Krüger, T. Mommsen, *Corpus iuris civilis*, I. *Digesta*, Hildesheim, 1993[17], p. 701 n. 13 *ad h.l.* and cf. also «VIR.», IV, Berlin, 1914, c. 150 line 6, *ad v.* '*nisi*', and 173 line 39, *ad v.* '*nomen*': «(Trib.?)»], which are not to be mistaken with the cases of '*error nominis*' [which, rightly, Voci counters: cf. D. 18.1.9.2 (Ulp. 28 *ad Sab.*)] and 231 – with n. 13 – (in which it is observed, more in general, that the «*error in nomine* attiene alla pura e semplice denominazione di una persona o di una cosa, già ben identificata per mezzo di una *demonstratio* (descrizione) [*error in nomine* regards the simple denomination of a person or a thing, that is already well identified through a *demonstratio* (description)]» and that, thus, «poiché l'esatta identificazione interessa più del modo, con cui ad essa si giunge, l'*error in nomine* non produce invalidità [the *error in nomine* gives no way to inefficacy, because the exact identification is in itself more relevant than the way by which such identification is reached]»: cf. again, more in general, D. 18.1.9.1 (Ulp. 28 *ad Sab.*); D. 35.1.17.1 (Gai. 2 *de leg. ad ed. praet.*); D. 35.1.34 (Florent. 11 *inst.*); by a mere mistake, then, it is mentioned D. 40.5.54 (Maec. 16 *fideicomm.*), while I think that Voci meant to quote the interesting position on the unrelevance of the '*error in syllaba*' espressed in D. 40.4.54.pr. (Scaev. 4 *resp.*) (where the testator manumitted the slave *Cratistus* by writing,

cannot be determined.

Besides, the discussion is consistent with the general *regula iuris* – that Lenel puts on the beginning of the same palingenetic fragment[112], but that could also follow the text now examined[113] – a *regula* deriving from the

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though, *Cratinus*, who, according to the *responsum* of Scevola, shall be considered, anyhow, as manumitted, as an effect of the 'real' intention of the testator); D. 45.1.32 (Ulp. 47 *ad Sab.*); *Inst.* 2.20.29 and, lastly, C.6.23.4 [Imp. Gordian. A. Rufino]; it is to be remarked, though, that Voci does not consider D. 35.1.27 among the textes regarding such issue) and again A. Wacke, *'Errantis voluntas nulla est'. Grenzen der Konkludenz stillschweigender Willenserklärungen*, in «Index», XXII, 1994, p. 279, who deals with the point, and writes that, in our specific case – *i.e.* in case of a mistake regarding the name (or the *praenomen*) of the *iudex privatus* – the interpretative problem «può essere superato con la ricerca dell'effettivo intento dei contraenti [can be overcome by an investigation about the true will of the contracting parties]» (so said Gandolfi, *op. cit.*, 113). Wacke, *op. et loc. cit.*, instead, lingers over the differences that there are between D. 5.1.80, from one side, and D. 5.1.2.pr. (Ulp. 3 *ad ed.*) and D. 2.1.15 (Ulp. 2 *de omn. trib.*), on the other side: in the first case we are in the presence of «ein blosser *error in nomine* [a mere *error in nomine*]», while, in the other two cases, Ulpian would deal with '*error iuris*' and '*error in persona*' «als Unterfall eines *error facti* [as a sub-case of an *error facti*]» (but in both cases, mostly in the light of the opinion of Julian as acknowledged by Ulpian, the effect would be the voidness of the'*quod actum fuit*': «in beiden Fällen ist das Verhandelte nichtig [in both cases what was handled is void]»).

112 Fragment number 21 is palingenetically composed – in the reconstruction of Lenel – of D. 34.8.2 (that is the first part of it) and of the text in D. 35.1.27 (that is the immediate continuation): cf. Lenel, *Palingenesia iuris civilis*, I, 42 (and see *infra*, n. 113); such datum seems to vanish, partially, in Vacca, *Contributo allo studio del metodo casistico nel diritto romano*, 108, where, with regard to D. 34.8.2, it is stated that here, as «in alcuni casi […], l'enunciazione è limitata al solo criterio decisionale [in some cases …, the enunciation limits itself to the only decisional criterion]». A different problem appears to be referred to the possibility to clarify, from one side, the original content of the text in D. 34.8.2 – which very probably suffered an intervention of the Compilers, for an evident need to adapt it to the inside of the title of the Digest '*de his quae pro non scriptis habentur*' (and cf. D. 34.8.1 [Iul. 78 *dig.*]) – and, on the other side, to its present generalizing content. But, while for the first hypothesis, we can (and, in lack of further elements, we must) limit ourselves to supposing that the lexical part that connected the two sections of the palingenetic fragment was deleted [cf. Lenel, *Palingenesia*, I, c. 42 n. 21 (Alf.)] – and such opinion could have been held also by Bremer, *Iurisprudentiae antehadrianae quae supersunt*, I, p. 169, who was satisfied by emending, fussily but not exemplarily, *sunt* with *esse* (besides, Bremer's emendation is the only critical doubt mentioned by «Index interpolationum», II, c. 303 *ad h.l.*) – as to the second conjecture (*i.e.* the extremely generalizing nature of the *regula iuris*) we can observe that such phenomenon is not extraneous to the servian-alfenian style.

113 As it has been remarked in the preceding note, according to Lenel, *Palingenesia*, I, c. 42 n. 21 (Alf.), the palingenetic original fragment would be so composed – at least in

elaboration of Quintus Mucius[114] and reported in

its structure: [D. 34.8.2]: '*Quae in testamento scripta essent neque intellegerentur quid significarent, ea perinde sunt ac si scripta non essent: reliqua autem per se ipsa valent*'. [D. 35.1.27]: '*In testamento quidam scripserat, ut sibi monumentum ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii, fieret: nisi factum esset, heredes magna pecunia multare et cum id monumentum Publii Septimii Demetrii nullum repperiebatur, sed Publii Septimii Damae erat, ad quod exemplum suspicabatur eum qui testamentum fecerat monumentum sibi fieri voluisse, quaerebant heredes, cuiusmodi monumentum se facere oporteret et, si ob eam rem nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur. Respondit, si intellegeretur, quod monumentum demonstrare voluisset, is qui testamentum fecisset, tametsi in scriptura mendum esset, tamen ad id, quod ille se demonstrare animo sensisset, fieri debere: sin autem voluntas eius ignoraretur, poenam quidem nullam vim habere, quoniam ad quod exemplum fieri iussisset, id nusquam exstaret, monumentum tamen omnimodo secundum substantiam et dignitatem defuncti exstruere debere*'. In my opinion, though, the *regula iuris* in D. 34.8.2 – which is of a general kind, containing in itself a true hermeneutical canon – could find a better position if we put it – in the opposite way with regard to the reconstruction of Lenel – immediately after D. 35.1.27. This solution matches better the style of the *responsa*, in general, the style of the servian school, in particular, and it is consistent with the same description of the analitical method, adopted by Servius, referred by Cic., *Brut.* 41.152 (on which, widely, *supra*, §§ 1.1 and 1.2). Thus, the text could have been organized as such: [D. 35.1.27]: '*In testamento quidam scripserat, ut sibi monumentum ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii, fieret: nisi factum esset, heredes magna pecunia multare et cum id monumentum Publii Septimii Demetrii nullum repperiebatur, sed Publii Septimii Damae erat, ad quod exemplum suspicabatur eum qui testamentum fecerat monumentum sibi fieri voluisse, quaerebant heredes, cuiusmodi monumentum se facere oporteret et, si ob eam rem nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur. Respondit, si intellegeretur, quod monumentum demonstrare voluisset, is qui testamentum fecisset, tametsi in scriptura mendum esset, tamen ad id, quod ille se demonstrare animo sensisset, fieri debere: sin autem voluntas eius ignoraretur, poenam quidem nullam vim habere, quoniam ad quod exemplum fieri iussisset, id nusquam exstaret, monumentum tamen omnimodo secundum substantiam et dignitatem defuncti exstruere debere*'. [D. 34.8.2]: […?] '*Quae in testamento scripta essent neque intellegerentur quid significarent, ea perinde sunt ac si scripta non essent: reliqua autem per se ipsa valent*'. Besides, this second hypothesis has the quality to make even more consistent the whole aspect of Book V – *pars* '*de legatis*' – of the alfenian *digesta* in the anonymous epitome (at least in the version that was left to us): frag. 20, composed by D. 33.8.14 and frag. 21 (represented by D. 35.1.27), opens with the description of two troublesome cases, to which the *regula* of D. 34.8.2 follows. Clearly, in this case, Lenel followed the usual method, adopting the order of the Digest (D. 33.8.14 – D. 34.8.2 – D. 35.1.27), whenever he did not think to do it otherwise for concrete reasons (see Lenel, *op. cit.*, 'praefatio', § III, s.i.p., as he did, instead, with frag. *22 [= D. 4.6.42], for the motivations expressed: Lenel, *op. cit.*, c. 42 n. 1). Nonetheless, in my opinion, in this case, it is advisable to avoid the order of the Pandectae.

114 Cf., to this regard, D. 50.17.73.3 (Q.M. *l.s.* Ὅρων) [= Lenel, *Palingenesia*, I, c. 763

D. 34.8.2 (Alf. 5 *dig. ab anon. epit.*)[115]: Quae in testamento scripta essent neque intellegerentur quid significarent, ea perinde sunt ac si scripta non essent[116]: reliqua autem per se ipsa valent[117].

All this is implicitly told in advance in the *quaestio* of D. 35.1.27 – whose askers are expressly called «heirs» (‘*quaerebant heredes*’) – but the first datum emerging from an accurate reading of the question asked to the jurist is that the protagonists choose – between the two possible solutions pinned down by Alfenus[118] – the one more profitable to them. The part of the text

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n. 50 (Q.M.)]: ‘*Quae in testamento ita sunt scripta, ut intellegi non possint, perinde sunt, ac si scripta non essent*’. The text – though possibly summarized by the Compilers because of the title of the Pandectae in which it is inserted, but very similar to the original alfenian one – derives (*scl.*: it should derive) directly from the work of the jurist who died in 82 a.C. (see, for all the others, with references, A. Schiavone, *Quinto Mucio teologo*, in «Labeo», XX, 1974, p. 341 and n. 68; see also Id., *Nascita della giurisprudenza*, Bari, 1976, p. 39 f. and now, Id., *Ius*, p. 203 and p. 446 n. 19).

115 Cf. Lenel, *Palingenesia*, I, c. 42 n. 21 (Alf.).

116 Such rule works, of course, under the condiction that the impossibility to understand the words is absolute: cf., as an instance, and with regard to the meaningful use of the verb ‘*intellegere*’ in a context of legacies, D. 30.20 (Pomp. 5 *ad Sab.*): ‘*Qui duos servos haberet, unum ex his legasset, ut non intellegeretur quem legasset, legatarii est electio*’.

117 The second and last part of the fragment (‘*reliqua autem per se ipsa valent*’), about which, strangely, the interpolation scholars did not intervene, requires also some reflections: also comparing it with the mucian «matrix» (see D. 50.17.73.3 *supra*, n. 114) we could think, from one side, to an end added by the Compilers. From the other side, such end could show the development of the mucian thought carried out by the servian-alfenian reflection. This second solution seems to me preferable if the text is to be read together with D. 35.1.27, which represents its factual premise, by which, what is ununderstandably written is considered as not present, while the understandable part has its effects (see *infra*, in the connected discussion). Cf., then, D. 28.5.46(45) (Alf. 2 *dig. a Paul. epit.*), in the closing part in which it is asserted that: ‘*id quod impossibile in testamento scriptum esset, nullam vim haberet*’. Such close, though focused on the ‘*id quod impossibile scriptum*’, and not on what is not «understandable», seems to confirm the interpretative tendency of the servian school (this would let us reject, in my opinion, the interpolation doubts explicitly mentioned about D. 28.5.46[45] by E. Rabel, *Origine de la règle: ‘impossibilium nulla obligatio’*, in «Mélanges C.J. Gérardin», Paris, 1907, p. 489, which seemingly are assumed also by V. Scialoja, *Sulle condizioni impossibili nei testamenti*, in «BIDR.», XIV, 1902, p. 26 f., and by H. Peters, *rew*. to Vernay, *Servius et son École. Contribution à l’histoire des idées juridiques à la fin de la République romaine* (1909), in «ZSS.», XXXII, 1911, p. 470.

118 It seems advisable to repeat that, either the testator was referring to a not identifiable model (therefore, we are in presence of elements that are inserted in the testament but that it

connected to this point sounds so: *quaerebant heredes, cuiusmodi monumentum se facere oporteret et, si ob eam rem nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur*.

Such request is expressed through two questions. The first contains a sort of *captatio benevolentiae* – a declaration of good intentions[119] – that is, what kind of herma is to be built up (‘*quaerebant heredes, cuiusmodi monumentum se facere oporteret*’)[120].

Actually, this premise seems, though quite subtly, to be needed in order to bring on the second question (‘*et, si – num poena tenerentur?*’), to which the *heredes* truly aim – *i.e.* if they really must pay the *poena* – because they let the question be preceded by a *ratio* that is, at the same time, an *infirmatio rationis*. In other words, the *heredes* hide themselves behind a true alibi, so expressed: ‘*nullum monumentum facerent, quia non repperirent, ad quod exemplum facerent*’.

The fact that we are in front of a little beguilement[121] is made clear, in my opinion, by the contrast of expression between the description of the events (*cum id monumentum Publii Septimii Demetrii nullum repperiebatur, sed Publii Septimii Damae erat, ad quod exemplum suspicabatur…*, et rell.) and what the heirs asserted. Actually, these consided ‘*non repperire monumentum*’ as something absolute, while, in the description of the case, such verb – in the negative form – was referred only to the failure to find a model as the one descripted by the testator, and this left open the chance that ‘*esse monumentum*’ (scl.: *Publii Septimii Damae*) and the following (logic) possibility, in the form of a doubt (‘*suspicabatur*’), that this was the model, the *exemplum* mentioned –in facts (*mens*) – by the testator.

Thus, the jurist is asked to give a specific answer, and the way in which

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is not possible ‘*intelligere quid significarent*’ and, ‘*perinde*’, that must be considered ‘*ac si script*[*a*] *non essent*’: cf. D. 34.8.2), or we have to use data that can be analogically applied (of course, just because they can be applied, *i.e.* the existence of the other *monumentum*).

119 Such interpretation is, implicitly, excluded by Schulz, *History of Roman Legal Science*, p. 78 n. 2 = Id., *Geschichte der römischen Rechtswissenschaft*, p. 94 n. 2 = Id., *Storia della giurisprudenza romana*, p. 148 n. 1, according to which the *heredes* asked «semplicemente» (such the translation of Nocera; «merely» – «nur», in the original text) ‘*num poena tenerentur*’, because the answer of the jurist is the following: ‘*poenam nullam vim habere*’. See, though, what is remarked in the present work.

120 Notice, incidentally, that the question is deliberately generic and that it avoids – we could say, painstakingly – to refer in an explicit way to the monument of Publius Settimius Dama.

121 So also according to the brilliant remarks of Horak, *Rationes decidendi*, p. 218, who asserts explicitly that, in the *quaestio*, «so amüsant die Scheinheiligkeit der Fragesteller durchschimmert [the hypocrisy of the asker shines through so amusingly]».

he builds his *responsum* seems to show his awareness that he is wading in muddy waters, so that every surrender to the thesis contained in the *quaestio* could lead him to elaborate an unfair solution[122].

The dialectic tools used by Alfenus are – in my opinion – an authentic masterpiece of juridical solving technique.

Thus, he tells us in advance the same elements that will allow him to create the general rule to which the case must be brought back – *i.e.* to what is contained in D. 34.8.2 (‘*quae in testamento scripta ... neque intellegerentur...*’)[123] – opening the answer with the same verb: ‘*respondit, si intellegeretur ...*’, etc.

While the *regula* in D. 34.8.2 shows, so to say, a «simple exit» (*i.e.*, if it is in no way possible to interpretate the written will of the testator, the clause is considered as not included, while the rest of the will is valid)[124], the use the jurist makes of it, in this case, is applied to a «multifarious»[125] order of facts, through the examination of three possibilities.

In first place, the jurist analyses the hypothesis that the testator ‘*monumentum demonstrare voluisset*’ but – this is where he introduces an element of absolute novelty, which has a smashing effect on the logic that the heirs

122 So, on the contrary, in the attention payed to the defence of the *aequitas*, as a characteristic of the servian school: cf., the famous funeral oration of the jurist, Cic., *phil.* 9.5.10, about whose truth see, *e.g.*, R.G.M. Nisbet, *The Speeches*, in *Cicero*, *cur.* T.A. Dorey, London, 1964, p. 72. Cf. also Cic., *top.* 2.9.

123 On the advisability of the palingenetic choice made by Lenel, see what I have remarked *supra*, n. 112-113.

124 Cf., for instance, in similar matters and in the actual italian law, the art. 628 cod. civ. («*Disposizioni a favore di persona incerta.* – È nulla ogni disposizione fatta a favore di persona che sia indicata in modo da non poter essere determinata [*Clauses in favour of an uncertain person* – every clause in favour of a person who is mentioned so that he cannot be identified is void]») and, mostly, the art. 625 cod. civ. («*Erronea indicazione dell’erede o del legatario o della cosa che forma oggetto della disposizione.* – Se la persona dell’erede o del legatario è stata erroneamente indicata, la disposizione ha effetto, quando dal contesto del testamento o altrimenti risulta in modo non equivoco quale persona il testatore voleva nominare. [2° *co.*]. La disposizione ha effetto anche quando la cosa che forma oggetto della disposizione è stata erroneamente indicata o descritta, ma è certo a quale cosa il testatore intendeva riferirsi [Erroneous mention of the heir or of the legatee or of the thing object of the clause. – If the heir or the legatee were erroneously mentioned, the clause is valid, when, from the context of the testament or otherwise, it results in a non-equivocal way which person the testator wanted to mention. [2° *co.*]. The clause is also valid when the thing that is object of the clause was erroneously mentioned or described, but it is certain to which thing the testator meant to refer]»).

125 See Cic., *Brut.* 41.152 (‘*latentem explicare definiendo*’), in the interpretation that we have given *supra*, n. 8 and 9 (and reference text).

try to impose – '*tametsi in scriptura mendum esset*', *i.e.* he also considers the hypothesis that the testator made a mistake about the identification of the model. Should such mistake be ascertained, the unavoidable consequence will be that the heirs should refer '*ad id, quod ille* [*i.e.* the testator] *se demonstrare animo sensisset*'[126] (and so '*fieri debere*'[127])[128].

In second place, if, on the contrary ('*sin autem*'), '*voluntas eius ignoraretur*' – in other words it cannot in any way be ascertained which model the testator had in mind – '*poenam quidem nullam vim habere*'. In this hypothesis too, the logic of Alfenus does not shrink from a painstaking attention to the context '*regula-casus-responsum*': the jurist does not assert *tout court* that the monument must not be built – this was the solution to which the heirs were aiming[129] – but that the heirs are not obliged to pay the penalty, '*quoniam ad quod exemplum fieri iussisset, id nusquam exstaret*'[130].

At this point, the jurist gives, so to say, the final blow in such mesmerising duel of concepts. If the *heredes* could – hypothetically – begin to believe they were at safe, because of the second part of the solution (in which it was

126 The mentioned sentence ('*quod ille – sensisset*') defines «la volontà del defunto [the will of the dead]» expressed «con gli stessi termini del diritto sacro [with the same words of the sacred law]»: so Voci, *Diritto ereditario romano*[2], II, p. 930 and cf. V. Giuffrè, *Riflessioni sul 'Diritto ereditario' del Voci*, in «Labeo», XI, 1965, p. 93 n. 16; A. Burdese, *Note sull'interpretazione in diritto romano*, in «BIDR.», XCI, 1988, p. 194-195 and n. 42, and Id., '*Interpretazione nel diritto romano'*, in «Digesto delle Discipline Privatistiche», X, Torino, 1993, p. 7. On the contrary – but wrongly – Segrè, *Miscellanea esegetica*, 546, judged the «menzione dell' '*animus*' [mention of the '*animus*']» to be an interpolation, «oltrechè […] inutile [besides … unuseful]» (see also *supra*, n. 101; a rejection that missed, on the contrary, in the original version of the work in Id., «Scritti in onore di B. Brugi», p. 411: as it emerges from the *Avvertenza* contained in Id., *Scritti giuridici*, I, Cortona, 1930, p. XIV, «l'Autore ha consentito a rivedere, rifondere ed aggiornare, in quanto gli fosse possibile, i Suoi Scritti per la loro pubblicazione [the Author consented to edit, confere and adjourn, as far as it was possibile to him, His Writings for their publication]» in the «Raccolta [Collection]»).

127 Such principle works under the condiction that, in general, the *sentire* of the *scriptor* is not ambiguous: see Cic., *de inv.* 2.40.116 (quoted *supra*, § 1.1).

128 It is important to underline that such part of the text recalls, with a particular stilistic harmony, the '*ut ... fieret*' and the '*nisi factum*' of the description of the events, and the '*se facere oportere*' and the '*nullum fecissent – facerent*' contained in the *quaestio* of D. 35.1.27.

129 Cf. *supra*, in this work, and the clause '*et, si ob eam rem, nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent ...*', et rell.

130 The '*id nusquam exstaret*' is, then, the minimum – and very rigid, at the same time – limit to exclude the *poena*: *i.e.* there must not «exist» – literally «emerge from no place» ('*nusquam exstaret*') – nothing that can be assumed as 'a model'.

supposed that '*voluntas eius* [scl.: *testatoris*] *ignoraretur*'), Alfenus now takes back the general principle about the interpretation of *negotia mortis causa*, *i.e.* that the true will of the testator must be identified and kept however safe.

For such reason, if the confusion about the *exempla* made it (even) impossible to identify the model to which one should refer, one point remains clear: the testator «wanted» (with no chance of doubt) that a monument had to be built to his memory by the heirs. And such, correctly, is the response: '*monumentum tamen omnimodo secundum substantiam et dignitatem defuncti exstruere debere*'[131].

Another remark. The binomious used by Alfenus '*substantia et dignitas*' ('*secundum substantiam et dignitatem defuncti*')[132] could look as neutral. Actually, it is not so, because, if we consider the concision (and precision) that are typical of the style of the Roman jurists, such combination of words identifies the two extreme limits inside which the *heredes*[133] are allowed to move – possibly also to protect the *heredes* themselves[134], because there is no other model of behaviour to be followed.

On the one hand, in order to build up the monument, a sum shall be used which shall be proportioned to the estate (*substantia*) left from the testator:

131 Thus, the text is far from being interpolated, as it was thought, in first place, by the authors quoted *supra*, n. 101; see also G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, III, Tübingen, 1910, p. 168; IV, p. 43; S. Perozzi, *Istituzioni di diritto romano*, II, Roma, 1928², p. 548 n. 4; Betti, *Istituzioni di diritto romano*, I, p. 190 n. 49; De Sarlo, *Alfeno Varo e i suoi digesta*, p. 27 and n. 1-2, and Horak, *Rationes decidendi*, 218 and n. 20. As to the genuiness, at least substantial, of the close, see B. Biondi, *Successione testamentaria e donazioni*², Milano, 1955, p. 525 and n. 1, and Di Salvo, *Il legato modale in diritto romano*, Napoli, 1973, p. 359-360 n. 100, p. 390 n. 208.

132 As it was correctly observed by Biondi, *Successione testamentaria*, p. 525 n. 1, about «il pregiudizio che sia sempre giustinianeo il richiamo alla *substantia* e alla *dignitas* per la determinazione della disposizione, nulla di preciso si è potuto invocare [the prejudice that the reference to the *substantia* and to the *dignitas* in order to determine the clause dates always back to Justinian, nothing definitive could be claimed]». Cf. also C. Paulus, *Die Idee der postmortalen Persönlichkeit im römischen Testamentsrecht. Zur gesellschaftlichen und rechtlichen Bedeutung einzelner Testamentsklauseln*, Berlin, 1992, p. 186 f.

133 Though not discretionally, if Socini (jr., 1482-1556) is right – as he could be – in stating, in a annotation referred by Gothofredus: «*forma per testatorem expressa si non reperitur, arbitrio boni viri declaranda fuerit*» (cf. Gothofredus, *Corpus Iuris Civilis Romani*, I, p. 646 n. 10 *ad h.l.*).

134 The dialectical dispute between the askers and the jurist does not at all deprive this latter of his peace of mind, which he needs in order to keep alive his feeling of fairness (and equanimity) and to infuse it inside the response – a datum about which the modern jurists (mostly prosecutors and judges) should probably reflect.

if the inheritance is composed by a modest amount of goods, the heirs cannot be asked to incur (objectively) unproportioned expenses.

On the other hand, even if the inheritance is of relevant value, nothing shall be erected that can look like an offence to the memory of the deceased – expecially if his *dignitas* was modest: to erect an equestrian monument, for instance dressed as a senator, to someone who, in his life, got rich with illicit, or, though honest, purely commercial business, could generate hilarity, if not blame, in those passing by, as well as a monument erected in the role of an athlet to someone who was not very phisically fit (o who was disabled, or even misshapen) could not but lead to depreciating laughters or to pity.

In the same way, the heirs, in presence of a wealthy and honoured testator, could not restrict themselves to a little commemoration stone or to a rundown herma of small dimensions (that, in this case, would go against both the *substantia* received *mortis causa* and the *dignitas* of the testator). Again – as fourth hypothesis[135] – both modest *dignitas* and *substantia* shall be matched (only) with a decent sign of the *pietas* commonly owed.

As it was written to this regard, the monument «deve perpetuare la memoria del ruolo politico-sociale che il defunto occupava durante la vita [must perpetuate the memory of the social-political role of the deceased during his life]»[136], and, therefore, the criteria mentioned by Alfenus cannot be considered as «elementi estranei alla disposizione [elements alien to the clause]», because, if one datum is sure (*i.e.* it can be clearly deduced by the interpreter), it is that «il disponente ha voluto la costruzione del monumento [the testator wanted the monument to be built]»[137]. Thus, if the heirs aimed, perhaps, to avoid such effect, they shall surrender to the evidence of the argument.

In conclusion, we could remark the symmetry used by the jurist both in the question and in the answer. We are in presence of a sort of chiasmus,

135 Being such sentence composed by two elements (*substantia* and *dignitas defuncti*) we will have, «algebrically», four possible solutions, implied by the fact that the rule, elaborated by the jurist, is meant to be «general», and, thus, to cover all cases. Of course we must recognize that, in practice, a heir willing to spend a sum higher than the inherited estate will be difficult to be found.

136 So Negri, *Un esempio di interpretazione del legato nel diritto romano e nella giurisprudenza dei tribunali italiani moderni*, in «Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne», III, p. 611.

137 Cf. Biondi, *Successione testamentaria*, 525. The same author, more in general, refers the principle (though partially criticising it) according to which «se risulta che il testatore abbia adoperato una dizione erronea, qualora consti la *mens testatoris*, è arbitrario dare peso all'errore trascurando la *mens* [if it results that the testator used an erroneous wording, whenever the *mens testatoris* is known, it is arbitrary to give relevance to the mistake and to neglect the *mens*]» (*ibid.*, p. 521).

whose outside elements are both the part of the text that I called an (affected) show of good will by the *heredes* (‘*quaerebent heredes, cuiusmodi monumentum se facere oporteret*’) and the part including the alfenian «blow» (‘*monumentum tamen omnimodo* [!] *secundum substantiam et degnitatem defuncti exstruere debere*’). The inside elements are, on the opposite, both the continuation of the *quaestio* (‘*et, si ob eam rem nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur*’) and the first part – which is dialectically built up in two hypothesis – of the answer (‘*Respondit, si intellegeretur, quod monumentum demonstrare voluisset, is qui testamentum fecisset, tametsi in scriptura mendum esset, tamen ad id, quod ille se demonstrare animo sensisset, fieri debere: | sin autem voluntas eius ignoraretur, poenam quidem nullam vim habere, quoniam ad quod exemplum fieri iussisset, id nusquam exstaret*’).

5.1. Another relevant text[138], which was defined by Horak as a «*casus perplexus*»[139] and even as «ein paradoxen Fall [a paradoxical case]»[140], concerns a complex case about a *cautio damni infecti* that two co-owners both promised one to the other (‘*damni infecti – restipulatus est*’) to cover possibile damages deriving from the demolition, and the following re-building[141], of a *paries communis*:

D. 39.2.43.1 (Alf. 2 *dig. ab anon. epit.*)[142]: Cum parietem communem aedificare quis cum vicino vellet, priusquam veterem demoliret, damni infecti vicino repro-

138 This was studied by R. Backhaus, *Casus perplexus. Die Lösung in sich widersprüchlicher Rechtsfälle durch die klassische römische Jurisprudenz*, München, 1981, p. 26 ff. (in the section entitled: ‘*Der Rekurs auf die juristische Konstruktion – eine causa proxima?*’); see, though, F. Horak, *rew.* to Backhaus, *Casus perplexus* (1981), in «ZSS.», CI, 1984, p. 393 n. 27, who accuses the author, not without reason, of having omitted a solid analysis of the text.

139 Cf. Horak, *Rationes decidendi*, 142 (and see Grosso, *‘Rationes decidendi’* , p. 115 = Id., *Scritti storico-giuridici*, IV, p. 689, who simply translitterated such expression in «caso perplesso [perplexed case]»).

140 Horak, *Rationes decidendi*, p. 93. I believe, though, these are once again opinions connected to an uncomplete understanding of the argumentative structure of the text.

141 Such binomious (*i.e.* the demolition «and» the re-building of the *paries*) is implied by the whole meaning of the text where it is asserted, in the *casus*, ‘*cum parietem communem aedificare quis cum vicino vellet, priusquam veterem demoliret ...*’, et rell., and, repeating the same words, in the *responsum*, ‘*non oportuisse eos, cum communem parietem aedificarent, inter se repromittere ...*’, et rell. (see just beyond, in this work).

142 Cf. Lenel, *Palingenesia*, I, c. 38-39 n. 5 (Alf.).

misit adeoque[143] restipulatus est: posteaquam paries sublatus esset et habitatores ex vicini cenaculis emigrassent, vicinus ab eo mercedem, quam habitatores non redderent, petere vult: quaesitum est, an recte petet. Respondit non oportuisse eos, cum communem parietem aedificarent, inter se repromittere neque ullo modo alterum ab altero cogi potuisse: sed si maxime repromitterent, tamen non oportuisse amplius quam partis dimidiae, quo amplius ne extrario quidem quisquam, cum parietem communem aedificaret, repromittere deberet. Sed quoniam iam totum repromisissent, omne, quod detrimenti ex mercede vicinus fecisset, praestaturum[144].

First of all, we must say that the text is historically precious, because it gives us an important proof about the existence of the *cautio damni infecti*, in Rome, already during the first century b.C.[145]. However, problems about

143 According to part of the authors, '*adeoque*' finds itself in the place of the more correct '*ab eoque*' (see Mommsen, Krüger, *Corpus Iuris Civilis*, I. *Digesta*, p. 644 n. 24, to whom Horak, *Rationes decidendi*, 142 n. 38, adheres). Besides, Mommsen and Krüger (*op. cit.*, 644 n. 23) proposes the emendation of '*demoliret*' in '*demolirent*' (on the basis of a suggestion – but in a doubting form – of the same Mommsen, *Digesta Iustiniani Augusti*, II, 394 n. 1). In my opinion, if the first correction can be considered as not without any foundation (though I have a doubt about its real usefulness), the second does not seem to match the discourse structure of § 1 in D. 39.2.43, in which the case is about a '*quis*' who – '*cum vicino*' – '*aedificare vellet*'; who '*damni infecti vicino repromisit*' and who '*adeoque <ab eoque> restipulatus est*', all this '*priusquam veterem* [= *parietem*] *demoliret*': the only logical motivation, which we can suppose was at the basis of the suggestion (*i.e.* that the wall was demolished by the will of both), does not overcome, though, the morphological textual datum. Besides, even in the continuation of the fragment, the parties of the controversy are kept neatly distincted, even under the semantic profile (and we see such supposition was not admitted by «Digesta Iustiniani Augusti» – *cur.* P. Bonfante, C. Fadda, C. Ferrini, S. Riccobono, V. Scialoia –, Milano, 1931, p. 1066 *ad h.l.*, who, besides, admit, n. 1, the preceding '*ab eoque*').

144 Translation from A. Watson, *The Digest of Justinian. III*: «A man wished to build a party-wall together with his neghbour and had a stipulation made to himself by the latter. After the wall had been removed and the tenants had moved out of the neighbor's upper rooms, the neighbor wanted to claim from the other party the rent which those tenants were not paying. The question arises of whether this claim is legitimate. He replied that when building a party-wall, they ought not to have made mutual undertakings and that neither of them could in any way have been compelled by the other to do so; that granted that they did make undertakings, they ought not to have done so for more than half the value, which is the maximum that anyone would have to undertake even to a third party when building a party-wall; but that since, in fact, they had made undertakings for the whole sum, all loss sustained by the neighbor in the matter of rent would have to be paid.»

145 And this though the surviving of one of the two forms of *ex lege agere* (cf. Gai., *inst.* 4.30-31): see G. Branca, *Danno temuto e danno da cose inanimate in diritto romano*, Padova, 1937, p. 73 ff. (on which see G. Grosso, *rew*. to Branca, *Danno temuto* (1937), in

its content arise when, once the wall in common (that clearly divided the two properties and that became unuseful to bear them) is demolished, in order to have its *refectio*, the lodgers of one of the two buildings ('*habitatores ex vicini caenaculis*') – claiming, as we can presume, the impossibility to enjoy the building properly – just leave (*emigrant*)[146]. Thus, they break, unilaterally – but for a '*iusta causa*'[147] – the contract of *locatio* with the *dominus* (who is the '*vicinus*', *i.e.* one of the two authors of the reciprocal *cautiones*).

Now, this latter, who suffered the economical loss deriving from the *emigratio habitatorum* (*habitatores* who, for the reasons we have just said, could not be usefully sued with the *actio locati* by the owner for failed fulfillment of contract), intends to ask the co-owner who promised the *cautio*, on the basis of the *cautio* itself, to pay the *quantum* corresponding to the lease rent – or better, to the part of rent – that he cannot anymore collect from his lodgers (and that he would have instead obtained, if the contract had gone on until its natural end).

The question '*quaesitum est, an recte petet*' contains, briefly, the doubt that is exponed to the jurist by the subject who is asked to pay the sum[148].

«SDHI.», II, 1938, p. 559 = Id., *Scritti storico-giuridici*, IV, p. 60, specifically).

146 It is unusual that, in the language of the Roman jurists, the verb '*emigrare*' is used only by Alfenus (it appears, beside the text here analysed, also in D. 19.2.27 [Alf. 2 *ab anon. epit.*], quoted *infra*, following n.: see «VIR.», II, Berlin, 1933, c. 469, *ad h.l.*), while '*emigratio inquilinorum*' is used, in the only occurrance known to us of such substantive (see *loc. ult. cit.*), in a context similar to the one here examined, D. 39.2.28 (Ulp. 81 *ad ed.*): '*In hac stipulatione venit, quanti ea res erit. Et ideo Cassius scribit eum, qui damni infecti stipulatus est, si propter metum ruinae ea aedificia, quorum nomine sibi cavit, fulsit, impensas eius rei ex stipulatu consequi posse: idemque iuris esse, cum propter vitium communis parietis qui cavit sibi damni infecti, onerum eorum relevandorum gratia, quae in parietem incumbunt, aedificia sua fulsit. In eadem causa est detrimentum quoque propter emigrationem inquilinorum, quod ex iusto metu factum est. Aristo autem non male adicit, sicuti hic exigit Cassius, ut si iustus metus migrandi causa praebuerit, ita in eius personam qui fulsit eadem Cassium dicere debuisse, si iusto metu ruinae fulcire coactus est*'.

147 See again, on such issue, D. 19.2.27 (Alf. 2 *ab anon. epit.*): '*Habitatores non, si paulo minus commode aliqua parte caenaculi uterentur, statim deductione ex mercede facere oportet: ea enim condicione habitatorem esse, ut, si quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi sustineret: non ita tamen, ut eam partem caenaculi dominus aperuisset, in quam magnam partem usus habitator haberet. Iterum interrogatus est, si quis timoris causa emigrasset, deberet mercedem necne. Respondit, si causa fuisset, cur periculum timeret, quamvis periculum vere non fuisset, tamen non debere mercedem: sed si causa timori iusta non fuisset, nihilo minus deberet*'.

148 Besides, this conclusion is also proved by what it is objected in § 2 of D. 39.2.43 (v. *infra*, § 5.2).

Such question implies that there is a problem in bringing back – in terms of causal connection – the loss of the *merces* «to» the *damnum* occurred because of the demolition and the re-building of the *paries*. In other words, the questioner – while he seems to have already solved the point negatively – asks the jurist if it is correct to consider as *damnum*, deriving from constructing, the cancellation of the loan contract – because of the economical loss following from it – and, most of all, if the *cautio* can cover such damage.

The *responsum* analyses – once again with the effective method of distinction[149] – three connected hypothesis. The jurist observs firstly that, (being the property in co-ownership and) being such business in common, no promise was needed to cover *damnum infectum*, nor, for the same reason, could one co-owner of the *paries* in any way sue the other to make him promise something[150].

Secondly, if the co-owners wanted to guarantee each other with the *cautio*, they would not be obliged to do it for a sum superior to the half of the property value (*i.e.* a sum corresponding to the ideal share of the property of each one and, most of all, to the limit of their potential civil liability)[151].

149 See *supra*, n. 68 (and reference text).

150 Such specification of the text could offer an argument against the theory of Branca, *Danno temuto*, p. 79 ff., about the original edictal creation of the *cautio* (just) with regard to the *paries communis*: on such point see A. Masi, *'Denuncia di nuova opera e di danno temuto (premessa storica)'*, in «Enciclopedia del diritto», XII, Milano, 1964, p. 163 and M. Rainer, *Bau- und nachbarrechtliche Bestimmungen im klassischen römischen Recht*, Graz, 1987, p. 139. The same alfenian specification – '*neque ullo modo alterum ab altero cogi potuisse*' – seems to match (to deny its absolute efficacity in the specific case of the co-owners) the *ratio* expressed, subsequently, by Gai., *inst.* 4.31, according to which '*damni vero infecti nemo vult lege agere, sed potius stipulatione quae in edicto proposita est obligat adversarium suum*'.

151 The part '*sed si maxime repromitterent, tamen non oportuisse amplius quam partis dimidiae, quo amplius ne extrario quidem quisquam, cum parietem communem aedificaret, repromittere deberet*' seems, then, unconsistent with regard to those authors who hold the theory according to which the '*cautio vitio operis quod fit*' (*refectio* included) «poteva trovare applicazione soltanto nell'ipotesi di un *opus novum*: per i lavori di restauro – ammenoché fossero compiuti *in publico* – non sarebbe stato possibile obbligare alla *cautio* [could be applied only to the case of an *opus novum*: it would not be possible to oblige to the *cautio* for the restoration works – unless they were made *in publico*]» (so Masi, *'Denuncia di nuova opera'*, p. 165). Now, at least for what the alfenian text refers, thus with reference to its age, such *cautio*, if it cannot be imposed to the co-owner, surely can be imposed, by a third party (*i.e.*, usually the possible plaintiff), to the co-owners, in the measure of their respective shares of the *dominium*; besides, such *cautio* is surely referred to an *opus novum*, because such would be the *paries* substituting the *communis*, blew down to make room to a more fitting one. It is advisable to mention that the whole section '*sed si – deberet*' (and the expression

Nonetheless, because, while showing their will to reach a contract agreement, they undertook the commitment to be liable – each one – for the entire damage that the *opus* could cause ('*quoniam iam totum repromisissent*')[152], then, the jurist deduces, the *cautio* will also cover the damage '*ex mercede*', because such damage can be connected – *ex cautione* – to the demolition and the re-building of the *paries communis* ('*omne, quod detrimenti ex mercede vicinus fecisset, praestaturum*').

5.2. Nonetheless, the dialectical duel is not over; actually, in some way, it becomes harder because the contested questioner[153] tries to oppose to the jurist, as an argument, the same *sententia* that the jurist himself has just expressed. In other words, as Negri remarked, «l'interlocutore è tanto abile da imitare, nella richiesta, il linguaggio usato dal giurista nella risposta data al vicino [the asker is so skilled to imit, in the question, the language used by the jurist in the answer he gave to the neighbour]»[154]:

'*in totum*') was the object of a annihilating criticism by A. Guarneri Citati, *Miscellanea esegetica*, I, in «Scritti F. Innamorati», Perugia, 1932, p. 95 and f., who, evidently, does not seem to have understood the richness of the dialectical structure of D. 39.2.43.1. The author, actually, gave to his solution the following grounds: «L'affermazione '*non oportuisse* eos inter se repromittere neque ullo modo … potuisse' esclude che il giurista avesse potuto continuare 'sed si repromitterent … *non oportuisse* amplius quam partis dimidiae', trattandosi di una delucidazione non solo superflua ma anche contraddittoria con quanto precede [the assertion '*non oportuisse* eos inter se repromittere neque ullo modo … potuisse' excludes that the jurist could have followed with 'sed si repromitterent … *non oportuisse* amplius quam partis dimidiae', because this is not only a superfluous explanation, but because it also contradicts what precedes it]» – this, as we have showed in this work, is merely a *petitio principii*. And this way he went on, but always being guilty of the same miscomprehention: «Pure l'*in totum* fu, in conseguenza, aggiunto, e del resto anche altre volte è spurio [also the *in totum* was added, by consequence, and besides also other times it is spurious]» (p. 96; the graphical choices inside the text are of the same Guarneri Citati).

152 The form of the response seems to contain an (implicit) rebuke to the parties of the *cautio*: if they would have asked a previous opnion to the (to a) jurist about how to determine the *verba* of the *cautio*, they could have been informed about the various possibilities, among which they could have choosen the right set-up of interests they both truly wanted, avoiding unexpected consequences.

153 Even the verb used in the text ('*consulere*') supports such interpretation because – as Ferrini, *Intorno ai Digesti di Alfeno Varo*, p. 5 = Id., *Opere* II, p. 172, observed – differently from '*quaerere*', it refers only to the questions asked by the client.

154 So Negri, *Per una stilistica dei Digesti di Alfeno*, p. 148: here the author seems to think, differently, that the (first) answer contained in § 1 of D. 39.2.43 was given to the counterparty. I believe, on the contrary, that the two parts of the text (§§ 1 and 2 of D. *eod.*) had as their only receiver the co-owner who was asked to pay back the rent lost by the other:

D. 39.2.43.2 (Alf. 2 *dig. ab anon. epit.*)[155]: Idem consulebat, possetne, quod ob eam rem dedisset, rursus repetere, quoniam restipulatus esset a vicino, si quid ob eam rem, quod ibi aedificatum esset, sibi damnum datum esset, id reddi, cum et ipsam hanc pecuniam, quam daret, propter illud opus perderet. Respondit non posse propterea quia non operis vitio, sed ex stipulatione id amitteret[156].

The asker approves the words of the jurist, showing (apparently) that he wants to comply with them, as if he was fully persuaded of their wisdom (and, in facts, of the unavoidable consequences deriving from the reasoning of Alfenus).

But if it must be so – and, most of all, if '*omne, quod detrimenti ex mercede vicinus fecisset, prestaturum*', as the same jurist asserted – then, the asker objects – through a rhetorical question actually concealing an exception – if, once the value of the *merces* '*ob eam rem*' has been paid, he can ask to have back the sum ('*rursus repetere*'), because he too received the *restipulatio* from his neighbour and co-owner of the wall '*si quid ob eam rem, quod ibi aedificatum esset, sibi damnum datum esset, id reddi*'. The point is that, if one considers the formal premises of the reasoning, the same money the asker will have to pay, according to the decision of the jurist, he will lose it due to the same *opus*, because of which his neighbour had claimed the money, obtaining full satisfaction.

There is no doubt that such issue seems to be, *prima facie*, artificial – though this does not allow us to doubt about the truth of the event[157].

But the true problem that the jurist has to face – again – is not to perceive the beguilement in such reasoning, but to succeed in giving proper reasons why such reply does not stand up, though it seems to have sound premises, as they come undoubtedly from the preceding *responsum*.

Alfenus is aware that his counter-reply must shoot at the core of the prob-

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idem consulebat.

155 Cf. Lenel, *Palingenesia*, I, c. 38-39 n. 5 (Alf.).

156 Translation from Watson, *The Digest of Justinian. III*: «The same individual asked for advice as to whether he could claim back what he paid on this account on the grounds that the stipulation made to him by his neighbor had provided that any loss he might sustain as a result of the carrying out of the building-work should be restored to him and that the money that he paid counted as a loss caused by the carrying out of the work. He replied that such a claim could not be made since it was not because of defect in the work but by virtue of the stipulation that he had sustained the loss in question».

157 About such issue see *infra*, § 7. The logical construction and the same morphology of the sentences show an «insisting» style belonging to an «expert» (and not to any *civis*), but it is very probable that this effect represents only the (technical, as I have already said) way by which the jurist expounds the objection raised in facts by the (smart) antagonist.

lem and, most of all, cannot concede to the opponent any chance to prolongate the discussion, a prolongation that could be profitable to the opponent, even only in terms of a progressive wearing out of the persuasive strenght contained in the response.

'*Respondit non posse propterea quia non operis vitio, sed ex stipulatione id amitteret*'[158]: the answer – besides being connected, for the sake of brevity, with the first *quaestio*[159] – deletes the claims of the asker.

The reasoning of the jurist makes it clear that it is not possible to ask to have back what it was paid to the neighbour, because the economical loss following from the payment of the value of the *merces* cannot be considered as a *damnum* deriving from the defected property in co-ownership, but as a (juridical) consequence (coming out from the – voluntary or not – fulfilment) of the *stipulatio*.

This means that the asker made the mistake to (try to) consider the damage – *i.e.* the *res facti* – suffered by the neighbour (*i.e.* the loss of the rent) as one of the consequences deriving from the agreement freely reached by the *stipulatio* – that is, on the contrary, *res iuris*.

Being it not so, *per absurdum*, if we consider the reasoning of the opponent in general terms, «every» payment made for «any» cause (as, for instance, the payment of the price in a sale contract) could be asked back by reason of damage, because there is no doubt that, from a merely accounting perspective, to every payment corresponds an immediate economic loss (*i.e.* a *damnum*)[160], as we can argue – we are still reasoning by paradox – if we read in the opposite way the generalizing statement in D. 39.2.3 (Paul. 47 *ad ed.*): *Damnum et damnatio ab ademptione et quasi deminutione patrimonii*

158 As to the evaluation of the *operis vitium*, once again with regard to *cautio damni infecti*, see Servius in D. 39.2.24.4-5 (Ulp. 81 *ad ed.*), about whom cf., *e.g.*, Horak, *Rationes decidendi*, p. 104 n. 5. Also because of such detail, the critical doubt expressed by Pernice about the part '*propterea* – in fin.', mentioned (and admitted) by Bremer, *Iurisprudentiae antehadrianae quae supersunt*, I, p. 309 (in *appar. ad h.l.*), does not seem to have grounds – and besides, it lacks reasonableness, because it fails at catching the decisional *ratio* of the response.

159 Actually, if we observe the structure of the whole fragment of D. 39.2.43 (Alf. 2 *dig. ab anon. epit.*), we can notice that, in a sort of espositive intersection, the first *quaestio* and the second *responsum* are remarkably coincise, while, on the contrary, the first *responsum* and the second *quaestio* develop in an articulated explanation.

160 In rigorously logical terms, this cannot be considered as balanced by the purchase – in the mentioned case of the *emptio-venditio* – of a good that is economically equal or even superior to the fixed price. Such remark is valid *a fortiori* if the value of the good was overestimated – with no deception by the counterparty – from the purchaser, interested, for personal reasons, to own the *res*.

dicta sunt[161].

6. At this point of our research, it can be remarked that the textes we have examined come all from the anonymous collection of the *digesta* of Alfenus. Because of this detail, we could be lead to conclude that such logic-stlistic element is to be ascribed – by hypothesis – to the work of the epitomist and not to the elaboration of the jurist of the Late Republic[162].

Actually, also in the paulinian collection of the alfenian *opus* there is a meaningful – though controversal[163] – text considered by some scholars, in any case, among the ones that «più e meglio rispettano il discorso originario [respect more and better the original writing]»[164], notwithstanding the tendency usually showed by Paulus to follow his autonomous thought and judgement in reporting and commenting the writings of others[165]:

D. 10.4.19 (Alf. 4 *dig. a Paul. epit.*)[166]: Ad exhibendum possunt agere omnes quorum interest. Sed quidam consuluit, an possit efficere haec actio, ut rationes adversarii sibi exhiberentur, quas exhiberi magni eius interesset. Respondit non oportere ius civile calumniari neque verba captari, sed qua mente quid diceretur, animadvertere convenire. Nam illa ratione etiam studiosum alicuius doctrinae posse dicere sua interesse illos aut illos libros sibi exhiberi, quia, si essent exhibiti, cum eos legisset, doctior et melior futurus esset[167].

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161 See, for all the others, G. Valditara, *Sulle origini del concetto di 'damnum'*[2], Torino, 1998, p. 1 ff. (p. 4, more specifically), also for what concerns the textual and jurisprudencial tradiction that is the foundation of the paulinian syntesis.

162 It must be told, in any case, that such conclusion has been expressed for mere completeness: actually, it goes in the opposite direction from the *communis opinio*, according to which the anonymous epitome has as its specificity – compared to the paulinan – the essential adherence of its textes to the alfenian original (see *supra*, n. 33 and reference text).

163 See just *infra*, in the present work.

164 So Bretone, *La tecnica del responso serviano*, 13 = Id., *Tecniche e ideologie*[2], p. 98; on such point cf. also Horak, *Rationes decidendi*, p. 268 (for the alfenian fathership) and, now, Schiavone, *Ius*, p. 454 n. 86 (who goes so far to assert that «da '*respondit*' in poi tutto fa pensare che [sia] Servio ad avere la parola [from 'respondit' on, everything let us think that it is Servius speaking]»).

165 This starting from the specific and emblematic case of the report on the opinion of Sextus Pedius in D. 9.2.33.pr. (Paul. 2 *ad Plaut.*) and D. 35.2.63.pr. (Paul. 2 *ad leg. Iul. et Pap.*): I allow myself to refer once again to Miglietta, *'Servus dolo occisus'*, p. 270 ff. (with bibliography there cit., and cf. p. 273 f. n. 193, in particular), and, lastly, to C. Giachi, *Studi su Sesto Pedio. La tradizione, l'editto*, Milano, 2005, p. 208 ff.

166 Cf. Lenel, *Palingenesia*, I, c. 51 n. 66 (Alf.).

167 Translation from Watson, *The Digest of Justinian*, I: «All interested parties can sue

Such fragment was studied by the scholars quite deeply, starting from the textual criticisms of Beseler – according to whom the entire first sentence (‘*ad exhibendum possunt agere omnes quorum interest*’) is interpolated – to the last synthesis of Roth[168]. Other authors, on the contrary, supposed that the text could not derive from a classical elaboration, nor from the Compilers; thus, it should be ascribed to some intermediate hand that cannot be better identified[169]. In this wiew, such unknown hand that worked (if it worked) on

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for production. But a man inquired whether this action could effect the production of his opponent's accounts in whose production he had a great interest. The reply was that the civil law should not be applied vexatiously or interpreted in a captious spirit, but the correct procedure is to consider the intention behind each statement. For by the same reasoning, a student of some discipline could say that it was in his interest for such and such books to be produced for him, because if they were produced, he would be more knowedledgeable and better when he had read them».

168 About such text cf., beside the other authors mentioned in the continuation of this work, L. De Sarlo, *Documento oggetto di rapporti giuridici privati*, Firenze, 1935, p. 253 f., and Id., *Alfeno Varo e i suoi digesta*, 136 ff.; J. Burrillo, *Contribuciones al estudio de la 'actio ad exhibendum' en derecho clásico*, in «SDHI.», XXVI, 1960, p. 239 f.; A. Fernandez Barreiro, *La previa información del adversario en el proceso privado romano*, Pamplona, 1969, p. 132, p. 372, p. 375 and p. 439 f.; Horak, *Rationes decidendi*, p. 268-269; D. Simon, *Summatim cognoscere. Zwölfe Exegesen*, in «ZSS.», LXXXIII, 1966, p. 202 ff.; Bretone, *La tecnica del responso serviano*, 12 ff. = *Tecniche e ideologie*, 98 ff.; R. Willvonseder, *Die Verwendung der Denkfigur der 'condicio sine qua non' bei den römischen Juristen*, Wien-Köln-Graz. 1984, p. 71 f.; Schiavone, *Giuristi e nobili*, p. 134 and p. 227, and now Id., *Ius*, p. 232 ff., and Roth, *Alfeni Digesta*, p. 43 f. (specifically). For an interesting reference (that would deserve a deeper attention) to the relationships between the sanction contained in D. 10.4.19 (‘*non oportere – convenire*’) and the ciceronian work, see also M. Ducos, *Roma e il diritto*, Bologna, 1998, p. 115.

169 For what concerns the different positions, cf. G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, I, Leipzig, 1910, p. 7 (*contra*, though, O. Lenel, *Zum edictum perpetuum*, in «ZSS.», XXXVII, 1917, p. 121 and n. 1, and cf. Id., *Edictum Perpetuum*[3], 225); Id., *op. cit.*, V, Leipzig, 1931, p. 25 and again Id., *Unklassische Wörter*, in «ZSS.», LVII, 1937, p. 5; Schulz, *History of Roman Legal Science*, p. 206 n. 1 = Id., *Geschichte der römischen Rechtswissenschaft*, p. 255 n. 2 = Id., *Storia della giurisprudenza romana*, p. 366 n. 2 (according to whom the text, together with the one saved in D. 19.2.31 [Alf. 5 *dig. a Paul. epit.*], would not be completely classical, «ma neppure suon[erebbe] compilatorio [but neither it sounds as deriving from the Compilers]» and, therefore, it would have been object of «interpolazioni pregiustinianee [interpolations dating before Justinian]») and also M. Talamanca, *'Actio ad exhibendum'*, in «*Novissimo Digesto Italiano*», I.1, Torino, 1957, p. 256. Cf., though, M. Marrone, *'Actio ad exhibendum'*, in «AUPA.», XXVI, 1958, p. 266 f.; Burrillo, *Contribuciones al estudio de la 'actio ad exhibendum'*, p. 240; M. Kaser, *Die 'formula' der 'actio ad exhibendum'*, in «RIDA.», XIV, 1967, p. 273 n. 35 = in «Studi E. Volterra», III, Milano, 1971, p. 554 n. 41; Id., *Das römische Privatrecht*, I[2], München, 1971,

the text could even be the hand of the epitomist Paulus, but such conclusion cannot lead us to reject, almost automatically, the alfenian origin of the *principium iuris* preserved in D. 10.4.19[170]. Thus, we can agree with the stylistic judgement expressed by Bretone, who asserted that the response, while summing up a series of events to which many voices should have taken part, offers a neat trace of them, therefore proving the substancial adhering of the present text to the original version[171].

As to what concerns the content of D. 10.4.19 – once stated the law principle according to which (only)[172] those that – being entitleld to a property – have an interest in it[173] can sue with the *actio ad exhibendum* – the case

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p. 434 n. 24 and A. Watson, *The Law of Property in the Later Roman Republic*, Aalen, 1984, p. 108 and n. 3 (according to whom «the tenor of the text is exactly what one would expect from a Republican jurist replyng to a question»; see also *supra*, n. 33).

170 We can appreciate the thought of Schiavone, *Giuristi e nobili*, p. 134, according to which «l'organizzazione del discorso ('consuluit, respondit') è simile a quella dei testi provenienti dalla più fedele epitome anonima: anche se ora siamo di fronte alla trascrizione di Paolo. Qui però sembra che il commento debba aver salvato il modello alfeniano, forse con qualche elisione rispetto alla stesura originaria [the organization of the discourse ('consuluit, respondit') is similar to the one of the textes deriving from the more faithful anonymous epitome. But here the comment seems to have saved the alfenian model, maybe with some elisions in comparison to the original version]». We cannot exclude, actually, that the opening of the *responsum* – in the part that goes from '*non oportere*' to '*animadvertere convenire*' – could be the object of paulinian addictions or alterations (see *e.g.*, about the paulinian insertions in the alfenian text, C.A. Maschi, *La conclusione della giurisprudenza classica all'età dei Severi. Iulius Paulus*, in «ANRW.», II.15, Berlin - New York, 1976, p. 681 f., and Schulz, *History of Roman Legal Science*, p. 206 = Id., *Geschichte der römischen Rechtswissenschaft*, p. 254 f. = Id., *Storia della giurisprudenza romana*, p. 366 f.). For completeness, compare the text of D. 44.7.35.pr. (Paul. 1 *ad. ed.*) and D. 23.4.5.1 (Paul. 7 *ad Sab.*), and cf. *Vat. fr.* 96 (Paul. 7 *resp.*). As to what concerns the other quotations from *ius civile* made by Paulus (often, in the books *ad edictum*, expressed through the binomious *ius civile – ius honorarium* or *praetorium*, on which see A. Mantello, *Il sogno, la parola, il diritto. Appunti sulle concezioni giuridiche di Paolo*, Macerata, 1993, p. 361), cf. D. 36.1.41(40).pr. (Paul. 20 *ad ed.*); D. 6.1.23.pr. (Paul. 21 *ad ed.*); D. 14.1.5.1 (Paul. 29 *ad ed.*); D. 26.1.1.pr. (Paul. 38 *ad ed.*); D. 37.1.6.1 (Paul. 41 *ad ed.*); D. 44.7.43 (Paul. 72 *ad ed.*); D. 50.16.70 (Paul. 73 *ad ed.*); D. 48.20.7.pr. (Paul. l.s. *de portion. quae lib. damnat. conc.*); D. 28.6.43.pr. (Paul. 9 *quaest.*); D. 24.1.26.pr. (Paul. 7 *ad Sab.*); D. 24.3.17.1 (Paul. 7 *ad Sab.*, D. 24.3.17.1); D. 1.1.11 (Paul. 14 *ad Sab.*) and, lastly, D. 28.6.38.3 (Paul. l.s. *de sec. tab.*).

171 Cf. Bretone, *Storia del diritto romano*, p. 207.

172 This is, in any case, the sense of the '*regula*'; its widest expression belongs definitely to the age of Justinian (cf., for all the others, Marrone, *Actio ad exhibendum*, p. 266 f.).

173 Cf., preferably in my opinion, Rudorff, *Edicti perpetui quae reliqua sunt*, p. 97 (and

concerns someone (‘*quidam*’) who, on the basis of the same principle, tries to infuse in the jurist the convinction that his request to the defendant to produce the account books is licit, because, as *quidam* states, he has not only a «simple» interest in them, but a «remarkable interest» (‘*quas exhiberi magni eius interesset*’) – that would meet *ad abundantiam* the requirement asked to take the legal action[174].

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cf. p. 98 n. 4, for the textes and sources), in the part in which he explicitly mentions the word ‘*interesse*’*:* «*Iudex esto. Quantae pecuniae paret A*^{i} *A*^{i} INTERESSE *rem de qua agitur sibi exhiberi, si ea res* PENES *N*^{m} *N*^{m} *est dolove malo N*^{i} *N*^{i} *factum est quo minus penes eum esset, neque arbitratu tuo A*^{o} *A*^{o} *res exhibeatur,* TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNA. SI NON PARET ABSOLVITO» (small capitals are of the author), cf., beyond the alfenian-paulinian text about which we are discussing, also D. 10.4.3.9-11, D. 10.4.7.7 and D. 10.4.9.8 (Ulp. 24 *ad ed.*); see LENEL, *Edictum Perpetuum*, p. 220 ff. (and L. JOUSSERANDOT, *L’Édit perpetual*, Paris, 1883, p. 224), and MANTOVANI, *loc. ult. cit.*, where, in order to suggest a version modelled on the specific case ‘*hominem de quo agitur exhibere oportere*’, the reference term is omitted, on the basis of the texts mentioned in n. 177 f. (see J. PARICIO, *Sobre las fórmulas procesales romanas*, in ID., *De la justicia y el derecho*, Madrid, 2002, p. 274; but see also KASER, *Die ‘formula’ der ‘actio ad exhibendum’*, p. 273 n. 35 = in «Studi E. Volterra», III, 554 n. 41 and M. KASER, T. HACKL, *Das römische Zivilprozessrecht*, München, 1996, p. 276 n. 11). I would be, instead, somehow doubtful about the interpretation offered by SCHIAVONE, *Ius*, 232, where – after the translation of the *incipit* of the text, «possono ricorrere all’azione esibitoria tutti coloro che abbiano un interesse [everybody that has an interest can sue with the *actio exhibitoria*]» – such author inserts, between square brackets, as an addiction, the following specification: «[all’esibizione di una cosa [in the production of a thing]]». Now, it seems to be out of doubt that all those who have an interest «in the production» (*scl.* of something) can sue with the *actio ad exhibendum*, but the concept – in the essentiality of the edictal language – is already clearly expressed in (and through) the same *nomen* of the trial. We could then consider such premise as an interpolation (justified, in such hypothesis, by the theory that the modern concept – in the italian law – of «interest to sue» was generalized quite lately, if not even under Justinian: see *supra*, n. 172), and, maybe, as the outcome of the summing up in a «general rule» of a primitive, wider exposition. Besides, the sign ‘*exhibere*’ seems to imply, sometimes, the reference to more complex concepts than the immediate one (see, *e.g.*, G. FALCONE, *Per la storia dell’ ‘indefensio’ nella rivendica: ‘agere in rem per sponsionem’ e interdetto ‘quem fundum’*, in «AUPA.», XLIII, 1995, p. 555 and n. 63 for bibliographic references).

174 Such conclusion can be seemingly inferred, I think, from the whole structure of the *quaestio* (though its apparent ‘vagueness’ due to the use of the interrogative particle ‘*an*’). We could consider, as working hypothesis, that the asker could have as his aim to know – through the examination of the *rationes* – the factual substance of the estate of his business competitor, in order to sell the same wares at a lower price than the one requested by his antagonist (and that he could, in any case, request). This is undoubtly – if compared with the first – a «(great) interest», apparently consistent with the literal content of the *regula iuris* (*ad exhibendum possunt agere* ‘*omnes quorum interest*’).

We notice again incidentally the presence of tipical lexical parallelisms between *quaestio* and *responsum*, with a development in the continuation – The (juridical) «interest» grows up to become a «remarkable interest», and this alone should urge the jurist to agree to the question of the asker.

On the contrary, the answer is caustic as well as severe: '*respondit non oportere ius civile calumniari*[175] *neque verba captari*[176]*, sed qua mente quid diceretur, animadvertere convenire*'.

As the lexical physionomy of the sentence declares, this is a solemn stigmatization of every sophism that, though respecting apparently the *verba*, actually tends to distort the true value of a «normative» – if we are allowed to shift to the modern dogmatics – sentence [177]. We are again in front of a case of inductive creation of the *regula iuris*, which comes from the attentive examination of the case[178]. In this sense, Roht is right in saying that the jurist answers the question «mit dem «allgemeinen Verbot» des Rechtsmißbrauchs»[179], *i.e.* imposing a general (maybe we could say «ab-

175 *I.e.*, according to Accursius, «*falso scientier impugnare*» (cf. *Digestum Vetus* [Lugduni 1557] 520, gl. '*calumniari*').

176 About this point cf. also G. Astuti, '*Captazione (premessa storica)*', in «Enciclopedia del diritto», VI, Milano, 1960, p. 264, in which the '*captare verba*' is considered as showing «the illicity of the aim, in addiction of the behaviour»; and see already F. Lanfranchi, *Il diritto nei retori romani*, Milano, 1938, p. 584 and Burrillo, *Contribuciones al estudio de la 'actio ad exhibendum'*, p. 240.

177 Cf., for instance, D. 34.5.26(27) + D. 1.3.17 (Cels. 26 *dig.*): '*Cum quaeritur in stipulatione, quid acti sit, ambiguitas contra stipulatorem est. Scire leges non est verba earum tenere, sed vim ac potestatem*' – and, even more, D. 17.1.29.4 (Ulp. 7 *disp.*): '*Quaedam tamen etsi sciens omittat fideiussor, caret fraude, ut puta si exceptionem procuratoriam omisit sive sciens sive ignarus: de bona fide enim agitur, cui non congruit de apicibus iuris disputare, sed de hoc tantum, debitor fuerit nec ne*' (and we can find a reflection of such principles in literature, in Apul., *metam.* 9.42, to which the famous aphorism '*de asini umbra*' is traditionally connected). See also *supra*, n. 86.

178 Besides, in matter of production of accounting books, only one case in which the Roman jurists thought to concede the *actio ad exhibendum* seems to exist. It is D. 10.4.3.14 (Ulp. 24 *ad ed.*), in which it is referred the opinion of Julian regarding some accounting annotations made by a third party on some material owned by the plaintiff, but fallen into the possess of others. The *ratio* of being entitled to such *actio* lays here in the fact that the plaintiff would be also entitled to the *reivindicatio* with reference to the same writing material ([…] *servus, inquit* [scl. Iulianus]*, uxoris meae rationes meas conscripsit: hae rationes a te possidentur: desidero eas exhiberi. Ait Iulianus, si quidem mea charta scriptae sint, locum esse huic actioni, quia et vindicare eas possum …*, et rell.).

179 The primes are mine. So explicitly Roth, *Alfeni Digesta*, 43: «Beantwortet wird seine Frage mit dem allgemeinen Verbot des Rechtsmißbrauchs [his question is answered with a general prohibition of abusing the law]».

stract») prohibition to abuse the law[180].

Nonetheless, the jurist does not limit himself to sanctioning very negatively the *quaestio* by the value judgement we have told of[181], but he disproves its grounds of effectiveness through a classic *reductio ad absurdum*[182]. If the thesis of the asker should be accepted, we should deduce from it that everyone who has an interest – even a merely personal one[183] – to the *exhibitio* of the *res* belonging to others could use the mentioned *actio*, but this is actually in contrast with the concept itself expressed in the opening of the fragment ('*ad exhibendum possunt agere omnes quorum interest*')[184].

Hence, as the jurist counters, the owner of a library could be compelled, in a trial, to show his books to the scholar who would claim it, founding such claim on his interest to deepen his knowledge and to widen his learning by reading such books. But this solution must be rejected, though such interest belongs to an expert of some matter of knowledge (and not simply to a subject who is intellectually eager to learn): '*nam illa ratione etiam studiosum alicuius doctrinae posse dicere sua interesse illos aut illos libros sibi*

180 Thus, this can have nothing to do with a generalized principle of «interest to sue», as D. 10.4.3.1 (Ulp. 24 *ad ed.*) demonstrates: '*Qui ad exhibendum agit, non utique dominum se dicit nec debet ostendere, cum multae sint causae ad exhibendum agendi*' – correctly interpreted by Roth, *Alfeni Digesta*, 44 n. 70. As to the interpolation doubts expressed on the same text by Beseler, *Beiträge*, I, 34; Id., *op cit.*, IV (Tübingen 1920) 86, with particular reference to the words '*nec debet ostendere*', they derive from a superficial consideration of the Ulpian' lexicon, about which I allow myself to refer – though on specific elements – to M. Miglietta, *Elaborazione di Ulpiano e di Paolo intorno al 'certum dicere' nell' 'edictum 'generale' de iniuriis'*, Lecce, 2002, p. 11 ff. = Id., *Intorno al 'certum dicere' nell' 'edictum generale' de iniuriis*, in «Labeo», XLVIII, 2002, p. 219 ff.; nor, in the same way, criticisms to the sentence '*cum multae – agendi*', repeated also by Longo and Perozzi, in C.F. Glück, *Ausfürliche Erläuterung der Pandekten nacht Hellfeld*, Erlangen, 1790-1892, trad. it. – *Commentario alle Pandette* –, Milano, 1888-1909, X, s.d., p. 208 *sub* e), seem to me founded.

181 On this regard the comment expressed by the glossator of the XIIth century Viviano Tosco is very interesting: «*Ponit regulam, quae fallit in duobus casibus hic positis. Regula plana est. Exempla. Ecce petebam a Titio decem: ipse habebat instrumenta quibus poteram probare intentionem meam, nunquid possum contra eum agere ad exhibendum ut ea exhibeat. Et respondetur quod non*» (see *Digestum Vetus*, 520 *ad h.l.*, gl. '*Ad exhibendum*'): thus, in the hypothesis described, the request would not be founded on captious arguments, but it would be functional to demonstrating the solidity of the *intentio*.

182 About this profile see already Horak, *Rationes decidendi*, 267 and n. 1, and Grosso, *'Rationes decidendi'*, 119 = Id., *Scritti storico-giuridici*, IV, , 693.

183 And this, apart from the intensity of such interest (see, actually, the part '*quas magni eius interesset*' of the text examined).

184 On such point see what I have remarked *supra*, n. 173.

exhiberi, quia, si essent exhibiti, cum eos legisset, doctior et melior futurus esset'[185].

Neither the «interest» (objective and, if considered in itself, deserving attention) to have a better scientific knowledge, or to develop a specific learning, can become the touchstone in a comparison of interests where, on the other hand, the freedom of *dominium*, an absolute value, is involved[186].

Thus, if such request – which, in itself, deserves much more respect than the request to see the account books of others in order to acquire elements to the advantage of one's business – cannot be admitted, *a fortiori* the first request too, which aimed to order the production of the *rationes adversarii*, shall be rejected.

7. Now, having all this examined, complex conclusions, which, I think, can be easily inferred from the preceding pages, seem not to be needed. Nonetheless, it is certain that the text we have examined do witness the presence of a stilistic element, which is definitely to be admired, but, most of all, which is «tipically» alfenian.

Such remark adds, therefore, a datum against the opinion – that enjoyed, it seems to me, an approval quite superior to its evidence – who sees in Alfenus Varus a (mere) collector of servian material, while he shows, at least for what we have seen, a relevant scientific autonomy[187].

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185 Notice the unusual and emblematic fact that the syntagma '*doctior et melior*' is similar to the one present in Cic., *Brut.* 41.151, with reference to Servius (see *supra*, § 1.2), a parallelism already brilliantly caught by Negri, *Per una stilistica dei Digesti di Alfeno*, p. 152.

186 Cf., on such issue, D. 10.4.3.3 (Ulp. 24 *ad ed.*) – cf. Lenel, *Palingenesia*, II, c. 557 n. 719 (Ulp.): '*Est autem personalis haec actio et ei competit qui in rem acturus est qualicumque in rem actione, etiam pigneraticia Serviana sive hypothecaria, quae creditoribus competunt*' – about which cf. G. Grosso, *I problemi dei diritti reali nell'impostazione romana. Lezioni universitarie*, Torino, 1944, p. 257 f.; Marrone, *Actio ad exhibendum*, p. 197 ff.; (with doubts) Burrillo, *Contribuciones al estudio de la 'actio ad exhibendum'*, 247 and n. 184, and A. Watson, *'Actio serviana' and 'actio hypotecaria' (a conjecture)*, in «SDHI.», XXVII, 1961, p. 357 ff.

187 See *supra*, n. 31-32. We could also, for instance, usefully examine, because of the presence of some profiles not extraneous to the investigation now concluded, D. 39.4.15 (Alf. 7 *dig. ab anon. epit.*) – cf. Lenel, *Palingenesia*, I, c. 44 n. 28 (Alf.) –: '*Caesar cum insulae Cretae cotorias locaret, legem ita dixerat: 'ne quis praeter redemptorem post idus Martias cotem ex insula Creta fodito neve eximito neve avellito'. Cuiusdam navis onusta cotibus ante idus Martias ex portu Cretae profecta vento relata in portum erat, deinde iterum post idus Martias profecta erat. Consulebatur, num contra legem post idus Martias ex insula Creta cotes exisse viderentur. Respondit, tametsi portus quoque, qui insulae essent, omnes eius insulae esse viderentur, tamen eum, qui ante idus Martias profectus ex portu*

At the state of our knowledge, no analogy can be inferred from the content of the *responsa* ascribed to Servius, neither from which that were left to us – though always by another jurist – in a version probably similar to the original, or, however, not too far from it[188].

Thus, a further confirmation seems to be found to the fine page of the essay that Giovanni Negri dedicated to the stilistic of the alfenian *corpus*, where it is observed what follows: «come accade nei disegni enigmistici, ove congiungendo dei punti si ottiene un'immagine, è possibile rintracciare in un microcontesto, assunto quale ipotesi di lavoro, un reticolato di corrispondenze stilistiche (non soltanto lessicali o grammaticali) che, pur tenendo conto del genere letterario e degli standars del linguaggio tecnico, è difficile sottrarre alla presenza unitaria di un autore. Questo reticolato non potrà mai rivelare un'immagine compiuta, ma almeno la struttura del conte-

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esset et relatus tempestate in insulam deductus esset, si inde exisset non videri contra legem fecisse, praeterea quod iam initio evectae cotes viderentur, cum et ex portu navis profecta esset'. Unusual, at the first reading of the text, is the presence at the beginning of the name '*Caesar*', which could be written instead of '*censor*' (I believe, actually, this is a sort of intellectual short circuit suffered by the copyist – but not remarked by the critics [cf. «Index interpolationum», III – *cur.* E. Levy, E. Rabel – Weimar, 1935, c. 100, who do not mention the fragment and see F. Wubbe, *Vi tempestatis*, in «Mélanges F. Sturm», Liège, 1999, p. 588)]: a mistake that could have been favoured, from one side, maybe by the fact that Caius Julius Caesar obtained – among the others – even the censorian power (*i.e.* what was called *praefectura morum*: but see F. De Martino, *Storia della costituzione romana*, III, Napoli, 1973, p. 243), but, mostly, by the fact that inside the *lex dicta* and the *responsum* the *idus Martias* is mentioned, a date that was fatal – as it is universally known – for the dictator: see Suet., *Caes.* 1.81-82). But, most of all, the articulated and particularly complex – so that it sounds intricate – answer of the jurist seem to be, a bit laboriously, aimed to face the premise according to which the ship of the third party ('*quidam*') is «storically» got out from the harbour after the idis of March, thus «objetive» violating the reserve clause in favour of the concessionaire. This latter, therefore, could assert his right – but such possibility must not be considered as relevant, on the contrary, thanks to the presence of *vis maior* (that is, in our specific case, the *vis venti*). Cf., though, already the remarks of G. Negri, *Sulle 'concessioni' minerarie nel diritto romano*, in «I rapporti contrattuali con la pubblica amministrazione nell'esperienza storico-giuridica», Napoli, 1997, p. 61.

188 Cf., in particular, D. 28.5.46(45) and D. 33.7.16.1-2 (Alf. 2 *dig. a Paul. epit.*); D. 33.4.6.pr., D. 34.2.39.2 and D. 35.1.40.3 (Iav. 2 *ex post. Lab.*); D. 40.7.39.3 (Iav. 4 *ex post. Lab.*); D. 18.1.80.2 and D. 28.1.25 (Iav. 5 *ex post. Lab.*); D. 23.3.79.1 (Iav. 6 *ex post. Lab.*); Aul. Gell., *noct. att.* 4.2.12; D. 32.62 (Iul. l.s. *de ambig.*); D. 5.1.80 (Pomp. 2 *ad Sab.*); D. 35.1.6.1 (Pomp. 3 *ad Sab.*); D. 33.7.15.pr. (Pomp. 6 *ad Sab.*); D. 46.3.67 (Marcell. 13 *dig.*); D. 40.4.48 (Pap. 10 *quaest.*); D. 28.7.28 (Pap. 13 *quaest.*); D. 3.5.20(21).pr. (Paul. 9 *ad ed.*); D. 14.2.2.pr. and § 3 (Paul. 24 *ad ed.*); D. 34.2.4 (Paul. 54 *ad ed.*); D. 9.3.5.12 (Ulp. 23 *ad ed.*); D. 15.1.17 (Ulp. 29 *ad ed.*); D. 17.2.52.18 (Ulp. 31 *ad ed.*); D. 33.7.12.pr. and D. 33.7.12.6 (Ulp. 20 *ad Sab.*): list quoted from Miglietta, *'Servius respondit'*, cap. II.

sto […] direi di sì [as it happens in the enigmistic draws, where, connecting some points one to the other, a picture is obtained, it is possibile to trace in a micro-context, which we assume to be our work hypothesis, a net of stilistic correspondences (not only lexical or grammatical) that, though the literary genre and the standards of the technical language should be taken into due account, it is difficult to consider without supposing the presence of one only author. Such net cannot ever reveal a complete picture, but I would say it can reveal […] at least the structure of the context]»[189] [190].

189 Cf. Negri, *Per una stilistica dei Digesti di Alfeno*, p. 142.

190 Research carried out inside the special research project «Pat-Csr», financed by the autonomous Province of Trento, and titled «*Accesso aperto alla conoscenza scientifica e sistema trentino della ricerca: profili giuridici* [open access to the scientific knowledge and Trento's research system: juridical profiles]» (University of Trento, Faculty of Law; p.i.: Maurizio Manzin; responsible for the Roman law area: Massimo Miglietta).