

vo avrebbe avvantaggiato il *dominus*), che – come sappiamo<sup>90</sup> –, non era annuale, ma in perpetuo. Tuttavia, come già affermato in precedenza<sup>91</sup>, dalle fonti sembrerebbe che, anche qualora gli effetti dell'attività del *servus* si fossero riversati sul patrimonio del *dominus*, colui che avesse contratto con lo schiavo, avrebbe potuto comunque agire con l'*actio de peculio* (sempre che esso fosse esistente)<sup>92</sup>; pertanto, il riferimento al regime di tale azione – pur essendo stato fatto verosimilmente proprio perché l'attività dello schiavo si svolgeva sul peculio – non può essere considerato un indizio 'sicuro' ai fini della nostra indagine<sup>93</sup>.

5.- In conclusione, non vi è il benché minimo elemento che possa suffragare la tesi che vede l'*exercitio navis* del *servus* svolta nell'ambito del patrimonio del *dominus*, e quindi nel suo interesse. Dalla stessa definizione di *exercitor* che troviamo nelle fonti e, soprattutto, dai testi analizzati – in particolar modo da D. 14.1.1.20 e da D. 14.1.6 pr. –, è emerso chiaramente che il *servus* realizzasse tale attività nel 'proprio' interesse, andando quindi ad incrementare (e, eventualmente, a diminuire) il peculio, e ciò anche qualora vi fosse stata la *voluntas* del *dominus* (la quale avrebbe comportato semplicemente un aumento della responsabilità e non anche una diversa imputazione degli effetti dell'attività dello schiavo).

Dalla definizione di *exercitor* fornita da Ulpiano si evince, inoltre, che l'*exercitio navis* del *servus* si poteva realizzare anche su una nave che non rientrasse nel suo peculio, perché appartenente o ad un terzo, che gliel'avesse a lui locata, oppure allo stesso *dominus*, il quale, senza farla rientrare nel peculio, gliene avesse concesso l'utilizzo (dietro mercede o *fide dominica*)<sup>94</sup>.

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<sup>90</sup> D. 15.3.1.1 (Ulp. 29 *ad ed.*).

<sup>91</sup> V. *supra*, par. 3.

<sup>92</sup> Ovviamente, non era vero il contrario: le cose che andavano ad incrementare il peculio, infatti, non erano considerate come un utile del *dominus* (v. D. 15.3.6 [Tryph. 1 *disp.*]).

<sup>93</sup> A meno che non si voglia vedere un indizio, non solo appunto nel richiamo all'*actio de peculio* e al suo regime, ma anche nella problematica affrontata, cioè la morte del *servus*. Problematica, questa, che viene esaminata da Ulpiano anche nel paragrafo precedente (D. 14.1.4.3 [Ulp. 29 *ad ed.*]: *Si servus sit, qui navem exercuit voluntate domini, et alienatus fuerit, nihilo minus is qui eum alienavit tenebitur. Proinde et si decesserit servus, tenebitur: nam et magistro defuncto tenebitur*), assieme a quella dell'alienazione del *servus* (*exercitor voluntate domini*), e che risultano entrambe affrontate a proposito dell'*actio de peculio* (v., ad es., oltre all'intero titolo II del XV libro dei *Digesta*, D. 15.1.32.2 [Ulp. 2 *disp.*]; D. 15.1.33 [Iav. 12 *ex Cass.*]). Ciò potrebbe denotare, pertanto, una preoccupazione derivante dal fatto che, se non ci fosse stata l'*actio in solidum*, l'unico rimedio sarebbe stata appunto l'*actio de peculio*. Sinceramente, però, non mi sembra che neanche questi elementi costituiscono degli indizi sicuri.

<sup>94</sup> Sul punto, v. *supra*, par. 2.

## Topical argumentations in legal texts: the *tabula picta*\*

The *tabula picta* case is about a person who had painted a picture on someone else's panel so that a question of ownership arose: who was the owner of the painting? the painter or the owner of the panel? At a certain point in time, this legal question had given rise to a difference of opinion between two groups of jurists. Whereas some jurists maintained that the painter had become owner of the painting, other jurists held the opinion that the owner of the panel was the legitimate owner of the painting.

This article discusses the legal texts that mention the *tabula picta* case: Gai 2.78; D. 41.1.9.2 (Gai. 2 *rer. cott.*); D. 6.1.23.3 (Paul 21 *ad ed.*) and *Inst.* 2.1.34. First, the texts of Gaius are analyzed (§ I). Whereas these texts do not mention a controversy, Paul does. He also brings up the arguments that the jurists used in support of their opinion. Paul's text is discussed in the second part of this article (§ II). The third part, discusses how Justinian ended the controversy. Modern scholars often interpret the difference of opinion about the ownership of a *tabula picta* as a controversy between the Sabinians and the Proculians. The question whether the controversy about the *tabula picta* was a school controversy is addressed in the fourth part of this article. The fifth part summarizes the modern interpretations of the *tabula picta* case and explains why they are inadequate. Finally, it is demonstrated that the legal problem at the root of the controversy arose in legal practice and that the parties involved had consulted two different groups of jurists. The jurists formulated an advice to the advantage of the party that consulted them and, since they were in need of adequate arguments to convincingly do so, they used rhetoric and *topica*.

### I. Gaius about the *tabula picta*

In 2.78, Gaius mentions a case of a *tabula picta*<sup>1</sup>:

\* This article is a revision of the Dutch publication T. Leesen, *Romeinse schilderkunst op andermans paneel: Wie wordt eigenaar van de tabula picta?*, in *Groninger Opmerkingen en Mededelingen* 23, 2006, 113 ss.

<sup>1</sup> G. Bortolucci, *Nota a Gaio, Inst. II, 78*, in *BIDR.* 33, 1923, 151 ss.; C. Longo, *Corso di diritto romano. Le cose - la proprietà e i suoi modi d'acquisto*, Milano 1946, 114-115; F. De Zulueta, *The Institutes of Gaius. Part II: Commentary*, Oxford 1963<sup>2</sup>, 78; C. Sanfilippo, *Accessione*, in *NNDI.* 1.1, 1964, 131-132; P. Maddalena, *Tabula picta: Ritorno a Jhering*, in *Labeo* 13, 1967, 68 ss.; M. Kaser, *Tabula picta*, in *TR.* 26, 1968, 31 ss.; K. Visky, *Sulla qualifica della pittura e della scultura nelle fonti del diritto romano*, in *Studi in onore di Giuseppe Grosso*, IV, Torino 1972, 333 ss.; E.

*Sed si in tabula mea aliquis pinxerit veluti imaginem, contra probatur; magis enim dicitur tabulam picturae cedere. Cuius diversitatis vix idonea ratio redditur; certe secundum hanc regulam si me possidente petas imaginem tuam esse, nec solvas pretium tabulae, poteris per exceptionem doli mali summoveri; at si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat; quo casu nisi solvam inpensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. Illud palam est, quod sive tu subriperis tabulam sive alius, competit mihi furti actio<sup>2</sup>.*

This text is situated in the second book of Gaius' *Institutiones*. In 2.66-79, Gaius discusses three ways of acquisition of ownership based upon *naturalis ratio*. First, he mentions *occupatio* (2.66-69). A person who takes possession of a *res nullius* (e.g., wild animals, birds, fishes or war booty) becomes its owner through *occupatio*. Second, Gaius (2.70-78) discusses *accessio*. This is when someone adds something to someone else's thing so that they become unseparable. Third, Gaius (2.79) brings up *specificatio*. When somebody creates for himself a new thing by processing the material of somebody else without mutual agreements, this is called *specificatio*.

The text in question is dealt with in the part about *accessio*. The principle rule for *accessio* relates to immovable goods: 'Superficies solo cedit' or 'A superstructure goes with the land'. According to this rule, a building becomes the property of the landowner<sup>3</sup>. By analogy with this rule, written letters also became the property of the parchment or papyrus owner<sup>4</sup>. However, the *tabula picta* case departed from the principle rule ('*Sed..., contra probatur*'). When A had drawn a picture on a panel belonging to B, the painter (A) became owner of the final product, i.e., of the painting<sup>5</sup>. According to Gaius, no proper reason was given for this distinction between *scriptura* and *pictura*, nor for going against

Valiño, *Actiones utiles*, Pamplona 1974, 225 ss.; R. Sotty, *Recherche sur les utiles actiones. La notion d' action utile en droit romain classique*, Grenoble 1977, 295 ss.; F. Lucrezi, *La 'tabula picta' tra creatore e fruitore*, Napoli 1984; T.G. Watkin, 'Tabula Picta': *Images and Icons*, in *SDHI*, 50, 1984, 383 ss.; A. Plisecka, *Accessio and specificatio reconsidered*, in *TR*, 74, 2006, 45 ss.

<sup>2</sup> «But if someone has painted for example an image on my panel, the contrary is held. Indeed, it is rather said that the panel follows the picture. For this distinction, a proper reason is hardly given. According to this rule, it is certain that if you bring an action against me, who is in possession, to claim the painting as yours, without paying the value of the panel, you can be withheld by means of an *exceptio doli mali*. But if you would possess, the consequence is that an *actio utilis* against you has to be given to me. In this case, you can repulse me by means of an *exceptio doli mali*, unless I pay the expenses of the picture. At least if you have been a possessor *bona fide*. Of course, if you or anyone else has stolen the panel, the *actio furti* comes to me».

<sup>3</sup> Gai 2.73.

<sup>4</sup> Gai 2.77.

<sup>5</sup> See also *Ep. Gai* 2.1.4.

the principle rule ('*cuius diversitatis vix idonea ratio redditur*')<sup>6</sup>.

In the Digest, Gaius also mentions this distinction between *scriptura* and *pictura*. The relevant text is D. 41.1.9.2 (Gai. 2 *rer. cott.*):

*Sed non uti litterae chartis membranisque cedunt, ita solent picturae tabulis cedere, sed ex diverso placuit tabulas picturae cedere. Utique tamen conveniens est domino tabularum adversus eum qui pinxerit, si is tabulas possidebat, utilem actionem dari, qua ita efficaciter experiri poterit, si picturae inpensam exsolvat: alioquin nocebit ei doli mali exceptio: utique si bona fide possessor fuerit qui solverit<sup>7</sup>. Adversus dominum vero tabularum ei qui pinxerit <rectam> vindicationem competere dicimus, ut tamen pretium tabularum inferat: alioquin nocebit ei doli mali exceptio<sup>8</sup>.*

<sup>6</sup> Watkin, 'Tabula picta': *Images and Icons* cit., 383 ss., tried to explain why the rule for the *tabula picta* case deviated from the principle rule. In his view, the first sentence of Gai *inst.* 2.78 ('*Sed si in tabula mea aliquis pinxerit veluti imaginem*') provides an explanation for the deviation. According to Watkin, the original meaning of the term 'imago' was 'a funerary image acting as a focus for the spirit of the dead ancestor'. Because of the religious significance of these images, the principle rule for *accessio*, on the basis of which the owner of the panel would become owner of the precious 'imago', could not be applied. In Gaius' time, the religious meaning that caused this deviation may have been forgotten. Although the historical background of this exception had been lost and Gaius was no longer able to justify it, he still held on to the old rule. The fact that Gaius still mentioned the old rule, demonstrates, according to Watkin, that Roman jurists were conservative. Only Paul dared to renounce the old rule. Justinian, finally, decided that the old rule in favour of the painter prevailed, although his decision had nothing to do anymore with the original religious reason. In my view, Watkin's theory is farfetched and does not find sufficient support in the sources. There is no source before the time of Gaius that provides information about the *tabula picta* and the so-called religious meaning of an 'imago'.

<sup>7</sup> According to Th. Mommsen, *Corpus Iuris Civilis*, I, Berlin 1954, 691 n. 19, the text has to state '*qui pinxerit*'.

<sup>8</sup> «Pictures do not follow the panel in the same way as letters follow the paper or parchment. On the contrary, it was decided that the panel follows the picture. Nonetheless, it is convenient that an *actio utilis* is given to the owner of the panel against the painter who is in possession of the panel. He can bring this action to effect if he pays the costs of the painting. Otherwise, an *exceptio doli mali* will be held against him; at least if the person who paid [painted] was a possessor *bona fide*. We will say it is appropriate that the painter has a *vindicatio* against the owner of the panel, at least if he pays the price of the panels. Otherwise, an *exceptio doli mali* will be held against him». According to the translation of A. Watson, *The Digest of Justinian*, II, Philadelphia 1985, the clause 'utique si bona fide possessor fuerit qui solverit' was subordinate to the main clause 'adversus dominum vero tabularum ei qui pinxerit <rectam> vindicationem competere dicimus...'. He translated this sentence as follows: 'if it were a possessor in good faith who paid for and painted the tablet, we would give him a direct *vindicatio* against the owner of the tablet...'. However, it is erroneous that a painter who would be both possessor and owner, could still bring a *rei vindicatio* against the *dominus tabulae*. In my view, the clause in question 'utique si bona fide possessor fuerit qui solverit' was subordinate to the main clause 'utique tamen conveniens est domino tabularum adversus eum qui pinxerit, si is tabulas possidebat, utilem actionem dari'. The *dominus tabulae* could bring an *actio utilis* against the painter who was in possession of the painting. He could only do so if the painter was a possessor *bona fide*. If the painter was a possessor *mala fide*, Gaius (2.78) states that the *dominus tabulae* had to bring an *actio furti* against him.

The legal problem in the above-mentioned texts of Gaius is twofold. Gaius did not only discuss a question of ownership, but also paid attention to any subsequent arrangements between both parties. When A painted a picture on B's panel, without mutual agreements, Gaius maintained that A became owner of the painting. Although the words 'magis enim dicitur tabulam picturae cedere' in Gai 2.78 seem to imply the existence of an opposite opinion, Gaius did not mention a controversy. Gaius also distinguished three potential situations in which arrangements had to be made and, in all of these cases, A was the owner of the final product: 1) the *dominus tabulae* (B) was in possession of the final product; 2) the painter (A) was possessor *bona fide*; and 3) the painter (A) was possessor *mala fide*.

In the first case, A was owner of the painting and could bring a *rei vindicatio* against the possessor (B). In order to acquire possession of the painting, A had to pay the value of the panel as damages to B. If he did not do so, B was not obliged to return the painting to A. He could use this right of retention by integrating an *exceptio doli mali* into the *formula* of the *rei vindicatio*. In the second case, A was both owner and possessor *bona fide* of the painting and B could bring an *actio utilis* against him. If B made use of this action, he had to indemnify A for the costs of the picture ('*impensa picturae*'). If he refused to do so, A could repulse him by means of an *exceptio doli mali*<sup>9</sup>. In the third case, A was possessor *mala fide* of the painting. In that case, B could bring an *actio furti* against A.

<sup>9</sup> The possibility of B to bring an action against A raises two questions: 1) What does B want to achieve when he brings an *actio utilis* against A? and 2) What is the legal qualification of this *actio utilis*? In literature, these two questions have given rise to various answers. For a clear summary of the different theories and bibliographical references, see Kaser, *Tabula picta* cit., 41 ss. I will confine myself to the most common interpretation of this *actio utilis* and its function. It cannot have been B's intention to acquire ownership of the painting, for Gaius clearly states that A had become owner of the painting. Nor is it possible that B wanted to claim ownership of his panel, for the mere panel did not exist anymore. According to R. Von Jhering, *Übertragung der Reivindicatio auf Nichteigentümer*, in R. von Jhering, *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und Deutschen Privatrechts*, I, Jena 1881 (Aalen 1969), 47 ss., the function of the *actio utilis* was to obtain an indemnification for the panel. Kaser agrees with this point of view and qualifies the *actio utilis* as a *rei vindicatio utilis*. However, this action would oblige A to pay to B the value of the final product, i.e., the panel and the image. Because of the integration of an *exceptio doli mali* in the *formula*, B was obliged to pay to A the value of the image. In order to avoid payments to and fro, A only had to pay to B the value of the panel. The difference with a regular *rei vindicatio* would be that the purpose of the *rei vindicatio utilis* was not the restitution of an object, but an indemnification in money.

## II. D. 6.1.23.3 (Paul. 21 ad ed.): Text, controversy and argumentation

In the abovementioned texts, Gaius univocally answered the question of ownership in the *tabula picta* case by stating that the painter (A) became owner of the painting. According to Paul, however, the same legal question gave rise to a controversy. The relevant text is D. 6.1.23.3 (Paul. 21 ad ed.):

*Sed et id, quod in charta mea scribitur aut in tabula pingitur, statim meum fit: licet de pictura quidam contra senserint propter pretium picturae: sed necesse est ei rei cedi, quod sine illa esse non potest*<sup>10</sup>.

This text is situated in title 6.1 of the Digest 'About the *rei vindicatio*' ('*De rei vindicatione*'). In the preceding text, namely, D. 6.1.23.2 (Paul 21 ad ed.), Paul maintained that, when A attached something belonging to B to his own thing so that it became part of it, the principle rule for *accessio* was applicable. Like most jurists, Paul maintained that A became the owner of the final product. If, for example, A fixed an arm or a leg belonging to B to his own statue, A became owner of that statue. Next, Paul discussed both *scriptura* and *pictura*. If A had written letters on B's parchment or had painted a picture on his panel, Paul argued that, in both cases, B became owner of the final product, because the letters or the picture could not exist without the parchment or the panel ('*sed necesse est ei rei cedi, quod sine illa esse non potest*'). In both cases, Paul chose an analogue application of the principle rule for *accessio*. With regard to the *tabula picta*, Paul defended a different opinion than the one in Gai 2.78 and D. 41.1.9.2 (Gai 2 rer. cott.). Gaius only put forward the view that Paul ascribed to 'some jurists' ('*quidam*'). These jurists granted the ownership of the painting to the painter and argued by way of an alliteration 'propter pretium picturae'.

## III. Inst. 2.1.34: The controversy decided

Apart from Paul, also Justinian stated that the *tabula picta* case had given rise to a controversy between some jurists ('*quidam*') who made the painter owner and other jurists ('*alii*') who argued in favour of the *dominus tabulae*. In the same text, Justinian also decided which opinion should prevail. The relevant text is Inst. 2.1.34:

<sup>10</sup> «But also this, what is written on my papyrus or painted on my panel, immediately becomes mine. Some have held the opposite position with regard to the painting, because of the value of the painting. But where one thing cannot exist without the other, it is necessary that it follows the latter».

*Si quis in aliena tabula pinxerit, <quidam putant> tabulam picturae cedere: <alii> videtur picturam, qualiscumque sit, tabulae cedere. Sed nobis videtur melius esse, tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere. Unde si a domino tabulae imaginem possidente is qui pinxit eam petat nec solvat pretium tabulae, poterit per exceptionem doli mali summoveri: at si is qui pinxit possideat, consequens est, ut utilis actio domino tabulae adversus eum detur, quo casu, si non solvat impensam picturae, poterit per exceptionem doli mali repelli, utique si bona fide possessor fuerit <ille qui picturam imposuit>. Illud <enim> palam est, quod, sive is qui pinxit subripuit tabulas sive alius, competit <domino tabularum> furti actio<sup>11</sup>.*

In Justinian's time, it was decided that the painter became owner of the *tabula picta*. The jurists of Justinian's chancery argued that it would be ridiculous that a picture of Apelles or Parrhasius, two famous Greek painters from the 4<sup>th</sup> century BC, would follow a very cheap panel through *accessio*. They probably mentioned these two artists, who lived about 900 years before their time, in order to demonstrate their cultural baggage. The argument that, compared to a wooden panel, a picture is worth more, is the same as that in the text of Paul. The painter becomes owner of the painting because of the value of the picture ('propter pretium picturae').

#### IV. A School controversy?

Although the texts of Gaius do not mention a controversy, those of Paul and Justinian demonstrate incontestably that, at the latest in the time of Paul, the question of ownership of the *tabula picta* had caused a difference of opinion between two groups of jurists. However, it is not clear whether this difference of opinion was a school controversy between the Sabinians and the Proculians<sup>12</sup>.

<sup>11</sup> «If someone has painted on someone else's panel, some think that the panel follows the picture. Others maintain that the picture, no matter what the quality is, follows the panel. But we think it is better, that the panel follows the picture for it would be ridiculous if a picture of Apelles or Parrhasius would follow a very cheap panel through *accessio*. If the painter should claim it from the owner of the panel who is in possession of the painting without paying for the value of the panel he can be withheld by means of an *exceptio doli mali*. But if the painter is in possession the consequence is that, against him, an *actio utilis* is given to the owner of the panel. If, in this case, he does not pay the costs of the picture, he can be repelled by means of an *exceptio doli mali*, at least if the person who has painted the picture is possessor *bona fide*. For it is clear that if the painter or someone else has stolen the panels, an *actio furti* is granted to the owner of the panels».

<sup>12</sup> In the early Roman Principate, two law schools existed in Rome, the Sabinians and the Proculians. Nearly all the prominent jurists of that time belonged to either the one or the other. The representatives of these law schools defended opposite positions over several points of private

Moreover, if it was a school controversy, it is not clear which point of view represented that of the Proculians and which one that of the Sabinians.

Among others, Kaser and Lucrezi maintain that the controversy about the ownership of the *tabula picta* was a school controversy. In their view, the opinion to make the painter owner had to be attributed to the Proculians and the opinion to make the *dominus tabulae* owner had to be assigned to the Sabinians<sup>13</sup>. In support of these claims, Kaser and Lucrezi mention three arguments. First, they made a connection between two successive texts in Gaius' *Institutiones*, namely Gai 2.78 about the *tabula picta* and Gai 2.79 about *specificatio*. The legal question in the latter text regarded the ownership of a new thing (e.g., wine) that A made for himself by using B's materials (i.e., grapes). Whereas the Sabinians argued in favour of the *dominus materiae*, the Proculians maintained that the maker had to become owner of the new thing. By analogy with this case of *specificatio*, the Sabinians may have favoured the *dominus tabulae* and the Proculians the painter. Second, the argumentation in favour of the *dominus tabulae* that is mentioned by Paul finds a clear parallel in the Sabinian argumentation in the case of *specificatio*<sup>14</sup>. In both cases, the jurists argue that the final product cannot exist without the basic materials (i.e., the panel or the grapes). The third argument is that Gaius (2.78) showed his aversion for the opinion to make the painter owner by stating 'cuius diversitatis vix idonea redditur' or 'for this distinction, a proper reason is hardly given'. Since Gaius made part of the Sabinian school, it makes sense that he expresses his aversion for the opinion of the rival school of the Proculians.

Despite these indications, there is no substantial evidence that the difference of opinion about the ownership of the *tabula picta* was a school controversy<sup>15</sup>.

law. These are known in modern literature as the school controversies. Recently, I have published a monograph in which almost all the school controversies are analyzed that are mentioned in Gaius' *Institutiones* in order to demonstrate that there was a connection between jurisprudence and legal practice and, more specifically, between the controversies and rhetoric. T. Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies*, Boston-Leiden 2010.

<sup>13</sup> Unlike Kaser, *Tabula picta* cit., 35-36, and Lucrezi, *La 'tabula picta' tra creatore e fruitore* cit., 34 ss., D. Liebs, *Rechtsschulen und Rechtsunterricht im Prinzipat*, in ANRW 2.15, 1976, 250, maintained that the Proculians argued in favour of the *dominus tabulae* and the Sabinians in favour of the painter, but he did not mention any argument in support of this claim.

<sup>14</sup> In D. 41.1.7.7 (Gai. 2 rer. cott.), the Sabinians defended their opinion about the *specificatio* case as follows. The owner of the grapes should become owner of the wine 'quia sine materia nulla species effici possit' or 'because without material nothing can be made'.

<sup>15</sup> In the same vein, Longo, *Corso di diritto romano* cit., 114 and Watkin, '*Tabula picta*': *Images and Icons* cit., 395-396. In his monograph about the school controversies, G.L. Falchi, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, does not include the controversy about the *tabula picta*.

Unlike the texts about *specificatio*, the *tabula picta* sources do not mention the names of the law schools, nor those of their representatives. D. 6.1.23.3 (Paul. 21 *ad ed.*) and *Inst.* 2.1.34 only mention a difference of opinion between some jurists ('quidam') and other jurists ('alii'). Because of this inadequacy of the sources, it is impossible to pronounce upon the nature of the controversy in question. Moreover, Kaser and Lucrezi make two mistakes in their reasoning. First, they claim that, by analogy with the school controversy about *specificatio* in Gai 2.79, the difference of opinion in the preceding text (Gai 2.78) about *accessio* also entailed a controversy between the Sabinians and the Proculians. However, the text about *accessio* (Gai 2.78) does not mention a controversy, so that the analogy is invalid. Second, they make use of a circular reasoning. By analogy with the school controversy about *specificatio*, they qualify the opinion in favour of the painter as the Proculian opinion and that in favour of the *dominus tabulae* as belonging to the Sabinians. Thereupon, they conclude that the controversy about the *tabula picta* had to be a school controversy.

#### V. The *tabula picta* controversy: modern theories

Of those scholars who regarded the difference of opinion about the ownership of the *tabula picta* as a controversy between the Sabinians and the Proculians, only Sanfilippo and Lucrezi tried to explain why and how that controversy arose. They regarded the two schools as academic associations in which jurists discussed legal problems of a theoretical nature. They believed that the controversies developed because of a fundamental difference that existed between the two schools and that the antagonism between the schools could be explained in terms of conservative versus progressive. In their view, the Sabinian point of view in favour of the *dominus tabulae* was traditional and the Proculian opinion to make the painter owner was progressive<sup>16</sup>.

According to Sanfilippo, the Sabinians regarded the *tabula picta* as an instance of *accessio*, whereas the Proculians maintained it was *specificatio*. In case of *accessio*, the Sabinians, who were 'più tradizionalisti e materialisti', granted ownership of the final product to the owner of the greatest and most voluminous thing, called the 'maior species'. In support of this interpretation, Sanfilippo refers to a text of Ulpian in the Digest, namely D. 34.2.19.13 (Ulp. 20 *ad Sab.*). In this text, Ulpian mentions the opinion of Sabinus that gems, mount-

<sup>16</sup> Sanfilippo, *Accessione* cit., 131-132; Lucrezi, *La 'tabula picta' tra creatore e fruitore* cit., 250 ss.

ed on silver or golden dishes, follow these dishes. According to Sanfilippo, the conservative Sabinians applied this rule to *accessio* as well. Unfortunately, Sanfilippo did not elaborate any further on this assertion. I suppose that especially the sentences 'ei enim cedit, cuius maior et species' ('for an object follows that thing which is greater in form') and 'accessio cedit principali' ('an addition, i.e., an accessory, follows the main object') are important for his theory. On the basis of these sentences, Sanfilippo may have concluded that the Sabinians, in case of a *tabula picta*, would have attributed the painting to the owner of the 'maior species' (i.e., the *dominus tabulae*). The Proculians, on the other hand, who were 'più aperti a nuove visioni', regarded the painting as a case of *specificatio*. By analogy with their opinion about *specificatio*, they attributed ownership of the painting to the painter.

Three critical remarks demonstrate that this theory is not convincing. First, Ulpian's text does not prove the conservative nature of Sabinus' opinion that the gems follow the dishes. Second, the comparison between the two cases does not stand because Ulpian's text has nothing to do with the acquisition of ownership by means of *accessio*. The text is about a legacy of gold or silver. The legal question in D. 34.2.19.13 (Ulp. 20 *ad Sab.*) was the following: 'If silver or golden saucers or dishes, on which gems are mounted, are bequeathed, do these gems are subsumed under the legacy of gold or silver?' In other words: 'Does a legatee of gold or silver also become owner of the gems that are mounted on the golden or silver saucers or dishes<sup>17</sup>? Third, since the relevant text in Gaius' *Institutiones* is situated in the part about *accessio*, it is unlikely that the Proculians regarded the *tabula picta* case as an instance of *specificatio*.

Apart from Sanfilippo, also Lucrezi qualified the Sabinian view as conservative and that of the Proculians as progressive. He related the controversy to the gradual emancipation of the artist and painter in Rome. While the aristocratic prejudice to appreciate art but not the artist was still vivid in the 2<sup>nd</sup> cent. AD<sup>18</sup> and most of the painters were still slaves at that time<sup>19</sup>, in the Constantin era, painters acquired a series of privileges<sup>20</sup>. After the artist had climbed the social ladder, the ownership of the *tabula picta* was no longer attributed to the *dominus tabulae*, but to the painter. Eventually, the Proculian opinion in favour of the painter triumphed.

This theory does not convince me either. Lucrezi asserted that the opinion in favour of the *dominus tabulae*, assigned to the Sabinians, was conservative

<sup>17</sup> P. Voci, *Diritto ereditario romano*, II, Milano 1963<sup>2</sup>, 290 ss.

<sup>18</sup> Plut. *Per.* 1.4; 2.1.

<sup>19</sup> See, for example, D. 6.1.28 (Gai. 7 *ad ed. prov.*).

<sup>20</sup> CTh. 13.4.2 (= C. 10.66.1); 13.4.4.

and predominant until the artist became more appreciated. However, this so-called conservative opinion was not even mentioned in Gaius' *Institutiones*, a textbook that dates back to the 2<sup>nd</sup> century AD. Gaius (2.78) only mentioned that the painter became owner. In order to solve this inconsistency in his theory, Lucrezi asserted that the original text of Gaius had been manipulated. The fact that Lucrezi adapts his sources in order to make them fit his theory, undermines the credibility of his theory.

Finally, a few general points of criticism against both Sanfilippo and Lucrezi may be added. Since the sources do not give a decisive answer to the question of whether the difference of opinion about the ownership of the *tabula picta* was a school controversy, the theories of both scholars are built upon sandy grounds. Even if the controversy about the *tabula picta* was a school controversy, it cannot be stated with certainty which opinion was taken by the Proculians and which by the Sabinians. Both Sanfilippo and Lucrezi fail to underline that their theories are based on a number of presuppositions.

## VI. Topical argumentations in the *tabula picta* case

In my view, the legal problem that gave rise to the controversy about the *tabula picta* was not a theoretical problem, but arose in legal practice. If the question of ownership of the *tabula picta* had been a theoretical problem, the principle rule for *accessio* ('*superficies solo cedit*') unmistakably would have applied. By analogy with this rule, the painting would follow the panel. It is impossible to explain the origin of the controversy in this way. The legal problem at the root of the controversy was not a theoretical, but a practical problem for which one correct solution did not exist. When the parties involved asked jurists for legal advice, they looked at the problem from different angles and gave different *responsa*. In order to justify their answers, the jurists were in need of adequate arguments. For this purpose, they used rhetoric and *topica*.

The controversy about the ownership of the *tabula picta* may have originated in the following way. After A had painted a picture on B's panel without mutual agreements, a conflict arose between both parties about the ownership of the painting. The owner of the panel (B), who wanted to become owner of the painting, consulted some jurists and expected a legal advice that would be to his advantage<sup>21</sup>. They suggested him to bring a *rei vindicatio* against the painter,

<sup>21</sup> In his *De oratore* (Cic. *de or.* 1.239-240), Cicero indicates that it was not uncommon for a jurist to give an advice that served the cause of the citizen who consulted him. A citizen from the countryside consulted Publius Crassus, who was campaigning for the office of *aedile*. However,

who was in possession. The painter (A) seems to have consulted other jurists. They maintained that he had nothing to fear from the trial and that he was the rightful owner of the painting.

Obviously, both groups of jurists were in need of adequate arguments. In order to build up a convincing argumentation, they made use of rhetoric and, more particularly, of *topoi*. Indeed, the Roman jurists were acquainted with rhetoric and *topica*. Every young Roman who belonged to the Roman elite and who aspired a career in public life was educated in grammar, literature, rhetoric, law and philosophy<sup>22</sup>. For jurists, the main information on rhetoric and *topoi* was contained in Cicero's *Topica* and Quintilian's *Institutio Oratoria*<sup>23</sup>. The former work was written by Cicero in 44 BC for his friend Trebatius, who was a jurist. The significance of Cicero's *Topica* is that it was not primarily composed for dialecticians or advocates, but for jurists and that its examples pertained to private law so that the theory of *topoi* was adapted to the jurists' needs. In his *Topica*, Cicero (*top.* 66) confirms that the jurists were acquainted with rhetoric and *topoi*. He asserted that a careful study of the *topoi* of arguments would enable orators, philosophers and also jurisconsults to argue fluently about questions on which they had been consulted. Quintilian's *Institutio Oratoria* is a textbook for students that was published in 94 or 95 AD and covers the entire study of rhetoric.

*Topica* is a part of rhetoric and, more specifically, of *inventio*. Invention implies the discovery and formulation of arguments pro and contra. The term *topica* is derived from the Greek word *topos*, which is translated in Latin as *locus* and literally means 'place'. *Topoi* or *loci* are places where arguments lurk. They are characterised by their names (e.g., a *locus a definitione*, a *similitudine*, or a *differentia*) and are meant to guide an associative process that might lead to an argument for or against a certain point of view.

Let us now turn to the *tabula picta* case. While some jurists maintained that the painter was owner of the *tabula picta*, others held the opinion that the *domi-*

the jurist gave an advice that was not to the citizen's advantage. Servius Galba, who accompanied Crassus, noticed that the citizen was disappointed and asked him what he had consulted Crassus about. The man presented his legal problem to Galba, who gave him a different advice that did serve his purpose. In support of his view, Galba cited several parallel cases and argued against a strict interpretation of the law and for an equitable one. Crassus, in his turn, referred to some authorities in order to support his view, but eventually had to admit that Galba's argumentation seemed plausible and even correct.

<sup>22</sup> For the education of young, noble Romans, see S.F. Bonner, *Education in ancient Rome. From the Elder Cato to the Younger Pliny*, London 1977, 288 ss.

<sup>23</sup> Aristotle's *Topica* are of use only to a minor extent, since Aristotle focuses on dialectical topics rather than on rhetorical topics.

*nus tabulae* was the owner. In the first paragraph, I will discuss the arguments of the former group of jurists and argue by means of what *topos* they may have found it. In the second paragraph, I will do the same for the argumentation of the latter group of jurists.

### VI.1. The painter's defence

When the *dominus tabulae* claimed the painting from the painter, the latter turned to some jurists for legal advice: 'I have painted a picture on someone else's panel without his consent and now he claims to be the owner of the painting. How can I defend myself?' The jurists may have answered that he did not have to worry and that he was more entitled to the painting because of the price of the picture (D. 6.1.23.3 [Paul. 21 *ad ed.*): '*propter pretium picturae*'). It was ridiculous that a picture of a painter like Apelles or Parrhasius would follow a worthless panel through *accessio* (Inst. 2.1.34: '*ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere*'). How did the jurists find this argument?

The argument '*ridiculum est ...*' was an *argumentum ad absurdum* that the jurists found by means of the *locus ex comparatione*. In his *Topica*, Cicero states that any comparison is made between things of which one is greater or less than the other or between things that are equal<sup>24</sup>. The jurists may have compared the picture with the panel with regard to the value of both things. In comparison to a cheap panel, the price and value of a picture were much higher. Therefore, it would be absurd to attribute the ownership of the painting to the panel owner.

The argumentation which these jurists used in defence of the painter may be reconstructed as follows:

- Since it is absurd that a picture, which is far more valuable than a panel, would follow the panel,
- the painter is the legitimate owner of the *tabula picta*.
- A is the painter.
- Therefore, A becomes the owner of the *tabula picta*.

### VI.2. The charge of the *dominus tabulae*

After the painter had argued in his defence that he was the legitimate owner of the painting, the *dominus tabulae* claimed ownership of the *tabula picta* him-

<sup>24</sup> Cic. *top.* 68.

self. The jurists argued that the *dominus tabulae* was the legitimate owner of the painting because the picture could not exist without the panel (D. 6.1.23.3 (Paul. 21 *ad ed.*): '*necesse est ei rei cedi, quod sine illa esse non potest*'). The jurists could have found this argument in two ways. Possibly, they found the argument themselves by means of the *locus ex causis*. The other possibility is that they derived the argument from the *specificatio* case where the Sabinians used a similar argument that was also based on the *locus ex causis*<sup>25</sup>. In order to demonstrate that, in any case, the argument in favour of the *dominus tabulae* was an argument *ex causis*, I will discuss what Cicero stated about this *topos* in his *Topica* and then make the connection with the argument.

In the first discussion on the *locus ex causis* (§ 22), Cicero gives an example of an argument that can be found under this *topos*<sup>26</sup>. In the second discussion (§58-66), the notion of cause itself is examined. Cicero (§ 58) makes a distinction between the two main kinds of causes: 1) those, which inevitably produce an effect and 2) those without which the effect cannot be produced:

*Causarum enim genera duo sunt; unum, quod vi sua id quod sub eam vim subiectum est certe efficit, ut: ignis accendit; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere, quod sine eo non possit effici*<sup>27</sup>.

In this connection, the second group of causes '*sine quo effici non possit*' is relevant. Let us now compare the argument, mentioned by Paul, with the *locus ex causis* mentioned by Cicero.

D. 6.1.23.3 (Paul. 21 *ad ed.*): *Sed et id, quod in charta mea scribitur aut in tabula pingitur, statim meum fit: ... sed necesse est ei rei cedi, quod sine illa esse non potest.*

Cic. *top.* 58: *Causarum enim genera duo sunt; unum, ... ; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere, quod sine eo non possit effici.*

<sup>25</sup> T. Leesen, *Produced and Bottled in Rome. Who Owned the Wine? The Controversy about Specificatio*, in *RIDA*, 53, 2006, 265 ss.

<sup>26</sup> Between the estates of A and B, there was a party wall and A had built a new wall, which touched the party wall at right angles and rested on arches. When B wanted to demolish the party wall, he gave guarantees that he would cover any damage he might cause. However, while demolishing the party wall, B did damage, but the damage was caused by an arch. In this case, B would not be bound to cover the loss, for the damage was not caused by his building activities, but by the fact that the wall at A's side could not stand without the support of the party wall. This argument is found under the *locus ex causis*.

<sup>27</sup> «In fact, there are two kinds of causes: one which certainly effects by its own force what is subjected to this force, for example: fire burns. The other which does not have the nature of producing an effect but without which an effect cannot be produced, for example if someone wanted to call bronze the cause of a statue, because it cannot be produced without it».

The similarity in the wording of D. 6.1.23.3 (Paul. 21 *ad ed.*) and Cic. *Top.* 58 demonstrates that the argument in favour of the panel owner was found by means of the *locus ex causis*. Cicero considered it useful to enumerate the various kinds of causes. Someone searching for an argument could be guided by browsing through this list of types of causes. When the jurists considered the first distinction between the two main kinds of causes, they probably acknowledged that the panel was not a cause which inevitably effected a painting. However, the second kind of cause, '*sine quo effici non possit*', was pertinent: without the panel, the painting could not exist.

The argumentation in support of the *dominus tabulae* can be reconstructed as follows:

- Since a picture cannot exist without the panel.
- The ownership of the painting must be granted to the owner of the panel.
- B is the owner of the panel.
- Therefore, B is the legitimate owner of the painting.

## VII. Conclusion

This article demonstrates that the controversy about the ownership of the *tabula picta* did not have a theoretical background, but arose in legal practice. The jurists formed an opinion about a concrete legal problem that can be described as follows: 'When A painted a picture on B's panel, without his permission, who was the owner of the *tabula picta*?' The legal problem at the root of the controversy had two "solutions" that both could be defended. The jurists formulated their legal advice in favour of the party who consulted them. With the help of rhetoric and, in particular, Cicero's *topica*, they searched for adequate arguments to support their advice. One group of jurists argued that the painter (A) became owner of the *tabula picta*, '*propter pretium picturae*'. This was an argument *ex comparatione*: in comparison to a cheap panel, the picture was valuable. Therefore, the painter has to become owner of the painting. The other group of jurists maintained that the *dominus tabulae* (B) was the owner of the painting and used an argument *ex causis* in support of their view: '*nesse est ei rei cedi, quod sine illa esse non potest*'. Since a picture could not exist without the panel, the owner of the panel had to become owner of the painting. The similarity in wording between the legal text of Paul and the rhetorical text of Cicero is striking. This interpretation of the controversy about the *tabula picta* has implications for the modern interpretation of Roman jurisprudence and the role of the Roman jurist. The Roman jurist was no theoretician who only had interest for legal science and was primarily concerned with the development of

a coherent system of private law. Jurists played a significant role in society and held public offices. When a legal problem occurred in practice, the parties could ask the jurists for advice. Roman jurists were first and foremost legal practitioners whose major legal activity was *respondere*, i.e., giving legal advices in legal disputes. It was their task to look at the legal problem from different perspectives and to build up a convincing argumentation.

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