

# Rechtsgeschichte

[www.rg.mpg.de](http://www.rg.mpg.de)

<http://www.rg-rechtsgeschichte.de/rg13>  
Zitiervorschlag: Rechtsgeschichte Rg 13 (2008)  
<http://dx.doi.org/10.12946/rg13/080-116>

Rg **13** 2008 80–116

**Oswaldo Cavallar**

## The Wheels of Watermills and the Wheel of Fortune

*A consilium* of Donatus Ricchi de Aldighieris

## Abstract

Along with two well rehearsed *quaestiones disputatae*, Bartolus de Saxoferrato's *repetitio ad l. Quominus* constitutes the cornerstone of the medieval elaboration of legal issues relating to rivers. Ranging from the construction of watermills to protective embankments, and from the maintenance of water canals to the reconstruction of run-down structures, the eighteen questions of the *repetitio* prepared students for situations they would likely encounter when practising law. A legal opinion (*consilium*) penned by one of Bartolus' disciples, Donato Aldighieri, in response to the doubts the Abbot of Vallombrosa had concerning damage inflicted on his monastic estate by the Arno river, illustrates the legal fertility of Bartolus' seminal discussion. In addition, the *consilium* also attests to the complexity of the efforts of a medieval commune, Florence in this specific case, to gain control of a resource like the Arno, essential for the economic development of the city. Unable to shoulder alone the financial burden of preventing floods, the commune had no other option than to enlist the help and know-how of a monastic institution. Though the whole city benefited from the preventive work of the monks, the new embankment engendered an unexpected conflict with other adjacent land owners. The politically prominent Donato was called in to negotiate the abbot's rights against the claims of the adjacent owners and the policy of the city.



DELLO STATO ANTICO E MODERNO  
 D E L  
**F I U M E A R N O**  
 E DELLE CAUSE E DE' RIMEDI DELLE SUE INONDAZIONI  
 RAGIONAMENTO ISTORICO MATTEMATICO  
 DELL' INGEGNERE  
**FERDINANDO MOROZZI**  
 DI COLLE DI VALDELSA.  
 DEDICATO AL MERITO SUBLIME  
 DELL' ILLUSTRISSIMO, E CLARISSIMO SIG. SENATORE  
**GIOVANNI FEDERIGHI**  
 SOPRINTEDENTE GENERALE  
 DELLE POSSESSIONI DI S.A.R.  
 CONTENENTE ARNO DALLA SORGENTE FINO A FIRENZE



I N F I R E N Z E M D C C L X V I.  
 Nella Stamperia di Gio. Batista Stecchi, all' Infegna di S. Ignazio Lojola.  
 Con licenza de' Superiori.

# The Wheels of Watermills and the Wheel of Fortune

A *consilium* of Donatus Ricchi de Aldighieris\*

The *consilium* at the center of this piece – a legal opinion written by Donatus Ricchi de Aldighieris, a Florentine lawyer and a prominent political figure, on February 22, 1382/83 – is not a première. It was first published in 1766 by Ferdinando Morozzi in his *Dello stato antico e moderno del fiume Arno* – a work then reprinted by Forni in 1986 for an audience of learned »curiosi«. <sup>1</sup> A »ragionamento storico matematico,« as the subtitle has it, devoted to the investigation of the causes and description of the remedies for the severe floods of the Arno river that periodically beleaguered Florence and the surrounding territory since the early Middle Ages, is neither the place where historians of medieval law would first look in search of legal opinions nor the kind of work that would attract their immediate attention. Bypassed by the monuments of learned jurisprudence because a provincial lawyer wrote it, Donato's *consilium* crossed my path by chance while working on and around Bartolus de Sassoferrato's tract *Tiberiadis*. <sup>2</sup>

Tarnished by transcriptional lacunae, marred by idiosyncratic use of capitalizations and italics, and bereft of a critical apparatus, that legal opinion, as it stands, is an archeological curiosity that would hardly egress the confined space of a footnote. Despite its opening line stating that it is a copy made by the author, not the sealed original, Morozzi presented it as if he had found the original (»un consulto legale, che in Originale«) and as a significant illustration of »the damages caused by the flood of 1380.« <sup>3</sup> Yet, even a cursory reading shows that it was requested by the abbot of Vallombrosa, Simone, to clarify some legal doubts and focused on the damages the embankment (*laborerium*) of Vallombrosa caused to a mill jointly owned by lay people and the rector of an unnamed church nested in the plain of S. Salvi, just outside the walls of Florence near Porta alla Croce. Although the focus of the lawyer, liability for damages, was predictably narrow, Simone's predecessor was indeed preoccupied because the Arno was gnawing away fertile soil, his mills were not operating properly, and had to make

\* This research has been made possible by the S. V. D. School Fund and a meagre contribution from Pache I-A-2 of Nanzan University.  
1 FERDINANDO MOROZZI, *Dello stato antico e moderno del fiume Arno e delle cause e de' rimedi delle sue inondazioni*, Florence 1766; repr. Bologna 1986, pt. II, 109–112. Only pt. I and II have been published; death prevented the author from publishing pt. III

and IV. For the edition of the *consilium*, see the Appendix.  
2 OSVALDO CAVALLAR, *River of Law: Bartolus's Tiberiadis (De aluvione)*, in: JOHN A. MARINO, THOMAS KUEHN (eds.), *A Renaissance of Conflicts: Visions and Revisions of Law and Society in Italy and Spain*, Toronto 2004, 31–129.

3 MOROZZI, *Dello stato antico e moderno del fiume Arno* (nt. 1) pt. II, 109.

a sizeable investment to build an embankment to protect the monastery's estate, as well as the city walls. Beside the harm the monastic estate suffered, for Simone there was another upsetting thought. He had to pay the rector of that church damage compensation whose amount was to be determined by the *Ufficiali della Torre* – the magistracy entrusted, among other tasks, with the protection of the territory, the maintenance of streets and bridges, and the supervision of rivers and mills. The officials who mediated between the conflicting interests of the rector and the abbot were preoccupied with the river threatening the city walls, and they were more than willing to exploit the resources of the monastery and the monks' knowledge of hydraulics for the benefit of the whole city.

Despite qualms about Morozzi's edition and contextualization, the issues brought forward by that piece are nonetheless intriguing: the environment, to convert the role of the river in modern currency; the elaboration of the legal status of water powered mills – a field medieval jurists had to develop on their own because Roman law had nothing to say about a posterior technological development<sup>4</sup> and the unexpected problems it created –; a conflict between monastic and diocesan institutions mediated by the city officials; a potential clash between a prominent magistracy and a powerful monastery whose abbots could go from Vallombrosa – the mother house of the reformed Benedictine congregation founded by Giovanni Gualberto in the first half of the eleventh century – to Florence without stepping outside the congregation's possessions and enjoyed the privilege of taking along an armed escort; and the limited resources of a body politic versus the capabilities of a monastic institution, to mention just a few.

Beyond this, there is another and perhaps broader issue deserving attention. While historians have paid some attention to the so-called »regime giuridico« (the legal status) of mills, mainly by inferring legal rules from observed social practices, contracts, and notarial instruments, they have neglected to explore and tap into the works of jurists – glosses, architectonic commentaries, *quaestiones disputatae*, *repetitiones*, tracts, and *consilia* – as sources that throw light on the legal status of waters, rivers, and mills, and the competition for the use of these limited resources.<sup>5</sup> The cornerstones of the legal construction of mills and their appurtenances – such as the *quaestio disputata* of Franciscus Accursius,

4 For this little-used late antique invention, see TERRY S. REYNOLDS, *Stronger than a Hundred Men: A History of the Vertical Water Wheel*, Baltimore 1983, and PAOLO MALANIMA, *I piedi di legno. Una macchina alle origini dell'industria medievale*, Milan 1988.

5 Symptomatic of this disregard for legal sources is the otherwise excellent bibliography given in:

*I mulini dell'Europa medievale*, ed. by PAOLA GALETTI and PIERRE RACINE, Bologna 2003.

Bartolus' *repetitio ad l. Quominus* (D. 43.12.2) and the procedural manuals of Gulielmus Durandis and Roffredus Beneventanus, as well as the commentaries on different parts of the *Corpus iuris civilis* of Dynus de Musiello, Cynus de Pistorio and Guillelmus de Cuneo – are all recalled in Donato's *consilium*. By filtering the narrative of disputes and retaining only legally significant »facts,« the *consilia* of jurists help historians to identify patterns of conflicts and solutions in what at first sight may appear as a kaleidoscopic range of quarrels. Without pretending to be exhaustive, a few instances may be useful. Baldus de Ubaldis, Bartolus' prized pupil and the foremost legal consultant of the second half of the fourteenth century, was often consulted on scores of disputes related to mills: liability for damages, the meaning of the term »molendinus« (mill) – namely, whether or not its parts, such as the grinding stones, were comprised under that term –, the contractual obligation of the miller to maintain the structure in the face of an act of God, the conditions for the construction of a new mill, and whether a river on the border of two towns should be considered »common« or »public,« given the plan of one of the towns to build there her own mill.<sup>6</sup> Likewise, the index of the printed collection of *consilia* of Petrus de Ancharano – an index that arranged the *consilia* according to the titles of the Decretals – opens with a case that occurred in Spoleto. Both the city and the bishop owned a mill on a water course just outside the city walls, and the inhabitants were free to use the services of whichever they liked. After a statute compelled the lay inhabitants to use only the city-owned mill, came up the question whether or not such an enactment constituted a violation of the church's privileges (*libertas ecclesie*) and if it could be lawfully promulgated by the city council. Not only the first *consilium* but the two subsequent pieces, too, are devoted to the solution of those questions.<sup>7</sup> Certainly because a bishop was involved the opinion of leading canonists was sought – the whole college of doctors of law of the University of Bologna, including Petrus de Ancharano and Gaspar Calderini, not to mention Baldus himself who wrote the leading opinion. Canonists were no less well prepared than their fellows civil lawyers to untangle this kind of contentious issues. Jurists like Bartolus, too, were very attentive to this problem-ridden field. Construed around eighteen questions, his *repetitio ad l. Quominus* addressed a number of exemplary cases that his students would likely encounter while practicing law

6 BALDUS DE UBALDIS, *Consilia*, Venetiis 1575, vol. III, f. 16r, cons. no. 62; f. 28rv, cons. no. 107; f. 41r–42v, cons. no. 145; f. 76r, cons. no. 273; vol. I, f. 24v–25r, cons. no. 71, f. 68v–69r, cons. no. 241; vol. IV, f. 16r, cons. no. 62.

7 PETRUS DE ANCHARANO, *Consilia*, Romae 1474, s. f., cons. no. 11, 12, and 13.

in any late medieval city. At least three of those questions, as we will see, became very relevant for Donato.

Yet, to go beyond the anecdotal value of Donato's piece, a manuscript copy, if not the original *consilium*, had to be found. But where to search? Skimming over hundreds of not yet catalogued or approximately described collections of *consilia* with few clues was not a viable option. It was the proverbial »a needle in a haystack.« Yet, while the wheels of the mills of the plain of S. Salvi have stopped spinning long ago, the wheel of fortune began to spin in my favor. If not the original, at least the very copy Morozzi used was much closer than I had expected. It was here in Japan, housed in the library of the old Imperial University of Tokyo, now called the Tōdai.

This unusual location calls for a brief description of the history and a sampling of the content of the manuscript. In 1766, that manuscript was in Florence in the hands of the polymath Domenico Maria Manni (1690–1788) who alerted Morozzi of the existence of that rare specimen. Thereafter, Sir Thomas Phillipps (1792–1872), the English bibliomaniac who amassed the largest collection of manuscripts and rare books a single person has ever managed to assemble, acquired it (ms. 8889). After his grandson Thomas Fitzroy Fenwick dismembered and auctioned the main part of that collection, the London booksellers Phillip and Lionel Robinson purchased the uncatalogued »residue.« What the Robinsons were unable to sell, was catalogued and auctioned by the New York-based antiquarian H. P. Kraus. According to the information kindly provided by the Tōdai's librarians, on March 14, 1988, the administration of the Tōdai was able to purchase that item for its own library where it rested unattended (call-number A100:1790).

Indeed, the only available description of its content is the inflated one that was prepared for the auction and in view of the price it could fetch (13,600,000 ¥) rather than the needs of scholarship. As to increase the market value, it makes no effort to identify the pieces that have been already printed – for instance the several *quaestiones disputatae*, *repetitiones*, and *tractatus* by Bartolus placed at the beginning of the codex, and the interspersed *consilia* of Cynus de Pistorio, Baldus and Angelus de Ubaldis, Petrus de Ancharano, and Paulus de Castro – and to distinguish them from the yet unpublished material. While all of Bartolus' pieces are well

known to medieval legal historians and have been printed in every edition of his opera, it deceptively suggests that this might not have been the case. Similarly, all the *consilia* receive either the qualification »work known« or »work unknown« on the basis of whether or not that jurist had his works printed, not on the basis of whether or not that specific *consilium* had been actually printed or critically edited. Last but not least, the script is described, with some imagination, as »humanistic« mingled with »cursive.« More generally, the introduction to the list of the transmitted items attempts to turn into a selling point an absent humanism – an indication that the author of the description was unfamiliar with *consilia* literature, its content, style, and purpose.

Aside a set of eleven *quaestiones disputatae*, mainly by Bartolus, the manuscript contains 117 *consilia* (for convenience's sake I adhere here to the number given in the description) originating from areas around Florence and Perugia and all but three are latter copies. The sealed originals bear the signatures of Petrus de Ancharano (f. 150v–151r), Nicholaus domini Francisci de Cambionibus de Prato (f. 177r–181r), and Torellus domini Nicholai de Torellis de Prato (f. 225rv). Significantly, the subscription of Petrus de Ancharano was entirely written by the canonist himself; similarly, Torellus' piece, except the *punctus*, was written by his own hand. In addition, the manuscript contains two *consilia*, each followed by two endorsements (f. 291r–296v), penned by prominent Florentine and non Florentine jurists, such as Rafael Fulgosius, Honofrius Bartholini de Perusio, Johannes de Bandini de Sena, Torellus domini Nicholai de Torellis, and Philippus domini Thome de Corsini, on behalf of the mistress of John Hawkwood – the English condottiere employed by the Florentine government in its war against the »tyrant« of Lombardy Giangaleazzo Visconti – and her female children. Although the offspring of the »concubina sive amasia,« Caterina, were the product of a »dannabilis et accusabilis coitus,« and thus by law excluded from testamentary succession, the jurists devised a way to accommodate the last wishes of the testator. This *post-mortem* token of Florentine gratitude toward that »magnificus miles armate militie,« no doubt because of its present location and the absence of a reliable description of the content of the codex, has escaped the attention of his latest biographer, William Caferro, who dwells on the condottiere's prowess on the field of extramarital affairs.<sup>8</sup> Besides this single exemplification,

8 WILLIAM CAFERRO, John Hawkwood: An English Mercenary in Fourteenth-Century Italy, Baltimore 2006, 310–331.



the codex transmits other pieces, including a remarkable set of *consilia* on legitimation, that are worthwhile exploring because of their bearing on political, economic, and social history of the late thirteenth and fourteenth century.

The manuscript on which Morozzi based his transcription is the one which the Tōdai has purchased. The folio number (c. 69) of the »Libro manoscritto di varij consulti« Morozzi indicated as the beginning of Donatus' *consilium* corresponds to the folio of the Tōdai's manuscript (f. 69r) where that opinion starts. After acquiring the manuscript, the library did not renumber all the folios so to include the inserts, the originally unnumbered pages, and the several blank pages left at the end. Though not too precise, Morozzi's description of the content of the codex, »varij consulti,« reflects well the main components of the Tōdai's codex-117 *consilia*. Moreover, the lacunae in Morozzi's transcription correspond to sections of the text that are difficult to decipher at first sight, especially by one untrained in Roman and medieval law.

Enter Donato Aldighieri, a disciple of Bartolus of Sassoferrato. The penury of details on Bartolus' life, the early stages of the diffusion of his legal works, and the composition and consistency of his academic audience have been often lamented. That Baldus de Ubaldis and his brother Angelus attended Bartolus' lectures is well known. Yet, beyond these big stars who in their turn became acclaimed university professors, we are left in the dark on the identity of his other students – especially those who took up the more humble profession of lawyer. Donato, along with Filippo Corsini mentioned above, is thus one of the names to be added to the list of Bartolus' minor disciples – a list destined to grow as local collections of *consilia* become better known.

While quoting from *repetitio ad l. Quominus*, Donato added the qualification »preceptor meus« after its author's name thus indicating that he studied under Bartolus. Though cited as »tractatus ... de fluminibus« – perhaps an indication that some ambiguity existed on the precise title of some of Bartolus' works, particularly in the decades just after his death –, there is no doubt that he meant the *repetitio*, not the tract *De fluminibus seu Tiberiadis*. At this stage, it is not possible to determine whether Donato pursued his studies at the University of Pisa or, more likely, Perugia.<sup>9</sup> A tone of deference toward his »preceptor« permeates the whole *consilium*. Not only deep respect, but also adherence to

<sup>9</sup> LAURO MARTINES, *Lawyers and Statecraft in Renaissance Florence*, Princeton (N.J.) 1968, 482, for a short biography of this lawyer.

his teaching and extensive borrowings mark the text. In contrast to the wavering stance of Accursius' *Glossa ordinaria* and one disputable opinion of Cynus, Bartolus reflected the »oppynio magis communis« and »vera.« In a case where the lawyer had to solve a rarely occurring issue – whether or not a mill downstream could inflict damages to one upstream –, Bartolus was the guide who could provide tried and tested »iura« and »rationes«.

On Donato's activity as a city-based lawyer we have little documentation. Gero Dolezalek lists only two manuscripts containing his *consilia*: Vat. lat. 8069, f. 145v–146r, a short legal opinion underwritten by an impressive series of consultocrats (Angelus de Ubaldis, Franciscus de Albergottis of Arezzo, Petrus de Ubaldis of Perugia, Donatus Richi de Altigheris, Nicolaus de Cambionibus of Prato, Johannes de Lignano, and Anthonius de Presbiteris of Bologna) housed in the Vatican Library; and Magliab. XXIX, 174, housed in the Biblioteca Nazionale of Florence.<sup>10</sup> The subscription, though we do not know the circumstances that prompted the case, indicates that Donato was well connected.

In contrast to his scarcely documented forensic activity, Donato's political career and his political views can be charted with more accuracy, thanks to Lauro Martines and especially Gene A. Brucker. If one has to gauge his political stature from his office holding record, Martines' qualification as »outstanding political figure« seems inappropriate. The »Tratte« – the official list of the citizens who had been nominated for one the three highest executive offices of the Florentine Republic (the Standard-bearer of Justice and Priors and two advisory councils: the Buonuomini and the Gonfalonieri di Compagnia) – mention him only once: an »ammonito« (prohibited from taking public offices) who had then been exiled to Ferrara for a short period.<sup>11</sup> Anecdotal evidence shows that his name was once proposed as a possible ambassador to the Pope in Avignon.<sup>12</sup> If one now turns to the »Consulte e pratiche« – the records of the advisory body of citizens the Florentine government summoned for advice on pressing issues – a different picture emerges. As a member of the Ricci faction – a faction that claimed to speak on behalf of the guilds – he was actively engaged in the political debate until his death. His expert advice as a jurist, was sought on the lawfulness of enacted pieces of municipal legislation and the legality of the interdict (1375–1378) under which his city had been placed by Pope

10 GERO DOLOZALEK, Verzeichnis der Handschriften zum Römisches Recht bis 1600, Frankfurt am Main 1972, s.v. »Donatus Aldighieris.«

11 Florentine Renaissance Resources, Online Tratte of Office Holders, 1282–1532. Florentine Renaissance Resources/STG: Brown University, Providence (R. I.) 2002, accessed 03, 23, 2008.

12 MARTINES, Lawyers and Statecraft (nt. 9) 287.

Gregory XI.<sup>13</sup> Befitting his training as lawyer, he also appears as one of the two sponsors of a piece of legislation intending to curtail the power of the Capitani di Parte Guelfa by adding to their number two more members taken from the lower guildsmen.<sup>14</sup> The price he had to pay for his opposition to the Parte was hefty. On January 22, 1378, adding insult to injury, labeled as Ghibelline, he was excluded from office and sentenced to a three year term of exile in Ferrara. A petition presented to the Signoria on July 21, 1378, recognized that by his own »origo« and that of his ascendants he was, and had always been, a true »Guelfus« and asked for his full reintegration.<sup>15</sup> The *consilium*, which Donato wrote just before his death, indicates that he was back in Florence and had resumed his profession.

Content aside, one formal aspect of this *consilium* deserves attention. Since it was written on the request of the abbot of Vallombrosa, it can be classed as *consilium pro parte* – an opinion written for one of the litigants, not for a judge presiding at municipal court. In addition, it is dissociated from the usual path of a legal action pursued in front of a judge. Likely, before bringing matters to court, the abbot intended to have some clarifications on the legal position of the monastery and his chances of winning the case. Though giving advice to a client, the lawyer cast his opinion as if it were a *consilium sapientis*: his advice would not have changed if the same question would have been submitted to him for the more lofty and impartial *consilium sapientis*. No matter who would have asked and in what context, his answer would have been the same. In these two legal genres – *consilium sapientis* and *consilium pro parte* or *allegatio* – what one could expect from a lawyer or a jurist differed. In a *consilium* commissioned by the court he had to produce by statute within a certain amount of time an acceptable resolution of the dispute. The commissioning judge, in his turn, was generally bound by the terms of the *consilium* in his ruling. In one commissioned by a party, in contrast, the lawyer was expected to earnestly argue on his client's behalf. The judge had to take into consideration the arguments and reasons produced in the dialectical confrontation between the parties' lawyers. This recasting of a *consilium pro parte* has received little attention from historians of law. Was this done because of the disinterestedness of the advice? Or was this a mere rhetorical exercise or a marketing strategy to boast the position of the jurist and his advice in front of

13 Ibidem, 187–189, for consultations on legislation; and 286–287, for the papal interdict.

14 GENE A. BRUCKER, *Florentine Politics and Society: 1343–1378*, Princeton (N. J.) 1962, 208; and MARTINES, *Lawyers and Statecraft* (nt. 9) 187–188.

15 For the text of this petition, see GINO CAPPONI, *Storia della Repubblica di Firenze*, La Spezia

1990, vol. I, 594–599, especially 597 for the clause on Donato.

the client? The first option seems the more likely. Independently from whether or not the client would have hired the same legal adviser when bringing suit, the counselor had much to lose in giving an unsound advice.<sup>16</sup> A similar case occurred early in the next century. The wife of a »doctor,« likely a jurist, was caught in violation of Florentine sumptuary law. The notary who prosecuted the case was forbidden by municipal statute to resort to a *consilium* and accept one if presented by the defendant. Notwithstanding this prohibition, the jurists who rallied in support of one of their colleagues had no qualms about submitting a legal opinion with several endorsements. Two of the subscribers asserted that their position would not have changed if they were asked to wear the mantle of »sapientes.«<sup>17</sup> Impartiality alone could be boring; yet, mixing an impartial advice and earnest arguing could make for a very persuasive tool.

Before examining the context and the content of the *consilium*, there are a few minutiae that have to be taken care of. To my knowledge, there are no specimens of legal opinions written and/or sealed by Donato himself to which one may compare the text of the Tōdai's manuscript. Though there is no absolute certainty that it is a holograph, there are no insurmountable objections against thinking that it is his handwriting. Likewise, the elegant script constitutes no objection against dating it to the second half of the Trecento. As the three other autographs transmitted by this codex indicate, it was preserved as a sort of memorabilia for its antiquarian value. As to the reason why Donato himself made, or had someone else made, a copy we are in the dark. There is neither evidence that he intended to produce and publish his own collection of *consilia*, as it was becoming fashionable among the major jurists of his age, nor that he was an avid collector of other lawyers' legal opinions a la Antonio Strozzi – the Florentine jurist who between the second half of the fifteenth century and the early decades of the sixteenth collected every opinion he could get his hand on and organized them in a series that now comprises twenty volumes. The circumstances and/or the station of the requester might have prompted him to keep a copy. The happenstance of that single transcription and the paucity of his legal opinion are, after all, indications that Donato's consulting activity was more sporadic than it has been suggested.

\* \* \*

16 On the ethical issues surrounding the profession of jurists and lawyers, see JAMES A. BRUNDAGE, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago 2008, 181–191, 308–328.

17 For this case, see OSVALDO CAVALLAR, JULIUS KIRSHNER, *Licentia navigandi ... prosperis ventis afflantibus: L'esonzione dei doctores e delle loro mogli da norme*

suntuarie, in: A Ennio Cortese, ed. by ITALO BIROCCHI, MARIO CARAVALE, EMANUELE CONTE and UGO PETRONIO, Rome 2001, vol. I, 204–227.

In contrast to the scenario of many *consilia* where stages of life (birth, marriage, and death), unfortunate incidents (theft, violence, and murder), and other human-related activities or transactions constitute the background, in the case at hand, besides mill-owners, there is a powerful non-human actor on the stage to be reckoned with – the non-prosecutable Arno. This unusual protagonist and the steps the Florentines took to modify its behavior require a brief introduction.

The literature on the Arno, no doubt because of the flood of November 1966 but also out of interest for the historical development of relationship between humans and their environment, has grown rapidly, ranging from the technical to the commemorative, from the historical to the pictorial, from the archeological to difficult to translate »recupero ambientale,« and from the never materialized plans proposed by utopists to those developed by modern engineers and geologists and slowly implemented by the regional authorities. Flood prevention proposals have attracted the attention of well known artists and scientists, such as Brunelleschi and Leonardo, and less known, such as Sigismondo Coccapani who in his *Trattato del modo di ridurre il fiume di Arno in canale* recycled Bartolus' introduction to his *Tiberiadis*.<sup>18</sup> In the case of Leonardo's multifaceted interests, the painter, too, can be linked, though in an obviously accidental way, to the zone of our dispute. It was the monastery of S. Salvi that commissioned Andrea del Verrocchio the »Baptism of Christ« whose lower left angel was painted by Leonardo himself – then a young apprentice in Verrocchio's shop. Well known names of the history of political thought, such as Niccolò Machiavelli, and of the history of science, such as Galileo Galilei, can be linked without effort to the history of that river.<sup>19</sup> Since the Middle Ages, Florentine chroniclers and historians have documented the river's major floods, compared their magnitude, searched for their causes, interpreted them as signs transcending nature, and left records of some of the measures, immediate and preventive, taken after each flood. More subtly, modern historians have brought into the limelight the ambiguous relationship that linked Florentines to their environment, how the memory of major disasters was kept and let fade away, how socio-economical needs affected and retarded the implementation of the municipal enactments prompted by a flood, the slow emergence of an environmental consciousness, and, first among monks, a grow-

18 SIGISMONDO COCCAPANI, *Trattato del modo di ridurre il fiume di Arno in canale e altri scritti di architettura e di idraulica* ed. by ELISA ACANFORA, Florence 2002; and OSVALDO CAVALLAR, *Il Tevere sfocchia nell'Arno: Sigismondo Coccapani e il proemio al trattato Tiberiadis di Bartolo da Sassoferrato*, in: *Rechtsgeschichte* 3 (2003) 223–231.

19 ROGER D. MASTERS, *Fortune is a River: Leonardo da Vinci and Niccolò Machiavelli's Magnificent Dream to Change the Course of Florentine History*, New York 1999.

ing awareness of the consequences of deforestation.<sup>20</sup> More importantly, they have balanced familiarity and threat – the ordinary and the extraordinary. Work, business, and rituals had, after all, to go on despite the floods.

The present-day elegant flow of the Arno before it enters Florence is a human-made deception. Traces of the »historical« course have been erased and hidden by the urbanization process of the past half a century. Yet still-in-use toponyms – such as Piscina, Palude, Vado, Pelago, Lame, Cannetole, and Lagaccio – reveal that part of the Florentine plain was covered with swamps until recently. One of the most remarkable features of the course of the river – variations that can be traced in chronicles, documents, toponyms, and in the landscape itself – is the so-called »Bisarno« – a bifurcation of the river that created an island extending from Ricorboli to the mill of Rovezzano. Leonardo has left a graphic representation of this zone and a description of its main features: It was about 5650 »braccia« long and transversed by several branches of the river; two localities called »Rotta« point out places where the river tended to break out and flood the adjacent land. Yet, when Leonardo sketched his drawing, this island was about to disappear and join the left side of the bank. Again, just before entering the city, the Arno took another sharp twist to the right and created another island, variously called »Isola San Salvi,« »insula prope Guarlonem,« and »insula de la Piascentina.« The proximity of the river to the city walls and Porta alla Croce, formerly S. Ambrogio, represented an obvious threat to the inhabitants and a source of apprehension for the officials and the monks.<sup>21</sup>

The flatland extending between Rovezzano and the city walls was filled by the imposing presence of the same monastic institution, the Vallombrosian branch of the Benedictine monks, under two independent canonical institutions: the church and the convent of S. Salvi – the second monastery of that congregation – and the so-called Villa del Guarlone – the residence of the early abbots of Vallombrosa before they moved to Badia a Ripoli on the other side of the river – and annexed territories depending directly on the mother house.<sup>22</sup> Both the church and the residential palace with its tower had been bequeathed to the founder in 1048. Although the coexistence of these two institutions was not always peaceful, each consolidated its control over that fertile territory by bequest, purchase, and exchange of land. Both institutions have

20 For perceptive reflections on the effects of deforestation, see the text of Bernardo Segni reported in GIUSEPPE AIAZZI, *Narrazioni storiche delle più considerevoli inondazioni dell'Arno*, Florence 1845; repr. Sala Bolognese 1996, 12–13.

21 UGO LOSACCO, *Variazioni di corso dell'Arno e dei suoi affluenti nella pianura fiorentina*, in: *L'Universo* 42 (1962) 557–674,

673–686; and SILVIO PICCARDI, *Variazioni storiche del corso dell'Arno*, in: *Rivista di Geografia Italiana* 63 (1956) 15–34.

22 For the early history of S. Salvi, see VANNA VANNUCCI, *Vita economica di un monastero alle porte di Firenze dal sec. XI al XIII: la Badia di S. Salvi*, in: *Miscellanea storica della Valdelsa* 69 (1963) 7–77, and 70 (1964), 22–61.

since disappeared: in 1529/30 the monastery and the church were looted and almost completely destroyed, save for Andrea del Sarto's »Last Supper,« by the army of Charles V during the siege of Florence. Also the Villa del Guarlone had already been turned into a disbanded farm house by the time Emanuele Repetti (1776–1852) wrote his *Dizionario geografico, fisico e storico della Toscana*.

Like the Cistercians, the monks of Vallombrosa came into direct contact with the river through the mills they owned, built, and leased out – a structure that, up to the twelfth century, in Florence as well as in other major Italian cities, largely belonged to ecclesiastical institutions. The consolidation of the Vallombrosian estate during the twelfth and thirteenth century affected the Arno. Near the actual bridge of S. Niccolò a weir (*pescaia*) cut the river from bank to bank; a network of canals which crossed the estates on both sides of the river, kept the eighteen mills lined up along the so-called Corso dei Tintori functioning even during the summer.<sup>23</sup> An oft-quoted privilege of Emperor Henry VI (1187) recognized the monks' lawful possession of the buildings (mills, very likely) they had on the Arno and its tributaries, permitted them to increase their number, prohibited others from building new *molendina* (mills) without the consent of the abbot, and granted them permission to dig a canal from the river to the monastery or another place of their liking. Still cited in court centuries later when Cosimo I ruled on a controversy between the monks and the public treasury, that document became the legal foundation for the concentration, if not a virtual monopoly, of mills between the city and Varlungo – the area between Rovezzano and S. Salvi.<sup>24</sup> In 1247, the abbot Iacobus could lease out an unspecified number of mills on the Arno and a piece of land on the »isola d'Arno«; in 1290, the monks could afford to rent no less than four mills propelled by the weir of Camarzio.<sup>25</sup> Yet, only the mills of Rovezzano and S. Salvi withstood the onslaught of the 1333's flood, all the others, including those built within the city walls, having been swept away by the force of the waters. Since the Commune did not permit their reconstruction – because it was believed that weirs and dams by raising the level of the waterbed had aggravated the damages of the flood –, those outside the walls became all the more important.<sup>26</sup> Vestiges of some of those mills can be still detected in modern toponyms, such as »il mulinaccio« and »la casaccia.«

23 ROBERT DAVIDSOHN, *Forschungen zur Geschichte von Florenz IV*, Berlin 1908, 444.

renze dalla metà del '200 al 1348, Florence 1978, 74, 493.

24 For this document as a sign of transition in the policy of investments, see VANNUCCI, *Vita economica* (nt. 22) 70–72.

25 DAVIDSOHN, *Forschungen* (nt. 23) 446.

26 GIULIANO PINTO, *Il libro del biadaiuolo: Carestie e annona a Fi-*

Since the disaster of 1333, the Commune attempted to regulate the course of the river within and just before it entered the city.<sup>27</sup> The proposal the historian Giovanni Villani made – namely, to build a containing wall on the right bank of the river from ponte Reale (a bridge planned but never built) to the mills of S. Salvi – was slow to materialize. »[I]t will be built,« he lamented, »when it will please those who rule the city.«<sup>28</sup> Controlling the river in the section going from the city walls to Rovezzano and further up to il Girone, the sharp twist the river made just before entering into the flatland, was a much more difficult task for two reasons. First, the geological configuration of the terrain was a major obstacle. And, second, any intervention brought the Commune into contact with big and small landowners whose cooperation was a precondition for any successful attempt to control the river. In 1341, unable to do the work by itself, the Commune lent 223 florins to the abbot of S. Salvi to work on containing the river. Yet, the flood of November 1362 destroyed the weir near Porta alla Giustizia and the wall built to protect the same gate.<sup>29</sup> In 1370, with the intention to improve the hydrological conditions of the plain of S. Salvi, the Ufficiali della Torre allowed the abbot of Vallombrosa to build an embankment and dams near Rovezzano to protect the possessions of the monastery, as well as the city.<sup>30</sup> In 1377, the abbot spent 300 florins to repair and restructure the weir of his mills.<sup>31</sup> Then, around 1380 and after another flood, it was again the turn of the abbot of Vallombrosa to intervene once more along the course of the river with the consent of the Commune.<sup>32</sup> Not only the entire plain of S. Salvi had been flooded, but since the river had shifted its course to the right, the Vallombrosian mills of il Guarlone and S. Salvi became inoperative. In the following year, if Morozzi's reading of *Il libro della luna* – a register recording the decisions of the Ufficiali della Torre – can be trusted, the same officials foresaw an expenditure of five thousand florins for repairing the damages.<sup>33</sup>

As the *consilium* shows, the case at hand, though part of a bigger problem, focused on the damages the mill of Vallombrosa caused to that of the church of Varlungo. The immediate cause of the nuisance was the weir the monks had built to draw water to their own mill. Low dams and weirs – a mixed blessing – permitted the force of water to propell mills even during the summer when the level of the river was at the lowest point. By raising the level of

27 For some of the measures taken in the immediate aftermath of this disastrous flood, see ALESSANDRO GHERARDI, *Di alcune memorie storiche riguardanti l'inondazione avvenuta in Firenze l'anno 1333*, in: *Archivio storico italiano* ser. III, vol. 17 (1873) 240–261.

28 GIOVANNI VILLANI, *Nuova cronica*, XIII, cxvi, ed. by G. Porta, Parma 1990, vol. III, 556–557.

29 AIAZZI, *Le più notevoli inondazioni* (nt. 20) 11–29, for abstracts from major Florentine historians.

30 FRANCESCO SALVESTRINI, *Santa Maria di Vallombrosa: Patrimonio e vita economica di un grande monastero medievale*, Florence 1998, 33, note n. 15.

31 *Ibidem*, 256, note 136.

32 FRANCESCO SALVESTRINI, *Libera città su fiume regale: Firenze e l'Arno dall'Antichità al Quattro-*

*cento*, Florence 2005, 73–86, for the various attempts to regulate the river.

33 MOROZZI, *Dello stato antico e modern*, vol. II (nt. 1) 10.

water upstream or regulating its flow they ensured a constant supply of power to mills. Though useful, if not indispensable, they constituted an impediment to navigation and floating down the river the timber cut in the Apennines, if they cut across the entire river. The Cistercian weir of Badia a Settimo was destroyed and compensated for by the Commune, because it allegedly impeded navigation between Florence and Pisa.<sup>34</sup> Concerned with the transportation of construction material to the city, the statute of the Capitano del Popolo of 1322–25 established a fine for owners of mills on the Arno and Sieve, a tributary of the Arno, who did not provide an opening of at least three »braccia« in their weirs for letting timber go through.<sup>35</sup> Similarly, the statute of the Podestà of 1325 established that all the weirs belonging to the abbot of Settimo should have a »callaria« (a gate) ten »braccia« wide to allow the transit of the boats moving between Florence and Pisa.<sup>36</sup> In addition, these impassable barriers stopped the floating deposits and the topsoil the river carried, especially during winter and spring, and caused siltation. Last but not least, they impeded the movement of migratory fish keeping them away from spawning habitats.<sup>37</sup> Effects on the aquatic ecosystem aside, if mills were clustered together the weir downstream had the effect of raising the water level and impeding the proper operations of the mill upstream. In turn, the water discharged by the mill upstream often created a stream in the river – a nuisance for the next mill owner who had no other options than to build a new weir to ensure a sufficient and constant supply of water power.<sup>38</sup> Because of its frequency, this kind of nuisance was discussed in juridical literature.<sup>39</sup> *Consilia* show that this was a contentious field.<sup>40</sup>

Juridical literature aside, a few cases are well documented and have been studied, though from another perspective. Typical is that of the mill of the convent of Santa Brigida e San Salvatore al Paradiso whose vicissitudes have been reconstructed by Giovanni Roncaglia thanks to an account book kept by the scribe of that institution. To the satisfaction of sisters and monks, the mill they had built on the Ema river started to operate partially in January 1489, half a year after its construction had started. Yet the construction encountered obstacles: the monks of San Miniato a Monte and the canons of Santa Maria del Fiore, as well as nearby landowners, opposed it for they perceived it as a threat to their own interests. Their objections ranged widely, from the ownership of

34 PAOLO PIRILLO, *Il fiume come investimento: i mulini e i porti sull'Arno della Badia a Settimo*, in: *Rivista di Storia dell'Agricoltura* 29 (1989), 19–43.

35 *Statuti della Repubblica fiorentina*, ed. by ROMOLO CAGGESE, *Statuto del Capitano del Popolo degli anni 1322–25*, new ed. Florence 1999, 213–214, lib. V, rub. XII, *De conducentibus ligna ad civitatem Florentie per flumen Arni et de capientibus et restitutione ipsorum*.

36 *Statuti della Repubblica fiorentina*, ed. by ROMOLO CAGGESE,

*Statuto del Podestà dell'anno 1325* (new ed. Florence 1999, 307, lib. IV, rub. XLV, *De faciendis callariis in piscariis molendinorum*.

37 On the ecological side effects of breakwater, see RICHARD C. HOFFMAN, *Economic Development and Aquatic Ecosystems in Medieval Europe*, in: *The American Historical Review* 101 (1996) 631–669.

38 For examples of nuisances, see ANGELA LACONELLI, RITA LUISA DE PALMA, *Terra, acque e lavoro nella Viterbo medievale*, Rome 1992, 19, note 62; 21–22, 44.

39 BARTOLUS ad l. *Fluminum* (D. 39.2.24), vol. V, f. 44ra–va, for a discussion on their ownership and related problems.

40 BALDUS DE UBALDIS, *Consilia*, vol. III, f. 76rb, cons. no. 273.

the land on which the mill was being built to the potential threat to the surrounding environment. To dissipate doubts, the case was submitted for adjudication to the Ufficiali della Torre who, while dismissing the objection grounded on ownership, forced the monastery to ask for permission whenever the appurtenances of the mill, such as the weir and head and tail race, came into contact with property that did not belong to the convent. To settle persisting dissensions, the Officials sent a group of four experts to inspect the place and report on the feasibility of the mill. The report was favorable to the sisters and monks for their new mill would not become a nuisance to an older mill upstream, provided that the height of their weir would not exceed two »braccia« and  $\frac{3}{4}$  – that height ensured that resurging water would not impede the upper mill because between the top of the inferior weir and the duct of the upper mill a leeway of more than one »braccio« was left – and the observance few other conditions spelled out in detail. Yet the life of the new construction was short. One night of September 1494, the armed monks of San Miniato a Monte came and destroyed the weir claiming that it impeded the proper functioning of their own mill upstream.<sup>41</sup>

In contrast to the rowdy monks of San Miniato a Monte, the abbot of S. Salvi, Iacopus, contemplated the possibility of nuisance when he leased out some mills on the Affrico river, a small tributary of the Arno, on April 25, 1247. The one-year contract stipulated that the lessees had to improve the overall conditions of the mills and pay an annual rent of three »modia« of corn. Since the leased mills were downstream, the abbot inserted a clause in the contract: »if the weir would cause some damages to the mill of the monastery placed on the river upstream, or if the water would surge and impede its functioning,« the new »piscaria, claudenda et laborerium« had to be removed and destroyed, and the abbot had to restore the expenses the lessees shouldered.<sup>42</sup>

The situation in which Simone found himself differed, for a magistracy stood between the church and the abbot. The expertise of a notary was no longer sufficient, and legal advice was a necessity. The reason why the abbot conveyed his doubts to Donato is hard to fathom. The opening lines of the *consilium* indicate that the two were not alien to each other and Donato might have advised the abbot on other occasions – just as Lapo da Castiglionchio, canonist and obdurate Guelph, had advised the monastery of

41 GIOVANNI RONCAGLIA, Note su un cantiere edile nel tardo medioevo: La costruzione del mulino di Santa Brigida al Paradiso, pdf, Archeologia medievale unisi.it.

42 Contract published in SALVESTRIANI, Libera città su fiume regale (nt. 32) 93–94.

S. Salvi.<sup>43</sup> Since Lapo was declared magnate and exiled in 1378, it is not unlikely that the abbot chose a legal consultant more in tune with the views of the new regime. Expressions like »predecessor meus« and »ego teneat,« indicate that the abbot himself formulated the *punctus* and sent it to Donato, likely by letter.<sup>44</sup> The abbot's lamentable discretion, or Donato's editorial work, has deprived us of the name of the church, the rector, and the lay people who shared ownership. Though the text mentions the church of Varlungo, at this stage, a more precise identification is not possible given the high concentration of mills in that zone. Since, starting from the middle of Trecento, the government had if not prohibited at least discouraged the operations of the floating mills located on the section of the Arno that crossed the city,<sup>45</sup> it is not surprising that they were moved into areas East and West of the city. Just after Varlungo, in the two parochial churches of Rovezzano, S. Michele and S. Andrea, members of the Albizzi family owned mills for cereals and fulling mills for the production of wool (*gualchiere*), known as »the mills of the Cerchi.«<sup>46</sup> These two assets, though not so imposing as the fulling mills the Albizzi had in Remole, and their infrastructures of weirs and the network of water ducts certainly affected the flow of the Arno, for on three sides they bordered the river. If the actual via del Guarlone may give us an approximate indication of the location of the abbot's mill (*il mulino del Guarlone*), it is not difficult to imagine that, due to the proximity of Rovezzano to Varlungo, the Albizzi's mills affected those in Varlungo. Yet, it is more difficult to imagine that their effects could be felt as far as S. Salvi.

The craftiness with which the *punctus* links causes and effects indicates that the abbot was aware of what elements a jurist needed to know to pronounce his oracular *responsum*, though the details a modern social historian would like to know were none of his concerns. A nuance of his narration shows that he was also familiar with legal requirements: the mill upstream altered in a significant way the normal flow of the river – a point on which the lawyer will dwell at length. Grammarians may rightly feel uneasy in front of the expression »semper rapidus semper fluebat.« Yet, that second and redundant »semper« conveys the relentlessness and the extent of the alteration. The abbot's skills also extended to representation or, better, self-fashioning. By glossing over the reasons why the city officials enjoined his predecessor to pay compensation to

43 LAPUS DE CASTIGLIONCHIO, *Allegationes iuris*, Venetiis 1571, 65.

44 For a not at all unusual case where the *punctus* is a letter addressed to

the jurist (Bartolus), see Ravenna, Biblioteca comunale Classense ms. 448, n. 6.

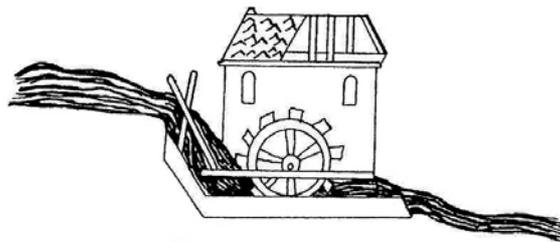
45 On this project of beautification, see JOHN MUENDEL, *Medieval Urban Renewal: The Communal Mills of the City of Florence, 1351–1382*, in: *Journal of Urban History* 17 (1991), 363–389.

46 HIDETOSHI HOSHINO, *Note sulle gualchiere degli Albizzi a Firenze nel basso Medioevo*, now reprint-

ed in his *Industria tessile e commercio internazionale nella Firenze del tardo Medioevo*, Florence 2001, 41–63, especially 51–52 for the mills near Rovezzano; and LORENZO FABBRI, *Opus novarum gualcheriarum: gli Albizzi e le origini delle gualchiere di Remole*, in: *Archivio storico italiano* 162 (2004) 507–560.

the church of Varlungo, he portrayed his predecessor and himself as victims of an improper use of the river; by stressing the benefits the city obtained because of the embankment, he depicted his predecessor and himself as selfless pursuers of the goods of the commonwealth. Yet, what the abbot left, out or what Donato did not include when he transcribed the *punctus*, can be easily reconstructed and integrated thanks to the *consilium*.

The mill of the church discharged its water into the river. The tail race, because of the force of the water, formed a stream that corroded and damaged the unprotected lands of the monastery. In addition, the damages, far from being confined to monastic land, threatened the city walls. Given this double threat, the *Ufficiali della Torre* granted the abbot, Simone's predecessor, permission to build an embankment (*laborerium*) on the land of the congregation, the bank of the river, and in the bed of the river – three places having a different legal status. That permission, however, had a string attached. The abbot could build freely and with impunity but had to make good the damages the church may suffer. The determination of that amount was left to the *Officials'* discretionary assessment. Typically, the officials would send a commission of experts (*agrimensores* or land surveyors) to inspect the place; the experts would then prepare a written report and submit it to the officials under oath; and the officials would base their decision on the report. Unfortunately, the *punctus* does not specify the kind of work the abbot undertook. The two terms Simone used, »*laborerium*« and »*edificium*« (building), suggest, along with the amount of damages the estate suffered (thousand florins), that the interventions on the river and the banks had been extensive. The *consilium*, recasting the abbot's interrogative as a »*dubium iuris*«, mentions a mill and some of the indispensable infrastructures (*edificium*, *clausura*, *piscaria*, and *molendinus*) – likely reflecting the true extent of the modifications. The kind of nuisance the embankment caused – and thus the reason why the officials enjoined the abbot to make good the damages the church may suffer – is not specified in the *punctus*. Rather than one deriving from competition or loss of revenues due to proximity, it is likely that the new weir raised the water level of the river, caused a reflux impeding proper discharge of the mill



upstream, and ultimately made it inoperative in certain periods, if not forever.

The legal grounds for the officials' intervention in a dispute between a diocesan and a monastic institution are more difficult to grasp. For sure, at this time, the Commune could claim – though perhaps not fully assert – its jurisdiction on public rivers. The *punctus* suggests that the abbot had the consent of the Commune before building his embankment – especially for what concerned the bed of the river. The part of the embankment that was built on monastic estate was unproblematic, for the owner was free to do as he pleased. The feasibility of the part that was built on the banks depended on who owned the adjacent field, for the use of the banks was open to all, or public, though ownership may belong to the owner of the adjacent field. In the case at hand, we may safely presume that ownership belonged to the monastic congregation. In this regard, the only issue was whether or not the work impeded others from using the banks – say, for loading and unloading boats. With regard to the part that was built in the bed of the river, Roman law and the *ius commune* considered the purpose of the construction. If a private party built in a public space for his own utility, the builder was bound to give security for damages; conversely, if the work was done for public utility, the builder was exempted. If the work became a nuisance, appeal to a judge was allowed.<sup>47</sup> The critical issue was thus how to construe the work that was done in the bed of the river: was it done for private or public utility? Simone had no doubts.

He was dissatisfied for two reasons. First, his monastery suffered damages for one thousand florins; second, the whole embankment had been built to protect the city walls, not only the monastic estate. Now, given the undisputable public utility of the work his predecessor had built and in view of an impending decision of the Officials on damages, he wished to know whether or not such an indemnification was justifiable under the *ius commune* – a vast body of Roman civil, canon, and feudal law, held together by a network of glosses, commentaries, tracts, and *consilia*.

For Donato circumscribing the issue to the *ius commune* meant that statutory dispositions, enactments of the city council, and the bearing of the decision of the officials had to be set aside and given only a passing consideration. It meant also that the abbot's

<sup>47</sup> See l. Fluminum (D. 39.2.24), and the commentaries of Dynus and Bartolus.

question had to be reformulated as to fit into the framework of previous legal discussions. Was one – say, a private person, or an institution – permitted to build on his own property, the bank of a public river, and in the river itself an embankment, a mill race, a weir, and a mill so that the water would resurge, alter its course, and impede the operations of a mill upstream? Since a question so formulated invited a negative answer, Donato added a series of »factors« that had to be pondered – the consequences of each of the two constructions. After the edification of the first mill the flow of water became faster than usual and the river altered its normal course; a great damage was done to the monastic estate and neighbors, and even a greater one could be portended for the city. Yet, because of the second construction, those damages had been contained and the flow of the river reverted to its usual or »natural« course. To put it in a more synthetic way, three points had to be examined: first, the advantages (*commodum*) accruing to the second builder; second, the losses and the expenditures the second builder incurred; and, third, the nuisance (*damnum*) occurring to the first builder.

The examination of these three points took Donato on a detour – up to the Glossa and then down to Bartolus, via Franciscus Accursius, Martinus Sillimani, Gulielmus Durandis, Roffredus Beneventanus, Dynus de Musiello, Andreas de Ysernia, Guillelmus de Cuneo, and Cynus de Pistorio – that, though for the most part practically irrelevant, sounds like a tribute to his preceptor. It is not necessary to follow him in his meandering, for this whole section was almost verbatim lifted from Bartolus' *repetitio ad l. Quominus*, except the reference to Sillimani. It suffices to consider the position of the Glossa and that of Bartolus.

Thinking of the applicability of § *Si initium* – the date and the name of the consul mentioned at the beginning of a document are common to all subsequent documents that do not have them – Accursius gave the following example: when a mill upstream obstructs the flow of water with the result of impeding the proper functioning of another one downstream. He was playing with the term »ratio,« meaning »account book« – the meaning required by the text he was explaining – and »reason« or »right« – the meaning required by the example he adduced. In simple terms, he hinted that both mills had the same right to use the water of the river. He also mentioned in passing that there was a law to the contrary.<sup>48</sup>

48 Glossa rationis ad l. Si quis ex argentariis, § Si initium (D. 2.13.6.6).

Subsequently, he reverted to the same problem two more times without producing a uniform solution.<sup>49</sup> Not surprisingly, jurists of the following generations found his views inconsistent, his solution unsatisfactory, and, as not to undermine the authoritative status of the *magna glossa*, had to gloss the glossa. Conundrum notwithstanding, the opinions of the jurists consolidated around a legal principle and a clear answer to the proposed case. The accepted principle was that the water of a public river was a common resource and all were entitled to use it; the consensus was that the mill upstream should not impede or alter the flow of water to the detriment of others.

In just about hundred years, and no doubt because the topic was socially and economically relevant, Accursius' bare-bones example became a port of call and the subject of several *quaestiones disputatae* debated, for example, by Franciscus Accursius and Albertus de Odofredis<sup>50</sup> – respectively the son of Accursius and Odofredus de Denaris, Accursius contemporary and concurrent at the University of Bologna. At the time of Bartolus, jurists referred to it as a *quaestio sabatina* and Bartolus himself labeled it as »an old question«.

With an analytical precision that Accursius did not display, Bartolus distinguished between »private« and »public« rivers, such as the Arno. In the second instance, the discriminating criterion was whether or not the first builder had built the mill licitly. If so, the second builder could be prohibited; if illicitly, the second had no impediments whatsoever.<sup>51</sup> Not surprisingly, Bartolus spelled out at length the meaning of »licitly« and observed that under the *ius gentium* all could benefit from the water of a public river, provided that their use did not come to the detriment (*iniuria*) of others.<sup>52</sup> Scoring his first point at the end of his scoreless detour, Donato pointed out that »one is said to do something illicitly when he does something that causes damage to a neighbor.« No norm of the *ius gentium* and *ius commune* precluded the rector of the church from using the Arno's water for propelling his own mill, but his use of the river should not come to the detriment of the abbot's mill and estate.

Yet, Donato had to admit that the terms of the case the abbot had prospected differed and Bartolus' typical case was of little help. First, because the case centered on the damages caused by the mill downstream. Such a situation was rather unusual and rarely

49 Glossa aqua ad l. Quominus (D. 43.12.2), and procurator ad l. Si manifeste (C. 3.34.7), where the glossator concluded that the construction of the upper mill, in itself, had no legal obstacles.

50 Biblioteca Apostolica Vaticana, Archivio S. Pietro, A 29, f. 164va–165va, for Accursius' quaestio; and f. 198rb–199ra, for Odofredus's.

51 BARTOLUS ad l. Quominus, f. 155rb–155va, n. 2: »Aut primus habuit molendinum licite aut non. Si habuit licite non potest secundus facere nec auferre sibi lucrum quod licite capit ex publico ... Si vero non habet licite tunc secundus potest eum impedire.«

52 Ibid., f. 155va, n. 5: »dum tamen ille qui ducit primo ducat sine iniuria vicinorum.«

occurring for the commonsensical reason that the water flowed downstream and a superior owner could easily alter its course, not the opposite. Second, because the mill upstream altered the flow of water making it more impetuous and harmful. Third, because the owner downstream had to protect his own land.

Not as unique as it may seem, the case at hand, stripped of its contingent elements, was discussed by Bartolus in his *repetitio ad l. Quominus*, in the third question. With regard to this text, it should be noted that Bartolus consciously broke new grounds and departed from established doctrines. He himself listed and explained some of the major departures in his commentary to *l. Fluminum* (D. 39.2.24).<sup>53</sup> If the resurging water impeded the functioning of the upper mill, the construction of the lower mill could be prohibited, if the river was public. In support of his view, Bartolus lined up powerful arguments. Ulpianus, explaining the expression to »cause the water to flow otherwise than it did the previous summer,« held that doers are liable under the interdict if what they have done »changes the current by making the water deeper, or narrower and therefore swifter« – (»dum vel depressior vel altior fiat aqua ac per hoc rapidior fit«).<sup>54</sup> Since the focus was on a weir or a dam, »altior« was the key word and meant »higher«. The Roman jurist Neratius had considered the case where a construction intended to keep out water from one's field turns into a nuisance for a neighbor – for instance, when because of rain the nearby marsh overflows and the embankment causes the water to flow into the land of a neighbor. In this case the embankment could be forcibly removed by means of an »actio aquae pluviae.«<sup>55</sup> Another fragment, § *Sed apud Servii*, stated that if one plants willows and because of this the water overflows and damages a neighbor, an action to ward off rain water can be brought.<sup>56</sup> Still another fragment, § *Apud Labeonem*, stressed the principle that water should flow unimpeded. A neighbor fails to keep clean a ditch and because of this the water overflows and damages the upper owner. The landowner who suffered damages can bring an action: either the inferior owner cleans the ditch or lets the upper owner clean it.<sup>57</sup> Water, be it in the form rain or river, had its natural way of flowing; protecting oneself against it was licit but protection should not come to the detriment of others. To this logic that respected certain arrangements of nature – the morphological configuration of the landscape – there

53 BARTOLUS ad l. Fluminum, vol. V, f. 44ra–va.

54 D. 43. 13.1.3 in c.

55 D. 39.3.1.2.

56 D. 39.3.1.6.

57 D. 39.3.2.1.

was a counterargument. Still another fragment, § *Idem Labeo*, expressed the view that if one diverts a torrent to stop the water reaching him and this causes damages to a neighbor, an action cannot be brought. Not only a case, but also an important legal principle was stated in that fragment: if the person who diverted the torrent had no intention to damage his neighbors and did the work only to avoid suffering damages, no action could be brought.<sup>58</sup> Though Labeo's pointed argument could not be easily ignored, it could be interpreted. Accursius and Bartolus thought that Labeo's argument applied where the owner built an embankment on his own estate, not on the banks or in the bed of the river.<sup>59</sup> A distinction unwarranted by the Roman fragment ensured the coherence of the system of *ius commune*. The principle that a protective embankment should not cause damage to others stood and, seemingly, defeated the abbot.

Yet, Donato had no reason to fear. When he introduced his mentor's argument he did so with a qualification: the case stripped down to its bare elements (*in simplicibus terminis*) has been discussed by Bartolus. What was beyond the bare-bones made all the difference. Again Donato turned to Bartolus who underscored the legal implications of altering the free flow of a public river. If the upper owner altered significantly the natural flow the inferior owner was entitled to build an embankment. Donato reiterated the



Ferdinando Strozzi delin. Fabio Bernardi incisit.  
Veduta del Castello di Givoli, e Sbocco della Chiassa in Arno

58 D. 39.3.2.9: »si modo non hoc animo fecit, ut tibi noceat, sed ne sibi noceat.«

59 BARTOLUS ad l. Quominus, f. 155vab, n. 8: »ibi edificabat in suo ... questio nostra loquitur quando edificabat in publico.«

basic principle that no one could alter the flow of a river by making the water run higher, lower, or faster. To buttress his thesis he alleged several fragments of Roman law: § *Hoc interdicto*, a provision preventing a river from drying up because of unauthorized tapping; § *Ait pretor*, a norm against causing the water to flow otherwise than the previous summer; and § *Sunt qui putent*, a text suggesting that the praetor should decide whether or not an exception should be granted to one who built up the bank of a river («*muniendae ripae causa*») on grounds of convenience (*utilitas*) and despite the fact that the work altered the flow at the cost of inconvenience of those living around.<sup>60</sup> Elaborating on the implications of these fragments, Donato deemed licit to protect one own estate to build an embankment by which the water would then revert to its natural or former status, even if the intervention was a significant one, and the riverbed to its older shape. With a partial citation of Ulpianus he buttressed his point: »I know that many have diverted rivers altogether and changed their bed for the good of their land« – the omitted part stated: »it is right to take into account the convenience and safety of the doer, but only if he does no injury to those living around.«<sup>61</sup> Selectivity aside, on grounds of the cited laws the benefits (*utilitas*) accruing to the second builder had to be considered, rather than the nuisance (*damnum sive incommodum*) caused to the first. For, first, the construction was dictated by a »just and necessary cause« and, second, Ulpianus' premises – namely, heavy damage has been caused by the river and land devastated – matched the situation in which the abbot found himself.

The eleventh question of Bartolus' *repetitio* gave Donato additional ammunition. Bartolus supposed that one built a weir or a dam in a river for a reason and asked if the neighbors could prohibit it for the water surged higher than usual on the banks and flooded the adjacent terrain. For the jurist, the neighbors had no action for two reasons. First, the construction did not violate the main purpose of banks – namely, to contain the water of the river. Second, under the *ius commune* the use of the banks was open to all, though their property may belong to the owner of the adjacent field. In addition, Bartolus introduced two other considerations: the advantages accruing to the doer and the eventual damages inflicted to neighbors. If advantages were evident and there were no damages, the construction could not be impeded; similarly, if

60 D. 43.13.1.1, 3, 6.

61 D. 43.13.1.7.

the drawbacks were minimal or negligible. If there were no evident advantages for the doer and the work turned into an annoyance, it could be prohibited.<sup>62</sup> Since the question of the abbot was on law, not on facts, it sufficed for Donato to enucleate a principle: the advantages accruing to the abbot had to be weighted against the damage the church suffered.

Donato's way of balancing benefits and damages, and his counterintuitive way of justifying loss of profit, hinged on a distinction developed by Dynus regarding the use of a public resource or space. Dynus considered how to balance *lucrum* and *damnum* first when nature was involved (*ex natura*) and then when human work was involved (*ex operando*). In the second instance he argued: »if I do something chiefly for my own benefit and as a consequence I damage another, for the party loses profit (*lucrum*), I'm not liable.« On the contrary, if one does something with the intention of harming another, then there is liability and the person who suffered damages has an action. In a doubtful case, the law presumes that the doer acted for his own convenience and there is no liability, unless the contrary is proved.<sup>63</sup> In support of the principle of having one shoulder a minimum of annoyance for another benefits Donato adduced a modified version of the principle of Christian charity: »a well ordered charity begins with oneself« (»ordinata charitas incipit a se ipso«).<sup>64</sup> It was not the task of law to require a self-defeating charity.

Donato's next argument focused on the order in which damages had been inflicted. It was certain that the first builder was not entitled to alter the flow of the river by an artificial work (*opere manufacto*). Consequently, it was licit to the second builder to build an embankment for protection against the swifter flow of the river. In support of this view he cited *l. Quamvis*: »Although it is not lawful to divert the natural course of a river to another place by artificial means, it is not prohibited to protect a bank against a rapid current.«<sup>65</sup> Though this fragment referred to banks, its purport could also be applied to the river and the bed of the river, for all were open to public use. Asking if there were other arguments and reasons (*quid plura?*), Donato asserted that not only one could build to his own benefit, but also a neighbor may as a consequence sustain damage (*sentiat damnum*). The classical case was that of one digging a well in his own property and by doing so he cut off the vein of water supplying the neighbor's well. Since

62 BARTOLUS ad l. Quominus, f. 156rv, no. 21.

63 DYNUS ad l. Fluminum (D. 39.2.24.12), Lugduni, 1513; repr. Bologna 1971, s.f. As the numerous marginal corrections show, the text of the apostillae is very corrupted.

64 Glossa proximum ad l. Preses C. 3.34.6.

65 C. 7.41.1.

the doer was exercising his right and the cause of damage lay not with any defect of the work that was carried out, Trebatius flatly answered: »non teneri damni infecti.« The Glossa underscored that since the damage was not intentional or done with malice, the neighbor had no action.<sup>66</sup> A similar situation was described in *l. Si in meo* (D. 39.3.21). If one cuts off a vein of water with the result that water ceases to reach the neighbor's land, the former was not considered to have acted with force, provided that no servitude of water was owned. Again, the Glossa stressed that one was held to be liable only if »you have the intention to do harm« (»si animo nocendi feceris«).<sup>67</sup> All the more this was true when the neighbor instead of suffering damages lost some advantage (*commodum*). For, after all, to lose a *commodum* derived from a public resource and to suffer damages it was not the same.<sup>68</sup>

The answer to the objections did not detain Donato – namely, that the alleged laws applied where one built on his own land, not on public property. Departing from the interpretation of the Glossa and adhering instead to the views expressed by Dynus and Bartolus, Donato asserted that in such cases it was licit to build not only on his own land but also on a public space – that is, on the banks and in the bed of a river. If ambiguity existed, there was another legal presumption that could be applied: when in one regard something is done licitly and in another illicitly, the law presumes it was done licitly, unless the contrary is proved.<sup>69</sup> The burden of proof was thus shifted to the rector of the church and the lay owners.

Donato found his closing argument in »natural law« (*lex naturae*). As Paulus used it, »lex naturae« referred to the particular set of rules regulating an institution of Roman law, the dowry in this case. Yet, the wording of that fragment invited a much broader extension: »natural law« does not make a thing worse, but restores it to its proper form (»quod lex naturae ... tribuit, non fit ... deterior, sed formae suae redditur«).<sup>70</sup> Nature, if left alone, restores things to their pristine status. Explaining this fragment, glossators and commentators noted that a »thing easily returns to its natural condition.« Donato's reading was on the same wavelength. Consequently, the position of the abbot was the strongest. He worked for, not against, nature. First, because the flow of the river reverted to its pristine and natural status; and, second, because the law itself favors the restoration of a thing to its proper

66 Glossa Non teneri ad l. Fluminum, § Item videamus (D. 39.2.24.12).

67 Glossa Teneris ad l. Si in meo (D. 39.3.21).

68 Glossa Faciat ad l. Proculus, ff. De damno infecto (D. 39.2.26): »Et sic nota, non esse eandem rationem damnum sentire et lucrum non facere.«

69 Glossa Non teneri ad l. Fluminum, § Item videamus (D. 39.2.24.12):

»quod semper presumitur, scilicet quod non faciam animo nocendi.«  
70 D. 2.14.27.2 in c.

form. Bordering on the Florentine political assumptions on which Felix Gilbert has attracted attention, the work of the abbot was not an innovation, but a reform in the original sense of the word – a re-establishment of the old way that had existed since the earliest times of the river.<sup>71</sup>

The sole focus on the *ius commune* grounds for the position of the monastery excluded considerations based on municipal dispositions contained in the statutes or enacted as »provvisioni« by the legislative city councils. Indeed, municipal legislation had very little to say on the issue at hand and the only vaguely related disposition concerned procedure: in suits impeding the use of water the podestà was obligated to open an inquiry on the claim of the plaintiff accompanied by an oath.<sup>72</sup> That meant that the abbot's procurator could sue upon presenting a *libellus* (the plaintiff's written declaration) with evidence of damages. Though Donato avowed to restrict his arguments to common law, he nonetheless made a passing reference to municipal statutes – »Nothing would change even if one would take into consideration the city statutes« – and cited two rubrics of the *Statuto del Podestà* that, at first sight, appear irrelevant at best for they concern rustic servitudes (*iter*) and windows.

Significantly, Donato scrutinized the text of the statutes not in search of a specific rule – say, one on fair use of running water or on mills – but as if they were a text of Roman or canon law from which a jurist could infer the »ratio legis« – a legal rule or principle of broad applicability.<sup>73</sup> The first rubric – *Quod liceat alicui ire per terras vicinorum ad terras suas* –, modeled after the Roman »servitutes rusticorum praediorum,« to forestall quarrels among neighbors granted the owner of a field deprived of an access road the right to pass through the neighbor's land, provided the damages were kept to a minimum. In contrast to Roman law, the statute allowed the beneficiary to drive a draught animal, for instance an ox, for working the field. To ensure that beneficiaries of servitudes could access their fields and enjoy ownership rights, the owners of the land on which the servitudes were imposed could suffer a minimum of damage. By extension, the abbot to enjoy the use of his own mill was entitled to inflict a modicum of damages to the owners of the mill upstream. The second rubric – *De non habendo fenestras super tectum, curtem vel terrenum alicuius* – has a similar purport. While making a new window overlooking

71 FELIX GILBERT, Machiavelli and Guicciardini: Politics and History in Sixteenth Century Florence, Princeton (N.J.) 1985, 28–45.

72 Statuto del podestà, 163, lib. III, rubr. I: De malefitiis commissis et dannis datis et de violentiis non inferendis.

73 For the tools jurists used to interpret the statutes, see MARIO SBRICCOLI, L'interpretazione dello statuto: Contributo allo studio

della funzione dei giuristi nell'età comunale, Milan 1969.

somebody else's roof, courtyard or property was generally forbidden, nonetheless a window could be made if the purpose was to illuminate the interiors of one's house, provided it had bars on it. Light, after all, was a common and inexhaustible resource, flowing just like water. Using it in accordance to its original purpose – namely, to illuminate the interiors of a building – could not be impeded. The bars prevented some of the possible misuses, such as using the window as an exit for walking on roofs, throwing off perilous objects or used water, and peering into the neighbors' privacy.<sup>74</sup>

The bearing of the deliberation of the *Ufficiali della Torre*, although outside the *ius commune*, was another unavoidable issue the lawyer had to address. For Donato the deliberation of the officials corroborated his conclusion that the abbot was not liable for damages. The reason that prompted the officials to grant the construction permit was the benefit that would accrue to the »res publica« of the city of Florence, not so much the benefit the monastery would derive. After all, the decision to grant permission to build an embankment was taken after consultation with the experts in that field and their opinion was authoritative. Finally, that the abbot was not bound to make good the damages was a topic not worthwhile discussing. Donato's reason – namely, that the abbot did not give his assent – is not clear. Presumably, Simone's predecessor knew that the permission had a string attached and it is difficult to imagine that the burden he shouldered did not pass to his successors in office. Hastening to his subscription, unfortunately, Donato glossed over the many other »necessarias et evidentissimas rationes« one could adduce in favor of the abbot.

\* \* \*

For the history of medieval legal thought, Donato's *consilium* foregrounds one aspect of the diffusion of Bartolus' thought that has not been appreciated. It reminds us that, at least for one generation or so, Bartolus' thought was brought into city courts and councils by some of his pupils who did not hold university professorships but practiced as lawyers and judges. These students filled many of the »dwelling places,« of which Bartolus spoke in one of his graduation speeches, that had been prepared »in the house of my Father.« Perhaps unwillingly, he has aptly illustrated with a biblical image several of the ways in which his thought

74 Though the term »privacy« may look like an anachronism, Cynus asked the question whether or not a private person could build a tower near a convent as to look into the »secreta fratrum,« see his commentary to l. *Altius* (C. 3.36.8), f. 176v.

would spread over Europe: teaching, judging, and counseling. The almost unavoidable self-cloning process that occurred within the universities and the few brilliant exception it produced, such as Baldus de Ubaldis, has been carefully charted by historians of law. More recently, the transmission of this intellectual patrimony has attracted the attention of historians of political thought.<sup>75</sup> Yet, the role played by his students, especially those who became judges or city-based lawyers, has been left in a zone of shadow, as if only manuscripts and university chairs counted. An answer to the question of what role did they play may likely come from social historians who have found in his work an inexhaustible repertory of entry-points for examining almost every facet of late medieval and Renaissance society.<sup>76</sup> Going beyond a passing citation, Donato's *consilium* shows how, some twenty years after Bartolus' death, the answer to the doubts of a client could be construed on the questions examined in a single *repetitio*.

How can we assess Donato's performance? His extensive borrowings from the work of his *promotor* may invite an assessment underscoring his lack of originality. His *consilium*, after all, has none of the flashes of understanding that one finds in Baldus' opinions – an insight that can throw new light on an ordinary subject and make the reader see it in a different way. Yet, is it originality and creativity that we have to look for in this kind of legal opinions written for a paying client? And, more importantly, what did the client expect from his counselor? Despite a maze of allegations that could be taken to mean one thing and its contrary, the advice Donato gave the abbot was on the whole sound. As the abbot had instinctively perceived, the situation in which he found himself smacked of injustice. Three elements had to be pondered: the losses accruing to the church' mill, those accruing to the Vallombosian estate, and the benefits the city derived. Considering the non-operability of the mills, the balance is equal; the erosion of land, which was a loss only the abbot and his neighbors suffered, made the needle shift in favor of the abbot. Lastly, the benefits the city derived made it tilt even more on his side. Weighing precisely losses and benefits was a task to be accomplished in court, after listening to the expert opinion of *agrimensores*, not Donato's task. What he accomplished was a persuasive conceptualization in legal terms of the dissatisfaction, if not the anger, the abbot felt. In this, indeed, he succeeded.

75 DIEGO QUAGLIONI, *Politica e diritto nel Trecento italiano. Il »De tyranno« di Bartolo da Sassoferrato (1314–1357)*, con l'edizione critica dei trattati »De Guelphis et Gebellinis,« »De regimine civitatis« e »De tyranno«, Florence 1983.

76 LAURO MARTINES, *The Career and Library of a 15th-Century Lawyer (Bartolus of Sassoferrato's Grandson)*, in: *Annali di storia del*

*diritto* 3–4 (1959–60) 323–32; and JULIUS KIRSHNER, *Bartolo of Sassoferrato's De tyranno and Sallustio Buonguglielmi's Consilium on Niccolò Fortebracci's Tyranny in Città di Castello*, in: *Medieval Studies* 68 (2006) 303–331.

The solution Donato advanced parallels the view Baldus proposed in his commentary to *l. Si manifeste*. »If you have built a mill upstream,« he wrote, »I can build my own mill downstream in a place where it is licit to do so.« The fact that the inferior weir makes the water stagnate, surge, and ultimately »impede the proper operations of your mill« is immaterial, for »I did it not with the intention of damaging you,« but with that of benefiting myself.<sup>77</sup> The nuisance to the first mill was just a »quandam consequentiam« that should not be taken into consideration; what mattered was the »principale propositum« of the second builder which was »consonant with the law.« Baldus also indicated how to solve a conflict when the height of the second weir was too high: »if the weir is so high that it damages you and does not benefit me,« the matter should be submitted to the arbitration of those who are experts in this art who would then determine its proper height.

The steps the abbot took after he received the *consilium* are not known and lay beyond the scope of the present investigation which is to show the potentiality of a legal genre for the history of water powered mills. Had he gone to court, if not a victory, at least an agreement on sharing a public resource based on time or quantity can be easily envisaged. A well known »precedent« – a *quaestio disputata* cited by Accursius, Bartolus, and Baldus – existed. In the version Baldus transmits, the Commune of Bologna granted first the Franciscans then the Dominicans permission to use the water of »Sapientia minor.« The Franciscans objected that the second concession was invalid. The *sapientes*' solution was that water was to be shared, since it was sufficient for the needs of both institutions.<sup>78</sup> This was not a servitude imposed on the first user but a form of »communi dividundo« – sharing a common resource on a base of time and quantity.

That mills were a source of endless conflicts, especially where they were clustered together, has been noted by Marc Bloch in his path-breaking work.<sup>79</sup> Not all conflicts went to court for adjudication, and resorting to violent means or self-help, such as burning down a mill and destroying a weir, was not unheard of. How and on what legal grounds the conflicts were solved remains a territory to be charted. Though Roman law had nothing to say on mills, the jurists found there the conceptual tools and vocabulary that permitted the elaboration of viable solutions. In the case at hand, via Accursius and Bartolus, Donato grounded his solution

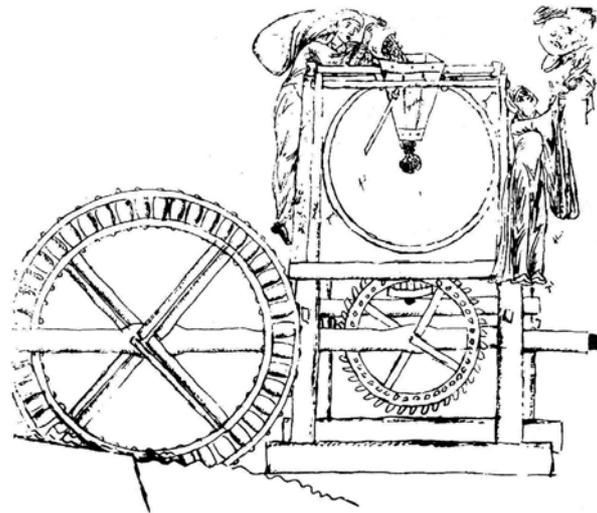
77 BALDUS ad l. Si manifeste, f. 229v, no. 2: »quia hoc non facio ut noceat tibi, sed ut prosit mihi.«

78 BALDUS ad l. Aquam, C. de servitutibus (C. 3.34.4), fol. 229v.

79 MARC BLOCH, Avènement et conquête du moulin à eux, in: Annales d'Histoire économique et sociale VII (1935) 538–563.

on concepts of Roman ascendancy – profiting (*lucrum*), ceasing of profits (*lucrum cessans*), inflicting a tolerable amount of damages (*modicum damnum*), and inflicting damages (*damnum*). The *repetitio* of his mentor gave him bare-bones frames within which he could place the specific facts of the case. Yet, unfettered by the typicality of those frames, he grasped the elements that made a difference and, at the same time, from each of them he retained arguments and reasons to build up a case for his client. That he was a consummated adviser of the Florentine government should come as no surprise.

**Oswaldo Cavallar**



Appendix

Casus talis est

Copia consilii redditi per me Donatum die XXII. februarii anno incarnationis Domini MCCCCLXXXII

Quoddam molendinum cuiusdam ecclesie in quo quidam layci partem habebant, positum secus flumen Arni iuxta ripam ex parte plani Sancti Salvii, aquam ad se trahebat, ut moleret, propter quod dicti fluminis cursus semper rapidus semper fluebat iuxta dictam ripam. Ex quo plura predia nostri monasterii corrodit et dextruxit, et in tantum cotidie dicti terreni corrosio augmentabatur quod Officialies Turris communis Florentie, dubitantes ne suo impetu prosterneret et verteret muros civitatis, providerunt, ordinaverunt et statuerunt quod, ad reparationem dicte corrosionis et subversionis murorum civitatis, predecessor meus edificaret quoddam laborerium in nostro territorio, et in lecto dicti fluminis libere et impune, cum ista conditione: quod pater abbas Vallisymbrose restauraret et restaurare possit, teneatur et debeat rectorem ecclesie de Varlungo de damno et incommodo quod eveniret vel evenire posset dicte ecclesie et rectori ipsius in suo molendino, quod habet supra dictum locum et postam, pro constructione predicta, id, quod et quantum declaratum fuerit et deliberatum per dictos Officialies et eorum officium.

Modo queritur: cum monasterium nostrum propter molendinum dicte ecclesie sit dampnificatum in milibus florenorum, et totum laborerium factum per meum predecessorem constructum fuerit ad reparationem prediorum dicti monasterii et murorum civitatis et in nostro [et] civitatis, utrum de jure communi ego teneam rectori dicte ecclesie ad restorationem damni quod consequitur de suo molendino propter nostrum edificium seu aliis laycis qui partem habeant in dicto molendino.

Casus talis est.

Copia Consilii redditi p me donatum die xxii febr. ano incarnat dñi .mcccclxxxii

Quoddam molendinum cuiusdam ecclesie in quo quidam layci partem habebant, positum secus flumen Arni iuxta ripam, ex parte plani Sancti Salvii, aquam ad se trahebat, ut moleret, propter quod dicti fluminis cursus semper rapidus semper fluebat iuxta dictam ripam. Ex quo plura predia nostri monasterii corrodit et dextruxit, et in tantum cotidie dicti terreni corrosio augmentabatur quod Officialies Turris communis Florentie, dubitantes ne suo impetu prosterneret et verteret muros civitatis, providerunt, ordinaverunt et statuerunt quod, ad reparationem dicte corrosionis et subversionis murorum civitatis, predecessor meus edificaret quoddam laborerium in nostro territorio, et in lecto dicti fluminis libere et impune, cum ista conditione: quod pater abbas Vallisymbrose restauraret et restaurare possit, teneatur et debeat Rectorem ecclesie de Varlungo de damno et incommodo, quod eveniret vel evenire posset dicte ecclesie et rectori ipsius in suo molendino, quod habet supra dictum locum et postam, pro constructione predicta, id, quod et quantum declaratum fuerit et deliberatum per dictos Officialies et eorum officium.

Modo queritur, cum monasterium nostrum propter molendinum dicte ecclesie sit dampnificatum in milibus florenorum, et totum laborerium factum per meum predecessorem constructum fuerit ad reparationem prediorum dicti monasterii et murorum civitatis et in nostro [et] civitatis, utrum de jure communi ego teneam rectori dicte ecclesie ad restorationem damni, quod consequitur de suo molendino propter nostrum edificium seu aliis laycis qui partem habeant in dicto molendino.

In Christi nomine, amen. Interrogatus ego Donatus a reverendo patre et singulari domino meo domino Symone Dei gratia abbate Vallisimbrose, respondere de iure super puncto predicto, puto quod ad exquirendum veritatem, circumscriptis omnibus municipalibus legibus, ac etiam dicta deliberatione et provisione factis per dictos Offitiales, videndum sit quid de iure communi. Ex themate igitur dubium sit istud: utrum liceat privato in suo ac etiam<sup>80</sup> ripa fluminis publici et in ipso flumine, sive fluminis alveo, construere edificium, clausuras<sup>81</sup> et piscarias cum molendinis ex latere inferiori fluminis, ex quibus aqua in superiore fluminis parte restagnetur sive divertat, ita quod molendina superiora privatorum prius constructa efficiantur inutilia. Hoc presupposito: quod ex prima constructione cursus fluminis rapidior factus fuerat ultra solitum, ex quo vicini, et maxime dictus qui secundo construxit, ante ipsam constructionem, maximum damnum et incommoditatem susceperant in eorum prediis existentibus iuxta fluminis ripas, et cotidie magis inualescebat aqua divertens a recto et solito fluxu suo et peiora verisimiliter sperabantur, que propter dictam secundam constructionem cessaverunt, et cursus fluminis magis ad statum suum naturalem reductus est. Et in predictis potissime adverte tria. Commodum quod consequitur secundus construens. Item, damnum quod evitat. Tertio damnum sive incommodum quod primus suscipit. Pro quorum examinatione adduco questionem quam glossa movet in simplicibus suis terminis de eo qui facit molendinum ex latere superiori fluminis, ita quod impedit vicinum molendinum habentem ex inferiori latere, de qua in l. si quis ex argentariis, § si initium, ff. de edendo (D. 2.13.6.6), et in l. quominus, de fluminibus (D. 43.12.2), et in l. si manifeste, C. de servitutibus (C. 3.34.7), ubi glossa se firmat, varians ab aliis preallegatis, et tenet quod licite possit. Hec questio fuit antiqua et sabatina, et per multos doctores postea disputata, maxime per Franciscum Accursii in questione que incipit ›Quidam burgensis‹ et cet., et per Martinum Silimani, et de ipsa per Rofredum in libellis iuris civilis, Inst., de interdicto Ne quid in flumine publico, et Speculatorem in tit., De causa possessionis et proprietatis, § Quia vero, in tertia columna,<sup>82</sup> et per Andream de Ysernia in X. coll., in tit. Que sint regalie (L.F. 2.55), super verbo ›flumina,‹ et per Guillelmum de Cuneo in dicto § si initium, Cynus in d. l. si manifeste.<sup>83</sup> Dominus Bartholus de Sassoferato, preceptor meus, in tractatu quem composuit de fluminibus super dicta l. quominus,<sup>84</sup>

80 in post etiam del.

81 clausuras corr. ex causuras.

82 GULIELMUS DURANDIS, *Speculum iudiciale*, Basileae 1574; repr. Aalen 1975, lib. III, part. II, vol. II, 140–141, n. 16.

83 CYNUS DE PISTORIO, ad l. Si manifeste, Francoforti ad Moenum 1573; repr. Torino 1964, vol. I, fol. 176vb.

84 BARTOLUS DE SAXOFERRATO, *Repetitio ad l. Quominus*, ff. de flu-

minibus, Venetiis 1526, vol. V, fols. 155ra–157ra.

in prima questione, qui in effectum tenet oppinionem magis comunem et veram, quam etiam tenet Cynus, videlicet, quod si in flumine ff. 96v/ publico inferior faciat licite molendinum, alius superior non potest postea aliud molendinum vel edificium facere propter quod noceatur inferiori, alias si inferior non licite fecerat, potest, per iura allegata per eos. Quando autem dicatur facere licite vel illicite declarat ibi idem Bartholus, in secunda questione.<sup>85</sup> Et inter cetera illicite facit quando facit aliquid per quod nocetur vicino, ut in casu nostro, et probatur per iura inferius allegata, et per ea que ipse notabiliter scribit in dicta questione secunda. Sed in questione nostra mutantur termini circa plura, ex quibus magis validatur infrascripta conclusio.

Primo, quia proponitur casus conversus, scilicet quod inferior fecit edificium et molendinum per quod nocetur superiori.<sup>86</sup> Et hoc ideo quia magis insolitum et naturaliter raro contingit, cum aqua ad inferiora profluens facilius impediri vel verti possit per superiorem quam inferiorem, ut patet. Secundo, quod propter molendinum superius primo factum aqua aliter et divertens a fluxu solito rapidiori cursu fluebat, unde nocebatur inferioribus. Tertio, quod predictus inferior propter edificium quod fecit sibi et prediis suis consuluit adversus damnum predictum. Que omnia singulariter ponderanda sunt, ut inferius apparebit.

Hanc secundam questionem conversam prime in simplicibus terminis, scilicet quando inferior facit molendinum per quod nocetur superiori, movet dominus Bartholus in dicto tractatu in tertia questione<sup>87</sup> de qua in effectum tenet quod sive in publico sive in suo quis edificet in casu in quo aqua ante libere currebat et<sup>88</sup> sibi damnum non dabit, et tunc non possit; alias secus, ut in casu proposito. Sic intelligi debet l. ii, § penultimo, ff. de aqua [et aque] pluvie arcende (D. 39.3.2.9), licet glossa ibi aliud dicat quando edificatur in suo.<sup>89</sup> Quod probatur sic debere intelligi per l. ii, § Idem Labeo (D. 43.8.2.28), alias incipit ›Si quis in suo,‹ cum ibi notatis in glossa<sup>90</sup> ff. ne quid in loco publico. Pro hac sententia et oppinione est casus expressus in l. i, § i, et § ait pretor, et § sunt qui putent, ff. ne quid in flumine publico (D. 43.13.1.1, 3, 6), ubi textus dicit quod non licet aliquid facere per quod aqua aliter fluat vel fiat depressior vel altior vel rapidior cum incommodo accolentium sive vicinorum, quod hic superior primo fecerat, ut in punto proponitur. Ex quo licet non solum edificium ad tutelam sive defensionem rerum suarum facere, reducendo cursum aquarum

85 Ibid., fol. 155va, no. 3–7.

86 superiori corr. ex inferiori.

87 BARTOLUS, Repetitio ad l. Quominus, fol. 155va–b, no. 8.

88 in effectum-et add. in marg. Sinistro.

89 Glossa averterit e influat ad l. In flumina, § Idem Labeo.

90 Glossa si quis e tuum ad l. Hoc interdictum, § Idem Labeo.

ad solitum et seu magis proprium fluxum et alveum. Quinymo etiam licet mutare non tamen aliquantulum sed multum. Unde juris consultus hanc sententiam comprobando utitur istis verbis: »plerosque scio prorsus flumina avertisse alveosque mutasse, dum prediis suis consulant»<sup>91</sup> et cet. Et per consequens, ut dictis iuribus probatur, potius attendi debet utilitas huius secundo loco edificantis, que maxima est, a causa iusta et necessaria proficiscens, quam damnum sive incommodum primi. Pro hoc facit l. i, § Neratius, et § [Sed] apud (D. 39.3.1.2, 6), et l. ii, § i (D. 39.3.2.1), ff. de aqua [et aque] pluvie arcende, et etiam quod dicit dominus Bartholus in XI questione dicti sui tractus.<sup>92</sup> Quare licet edificium facere per quod quis sibi consulat, licet alteri officiat. Si autem solum per hoc alii officeret, et sibi non prodesset, prohiberetur, l. ii, § idem Varus, ff. de aqua [et aque] pluvie arcende (D. 39.3.2.5); et facit ad hoc l. in fundo, ff. de rei vindicatione (D. 6.1.38). Et maxime quia ordinata caritas incipit a se ipso, ut C. de servitutibus et de aqua, l. preses (C. 3.34.6), et l. si manifeste (C. 3.34.7). Et quamquam cum modico vicini incommodo toleraretur, non tamen cum magno, quod procedit in hiis que publica sunt, ut in ripis que adherent prediis privatorum. Secus autem quando damnum inferretur rebus privatorum, maxime magnum, quod per plures concludentes rationes et iura ostendit dominus Bartholus in dicta XI questione.

Preterea, certum est quod priori edificanti non licuit fluminis naturalem cursum opere manufacto avertere. Licuitque secundo ripam suam adversus rapidus amnis impetum munire: hic est testis ad literam in l. i, C. de alluvionibus et paludibus (C. 7.41.1), cum concordantibus ibi in glossa positus.<sup>93</sup> Et quod dictum est de ripa, similiter procedit in flumine et fluminis alveo, quorum usus publicus est, ut Insti., de rerum divisione, § flumina, et § riparum (l. 2.1.2, 4), et ff. e. ti., l. nemo (D. 1.8.4), et l. item lapilli (D. 1.8.3), cum ibi notatis per glossam, et l. riparum (D. 1.8.5). Quid plura? Nedum quis possit edificare ad suum commodum tantum, ymo etiam si ex eo alius damnum sentiat. Ymo si in meo puteum vel fontem facio, ita quod vene aquarum vicini avertantur, siccentur sive percidantur, ex quo vicinus dampnum patiatur, hoc licet, ut l. fluminum, § finale (D. 39.2.24.12), et l. Proculus, ff. de damno infecto (D. 39.2.26), et l. i, § denique (D. 39.3.1.12), et l. si in meo (D. 39.3.21), de aqua [et aque] pluvie arcende. Multo igitur fortius ubi vicinus magis commodum perdit quam damnum patiatur, ut in casu nostro, cum non sint paria lucrum sive commodum<sup>94</sup>

<sup>91</sup> D. 43.13.1.7.

<sup>92</sup> BARTOLUS, Repetitio ad l. Quominus, fol. 156rb–156va, no. 21.

<sup>93</sup> Glossa non est ad l. Quamvis, C. de alluvionibus et paludibus.

<sup>94</sup> commodum corr. ex incommodum

amictere et damnum pati, ut dicta l. Proculus, et l. finale, C. de codicillis (C. 6.36.8), et ff. de aqua [et aque] pluvie arcende, l. i, § i, et l. qui autem (D. 42.8.6), in principio, que in fraudem creditorum.

Et si in contrarium dicatur quod iura predicta loquuntur quando quis edificat in suo non autem in publico, ut l. ii, § merito, ff. ne quid in loco publico (D. 43.8.2.10), quod tenet glossa solvendo dictum contrarium in dictis l. Proculus, et § merito,<sup>95</sup> respondeo quod per alia iura superius allegata et secundum sententiam ut prefertur domini Bartholi, que vera est, et per Dynum in distinctione quam posuit in d. l. fluminum, § finali,<sup>96</sup> et Cynum in l. i, C. de sententiis que pro eo quod interest proferuntur<sup>97</sup> (C. 7.47.1), non solum in suo sed etiam in publico licet /f. 97/ hoc casu; quia, ut proponitur, dictum molendinum prius constructum damnum et iniuriam inferebat. Unde licuit ea repellere etiam cum incommodo et damno prioris, ut dictum est. Preterea quotiens idem actus fit uno respectu licite, alio vero illicite, semper a jure presumitur factus eo modo et respectu quo licuit tantum, ut l. merito, ff. pro socio (D. 17.2.51), et in c. nisi essent, extra de prebendis (X. 3.5.21), quod in materia proposita tenet glossa in d. l. fluminum, § finali, et per Dynum in dicta sua distinctione.

Postremo multum corroboratur ista conclusio, quia propter secundum edificium aqua magis rediit ad suum pristinum maturationem cursum, et sic veteri forme redditur, cui quidem singulariter autem iura favent, ut l. si unus, § quod [et] in spetie, ff. de pactis (D. 2.14.27.2 in c.), et notatur in aut. Quas actiones, C. de sacrosantis ecclesiis (post C. 1.2.23).<sup>98</sup>

Concludo igitur ex predictis dictum dominum patrem abbatem Vallymbrose, de jure communi, licite edificasse. Et per consequens prefatum reverendum patrem dominum Symonem, eius successorem, nullo modo teneri ad aliquam restaurationem sive restitutionem damni sive incommodi predicti, domino rectori ecclesie de Varlungo, neque aliis quibuscumque clericis vel laycis aliquod ius vel partem habentibus in priore molendino predicto. Et sic indubie juris esse.

Et si velimus attendere in predictis jus municipale civitatis Florentie, idem dicendum est, ut patet expresse in libro II statutorum domini potestatis, c. xxxiii,<sup>99</sup> et c. lxvii.<sup>100</sup>

Quid autem importet dicta provvisio et deliberatio dictorum Officialium dicendum est quod multum favet dicte conclusioni

95 Glossa faciat ad l. Proculus, ff. de damno infecto, et glossa commodum ad l. Hoc interdictum § Merito, ff. ne quid in loco publico.

96 Dynus de Musiello ad l. Fluminum, Lugduni 1513; repr. Bologna 1971, s.f.

97 Cynus ad l. Cum pro eo, vol. II, fols. 457v-462r.

98 Glossa excluduntur ad aut. Quas actione, C. de sacrosanctis ecclesiis.

99 Statuti della Repubblica fiorentina, a cura di Romolo Caggese, Firenze 1921, Statuto del Podestà dell'anno 1325, 102, rub. XXXIII: Quod liceat alicui ire per terras vicinorum ad terras suas.

100 Ibid., 126, rubr. LXVII: De non habendo fenestras super tectum, curtem vel terrenum alicuius.

ipsamque convalidat, maxime propter causas quas addiunt quare dictus dominus pater abbas dictum edificium facere posset, et non tantum ut evitaretur dampnum privatorum et dicti monasterii Valle, sed etiam reipublice civitatis Florentie consuleretur, ut latius patet ex ea, et maxime cum illa processerint ex consilio magistrorum peritorum in dicta arte in magno numero, quibus credendum est. Quod autem ipse dominus pater abbas teneretur vel deberet restaurare dictum rectorem, ut in dicta provisione sive deliberatione cavetur, frustratorium esset disputare, maxime cum nullum dictus pater abbas prebuerit assensum; ac etiam per multas necessarias et evidentissimas rationes, quas narrare supervacuum est, non tantum in clericis sed etiam in laicis.

Ego Donatus Ricchi de Aldigheriis de Florentia, legum doctor minimus, vincto iure esse per omnia, ut superius continetur, et propria manu scriptum. Et si in me dicta quo committeretur idem dicerem et consulerem. In quorum fidem predictis etiam subscripsi et sigillum quo utor apposui.

Ego Donatus Ricchi de Aldigheriis de Florentia legum doctor minimus, vincto iure esse per omnia, ut superius continetur, et propria manu scriptum. Et si in me dicta quo committeretur idem dicerem et consulerem. In quorum fidem predictis etiam subscripsi et sigillum, quo utor apposui.