

Commentators and Beyond

Some Texts to Discuss

How do the commentators use the following text?

D.8.3.16: *Callistratus, Judicial Examinations, third book*: The deified Pius declared in a rescript to bird-catchers that it was not reasonable for them to go fowling on other people's land without the permission of the landowner.

Ordinary gloss on 'fowlers' (*aucupibus*): "The same is true in the case of hunting. But since fowling on another's land is prohibited by this law, therefore that which is taken does not become his who takes it ... and if it happens, it seems that it ought to be restored But I say to the contrary, as in [JI.2.1.12, 13 ...] But can the hunter be distrained while he is still in the field so that he return what he has captured? Say that he cannot ... but let [the owner] bring an action of *iniuria*."

Jl.2.1.12 [probably the passage being referred to in the gloss above]: "[So far as the occupant's title is concerned,] it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose."

Accursian gloss on 'forbid him entry': "What if after prohibition he takes something? Answer: He does not make it his. [C.3.32.17 (a man has bought a piece of land by fraud and the judge is ordered to restore both the land and its fruits to the previous owner), C.3.32.22 (states the general rule that bad faith possessors have to restore all the fruits they have taken from the land, while good faith possessors have only to restore those that accrue after the *litis contestatio*); cf. Jl.2.1.14 (the passage on bees, above, IA). ADDITION: Say that this is true, according to Angelus [de Ubaldis, fl. 14th century], if the fruit of the land consisted in hunting, otherwise not, as the gloss holds in [D.8.3.16 v^o *aucupibus*] and in [D.41.1.3 s.v. *prohiberi* (which simply cross-refers the gloss on D.8.3.16)], although Por. [Johannes Christopherus Portius, below] follows this gloss."

Bartolus on D.41.5.5.1: I wish to go into your field for fowling, and even though you prohibit it, I go in; do I acquire a right by my hunting? And the gloss sends you to [D.8.3.16]. The contrary is noted in [Jl.2.1.12], but the gloss on [D.8.3.16] is true, and Dy. holds to it.

Portius on Jl.2.1.11: "Dynus, however, holds to this gloss, and I like his opinion, first by the laws alleged in this gloss, but I urge by a reason [*sed suadeo ratione*]: for from the time that the entrant by entering falls into a state condemned by the law, he ought not get any benefit. ... And by this reason the rule that when something is no one's, etc., does not stand in the way because that [rule] does not win primacy of place when the entry was vicious. This is proved here in 'it is clear [that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose]', as if to say, 'Although I told you that so far as acquiring ownership of those things that are no one's is concerned, it makes no difference whether someone captures on his own land or another's; nonetheless, this is true unless he takes having entered against the will of the owner'. And by this also it does not stand in the way, because the entry is punished by the action of *iniuria*, because one could by capture take greater profit than one suffered mulct by vicious entry. I confess, however, that the owner of the land may not hold the hunter until he restore what he has captured, if he knows him, and in this I approve the gloss in [D.8.3.16] which expresses this."

Nicholaus de Tudeschis (Abbas Panormitanus), Consilium Stante statuto (2.79), in

Materials § 14C1

There is a statute that provides that a man is enriched with a third part of his wife's dowry if she dies before him without children, if a man leads a wife to his house and lives with her or goes to live with her. It is asked if he who led a wife by words of the present tense and brought her to the house of his usual habitation and had her there in his family enjoys the benefit of the statute, the aforesaid consort or spouse dying in the house of the same man before the marriage was consummated by carnal coupling.

[1.] It seems first that not: because the statute makes mention of a wife and man, but the name 'wife and man' sometimes is understood to be only those who have consummated the marriage by carnal coupling. [How do you think that Panormitanus comes out on this one?]

[2.] The woman was led to the house.

[3.] She lived with her husband, even though she was not carnally known.

[4.] There cannot be assigned any good reason to the law unless it be that the husband in sustaining the burdens of the marriage incurs many losses, and although he has dowry for supporting them, the expenses for clothing and ornaments are so great that the dowry is consumed in them.

Nicholaus de Tudeschis (Abbas Panormitanus), Consilium Facti contingentia (1.1), in Materials § 14C2

A. contracted spousals by words of the present tense with B. and received from her a dowry of 1000 *lire*. B. died before A. had led her to his house or had otherwise consummated the marriage, and the question was whether he was entitled to one-half of the dowry under a statute that said "If any woman dies without children from the man to whom she is married (*viro cui nupta est*), a half of the dowry at the time of her death shall remain to the husband"

[1.] The statute should be strictly construed.

[2.] The statute is not intended to apply to virgins.

[3.] *Viro cui nupta est* is not intended to apply to a man who had not led his wife into his house.

[4.] The purpose of the statute is to compensate the husband for the expenses of the marriage celebration and of maintaining his wife in his household.

Liability for Damages Caused by the "Ball Game" (Florentine Rota , 1780) (*Materials* Part XIVF)

The Facts of the Case

In the Tuscan town of Marradi since time immemorial, it was customary during the summer for a team of amateurs (*dilettanti*) to play a ball game¹ in the public square. According to a similar usage existing in other towns of Italy, the game was played mostly as an amusement or public feast for the citizens, rather than as an athletic exercise for the local youth. The owners of houses surrounding the square never opposed the use of the area for the game. It was also customary that the team would notify the owners of the day during the summer on which the games would be commenced, in order that they might adopt measures to avoid damages to their

houses, especially to the windows.²

¹ The game known as *gioco del pallone* was not football. From the authorities cited in the opinion, the ball was launched by hand or by an appropriate gadget (*sagibulo*). See note 25 *infra*.

² Although the decision is not clear on this point, it is reasonable to assume that the windows and other parts of the houses had to be protected only during the hours of the game, which were known to the owners. The games season involved a certain burden of conduct for them, since they were required to adopt appropriate measures to avoid damages.

Hints of various possible attitudes and legal conclusions can be found in this language.

“Immemorial” when connected with the word “custom” states a possible condition under which customary law can arise. (This is true in both the *ius commune* and in our law.) But what is the customary law that is being alleged here? For as long as anyone can remember, these folks had been playing a ball game. That was the custom of the town, but what is normative about this? Not every custom, even if immemorial, gives rise to law.

The next sentences head us off in another direction. The folks that played this game weren’t doing it for their own exercise, at least not principally; they were doing it for the “amusement or public feast of the local citizens.” So what? Well, the suggestion seems to be that we have a conflict here between public and private interests, not just a conflict between two incompatible sets of private interests.

The owners of houses surrounding the square had never objected to this practice. Why are we being told that? The statement suggests an argument by prescription or laches, that is to say that someone has acquired a right by long usage or that someone has lost one by failing to exercise it in a timely fashion.

It was also customary that the owners of houses around the square be notified when the game was to take place, so that they could take measures to prevent any damage to their houses. The unstated conclusion that we are probably meant to draw from this statement is that all the other houses in the square were able to avoid damage during the ball game by taking some relatively minor precautions, such as shuttering the windows.

At the beginning of the season of 1778, the team, as usual, gave formal notice to the homeowners that the games would commence on July 24. The Fabronis, a noble family of Marradi, having restored the facade of their house located in the public square, asked the Community Magistrate for an injunction prohibiting the game or for a *cautio de damno infecto*.³ The team, resenting the fact that one family would oppose the public games, claimed that the game had to be absolutely free and “immune” from any liability for damages as it had been in the past.

³ In the *ius commune*, the *cautio de damno infecto* dealt with in the Digest 32.9 had become a kind of suretyship or warranty to be given for a person building or making a work on his land from which damages could result to neighboring property, or where it is probable that damages would result from an existing building, work, or situation of the property of that person. See the present articles 1171 and 1172 of the Italian Civil Code. In the Digest, the *cautio* was not a suretyship; it was a solemn promise (*stipulatio*) to be made by that person, that he shall pay those damages. Further, from Vernaccini’s decision it seems that the *cautio de damno infecto* could be extended to damages probably resulting from acts other than building or making a work on land, *i.e.*, in the instant case from playing a ball game.

The team of ball-players notified the house owners that the games would commence on 24 July 1778. The Fabronis, a noble family that owned a house on the square the façade of which had just been restored, applied for a decree (I wouldn’t use the word “injunction,” though Gorla does) from the seven-member *magistrato comunale* forbidding the holding of the games or for a *cautio de damno infecto* (more of this in a minute). The team, “resenting the fact that one family

would oppose the public games” (a lot of local tension is conveyed by that phrase) claimed that the games had always been free from any liability for damages. Now this is legal claim, a claim of customary law. As such, it is probably way too broad. Surely, there would be liability if a player deliberately threw a ball at an unshuttered window.

On July 20, 1778, the Community Magistrate, composed of seven members, unanimously rendered a decree that:

The amateurs’ team can continue giving such *licit* amusement in the public square; however, the question of damages is to be left open and discussed in the ordinary course of justice.⁴

⁴ The Community Magistrate seems to have been mainly a type of administrative body, which had the power of deciding administrative controversies by a “hearings” procedure. Therefore, the Community Magistrate, while denying the injunction, renvoyed the parties, for the question of damages, before the competent local court of the *Vicario*.

On the same date, the Community Magistrate issued a decree stating that in the territory of Marradi there was no place, other than the public square, where the ball game could be conveniently played. This decree was given at the request of the *Auditore Fiscale*,⁵ who asked, at the solicitation of the Fabronis, whether it was possible to find another place “adaptable” to the game without inconvenience to neighbors and the “ornament” of their houses.

⁵ The *Auditore Fiscale* sitting in Florence was one of the highest agents or officers of the Grandduke, who had agents in every important town. It is not clear whether the *Auditore Fiscale* considered in the decision is the main office in Florence or its agent in Marradi.

The *magistrato* issued two decrees: (1) that it would not forbid the holding of the games; it would not forbid “licit” activity, and (2) there was no other convenient place to hold the games. It refused, however, to rule on the question of liability, referring that to “the ordinary course of justice.”

A word should be said about the *magistrato*. It seems to operate something like a city council, but it is more judicial than that, because appeals can be taken from its decisions. Vernaccini makes quite a bit of the fact that no appeal was taken. Hence, the decision of the *magistrato* is *res judicata* or, at least, the law of the case. But the Fabronis did bring a case to the “ordinary course of justice,” the local *vicario*, for a *cautio de damno infecto* and (and it’s hard to see how this is not the same thing) for damages that might be caused by the ball game.

No appeal or recourse was taken by the Fabronis from the two decrees. They did, however, file an action before the ordinary local court of the “*Vicario*,” for a *cautio de damno infecto* and for the payment of any damages caused by the games. The *cautio* was also sought for future damages that would result from games during subsequent summer seasons. On July 26, 1778, the team gave the *cautio* by way of a personal suretyship of one citizen of Marradi, in order to avoid delay of the public amusement. However, the *cautio* was given “without any prejudice of the question of liability for damages, to be examined in the subsequent course of procedure.” During the games of that season, damages of eight lire were caused to the windows and shutters of the Fabronis’ house.⁶ Further, the facade was soiled by the ball being dirtied in sand and lime on the ground that was used to restore the Fabronis’ house, and damages were estimated at forty lire.

⁶ The Fabronis left the shutters open, so that damage was caused to the windows. However, it is not clear from the decision exactly what damage was caused. It might be that the shutters were freshly

painted or varnished during the restoration of the house, and the ball had soiled the fresh paint or varnish.

On January 20, 1779, the *Vicario* gave a judgment for payment of the former damages, but acquitted the team for the latter damages, since the ball was dirty due to the sand and lime heaped on the ground by order of the Fabronis. Both parties appealed to the *Magistrato Supremo* in Florence: the Fabronis asked for the payment of damages for soiling the facade, the team to be acquitted for damages caused to the windows and shutters of the Fabronis' house.⁷

⁷ At this point, Vernaccini, after his narration of the “facts of the case” and before exposing the “Motives,” says that he has given his decision in favor of the team, after “a serious and mature study of the case as required by its *exemplarity*,” meaning a new and important precedent. It is interesting to note that in other cases Vernaccini had occasion to say that even one single precedent could be binding when the decision is the product of serious and mature study of the case and is thoroughly “motivated”; if so the *binæ judicaturæ* are not necessary.

*The Motives*⁸

⁸ The following paragraphs present the “motives” of Vernaccini’s decision, in the order that they appear in the decision, and as they have been numbered by the reporter in the *Collezione* mentioned *supra* note 5.

Now we need to know something about the legal background. We have already said that the formal Roman law of delicts is odd, and in many ways deficient when compared to our tort law, or the modern Continental law of wrongs. Among other things, Roman law has no category that corresponds to our law of nuisance. (The absence of a category may be an advantage rather than a hindrance if we consider the mess that is our law of nuisance.) Here we have a case that calls for what we would call the law of nuisance, and it’s interesting to see how these guys make it work. The best way to do that is to turn to the legal motivations that Vernaccini offers.

(1) According to the common opinion of *Doctores* interpreting the *Lex Aquilia*, the basic Roman law on torts, the act causing damage must be committed with *dolus*, or, at least, with *culpa* in order to constitute an *iniuria* or wrong, and thereby give rise to liability for damages. There is no *iniuria* without at least *culpa*.

The motivation labelled (1) gives a basic statement of the law under the *lex Aquilia* (the Roman statute that was the basis of most, but not all, actions for damage to property). The statement is basically correct. There is no liability under the *lex Aquilia* unless either *dolus* (intentionally causing harm) or *culpa* (roughly, negligence) can be found. *Culpa* is as difficult a word in Roman law as is our “negligence.” It is sometimes contrasted with *casus* (accident). It is sometimes said to rest on foresight (*quod provideri poterit*), and, as in our law, there is an issue about how far back the foresight has to go. Title 2 of book 9 of the *Digest* has wonderful collection of material on Aquilian liability, and, as in our law, a lot turns on the facts of the cases. I give here both *Digest* 9.2.7.4 and *Digest* 9.2.11pr, both of which Vernaccini cites:

Digest 9.2.7.4: “If one kills another in wrestling or in the pancratium, or in a sparring match, or in any public exhibition, there is no Aquilian liability, since the damage seems to be committed in the cause of honor and valor, not wrongfully (*iniuria*, a key word in the statute). But this does not hold in the case of a slave, since only freemen are accustomed so to contest; it does hold if a *filius familias* is wounded. Obviously the Aquilian action will lie if the plaintiff is wounded after he has given in, or if a slave not a party to the contest has been killed, but there is no action if his master has entered the slave in a private match.” If anything, this cuts the other way, because it makes clear that the absolution from liability depends on what we would call assumption of risk. The person who voluntarily enters into a boxing match takes the risk that he may get killed. But the Fabronis were not playing the ball game; indeed, they objected to its taking place. The question,

if we put it in terms of assumption of risk, is whether we can push the assumption back to the point where the Fabronis decided to refurbish the façade of their building in the summer rather than waiting for the autumn.

Digest 9.2.11pr: “Mela gives another case: if a ball game was going on and a player hitting the ball knocked it against the hand of a barber so that the throat of the slave being shaved by the barber was cut by the razor, whoever of them was negligent will be held under the *Lex Aquilia*. Proculus holds that the barber was at fault; and truly, if he was doing business near a place usually devoted to sport or where there was heavy traffic, he is partly responsible; but there is much to be said for the view that he who engages as a barber one who has set up his stool in a dangerous place has only himself to blame.” This is a bit closer. The key to the case, in my view, is that activity of both the barber and the ball-players takes place in the public square. I cannot imagine that the same result would have been reached if the barber had been in his barber shop and the ball came in through the window, though I must confess that I cannot think of a Roman authority directly on point.

(2) Further, there is no *culpa* and, therefore, no *iniuria* and no liability when the act causing damage is “*licit and permitted by law*.”

(3) According to the *communis opinio* of the *Doctores*, the ball game is considered a licit and permitted act which cannot be prohibited: *est de iure permissus, nec potest de iure prohiberi*.⁹ Further, in the particular case the game is to be considered licit and permitted precisely¹⁰ in the public square of Marradi, since there was an immemorial custom of playing it in the public square and, more importantly, because it was authorized by the Community Magistrate’s decree of July 20, 1778, that there was no other place where the game could be conveniently played; this decree, for lack of appeal, has become a *res iudicata*.

⁹ See *Il Museo Guarnacci*, *supra* note 1, at 16. The *Doctores* cited in the decision, in support of this principle, describe the *Ludus Pilae flatu plene*, the game of the ball inflated with air, as was played by hands or by the *sagibulo*. Amongst the *Doctores* cited is Franciscus A. Bonfini, a great judge of the *Rota Fiorentina*, during the first half of the 18th century, who wrote on the subject in his two works, *Ad Bannimenta* and *De Fideicommissis*. In the latter work, at *Disputatio* 93 of 1733, Bonfini, at the request of the *Magistrato Supremo*, gives a kind of inventory of the various games and plays, licit and prohibited, which were in use in Italy and in the world of the *ius commune*. Amongst the licit games, beside the “*gioco del pallone*,” he mentions the “*gioco del calcio*,” a kind of football which was played in Florence and Lucca.

¹⁰ The principles stated in paragraphs (1) and (2) as being of a general character were insufficient to eliminate liability, because it was also necessary to explain the legal reason why in the particular case the owners of the houses surrounding the public square had to suffer the inconvenience or the burden of conduct deriving from the games. On the other hand, if the ball game had been prohibited by law, there would have been no immunity from liability, even if the ball game had been authorized by the local custom or the decree of the Community Magistrate of July 20, 1778. In other words, the motives alleged in paragraphs (2) and (3) are interdependent.

(4) Therefore, since the game is an act *licit and permitted*, which in the particular case was *licit and permitted precisely* in the square of Marradi, the team was not liable for damages caused by the game to the houses surrounding the square.¹¹

¹¹ Here the decision, besides citing again the authorities cited in paragraph (2), cites other authorities. First of all, it cites the Digest 9.2 (on *Lex Aquilia*, 7, § 4 (*si quis*)). This text says that there is no *iniuria* in the case of boxing or other fighting in a public game when one of the parties is killed, because the harm is caused for the sake of glory and virtue, and not to commit an *iniuria*. Then, the decision cites *Doctores* interpreting that text; among them it again cites Bonfini. This author says that such custom (*consuetudo*) of boxing or fights excuses the fighting party (*ludentem*) from punishment

for assault and battery or homicide, if the game is done without fraud (*sine dolo*) in a place established for that purpose (*in loco ordinato et consueto*); however, he adds, if harm or death is caused *in loco non ordinato*, and in an illicit game, then according to the *Lex Aquilia*, there is punishment. This citation of the Roman text, the *Doctores*, and Bonfini is an instance of Vernaccini using the *argumentum a similibus*. See note 13 *supra* and accompanying text. Indeed, the harm or death considered by the Roman text, the *Doctores*, and Bonfini is caused to the other party of the game and not to the public or to property close to or surrounding the place where the game is played.

(5) Moreover, as was customary, the team notified the owners of the houses surrounding the square of the day on which the games would begin in order to allow them to adopt measures to protect items likely to suffer harm from blows by the ball. This notification represents an act of “diligence,” to avoid damages ensuing from a licit and permitted act. Indeed, some of the *Doctores* require that even in the case of a *licit and permitted act*, *diligentia* (care) must be used to avoid damages.¹²

¹². Here again, Vernaccini gives an example of an *argumentum a similibus* in his citation of authorities. Among the *Doctores* cited is Menochius (16th century), that when a person in a public game, permitted in a certain place, kills one of the spectators, there is no punishment, if any *culpa* is lacking. It is to be noted, first, that Vernaccini introduces here the idea that the game has to be played without *culpa*, *i.e.*, according to the ordinary or natural course of such games, and, second, that here a closer similarity is introduced, *i.e.*, the case of harm caused to one of the spectators. See note 27 *supra*. However, the *argumentum a similibus* is still stretched. Indeed, that spectator is a person who *willingly* puts himself in a position where he can suffer some harm deriving from the game in its ordinary course, while the owners of the houses did not put their houses *willingly* in such a position. However, there is a special similarity when the conduct of the Fabronis is considered, since they decided to restore the facade of their house knowing that the games were to be played in the square.

(6) The Fabronis ignored the notice and left exposed to possible damage items that could have been protected from harm. Similarly, they had embellished the facade of their house located where they knew the game was customarily played.¹³ Thus, the Fabronis *willingly* exposed themselves to the damages which could derive from the game. Therefore, the text of the Digest 11 *ad legem Aquiliam* is to be applied.¹⁴

¹³. This does not seem to mean that the Fabronis could never restore or embellish the facade of their house. Thus, they had the burden of doing that work during a proper time, after the season’s games and not in their imminence. If the work had been done in the proper time, it would have allowed ample time for the paint on the facade and the shutter to dry. Therefore, the blows of the ball would have dirtied the facade and the shutters only with that small quantity of dust that ordinarily adheres to the ball and which could be easily cleaned after the game. This was the usual and relatively small inconvenience that all the owners of the houses surrounding the square had to suffer, in good peace, *in buona pace*.

¹⁴. The text of Digest 9.2 (*Ad Legem Aquiliam*), 11, is a case involving the following facts: In the course of a ball game, the ball was pitched with great force striking the hand of a barber shaving a customer whose throat was cut. The *jureconsult* Proculus held that the barber, not the player, was at fault (*culpa*), because the barber conducted his business near an area where it was customary (*ex consuetudine*) to play the ball game, or where people passed frequently. Thus the barber is liable for damages toward his client, although it would not be wrong to say that the client could not complain if he permitted the barber, who keeps his shaving chair (*sellam*, not a shop) in a dangerous place, to shave his face. Here the *argumentum a similibus* seems to be nearer to the case in Vernaccini’s decision. The barber had *willingly* put his trade chair in a place where it was customary to play the ball game, and in a similar manner the Fabronis did not protect the windows and embellished the facade of their house in a place where it was customary to play the ball games. Despite that fact, there are some differences between the two situations.

(7) The Fabronis raised two objections to these arguments. First, they argued that the rules of immunity from liability in case of an act licit and permitted is applicable

only when, as a consequence of that act, nothing is introduced onto the neighbor's property: *nihil in alienum immittitur*.¹⁵ This objection must be rejected. While this is true where a work to be done is new and unusual, it does not apply, however, to a work already *pre-existing and usual*.¹⁶ Thus, the rule is not applicable in the instant case, since the ball game was not introduced *for the first time* in the public square of Marradi, nor played in a *new and unusual manner*, but rather was played in the public square since time immemorial, and it was intended that the game would continue there in the *ancient and usual* manner.

¹⁵. The text invoked by the Fabronis was Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. According to the Fabronis' objection, in the ball game what is introduced in the neighbor's property is the ball launched by the players. The Roman text deals with quite different cases of "immission," *i.e.*, "immission" of smoke or water from a factory or a land onto the neighbor's property, whereas here the ball is "immitted" by a group of persons. Here we find an *argumentum a similibus* adopted by the Fabronis' lawyer and discussed as such by Vernaccini.

¹⁶. Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* in their comments of the Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. However, these authorities deal with the case of a building, construction, or other similar work. Here again we find an *argumentum a similibus*: such building or work is considered similar to the ball game.

Motivations (2)–(7) are odd, and I think that Gorla has them right. It would seem that the Italian doctors of the *ius commune* made up lists of licit and illicit activities. One of the purposes of these lists was for purposes of determining liability. If one was engaged in an illicit activity, then the actor was absolutely liable for any damage that resulted. It seems pretty clear that this ball game was on the list for licit activity. Hence, no absolute liability. It also seems clear that because this is a licit activity it was within the discretion of the *magistrato* to say where it should take place. (They probably would have had no authority authorize an illicit activity.) The problem, of course, is that Vernaccini's conclusion (that because the activity is licit and authorized in this place, there is therefore no liability) does not follow, and I think he knew that because he goes on at some length after he has made that statement.

(8–11) Secondly, the Fabronis objected that future damages and the *cautio de damno infecto* for such damages were the main object of their action.¹⁷ Therefore, they argued that the pertinent law was not the *Lex Aquilia*, concerning damages already caused and requiring *culpa*; rather, the applicable law was *cautio de damno infecto*, under which the *cautio* has to be given also for future damages deriving from a licit and permitted act even if no *culpa* occurs. This objection too must be rejected. While this might be true in the case of future damages that one fears would derive from a *new and unusual* work it is not true in the case of damages which one fears would derive from a *pre-existing and usual* work. In the latter case, the obligation of giving the *cautio de damno infecto* presupposes *culpa*, if not a *culpa in committing* something, at least a *culpa in omitting* something, that is *negligentia*.¹⁸

¹⁷. It is to be understood that the Fabronis asked for a *cautio de damno infecto* as a safeguard for damages deriving from the games during the summer seasons following the year 1778.

¹⁸. Here the decision cites Donellus (a French author of the 16th century) in a work where, *inter alia*, he deals with cases of a house or similar work which was badly built, built with bad materials, or which the owner neglected or omitted to repair (*i.e.*, three cases of *culpa* or *negligentia*). For this *argumentum a similibus* see note 32 *supra*. [In 2003, Maggie Wickes suggested that the distinction that Vernaccini draws is ultimately based on D.39.2.43pr. This is worth pursuing. CD]

(12) Moreover, the law of the *cautio de damno infecto* has no bearing on the present case, since the object of the *cautio* is that of safeguarding against future damages

deriving from *extrinsic and accidental* defects of the work, and not against future damages deriving from *natural and intrinsic* defects such as wind.¹⁹

¹⁹. Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* concerning buildings or other similar works. See note 32 *supra*.

(13) Because the ball cannot always be directed by the players precisely where they want and, therefore, may strike surrounding houses, this constitutes a *natural and intrinsic* defect of the ball game.²⁰ Thus, damages deriving from such a game cannot be the subject matter of the *cautio de damno infecto*. On the contrary, this is a damage that the owners of houses located in a public square, where a game is played, have to suffer in good peace (*in buona pace*) as a natural and inevitable consequence of the location of their houses, similar to that suffered by the owner of inferior land from the natural and inevitable flow of water from the superior land of a neighbor.²¹

²⁰. Here again we find an *argumentum a similibus*: that is, the *natural and intrinsic* inconveniences (so called “defects”!) of the ball game are considered as similar to the *intrinsic and natural defects* of a building or other work or to the fact that the exceptional blow of the winds may disrupt some part of that building (*e.g.*, the tiles) and cause that part to fall on the neighbor’s property.

²¹. For this rule, Vernaccini cites *Doctores* in their treatises on the law of waters. See also C. civ. art. 640; La. Civil Code art. 660 (1870); Italian Civil Code art. 913 (M. Beltramo, G. Longo & J. Merryman transl. 1969). This is one of the “servitudes” deriving from the situation of lands or neighbor’s relations, the so called “legal servitudes” (*i.e.*, deriving from the law). Here we find the last and most significant *argumentum a similibus*, which can be considered as a metaphoric way of saying that on the houses surrounding the square there was a burden or legal servitude to suffer the inconveniences deriving from the public spectacles or “amusement” (*divertimento*) of the ball game. See notes 18, 29 *supra*. It is not a question of establishing which of the two, the customary spectacle or the building of the houses, preceded the other in order of time. Even if the houses were built before the establishment of the games, the owners had to suffer that servitude. On the notion of servitude see note 44 *infra*.

That brings us, then, to motivations (8)-(13) and the *cautio de damno infecto*, the action that the Fabronis had originally brought. In Roman law the *cautio de damno infecto* was a proceeding brought before the praetor for security (*cautio*) for damage not [yet] done (*de damno infecto*), when a landowner feared that building works being conducted on a neighbor’s property might damage his own property. The *cautio* in Roman law was a formal contract (*stipulatio*) to pay the damages that the building neighbor had to enter into. The purpose of the proceeding is a bit unclear from the surviving sources, but it would seem to convert a potential delictual liability into a contractual one. As a result, the building neighbor was probably strictly liable for any damage that his activity caused. Now Gorla is certainly right that the way that this worked in 18th century Italy was different from the way it worked in Rome. (There was no formal contract; instead someone stood surety for the folks who were conducting the ball game, but the result was the same as in the classical law.) Gorla is also right that there is, so far as I know, no authority in Roman law for giving the *cautio* when the potentially damaging activity is not being engaged in by another property owner. But the big question about the *cautio*, which Gorla doesn’t really answer, is whether the Roman sources in any way support Vernaccini’s various holdings that one who gives the *cautio* is liable only in the case of “new and unusual work” and not “pre-existing and usual work,” or, in later place, that it deals only with “extrinsic and accidental effects of the work” as opposed to “natural and intrinsic defects” of it. (I realize that Vernaccini cites decisional law on this topic, and I haven’t been able to get into that, but I have taken a look at what the basic Roman texts on the topic say.)

A few years ago, a student in this course wrote a paper on this case and came up with the

following text from Digest 39.2.43pr, which both she and I think is the likely source of Vernaccini's distinction: "A certain man promised indemnity against threatened injury to his neighbor. Tiles from his building were thrown by the wind upon those of his neighbor and broke them. The question arose whether any damages were to be paid. [Alfenus Varus] answered was that this should be done if what happened resulted from any defect or weakness of the building, but if the force of the wind was such that it could shake even a strong building, no payment could be collected. And even though it were provided in the stipulation that damages would be payable 'if anything should fall on it', nothing would be considered to have fallen, where anything was thrown down either by the force of the wind, or by any other external force, but only what collapses for intrinsic reasons." While it seems clear that this passage is at least one of the sources of the distinction that Vernaccini draws, he fails to note that what the passage deals with is an act of God. You can't sue God; you can sue the ball-players.

Mixed in with this material is material on servitudes. *Digest* 8.5.8.5 is cited twice in course of these discussions. It's a wonderful case; we ought to take a look at it:

Digest 8.5.8.5: "Aristo, in an opinion given to Cerellius Vitalis states, that he does not think that smoke can lawfully be discharged from a cheese-factory upon buildings situated above it, unless a servitude of this kind is imposed upon said buildings; and this is admitted. He also says that it is not legal to discharge water or anything else from an upper on to a lower building, as the party has only the right to perform such acts on his own premises as will not discharge anything upon those of another, and there can be a discharge of smoke as well as of water; hence the owner of the higher building can bring suit against the owner of the lower and allege that the latter had no right to do this. He says, in conclusion, that Alfenus holds that an action can be brought in which it is alleged that a party has no right to cut stone on his own ground in such a way as to allow the pieces to fall on my premises. Hence Aristo says that a man who rented a cheese-factory from the people of Minternæ could be prevented by the owner of a house above it from discharging smoke, but the people of Minternæ would be liable on the lease; and he also says that the allegation which he can make in his suit against the party who discharges the smoke is that he has no right to do so. ..."

The Bottom Line

1. As Gorla points out, the result of the case is to impose a servitude on the owners of property in the public square. This is odd because servitudes are normally regarded in the civil law as having to arise from the volition of the land owner (they normally cannot be prescribed) and because they must be for the benefit of the adjacent property not for the benefit of an individual.
2. The result is also quite startling, as Gorla also points out, when viewed in the light of modern Italian law. Today the ball game would be regarded as a dangerous activity. As such the burden would be on the doer to show that he had taken all suitable measures to prevent this from happening. I think the same would be reached in Anglo-American law under the principle of a case known as *Rylands v. Fletcher*.
3. Gorla gives us a nice account of both the legal and the historical background. I'm inclined to think that may be right when he says that the result that the judge (Vernaccini) reaches is a desired one, to appease the lower and middle classes at the expense of the nobility. [V. is working for the grand duke of Tuscany.]
4. But my main point, which I'll say a bit more about tomorrow is how little has changed. There's not much here that would surprise Bartolus.