Paries communis as an example of opposition between LEX (XII Tab. 7.1) and IVS (in D. 39.2.35-37)

The contrast between the rule of *ambitus*, drawn from the Law of the Twelve Tables, and the fact that party-walls were a very common feature in Rome is known to all. In this sense, this contrast corresponds to the central theme of our congress in Osaka, since to the rule drawn from the *Lex*, we oppose a common practice of the party-walls, itself consecrated by the *Ius*.

1. As for the Lex, the Law of the Twelve Tables:

The so-called "ambitus-rule" has been reconstructed as follows: "AMBITVS PARIETIS SESTERTIVS PES <esto>". Traditionally[1], neighbouring problems are located in table 7 of the Twelve Tables and the ambitus-rule would be 7.1. This sentence can be translated by: "Let the reserved space along a wall be two and a half feet!"
This reconstruction of the rule is not disputed and accepted as such, even though it causes quite some difficulties.

This "*ambitus parietis*" rule has been transmitted to us mainly by Varro (*De lingua Latina* 5.22.):

22. *Via quidem iter, quod ea vehendo teritur, iter item actus, quod agendo teritur ;* ***etiam ambitus <i>ter, quod circumeundo teritur : nam ambitus circuitus ; ab eoque Duodecim Tabularum interpretes 'ambitus parietis' circuitum esse describunt.*** *Igitur tera terra et ab eo poetae appellarunt summa terrae quae sola teri possunt, 'sola terrae'.*
Translation (by Roland G. Kent, Loeb 1938):
22. A 'road' (*via*) is indeed a 'way' (*iter*), because it 'is worn down' (*teritur*) by 'carrying in wagons' (*vehendo*); a 'driving-passage' (*actus*) is likewise an *iter*, because it is worn down by 'driving of cattle' (*agendo*). **Moreover an 'edge-road' (*ambitus*) is a 'way' (*iter*), because it 'is worn' (*teritur*) by the going around: for an edge-road is a circuit; from this the interpreters of the Twelve Tables define the *ambitus* of the wall as its circuit.** Therefore tera, terra; and from this the poets have called the surface of the earth, which *sola* 'alone' can be trod, the *sola* 'soil' of the earth.

[1] According to Michel Humbert (La loi des XII Tables, Paris 2018, p.318), this tradition starts with Dirksen.

The rule according to which one cannot build within 2 and a half feet of the boundary of one's land would therefore be the consequence of a need to let a person through and it is this repeated passage that creates the path, as well as the name of the rule. As such, this rule seems to imply that party-walls didn't exist in the times of the *Decemviri*. Or at least that they were not allowed. But it is unclear whether party-walls have indeed been prohibited. There is no archaeological evidence for this and Michel Humbert hypotheses that it might be that the rule was only applicable when someone did not want to build until the land limit. So, it could have been a facultative rule, applicable only if the neighbours wanted to leave some free space beyond their building. But this raises of course the question of the agreement between neighbours, and if you have an agreement between neighbours, it could include an agreement to build a party-wall. That would eventually mean that either you agree on building a party-wall, either you don't and then you must respect the *ambitus parietis sestertius* rule.
But it could also very well be, that we misunderstand the meaning of *ambitus*, because Publius Mucius Scaevola (in Cic. Topica 24) seems to have another definition of what *ambitus* means:

Cic. Top. 24 (...) *Quoniam P. Scaevola id solum esse ambitus aedium dixerit, quod parietis communis tegendi causa tectum proiceretur, ex quo tecto in eius aedis qui protexisset aqua deflueret, id ambitus videri*.
My translation:
Since P. Scaevola said that the *ambitus aedium* only corresponds only to the part of the forward roof used to cover the party-wall, (part of the) roof from which the water flows into the house of the person who arranged the advance, you must consider that this is the law.

As we can understand from this text, *ambitus* and party-wall are not exclusive from each other[2]. For Scaevola, the *ambitus* is not identifiable with the unbuilt strip of land excluding the presence of a party-wall. It is rather an area defined, beyond the party-wall, by the needs of the flow or collection of rainwater.

[2] On this, see particularly : Catherine Saliou, Les compétences juridiques de l'architecte d'après Vitruve (De architectura I, 1, 10), in Cahiers des études anciennes 48 (2011), 201-217 (210).

The drawing is taken from Michel Humbert (XII Tables, p.317).

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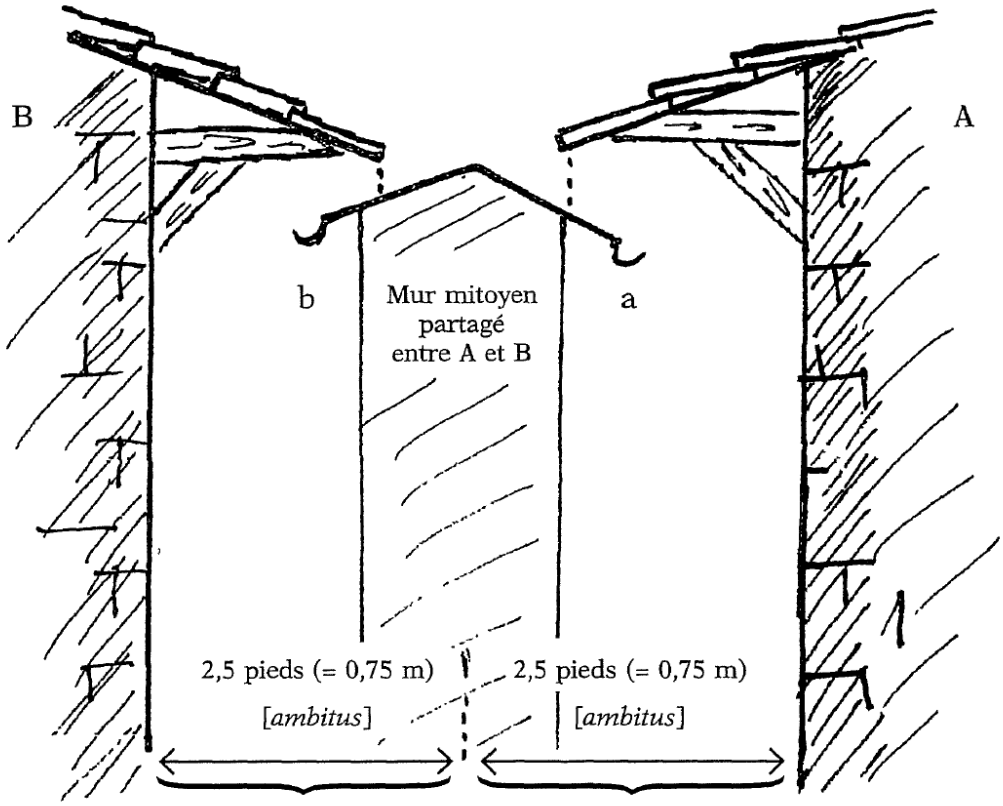

a) canal recueillant l'eau dégoûtant du toit et destinée à l'*impluvium* du propriétaire A
b) " " " " " " B

From architects like Vitruvius [3], we know that Roman architects too needed to know the law. For the population of

[3] Vitruvius (2.8.17): *Leges publicae non patiuntur maiores crassitudines quam sesquipedales constitui loco communi; ceteri autem parietes, ne spatia angustiora fiant, eadem crassitudine conlocantur. Latericii vero, nisi diplinthii aut triplinthii fuerint* (Lateritii vero, nisi diplinthii aut triplinthii fuerint. Πλίνθος, en grec, signifie brique. C'étaient donc des murs dont l'épaisseur se composait de la longueur de deux ou trois briques.) *sesquipedali crassitudine non possunt plus quam unam sustinere contignationem. In ea autem maiestate urbis et civium infinita frequentia innumerabiles habitationes opus est explicare. Ergo quum recipere non possent area plana tantam multitudinem ad habitandum in urbe, ad auxilium altitudinis aedificiorum res ipsa coegit devenire. Itaque pilis lapideis, structuris testaceis, parietibus caementiciis altitudines exstructae et contignationibus crebris coaxatae, cenaculorum ad summas utilitates perficiunt dispertitiones. Ergo moenibus e contignationibus variis alto spatio multiplicatis, populus Romanus egregias habet sine inpeditione habitationes*. English translation by Joseph Gwilt [https://lexundria.com/vitr/2.8.17/gw (6 September 2024)]: 17. The public laws forbid a greater thickness than one foot and a half to be given to walls that abut on a public way, and the other walls, to prevent loss of room, are not built thicker. Now brick walls, unless of the thickness of two or three bricks, at all events of at least one foot and a half, are not fit to carry more than one floor, so that from the great population of the city innumerable houses would be required. Since, therefore, the area it occupies would not in such case contain the number to be accommodated, it became absolutely necessary to gain in height that which could not be obtained on the plan. Thus, by means of stone piers or walls of burnt bricks or unsquared stones, which were tied together by the timbers

a city of the size of Rome, party-walls were inevitable because of the lack of space! And to build *insulae* of 6 or 7 floors, these (party-)walls needed to be thick enough, to be capable to carry these floors[4].

of the several floors, they obtained in the upper story excellent dining rooms. The Roman people by thus multiplying the number of stories in their houses are commodiously lodged.

[4] Vitruvius, 2.8.17 : La loi ne permet point de donner aux murs extérieurs plus d'un pied et demi d'épaisseur, et les autres, pour qu'il y ait moins d'espace de perdu, ne doivent pas être plus épais. Or, de telles murailles ne peuvent pas supporter plus d'un étage ; autrement il importerait qu'elles eussent dans leur épaisseur deux ou trois rangs de briques. Et dans une ville aussi majestueuse et aussi peuplée, il eût fallu un développement immense d'habitations. Aussi, comme l'espace que comprend l'enceinte de la ville n'est point assez vaste pour loger une si grande multitude, force a été d'avoir recours à la hauteur des édifices. Et, grâce au mélange d'assises de pierres, de chaînes de briques, de rangées de moellon, les murs ont pu atteindre une grande élévation ; les étages se sont assis les uns sur les autres, et les avantages se sont multipliés en raison de l'augmentation du nombre des logements. Les murs ayant donc, par la superposition des étages, pris un grand développement en hauteur, le peuple romain s'est créé de belles habitations sans difficulté.

But let's move to the fragment, that will be at the centre of the rest of our presentation.

Ulp., 42 ad Sabinum (D. 39.2.35) :
In parietis communis demolitione ea quaeri oportet, satis aptus fuerit oneribus ferendis an non fuerit aptus.
Paul., 10 ad Sabinum (D. 39.2.36) :
Sed ita idoneum esse plerique dixerunt, ut utrarumque aedium onera, quae modo iure imponantur, communis paries sustinere possit.
Ulp., 42 ad Sabinum (D. 39.2.37) :
Nam si non fuit, utique demolire eum oportuit nec debet, si quid damni ex hac causa attigit[5]*, is qui demolitus est teneri, nisi sumptuose aut parum bonus novus paries sit restitutus. quod si fuerit idoneus paries, qui demolitus est, in actionem damni infecti venit id, quanti interfuit actoris eum parietem stare: merito, nam si non debuit demoliri, restituere eum debet proprio sumptu. sed et si qui reditus ob demolitionem amissus est, consequenter restitui eum Sabinus voluit. si forte habitatores migraverunt aut non tam commode habitare possunt, imputari id aedificatori potest.*

English translation by Christopher.J. Tuplin, in Alan Watson's edition, 1998.
D.39.3.35 (ULPIAN, Sabinus, book 42):
In the case of the demolition of a party-wall, the question whether or not the wall was fit to support the weight put on it must be investigated.
D.39.2.36 (PAUL, Sabinus, book 10) :
Most authorities hold that the proper situation is for the party-wall to be capable of bearing the weight legally put on it by the two houses.
D.39.2.37 (ULPIAN, Sabinus, book 42) :
For if the wall is not suitable it is necessary to demolish it and if some injury occurs as a result, the person who did the demolition should not be held liable unless he spends too much or does a bad job in building a new wall. If, however, the wall that has been demolished was suitable, the matter comes within the scope of an action against anticipated injury for the amount of the plaintiff's interest in the wall remaining standing. This is as it should be since, if the wall ought not to have been demolished, the person who demolished it should restore it at his own expense. In addition, if there has been any loss of income as a result of the demolition, Sabinus wished that to be restored accordingly; and if the residents moved out or were unable to live as comfortably as before, this can be charged to the responsibility of the builder.

5 Dans le manuscrit de Bamberg (Staatsbibliothek Bamberg, Msc. Jur. 17), on trouve "*attingit*", mais avec un tilde ("~") sur le second "*i*". Dans le manuscrit du Vatican (Biblioteca Apostolica Vaticana, Pal. Lat., n. 754), on trouve clairement "*attigerit*". Dans l'édition "Haloander, on trouve "*contigit*". Dans l'édition de Gothofredus, "*attigit*" est remplacé par "*contigerit*". Chez Hesse (Hesse Ch.A., *Über die Rechtsverhältnisse zwischen Grundstücksnachbarn*, T.1, Eisenberg 1859, p. 110 s.), "*attigit*" est remplacé par "*contigit*". Ces leçons ne sont cependant pas signalées dans l'*editio maior* de Mommsen, qui propose de remplacer "*attigit*" par "*accidit*".

To be honest, I'm not so happy with the translation of Tuplin, for many reasons. To name just one: of course, I consider it a problem, when "*damnum*" is translated by "injury" ... and we're talking about the revised version of the English translation of 1998. But never mind: we will work with the Latin version anyway, the translation being there only to ease the access to the content.

In the main fragment, Ulpian addresses the question of the demolition of a party-wall. And about this, he writes that a distinction must be made according to whether or not the wall was capable of supporting constructions[6].
In order to clarify the terms of the distinction, the Compilers chose to insert here a text by Paul, which specifies when a wall can be considered *idoneus*, or suitable. The palingenetic context of this text written by Paul is interesting, as Lenel puts it immediately after D.9.2.45.5 (*qui idoneum parietem sustulit, damni iniuria domino eius tenetur*. He who removes an *idoneus* wall is liable to its owner for wrongful damage.). So, Book 10 of Paul's comment on Sabinus seems to elaborate both on the *lex Aquilia* and the *damnus infectus*, the future damage.

Ulpian's text goes on saying that if the party-wall is not *idoneus*, it must be demolished anyway. Whoever demolished it should not be held responsible for the damage that this demolition could have caused, unless the new wall was badly done, or at too great a cost.
On the other hand, if the party-wall – which has been demolished – was *idoenus*, the applicant may apply for the *id quod interest* on the basis of the *actio damni infecti*. Ulpian justifies this position by the fact that it is normal for anyone who destroys a wall that should not have been destroyed to have to rebuild it at his own expense.
At the end of the fragment, the jurist adds that since Sabinus, the *id quod interest* includes the *lucrum cessans* and gives an example for this: if tenants have had to be moved, or have been hindered in their enjoyment, the defendant must compensate them.

6 Afin de préciser les termes de la distinction, les Compilateurs ont choisi d'insérer à cet endroit un texte de Paul, qui précise quand un mur peut être considéré idoine: Paul., *lib. 10 ad Sabinum* (D. 39, 2, 36): *Sed ita idoneum esse plerique dixerunt, ut utrarumque aedium onera, quae modo iure imponantur, communis paries sustinere possit*. Un mur est donc considéré comme idoine, s'il est apte à supporter chacun des édifices qui, d'après le droit, peuvent s'appuyer sur ce mur indivis.

Discussion about the text:
In the Florentine maunscript, we can read: "*si quid damni ex hac causa attigit*". The use of "attingere" is surprising, as it is very unusual. Our text is the only one, in the Roman legal sources we have, where *damnum* is subject to *attingere*. In this context, "*accidere*" or "*contingere*" are much more common.
Mommsen [7] therefore proposes to replace "*attigit*" by "*accidit*". But actually, Ulpian seems to use the verb "*contigere*" very often in the context of a *damnum infectum*[8] and this would probably be at least as plausible as "*accidere*[9]".
By the way, Gerhard Beseler[10] also replaced "*attigit*" by "*contigit*" but with the justification that it was an interpolation of course.
In my view, "*contigerit"*, which is found in Godefroy, is the best lesson of the passage, without it being possible to be certain that that was also the term used by Ulpian. In any case, the meaning of the text is only slightly affected by this uncertainty.

Some more interpolationistic critique:
The Interpolationists[11] criticized the fragment on many other points too. Beseler[12] attacked the words "*somptuosus*" and "*somptuose*", because they appear only once in the Digest.

7 V. supra, note 5.
8 Au titre 39, 2 du Digeste, nous trouvons 7 textes d'Ulpien, contenant 8 fois "*damnum contingere*": Ulp., *lib. 53 ad ed.* (D. 39, 2, 71); Ulp., *lib. 53 ad ed.* (D. 39, 2, 13, 15); Ulp., *lib. 53 ad ed.* (D. 39, 2, 15, 18); Ulp., *lib. 53 ad ed.* (D. 39, 2, 15, 28): 2 fois; Ulp., *lib. 53 ad ed.* (D. 39, 2, 15, 31); Ulp., *lib. 81 ad ed.* (D. 39, 2, 30 pr.); Ulp., *lib. 43 ad Sab.* (D. 39, 2, 40, 1). En dehors de ce titre, il y a encore 3 autres occurrences: Ulp., *lib. 53 ad ed.* (D. 39, 3, 6, 6): 2 fois; Ulp., *lib. 25 ad ed.* (D. 47, 12, 3, 8).
9 One could imagine that the copyist misunderstood the abbreviation of the prefix, in which case "*contigere*" would be more appropriate. Moreover, the relationship of time is better marked with the anterior future (*attigerit, contigerit*) than with the perfect (*attigit, accidit, contigit*).
10 Beseler G., *Unklassische Wörter*, ZSS 57 (1937), p. 7.
11 Plusieurs auteurs admettent — parfois partiellement ou implicitement — les thèses interpolationnistes, mais sans donner de justifications particulières: Gaudemet J., *Étude sur le régime juridique de l'indivision en droit romain*, Paris 1934, p. 269; Longo G., *Corso di diritto romano - i diritti reali*, Padova 1962, p. 71 s.; Medicus D., *Id quod interest*, Köln-Graz 1962, p. 270 s.; Tafaro S., *Il giurista mediatore tra istanze sostanziali e schema pocessuale: l'actio ex cautione damni infecti*, INDEX 5 (1974/1975), p. 89 n. 27. V. aussi, plus récemment: Frier B.W., *Landlords and Tenants in Imperial Rome*, Princeton 1980, p. 102 s. Après avoir déclaré que le fragment est fortement ("heavily") interpolé (p. 102), il admet qu'il est le résultat d'une abréviation (p. 103 n. 113). L'interpolation serait donc formelle et n'aurait pas altéré le fond. Également: Frier B.W., *Tenant Remedies for Unsuitable Conditions Arising after Entry: A Roman Law Perspective on Modern American Law*, Studies A.A. Schiller, Leiden 1986, p. 72 n. 31.
12 Beseler G., *Unklassische Wörter*, ZSS 56 (1936), p. 97.

Still, these words are of common use in the literary sources[13]. A similar remark can be made about the word "*aedificator*[14]". Beseler[15] also attacks the 'tam' used with an adverb, but without a correlative particle. He reviews all the texts provided by the VIR and considers them all interpolated, without giving any further justification. In any event, the absence of the correlative particle does not allow any conclusion to be drawn as to the interpolation of the text. The "tam" used in such a way can either give the adverb a sense of superlative (meaning: "not very conveniently") or mean "as" (in the meaning; "not as conveniently"). In the Ulpian text, it is the second reading that must be retained.

Then there is also Giuseppe Branca[16], who specifically addressed the phrase "*quanti interfuit actoris eum parietem stare: merito, nam si non debuit demoliri, restitutione eum debet proprio sumptu*". The author believes that the *stipulator* cannot obtain compensation for damage other than that suffered by his own property, or by the party-wall itself. Through the *cautio*, however, the *stipulator* agreed to the work undertaken by the *promiseor*, even if in the strictness of the principles, they are illegal. Branca infers from this that it was therefore impossible for the *stipulator* to claim compensation for the damage resulting from the construction of the *opus* in question. The author considers this to be a "singular confusion[17]" that can only be attributed to Compilers.

In my view, as with many scholars[18], Branca's position does not hold. It is not clear why the *cautio* – especially if it is imposed by the praetor – would a priori legitimise an inadequate reconstruction of the party-wall. With Rainer[19], I believe that the applicability of the *cautio* is not limited to cases where the wall felled was *idoneus*.

13 V. pour *sumptuose*: Varro, *de re rust*., 3, 17, 6; Catullus, 47, 5; Suetonius, *Claud.*, 16, 4; Cicero, *Catil*., 2, 20; Plinius minor, *ep*., 9, 12, 1. Pour *sumptuosus*, v.: Cato, *de agr.*, 1, 5; Varro, *de re rust*., 2, 4, 22; Vitruvius, 1, 2, 8; Livius, 45, 3, 5; Columella, 7, 3, 22; Plinius minor, *ep.*, 2, 4, 3 et 2, 17, 4; Suetonius, *Nero*, 9; Apuleius, *Met*., 4, 13.

14 Beseler [Beseler G., *Unklassische Wörter*, ZSS 57 (1937), p. 2] pense que ce mot est interpolé, parce qu'il n'apparaît que deux fois dans le Digeste [Outre notre texte, v.: Venul., *lib. 1 stipulationum* (D. 45, 1, 137, 2)]. V. cependant: Cato, *Agr.*, 1, 4; Vitr. 6, 6, 7.

15 Beseler G., *Beiträge zur Kritik der römischen Rechtsquellen*, ZSS 66 (1948), p. 372 s.

16 Branca G., *Danno temuto e danno da cose inanimate nel diritto romano*, Padova 1937, p. 327 et p. 493 s.

17 V. Branca, *op. cit.*, p. 494.

18 V. : Medicus D., *Id quod interest*, Köln-Graz 1962, p. 270 s. n. 33; Palma A., *Iura vicinitatis*, Torino 1988, p. 215; Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 505 s.

19 Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 505 s.

Recent doctrine[20] has resolutely opposed the interpolationist assumptions made about our fragment.

However, one point that deserves to be emphasised is that the text speaks of *actio damni infecti*, whereas all the authors speak of *cautio damni infecti*. On this specific point, the interpolation seems obvious to the most recent doctrine, because, as Masi[21] writes, with the disappearance of the formulas, the Romans no longer spoke of *cautio damni infecti*, but of *actio damni infecti*. Ulpian is therefore dealing with the *cautio*[22]. This seems to be confirmed by another text of Ulpian: D. 39.2.33 (42 Sab.): *Inquilino non datur damni infecti actio, quia possit ex conducto agere, si dominus eum migrare prohiberet*.
But on the other hand, in several other fragments, the Compilers left the "*cautio damni infecti*" (see e.g. D.9.2.27.10; D.39.2.13.2; D.39.2.20pr.; D.39.2.39pr.; D.39.3.3.3; D.43.23.1.14).
The question is now: is it an interpolation, a mistaken or incomplete interpolation or is it just the evolution of Roman jurisprudence towards the end of the Classical era?

The latter is not totally impossible in my view. As an argument, I propose to read rapidly a text written by Paul:

Paul (49 ed.) D. 39.3.11.3: (...) *Magisque existimat id servandum in aquae pluviae arcendae actione, quod in actione damni infecti, quia utrubique non de praeterito, sed de futuro damno damno agitur*.
Translation by Tuplin: (...) And Julian thinks that this should be observed even more in the *actio aquae pluviae arcendae* than in the *actio damni infecti*, because in both cases it is not a question of a past damage, but of future damage.

20 V. en ce sens: Astolfi R., *I libri tres iuris civilis di Sabino*, Padova 1983, p. 171 s.; Palma A., *Iura vicinitatis*, Torino 1988, p. 215; Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 505.
21 Masi A., *Denuncia di nuova opera (storia)*, ED 12, Milano 1964, p. 165: "Scomparse le formule, la pretesa diretta ad ottenere la *cautio* viene inquadrata nel sistema delle *actiones*: si parla perciò di *actio damni infecti*." Pour mémoire, notons que Wlassak (*Römische Processgesetze*, 1, Leipzig 1888, p. 241 s.) ne semble pas avoir pensé à l'interpolation et écrit que l'*actio damni infecti* dont parle Ulpien ne convient, en principe, ni pour désigner la caution, ni l'*actio ex stipulatu* qui en découle. D'après le contexte, il conclut cependant qu'Ulpien désigne ici l'*actio ex stipulatu*.
22 Lenel (*Das Sabinussystem*, Strasbourg 1892, p. 71) pense que la terminologie utilisée permet de conclure que dans les œuvres de Sabinus (notre texte est tiré des commentaires *ad Sabinum* d'Ulpien), la matière du "dommage redouté" était étudiée dans le cadre de l'action civile. Cette remarque ne nous semble cependant pas remettre en question le fait que dans le texte d'Ulpien, notre question est bien abordée sous l'angle de la *cautio*.

This time, I cannot imagine that the text has been interpolated, because Paul really makes a comparison between the *actio aquae pluviae arcendae* and the *actio damni infecti*. And to me, this text makes sense almost only if it is comparing two actions. N.B.: Sitzia[23] considers this comparison strange, but unless you consider that everything has been invented by the compilers, you almost have to accept the idea that Paul made such a comparison.

[23] Francesco Sitzia, ricerche in tema di « actio aquae pluviae arcendae » dalle XII tavole all'epoca classica. Giuffrè. Milano 1977, p. 193 : « ... appaia ben strana una comparazione tra un'*actio civilis* e un mezzo pretorio di tutt'altra natura ».

Practical situation:
In practice, the situation portrayed by Ulpian is as follows. Primus and Secundus are co-owners of a party-wall. Primus would like to support a construction on this wall, but it is not strong enough for this purpose. Now, as it is said in Paul's fragment [lib. 10 *ad Sabinum* (D. 39.2.36)[24]] and Cicero[25], this is a right arising from the co-ownership of a party-wall. If Secundus[26] opposes the restoration or reconstruction of the wall, Primus will be able to assert its right in court[27]. In return, Secundus will be able to protect himself against the damage he would incur by destroying the wall, by forcing Primus to promise a *cautio damni infecti*. This *cautio* will be conventional if Secundus has not opposed the works; otherwise, it will be imposed by the praetor.

In the event that the co-owners do not agree, the praetor will grant Primus the right to tear down the party-wall, provided of course that it is not *idoneus*. As Paul writes[28], this means that the wall is not capable of supporting the buildings which

24 Le texte de ce fragment est reproduit supra, note 2.
25 Cicero, *top.*, 4, 22: *Ab efficientibus causis, hoc modo: "Omnibus est ius parietem directum ad parietem communem adiungere vel solidum vel fornicatum. At si quis in pariete communi demoliendo damni infecti promiserit, non debebit praestare quod fornix vitii fecerit". Non enim eius vitio qui demolitus est damnum factum est, sed eius operis vitio, quod ita aedificatum est ut suspendi non posset*. Sur ce texte, v. en particulier: Nörr D., *Cicero, Topica 4.22. Zur Anwendung der 'cautio damni infecti' bei einer Kommunmauer*, Symposion 1977 (Köln 1982), p. 269 ss.
26 En tant que copropriétaire d'un bien indivis, Secundus dispose d'un *ius prohibendi*: v.: Gai., *lib. 7 ad edictum provinciale* (D. 8, 2, 8): *Parietem, qui naturali ratione communis est, alterutri vicinorum demoliendi eum et reficiendi ius non est, quia non solus dominus est*. Notons que, comme le montre le fragment reproduit à la note suivante, ce *ius prohibendi* n'a pas un effet définitif dans les cas où une réparation s'avère indispensable. V. en ce sens: Emmerich, *Verbot der Demolition einer gemeinschaftlichen paries*, Zeitschrift für Civilrecht und Prozeß N.F. 18 (1861), p. 123 ss (Notons cependant que pour cet auteur, le "*paries*" dont il est question dans le texte de Gaius n'est pas à proprement parler un mur mitoyen, mais plutôt une haie mitoyenne); Hesse Ch.A., *Über die Rechtsverhältnisse zwischen Grundstücksnachbarn*, T.2, Eisenberg 1861, p. 248 ss; Hesse Ch.A., *Ueber die prohibitoria actio und über die Frage, ob Miteigenthümer gegen einander die Negatoria erheben können*, Jher.Jb 8 (1866), p. 69; Burckhard H., in Glück, *Ausführliche Erläuterungen der Pandecten*, 39-40, 2, Erlangen 1875, p. 115 ss; Gaudemet J., *Étude sur le régime juridique de l'indivision en droit romain*, Paris 1934, p. 269 n. 1; Longo G., *Corso di diritto romano - i diritti reali*, Padova 1962, p. 73 s.; Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 500 s.; Saliou C., *Les lois des bâtiments*, Beyrouth 1994, p. 68 ss.
27 Un autre fragment d'Ulpien nous apprend que Primus disposait à cette fin de l'action *communi dividundo* et de l'interdit *uti possidetis*. v.: Ulp., *lib. 71 ad edictum* (D. 10, 3, 12): *Si aedes communes sint aut paries communis et eum reficere vel demolire vel in eum immittere quid opus sit, communi dividundo iudicio erit agendum, aut interdicto uti possidetis experimur*. Notons que d'après Bonfante [Bonfante P., *Corso di diritto romano*, Roma 1926, T 2/2, p. 37 s. (Rist. Milano 1968, p. 48 s.)], la référence que fait ce texte à l'*actio communi dividundo* est interpolée. Dans le même sens: Longo G., *Corso di diritto romano - i diritti reali*, Padova 1962, . 73 s. Contra: Berger A., *Zur Entwicklungsgeschichte der Teilungsklagen*, Weimar 1912, p. 235 ss. Rainer [Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 500 s.] pense quant à lui qu'il est tout à fait imaginable que le fragment tel qu'il est parvenu par la Compilation de Justinien reflète fidèlement l'état du droit sous le règne des Sévères. Rainer (p. 502) admet cependant que l'interdit *uti possidetis* était le moyen normal et originel destiné à contrecarrer le *ius prohibendi*.
28 V. supra note 2.

the co-owners intend to build on it. However, this verification seems to have been difficult to carry out practically. It appears that, usually[29], the application — made by means of an *interdictum uti possidetis* [30] — was examined only superficially, and that the authorisation to demolish was granted on the basis of appearance. In return, the defendant's situation was protected by means of a *cautio damni infecti*. Thus, verification of the quality of the wall was postponed until it was demolished. It was probably only by demolishing the wall that its solidity could really be checked.

If it comes out that the demolition of the wall was inevitable because it was not *idoneus*, nobody will be liable for an eventual damage deriving from the destruction. Both co-owners will thus have to pay half of the cost of the works.

On the other hand, other situations, with another outcome, are also possible. It could be that Secundus will suffer a damage he will be allowed to claim a compensation for.
For this purpose, Secundus will rely on the *cautio damni infecti*. By acting *ex cautione*, he might be able to obtain the amount of the interest he had in the wall not being demolished.

This is the case in three situations:
Or when Secundus proves that the demolished wall was actually *idoneus*;
when Primus rebuilt a low-quality wall;
or finally when this wall has been rebuilt at too great a cost.

If Secundus can prove that they are in one of these three cases, Primus will be liable to it for the *id quod interest*, and will have to bear the cost of reconstructing the wall alone. The amount of this *id quod interest* shall be understood — at least starting from the time of Sabinus[31] — as including *lucrum cessans*. Thus, if Secundus leased the building adjacent to

29 V. en particulier: Rainer J.M., *Der Paries communis im klassischen römischen Recht*, ZSS 105 (1988), p. 503 s. V. aussi: Hesse Ch.A., *Über die Rechtsverhältnisse zwischen Grundstücksnachbarn*, T.1, Eisenberg 1859, p. 110; Burckhard H., in Glück, *Ausführliche Erläuterungen der Pandecten*, 39-40, 2, Erlangen 1875, p. 117 s.; Nörr D., *Cicero, Topica 4.22. Zur Anwendung der 'cautio damni infecti' bei einer Kommunmauer*, Symposion 1977 (Köln 1982), p. 27 n. 16.
30 V. supra note 21.
31 Sur la doctrine attribuable à Sabinus, v.: Schulz F., *Sabinus-Fragmente in Ulpians Sabinus-Commentar*, (rist.) Labeo 10 (1964), p. 264 s.; Astolfi R., *I libri tres iuris civilis di Sabino*, Padova 1983, p. 171 s.; Astolfi R., *Passi di Sabino nel commentario di Paolo*, Studi Sanfilippo 4, Milano 1983, p. 35.

that of Primus and, as a result of the works, the enjoyment of the building by its tenants has been reduced or has become impossible, the loss in rents which would result from it is included in the *id quod interest*.

What is of particular interest to me in this text is the justification given in the event that Primus is not liable for the damage suffered by Secundus. In writing that the wall should have been demolished anyway (*utique demolire eum oportuit*), Ulpian insists that the damage is not due to the demolition by Primus, but rather the consequence of the fact that the wall was not *idoneus*. The words '*ex haec causa*' refer to the first words of l.37: "*Nam si non fuit... (idoneus)*"[32].

According to Bonfante[33], "*ex haec causa*" here means "*vitium operis*".
But before Bonfante, Cujas[34] and already the Glossators[35] were also already talking about a flawed wall in our context:

Glossa "In parietis communis demolitione" ad D.39.2.35:
"*Si vero in culpa non fuisti: puta quia vitiosus erat, & minabatur ruinam, & aedium onera sustinere non poterat: non teneris mihi quia restituisti alium demoliendo veterem (...)*".
My translation: But if you were not at fault: suppose that it was defective, and threatened to collapse, and the building could not bear the burdens: you are not liable to me because you restored another by demolishing the old.

But the *glossa* takes a broader picture than Bonfante and sees more than just the case of a flawed wall and considers the insufficiency of the party-wall: "*& aedium onera sustinere non poterat*".

Vitium operis, referred to above, is obviously not the one which gives rise to liability *ex cautione damni infecti*[36]. The

32 Il est vrai que ces points de suspension ne renvoient précisément à "*idoneus*" que dans la Compilation du Digeste, puisque le mot est tiré du fragment de Paul (supra note 2). Ulpien (l. 35) s'exprime de manière légèrement différente: "*si non fuerit aptus oneribus ferendis*". Le contenu de ces mots nous semble cependant équivalent.
33 Bonfante P., *Corso di diritto romano*, Roma 1926, T 2/1, p. 339 (Rist. 1966, p. 399).
34 Cuiacius J., *Operum postumorum*, T. 7, Neapoli 1722, col. 415 (ad D. 8, 2, 13, 1).
35 V. Gothofredus D., *Digestum novum*, Lugduni 1603, *Glossa "In parietis communis demolitione*" (ad D. 39, 2, 35), col. 89 s.
36 V. en particulier Giaro [Giaro T., *Il limite della responsabilità ex cautione damni infecti*, BIDR 78 (1975), p. 272 s.], qui oppose le dommage dû au *vitium* (*aedium, loci, operis*) pour lequel le promettant est tenu, à celui dû à

defect to which Primus responds is not that of the party-wall, but the *vitium operis quod fit*[37], that is to say, the defect inherent in the act which he has been authorised to perform: the destruction and reconstruction of the party-wall. Primus' *cautio damni infecti* therefore does not cover the vice of the wall. Bonfante[38] also defines the '*vitium operis*' referred to here as an objective fact which excludes subjective fault. It is true that Ulpian does not hold anyone responsible for the wall's defect: If it is not *idoneus*, the cost of reconstruction will have to be borne by the two co-owners.

This is a consequence of the fact that the adjoining wall is an undivided property, the conservation of which is in the interests of both[39]. It is undeniable, however, that if the *vitium operis* had been attributable to only one of the co-owners, he alone would have had to provide for the reconstruction of the wall. This is also what we can draw from our text, since Ulpian states that if someone builds a '*parum bonus*' party-wall, he must bear his reconstruction '*proprio sumptu*'. Rather, it seems that here we are faced with a case where a *paries communis* which was *idoneus* is no longer *idoneus*. This can be either because it has become too old or because Primus decides to support a new construction, requiring a more robust party-wall.

With regard to '*vitium operis*', it must be borne in mind that a wall which is not *idoneus* is a wall which threatens to ruin, as the gloss[40] referred to above might suggest. Rather, it is a wall that threatens to collapse if the construction that Primus wants to support is built. It may indeed be considered that this is a defect of the party-wall, in so far as its function is to support the constructions which the co-owners intend to build on it.

The gloss referred to above[41] also seems to say that Primus is not liable for the damage incurred by Secundus as a result of the demolition of the party-wall because he did not commit

la force majeure, excluant toute responsabilité de celui-ci.
37 Sur la notion, v.: Masi A., *Denuncia di nuova opera (storia)*, ED 12, Milano 1964, p. 163 et p. 165.
38 Bonfante P., *Corso di diritto romano*, Roma 1926, T 2/1, p.339 (Rist. 1966, p. 399).
39 En ce sens, v. aussi: Palma A., *Iura vicinitatis*, Torino 1988, p. 214 ss, 216.
40 V. supra texte et note 34.
41 V. supra texte et note 34.

any fault[42]. In my view, such an interpretation of the solution proposed by Sabinus and Ulpian cannot be accepted though. There can be no question of verifying whether Primus committed a fault in destroying the wall, since except in the case of a contractual *cautio damni infecti* it was the praetor who granted him the right.

In the end[43], Primus is not bound because Secundus did not suffer any damage. The destruction of the wall had become necessary because it was not *idoneus*. This last explanation seems to us more correct.

Indeed, Ulpian writes that the defect of the wall (the fact that it is not *idoneus*) has the consequence that the wall must be demolished in any event. This demolition may result in damage to Secundus. The Jurist insists, however, that it was the fact that the party-wall wasn't sufficient to carry a heavier weight that caused (*ex hac causa*) the damage. Consequently, the perpetrator of the demolition (Primus) cannot be held liable.

Vice versa, if Primus had been allowed by the praetor to destroy the wall, but that by tearing it down, it appears that the wall was *idoneus*, then Primus will have to bear the costs alone, even though you still cannot claim that he committed a fault, as he had been authorised to do so by the praetor. So, there's still no problem of fault. But in the application of the *cautio damni infecti*, Primus will pay for the damage alone, as he promised to do (or as he was force to promise by the praetor).

As a conclusion, we can see that the IVS about party-walls was rather sophisticated, notwithstanding the initial question, whether the LEX of the twelve tables allowed the very existence of party-walls.

42 La même position semble encore avoir été adoptée par von Tuhr (von Tuhr A., *Zur Schätzung des Schadens in der Lex Aquilia*, Basel 1892, p. 12 n. 6). À cet endroit, l'auteur allemand défend l'idée que dans certains cas, si un bien est soumis à la menace d'être détruit, il a déjà perdu toute sa valeur. Il pense donc qu'une destruction anticipée de ce bien ne saurait pas entrainer l'application de la *lex Aquilia*. Nous avons déjà eu l'occasion de montrer que cette interprétation ne pouvait pas être retenue [V. supra (1e partie chapitre 1), notre exégèse de Ulp., D. 43, 24, 7, 4, point 3.6.]. Le cas du *paries communis*, qui nous occuppe, semble cependant échapper à cette explication d'après von Tuhr. Il semble que si Primus n'est pas tenu, c'est parce qu'il n'a pas commis d'*iniuria* ("Rechtswidrigkeit").
43 Burckhard H., in Glück, *Ausführliche Erläuterungen der Pandecten*, 39-40, 2, Erlangen 1875, p. 118.

On causation:
In the case of a *paries communis non idoneus*, the actual harmful event is the demolition by Primus. However, the fact remains that this wall had to be demolished anyway, and that if Primus had not done so, it would have collapsed anyway. If he had supported a construction on the party-wall — as is his right — the wall would have collapsed. The possibility of supporting a heavier construction than could be supported by the adjoining wall therefore constitutes the hypothetical harmful event.

Il est intéressant de comparer ce texte à un autre que nous avons examiné auparavant [44]. Il s'agit du cas où quelqu'un abat une maison qui aurait de toute façon été détruite par un incendie. Dans les deux cas, quelqu'un détruit une construction appartenant à son voisin sans être tenu du dommage qui en résulte, parce que cette construction était de toute façon destinée à périr.

Dans les deux cas également, la vérification de la réalité du fait dommageable hypothétique est postérieure à la réalisation effective du dommage. Dans le cas de l'incendie, on vérifie jusqu'où le feu progresse après que la maison ait été démolie, afin de vérifier si la maison eût également péri dans l'incendie. Dans le cas du mur mitoyen, on vérifie si le mur était réellement inapte à supporter les constructions des deux voisins, après la destruction de celui-ci.

Il y a cependant une grande différence au niveau de la justification du pourquoi celui qui abat la maison ou le mur n'est pas tenu. Dans le cas de l'incendie, Ulpien écrivait qu'il n'y avait pas de dommage si la maison eût de toute façon péri. Dans le cas du mur mitoyen, Ulpien s'exprime de manière très différente: "*si quid damni ex hac causa attigit*". La réalité du dommage n'est pas niée. Le jurisconsulte utilise le mot "*causa*" pour désigner la cause du dommage (Le mur n'est pas apte à supporter les constructions des coindivisaires). C'est donc parce que telle est la cause du dommage qu'Ulpien dit que "*nec debet is qui demolitus est teneri*".

44 V. supra (1e partie chapitre 1), notre exégèse de Ulp., D. 43, 24, 7, 4.

Comme on le constate, la solution dans le cas du mur mitoyen est clairement fondée sur une réflexion prenant en compte le lien causal.

En revanche, les deux cas diffèrent sur la nature du fait dommageable hypothétique. Alors que l'incendie, tout en pouvant avoir une origine humaine, est considéré comme étant une *vis cui resisti non potest*, un cas de force majeure, on ne peut pas en dire autant du fait que le mur mitoyen n'est pas apte à supporter la construction que Primus voudrait y appuyer.

Il reste cependant que dans la mesure où c'est le droit qui autorise les coindivisaires d'un mur mitoyen à y appuyer des constructions, il ne saurait être reproché à Primus d'avoir appliqué le droit. En ce sens, Primus ne saurait être tenu du fait dommageable hypothétique.

Au moment de la destruction du mur par Primus (fait dommageable effectif), il sera donc vérifié si le mur était ou non apte à supporter la construction en question. S'il ressort de cette vérification que le mur n'était pas *idoneus*, cela signifie donc que si Primus avait appuyé sa contruction sans démolir le mur au préalable, celui-ci se serait de toute façon écroulé (fait dommageable hypothétique). Cette vérification atteste donc de l'existence du fait dommageable hypothétique, et c'est celui-ci qu'Ulpien retient comme étant la cause du dommage subi par Secundus.

En ce sens, la chaîne causale hypothétique, en fonction de laquelle le mur se serait de toute façon écroulé, est dépassée par la destruction du voisin.

L'analyse de la causalité est différente lorsque l'on se trouve dans une situation où les protagonistes ont déjà des liens obligationnels entre eux. Ici, c'est le droit (*iure imponantur*[45]) qui détermine dans quelles conditions un mur mitoyen est *idoneus* ou non. En ce sens, Secundus est tenu de supporter les dommages qui découlent d'une simple application du droit.

45 V. D. 39, 2, 36, supra note 2.