BOOK REVIEW

Gardens & Neighbors: Private Water Rights in Roman Italy. By CYNTHIA JORDAN BANNON. Ann Arbor: The University of Michigan Press, 2008. ISBN 0-472-033530.*

Bannon's excellent study on servitudes is as creative and as difficult to find in the study of Roman law and in general in the study of ancient laws. As she expressly states, her approach is based on the paradigm 'Law and Economics', better known as 'Economic Analysis of Law'. She works along the line of the American scholar Dennis P. Kehoe, who has widely employed this approach and to whom the author is highly indebted[1].

For different reasons, the Economic analysis of law is an approach that classical scholars have rarely been familiar with. Jurists are more or less familiar with his paradigm but their usual approach, where Roman law is concerned, is rather to be focused on the so-called historical and dogmatic method, with deep roots in the interpolation critique and also in the Pandectistic, the German nineteenth century jurisprudence of concepts constructed on the commentary of the Justinean Pandects. In America, where Law and Economics has its origin, some jurists such as Bruce Frier or Dennis Kehoe with a classical background have been able to develop such a study in the field of Roman law.

The book under review offers a new interpretation of water rights by analyzing the Roman category of the *servitutes.* Bannon stress the economic value of those rights bearing in mind wealth maximization. Concepts such as the 'tragedy of commons' or considerations on the economic model are normally used to tackle the question of how the Romans solved the problem of rationing a common resource But at the same time, traditional tools such as the dogmatic analysis of the sources—i.e. a technical juristic approach— and the interpolation critique are also employed. The sources are rich and varied. Both legal and literary sources are taken into account. In the latter case, writers such as Frontinus or Pliny and especially Cato, Cicero or Columella play a significant part. Epigraphic evidence is normally necessary and even essential in some cases such as the *Tabu-*

* The author apologizes for the delay in producing this review.

[1] See, e.g. D. P. Kehoe (2007) Law and Rural Economy in the Roman Empire, Ann Arbor.

la Contrebiensis or the *Lex Rivi Hiberiensis*, but archaeological sources are also examined, since the physical evidence —especially that of farms near urban produce markets— is essential to understand how water supply and water distribution worked. The author acutely examines as a previous treatment the value given to each type of source (36–43).

The possibility of achieving sensible results by the use of the economic analysis of law in an ancient law is necessarily related to the concept of the economic model. An ancient law *per definitionem* took place in a context in which rational economy was very different from our present experience. Bannon tackles the difficult problem of the economic model that underlie the Roman economy. If the Roman jurists did not have an actual conception of efficiency or could not rely on trustworthy information in this field, an economic analysis of Roman law would be not possible at all. The allocation of scarce resources entails some knowledge of those questions but the degree of this knowledge is especially significant.[2]

The first chapter ("Rationality and Rationing a Common Resource") is on allocation of scarce resources as a general framework of the study. This chapter is focused on the rules that Roman landowners used in order to control water use. The foundations for conducting this research are several: apart from the legal sources, we must consider inscriptions, archaeological evidence and technical literary sources (Frontinus). These sources could help to answer some questions which legal evidence leaves without any clear answer. The legal sources in our case are, for instance D. 47.20.1.18 (Ulp. 70 *ad ed.*), in which Ulpian quotes precedent jurists (Marcellus, Trebatius and especially Proculus) on the problem of the limits of the right to watering herds of livestock, but also D. 8.3.24 (Pomp. 33 *ad Sab.*) or D. 43.20.4 (Iul. 41 *dig.*). She also bears in mind archaeological and anthropological studies such as Brent D. Shaw's "Lamasba: An Ancient Irrigation Community", *Ant Afr.* (1982) 18 61–103 and the illustrating case of medieval Valencia studied by Thomas F. Glick. The author pays attention to the specific literature on Roman law and even to some problems of the interpolation critique. Water supply was obviously shared, but once servitudes were established there was still room for the parties to regulate this relationship in detail concerning for instance schedules. Bannon rightly concludes that the jurists' treatment of the

[2] Bannon starts from the seminal studies on the allocation of scarce resources, balancing self-profit and neighbourly rights, such as K. J. Arrow (1972) "Gifts and Exchange", *Philosophy and Public Affairs* 4, 143-62

servitudes is that of the landowners who had an interest in market-oriented activities.

The second chapter ("Law and Neighborly Practice" 101–44) tackles the social background of servitudes, the cooperative and at the same time competitive relationships among neighbours. The author resorts to the commons theory to convey what those relationships meant. Cicero's (ad Att. 15.2.6.4) letter on his servitude in the lands of Tusculum is a good document to explain what criteria weighted a landowner in that moment, a text that Bannon comments upon but she starts her exam of the sources by commenting D. 43.21.2 (Paul 66 *ad ed.*), a text which reports an interesting *ius controversum* between Pomponius and Labeo according to the text by Paul. The dispute is over the right of the owner to bury the channel. According to the answer, Pomponius is against any free use by the landowner, which is supported on the other hand by Labeo. Bannon rightly relates this controversy to the problem of managing water supply in a commercial context of negotiation and legal rights. The case of Statilius Taurus (D. 8.3.35 Paul 15 *ad Plaut.*), dated in the first century AD is analyzed in this chapter as a paradigm of legal practice in a context in which different legal norms acted. We are dealing with a complex relationship between neighbours, productivity one hand and the enforcement of water-sharing on the other. The author points out that social cooperation was understood according to the traditional Roman patterns[3].

Chapter three concerning "Utility, Productivity and Planning" (145–93) examines those requirements. Utility (*utilitas*), for example, was one of the models to shape the concept of servitude (D.8.1.8 pr. Paul 15 *ad Plaut*). *Utilitas* could embrace not only self-sufficiency, but also commercial farming and specialized crops. In order to stress this wide concept the author studies cases in which not only water servitudes are included. Some literary—Cicero but also Frontinus—and epigraphic sources are also taken into account to explain the impact that innovation meant in such a context.

The fourth and final chapter ("Servitudes and the Sale of Land," 194–233) tackles the relationship between land and servitudes. This relationship had not always been clear, as Bannon points out. She quotes D. 8.3.36 Paul 5 *ad Plaut.*, in which Paul makes a distinction. The text has been obviously abridged by the compilers but clearly contrasts a situation based on the ownership of the thing

[3] Cic *De off.* 2.64; *Ad Att.* 15.26.

(which entails an *actio in rem*) and a personal action, arisen from a *stipulatio.* It is plausible, as the author, affirms, that the arrival of outsiders implied disputes over water rights in the sale of land.[4] The transfer of water rights when the property was sold followed the property, as D. 8.4.12 Paul 15 *ad Sab.* clearly states. Bannon starts her investigation from this fundamental paragraph and subsequently deals with the complicated casuistic derived from those principles.

Within this context—sale of lands—some rules with general scope were formulated, for example the continuity of the right of servitude (D. 8.3.23.3 Paul 15 *ad Sab.*), which was clearly stated by treating cases in which servitudes appear as unified rights that consequently could not be owned by shares. The law tried to help buyers dealing with sellers who concealed from them the existence of water servitudes. This is in general the problem of accurate information in the sale of land. This problem is specifically explored in the comment that Bannon makes to the Orata's lawsuit (Cic *De Orat.* 1.178; *De Off.* 3.67) since the author holds the theory that the case was exactly on water servitudes because of the existence of fishponds[5].

The book ends with a chapter on the main conclusions and with two Appendices: the first is a compilation of the sources regarding the use of water and hydraulic facilities on the farm (247–61); the second includes an inventory of sources of fishponds in Republican and early Empire Italian archaeological record, excerpted from James Higginbotham's "Gazetteer of Fishponds in Roman Italy (262–67).[6] The conclusion outlines the features she has pointed out throughout the book: the principles of the theory of commons, the accommodation of the legal rules to local practices where long-term relationships are concerned, the use of servitudes as an alternative to the purely social system of managing water supply, the servitude as an integral right closely linked to the land, the use of schedules or their effect on economic growth.

[4] Cat. De Agr. 1.2-4.

[5] A. Rodger (1983) "Concealing a Servitude", in P. G. Stein & A .D .E. Lewis, *Studies in Justinian's Institutes in Memory of J.A.C. Thomas,* London 134-50; ID (1994) "Concealing a Servitude II" *Index* 22 237-48.

[6] James Higginbotham (1997) *Piscinae. Artificial Fishponds in Roman Italy,* Chapel Hill 1997. This inventory, as its author himself admits (72) does not include pools that had no special accommodation for fish or pools which are poor preserved. This excellent work relies mainly on Columella's information on pisciculture but also on other literary sources and especially on archaeological evidence (10-1). Of course the access to fresh water was essential for the placement of fishponds as the author points out, but Higginbotham does not pay attention to servitudes. Bannon must take the credits for relating both questions.

As stated above, this book offers a creative and multidisciplinary approach that does not disregard more traditional ones. Sometimes (e.g. 123, which tackles the possible interpolation of *utilitas* in D. 4121.1.11 Ulp. 70 *ad ed.*) some problems could be perhaps treated more in detail but the new perspectives that Bannon opens is perfectly complementary to these kinds of commentaries. This fresh perspective could offer a new study of the economic aspects of Roman legal institutions which at the same time are still in need of the traditional approach (study of the actions, interpolation critique …) traditionally accepted as part of our discipline. I dare say that probably this theoretical framework could on the other hand contribute to create a basis for revising some of the conclusions achieved by the traditional paradigm.

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