

The Vices and Virtues of Friendship. Juridical Metaphors in Horace (*Ep.* 2.2 and *Sat.* 1.3)

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Abstract — Two poems by *Quintus Horatius Flaccus* (65–8 BC) provide us with the occasion to study how Roman society of the first century BC perceived the law. They allow us to see the creative process of the poet from a literary point of view and at the same time to become aware of his moral and philosophical values. This is a work of Roman law, but also of literature and of the language in which both are expressed. The legal analysis of the poems helps us to understand the way in which the author avails himself of legal situations and morphosyntactic phenomena that are characteristic of the language of law in order to achieve poetic effects, which would be impossible if he did not thoroughly understand the mechanisms of the *ius* that he refers to. One could say the same with respect to the public with whose complicity he reckons: a public — at least the elite that Horace addresses himself to especially — that knows how to “read between the lines,” since it is able to appreciate and understand, among the metaphors and other literary devices, the subtlety of the Roman

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jurists' thinking; all this because the legal world is nothing strange to it. Dating to around 19 and 36 BC respectively, both poems have as their underlying argument the taking shape of the concept of "vice," of the body and of the mind, and its antonym "virtue," the latter understood as careful consideration in judging the "defects or shortcomings" of others, especially one's friends.

I. Metaphors and juridical threads in Horace

That there are abundant references to the law in Horace's compositions is fully acknowledged.¹ Sometimes this is seen in the presence of legal terms (*ius, lex, iudicium, furtum*), used either in a technical or metaphorical sense.² On other occasions, moreover, the law appears as a narrative theme. This is the case in the two poems that are analysed here. In *Ep.* 2.2 the buying and selling of a slave is dealt with, as is the possibility of requiring the seller to take responsibility in the case of hidden defects; and *Sat.* 1.3 deals

¹ Already towards the end of the nineteenth century this was remarked upon by the French scholars M. Benech, *Études sur les classiques latins appliqués au droit civil romain. Les satiriques Horace, Perse, Martial, Juvenal* (Paris 1853), and H. Henriot, *Les poètes juristes. Remarques des poètes latins* (Paris 1858; repr. Aalen 1970), the latter a work which the author himself qualifies as a 'complément' to that of Benech. We find a continuation of the latter by the same author: *Moeurs juridiques et judiciaires de l'ancienne Rome d'après les poètes latins* (Paris 1865; repr. Aalen 1973). More modestly, in England we find A. F. Murison, "The Law in the Latin Poets," in *Atti del Congresso Internazionale di Diritto Romano Bologna e Roma XVII-XXVII aprile, 1933* (Pavia 1935), 609–39. From more recent times, we have U. Diederichsen, "Das Rechte in den Literatursatiren und episteln von Horaz," in *Festschrift für Claus-Wilhelm Canaris zum 70 Geburtstag*, 2 (Munich 2007), 1041–70; U. C. L. Gebhardt, *Sermo Iuris: Rechtssprache und Recht in der augusteischen Dichtung* (Leiden 2009); O. Diliberto, "La satira e il diritto: una nuova lettura di Horat., Sat. 1.3.115–117," in *Annali del Seminario Giuridico dell'Università degli Studi di Palermo*, 55 (2012), 385–402; R. Hassan, *La poesia e il diritto in Orazio. Tra autore e pubblico* (Naples 2014).

² See Gebhardt (note 1). For a statistical study of the compositions in which these terms appear and their frequency, see *id.*, 378. Regarding the metaphorical usage of juridical concepts: *Carm.* 1.5 on the elegiac desire of the female lover, and her enjoyment in making use of the appearance of the proprietary rights of usufruct (*id.*, 245); regarding the metaphor of goods acquired during life as ephemeral goods and life itself as an asset that human beings are deprived of through death, see *Carm.* 4.7 and *Ep.* 1.5 (*id.*, 365).

with the damage caused as a consequence of cutting back plants on another's land and the desecration of sacred things (and with the *actiones* that the prejudiced party could have recourse to in one case or another in order to be compensated). So we see themes relating to private and public law, to substantive and procedural law.³

Particularly striking is the profound knowledge that the poet reveals himself to have in both compositions in terms of the juristic thinking of his day, given that in the lines of the two chosen poems,⁴ jurisprudential reflection is perceived as underlying the text in an earlier layer of writing ("hypotext"), as if he were dealing with a palimpsest.

As such, we can learn from reading the poems by bearing in mind the texts of the Severan jurists as gathered together in Justinian's Digest, particularly those of Ulpian given that his commentaries are a stratified sediment of opinions that go back to the jurists living around the time when Horace was writing (Trebatius Testa, Aulus Ofilius, Alfenus Varus, Antistius Labeo). This constitutes proof of the stability of Roman jurisprudential thought, while at the same time subtle differences allow us to form an idea of how permeable it was to the changes that historical progression demanded.

Moreover, in the first poem this impression is corroborated by documents from daily practice; tablets and papyri in which the particulars leave evidence of the business that was being transacted.

II. Regarding hidden flaws when buying and selling: *Ep.* 2.2⁵

Dated to around 19 BC, this is a letter that Horace wrote to a real person, a friend, Julius Florus, *advocatus*, *iurisconsultus*, and poet.⁶ Being a member of Tiberius' entourage as a *scriba*, and far

³ For an overview of the presence of *ius* in Horace's poetry, see Hassan (note 1).

⁴ Regarding the terms "hypotext," "hypertext," and "intertextuality" in the sense that I attribute them in this study, see G. Genette, *Palimpsestos. La literatura en segundo grado* (Madrid 1989), 13.

⁵ A detailed presentation with analysis of documents from day-to-day practice can be read in C. Carrasco García, "Una compraventa poética. Horacio, Epístola 2.2," *TRG*, 85 (2017), 79–114.

⁶ On dating the letter, see R. O. A. M. Lyne, *Horace. Behind the Public Poetry* (New Haven 1995), 186. Regarding the addressees of the Horatian poems, see M. Citroni, *Poesia e lettori in Roma* (Rome 1995), 244,

from Rome for over three years as a consequence of military campaigns in Asia, Florus must have written to Horace upbraiding him for not replying to his letters and for not sending him poems.⁷ In order to excuse himself, Horace dedicated a letter in verse to him:⁸

for whom at least 95 of the 162 compositions that form the corpus of Horace's works are addressed, using the second person, to one individual from the author's circle of private acquaintances. The third-century scholiast Porphyry wrote on Julius Florus: *hic Florus scriba Tiberii, fuit saturarum scriptor, cuius sunt electae ex Ennio Lucilio Varronae saturate*. See C. O. Brink, *Horace on Poetry. Epistles Book II: The Letters to Augustus and Florus* (Cambridge 1982), 269; L. Bessone, "Giulio Floro," in *Enciclopedia oraziana*, 1 (Rome 1996), 755. See also Hor. *Ep.* 1.3.21–25, addressed to the same individual, and in which he describes him in the following words: *Non tibi parvum ingenium, non incultum est et turpiter hirtum / seu linguam causis acuis seu civica iura / respondere paras seu condis amabile carmen / prima feres hederæ victricis praemia*.

⁷ Tiberius Claudius Nero, son of Livia the wife of Augustus, left in 21 BC on an official mission to place Tigranes on the throne of Armenia. During this campaign he was accompanied by an entourage comprised of various young men who belonged to the equestrian order and had literary interests like those of Tiberius Claudius himself. See H. Silvestre, ed., *Horacio. Sátiras, Epístolas, Arte poética* (Madrid 2000), 365 nn.1 & 2.

⁸ Brink (note 6), 21, and N. Rudd, ed., *Horace. Satires and Epistles. Persius: Satires* (London 1997), 183:

[1] To Florus: loyal friend of the good and gallant Nero. [2] Suppose somebody wanted to sell you a slave who was born [3] at Tibur or Gabii, and said to you: "Here's an attractive lad [4] with a fair skin, beautifully built from head to toe. [5] Eight thousand and he's yours, signed, sealed and delivered. [6] He's home bred, quick to obey his master's orders; [7] he has had a touch of basic Greek, and will turn his hand to [8] any skill that's required; wet clay can be moulded; [9] he'll even sing you a simple song to go with your wine. [10] Too many claims reduce credibility. Only a salesman [11] who wants to get rid of his goods will praise them above their worth. [12] I'm not obliged to sell; I'm poor, but not in the red. [13] None of the dealers would make you this offer. I'll do it for you, sir [14] but no one else. Once he dodged his work and, as usual, [15] hid under the stairs in fear of the strap on the wall. [16] So let's shake — if you're not put off by the lapse I mentioned." [17] The man, I fancy, would be in the clear. The goods were faulty, [18] but you bought them with your eyes open; the terms were stated. [19] Will you still sue him and waste his time with false allegations? [20] I told you when you were leaving that I was lazy; I told you [21] I was almost physically incapable of such a commitment (I dreaded [22] your angry recriminations if your letters went unanswered). [23] I might have saved my breath; for although the law's on my side [24] you still contest the case. On top of that you

have been more appropriate).⁹ On other occasions, juridical vocabulary is employed in common parlance in a metaphorical sense: *fuga* (l. 16). Sometimes the poet avoids the technical word, but calls it to mind through images (ll. 158–159): the rite of the bronze and scales as a form of acquisition of *dominium* (*si proprium est quod quis libra mercatus et aere est*), which was different from acquisition through use (*quaedam, si credis consultis, mancipat usus*). There are also thematic words around which the poet organizes his legal reasoning, like *prudens*, *vitiosum*, *lex*, *atemptas* (ll. 18 and 24). Line 19 talks of the *lite iniqua*, recalling the inappropriateness of aedile *actiones*, and line 23 of *mecum facientia iura*. As concerns the stylistic resources, we see that morphosyntactical structures characteristic of legal texts are used frequently, such as the redundant expression *fiet eritque tuus* (l. 5, “you will have it and it will be yours”) to refer to the effects of an agreement (tautology¹⁰ to avoid the interpretative doubts, of which we are offered many examples in the texts — D. 21.1.1: *dictum promissumve; morbus vitiumve* — and recourse to the rhetorical device of hendiadys, in order to encompass the largest number of hypotheses in only one term).¹¹

Secondly, just as with many legal texts and rhetorical discussions, the poem begins with a *protasis* or introduction to a long conditional phrase that goes from the second line (*si quis forte velit*) to the sixteenth (*des nummos*).¹² There are fourteen lines in

⁹ See P. Rasi, *Le satire e le epistole di Q. Orazio Flacco. Parte II. Le epistole* (Florence 1930), 188.

¹⁰ See A. S. Wilkins, *Q. Horati Flacci. The Epistles of Horace* (London 1964), 291.

¹¹ Regarding the double formulations *fugitivus errove* and *morbus vitiumve* as usages found in contracts, through which the maximum number of cases is sought to be included, eliminating doubts (*tollendae dubitationis gratia*) and as such further securing the buyer's position, see G. Impallomeni, *L'editto degli edili curuli* (Padua 1955), 26. Also, R. Gamauf, “Erro. Suche nach einem verschwundenen Sklaven. Eine Skizze zur Interpretationsgeschichte der ädilizischen Edikts,” in J. Hallebeek, et al., eds., *Inter Cives Necnon Peregrinos. Essays in Honour of Boudewijn Sirks* (Göttingen 2014), 276.

¹² One of the most significant variations among the critical editions of *Ep. 2.2* relates to the extent of the seller's declaration (for some, it extends to line 15; for others, to line 16). See in this respect Wilkins (note 10), 291. Among those who opt for the former: Rasi (note 9), 188, for whom the *protasis* extends only up until line 15, the apodosis being divided in “due proposizioni coordinate asindetice.” One particular interpretation of the question from a juridical point of view can be found in Diederichsen (note 1), 1043.

dactylic hexameter between one and the other, with the details of the sale. The apodosis or consequence (*ille ferat*) of line 17 follows these.¹³

Thirdly, in respect of the method followed in the composition (the letter as a whole and not only the twenty-five lines collected here), we could add that Horace adopts that of the jurists when elaborating their *responsa*: he goes from the particular to the general; he proceeds by way of induction, and starting with an example as prosaic as the buying and selling of a slave, investigates questions of such great consequence as the meaning of life or the role of literature.

Fourthly, as regards the content, by combining the metaphor and language that is delicately literary and particular to poetry with the technical language of the law, Horace implicitly brings together in the negotiations at the beginning of the letter the principles that the curule aediles anticipated in their edict in order to protect buyers who were victims of deception on the part of the sellers (*causa huius edicti proponendi est, ut occurratur fallaciis vendentium, et emptoribus succurratur*, says D.21.1.1.2¹⁴). Literary sources offer numerous examples of such sophistry used by *mangones* or slave-dealers to defraud buyers,¹⁵ be it by hiding the defects of the merchandise — for example by covering the slave with adornments, as Seneca describes¹⁶ — or by attempting to simulate qualities that in reality were absent, a recurring ex-

¹³ The hexameter is hieratic verse, a length particular to solemn narrations and epic poetry, and also of prophetic poetry and teaching. See J. L. Moralejo, *Horacio. Sátiras, Epístolas, Arte Poética. Introducción, traducción y notas* (Madrid 2008), 13.

¹⁴ See likewise Cic. *Off.* 3.17.71: *Nec vero in praediis solum ius civile ductum a natura malitiam fraudemque vindicat, sed etiam in mancipiorum venditione venditoris fraus omnis excluditur. Qui enim scire debuit de sanitate, de fuga, de furtis, praestat edicto aedilium.* See also D.21.1.44 pr. (Paul 2 ed. aed. curul.): *Iustissime aediles noluerunt hominem ei rei quae minoris esset accedere, ne qua fraus aut edicto aut iure civili fieret*, a text in which reference is made to the intervention of the aediles against the fraudulent practice by slave dealers of considering slaves to be accessories of a *res*.

¹⁵ R. Ortu, "Praeda Bellica: La guerra tra economia e diritto nell'antica Roma," *Diritto@Storia*, 4 (2005).

¹⁶ Sen. *Ep.* 80.9: *Equum empturus solvi iubes stratum, detrahis vestimenta venalibus, ne qua vitia corporis lateant: hominem involutum aestimas? Mangones quicquid est, quod displiceat, aliquo lenocinio abscondunt, itaque ementibus ornamenta ipsa suspecta sunt. Sive crus alligatum sive brachium aspiceres, nudari iuberes et ipsum tibi corpus ostendi.*

ample being the youth of the slave, just as texts of Pliny¹⁷ and Quintilian¹⁸ describe. For this reason, these professionals had a very low social standing.

The clauses of the edict were: *de natione pronuntianda; vitia et morbi; dicta vel promissa; ne veterator pro novicio veneat; fugitivus vel erro.*

Their echo in the poem can be heard if it is analysed in light of the texts of book 21, title 1 of Justinian's Digest, in which the said edictal clauses are contained in their definitive versions as given to the edict by the second-century jurist Julian.¹⁹ The same

¹⁷ Pliny refers among other things to the sophistry of removing hair from the slave's armpits with wax to camouflage the passage to puberty: Plin. *Nat.* 21.170: *Hyacinthus in Gallia maxime provenit. Hoc ibi fuco hysginum tingunt. Radix est bulbacea, mangonicis venaliciis pulchre nota, quae e vino dulci inlita pubertatem coerces et non patitur erumpere. Torminibus et araneorum morsibus resistit. Urinam impellit. Contra serpentes et scorpiones morbumque regium semen eius cum habrotono datur.* Plin. *Nat.* 30.41: *Umeri doloribus mustelae cinis cum cera medetur. Ne sint alae hirsutae, formicarum ova pueris infricata praestant, item mangonibus, ut lanugo sit pubescentium, sanguis e testiculis agnorum, cum castrantur, qui evulsis pilis inlitis et contra virus proficit.*

¹⁸ Quint. *Inst.* 2.15.25: *Colorem fuco et verum robur inani sagina mentiantur.* Interesting in this respect is the detailed exposition of the methods to deceive the buyers of slaves, given by Rufus of Ephesus (first century AD), known to us through translations into Arabic. See Ibn Butlan, "General Treatise on the Skills Useful for Purchasing and Examining Slaves," in S. Swain, *Economy, Family and Society from Rome to Islam. A Critical Edition, English Translation and Study of Bryson's Management of the Estate* (Cambridge 2013), 270–79 (Appendix).

¹⁹ The origin of the aedile's edict is a much discussed question and the bibliography on this subject is vast. Regarding the text of the edict, see A. F. Rudorff, *Edicti perpetui quae reliqua sunt* (Leipzig 1869), 259; O. Lenel, *Das Edictum Perpetuum* (Leipzig 1927), 554; S. Riccobono, ed., *Fontes Iuris Romani Antejustiniani* [1. *Leges*] (Florence 1968), 389. Regarding origins, see A. Senarclens, "La date de l'édit des édiles 'de mancipiis vendundis'," *TRG*, 4 (1922), 384; "Servus recepticius," *TRG*, 12 (1933), 390; Impallomeni (note 11) 90; A. Watson, "The Imperatives of the Aedilician Edict," *TRG*, 39 (1971), 73; D. Pugsley, "The Aedilician Edict," in A. Watson, ed., *Daube Noster* (Edinburgh 1974), 253. Among the most recent work on the subject, see L. Manna, *Actio redhibitoria e responsabilità per i vizi della cosa nell'editto de mancipiis vendundis* (Milan 1994), 1; E. Jakob, *Praedicere und cavere beim Marktkauf. Sachmängel im griechischen und römischen Recht* (Munich 1997), 123; R. Ortu, 'Aiunt aediles . . .'. *Dichiarazioni del venditore e vizi della cosa venduta nell'editto de 'mancipis emundis vendundis'* (Turin 2008), 40; N. Donadio, "Azioni edilizie e interdipendenza delle obbligazioni nell' 'emptio venditio'. Il problema di un giusto equilibrio tra le prestazioni delle parti," in L. Garofalo,

can be said of the commentaries that the jurists made on these clauses in full knowledge of what they were doing: many of them had held the aedilician magistrature.²⁰ The said jurisprudential commentaries underlie the palimpsest that is the poem (“hypertext”) as a pre-existing text (“hypotext”).

1. *De natione pronuntianda*

As such, the initial reference to Tibur or Gabios (l. 3) as places where slaves came from is a response to the prescription in the edict regarding the obligation on the seller to declare the nationality of the slave (D.21.1.31.21), given that the text of the Digest says that “one assumes that certain slaves are good, because they are of a nationality that does not have a bad reputation, whilst others are considered bad because they are from a nation that has a bad reputation.” It is the clause *de natione pronuntianda*.²¹

D.21.1.31.21 (Ulpian 1 *ad edictum aedilium curulium*). Qui mancipia vendunt, nationem cuiusque in venditione pronuntiare debent; plerumque enim natio servi aut provocat, aut deterret emptorem. Praesumptum etenim est, quosdam ser-

ed., *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, 2 (Padua 2007), 457.

²⁰ This is the case for Gnaeus Flavius, Licinius Crasus *Dives*, Sestus Aelius Paetus Catus, C. Sempronius Tuditanus, Q. Mucius Scaevola, Servius Sulpicius Rufus, among others. See Ortu (note 19), 46.

²¹ For many scholars this clause is one of those that were incorporated in the first years of Augustan rule into the original edict *de mancipis*, whose exact date is not known, as stated above (note 19). The references to the aediles, the edict and *redhibitio* that are found in the comedies of Plautus, in Cato's thinking through Aulus Gellius (Gell. 17.6.2–6) and, particularly, in Cicero (Cic. *Off.* 3.17.71), has led most doctrinal thought to date it to the second century BC, at a time when wars of conquest brought huge numbers of slaves into Rome. See Plaut. *Capt.* 813–824; *Rud.* 373–374; *Mer.* 416–419; *Mil.* 725–730; *Mos.* 795–780; *Per.* 160. See also the citations in Ortu (note 19), 58. A text of Varro, who in his work *De re rustica* (2.10–11) refers to the Phrygians as being considered shy, the inhabitants of Mauritania as vain, the Cretans as liars, the Sardinians as proud, and the Corsicans as stubborn, corroborates the existence of nationalities that brought with them a bad reputation. Horace himself in Satire 1.3, which we shall analyse below, uses the same contemptuous tone towards the Sardinians when he describes the Sardinian singer Tigellius as inconstant (l. 4: *Omnibus hoc vitium est cantoribus, inter amicos / ut numquam inducant animum cantare rogati / iniussi numquam desistant. Sardus habebat / ille Tigellius hoc. Ll. 9–11: Nil aequale homini fuit illi; saepe velut qui / currebat fugiens hostem, persaepe velut si / Iunonis sacra ferret; habebat saepe ducentos.*).

vos bonos esse, quia natione sunt non infamata, quosdam malos videri, quia ea natione sunt, quae magis infamis est.

The provenance of the poem's slave from the Italian peninsula itself, when added to the other qualities attributed to him, would justify his high price.²²

Going back to the first line of the poem, and in connection with D.21.1.31.21, "if the nationality had not been declared," says the text of the edict, "an action shall be given to the seller and to everyone to whom the business belongs; an action through which the buyer will redeem the slave."²³

D.21.1.31.21 (Ulpian 1 *ad edictum aedilium curulium*). Quod si de natione ita pronuntiatum non erit, iudicium emptori omnibusque, ad quos ea res pertinebit, dabitur, per quod emptor redhibet mancipium.

As is well known, the *ius honorarium* provided the buyer with the possibility of reacting to his expectations being defrauded by bringing *actiones in factum*: the *redhibitoria* (D.21.1.31.2) and *aestimatoria* (or *quanti minoris*, D.21.1.18). These actions offered, as such, an alternative to the protection of the *ius civile*, in which the *actio ex stipulatu* already existed — when the sale and purchase was formalized through stipulation (D.21.1.19) — and the *actio empti*, applied where *dolo in contrahendo* had arisen. These last two, as *actiones in ius concepta*, had the advantage of not being subject to prescription although they only allowed *id*

²² Eight thousand *sestertii* is a high price if we compare it with that of the slave Davus from *Sat.* 2.7.43, also by Horace, for whom the sum of 2,000 was paid. Or with the normal price of a slave who was a cook, a trade that seems to have been much valued and for which according to Pliny (*Nat.* 9.67) the sum of around 2,700 would be paid. Or the sum of 1,200 that was paid for the slave of Trimalchio's dinner party (Petron. *Sat.* 68). It turns out to be cheap compared to the prices referred to in Mart. 8.13, 11.38 — 20,000 *sestertii* — or in 1.58, 3.62, 11.70, in which the amount of 100,000 *sestertii* is talked of. These are valuations that we can read about in N. Rudd, ed., *Horace: Epistles Book II and Epistle to the Pisones ("Ars poetica")* (Cambridge 1989), 123. Another comparative study of slave prices arising from the information set out in the Pompeian and Herculanean tablets is in G. Camodeca, "Tabulae Herculanaenses: riedizione delle emptiones di schiavi (TH 59–62)," in U. Manthe and C. Krampe, eds., *Quaestiones Iuris. Festschrift für Joseph Georg Wolf zum 70. Geburtstag* (Berlin 2000), 66. See also Jakab (note 19), 7.

²³ As regards the reach of the *actio redhibitoria* in the case of non-fulfilment of the duty to declare the slave's nationality, see Manna (note 19), 73.

quod interest to be claimed, that is to say, compensation for the prejudice suffered as a consequence of having paid more than the real value for something. If fraud has taken place, the buyer can moreover be indemnified for eventual losses caused, even though he would not be returned to the financial position he had been in prior to the conclusion of the contract. This was only made possible by the *actio redhibitoria*, by virtue of which the buyer had to restore to the seller the slave and his incidentals — in the case of a female slave, her child, or the *peculium* in the case of a slave who possessed one — and however much had been acquired through him. He also had to reimburse the seller for possible damage or loss caused to or by the said slave, either by himself or by anyone subject to him (a member of his family or a *procurator*). For his part, the seller had to restore the price, any interest on it, and to pay the eventual expenses laid out by the buyer with regard to the *res* (in this case, the slave). In this sense, the *actio redhibitoria* is spoken of as “doubly arbitrary,” given that it pressured the judge to summon both sides, not just the claimant as happened usually in *actiones* that contained this type of clause.²⁴

When Horace introduces the rhetorical question *insequeris tamen hunc et lite moraris iniqua?* in line 23, he is invoking this play on *actiones*.²⁵

2. *Ne veterator pro novicio veneat*

The adjective *candidus* (l. 4) when referring to a clear complexion, the literary expression *verna* (l. 6) when alluding to the fact of having been born at home, and the metaphorical mention of a slave as damp clay (l. 8), are all appraisals that make us think of the slave as young, inexperienced, and adaptable to the patron’s needs, rather than as a veteran. We are dealing with the edictal prescription contained at D.21.1.37, and according to which an action is recognized for seeking a ruling on the contract when confronting those who sell veteran slaves as if they were novices because the latter were considered more valuable. It is the clause *Ne veterator pro novicio veneat*.

D.21.1.37 (Ulpian 1 *ad edictum aedilium curulium*). Praecipiant aediles, ne veterator pro novicio veneat. Et hoc edictum fallaciis venditorum occurrit: ubique enim curant aediles,

²⁴ See L. Garofalo, *Studi sull'azione redhibitoria* (Padua 2000), 7.

²⁵ Only with time could the buyer attain, in good faith, a ruling that resolved the contract through the *actio empti*. See Donadio (note 19).

ne emptores a venditoribus circumveniantur. Ut ecce plerique solent mancipia, quae novicia non sunt, quasi novicia distrahere ad hoc, ut pluris vendant: praesumptum est enim ea mancipia, quae rudia sunt, simpliciora esse et ad ministeria aptiora et dociliora et ad omne ministerium habilia: trita vero mancipia et veterana difficile est reformare et ad suos mores formare. Quia igitur venaliciarii sciunt facile decurri ad noviciorum emptionem, idcirco interpolant veteratores et pro noviciis vendunt. Quod ne fiat, hoc edicto aediles denuntiant: et ideo si quid ignorante emptore ita venierit redhibebitur.

Comparing the composition of line 6 of the poem (*verna ministeriis ad nutus aptus erilis*), with the Digest (*mancipia quae rudia sunt, simpliciora esse, et ad ministeria aptiora, et dociliora, et ad omne ministerium habilia*) is in the end very telling.²⁶

3. *Vitia et morbi*

At the same time, the verses reveal the knowledge of the poet — and of his better-informed readers²⁷ — regarding the requirement for the seller to declare the illness (and other defects), or, in this case, to guarantee their absence. This, according to what can be deduced from documents stemming from general practice, is established through the formula *sanum / sanam esse*.²⁸ The rele-

²⁶ Celius, whose opinion we have a record of through Venuleius in D.21.65.2 (Venul. 5 *act.*), contributes towards making the term *veteranus* more precise:

Servus tam veterator quam novicius dici potest. Sed veteratorem non spatio serviendi, sed genere et causa aestimandum Caelius ait: nam quicumque ex venalicio noviciorum emptus alicui ministerio praepositus sit, statim eum veteratorum numero esse: novicium autem non tirocinio animi, sed condicione servitutis intellegi. Nec ad rem pertinere, Latine sciat nec ne: nam ob id veteratorem esse, si liberalibus studiis eruditus sit.

²⁷ See Citroni (note 6), 435.

²⁸ See, e.g., CIL III 940 = FIRA, 3, 285 (AD 142) (“Emptio pueri”), a document comprising three *tabulae*, of which the *scriptura interior* is reproduced below. Further on this document, see Jakab (note 19), 166; D. Mantovani, *Le formule del processo privato romano*, 2nd ed. (Padua 1999), 116.

Dasius Breucus emit mancipioque accepit puerum Apalaustum, sive is quo alio nomine est, *n(atione) Gr<a>ecum*, apocatum pro uncis duabus, (denariis) DC de Bellico Alexandri, f.r. M. Vibio Longo.

Eum puerum sanum traditum esse, furtis noxaque solutum, erronem fugiti<v>um caducum non esse pr<a>estari: et si quis eum puerum

vant clause is *vitia et morbi*, as laid out in D.21.1.1.²⁹ If the seller would not guarantee the absence of illness or defects, the buyer may have been able to rely on the *actio redhibitoria quod cautum non erit*, or the *actio aestimatoria quod cautum non erit*, which could be exercised within two and six months respectively from the execution of the contract (D.21.1.28).³⁰

In the poem's sale, the slave is not only not diseased (*sanum esse*), but is *candidus et talos a vertice pulcher ad imos*.

D.21.1.1.1 (Ulpian 1 *ad edictum aedilium curulium*). Aiunt aediles: Qui mancipia vendunt certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntianto, quodsi mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit cum venire, fuisset, quod eius praestari oportere dicetur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. . . . Item si quod mancipium capitale fraudem admiserit, mortis consciscendae sibi causa quid fecerit inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntiatio; ex his enim causis iudicium dabimus. Hoc amplius, si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus.

In the same way, I would highlight the poem's other line that calls

q(uo) d(e) a(gitur) partemve quam quis ex eo evicerit, q(uo) m(inus) emptorem s(upra) s(criptum) eunve ad q(uem) ea res pertinebit uti frui habere possidereq(ue) recte liceat, tunc quantum id erit, quod ita ex eo evictum fuerit, t(antum) p(ecuniam) duplam p(robam) r(ecte) d(ari) f(ide) r(ogavit) Dasius Breucus, d(ari) f(ide) p(romisit) Bellicus Alexandri, id(em) fide sua esse iussit Vibius Longus.

Proque eo puero, q(ui) s(upra) s(criptus) est, pretium eius (denarios) DC accepisse et habere se dixit Bellicus Alexandri ab Dasio Breuco.

Actum kanab(is) leg(ionis) XIII g(eminae) XVII Kal. Iunias Rufino et Quadrato cos.

Appi Procli vet(erani) leg(ionis) XIII G(eminae). Antoni Celeris. Iul(i) Viatoris. Ulpi Severini. L. Firmi Primitivi. M. Vibi Longi fideiusor(is). Bellici Alexandri vendit(oris).

²⁹ The same is seen in Gell. 4.2.1.

³⁰ D.21.1.28 (Gaius 1 *ed. aed. curul.*): *Si venditor de his quae edicto aedilium continentur non caveat, pollicentur adversus eum redhibendi iudicium intra duos menses vel quanti emptoris intersit intra sex menses.* The formulas that correspond to the said actions are in Mantovani (note 28), 113.

to mind the clause *vitia et morbi*, namely line 21 (*talibus officiis prope mancum*). In this case the poet himself is referred to and is sometimes confused with the slave in the example (ll. 3–15);³¹ sometimes, as in this instance, it is the person who sells himself that the friend complains to, wrongly (ll. 20–25: *Quid tum profeci, mecum facientia iura si tamen attemptas?*). That the poet is disinclined to reply to his friend's letters and to write poems is concealed behind the metaphor of being one-armed:

Dixi me pigrum proficiscenti tibi, dixi
talibus officiis prope mancum, ne mea saevus

As such, we can deduce from the poem the poet's subtle understanding of the difference that jurisprudence had been making *de facto* — the texts gathered in the Digest are innumerable³² — between defects that affected the body and were deemed to give rise to compensation due to their incapacitation (blindness,³³ inability to procreate, absence of a certain number of fingers,³⁴ but not the fact of having problems in one eye,³⁵ only one testicle,³⁶ or being left-handed³⁷), and those of character that did not admit the

³¹ Also, in *Sat.* 2.7.112–114 Horace portrays himself as a slave: *Adde quod idem / non horam tecum esse potes, non otia recte / ponere teque ipsum vitas fugitivus et erro / iam vino quaerens, iam sommo fallere curam.*

³² It is impossible to address here all the jurisprudential reflection on *vitia et morbi*. In keeping with the sharpness that characterized the Roman jurists, these were questions that the latter analysed in great detail, on the basis of ever-broadening theoretical rules. And as rules propounded in the juristic method require analysis on a case-by-case basis, but with the aim of extending the application of their answers, it can be said that they considered the diseases that gave rise to the *actio redhibitoria* to be those that prevented the thing — namely, the slave — being allocated to what was its common use or purpose. As such, in D.21.1.1.7 the definition of illness given by Sabinus is that of *habitum cuiusque corporis contra naturam, qui usum eius ad id facit deterioorem, cuius causa natura nobis eius corporis sanitatem dedit*; in D.21.1.1.8 it is held that *vitii sive morbi quod usum ministeriumque hominis impediunt*. Cf. J.-J. Aubert, “*Vitia animi: tares mentales, psychologiques, caractérielles et intellectuelles des esclaves en droit romain*,” in A. Maffi and L. Gagliardi, eds., *I diritti degli altri in Grecia e a Roma* (Sankt Agustin 2011), 236–48.

³³ D.21.1.1.7.

³⁴ D.21.1.10.

³⁵ D.21.1.12.1.

³⁶ D.21.1.6.2.

³⁷ D.21.1.12.3. Neither was the slave affected by stammering susceptible to the *actio redhibitoria* (D.21.1.1.7 and D.21.1.10.5), nor when he

actio redhibitoria (being superstitious, cantankerous, timid, greedy,³⁸ avaricious; likewise when dealing with a slave who gambled, drank or lied³⁹). Mixed defects would be a particular instance (where bodily problems led to mental degeneration and the reverse), such as the one mentioned by the poet here.⁴⁰ On the basis of this knowledge of the law, Horace makes poetry, very probably as a gesture of erudition to his juristic readership, among whom good friends were found. This is the case with Trebatius Testa, who had authored various *responsa* that appear in the Digest and deal with hidden defects, and who is converted by Horace into the protagonist of several compositions based on legal argument (as such, for example, *Sat.* 2.1 on defamation).⁴¹

When Horace defends himself in his epistle from the reproaches of Julius Florus for not having answered his letters and not having written poems (l. 19), he does so by pointing out how inappropriate this complaint was (*lite iniqua*), given that he had already warned him, as any seller should have done, not only about his indolence (a mental flaw that does not give rise to the *actio redhibitoria*), but also that it was so great and so incapacitating that it was as if he were one-armed (a physical defect that did allow such an *actio*).

In this respect, D.21.1.4.4⁴² and D.21.1.12.3⁴³ are informative.

suffered fevers, toothache, minor ulcers (D.21.1.1.8 and D.21.1.4.6), nor when he had one eye, one arm or one jawbone larger than the other if this did not prevent him from using them well (D.21.1.12.1), among other deficiencies.

³⁸ D.21.1.1.9, 11.

³⁹ D.21.1.4.2. Regarding the scope of the notion of “defect” in the literary and legal sources (were they exclusively physical defects? could they also be mental defects?), see J. D. Cloud, “The ‘*actio redhibitoria*’: Puzzles and Tensions over Mental Defects and Faults of Character from the Second Century BC to the Sixth Century AD,” in J. Drinkwater and B. Salway, eds., *Wolf Liebeschuetz Reflected. Essays Presented by Colleagues, Friends & Pupils* [*Bulletin of the Classical Studies*, Suppl. 91] (London 2007), 67–76.

⁴⁰ We will avoid going into the doctrinal dispute regarding the moment in which the difference between *vitia corporis* / *vitia animi* is formulated as a general category, as addressed by Ulpian in D.21.1.4.3. Jurists of the Republican era and at the beginning of the Principate, such as Horace and Trebatius Testa, use the expression *vitia corporis* more than once. The contrast between these and the *vitia animi* seems to be present in Vivianus and Veneleius. See Ortu (note 19), 194.

⁴¹ Regarding the relationship between Trebatius Testa and Horace, see G. Crifò, “Trebatio Testa,” in *Enciclopedia Oraziana*, 1 (Rome 1996), 922–23.

⁴² D.21.1.4.4 (Ulpian 1 *ed. aed. curul.*):

In the first, the existence of mixed flaws — that is, of the body and spirit — is acknowledged, in respect of which the *actio redhibitoria* applies; in the second, the one-armed person is talked of openly as ill. From a stylistic point of view, recourse to the anaphora (*dixi*), which is consistent with alluding to something that has already appeared in the discussion, contributes to giving cohesiveness to the latter and in the end is evocative of the legal context where this rhetorical device is much used.⁴⁴

The defect having become apparent, the seller had to respond independently as to whether he had been aware of its existence or not.

D.21.1.1.2 (Ulpian 1 *ad edictum aedilium curulium*). Causa huius edicti proponendi est, ut occurratur fallaciis vendentium, et emptoribus succurratur, quicumque decepti a venditoribus fuerint: dummodo sciamus venditorem, etiamsi ignoravit ea quae aediles praestari iubent, tamen teneri debere. Nec est hoc iniquum: potuit enim ea nota habere venditor: neque enim interest emptoris, cur fallatur, ignorantia venditoris an calliditate.

The obligation imposed by the aediles disregarded both fraudulent intention (despite demonstrating that the seller who did not have it would be liable) and the knowledge that he had or did not have of the thing's actual condition. It talks of "objective responsibility with regard to the defects." This is not entirely accurate, given that the seller would not be liable for an existing defect when it

In summa, si quidem animi tantum vitium est, redhiberi non potest, nisi si dictum est, hoc abesse, et non abest; ex empto tamen agi potest, si sciens id vitium animi reticuit, si autem corporis solius vitium est, aut et corporis, et animi mixtum vitium, rehibitio locum habebit.

⁴³ D.21.1.12.3 (Ulpian 1 *ed. aed. curul.*):

Item sciendum est, scaevam non esse morbosum vel vitiosum, praeterquam si imbecillitate dextrae validus sinistra utitur, sed hunc non scaevam, sed mancum esse.

⁴⁴ Sometimes in the legal sphere we witness a fictitious connection, given that the elements or indications of the anaphora (adjectives, demonstrative pronouns, and participial verbal adjectives) are merely rhetorical additions. See J. A. González Salgado, "Elementos anafóricos en las sentencias actuales. Los adjetivos deverbales de participio," *Revista de la Lengua i Dret*, 62 (2014), 23–34.

was evident, manifest, or known in any way by the buyer.⁴⁵ It is what was encapsulated in the Middle Ages by the aphorism *vitia aperta non praestantur*. In this perspective, the aim of aedilician tutelage emerges clearly: not so much punishing deceit attributable to the seller, as protecting the purchaser with less experience and capacity to assess when compared to a professional *venaliciarius*. The seller's responsibility was objective not as regards the defects, but as regards "defrauding the expectations of the buyer."⁴⁶ This historical origin explains the way in which remedying hidden defects was standardized in European civil codes; that is to say, as the solution to a problem of "non-fulfilment of the buyer's interest that was the consequence of the defect's existence."⁴⁷

⁴⁵ D.21.1.14.10 (Ulpian 1 *ed. aed. curul.*):

Si nominatim morbus exceptus non sit, talis tamen morbus sit, qui omnibus potuit apparere, ut puta caecus homo venibat, aut qui cicatricem evidentem et periculosam habebat vel in capite, vel in alia parte corporis, eius nomine non teneri, Caecilius ait, perinde ac si nominatim morbus exceptus fuisset; ad eos enim morbos vitiaque pertinere Edictum Aedilium probandum est, quae quis ignoravit, vel ignorare potui.

In the same sense, see D.21.1.1.6.

⁴⁶ R. Fiori, "Bona fides. Formazione, esecuzione e interpretazione del contratto nella tradizione civilistica (parte seconda)," in R. Fiori, ed., *Modelli teorici e metodologici nella storia del diritto privato* (Naples 2011), 136.

⁴⁷ The compilers considered that ordinary responsibility for inadequacies could not include any non-fulfilment that was not attributable to the seller, given that there was certainly no non-fulfilment of the duty to provide the goods. At the same time, even though the existence of the defect implied an error on the buyer's part, the remedial actions were not conceived of as a cure for a defect in the consent. The aedilician responsibility has therefore come to be understood as a special responsibility, like a "means for assigning risk to the seller" due to the latter being better placed to know about the condition of the thing. From this point of view it implied a preference for protecting the buyer, the weakest party in the relationship. In recent years, nevertheless, this understanding has been changing, and Community directives are pointing State legislation towards unifying the remedies in favor of the buyer of the defective thing, in terms of "contractual responsibility for non-performance of the duty of compliance." In Germany a modification of the BGB has been adopted — as regards Directive 1999/44/CE — through the establishment of a seller's general duty to hand over the goods in conformity with the contract. In Spain, on the contrary, the option has been taken of establishing the aforementioned duty of compliance exclusively in the field of consumer rights (which implies a duality of the legal regime in sales according to which the buyer may or may not have the condition of consumer: Texto

4. *Dicta vel promissa*

The poem brings to mind, in the same way, the difference that the Roman legal order established between responsibility for defects that objectively prevented a person from benefitting from the slave (illness), and responsibility for the absence of physical, moral, or intellectual qualities that had been expressly promised and that may have determined the willingness to buy (beauty; disposition to carry out the master's orders; knowledge of Greek and aptitude for singing). The matter in question is expressed in the clause "*dicta vel promissa*." *Actiones aediliciae* also applied in this case:

D.21.1.1.1 (Ulpian 1 *ad edictum aedilium curulium*) (*in medio*). Quodsi mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit cum venire, fuisset, quod eius praestari oportere dicitur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur.

That is, "if in contravention of this," says the text in reference to the declaration on defects, "a slave had been sold or his condition ran counter to what had been said or promised when he was sold . . . , we will give an *actio* to the buyer."⁴⁸ Just as when there is an absence of qualities promised by the seller, his promise regarding the absence of defects that eventually became noticeable could be made good by the buyer through the *actio redhibitoria* and the *actio aestimatoria id est quanti minoris*, which could be exercised within six months and a year, respectively.⁴⁹

Refundido Ley General para la Defensa de Consumidores y Usuarios RD 1/2007, modified by law 3/2014 of 27 March transposing Directive 2011/83). The timeframes for demanding responsibility for the non-fulfilment of the duty of compliance are neither the very brief periods for reparation (six months) nor the broad periods for ordinary non-fulfilment (fifteen years); neither are these periods those of the action for annulment due to error (four years). See J. R. Verda y Beamonte, *Sanearamiento por vicios ocultos: las acciones edilicias* (Navarre 2009), 359.

⁴⁸ The objective character of the seller's responsibility for the purpose of the aedilician actions is equally made out, and he should be liable even though he confirms that he did not know that these qualities did not exist. If the buyer, on the contrary, brought the *actio empti*, in good faith, the fact that fraud did not exist would have absolved the seller of responsibility.

⁴⁹ See the formulas that correspond to each one of these actions in Mantovani (note 28), 113.

In the poem the seller declares on the one hand that the slave is a “beauty from head to foot,” and on the other he attributes to him all at once the qualities of: *verna ministeriis ad nutus aptus erilis, litterulis Graecis imbutus, idoneus arti culibet*. In this way the poet calls to mind the jurisprudential provision contained in D.21.1.19, according to which it was necessary to differentiate promises that were enforceable and “those that are made so as to recommend the slave . . . and that end up being merely conversational.”

D.21.1.19 pr., 2 (Ulpian 1 *ad edictum aedilium curulium*).
 Sciendum tamen est quaedam et si dixerit praestare eum non debere, scilicet ea, quae ad nudam laudem servi pertinent: veluti si dixerit frugi probum dicto audientem. Ut enim Peditus scribit, multum interest, commendandi servi causa quid dixerit, an vero praestaturum se promiserit quod dixit. . . . 2. Dictum a promisso sic discernitur: dictum accipimus, quod verbo tenus pronuntiatum est nudoque sermone finitur: promissum autem potest referri et ad nudam promissionem sive pollicitationem vel ad sponsum. Secundum quod incipiet is, qui de huiusmodi causa stipulanti spondit, et ex stipulatu posse conveniri et redhibitoriis actionibus: non novum, nam et qui ex empto potest conveniri, idem etiam redhibitoriis actionibus conveniri potest.⁵⁰

The declaration that the slave was a beauty, insofar as an obvious quality makes one think of the sort of declaration that is made in

⁵⁰ D.21.1.19 pr., 2 (Ulpian 1 *ed. aed. curul.*):

We have, however, to realize that there are statements that a vendor might make which he does not have to validate, namely, those which simply extol the slave; for instance, that he is thrifty, upright and obedient. In the words of Peditus, there is a great difference between what is said to commend the slave and an undertaking to make good what is stated. . . . 2. We distinguish a statement from a promise in the following manner: A statement is that which is declared *simpliciter* and ends therewith; but promise can relate to a mere undertaking, a formal promise or a contractual undertaking by *sponsio*. Accordingly, one who gives a *sponsio* in these matters, when the question is put to him, becomes liable to an action both on the stipulation and for rescission; and there is nothing strange in the fact that one liable to the action on purchase should be liable to the action for rescission.

(Translation of A. Watson, ed., *The Digest of Justinian*, 2 (Philadelphia 1985), 150.)

a general way so as to “promote” the thing and make the buyer mentally more inclined to buy it, but without any true commitment, has increasingly been called *dolus bonus*.⁵¹ The deliberately exaggerated and very common expression that was resorted to in order to describe the slave (l. 4: *candidus et talos a vertice pulcher ad imos*) would give credit to this thesis. The slave is not handsome ἐς πόδας ἐκ κεφαλῆς as he appears in other literary sources,⁵² but rather “even under his heels.” Not even a centimeter of his body escapes perfection. Furthermore, in lines 10 and 11 Horace echoes this practice of praising merchandise excessively when he acknowledges that “a lot of hype reduces credence, when the person who wants to get rid of his goods praises them more than is fair” (*multa fidem promissa levant, ubi pleniùs aequo / laudat venalis qui vult extrudere merces*).

This notwithstanding, the second group of characteristics refers to attributes that single the slave out and could determine the decision of the buyer who had a particular aim, although they could not be perceived at first sight. As such, for example, the slave who has knowledge of Greek culture or an ability to sing.⁵³ If this is the case, they would be considered as *dicta* or *promissa* and, in the case of non-concurrence, could give rise to the buyer

⁵¹ If in relation to defects the jurist Ulpian says in D.21.1.1.6 that “If a defect in or disease of the slave be perceptible (and defects reveal themselves generally through symptoms), it may be said that the edict has no place; its concern is simply to ensure that a purchaser is not deceived” (translation of Watson, ed. (note 50), 144.), it seems that the same should be said in respect of positive characteristics that are obvious. Precisely because they are evident, they could not give rise to the buyer’s rescission, after the contract was concluded, on the basis of non-compliance with the claims, except where there was fraud by the seller, in which case the civil action would be appropriate (*actio empti*).

⁵² The Roman version of the Homeric expression tended to be *a capillis usque ad unguis*. See P. Fedeli, ed., *Q. Orazio Flacco, Le Opere* [II. *Le Satire, le Epistole, l’Arte Poetica*], 2 (Rome 1994), 1397. Examples closest to the literary sources: Cic. *QRosc.* 7.20: *Non ab imis unguibus usque ad verticem summum, si quam coniecturam affert hominibus tacita corporis figura, ex fraude, fallaciis, mendaciis constare totus videtur?* Cels. *Med.* 7.7.15d.2: *Raso capite ante ea medicamenta, quibus in lippitudine pituita suspenditur, a superciliis usque ad verticem inlini debent.*

⁵³ Observe the poet’s recourse to the rhetorical device of asyndeton to refer to the slave’s qualities, just as when the seller would list them at the point of sale, and/or when they would appear written in a type of “label” or sign that was placed against the slave’s neck. This method of omitting conjunctions or links that would normally appear within the list is particular to poetry, and not common in legal parlance.

demanding aedilician responsibility.⁵⁴

Even in this case, jurisprudence bore in mind another subtlety, which lay hidden behind the poem's verses, namely that the said or promised qualities had to be distinguished in terms of those that could be rigorously demanded and others where the level of indispensability must have been less.

D.21.1.18 pr.–1 (Gaius 1 *ad edictum aedilium curulium*). Si quid venditor de mancipio affirmaverit idque non ita esse emptor queratur, aut redhibitorio, aut aestimatorio (id esse quanto minoris) iudicio agere potest: verbi gratia si constantem aut laboriosum aut curracem vigilacem esse, aut ex frugalitate sua peculium adquirentem affirmaverit, et is ex diverso levis, protervus, desidiosus, somniculosus piger, tardus, comesor inveniatur. Haec omnia videntur eo pertinere, ne id quod affirmaverit venditor amare ab eo exigatur, sed cum quodam temperamento, ut si forte constantem esse affirmaverit, non exacta gravitas et constantia quasi a philosopho desideretur, et si laboriosum et vigilacem affirmaverit esse, non continuus labor per dies noctesque ab eo exigatur, sed haec omnia ex bono et aequo modice desiderentur. Idem et in ceteris quae venditor affirmaverit intelligemus. 1. Venditor qui optimum cocum esse dixerit, optimum in eo artificio praestare debet. Qui vero simpliciter cocum esse dixerit, satis facere videtur, etiamsi mediocrem cocum praestet. Idem et in ceteris generibus artificiorum.⁵⁵

⁵⁴ On the difficulties in differentiating these two concepts with precision (*dicta*, perhaps a unilateral promise; *promissa*, a bilateral promise) see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town 1990), 315. Also noteworthy are Zimmermann's observations regarding the difficulty in distinguishing between "dicta et promissa" and non-binding statements. Every seller, he says, tends to praise his merchandise, and as long as his statements adhere to a general scheme, or comprise obvious exaggerations, no prudent buyer is going to take them seriously; for which reason the legal system would not hold the seller responsible. In this respect, I find Horace's words in lines 10 and 11 to be powerful, as we have already brought to light: . . . *multa fidem promissa levant, ubi plenius aequo / laudat venalis qui vult extrudere merces.*

⁵⁵ Watson, ed. (note 50), 149:

If the vendor makes some assertion about a slave and the purchaser complains that things are not as he was assured that they were, he can proceed by the action of rescission or that for a diminution in which an assessment is made. Suppose that the vendor says that the

As regards the poem it seems that it is one thing that the slave who is offered as a *litterulis Graecis imbutus* (l. 7), as in our case, did not know a word of Greek, and another that he did not have the knowledge of a Polybius, to give one example. We are entering into the sphere of the “gravity” of the defect.⁵⁶ It is not just chance that the poet uses the qualification *litterulis* instead of *litteratus* in relation to the slave’s knowledge of Greek; nor that he talks of *imbutus* instead of *instructus*.⁵⁷ On the contrary, these serve to support the idea that, depending on the description that was made of the thing, there were different levels to which a quality could be demanded, or to say the same thing in another

slave is loyal or hard-working or diligent or vigilant or that through his thrift, he has acquired a *peculium* and, on the contrary, he is fickle, wanton, slothful, sluggish, idle, tardy, or a wastrel. All these expressions of the vendor are not to be charged against the vendor with absolute literalism but should be reasonably interpreted. Hence, if he declare the slave to be loyal, one does not expect the absolute gravity and fidelity of a philosopher; if he declare him to be hardworking and watchful, he is not required to work all day and all night. All these qualities should be expected within reason and we hold the same of other assertions of the vendor. 1. If a vendor say that the slave is an excellent cook, he must supply a leader of his profession; but one who says simply that he is a cook meets his obligations, even though the slave be but a mediocre cook. The same applies to other trades and crafts.

⁵⁶ In respect of *litterulis . . . imbutus* as terms that have a somewhat pejorative connotation, see Rudd (note 22), 123. One could contrast this passage from Horace, where *litterulis* is a disparaging diminutive, with another by Suetonius where *imbutus litteris* equates to *litterator* and is distinguished from the *perfectus litteris*, who would be designated as *litteratus*. See Rasi (note 9), 189; Suet. *Gram.* 4.5.4: . . . *ait cum familia alicuius venalis produceretur, non temere quem litteratum in titulo, sed litteratorem inscribi solitum esse, quasi non perfectum litteris, sed imbutum.*

⁵⁷ Tac. *Dial.* 19.5.2: . . . *quin elementis studiorum, etsi non instructus, at certe imbutus sit, novis exquisitis eloquettiae itineribus opus est.* Regarding the term “imbutus,” the following passage from Vitruvius is also instructive, when he talks of the ideal training for an architect: Vit. 1.1.18.11: *Namque non uti summus philosophus nec rhetor disertus nec grammaticus summis rationibus artis exercitatus, sed ut architectus his litteris imbutus haec nisus sum scribere.* There are further abundant literary sources along the same lines. Cic. *de Or.* 2.162.6: *Sin sit is, qui et doctrina mihi liberaliter institutus et aliquo iam imbutus usu et satis acri ingenio esse videatur, illuc eum rapiam, ubi non seclusa aliqua acula teneatur, sed unde universum flumen erumpat.* Suet. Nero 20.1.1: *Inter ceteras disciplinas pueritae tempore imbutus et musica, statim ut imperium adeptus est.*

way, one could talk of a gradation regarding the seriousness of the defect. We have notice of this issue through a text attributed to Gaius (D.21.1.18 pr.–1), even though it is correct that a tradition in thinking could well be encapsulated as an appeal to equity and common sense.⁵⁸

Whether accidental or premeditated, all the juridical subtleties are present in the example of a sale contract that was chosen by Horace. Through the poem one could undertake a study into the reflection of Roman jurisprudence on the development of the concept of defect, on its hidden nature and the extent of its gravity; and likewise on the differentiation between responsibility for the existence of defects that were not declared, and responsibility for the stated or promised qualities not materializing, which in the case of absence, just as with defects, gave rise to the objective aedilician *tutela*. The same holds for the difference between promises that were actionable, and those that were not, given that they were only made to recommend the thing and to incline the buyer mentally towards acquiring it. These were all questions that the Roman jurists thought about, and that continue to be the subject of discussion by current doctrine.

Once more, whether consciously or unconsciously, Horace echoes the jurisprudential reflections that would have characterized his era at the beginning of the second century BC with the first *edictum de mancipis*, and been the subject of commentary among the jurists that he mingled with, as was the case with Trebatius Testa, Aulus Ofilius, or Antistius Labeo.⁵⁹ Commentaries would have been enriched with new theoretical examples up until the time of Ulpian, to whom we owe our knowledge. Or,

⁵⁸ A. Mantello, “Etica e mercato. Tra filosofia e giurisprudenza,” in F. Milazzo, ed., *Affari, finanza e diritto nei primi due secoli dell'impero. Atti del convegno internazionale di diritto romano, Copanello, 5-8 giugno 2004* (Milan 2012), 113. Horace himself, in Satire 1.3 (on which we shall comment below) regarding the “vices” of friends, develops the argument that it is necessary to differentiate between “serious defects” and *mediocria vitia*. The latter should be forgiven. See E. Frankel, *Horace* (Oxford 1957), 87 n.2.

⁵⁹ Given the difference in age between Horace and Antistius Labeo, certain doubts have been posited regarding whether the jurist to whom the poet is alluding in some of his verses (*Sat.* 1.3.82) was the prestigious jurist of the Augustan era, Marcus Antistius Labeo, or his father, Pacuvius Labeo, also a jurist. It is even speculated that he was possibly referring to Atinius Labeo, plebeian tribune in 131 BC. See P. de Paolis, “Labeone,” in *Enciclopedia Oraziana*, 1 (Rome 1996), 763; Hassan (note 1), 47.

all things considered, it is the jurists who echoed the way things took place in practice. The sensitivity of the poet does no more than record various examples, transferring them to his verses.

5. *Fugitivus vel erro*

In the metaphor of the sale of Horace, explicit reference is made to the clause *fugitivus vel erro* (l. 16) that features in all documents from daily practice where evidence is found of the sale and purchase of slaves (a statement regarding tendency to escape). In this case it is used in an exaggerated way, with literary ends: a way of avoiding the friend's reproach for the absence of correspondence.⁶⁰

Technically, the case that the poet recounts of the slave who, "on one occasion (*semel hic*) neglected his functions (*cessavit*),"⁶¹

⁶⁰ Tablets and papyri evidencing commercial transactions that took place on different dates and from one side of the Roman Empire to the other: from the Italian peninsula to the Phlegrean fields of Puteoli and Herculaneum; to Dacia (*Alburnus Maior*) and Syria (Port of *Pieria Seleucia*) passing through the British Isles (*Londinium*), not to forget the North of Africa, as some recent findings concerning the places where auctions were held show. To give just some examples:

1. TPSulp. 43 (21 August 38). See G. Camodeca, *Tabulae Pompeianae Sulpictorum (TPSulp.)*. Edizione critica dell'archivio puteolano dei Sulpicii, 1 (Rome 1999), 17.
2. TH 60 (AD 63–64). See Camodeca (note 22), 53–76.
3. CIL III 940 = FIRA, 3, 285 (AD 142) ("Emptio pueri"). See Jakab (note 19), 166; Mantovani (note 28), 116.
4. P.Lond. II 229 = FIRA, 3, 425–27 = ChLA III 200 = CPL 120, found in Syria (Seleucia Pieria).
5. Sale of the girl Fortunata (AD 1–2 C.), a *tabula cerata* found in London in 1994. See R. S. O. Tomlin, "The Girl in Question: A New Text from Roman London," *Britannia*, 34 (2003), 41–51. For stringent criticisms, and improved readings and reconstruction, see G. Camodeca, "Cura secunda della tabula londinese con la compravendita della puella Fortunata," *ZPE*, 157 (2006), 225.

All these documents reproduce, with very minor variations, the content and order of the aedilician edict in which the clauses relative to the responsibility for hidden defects are referred to. Some of these are echoed in Horace as we have had the opportunity to confirm: *natione pronuntianda; vitia et morbi; ne veterator pro novicio veneat* and, in particular, *fugitivus vel erro*. For a detailed commentary, see Carrasco Garcia (note 5), 105–10.

⁶¹ I translate the term "cessavit" in this way, consistently with the literary sources in which it does not appear in the sense of fleeing but rather, very frequently, of interrupting, stopping, halting an activity;

and immediately thereafter “hid under the stairs *pendentis habenae*,” in other words, with the intention of fleeing from the whip,⁶² is probably not dealing with a case of flight in accordance with what the Roman jurists had understood as such, as far as one can discern from D.21.1.1.17 (Ulpian 1 *ad edictum aedilium curulium*), a text in which Ulpian sets out his opinion sometimes in agreement with the jurists who preceded him, and other times by way of contrast with them.⁶³

The situation would not fall within the definition of escape

resisting, giving up; showing oneself to be lazy; stopping doing. As such, for example, Quintus Horatius Flaccus himself in *Ep.* 1.7.57: *notum et properare loco et cessare et quaerere* (known for working and for stopping working); Curt. 7.2.26.4: *Arachosios. Strenuum hominem et numquam cessantem!* (the man who never rests!); Liv. 45.23.11.1 *officio cesseremus* (avoiding one’s duties); Cic. *Nat. D.* 1.102.4: *tamen pueri etiam cum cessant exercitatione* (when one is resting). See also *TLL*, s.v. “Cesso”; *Vocabolario della lingua Latina* (Turin 2007), 165. Rasi (note 9), 190, notes that *cessavit* could be a euphemistic use of *fugit*. I am not convinced in this case, given that it would imply that the slave fled, and it is not known how (*motu proprio*, or because he was apprehended before he secured his escape) he returned to hide away out of fear of the whip.

⁶² The poet emphasizes that this “abandonment or neglect of functions” (*cessavit*) took place only on one occasion (*semel hic*). This is not a question of common conduct which, going by Labeo’s definition, would make us think more of the concept of *erro* than of *fugitivus* (D.21.1.17.14: *sed proprie errorem sic definimus, qui non quidem fugit, sed frequenter sine causa vagatur, et temporibus in res nugatorias consumptis serius domum redit*). Nevertheless, I share the opinion of those who understand that a substantial technical difference does not exist between the two concepts (apart from in the duration of the flight); they form part of the same exception and give rise to the same practical consequences (resolution of the contract and lowering of the price). See Gamauf (note 11), 275.

⁶³ D.21.1.17 (Ulpian 1 *ed. aed. curul.*):

Quid sit fugitivus, definit Ofilius: fugitivus est, qui extra domini domum fugae causa, quo se a domino celaret, mansit. 1. Caelius autem fugitivum esse ait eum, qui ea mente discebat, ne ad dominum redeat, tametsi mutato consilio ad eum revertatur: nemo enim tali peccato, inquit, poenitentia sua nocens esse desinit. 2. Cassius quoque scribit fugitivum esse, qui certo proposito dominum relinquat. 3. Item apud Vivianum relatam est fugitivum fere ab affectu animi intellegendum esse, non utique a fuga: nam eum qui hostem aut latronem. . . . 4. Idem ait: interrogatus Proculus de eo, qui domi latuisset, in hoc scilicet, ut fugae nactus occasionem se subtraheret, ait, tametsi fugere non posset videri, qui domi mansisset, tamen eum fugitivum fuisse: si autem in hoc tantum latuisset, quoad iracundia domini effervesceret, fugitivum non esse, sicuti ne eum quidem, qui cum domino animadverteret verberibus se adficere velle.

given by Aulus Ofilius (ca. 80 BC – AD 1), a jurist who was contemporary with Horace,⁶⁴ and for whom a fugitive was one who would abandon the home of the owner so as to hide from him (*Quid sit fugitivus, definit Ofilius: fugitivus est, qui extra domini domum fugae causa, quo se a domino celaret, mansit*). In the example given in the poem, the material or objective fact of being absent from the owner's house (*manere extra domum domini*) does not match this, nor does the intention to hide (*quo se a domino celare*) where *quo* indicates the objective, the aim.

Neither would the circumstances fit the opinion on *fugitivus* held by the jurist Sempronius Proculus (ca. 10–5 BC – ca. AD 70)⁶⁵ who, when interrogated about the slave who hid himself away in the home, distinguished between the slave who does so in order to escape whenever he has the opportunity (*ut fugae nactus occasionem se subtraheret*), and the slave who does so, as in our case, whenever the owner's anger was extreme (*quoad iracundia domini effervesceret*). In neither of the two cases is there concurrence, in its strict meaning, with the objective element of *manere extra domum domini* of which Ofilius spoke; for which reason, says Proculus, “he cannot be considered to have fled.”

Nevertheless, whether because Proculus in this case makes the *animus* of escaping prevail over the factual element of escaping, or because he interprets “escape” in a broad sense that would allow it to be considered as “withdrawal from the master's field of control, despite remaining within the same house,” the fact is that Proculus qualifies the first slave as fugitive, but does not do so regarding the second one, the slave in our poem. There is no escape because there is no *animus* to escape⁶⁶ in the slave who

⁶⁴ See F. J. Andrés Santos, “Aulo Ofilio,” in R. Domingo, ed., *Juristas Universales*, 1 (Madrid 2004), 141. The first extensive commentary on the edict of the urban praetor is attributed specifically to Aulus Ofilius, as is probably also the case with that of the edict of the curule aediles. See P. Biavaschi, *Caesari familiarissimus. Ricerche su Aulo Ofilio e il diritto successorio tra repubblica e principato* (Milan 2011), 9.

⁶⁵ See J. Paricio, “Sempronio Próculo,” in R. Domingo, ed., *Juristas Universales*, 1 (Madrid 2004), 159.

⁶⁶ D.21.1.17.4 (Ulpian 1 *ed. aed. curul.*):

Quid sit fugitivus . . . : 4. Idem ait: interrogatus Proculus de eo, qui domi latuisset, in hoc scilicet, ut fugae nactus occasionem se subtraheret, ait, tametsi fugere non posset videri, qui domi mansisset, tamen eum fugitivum fuisse: si autem in hoc tantum latuisset, quoad iracundia domini effervesceret, fugitivum non esse, sicuti ne eum quidem, qui cum domino animadverteret verberibus se adficere velle.

goes into hiding through fear of the whip.⁶⁷ Even understanding (as Ofilius had) that the objective circumstance of an escape, and the subjective element of *animus* to definitively get away from the master, were necessary in order to talk of flight, I am inclined to think that the decisive reasoning behind Proculus' opinion is that this second factor has special importance in particular cases, without it being necessary, for this reason, to talk of a dialectic confrontation between both elements, or of *ius controversum* with regard to the juristic opinions gathered by Ulpian in D.21.1.17.⁶⁸ It would be different had Horace simply said "he hid under the stairs"; various literary texts speak of escape on the basis that the stairs were the part of the house nearest to the door, facilitating the escape.⁶⁹ It seems that Horace made a real effort to ensure it was clear that the intention to escape did not exist.

As such, therefore, even assuming that Proculus' opinion was answering to a feeling shared by jurists somewhat earlier and contemporary to Horace (the only view that is certain to us is that of Ofilius, and it is shown to be much more limited in the requirement for *manere extra domum domini*), it would still make no sense to talk of escape in the case of the poem, given that the intention to flee is lacking.

This does not mean that Horace errs when qualifying the slave's conduct as *fuga*, after having given us so many signs of being up-to-date on the *ius*. On the contrary, this is about something intentional and it is one more indication of his virtu-

⁶⁷ Vivianus (D.21.1.17.3) gives another example of what we are talking about, when he holds that

a fugitive is to be so determined from his attitude of mind and not merely from the fact of his flight; for a slave who flees from an enemy or brigand, a fire, or the collapse of a building, certainly runs away, but he is not a fugitive. In the same way, a slave who runs away from the instructor to whom he was entrusted for training is not a fugitive, if the reason for his running away be the intolerable treatment which he receives. [It is the same] if that be the reason for his running away from someone who borrowed him.

(Translation of Watson, ed. (note 50), 148.) Regarding the figure of Vivianus, see C. Russo Ruggeri, *Viviano giurista minore?* (Milano 1997), 159.

⁶⁸ In a previous study, I myself inclined towards this interpretation, which I now consider can be revised. See C. Carrasco García, "*Fugitivus vel erro*: del que huye estando presente y del que permanece pese a la ausencia. O de la dialéctica voluntad-acción," *Seminarios Complutenses de Derecho Romano*, 28 (2015), 165–83.

⁶⁹ See Wilkins (note 10), 293, in reference to different passages by Cicero.

osity and of the value of legal filigree in his verses. It is the poetic way of making clear how unjustified his friend's approach was when trying to make him answer for an insignificant mistake which, moreover, he had anticipated by attributing to himself a defect (being one-armed) that he did not have (which would colloquially be to "cure oneself whilst in good health"). It is his way of dismantling, with a legal argument, Julius Florus' reproach for a minor failing like that of not replying to letters or writing poems for him. As such, just as the slave's conduct lacks the essential elements to be qualified as an escape and would make no headway in a law suit — even though the seller has referred to it in an excess of zeal — neither could the poet be reprimanded for his failure regarding the friend (*Quid tum profeci, mecum facientia iura si tamen attemptas?*, says line 23).

The chosen example does not cease to be remarkable: the slave who neglects his functions and then hides through fear of punishment. It seems intentional, in order to contemplate all the possibilities that jurisprudence was juggling in its attempt to crystallize the term *fugitivus*.

III. Regarding unlawful conduct. The different gravity of offenses: *Sat.* 1.3.

This brings us to the second poem, whose first lines allude to the necessity of being charitable about other people's flaws, especially those of friends (*ac pater ut gnati, sic nos debemus amici / si quod sit vitium non fastidire*, ll. 43–44).⁷⁰

Earlier in time to *Ep.* 2.2, it is, like the latter, composed in a literary form in dactylic hexameter.⁷¹ Dated to around 36 BC.⁷² it tackles the subject of the inexistence of the flawless person (l. 68: *nam vitiis nemo sine nascitur*); those having less serious defects being better (ll. 68–69: *optimus ille est qui minimis urgetur*). This affirmation prompts the poet to go to the defense of indulging

⁷⁰ With the title "The other as limit," C. Schlegel, *Satire and the Threat of Speech: Horace's Satires, Book I* (Madison, WI 2005), 30, sums up the argument of this satire.

⁷¹ See ll. 18–19: *Nunc aliquis dicat mihi "quid tu? / nullane habes vitia?" immo alia et fortasse minora*; ll. 25–27: *Cum tua videas oculis mala lippus inunctis / cur in amicorum vitiis tam cernis acutum/quam aut aquila aut serpens Epidaurus?*, among others. In the words of N. Rudd, *The Satires of Horace* (Cambridge 1966), 5, "The poem, after all, is a conversation-piece, not a dissertation."

⁷² See A. Palmer, ed., *The Satires of Horace* (Glasgow 1905), 136.

one's friends' flaws, which should be appreciated as virtues (similarly to what takes place in amorous and parent-child relationships (ll. 69–72: *amicus dulcis, ut aequum est / cum mea compensat vitii bona, pluribus hisce / si modo plura mihi bona sunt, inclinēt / amare si volet hac lege, in trutina ponetur eadem*).

Together with friendship, a typical Epicurean theme that is frequently present in Horace's poems,⁷³ the refutation of a hypothesis of Stoicism is set up as the protagonist in this case, through *reductio ad absurdum*: the defense of equality among the offenses and penalties. To evidence how contrary to justice this egalitarian treatment is, the poet turns to a comparison between cutting back plants that are on someone else's land (l. 116: *qui teneros caulis alieni fregerit horti*), and the desecration of sacred things (l. 117: *qui nocturnus sacra divum legerit*).

The usage of terms, concepts and morphosyntactic structures that are characteristic of the language of law, stands out in this composition as well. As in *Ep.* 2.2, sometimes we are dealing with a specialized lexicon, particular to the sphere of *ius*. Such is the case with the words *crimina* (l. 61), *sancire* (l. 67; this latter also being used in political and religious language), and *regula* (l. 118). We also have *consuetudo* (l. 36), *postulare* (l. 51), *coercitio* (l. 78), *furiousus* (l. 83); likewise *fideicommissum*, *sponsio*, and *furta*, the last of which the poet distinguishes completely from *latrociniiis* (ll. 94–95 and l. 122).⁷⁴ Elsewhere we find juridical terms that are used in common language with a metaphorical meaning: as such *vitia* (ll. 20, 28, 39) and corresponding forms like *vitiis* (ll. 26, 69, 70) and *vitium* (ll. 1, 44, 76), here in reference to a person's characteristics that, from the point of view of Roman law, are not considered defects that could give rise to the *actio redhibitoria*, as we have already seen in *Ep.* 2.2. As such, the poem talks of defects of the mind, like being irritable and not very subtle; also, defects of equal triviality relating to the physical world (being badly dressed and groomed). There are also thematic words around

⁷³ Friendship, a common theme of Epicureanism, is almost always present in Horace's works, given that many of the protagonists or addressees are friends (as in *Ep.* 2.2) or, independently from this, the virtues of friendship are praised. Regarding the letters, see W. Allen, "The Addressees in Horace's First Book of Epistles," *Studies in Philology*, 67 (1970), 260.

⁷⁴ Lines 94–95: *sit mihi? Quid faciam si furtum fecerit aut si / prodiderit commisa fide sponsumve negarit?* E. Gowers, *Horace. Satires. Book I* (Cambridge 2012), 137, points out the correspondence between this "si furtum fecerit" and the text of the XII Tables (8.12) "Furtum faxit."

which the poet organizes his legal reasoning: *stultus, improbus, and dignus* (l. 24). Sometimes Horace avoids the technical word, but calls it up through images. As such, just as *Ep.* 2.2 alludes to weighing scales, there as a metaphor for justice, it appears so here on several occasions, as in ll. 69–72 (*amicus dulcis, ut aequum est / cum mea compensat vitiis bona, pluribus hisce / si modo plura mihi bona sunt, inclinet amare / si volet hac lege, in trutina ponetur eadem*); also in ll. 78–79 (*cur non / ponderibus modulisque suis ratio utitur ac res / ut quaeque est ita supplicii delicta coercet?*).

In other cases morphosyntactic structures characteristic of legal texts are used: so the alliteration *peccatis . . . poscentem reddere rursus* (l. 75), which evokes the restitution of that which is legally owed, and *faciam si furtum fecerit* (l. 94), which calls to mind the prescription of the XII Tables (8.12: *furtum faxit*).⁷⁵ Horace also makes use of alliteration to list physical defects (*paetum pater et pullum, male parvus*).

But yet again, what is remarkable is the knowledge that the poet shows that he has — on the basis of the factual hypotheses that he chooses and the terminology with which he refers to them — of the jurisprudential disputes of his time. We have seen this in relation to the preciseness of terms like *vitium* and *fugitivus* in *Ep.* 2.2, regarding contracts of sale. In this case, two forms of conduct are dealt with; they are of different levels of gravity and according to the Roman legal system are unlawful: *teneros caules alieni fregerit horti* and *nocturnus sacra divum legeri*. Also addressed are the actions with which they should be pursued.

Sat. 1.3.115–117:

nec vincet ratio hoc, tantundem ut peccet idemque,
qui teneros caules alieni fregerit horti
et qui nocturnus sacra divum legerit.

The theft of sacred things refers to the *crimen sacrilegii*, a public offense punishable (according to some⁷⁶) with the sentence imposed for patricide. The unlawful cutting back of plants from someone else's land, already contemplated in the XII Tables, could be prosecuted, either through the *actio arborum furtim caesarum*

⁷⁵ Gowers (note 74), 137, draws our attention to how the alliteration *faciam furtum fecerit* reinforces the solemnity particular to the expression “quasi legal.” See also lines 105–106: *oppida coeperunt munire et ponere leges / ne quis fur esset, neu latro, neu quis adulter*.

⁷⁶ See B. Santalucia, *Diritto e processo penale nell'antica Roma* (Milan 1998), 200.

or the *arboribus succisis*, in the latter case if *fregerit horti* could be included in the notion of *arbor* (G.4.11; D.47.7.2; D.47.7.4), or if not, through the *actio* derived from the *lex Aquilia*.

The crystallization of the term *arbor* in order to determine when the action of the XII Tables was applicable gave rise to many disputes among the jurists (Horace's friend Trebatius Testa, amongst others: D.47.7.1). As has been brought to the fore by one scholar,⁷⁷ the satire's express reference to *teneros caules* (l. 116) excludes in this case the *actio* anticipated by decemvirate law, given that a tender shoot does not fall within the notion of *arbor*. At the same time, the use of the verb *freguerit* (l. 117) allows a parallel to be established between the drafting of the poem and the text of the *lex Aquilia*.

D.9.2.27.5 (Ulpian 18 *ad Edictum*). Tertio autem capite ait eadem lex Aquilia: ceterarum rerum, praeter hominem et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.

In this way, out of these two possibilities Horace must have been opting for the one that required the offender to be held responsible through the *actio legis Aquiliae*.

IV. Conclusion

My objective in using a literary source to address a legal question — responsibility for hidden defects in the case of *Ep.* 2.2; the various punishments for different offenses in the case of *Sat.* 1.3 — is not to reconstruct Roman law by finding support in the poems that does not exist in the legal texts.⁷⁸ Rather, I have sought to reverse the traditional point of view, through a reading of those same poems when guided by the law, and to highlight the representation of the law that could be held by society — that is to say, the poet and the public that he tried to please with his compositions, as well as reaching a better understanding of the

⁷⁷ O. Diliberto, "La satira e il diritto: una nuova lettura di Horat., sat. 1.3.115–117," *Annali del Seminario Giuridico dell'Università degli Studi di Palermo*, 55 (2012), 385–402.

⁷⁸ As such, for example, on the basis of the poem alone, I would not risk asserting (as some authors do) that the edictal clause *de natione pronuntianda* is from the Augustan era.

poetic works and creative process in Horace.⁷⁹

As regards *Ep.* 2.2, it is for the reader to decide whether the detail with which Horace describes the law suggests the presence of a contract of sale with which any citizen could be familiar, a consequence of the poet's own background (supposedly the son of a freedman who probably practiced as *coactor* in auctions,⁸⁰ Horace himself being the *scriba quaestorius*⁸¹), or instead is conditioned by the addressee of the letter: Julius Florus, *advocatus* and poet.⁸²

As regards *Sat.* 1.3, it could be that the example chosen to ridicule the propositions of Stoic philosophy on the equality of offenses and sanctions is random; the same could be said of the use of some terms that correspond to those with which the rules were expressed, and which the jurists argued over.

I am inclined to think that everything is premeditated and is explained by the fact that in the Rome of the first century BC, other people — apart from the jurists — were *iure imbuti*. Among these were the poet and the part of his readership that would read, or better, hear, his verses.⁸³

⁷⁹ I would say that this fits into the way of confronting the study of Roman law that has recently been described as the “contextual approach,” insofar as this is understood not only as a juridical phenomenon, but rather as a part of the history of ideas generally; “not only concerned with legal sources but also consider these sources as a part of intellectual history.” L. Winkel, “Roman Law and its Intellectual Context,” in D. Johnston, ed., *The Cambridge Companion to Roman Law* (Cambridge 2015), 11. We should include in this line of thought these works, cited above: Diederichsen (note 1); Gebhardt (note 1); Diliberto (note 1); Hassan (note 1). My investigation follows the path taken by Dario Mantovani — to whom I would like to extend here my sincere gratitude — and followed up by L. Pellicchi, *Per una lettura giuridica della Rudens di Plauto* (Parma 2012); *Innocentia eloquentia est. Analisi giuridica dell'apologia di Apuleio [Biblioteca di Athenaeum, 57]* (Como 2012).

⁸⁰ G. Williams, “*Libertino patre natus*: True or False?,” in S. J. Harrison, ed., *Homage to Horace* (Oxford 1995), 299 (in reference to *Sat.* 1.6, lines 87 and 88).

⁸¹ K. Freudenburg, “Writing to/through Florus: Criticism and the Addressee in Horace Epistles 2.2,” in *Memoirs Am. Acad. Rome*, 47 (2002), 35–55. See M. Fitzpatrick Nichols, “Social Status and the Authorial Personae of Horace and Vitruvius,” in B. T. Houghton and M. Wyke, eds., *Perceptions of Horace: A Roman Poet and His Readers* (Cambridge 2009), 109–22.

⁸² On how Horace adapts the tone and content of his letters to his interlocutor, see R. Ferri, “The Epistles,” in S. Harrison, ed., *The Cambridge Companion to Horace* (Cambridge 2007), 122.

⁸³ On the insistence in the poems of Horace himself on these being reserved to a circumscribed public, see W. Allen, “The Addressees in

And the point is that in Horace's era, the humanistic conception still reigned in the culture inherited from Hellenism,⁸⁴ the Republican aristocratic cultural model based on what could be called "unity of knowledge," characterized by a social class whose vocation was to acquire encyclopedic knowledge.⁸⁵ It is sufficient to remember the lines of Plautus, *Mostellaria* 118–128, in which he points out the importance of *ius* in the education of children.⁸⁶ Cicero also, and even Vitruvius, stress in their works the importance that the study of law had for the orator, for the philosopher, for the philologist or for scholars of antiquity;⁸⁷ simi-

Horace's First Book of Epistles," *Studies in Philology*, 67 (1970), 266. In book 1 of the Letters, on several occasions Horace himself insists on his intimacy with the circles of power (*Ep.* 1.20.23). At the same time, in *Ep.* 1.20.17 he jokes about turning into an author read by schoolchildren. Also, P. Fedeli, ed., *Orazio. Tutte le poesie*, trans. C. Carena (Turin 2009), xi, xviii, where he says that the poetry of Horace was learned, for a refined audience; the common reader, he says, would not have been able to penetrate a complex system of models, allusive connections, and a style with Pindaric echoes.

⁸⁴ M. Bretone, "Il testo giuridico," in G. Cavallo, et al., eds., *Lo spazio letterario di Roma antica*, 1 (Rome 1989), 436, reprinted in M. Bretone, *Diritto romano e coscienza moderna. Dalla tradizione alla storia* (Madrid 2011), 166.

⁸⁵ Regarding the necessity, in any *ars*, of the *artifex* (the specialist of any branch of knowledge) having numerous instances of expertise in several branches of culture, see E. Romano, "Il ruolo di Cicerone nella formazione di una cultura tecnica," in E. Narducci, ed., *Aspetti della fortuna di Cicerone nella cultura latina. Atti del III Symposium Ciceronianum Arpinas, Arpino 10 maggio 2002* (Florence 2003), 102. See Cic. *de Or.* 3.133: *Equidem saepe hoc audivi de patre et de socero meo, nostros quoque homines qui excellere sapientiae gloria vellent omnia qua quidem tum haec civitas nosset solitos esse complecti.*

⁸⁶ Plaut. *Mos.* 118–128:

Haec argumenta ego aedificiis dixi; nunc etiam volo / Dicere ut homines aedium esse similis arbitremini / Primumdum parentes fabri liberum sunt / Ei fundamentum substruunt liberorum / Extollunt, parant sedulo in firmitatem / Et ut (et) in usum boni et in speciem / Poplo sint sibi que, haud materiae reparant / Nec sumptus sibi sumptui esse ducunt / Expoliunt, docent litteras, iura leges / Sumptu suo et labore / Nituntur, ut alii sibi esse illorum similis expetant.

⁸⁷ Cic. *de Or.* 1.17–18: *Est enim et scientia comprehendenda rerum plurimarum, sine qua verborum volubilitas inanis atque irridenda est, . . . 18. Tenenda praeterea est omnis antiquitas, exemplorumque vis; neque legum, aut iuris civilis scientia neglegenda est. Cic. Orat.* 119–120: *. . . ne physicorum quidem esse ignarum volo. . . 120. Cumque illa divina cognoverit, nolo ignoret ne haec quidem humana. Ius civile teneat quo egent causae forenses cotidie. . . Cognoscat etiam rerum gestarum et*

larly, for the specialist in *ars* such as architecture.⁸⁸ Why not for the poet who developed his activity within cultivated circles, among the elite in which the jurists were also to be found? The latter, as we well know, being generally of lofty social extraction, had contact with Latin and also Greek literary works from the first moments of their formation.

Some of them would learn to read using a legal text: the XII Tables.⁸⁹ These formed the grammatical basis of their scholastic programs and like so many other regulations, the knowledge of which was transmitted primarily by word of mouth, they must have taken on the structure of verse, or of “rhythmic verse or prose” (Cicero described them as *carmen necessarium*).⁹⁰ A linguistic and cultural monument of ancient Rome, the references by which schoolchildren learnt them by memory are extremely well-known.⁹¹ Accordingly, they must all have had a certain familiarity

memoriae veteris ordinem, maxime scilicet nostrae civitatis, sed etiam imperiosorum populorum et regum illustrium. Cic. *de Orat.* 1.197: *His ego de causis dixeram, Scaevola, eis, qui perfecti oratores esse vellent, iuris civilis cognitionem esse necessariam.* (A necessity, that as E. Romano says, must not be interpreted exclusively as being of an obligatory nature, but rather as whatever was appropriate in particular socio-cultural environments.) Cic. *de Orat.* 1.193 also refers to the pleasure that the study of civil law can bring: *mira quaedam in cognoscendo suavitas et delectatio.*

⁸⁸ Vitruvius 1.1.3.9, regarding the ideal architect: *Et ut litteratus sit, peritus graphidos, eruditus geometria, historias complures noverit, philosophos diligenter audierit, musicam scierit, medicinae non sit ignarus, responsa iurisconsultorum noverit, astrologiam caelique rationes cognitatas habeat.* Likewise, Vitruvius 1. 1.4–7: *... omnes disciplinas inter se coniunctionem rerum et communicationem habere . . . ; encyclios enim disciplina uti corpus unum ex his membris est composita.*

⁸⁹ E. Norden, *La letteratura romana* (Bari 1958), 10.

⁹⁰ I say “they must have,” given that it is just as impossible to make assertions with certainty relating to the external form as it is to the content. As such, we do not know whether they were written on bronze (Dion. Hal. 10.57.7; Diod. 12.26.1; Livy 3.57.10), or on wood (Hor. *Ars P.* 399; D.1.2.2.4), in prose, or in verse. The intellectuals of the final era of the Republic had the same doubts. See E. Romano, “Effigies antiquitatis. Per una storia della persistenza delle Dodici Tavole nella cultura romana,” in M. Humbert, ed., *Le Dodici Tavole. Dai decemviri agli umanisti* (Pavia 2005), 454.

⁹¹ *A parvis enim, Quinte, didicimus “si in ius vocat,” atque eius modi leges alias nominare,* writes Cicero in *De legibus* 2.9, appealing to his brother’s memory regarding their childhood education. Likewise, the fact that when in the same work (*De legibus* 2.59) Cicero reminds Atticus about one of the regulations in the Decemvirate text that tended to limit funerary extravagance (Table X) he says *nostis quae sequuntur; discemus enim pueri XII ut Carmen necessarium; quas iam nemo discit.* This

with the *ius*. In connection with the former point it is necessary to remember the fact that reading in antiquity, be it private or public, was done out loud, with the aim of facilitating the memorization of any writings that were difficult to read as a result of *scripta continua*; much more so than re-reading, given the scant circulation of copies.⁹² With the verse's musicality contributing as much to its reading as to mnemonics, many authors turned to this literary style in their work, independently of the contents (history, literature, or law).

Therefore, the connection between law and poetry is not as strange as may have been thought initially; on the contrary, it goes back to the origins of written culture. In such a way it is easy to find poets like Horace who were familiar with jurisprudential disputes, and with jurists such as Labeo who were praised for their qualities as grammarians, and their rigor in etymological and linguistic analysis.⁹³

For this reason, the law must have had an important presence in Latin literature, even when it was non-legal. Its evocative quality, the expressive force of a legal term in a non-legal context, did not pass unnoticed by the poets. They saw that by resorting to the language of law, by using legal concepts in a metaphorical sense, they had a strategy for calling to mind the real context in which that technical language was used.

Reverting now to the verses of Horace, and in spite of what has been said, one must not lose sight of the fact that we are not talking about legal texts, but rather about literary ones. This can be appreciated in the lexicon and the style. Together with technical terms that are *a priori* not poetical, poetical words appear with a high expressive potential. This is so with *verna* in the first poem (*Ep.* 2.2), which alludes in this case to "Italic nationhood" (l. 6); with *idoneus arti cuilibet* in reference to a "novice" in opposition to a "veteran" (ll. 7–8); with *turpis* in *Sat.* 1.3 (l. 39) being opposed to *pulcher*.

As regards the style, together with techniques such as anaphora and alliteration, used as much in the language of law as in that of literature, other devices that are characteristic of the

coincides with the idea that they must have been written if not in verse then indeed in rhythmic prose.

⁹² W. J. Ong, *Oralità e scrittura. Le tecnologie della parola* (Bologna 1986), 171; G. Cavallo and R. Chartier, eds., *Historia de la lectura en el mundo occidental* (Madrid 2001), 23.

⁹³ Bretone (note 83), 451.

latter appear in the poems, but we would rarely see them in a legal text.⁹⁴ This is the case with the oxymoron, where there is a play on words or contrast of ideas, like those that can be seen in *Ep.* 2.2 (l. 10: *multa fidem promissa levant, ubi plenius aequo*; l. 12: *res urget me nulla; meo sum pauper in aere*); in *Sat.* 1.3 (l. 25: *tu videas oculis lippus inuctis*⁹⁵; ll. 22–23: *ignoras . . . ignotum . . . ignosco*). Horace also turns to the asyndeton: *Graecis imbutus, idoneus arti* in *Ep.* 2.2 (l. 7). The same can be said of his use of diminutives: *litterulis* in *Ep.* 2.2 (l. 7) and *pullus* in *Sat.* 1.3, characteristic of literary texts and inappropriate for legal ones. Another significant characteristic of the poems is the absence of rigidity in the textual order (*fiet eritque tuus* at the beginning of the agreement in *Ep.* 2.2), or the appeal to emotions/feelings (*quin etiam canet, indoctum sed dulce bibenti*) that we would not find in a legal text.⁹⁶ The same could be said of his recourse to proverbs, which can be appreciated in both compositions: *A vertice pulcher ad imos* (*Ep.* 2.2); *Ab ovo usque ad mala* and *Vitiis nemo sine nascitur* (*Sat.* 1.3).

To conclude, a reference to the lyrical Horace. It has been said of Epistle 2.2 that, “being written by Horace at a time when he wanted to move away from lyrical poetry, it is the most lyrical of his poetical compositions, understanding lyricism to be the outpouring of intimacy, the abandonment by the writer of the written page without obstruction or reticence.”⁹⁷

This is indeed how it is, as can be appreciated through the way in which Horace, alternating fiction with reality, offers us a

⁹⁴ Regarding the “language” (a more appropriate term than the “particular terminology” or “jargon”) of law as a variant of the common language, but with distinctive features that had a morphological, syntactical, and lexical character, see D. Mantovani, “Lingua e diritto. Prospettive di ricerca fra sociolinguistica e pragmatica,” in G. Garzone and F. Satulli, eds., *Il linguaggio giuridico. Prospettive interdisciplinari* (Milan 2008), 17–56.

⁹⁵ See P. M. Brown, ed., *Horace. Satires I* (London 1993), 117.

⁹⁶ Horace’s account, on the other hand, does not refer to a normative text, but rather to the preliminary agreements of a deal (the document’s transcription does not even confirm these accords). In general, on the language and style in Horace, see F. Muecke, “Lingua e stile,” in *Enciclopedia Oraziana*, 2 (Rome 1996), 755–86.

⁹⁷ E. Pasoli, “Per una lettura dell’Epistola di Orazio a Giulio Floro (Epist. II.2),” *Il Verri. Rivista di Letteratura*, 19 (1965), 131. Similarly in E. Pasoli, “Towards a Reading of Horace’s Epistle to Julius Florus (Epistles 2.2),” in K. Freudenburg, ed., *Oxford Readings in Classical Studies. Horace: Satires and Epistles* (Oxford 2009), 404.

perfect spiritual portrait of himself. Even in the twenty-five lines analysed here we have seen how he sometimes hides behind the hypothetical seller who warned the buyer of the “escape” — the very Horace who forewarned his friend of his laziness, of his lack of constancy in maintaining epistolary correspondence and in writing poems. On other occasions the poet confuses himself with the slave. Perhaps he is not identified by the trait of *candidus et talos a vertice pulcher ad imos*; on the contrary, Horace always joked around about his appearance, appealing to the grotesque when describing himself (he used to say that he was short, fat and grey-haired from an early age⁹⁸). However, we do recognize him in terms of his moral qualities: the *ministeriis ad nutus aptus erilis* could equate to his availability in respect of his friends (*Sat.* 1.5.40 and 1.6.68-78); *idoneus arti cuilibet* could equate to the various activities he himself acknowledged during his life (that of *scriba quaestorius*, amongst others).⁹⁹ Similarly, he can be recognized in terms of his intellectual qualities: *quin etiam canet indoctum, sed dulce bibenti* says the poem in respect of the slave, Horace qualifying his verses in another passage of the letter as *versus canoros*.¹⁰⁰ The slave is *litterulis Graecis imbutus*: we also know through this letter that Horace studied in Athens.¹⁰¹ The only declared and acknowledged flaw being, as he warned, his independent, elusive, lazy, and inconstant character in terms of performing the duty of replying to letters, to the point of refusing to be the secretary charged with the private correspondence of Augustus.¹⁰²

It is also possible in this respect to draw a parallel between *Ep.* 2.2 and *Sat.* 1.3. In the latter, Horace, whose task is to harmonize the verses, identifies with the Sardinian singer Tigellius, who was known for his lack of constancy (*incessus*) even with regard to Octavius Augustus.¹⁰³ Inconstancy as a vice in friend-

⁹⁸ Fedeli (note 83), vii: “There is no Latin poet who talks of himself more than Horace; about his life and his physical appearance, both as a youth and old man.”

⁹⁹ L. Ross Taylor, “Horace’s Equestrian Career,” *American J. Philology*, 46:2 (1925). More recently: Fitzpatrick Nichols (note 82). On other functions like that of *iudex selectus*, see Hassan (note 1), 15.

¹⁰⁰ Line 76: *i nunc et versus tecum meditare canoros!*

¹⁰¹ Line 43: *Adiecere bonae paulo plus artis Athenae.*

¹⁰² Fedeli (note 83), ix; Ferri (note 82), 125.

¹⁰³ Moreover, in *Sat.* 1.3 (ll. 28–35) he attributes to himself some of the same defects and virtues that are described in *Ep.* 2.2: *iracundior est paulo, minus aptus acutis / naribus horum hominum; rideri possit eo quod / rusticus tonso toga diffluit et male latus / in pede calceus haeret: at est*

ship, and the friend's benevolent treatment of it as a virtue when confronted by it, are the constants of both poems.

*bonus, ut melior vir / non alius quisquam, at tibi amicus, at ingenium
ingens / inculto latet hoc sub corpore.*