



# HISTORICAL PERSPECTIVES on Property and Land Law

EDITED BY  
Elisabetta Fiocchi Malaspina  
and Simona Tarozzi





## Historical Perspectives on Property and Land Law

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# Historical Perspectives on Property and Land Law

An Interdisciplinary Dialogue on Methods and Research Approaches

Edited by  
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and Simona Tarozzi

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TRANSFER OF IMMOVABLE PROPERTIES, PUBLICITY  
AND LAND LAW IN THE AGE OF JUSTINIAN:  
THE PERSPECTIVE OF THE PRAETORIAN PREFECT

Silvia Schiavo

1. Five edicts, issued by *praefecti praetorio Orientis* in V-VI century, provide stimulating perspectives on transfer of immovable properties, publicity, land law.

The five texts are part of a wider collection of thirty-three edicts (τύποι; in latin *formae*) transmitted through *Cod. Bodl. Roe* 18 and published by K.E. Zachariae in 1843.<sup>1</sup>

The edicts are not in an integral version, but in the form of epitomes. However, they offer an important overview on the normative power of *praefecti praetorio*, with reference to the Eastern prefects.

The praetorian prefect had administrative, fiscal, jurisdictional functions and could also create legal rules, through edicts, although with a significant limit: *edicta* could not be in contrast with the content of imperial constitutions.<sup>2</sup> Besides, the rules given by the *praefecti praetorio* had specific territorial boundaries, as they were in force only in the *praefectura* where they have been adopted.

The edicts issued by the *praefecti praetorio* did not need to be enforced through imperial constitutions. They had a normative value that was independent from a validation of the emperors.<sup>3</sup>

For the age of Justinian (the period we are interested in, as we will explain soon) two well-known imperial constitutions can confirm this circumstance.

In *CJ.* 3,1,16 and *CJ.* 8,40(41),27, issued by Justinian in 531, the emperor mentions *generales formae/generalia edicta* of the Eastern Prefecture. The emperor transposes the rules of the edicts and decides that they have to be

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1 Zachariae 1843, p. 227-278. In this article we will discuss some problems already addressed in Schiavo 2018, p. 295-347.

2 See *CJ.* 1,26,2, a constitution issued in 235 by Maximinus Thrax and later accepted in *Codex Iustinianus*. On the problems arising from this constitution, among others, discussion in Zachariae, 1843, p. 242; Pastori 1950-1951, p. 44; Arcaria 1997, p. 301-341; Pietrini 2010, p. 571; Fercia 2012, p. 4; Schiavo 2018, p. 12-18.

3 Goria 2011, p. 5.

applied in all the provinces of the Empire.<sup>4</sup> In Justinian's laws, it is undoubted that the edicts had an autonomous normative value also previously, and that they were not subjected to confirmation of the emperor.<sup>5</sup>

The analysis of the collection in *Cod. Bodl. Roe* 18 allows us to say that the prefects intervened integrating imperial legislation but, sometimes, also dictating norms about matters not directly regulated by emperors. The topics considered in the edicts of this collection were diverse: administrative issues, problems connected with the trial, evidence, documents in general etc.

On occasion, some of the normative solutions adopted by the prefects were taken on also by the emperors, probably because particularly effective.<sup>6</sup> The praetorian prefect judged in appeal *vice sacra*. Several cases arrived at his court, therefore he was continuously in contact with significant legal problems and had a strong interaction with practices and uses applied, at local level, within his prefecture.<sup>7</sup>

The edicts dealing with immovable properties are five: *Ed. 2*, issued by Bassus (548); *Ed. 5,3*, by Aerobindus (553); *Ed. 12*, by Eustathius (505-506); *Ed. 29*, by Archelaus (under Justin I) and *Ed. 33,1*, probably by Basilides (another prefect operating under Justin I).

All of them regulate, as we said, two distinct circumstances: the giving of *possessio* due to a judicial sentence and the act of *traditio* on the ground of a contract or a private transaction in general.

Scholars have often been divided on the meaning of these texts and diverging interpretations have been provided also in recent times.

To briefly summarize the discussion, according to a first explanation, the edicts deal with the phenomenon of *agri deserti*. Consequently, the prefects delineate here a mechanism for the assignment of agricultural lands in a state of abandonment (so that they can be again cultivated and the related taxes paid).<sup>8</sup>

For other scholars, this interpretation cannot be accepted: for several reasons, linking this directives to the problem of *agri deserti* is questionable.

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4 On *CJ.* 3,1,16, where *edicta* on the problem of *recusatio iudicis* are quoted, see Goria 2000, p. 376-379, p. 384; on *CJ.* 8,40(41),27 *pr.*, recalling edicts dedicated to the problem of *fideiussio iudicio sistendi causa*, Goria 2011, p. 6.

5 See Goria 2011, p. 6; Schiavo 2018, p. 18-23.

6 Observations in Schiavo 2018, p. 357-358.

7 On these profiles see Goria 2011, p. 5.

8 Rotondi 1914-1915, p. 46; De Dominicis 1971, p. 353; Solidoro Maruotti 1989, p. 334, note 278; Bonini 1990, p. 23, note 36.

The edicts regulate a procedure in execution of a sentence, but also the *traditio* of immovable properties, based on a contract: this circumstance has very limited connections with the question of *agri deserti*.<sup>9</sup>

Furthermore, in the same collection two more texts<sup>10</sup> outline a procedure specifically reserved to *agri deserti*, the so-called *adiectio sterilium*, which consists in a forced allocation of lands to be re-cultivated, so that expected tributes can be paid.

On the contrary, the five edicts, characterized by the presence of registration profiles and the massive involvement of the bureaucratic *apparatus*, seem to respond to the need of protection of the current *possessor* or *dominus* of the lands, as well as to fiscal control requirements.

Therefore, they appear to be connected to the problem of certainty about the *possessio* and ownership of lands, also for fiscal reasons.<sup>11</sup> We think it is the correct approach to better understand the content of these edicts.<sup>12</sup>

2. As mentioned above, the edicts of *Cod. Bodl. Roe* 18 regulating the topic of transfer of immovable properties are five.

In this work, however, our attention is drawn specifically towards one of them, *Ed. 2*, issued by Bassus and dating back to Justinian's times (548). In the text, the two situations (the giving of *possessio* on the basis of a sentence, or *traditio* founded on a private transaction) are particularly clear, and this circumstance allows us to make some observations on the problem we are dealing with.<sup>13</sup>

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9 See Fercia, 2012, p. 10; according to this scholar, *Ed. 5,5* issued by Aerobindus could be an exception; probably it could deal also with the question of *agri deserti* (see discussion in Schiavo 2018, p. 341-342).

10 *Ed. 1*, which is an epitome of *Nov. 166*, an edict issued by the *praefectus praetorio* Demosthenes, and *Ed. 24*, epitome of *Nov. 168*, another edict issued by the *praefectus praetorio* Zoticus.

11 Among others Schupfer 1905, p. 30; Pugliatti 1957, p. 114; Fercia 2012, p. 7; Voci 1987, p. 61.

12 See Schiavo 2018, p. 297.

13 *Ed. 12* of Eustathius concerns only the problem of the giving of *possessio* of immovable properties on the ground of a judicial decree; here the prefect introduces the possibility of *interdictum unde vi* against subjects entering an immovable property in the situation of *vacua possessio absentium* without a decree; *Ed. 29*, of Archelaus, deals with the process of issuing a decree of the giving of *possessio*; *Ed. 33,1*, of Basilides, again with the giving of *possessio* founded on a judicial decree; *Ed. 5,1*, issued by Aerobindus, could

Moreover, we also have the integral version of the edict, *Nov. 167*. It is well known that *Nov. 166, 167* and *168* are not Justinian's novels, but edicts of *praefecti praetorio*.<sup>14</sup>

First of all, important information on the question comes out from the *praefatio*:

*Nov. 167 praef.* Τα μὲν ἄλλα, ὅσα διευτώθη παρὰ τῶν ἡμετέρων θρόνων, καὶ ἐν κοινοῖς δηλούμενα γράμμασιν ἢ καὶ ἄλλοις γενικοῖς τύποις τῆς ἡμετέρας ἀρχῆς ἢ περὶ τῶν ἐπιχωρίων ἀρχόντων καὶ τάξεων καὶ ὅλως ἀπαιτητῶν διαλεγόμενοις, καθ' ὃν αὐτοὺς δεοὶ τρόπον τοῖς ὑπηκόοις προσφέρεσθαι, ἢ περὶ τῆς τῶν ὑπηκόων αὐτῶν ἐν τοῖς συναλλάγμασιν ὀρθότητος καὶ τῆς περὶ τὰς εὐσεβεῖς εἰσφορὰς εὐγνωμοσύνης, τὴν ἑαυτῶν ἔχειν ἰσχὺν βουλόμεθα καὶ ἐκ τῆς παρουσίας ἡμῶν προστάξεως, ἐκεῖνο δὲ σαφέστερον ἔτι προσδιορίσασθαι δεῖν ἔγνωμεν.<sup>15</sup>

Concerning the *praefatio* of the edict, it has to be stressed that Bassus recalls previous interventions of the prefecture, related to several legal fields: local governors, personnel and tax collectors and their relation with subjects; the rectitude of the subjects in the transactions and in the payment of taxes. As it has been observed, it is possible that the topic of the giving of *possessio* could be referred to the problem of rectitude of subjects in transactions.<sup>16</sup>

More in general, this is an important point of the text, because it describes some of the fields in which the praetorian prefects used to issue edicts.<sup>17</sup>

Furthermore, the *praefectus praetorio* states that the previous rules must be kept in force even after the new edict, aimed at better clarifying the already existing regulation. Probably, several problems in application of the antecedent statements were known by the prefect, and he decided to intervene again. In fact, the discipline dictated in *Nov. 167* contains some obscure aspects: it

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concern the question of *agri deserti*. An overview on these *edicta* in Fercia 2012, p. 1-16; Schiavo 2018, p. 295-347.

14 Discussion on this question in Zachariae 1843, p. 246-256.

15 See English translation in Miller, Sarris 2018, p. 1029: "We wish all other regulations of our high offices that are manifested in public documents, or other general directives of our authority-dealing either with how local governors, personnel and tax collectors in general must behave towards the subjects, or with the rectitude of the subjects themselves in their transactions, and their compliance over dutiful taxes- to retain their own force, by our present ordinance as well; but we have realised that there is one point on which we must make an even clearer determination, as follows".

16 See Gorla 2011, p. 6.

17 Gorla 2011, p. 6.

needed to be integrated with preceding rules, lacking, today, for the scholars.<sup>18</sup>

Bassus refers only to edicts of the *praefectura Orientis* and not to imperial interventions: this circumstance could indicate that the matter we are dealing with was principally regulated by the praetorian prefects, and not by emperors.

The prefect then dictates the new rules, clearly distinguishing between the two situations: the transfer of *possessio* of lands in execution of a provision of the judge, and the *traditio* on the basis of a contract.

Let us see what the rules are for the first case:

*Nov.* 167,1. Εἰ γάρ τις ἀκινήτου τινὸς ἀντιλαβέσθαι σπουδάζων ἀρχικὰς ψήφους πορίσοιτο, ἐπὶ μὲν τῆς εὐδαίμονος ταύτης πόλεως ἀρχέσει τυχὸν ἢ τάξις τὴν σχολὴν μαρτυροῦσα τῆς τῶν πραγμάτων τούτων νομῆς, εἰ καὶ τῶν γειτόνων ἢ αὐτὴ τάξις λέγει μαθεῖν, ὡς οὐδεὶς τῶν πραγμάτων τούτων ἐπιλέληται: ἐπὶ δὲ τῶν ἐν ταῖς ἐπαρχίαις κειμένων ὑπὸ τοῖς τῶν τόπων ἐκδίκους ὑπομνήματα ἃ παραπλησίως ταῦτο τοῦτο πράττονται δεήσει συνίστασθαι, μαρτυρίας μὲν ἔχοντα τῶν γειτόνων. τῆνικαῦτα δὲ ἄδειαν παρεχόμεν τοῖς τὰς ψήφους ἤτηκόσι τὰ πράγματα κατασχεῖν.<sup>19</sup>

If the transfer takes place in Constantinople, the competent office (probably the office of the executors<sup>20</sup>) must declare, according to evidence given by the neighbours, that nobody is currently in the *possessio* of the land.

In the provinces, the involvement of the *defensor civitatis* is necessary: after obtaining the witness of the neighbours about the *vacua possessio* he has to provide for the *confectio gestorum*, for the official documentation attesting the giving of *possessio*.<sup>21</sup>

As in others of the edicts on the same topic, here the role of the neighbours (people living close to the land) is highlighted. They are called to give witness

18 On the obscurity of *Nov.* 167 see Voci 1987, p. 62.

19 See english translation in Miller, Sarris 2018, p. 1029-1030. “Should anyone produce testimonials of an official with the aim of laying claim to an immovable property, in this sovereign city it will perhaps be enough for the office to attest that possession of this property is vacant, as long as the said office also states that it has been informed by neighbours that no-one has taken possession of these properties. For properties situated in the provinces, it will similarly be requisite for records to be drawn up the same effect under the defenders of the locality, also with attestation from neighbours; we then give those who have requested testimonials licence to take the properties in hand”.

20 See Schupfer 1905, p. 31.

21 On the *ius actorum conficiendorum* of the *defensor civitatis* see *infra*.

on the fact that the immovable property is not currently in someone's possession: it helps to avoid a conflict between the old and the new *possessor*.

They have a similar function in *Ed. 12*, by Eustathius, dating to Anastasius' times: in this edict, neighbours are involved (with inhabitants and *coloni*) to attest that the land, to be given in execution of a judicial decree, is in a situation of *vacua possessio*. Also *Ed. 29*, issued by the praetorian prefect Archelaus under Justin I, contemplates the presence of neighbours attesting the property is not in someone's *possessio*.<sup>22</sup>

Consequently, a common thread between these *edicta* can be identified. It is important to stress that the involvement of neighbours in the context of transfers of lands was not completely an innovation.

In fact, in postclassical age and in particular in Constantine's legislation (then accepted in the *Codex Theodosianus*) the presence of neighbours was requested for the sale of immovable properties -they had to attest that the seller was the owner-,<sup>23</sup> but also for gift -in this case, *vicinitas* was called to be present at the act of *traditio*.<sup>24</sup>

Neighbours had a strategic role in these constitutions, because of their concrete knowledge of the factual situation: according to some scholars, they were charged with significant functions in order to guarantee publicity and stability in the transactions regarding immovable properties.<sup>25</sup>

The role of neighbours here strongly connected Costantine's provisions with a far past, dating back to the Twelve Tables.<sup>26</sup>

After Constantine's legislation, however, the role of *vicinitas* in this context suffers a strong resizing. In a Novel of Valentinian III, *Nov. Val. 15,3*, and in a constitution issued by Zeno, *CJ. 8,53(54),31*, the function of neighbours is not so strong as in the past: on the contrary, an important position is given

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22 Analysis of these edicts in Fercia 2012, p. 1-16; Schiavo 2018, p. 299-319.

23 See *CTh. 3,1,2*; some differences in the version transmitted through *Fr. Vat. 35,6*. On the relation between the two texts see Sargenti 1982, p. 279-305; Sargenti 1983, p. 269-278.

24 Palma 1992, p. 477.

25 Cerami 1991, p. 637; Palma 1992, p. 477; Palma 2009, p. 931-947. The author writes: "I vicini, in quanto consapevoli della realtà di fatto, erano chiamati, dunque, a garantire l'effettività delle situazioni dominicali: in altri termini, la stabilità delle situazioni proprietarie veniva garantita attraverso un rafforzamento della pubblicità".

26 See Palma 2009, p. 939. The author thinks that in Constantine's constitutions the presence of neighbours is requested also for religious purposes, as a sign of christian solidarity.

to the utilization of public documents to ensure publicity of the transfers.<sup>27</sup>

Considering this framework, it is significant that the praetorian prefects recuperate in their edicts a specific role for *vicinitas*, going against the trend developed in the last imperial legislation.<sup>28</sup>

3. Let us now consider the regulation given by Bassus for the second situation:

*Nov.* 167,1 ... καὶ τοῖς μέλλουσι δὲ ἐκ συναλλαγμάτων τινῶν πράγμα λαμβάνειν καὶ νομὴν τοιαύτην ἢ δεσποτεῖαν ὑπὸ τὴν ἑαυτῶν ποιεῖσθαι κατοχὴν ἀναγκαίας τὰς τῶν ἐκδίκων ἐν ταῖς ἐπαρχίαις μαρτυρίας νομίζομεν, ὥστε ὑπομνημάτων συνισταμένων ὑπ' αὐτοῖς δηλοῦσθαι τὴν παράδοσιν, εἴτε ἐπιστάλματα τύχοι γραφέντα φροντισταῖς εἴτε ἐπιστάλματων χωρὶς ἢ παράδοσις μέλλοι γίνεσθαι, προσόντος ἐνταῦθα τοῦ καὶ τοὺς γεωργοὺς ἦτοι φροντιστὰς χρῆναι συνομολογεῖν ἐπὶ τῶν ὑπομνημάτων, ὡς τὸν νεώτερον εἰδεῖεν νομέα καὶ δεσπότην καὶ τῇ τοῦ παραδόντος ἀκολουθήσαιεν γνώμη τοῦτο αὐτοῖς ἐπιτρέψαντος, ἐνθα δὲ ἂν ἐκδικος μὴ παρῆ, τὸν λαμπρότατον τῆς ἐπαρχίας ἄρχοντα τὰ τοιαῦτα συνιστᾶν ὑπομνήματα προστάττομεν ἢ τὸν ὀσιώτατον τῆς πόλεως ἱερέα, ὕφ' ἣν ἢ κτήσις ἐστὶν, ὑπὲρ ἧς τὰ τοιαῦτα πράττεται, εἰ πολλῶ τυχὸν ὁ τῆς ἐπαρχίας ἡγούμενος ἀπολείπειτο τῶν τόπων, ἐν οἷς ἢ παράδοσις γίνεται ...<sup>29</sup>

<sup>27</sup> On the question, Palma 2009, p. 942.

<sup>28</sup> Also in *Edictum Theodorici* a certain role of neighbours is guaranteed: see *Ed. Theod.* 53. *De traditione vero quam semper in locis secundum leges fieri necesse est, si Magistratus, Defensor aut Quinquennales forte defuerint, ad conficienda introductionum gesta tres sufficient curiales, dummodo vicinis scientibus impleatur corporalis introductionis effectus.* See on this source Palma, 2009, p. 946, Tarozzi, 2018, p. 177, note 93; p. 295.

<sup>29</sup> English translation in Miller, Sarris 2018, p. 1030: “We also consider attestations from the defenders in the provinces to be necessary for those intending to take a property as a result of any kind of agreements, and to put such possession or ownership into their own hands; thus, when records are drawn up under the defenders, the conveyance will be made manifest whether there may perhaps be written instructions, or whether the conveyance may be going to take place without instructions; in that case, the agricultural workers or overseers must additionally assent, on the records, that they know about the new possessor and owner, and have complied with the intention of conveynor, who has told them to do this. Where there is not defender present, we direct that such records are to be drawn up by the Most Distinguished governor of the province, or else, if it happens that the provincial governor is a long way from the area where the conveyance is taking place, by the most holy prelate of the city under which lies the holding for which such transaction is taking place ...”

The second situation regulated in *Nov. 167* is the *traditio* of the immovable properties; as we said, the delivery that takes place on the basis of a contract.

More precisely, here the prefect refers to someone who wishes to acquire *possessio* (νομή) or ownership (δεσποτεία) of the land.

Probably this distinction is to be connected with the existence of different types of sale<sup>30</sup> in Justinian's compilation: a contract of sale that had real effects and a contract of sale that, on the contrary, produced only duties for the seller and for the buyer.<sup>31</sup>

In the provinces, the presence of the *defensor civitatis* is required: he must attest the successful delivery and proceed with the creation of public documentation, through the *confectio actorum* (as in the first case, assignment of *possessio* on the ground of a judicial decree).

After that, the prefect imposes another requirement: the agricultural workers (*coloni*) and the overseers (*curatores*), people who worked for the owner of the land have to declare that they recognize the person receiving the land as the new owner and *possessor*, obeying the intention of the conveyer. Perhaps, this is the most important novelty introduced by the prefect with the edict.<sup>32</sup> The obligation occurs not only if letters (ἐπιστάματα) are sent to the *curatores*, but also if there are not letters. We think that it is quite an obscure point to explain.

According to an ancient interpretation of *Nov. 167*, advanced by Cujacius and then accepted also by Zachariae, here two different situations are regulated: the case in which the owner of the land does not make the conveyance himself, but appoints through letters his *curatores* to proceed with it, and the case in which the owner himself makes the *traditio*.<sup>33</sup>

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<sup>30</sup> In fact, probably the contract that in most cases justified the *traditio*, the delivery of the land, was the *emptio venditio*. Also the gift could be in the mind of the prefect. See, on this question, Fercia 2012, p. 12. The scholar points out that in Justinian's age gift was a consensual contract with the duty, for the donor, to make *traditio* (*Iust. Inst. 2,7,2*. On this text: Lambertini 2007, p. 2745-2756).

<sup>31</sup> For the sale with real effects: *CJ. 4,21,17, emptio venditio cum scriptis*. In this case, the subsequent *traditio* has the function of transferring *possessio*. In the other case, when *emptio venditio* produced only obligations, the subsequent *traditio* was needed for the transfer of ownership. See Fercia 2012, p. 12.

<sup>32</sup> For this approach see Voci 1987, p. 62; probably the need of the declaration coming from *coloni* and *curatores* is a point through which the prefect tries to clarify the existing discipline (see his aim expressed in the *praefatio* of *Nov. 167*).

<sup>33</sup> See Zachariae 1843, p. 254, note 54.



Anyway, the most important aspect is that Bassus requires the presence of the *defensor*, and, in addition, a specific declaration coming from the overseers and the agricultural workers.

Furthermore, it is established that in case of absence of the *defensor civitatis* the involvement of the provincial governor is necessary, for the drawing of records attesting the *traditio*.<sup>34</sup> If the provincial governor is not available, it is possible to ask the bishop for the *confectio actorum*.<sup>35</sup>

The issue on which we would like to focus, as it appears significant for this research, is the problem of the characteristics of the *traditio* in the context of *Nov. 167*.

As several scholars noticed, the edict, in the part relating to the *traditio*, dictates several formal requirements that, on the contrary, we do not find in Justinian's compilation.<sup>36</sup>

On the ground of the principles emerging from *Digesta*, *Codex* and *Institutiones*, in fact, it seems possible to affirm that the *corporalis traditio* was not imposed in the transfers of immovable properties. Different mechanisms were widely accepted. In particular, ample room was made for the *constitutum possessorium*, which had been deeply opposed in the post-classical age.<sup>37</sup> Moreover, formal requirements as the presence of officials and the *confectio actorum* were not mandatory.<sup>38</sup>

Bassus has a different approach, imposing various profiles of solemnity. In addition to the *corporalis traditio*, in fact, he asks for the essential presence of the *defensor civitatis* who must draw the documents certifying the delivery

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34 According to Gorla 1995, p. 254, this means that the *defensor civitatis* was not in every city.

35 There are no sources that attribute the *ius actorum conficiendorum* to bishops and ecclesiastical authorities in general. However, *Nov. 167*, together with *CJ. 1,4,31*, shows an involvement of the bishop in the *confectio actorum* in substitution of the provincial governor. See also *CJ. 1,4,26 pr.-2* (in which an autonomous power of the bishop is attested). On the question: Tarozzi 2006, p. 254.

36 A part from a constitution dealing with transfer of lands in case of *suffragium*, *CJ. 4,3,1*. See Gallo 1988, p. 974; Cerami 1991, p. 653.

37 See Fercia 2012, p. 12

38 On the 'silence' of Justinian's compilation on the mechanisms of *traditio* relating immovable properties see Levy 1951, p. 130; Voci 1987, p. 67. According to Gallo 1988, 973-974, Justinian is not interested in profiles related with publicity. Different view in Cerami 1991, p. 651-656.

and the declaration of *coloni* and overseers.<sup>39</sup> From this point of view, it is possible to note a tendency, in the prefect's regulation, to use typical mechanisms of a formal act such as the ancient *mancipatio*.<sup>40</sup>

One could see disharmony between these provisions and what emerges from Justinian's compilation where less solemn principles are indicated. How can we explain this discrepancy?

We agree with scholars who believe that the regulation of the edicts integrated Justinian's system on these particular issues.<sup>41</sup>

According to this approach, Justinian, who did not state anything on the *traditio* of lands, referred tacitly to the rules given by the praetorian prefects; the prefects, among other things, probably took into account local practices and customs.<sup>42</sup> As we said before, in the *praeformatio* of Nov. 167 Bassus recalled previous edicts of the Eastern Prefecture on the topic, that needed to be clarified. This fact can support the idea that several directives on the question were already been issued.

Concluding the analysis of the second case regulated by Bassus,<sup>43</sup> another question has to be stressed. We saw that the discipline of *traditio* in Nov. 167 is quite far from the framework drawn by Justinian's compilation. Are the rules given by the praetorian prefect completely innovative?

Despite the peculiarity of the regulation foreseen by the prefect Bassus, not reflected in the contemporary imperial legislation, it is necessary to highlight some echoes of the previous Constantinian legislation on *donatio*. In *Fr.*

39 According to Zachariae 1843, p. 254, note 54, in the case of *traditio* regulated in this part of Nov. 167 also neighbours (recalled, as we said, for the case of the judicial decree) were involved. We think this is not clear: attestations coming from neighbours are not expressly indicated by the prefect in this point of the text.

40 In this regard, Bonfante wrote that in the edict of Bassus solemnities are required that are similar to the ones of the ancient *mancipatio*. See Bonfante, 1926, p. 255; more recently, Fercia 2012, p. 12. On aspects of publicity in *mancipatio* see Colorni, 1954, p. 19; Pugliatti, 1957, p. 106, who believes that mechanisms of publicity in a modern sense are present in *mancipatio* only in a minimal way.

41 For this approach see Voci, 1987, p. 67.

42 For Voci 1987, p. 67, Justinian "... rinvia tacitamente alle disposizioni prese dai prefetti del pretorio, ch'è da supporre tenessero conto delle diversità locali".

43 The final part of Nov. 167 is dedicated to the *traditio* in Constantinople, and it is a quite obscure regulation: the prefect says that the attestations concerning *traditio* and the executions already made give security to subjects who received the lands. On this question see Zachariae, 1843, p. 255, note 67.

*Vat.* 249 (see also *CTh.* 8,12,1) a set of formalities, including the drafting of deeds which had to be inserted in the records of the *iudex* or municipal magistrates were required.<sup>44</sup>

4. As we said in the first paragraph, scholars expressed different stances on the five edicts concerning the giving of *possessio* in execution of a decree and *traditio* on the basis of a private transaction.

We think that the correct approach is the one reconnecting the edicts with the problem of security and publicity in transfers of immovable properties.<sup>45</sup>

The analysis of *Nov.* 167, that covers both the situations recalled, can confirm this view.

As in the past legislation (think about Constantine's regulation in his interventions on sale and gift<sup>46</sup>), the various rules examined seem to meet the needs to create security on the legal situation of lands and on ownership or *possessio*.<sup>47</sup>

The mechanisms through which the goal is pursued are essentially the presence of officials, the drawing of deeds through the process of *confectio actorum*, the involvement, although with different roles, of neighbours (attesting the situation of *vacua possessio*), *coloni*, managers (who have to declare to recognize the person receiving the immovable property as owner and *possessor*).

In particular, the *confectio actorum*, through which deeds are created and recorded in the archives (in the specific case of *Nov.* 167, the *defensor civitatis* ones<sup>48</sup>), from which also copies could be extracted, had a clear and strong function of publicity, as some scholars pointed out.<sup>49</sup>

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44 On the function of *traditio* in Constantine's legislation on *donatio* see Lambertini 2007, p. 2753, note 19.

45 As pointed out by authors like Fercia 2012, p. 10.

46 See observations advanced in paragraphs 2 and 3.

47 On publicity see Colorni 1954, p. 37-38; Pugliatti 1957, p. 116-120.

48 On *confectio actorum* and *ius actorum conficiendorum* in general, Steinwenter 1915, p. 30; Lévy 1999, p. 311-326; Tarozzi 2006, p. 143-158. On the *confectio actorum* of *defensor civitatis* see, among others, Tarozzi 2006, 143-159. On the archives of *defensor civitatis*, observations in Schiavo 2018, p. 251-253.

49 See Schupfer 1905, p. 30-31; and especially Pugliatti 1957, p. 116 and p. 119. The author stresses that starting from postclassical age the conservation of documents in the *acta* or *gesta* of magistrates had a significant role of publicity: "Storicamente il fenomeno, considerato nella sua precisa portata e senza prevenzioni, ha una importanza considerevo-

Besides, the discipline envisaged by the prefect could be explained also with reference to fiscal necessities, which pushed towards a strong request for solemnity in the transfer of lands. The praetorian prefects had some reasons to intervene in this direction. They supervised the imposition and collection of taxes, and the registration of the acts relating to the *traditio* and to transfer of *possessio* facilitated the correctness of those operations.<sup>50</sup>

In conclusion, by mixing both ancient elements and new ones, the prefect Bassus creates a regulation directed to outlining a precise system of registration of property transfers, system which meets the need for security and, probably, also the need for fiscal control.

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le, e davvero è assai difficile poter sostenere fondatamente che esso è estraneo alla storia della pubblicità...". Different stance in Colorni 1954, p. 127-128.

<sup>50</sup> Pugliatti, 1957, p. 117, note 510, underlines the strict connection between private and public functions of the *insinuatio apud acta*. Observations in Voci 1987, p. 61.

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