The Actiones de novi operis and damni infecti: Nature and devlopment.

The origins of the *actiones de novi operis* and damni infecti can only be traced as far back as Roman Law and are both of praetorial origin. Their preventive character is of practical importance and this is sustained by the fact that they have been retained throughtout history in the major civil codes. Even though they might have simply given rise to a temporary remedy, they have reappeared in modern legislation with the same structure and with no less use.

Roman Law

Most Roman Law jurists sustain that the praetor evolved the *interdictum quod vi aut clam* due to the lacunae found in the *actio acquae pluviae arcendae,* which action dated back to the Laws of the XII Tables. Thus by means of a formal opposition known as a prohibition, it was indirectly possible to forstall any new works including those involving waterways; however, anyone exercising this latter action and interdict, faced the consequential problems of the *interdictum uti possidetis.* Hence Roman Law developed this new preventive means, the *novi operis nuntiatio,* intended to be able to suspend any new work in construction, which is capable of causing damages to the neighbouring tenements. This could be complemented by the *actio damni infecti* [1] which would have included cases wherin a building was in a precarious state and could collapse due to structural faults or due to antiquity and decay, in so doing causing damages to the neighbouring property. The actio damni infecti would then include indemnity for possible future damages.

Others however sustain that the novi operis nuntiatio was introduced after the actio damni infecti which latter action is of very old origin, prior to the Ebuzia Law. Thus according to this theory [2], the novi operi nuntiatio would have been introduced just before the Lex Rubria, circa 712 of Rome.

By means of the novi operis nuntiatio, the person carrying out any changes in a building *aut aedificando aut detraendo,* was summoned [3] in order to suspend the commenced work or to give a *cautio de demoliendo.* According to Ulpian it is these two remedies which differed the *nuntio iuris nostri conservandi causa* from the *damni depellendi gratia.* He who exercised the first

1. Manz. *Cours de droit Romain.* Vol. II §283
2. Sustained by Vuturi. *La teoria dell'operis novi nunciatio nel diritto Romano. (Arch. Guir. 1892 XLIX 504, 505).*
3. The summons could be made in any form.

action simply requested the suspension of the work, whilst by means of the other action, he intended to obtain a *cautio damni infecti*. Then again, while it was only obligatory to give security in the nuntiatio damni depellandi causa, if the defendant voluntarily chose to give security in the nunciatio juris nostri conservandi causa, he could continue with the works.

Ulpian also sustains that the novi operis nuntiatio could have a third scope resulting in the demolition of a new construction made on public land if such works, including constructions on the sea or on beaches, had obstruced the public from their common enjoyment. Such an action was thus exercisable by any member of the public.

The preprequisites of the nuntiatio novi operis were the *opus novum* and the *ius prohibendi,* i.e. the objective and subjective elements. Thus the work had to be *nondum facta - futura* and not *praeteria*. There were several special interdicts concerning completed works. It was also necessary for the work to be *solo conjuncta*, i.e. fixed to the earth and thus the demolition of buildings and the pruning and felling of trees would not be the object of this edict.

As is evident from the very name of the action, the opus had to be novum. This was given a very restrictive interpretation insofar that the buildings had to change the external appearance of the tenement. Finally, these actions were not exercisable in situations involving works the scope of which was the strengthening and reinforcement of old buildings, or works of ordinary repairs. Such inability to exercise this action [4] also applied to instances requiring urgent works which if delayed could lead to eventual damage.

Stölzel [5] sustaines that the ius prohibendi was a real right which could be exercised by means of the formula of the *ius mihi esse prohibere*. However according to this theory, only the owner and he who had a *servitù probitiva* could exercise the novi operis nuntiatio. Others sustain that such a real right could be complemented by means of an *actio in rem confessoria* or *negatoria*. Thus all those who could exercise such an actio confessoria or negatoria could likewise exercise the novi operis nuntiatio. However, De Vito opines that the usufructuary and those having a title of use and habitation could only exercise this action against third parties and not against the bare owner. Nontheless, these could exercise other actions resulting from contractual obligations. The subjects of this novi operis nuntiatio could include the owner of the building, the dominus servitus, the bonae fidei possessor and all those protected by an actio in rem utilis, such as the superficario, the pledgee, the emphyteuta and the usufructuary.

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4. Tommaso Brimo. 'Denuncia di nuova opera e di danno temuto', *Nuovo Digesto Italiano*, Vol. IV-714
5. A. Stölzel, *Die Lehre von der "operis novi nunciotio" unde dem "interdictum quod vi aut clam"*. Gottigen, 1865, p.24

It is evident that the novi operis nuntiatio was not restricted to a single formula. Most jurists opine that this action could be either public *(Praetoria)* or private; the latter further subdivided into verbal and symbolic.

The verbal was generally exercised by means of the phrase *"denuncio tibi, ne quid in illo loco novi operis me invito facias"*; whilst the symbolic depended upon the use of signs - by refusing to give a helping hand to those carrying out the new work or by throwing a small stone, *lapilli ictum,* towards them.

Not all jurists agree to these subdivisions. However, this notwithstanding, most opine that the various forms gave rise to different effects. Thus Ulpian sustains that whilst the public and symbolic conserved the possessory rights in the plaintiff, the verbal transferred such rights to the defendant and so Ulpian thought it fit to opt for the public or symbolic when the new work was being carried out on the plaintiff's tenement. However the novi operis nuntiatio did not require any specific solemn formula and a simple oral declaration would have often sufficed, but it was usual to use the phrase *"in hunc locum ne quid opus novum fiat nuncis"*. However this was not necessary and any formula which left no doubt as to the desired opposition to the "opus novum" was accepted. The validity of this protest and prohibition did not depend upon any witnesses even though their presence would strengthen the plaintiff's requests.

The primary effect of the novi operis nuntiatio was to stop all commenced work [6]. The person responsible for the works could not defend himself by stating that he was not well informed or of having ignored the impediment; neither could he alledge that he is an *infante* or *furiosus*, because the indictment was presented to a workman i.e. a person of reasonable intellegence.

The prohibitory injunction was real and not personal. Thus it was not necessarily presented directly to the propreitor. Suffice it to be presented to the possessor or to others who were helping in the completion of the new work, whoever they may be, including servants, women and minors without the necessary authorisation of their tutors, as long as such persons could physically notify the owner. However it was always necessary that the injunction be notified *in re praesenti* - in the tenement where the new work was being carried out or where it was so intended to be carried out [7]. Thus when the opposition only involved part of the new work, it was necessary to specify the part in litigation so that the *nuntiatus* would know within which limits he should confine the works. The prohibition could be notified on any day even by means of a procurator as long as a security was given in the form of a *cautio ratam rem dominum habiturum*.

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6. Ulpian - "Hoc edicto promittitur ut, sive iure sive iniuria opus fieret, per nuntiationem inhiberetur.
7. Ulpian - "Nuntiationem autem in re praesenti faciendam meminisse oportebit, id est eo loci, ubi opus fiat, sive quis aedificet sive inchoet aedificare".

Any abusive continuation of the work was considered *contra praetoria edictum* even though the prohibition was lacking in form or facts. Through the praetor, the plaintiff could be granted a *status quo ante* by means of the *interdictum demolitorum* or the *interdictum quod vi aut clam*. This notwithstanding, the lack of some legal prerequisites made the action null ab initio. Thus the plaintiff's choice in actions was very often limited, as the novi operis nuntiatio could not be exercised by any person:

> *"Si autem (usufructuarius) domino praedii nuncaverit, inutilis erit nunciatio"* and *"servo autem opus novum nunciari potest. Ipse vero nunciare non potest, neque nunciatio nullum effectum habet."*

On the other hand the effectiveness of the interdict quod vi aut clam depended on the facts of the case rather than on the plaintiff's title. Then again the place where the plaintiff notified the defendant of the interdict was of no legal importance and all that was required was a generic proof of the contravention. It therefore followed that an ineffective injunction based on the novi operis nuntiatio due to a mistake in the person presenting it or due to the place at which it was notified, could be easily ratified if the plaintiff changed the form and name of the action.

A special effect of the novi operis nuntiatio was the *stipulatio ex operis novi nunciatione,* which could take place *quod vicinus dicit, ius sibi esse, prohibere vicinum, opus novum invito se facere.* This consisted in the fact that the person responsible for the works gave security *de eventualiter demoliendo aut restituendo*. The stipulation was useful to the plaintiff as well as to the defendant. Once security is given, the plaintiff could no longer present any further pleas to the detriment of the defendant, in which case the defendant could oppose such further demands by means of special interdicts. Neither could the plaintiff seek to exercise another action similar to the novi operis nuntiatio during the pendency of the agreed stipulation.

If the defendant abided by the prohibition and suspended all works, the plaintiff had to seek to terminate the litigation within one year.

The defendant either accepted the illegality of the *opus* or opposed the claims of the plaintiff. In the first case there followed the immediate pronouncement of the *iussum restituendi;* in the second case, proceedings depended on the existence of facts and legal rights upon which the judge had to decide.

However if the defendant did not abide by the prohibition and continued the work, this would automatically be demolished as a result of the *interdictum demolitorum*. The defendant who did not wish to be subjected to the consequences of the interdictum demolitorum and yet desired to continue the commenced work, could either give a security - *cautio ex operis novi nuntiatone* or demand a *remissio praetoria*. If the plaintiff capriciously refused to accept the reasonable security offered, the defendant could continue with his works as though he had actually given security - *nam cum per actorem fiet, apparet in ea causa esse ut remitti debeat.*

Both the *cuatio* and the *remissio* interrupted the effects of the prohibition. *Si is, cui nuntiatum erit, ex operis novi nuntiatione satisdederit repromisseritve aut per eum non fiet, quo minus boni viri arbitratu satisdet repromittatue, perinde est, ac si operis novi nuntiatio remissa esset. Habet autem hoc remedium utilitatem: nam remittit vexationem ad praetorem veniendi et desiderandi, ut missa fieret nuntiatio.* The remissio was infact another **special** effect of this action as this was not a necessary result of the action.

If the praetor, summarily examining the merits of the case, found that plaintiff has no right competent to him at law, the praetor would annull the prohibition and this was known as *remissio praetoris.* If the remissio was demanded on behalf of an absentee, the demandant had to give security - *satisdatio.*

According to the developments of Justinian, the remissio was conditioned by the payment of a security. However this condition was questioned both by Schmidt [8] and Burchard [9] . Burchard distinguished the remissio from the cautio and concludes that the former was a true prohibitory interdict. Bonfante states that *"il decreto stesso che accorda la "remissio" è un interdetto proibitorio, con cui si mantiene la denuncia; se il denunciato ha il "ius prohibendi" si rimette nel caso contrario e sulla base di questo interdetto si apre il giudizio".* On the other hand, Branca disagrees with Bonfante and Burchard, and excludes the possibility of an interdict *"re fis fiat aedificanti"* which could protect the defendant after the eventual remissio. Branca opines that the praetor must have necessarily taken summary cognisance of the case inorder to confirm or completely exclude the effects of the novi operis nuntiatio. If this were not possible, the praetor granted the remissio as an interdict. One must therefore conclude that the remissio did not always automatically follow the "nuntiatio", but was simply one of the possible special effects.

Although, as stated [10] , only persons having specific legal titles could exercise the novi operis nuntiatio, it was evidently possible for a procurator to appear on behalf of one of the parties. If this procurator represented the plaintiff, the praetor had to make sure, that *"ne falsus procurator absenti noceat"*, and possibly demanding a security de rato. If the plaintiff appeared in person, the judge had to examine whether the rights he asserted were grave enough to justify the execution of the demanded interdict.

Thus, once the defendant had given security, or was remitted, he had the *ius aedificiandi,* and if the plaintiff desired to exercise his *ius prohibendi*, he had to opt for a petitorial action. If the defendant did not give security or was not discharged, the indictment would suffice because the plaintiff was simply exercising his ius prohibendi in which case it was the defendant who had the onus in proving his ius aedificandi [11]

8. Schmidt, *Das Interdiktenverfahren der Rohmer,* p. 209
9. Burchard, (Italian translation by Bonfante) *Commentario alle Pandette,* p. 253.
10. *Supra,* p. 000 111 222 333 444 555 666 777 888 999
11. V. Vuturi, *La teoria dell'operis novi nunciatio nel diritto Romano* Arch. Giur. 1892, XLIX. p.449)

At this stage, once the defendant is assured of his rights and the legality of the works, and proceeds in the works, this would not have been considered as a *facere contra edictum* and thus [12] the plaintiff could not demand the execution of the interdictum demolitorum. If the plaintiff still believed to have a legal right, he had to commence the necessary interdectal proceedings and thus prove his ius prohibendi.

The remissio was to a certain extent one of the modes by which the novi operis nuntiatio was extinguished. This interdict was inadmissable unless the plaintiff took an oath so as not to intentionally slander the defendant - *"qui opus novum nunciat, jurare debet, non caluminiae causa opus novum nunciare."*

Even though the preator could have ordered the prohibition, such order could always be revoked *contrario imperio*. Then again this action would be extinguished through the death of the plaintiff, or transfer of his property *"quia his modis finitur ius prohibendi"*. However the heirs or new owner could renew the interdict in their own names.

The summoning of a witness very often required a special and formal procedure; however such rules were not too stringently applied and thus the lack of this procedural formality did not seem to extinguish the action. Some opine that it was at least necessary for the plaintiff, on going to the praetor to request the issue of such an interdict, to name his witness - *testatio*. However Paulus declares that the plaintiff who declined to name his witness, did not in any way render this interdict inadmissable or extinguished.

Inspite of these possible temporary effects of the novi operis nuntiatio [13], it was always necessary that the case be finally judged on its merits. Thus on completion of the novi operis nuntiatio through the praetor's summary cognisance of the case, one had to present his case by means of another action - vindicatio, confessoria, negatoria or any other action which could generally follow the ius prohibendi or the ius aedificandi - *"Sciendum est, denegata executione operis novi, nihilominus integras legitmas actiones manere"*.

This new action had to be heard by the nominated and assigned judge and according to the formula proposed by the praetor. However if the plaintiff or defendant appearing before the 'Judex', confessed their guilt, the judge had to render such a new action inadmissable. This would take place when it was evidently apparent that the plaintiff or defendant in stating their motives for the requested interdict, respectively either lacked the right to prohibit the works or the right to continue suck works.

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12. Profs. Attanasio Mozzillo, *Novissimo Digesto Italiano* Vol. V, pp. 457-466
13. The praetor could either order the prohibition of the continuation of the works, or "ab initio" refuse to issue the requested prohibition, or he could finally order that security be given and allow the continuation of the works.

Occassionally upon the request of the parties, the merits of the case would precede the actual interdict. It made no difference as to whether it was the plaintiff or defendant who demanded such special procedures. However in either case, if the defendant did not present his case, the judge would automatically order him to give security, practically as a mode in punishing the defendant's default, and thus putting him on guard and making sure that he defends his rights *petitores partes sustinere*. Thus if the person responsible for the works, as defendant, is in default and refuses to defend himself, the judge would order that he gives security as a guarantee that he would not continue the works, unless prior to this, through an other action, he would have sought judgement upon his ius aedificandi as plaintiff in that suit *"Non prius se aedificaturum, quam ultro egisset, ius sibi esse altius tollere"*. However, if the defendant is the party who could have exercised the action demanding the prohibition of the continuation of the works, and such party is in default, refusing to defend himself, the judge would demand that he gives security so as not to impede the continuation of the works either by means of the novi operis nuntiatio or through an actual molestation of fact. *"Nec opus novum se nunciaturum, nec aedificandi vim facturum"*.

Thus, in this way, if such anticipatory judgement granted a ius aedificandi this would impede the other party from seeking any judicial or extrajudicial means of obstructing the continuation of the novi operis i.e. it would render the novi operis nunctatio inadmissable. On the other hand if this anticipatory judgement favoured the other party, it made the novi operis nunciatio effective and the prohibition definitive [14]

The Cautio Damni Infecti.

The *interdictum quod vi aut clam,* the *actio acquae pluviae arcendae,* the *operis novi nunciatio* and the *cautio damni infecti,* were the adequate Roman law actions dealing with most neighbourly discords. Both the cautio damni infecti and the operis novi nunciatio corresponded to the *damnum infecto* arising from the *opus iam factum* and the *opus quod fit,* and had a precautionary effect - preventive remedies with the scope of avoiding damages [15] or the imposition of an indemnity for that damage which one could not or did not want to avoid.

The *operis novi nunciate damni depelendi causa* had a pecularity of its own, taking the form of the nunciatio - a derivative of the praetorial cautio damni infecti. However, whilst the cautio damni infecti provided for a security for eventual damages arising from work already in existence on the neighbouring tenement *(opus iam factum)* or occassionally and only in specific cases, arising from the legitimate acts of the neighbour *(opus quod fit);* the novi operis nunciatio was limited to those illegitimate acts capable of causing substantial fear of eventual prejudice and damages - *operis novi iusis nostri conservandi causa, operis novi nuntiatio publici tuendi gratia.* Facts of a less stringent nature gave rise to the cautio damni infecti and the operis novi nuntiatio damni depellendi causa.

14. This special preventive procedure, in judging the merits of the case prior to the actual first phase of the "Novi operis Nuntiatio" is not possible under present Italian law.

The owner of a tenement could not leave the building in such a bad state of maintenance so as to give rise to fear of its immenent collapse. In such a case, the persons who would be affected by such damages, did not have a direct action in order to avoid such damages, but by means of a praetorial edict, were authorised to demand that the owner either repairs the building or give security as an indemnity for the eventual damages they fear; damages as yet unverified, if and when such damages would actually take place. This was the *cautio damni infecti* covering those damages which Gaius defined as *"damnum nondum factum, quod futurum veremur"*.

When the defendant was the owner of the endangering property, this security was given by means of a promise to stipulate or a praetorial stipulation made in the presence of the praetor, under his command or by his approval, after taking summary cognizance of the case without his sending the parties before the judex. On the other hand, when the defendant was simply a possessor, he either had to guarantee such obligations as a surityor else give a real guarantee i.e. with immovables. In any case the security was only binding for a limited time. If the danger verified itself within that stipulated time, one would act using the ordinary judicial or extra-judicial means depending on the type of security given i.e. either by means of the *actio ex stipulatu* or by means of the hypothecary action in order to be indemnified for the verified damages. If the damages did not verify themselves, the defendant could demand the security back. If the stipulated time had lapsed and the danger still existed, the praetor could demand the renual of the security - *iterum arbitratu praetoris ex integro erit cavendum*.

The security had to cover all the possible and forseable damages but did not have to make good for any luxury, as Ulpian states:

> *"quia, honestus modus servandus est, non immoderata cuis que luxuria subsequenda"*.

Thus if the feared damages included a wall with precious frescos, the value of such frescos would not be taken into account. If the defendant did not give adequate security, or he outrightly refused, the praetor put the plaintiff in possession [16] of the endangering property. Once the plaintiff was given detention of the building *"ex primo decreto"*, the owner was not actually and completely dispossessed. It simply gave the endangered party the right and power to materially enter the endangering building together with the ancillary right to hypothecate [17] that building and its surrounding land in his favour. Such effects could be overcome if the defendant chose to carry out the necessary repairs or give the necessary security - *cautio damni infecti*. If he failed to do this, the owner of the endangered building could obtain a conferment - *immissus* in *possessionem* - *ex secundo decreto*, by virtue of which it was held that the defendant had abandoned the building of which the plaintiff had by then acquired juridical possession, and possibly its ownership through usuca-

15. Actual damages as opposed to eventual damages.
16. Simply as detentor.
17. A special and not general hypothec.

pian. The plaintiff who opposed this new state of fact was liable to the *actio in factum* for damages and interests. Such a possession was backed by a iusta causa and was thus also guaranteed against third parties.

By analogy, the cautio damni infecti was extended to other similar cases wherin it was necessary to give security for the damages someone else might suffer; damages which one might suffer due to works carried out by he who had the right to carry them out. Thus during the pendency of the novi operis nunciatio or the interdictum quod vi aut clam, one could demand that security be given for damn infecti. This was so because by means of the novi operis nunciatio the plaintiff could only obtain the discontinuation of the works. If the plaintiff had opted for the interdict quod vi aut clam the Court could order the demolition of the works together with indemnifing the plaintiff for the present and past damages caused by such construction. However one had to exercise the edict damni infecto in order to request the indemnity for future and eventual damages. The imminent danger of a tree falling down or that of some eaves, even the existence of a contigous oven could give rise to the exercise of the cautio damni infecto. Thus Richerio [18] states that only public works carried out by means of public money could not be the object of the cautio damni infecti [19].

The municipal magistrates who did not have imperial jurisdiction, did not possess the power to demand security for damni infecti, nor the power to order an immissio in possessionem. However such powers could be granted and delegated in urgent cases.

According to Gaius, the classical Roman Law still retained two actions, both related to the fear of eventual damages - these actions, being those arising from the *cautio damni infecti* and the *legis actio damni infecti* [20].

The legis actio damni infecti was of a preventive nature and thus could not be exercised against consummated damages [21]. It is possible that this "legis" owes its origin to the decem viri [22].

Paul [23], as the oldest source of the institute states;

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18. Richerio, *Jur. univ., Lib. IV*, tit. XXXVIII, §139
19. "Nihil interest, an damnum immineat ex aedibus, vel fundo rarumque parte, an ex arboribus, an ex suggrundis, protectionibus, aliave quacumque causa, sive in urbe, sive in agro, dummodo ex vito operis accidentali, non naturali, puta vi ventorum, aut ex eo quod quis iure suo aliquid in suo fondo faciat, veluti aedificet, et ita luminibus vicini officiat."
20. "Tantum ex duabus causis permissum est lege agere: damni infecti et si centum virali iudicium futurum est .. Damni vero infecti nemo vult lege agere, sed potius stipulatione quae in edicto proposita est obligat adversarium suum, idque et commodius ius et plenius est."
21. Prof. A. Mozzillo, "La denunzia di nova opera e di danno temuto" - *Novissimo Digesto Italiano*. Cornil, *Droit Romain* - 1921. p.213 and Branca, - *La "prohibitio" e la denuncia di nuova opera come forma di autotutela consensuale*, agree to this. However, Barassi and Scialoja disagree.
22. Bonfante and Branca. However Mozzillo opines that it preceeded them.
23. **D.** 43, 8, 5.

"Si per publicum locum rivus aquae ductus privato nocebit, erit actio privato ex lege duodecium tabularum, ut noxa domino caveatur".

According to Biondi and Branca, problems arising from public acquiducts gave rise to special and specific actions such as the *legis actio aquae pluviae arcendae* arising from the *legis actio damni infecti.* However Paul opines that this was not necessarily so. If the dominus feared damages arising from works relating to the collection or conduction of water, he could opt for either of the two actions of the decem viri. The legis actio aquae pluviae arcendae satisfactorily developed a preventive role, and whoever opted for the *damno nondum facto* could achieve the same results as though he had exercised the *legis actio damni infecti.*

Both the Legis actio aquae pluviae arcendae and the legis actio damni infecti [24] necessitated the intervention of an arbiter - *legis actio per iudicis. postulationem.*. THe arbiter had full discretionary powers, and after having evalutaed the facts of the case, he gave a *issum* - an alternative to the *cavere* and the *opus restituere.*

The negative attitude of the defendant gave full rights to the plaintiff so as to interfere in the works carried out in the neighbouring tenement. The plaintiff would have also been indemnified for the expenses he incurred in eliminating the cause of the eventual damages. If the Judge granted plaintiff's requests, palintiff would not be granted a *restitutio operis* but a *patientam praestare* [25].

The old legis actio damni infecti neither excluded the giving of security, nor did it limit itself to the cautio. The defendant had the choice whether to give security or not, and it was he who eventually decided which action to take so as to guarantee the plaintiff's rights.

The procedural difficulties, the slow proceedings and the lack of interest of the *agere per actiones* were the eventual causes which changed the institute, making its proceedings flexible and faster. The cautio damni infecti orginally existed as a voluntary stipulation, and after being accepted by the arbiter in the proceedings of the legis actio damni infecti, was eventually taken up and improved by the praetor. He included it in his edicts and established a system, based on his capacity, of the missio in possessionem.

The first evidence of the praetorial intervention is to be found in chapter XX of the *Lex Rubria de Gallia Cisalpina* dated circa 49 - 42 BC. Some sustain that by that time it was as yet unknown to the praetore urbanus. The legis actio damni infecti retained its procedural efficacy till the beginning of the Empire when its procedure was ammended. The cautio damni infecti arising from

24. Arangio Riuz, *Frammenti di Gaio,* and Mozzill, *Contributo allo studio delle "stipulationes praetoriae", 1985, p. 86.*

the opus iam factum had already been changed by the praetor, making this action more limited than the legis actio damni infecti. Branca sustains that in this way, the *legis actio damni infecti* thus became a general action of the *damnum infecti* arising from the *facere, opus quod fit*. This latter action was not amended by the praetor and was only much later developed into the *operis novi nuntiatio damni depellendi causa*.

By the mid-Classical period there was an increase in administrative obligations relating to tenements, such as those involving maintenance of old and endangering buildings [26] . Thus even the civis were indirectly protected by means of the defence of public interest. The Classical *cautio damni infecti* by the time of Justiniam became the *action damni infecti* wherin the cautio was automaticlally included. The *missio in possessionem* had already became a condition to the cautio, although according to Byzantine sources such conferment could actually preceed the giving of security, upon manifestation of the *periculum*. The cautio became a burden imposed on the dominus who desired to be liberated from the ordered missio which was already being executed. The actio damni infecti was exercisable by all who had enough reason to fear a periculum arising from a neighbouring tenement [27] . Likewise, even the cautio arising from the *vitium operis quod fit* became a direct right by law. Thus the *operis novi nuntiatio damni depellendi causa* became an action per se.

The defaulting defendant was punished with the plaintiff's *missio in possessionem* within that part of the tenement where the new work had been carried out. By the end of the Classical period the *cautio damni infecti* was being combined to the *cautio ex operis novi nuntiatione* and thus the nuntiatio became an action for the restitutio of the operae.

During the Empire, Zenone and Justinan slightly amended both the actions in question. However, such modifications were of great importance effecting even future developments.

Zenone in his Constitution number 12 - *de aedificiis privatis* - made some salient amendments to the previous laws regarding private property. Thus when reconstructing buildings, Zenone ordered that one has to keep the old form of the construction; and new buildings must not impede the light or view which his neighbours had previously enjoyed. Obviously the neighbours could agree to the contrary and thus create praedial servitudes.

Zenone also legislated that new buildings must be at least ten paces away from the neighbouring tenement, and a hundred paces away, if the neighbour enjoyed a sea-view. He further legislated that the arbitor must first hear both parties before giving a preliminary judgement, and this he must do without

25. **D**, 39, 2, 6; **D**, 39, 3, 11; **D**, 3, 6; **D**, 39, 37 and Sargenti, *Legis actio aquae pluviae arcendae*, 1940, p. 141.
26. **D**, 1, 18, 7; **D**, 43, 10, 1, 1, **C**, 8, 10, 8, 1.
27. "Damni infecti stipulatio competit non tantum ei, cuius res est, sed etiam cuius periculo res est".

the delays of the ordinary Courts of Appeal. Finally, the party against whom the case is decided, had to pay all damages with interest.

By means of Constitution number 13 - *de aedificiis privatis* - Justinian made it clear that Constitution number 12 was not territorially limited to Constantinople, but was also applicable to the provinces. Justinian also made sure that no one would seek to block his neighbour's sea-view, by building a wall a hundred paces away. He therefore specifically prohibited this, and by virtue of Novella 63 imposed a fine equivalent to ten pounds of gold in weight for any such contravention.

The novi operis nunciatio undoubtedly also protected the owners of buildings, in whose favour Zenone had established the new building distances. However there were some doubts s to whether one could renew his pleas after the passage of one year from the original protest of the Novi operis nuntiatio. This appeared unjust to Justinian; primarily because if the prohibition was inadmissable, one year was too long, and on the other hand, too short if the prohibition was legitimate. Thus Justinian wanted the case to be decided within three months from the prohibition. If it was apparent that the case would take more than three months for the decision to be pronounced, the defendant was then asked to give security. However this security was now given to the judge rather than to the plaintiff. It is sometimes stated that through this, Justinian reintroduced the *satisdatio,* however, limiting it only to those cases which took more than three months to be finally decided. Otherwise, in all other cases, if the defendant wanted to give security and thus have the capacity to continue with his works, it was the plaintiff who decided on whether to accept the cautio personally or not.

Even the system of the *remissio* changed. By means of the remissio, the plaintiff was allowed to continue with his works, but the remissio could only be ordered by the judge after defendant had given *cautio ex operis novi nuntiatione*. Thus the defendant could be granted a provisional discharge at any time. However, this was only a conditional discharge, and although it temporarily gave the defendant his *ius aedificandi* this was always dependant upon a final judgement which could revoke such a conditional right and enforce the consequential demolition. However, if the preliminary difficulties were surpassed, the inhibited party could continue with his works once sufficient security was offered [28]

The defendant could always request a *remissio*. However the plea would then lead to a real and final sentence rather than a conditional discharge; but this was always pleaded in conjunction to the defendant's request that the plaintiff is not justified in his *ius prohibendi*. If plaintiff offered security, all works had to cease [29] and the defendant could only continue in his works if the case took more than three months to be decided.

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28. "Ut si non recte aedificaverit omne opus, quod post denunciationem fecerit, suis sumptibus destruet".
29. V. Vuturi, *op. et loc. cit.*

French Law

La dénonciation de nouvel ouvre

The *dénonciation de nouvel ouvre* was included in the French system with some modifications from the Roman Law action. However this disparity grew as time passed.

A decision by Pope Onario III shows the first stages of development of the French actio de novi operis. The Church of St. Opportuna of Paris had by means of a petition, opposed the actions of a citizen of Paris who, inspite of their opposition, had built on some land owned by this same church. They referred the case to the Paris officials, wherein the church representatives offered to prove their title together with the damages they had suffered. They thus requested that this Parisian be prohibited from continuing the construction works and that the officials take no cognizance of the security he had offered to give for its eventual demolition. The officials suspended the works and sought to decide the case through amicable means whilst giving the church the opportunity to prove their case. The parisian appealed to the Ecclesiastic Tribunal of Sens, which revoked the sentence of the Court of First Instance; accepted the security offered by the appelant and took no consideration of the proof brought forward by the church. The Church eventually appealed to the Pope requesting the acceptance of their proof together with the prohibition of the continuation of the works. The final decision pronounced by the Pope was based on the Actio de novi operis as deveopled by the Justinian in so far that the judge cannot accept the security unless the case can be decided within three months.

Boutillier, a fourteenth century councillor to the parliament of Paris had described the French novi operis nunciatio and its development. He stated that it was possible to exercise this action where one constructed or employed someone else to consturct a new work which work was prejudicial to someone else. The party who feared damages could seek an order to prohibit the continuation of these works. Such works must have already been effectively commensed. As soon as the molested party was aware of this new and prejudicial work, he was to go to the place of work where the new work was being carried out [30] and inform the people [31] on such site that the work they were responsible for, was prejudicial to his rights. He then ordered them to suspend the work after having warned them that everything would have to be put back to its original state. He would have also warned them that they would be fined if such orders were contravened. However, the fine would only be enforced if they continued their work before the judge delivered sentence upon the matter. It was indifferent whether the person responsible for the works was present or not when the molested party made such a declaration, as the workmen could inform him. From then on, the person who had originally ordered the works was deemed to be informed, and if he ever sought to continue the works he would be fined.

30. This is in conformity to the Roman law principles.
31. Whether they were dependents of the employer or not, such as workmen and assistents.

The work had to be entirely suspended until the person responsible for such works brought the judge upon the building site, informing him of this report. This is evidently very similar to the Roman Law proceedings of the novi operis nunciatio. However, in such a case, according to the French system, the person responsible for the works would be the plaintiff and the party who originally made the report and protest would be the defendant. Thus the defendant had only to sustain that report, and give the reasons why he had made such a complaint.

Some held it necessary that the complaint should be made not later than a year after the commencement of the new work, and that the case must be decided within three months of its appointment. Otherwise the person responsible for the work could demand the continuation of the work. If the case took too long to be decided and thus ruining what was once a profitable project, the judge could and in fact had to order the continuation of the work upon payment of a sufficient security. [32]

Thus according to Boutillier, the French fourteenth century novi operis nunciatio was an action concerning eventual and not consummated damages. The action did not necessarily lead to the entire demolition of the work, and although this could be requested, the primary effect of the dénonciation de nouvel ouvre was the immediate suspension of the works. However this French novi operis nunciatio, then began to be combined with the *complainte* - the french *actio manutentionis*.

Later, the procedure was further developed and it was no longer possible that the dénonciation be conducted verbally without previous judicial authority. It was also necessary that the protest should include the name of the other party, i.e. the person responsible for the works; so that such party could appear before the judge. Once the judge had heard both parties, he decided whether the action could be sustained or whether the work could be continued upon security being given by the person responsible for the work, who appeared as defendant [33] . It was in the judge's discretion whether the defendant could be allowed to give security so as to continue the works.

Henrion de Pensey and Merlin opine that the dénonciation de nouvel ouvre was a possessary action. This theory is confirmed by some decisions of the Cour d'Appel [34] . However Troplong [35] states that in practice, the dénonciation de nouvel ouvre was very often confused with the complainte, combining both actions and simply describing them as actions against molestations concerning the request for the demolition of new works. Infact Bonifacio does

32. This again is in accordance with the Justinian development of the "novi operis nunciatio".
33. Once the "dénonciation" could no longer be conducted verbally, the person who had made the original protest no longer appeared as defendant in the suit, but now appeared as plaintiff.
34. 28/2/1814; 11/7/1820; 15/3/1826.
35. Troplong, *Diritto Civile - "Della prescrizione"* Italian translation - 1841 edition - Cap. II - Del possesso §316. p. 255.

not distinguish between the *denuzia di novella opera,* the *turbativa per innovazione* and the *statuto di querela.* Bonifacio mistakenly describes these three actions as not concerning the suspension of works in general, but simply restricts them to cases involving the filling up of trenches and the demolition of buildings. Henry likewise limits the effects of these actions to the demolition of walls which were in some stage of construction - *la réintégrande - action en réintégration.*

French jurists have often questioned whether this action is exclusively a possessory action. This difficulty has arisen due to the fact that the French *Code Civil* and *Code de procédure Civil* nowhere do they ever mention the *dénonciation de nouvel ouvre* by name. Carbonnier [36] adheres to Merlin's theory that this is a possessory action. It should be noted that this debatable question is of grave importance to French jurists, as proceedings differ depending on whether this action is deemed to be possessory or petitorial in nature. [37]

Carré [38] opines that the old laws regulating this action, were abrogated, and thus it is no longer accepted as a sui generis action, having its own specific effects. He thus concluded that the dénonciation de nouvel ouvre whether possessory or petitorial, is no longer a principle action and is simply a means of protest, rarely used, and if so, always as a subsidiary to the principle pleas. However Troplong [39] is in total disagreement with this.

Then again, some opine that this action is limited to those cases where a person carries out work on his own tenement to the prejudice of his neighbour's property. Carbonnier [40] limits this action to those damages arising from works carried out on the neighbouring tenement. However this is not coherent to the principles of the Roman law action. Troplong states that the name of this action is of little importance, and adhering to the Roman Law principles he further states that the novi operis nunciatio deals with the opposition to a future molestation rather than to a present and actual molestation. It therefore concerns acts which are still to happen rather than consummated acts. Notwithstanding all this and inspite of the "novelty" of the work, this is basically a possessory action which does not substantially differ from that action one would have exercised due to a molestation in the enjoyment of possession resulting from works which have been completed. Troplong is also of the opinion that according to contemporary case law, the defendant would not have been allowed to give security so as to continue with his works.

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36. Jean Carbonnier. "*Droit Civile*" - "*Les Biens*". 11th edition, 1983. Chapt. II. 2.2 §66. p.291 et seq.
37. The actions concerning immovable property may either be possessory - competent to the "tribunal d'instance" (Art 321-329. 2° Code de l'organisation judicaire. 1978); or petitorial relating to "le fond du droit et la propriété (Art 1265 - Nouveau Code de Procédure Civile 1975) - competent to the "tribunal de grande instance".
38. Carré. *De la compétence.*
39. Troplong - *Op. cit. §318.*
40. Jean Carbonnier. *Op. et loc. cit.*

According to the ordinary rules of the *complainte,* the works must be demolished and the Court must order a *status quo ante.* Troplong does not find any substantial difference between the *dénonciation de nouvel ouvre* and the *compliante*. If the principle plea is based on the indemnity for damages together with a request for a status quo ante, such pleas may apply to the actio manutentionis as well as to the novi operis nunciatio. If the plaintiff does not request indemnity for damages, he would demand the suspension of the works and that everything be returned to its original state, so long as the work would not have proceeded too far. In this case this would be a true Roman Law novi operis nunciatio; however, it would also be an action against molestation wherein the plaintiff is seeking to maintain himself in possession - *retinendae possessionis* i.e. a possessory action. Thus Troplong disagrees with Carré in so far that this is a principle action and not a secondary plea, because the plaintiff principally requested the discontinuation of the works and only then would he seek to prove his possessory rights. If the Judge orders the suspension of the works, the Court would have upheld the plaintiff's principle plea - the only plea he actually advanced as he had no intention of requesting anything else simply because he would have suffered no damages as yet.

On the other hand, if one were to base his pleas on proprietary rights and title rather than possession, the dénonciation de nouvel ouvre would then be petitorial in nature. If the plaintiff requests the prohibition of the continuation of the works which may cause him damages, the plea would be *ex-primo decreto - per voie de référé* - by virtue of which the Court would issue a provisional order suspending the new works without prejudice to the merits of the case [41] . On the other hand, one can follow the system suggested by Carré, whereby the plaintiff's plea is based on an actio petitoria whilst provisionally requesting the suspension of the works through a secondary plea[42] . This provisional request would not be based on possession but on propreitary title and thus this would not be a possessory action [43]

As previously stated, Merlin and Henrion de Pensey opine that the dénonciation de nouvel ouvre, like the complainte is a possessory action. They base their theory on the fact that the novi operis nunciatio was an interdict in Roman Law and interdicts were possessory actions [44] . They thus concluded that the dénonciation de nouvel ouvre was in essence one of these possessory actions. However it is incorrect to state that all Roman Law interdicts were only concerned with possessory rights and never with proprietory titles [45]. Then again, had this to be the case, it is evidently clear that French Law did not follow the Roman law novi operis nuntiatio to its full extent. Thus Troplong

41. This procedure was followed by the Cour de Rouen (25/4/1826) and followed in analogous. cases. In fact this is taken for granted in the Cour de Bordeaux.
42. This procedure is in line with Art 134 and 337 of the old Code de Procédure Civile.
43. Thus not applying Art 3 and 23 of the old Code de Procédure Civile.
44. "Decreta de possessione vel quasi possessione facta, quibus non perpetua possessio addictur, sed temporaria, quoad de proprietate judictum sit".
45. "Interdictum non tantum de possessione editur, vel quasi possessione, sed **et de proprietate interdum et de quasi proprietate** ".

concludes that depending on the facts of the case, the dénonciation de nouvel ouvre may either be possessory or petitorial.[46]

As has already been stated, whether the dénonciation de nouvel ouvre is possessory or petitorial has important implications. Thus if the plaintiff has no possession, must he proceed to exercise the dénonciation as a petitorial action, or request the prohibition of the continuation of the new work as a secondary plea in the course of a petitorial action? This is the conclusion which one draws from the absolute theories of Merlin and Henrion de Pensey. Merlin's opinion is mistaken in so far that this plaintiff may request the suspension of the works either *ex primo decreto* or through a secondary plea. However this is only possible if he limits his pleas to a provisional and conditional *status quo*. However if the plaintiff were to request for the reversion of the property or the demolition of the works, such pleas would go beyond the limits and scopes of the dénonciation de nouvel ouvre as the action would no longer be of a provisional nature.

The same principles would apply if the prejudicial new work is not carried out on the tenement of the party demanding the suspension of such works. Thus if the works are carried out on the neighbour's tenement the plaintiff may request the Court to prohibit the continuation of these works. This would thus be a possessory action. On the other hand, if the works, which are no longer in their preliminary stages, lead to actual damages, this would no longer suit the requisites of the dénonciation de nouvel ouvre. This would be the case wherein a neighbour dug out a cesspit and its waters seep into the contiguous tenement and thus molest the other party's possession; or else if this same neighbour begins to construct a high building, which is as yet incomplete and too close to the other party's wall and thus limits his right of light. In both these cases, if plaintiff can prove his possession, he may effectively exercise a possessory action requesting the suspension of the works together with their demolition. However this action would resemble an *actio manutentionis* rather than a novi operis nunciatio even though both these actions were very often confused in French Law.

Thus Troplong[47] quotes a case in which Kellerman started to construct a building fifteen feet away from the tenement of Vacgemans who claimed a *ius lumnibus officiatur*. Vacgemans exercised the dénonciation de nouvel ouvre against Kellerman. The Cour de Cassation on the 28/2/1814 decided that once the servitude which Vacgemans was claiming, was non-apparent, possession did not give rise to any right and thus he could not exercise a possessory ac-

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46. "Porro cum Moribus Hodiernis actionum nomina non exprimantur, haec agendi facultas non negabitur ideo, quod quis alio modo suum jus persequi possit, actione communi dividundo, vindicatione servitutis, interdicto uti ppossidetis, quod vi aut clam, vel simili. **Potest quoque non modo petitorie, sed etiam possessorie**, ex omnibus illis causis, si quis, aedificando, per alium in usu juris sui turbetur, agere; idque vel solemni interdicto curiae, vel in municipiis a magistratibus eorum, vel eorum delegatis, ei curiae quom politiam vocant, praepositis".
47. Troplong, *Op. cit. §320.*

tion. In this way Vacgemens had to opt for a petitorial action, with the result that the plaintiff could not request the suspension of the works. In fact the Courts decided that "L'inibizione di costruire essere azione possessoria". However we cannot but disagree with such a conclusion.

Carré states that a plaintiff who cannot but opt for a petitorial action and prove his title, may request the demolition of the work through a secondary plea. Then again, according to Art. 806 of the old Code de Procédure Civil, a party may request a court decree ordering the provisional suspension of the works, till the judge decides upon the merits of the case, if he proves the urgency of his case.

Plaintiff can only request a *status quo.* He cannot include any pleas concerning possession. However this was overlooked by the Cour de Rouen. According to the facts of the case, Lemaitre had constructed a blockage in a watercourse on his own tenement and in so doing, deprived Auzou of the waters which used to fill his reservoir. Auzou as plaintiff, requested the demolition of the blockage *ex primo decreto.* The Court of First Instance of Rouen decided that it was not competent to hear the case but this was subsequently overruled by a decree of 25/4/1826. The Court then upheld plaintiff's request and ordered the new works to be demolished and that the waters should take their natural course.

Troplong opines that the court's decision was Ultra Vires, since the court was not competent to hear the case in so far that it had decided to deal with the question concerning possession when it was to decided on the merits of the case. However once the Court had ordered the demolition of the blockage, it had also accepted Auzou's declaration that he had possession. These were in fact competent to the Justice of the Peace. The court of First Instance was supposed to limit its orders to the suspension of the works and a *statu quo.* On the other hand, according to the facts brought forward by the parties, it appeared that the works which had blocked the waterway, had been completed. In this way the decision did not actually concern new works and the *dénonciation de nouvel ouvre,* as this action demands that the works be in their initial stages and that no actual damages would have as yet resulted [48] However, this fact further proves that this Court was not competent to decide such a case.

Plaintiff could have premissed the previous enjoyment of the water and if it were possible, for him to prove its possession he simply had to opt for an ordinary possessory action. However, had he exercised a possessory action he could not request the suspension of the works and if he intended to request for the demolition of the watercourse-blockage, he had to opt for the *complainte.*

Auzou could have also sought to exercise a petitorial action. However

48. Ulpian - "Adversus opera futura inductum est, non adversus praeterita: hoc est adversus ea quae nondum facta sunt, ne fiant".

in both these two latter cases, the court could not **provisionally** order the demolition of the works. The Court could have ordered a provisional suspension of the works, but is it ever possible to order a **provisional demolition!**

The true characteristic of the *dénonciation de nouvel ouvre* is its precautionary nature which results in a prohibition to construct any form of building. The pleas of the dénonciation could concern possessory rights or proprietary titles. Thus this action, depending on circumstances, may be instituted either before the possessory or petitorial judge. In this was, Troplong [49] concludes that it would be incorrect to denominate the *dénonciation de nouvel ouvre* as a possessory or petitorial action. It can be either of the two and thus a *tertium quid*. The true nature of this dénonciation is still highly contraversial as is evident from the various juristic opinions and court decisions.

It is noteworthy to mention some principles which Dalloz seems to have overlooked. Dalloz sought to separate the *actio manutentionis* completely from the *novi operis nunciatio*. He thus restricted the *complainte* to those cases where the commenced work was being carried out on the possessor's tenement; and the *dénonciation de nouvel ouvre* to those cases where the work was being carried out on the neighbour's tenement. If the works were commenced on the possessor's tenement, the plaintiff could not but exercise the complainte, and if the works were commenced on the neighbour's tenement, he could not opt for this same action so as to request the discontinuation of the works. It would seem that according to Dalloz, the plaintiff, in the latter case, could only exercise the dénonciation and once the works were completed, he could only seek to obtain his rights through a petitorial action. As stated earlier, Troplong disagrees with this theory and opines that the plaintiff may exercise the dénonciation de nouvel ouvre and request the prohibition of the continuation of the new works whether such works were being carried out on the neighbour's or on the possessor's tenement. Troplong further states that this plaintiff may likewise exercise the complainte. Troplong's theory is backed by extensive case-law.

If D were to block a watercourse or dig out a reservoir on his own tenement, depriving P of the water he had possessed for a year, this would result in a molestation of fact with regards to possession as well as a result of the new works. Thus plaintiff could exercise the complainte and request the demolition of the works which were causing him damages as a cause of molestation to his possession [50].

The true distinction between the *complainte* and the *dénonciation de nouvel ouvre* has nothing to do with the place where the prejudicial work is carried out. Thus Troplong opines that this distinction should be based on the percentage of overall completed work and the degree of damages which such

49. Troplong, *Op. cit. §323.*
50. Cour de Cassation 28/4/1829; 13/4/1819 - Sirrey 1819 p. 489 - (Re Dalloz - "Action possessoire"); 1/3/1815; 22/3/1833 - Sirey 1833 p. 321; 17/6/1834 - Sirey 1834 p. 542. (Re Merlin - Quést. de droit - Dénonciation di nouvel ouvre).

work has caused or could cause. If the work, wherever carried our, is a cause of molestation to possession and gives rise to actual damages, the plaintiff must exercise the complainte. On the other hand, if the works have not as yet given rise to any actual damages, and the plaintiff limits his pleas to a suspension of the works, he could exercise the dénonciation de nouvel ouvre, wherever the preparations for such work is actually being carried out. However, if the work is completed, plaintiff would have to exercise the complainte.

In this way, Troplong disagrees with Dalloz's theory which however is based on a decree of the Cour de Cassation of 1825 [51] where it was stated that Saulneret had dug out a cesspit in his own tenement, which cesspit had leaked into the basement of Martin. Martin exercised the *actio manutentionis* because he premissed that the water leakage was a cause of molestation to his possession. It is evident that no one can dig a cesspit in his own tenement to the detriment of his neighbour and thus Art. 674 of the old Code Civil prescribes the distance which in such cases is to be kept from the dividing wall. If, notwithstanding the obersvance of this precautionary legal distance, water still seeps into the neighbouring tenement, the cause of damages has to be removed.

The Court ordered Saulneret to fill in the cesspit and fined him £50 with interests. The Cour D'Appel de Louhons held that this was a case concerning the dénonciation de nouvel ouvre. However it also decided that the Justice of the Peace was not competent to deliver Judgement upon the case unless the plaintiff had requested the temporary suspension of the commenced work. Plaintiff had also to request that upon completion of the work, the case would eventually have to be decided by another court, since the decision would then no longer be provisional but petitorial in nature and thus not competent to the Justice of the Peace. It therefore follows that the decision of the Justice of the Peace was ultra vires.

Both the Court of First Instance and the Court of Appeal held that Martin was basing his action on the dénonciation de nouvel ouvre. However Martin was in fact exercising the complainte and had stated "vengo molestato nel possesso annuale della mia cantina; chieggo che la molestia cessi". These are not the pleas arising from the dénonciation. The Court of Appeal held that in a suit involving the novi operis nuntiatio the utmost the judge could order is the prohibition of the continuation of the works. It therefore follows that Martin did not infact exercise the dénonciation de nouvel ouvre but had opted for a true and proper action which by name and object had to be the actio manutentionis. This notwithstanding, both courts had decided otherwise.

It is possible that the courts had decided that Martin should have exercised the dénonciation de nouvel ouvre simply because the cause of molestation had emanated from works which Saulneret was carrying out on his own tenement. However this was never a prerequisite of the Interdictum de novi

51. 25/3/1825 - Sirey 1826 p. 349 - and similarly that of 14/3/1827.

operis nuntiatione [52] . The Court of Appeal had held that dénonciation can no longer be exercised once the work is complete. Thus plaintiff would have to opt for a petitorial action [53]

Troplong opines [54] that the Justice of the Peace should be granted more powers. The judge presiding over the court concerning possessory rights hardly ever ordered the demolition of the works carried out by the other party on the possessor's tenement. However Troplong never suggested that the Justice of the Peace should have the competence to order the demolition of completed works. Thus in a case involving the infiltration of water from a cesspit, the Justice of the Peace could demand the termination of the molestation. He could order the defendant to have the cesspit well plastered rather than uphold plaintiff's request to fill it in. The Justice of Peace is competent to order the discontinuation of the works and is also enpowered to order the removal of the molestation. However, he should always seek to combine the rights of the possessor with the preservation of the works.

Since 1975 [55] Chapter VI of the French Civil Code - *De la protection possessiore* - is limited to two sections namely Art. 2282 and 2283, and since the 28th of March 1979, the sections of the *"Nouveau Code de Procédure Civile"* concerning these actions are only four namely Art. 1264 to 1267.

Article 2282 states that:

> *"La possession est protégée sans avoir égard au fond du droit, contre le trouble qui l'affecte ou la menace...."*

Inspite of the generic phraseology found in this section Carbonnier states that one can still distinguish the three different possessory actions common to traditional civil law - the *complainte,* the *dénonciation de nouvel ouvre* and the *réintégrande.* However it should be noted that [56] French law never accepted the *cautio damni infecti.* Thus a neighbour could not exercise any actions and oblige the owner of the endangering premises to carry out the necessary repairs in order to obviate the danger and feared damages. The actio damni infecti was not accepted because French jurists opined that the mere apprehension and fear could never amount to an actual molestation of fact to the detriment of the neighbour's proprietary rights [57] . This notwithstanding French Law does not leave the neighbour unprotected. However he may only seek to enforce criminal liability through the various police and building regulations and can never seek civil damages in such circumstances.

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52. This latter theory advanced by Troplong was upheld by the Court of Appeal 28/2/1814; 11/7/1820; 15/3/1826; 17/6/1834.
53. Similarly in Roman law the "Novi operis nuntiatio" was inadmissable if the work was complete. In such a case the plaintiff who requested the demolition of the works had to opt for the interdict "quod vi aut clam" whereby the "iudex" would have ordered a "status quo ante". The "Complainte" originated from the "interdictum quod vi aut clam" and it was never necessary that the works would have been carried out on the possessor's tenement. Re Pothier (3 p. 236 §24), Upian 1.11. §14 D. de cloacis.
54. Troplong, *op. cit. §328.*
55. Loi §75 - 596 (9.7.1975).
56. Edgardo Borselli, *Nuovo Dig. Italiano* Vol. IV. p. 720.
57. This notwithstanding the fact that Art 2282 of the new french civil code seeks to protect the possessor. "contre le trouble qui l'affecte ou la menace".

Italian Law

Denuncia Di Nuova Opera e Di Danno Temuto

The *denuncia di nuova opera* and *di danno temuto* are considered as two sui generis actions which are aimed at obtaining provisional measures in order to protect a thing possessed. According to Edgardo Borselli [58] *"sono azione assicurattive, dirette alla tutela di uno stato di fatto, accordate dalla legge affinché nei casi urgenti l'individuo non sia trattato a farsi giustizia da sé e che producono effetti piú precari e limitati dalle azione possessorie, dalle quali differiscono in particolar modo perché hanno per oggetto indifferentemente la difesa della proprietà e del possesso"*.

These two actions differ both in their conditions and aim. In fact the *denuncia di nuova opera* has the scope of prohibiting the continuation of a new work when one has reason to fear that it will cause damage to a thing possessed. As stated, it is subject to certain conditions which differ from the *denuncia di danno temuto.*

The prerequisites of the *denuncia di nuova opera* include the possession of an immovable, a real right or any other object [59]; a new work commenced by some person on his own property or on the property of somebody else, less than a year before and which work is as yet incomplete; together with the fear of damage that such a work can cause to the thing possessed.

On the other hand, the *denuncia di danno temuto* aims at preventing another type of damage. Such damage must be imminent and must arise from some thing which is already in existance, in particular a building, a tree, or any other object; rather than being caused by a new work as is the case with the *denuncia di nuova opera.* The requisites of the *denuncia di danno temuto* are the possession of an immovable, of a real right or any other object; the fear of a serious and imminent damage to the tenement or object; and this being caused by a building, tree or any other object.

These actions are deemed to be possessory actions when they are closely connected to possession - when a possessor has an interest in preserving a thing which is the object of his same possession. This must be threatened by a new work undertaken on either of the parties' lands, or by threatened damages arising from a contiguous tree, edifice, or other thing.

The proceedings of these two actions are divided into two stages which are closely connected but which may differ in their aim and in their effects. The first stage is always competent to the Magistrate's Court which provides

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58. Edgardo Borselli, "Denuncia di nuova opera e di danno temuto" diritto civile: *Nuovo Digesto Italiano*, p. 77 et seq
59. Although this was specifally stated in section 698 of the old Italian Civil code, which has been slightly amended in the new section 1171 and put in more generic terms, these prerequisites are in theory still necessary.

precautionary measures. The magistrate, after summarily taking cognizance of the pleas of the parties, due to the special urgent proceedings adopted in such cases, confirms, modifies or revokes such pleas without prejudice to any subsequent judgement to be delivered on the merits of the case. Such judgement based on the merits of the case is often decided upon by the same magistrate. Although generally separate, both stages of the action may occasionally be unified [60] . The *denuncia di nuova opera* and *di danno temuto,* being of a precautionary nature, are generally limited to the first stage, whereas in the second stage, the parties opt for a petitorial or possessory action.

The second stage of the proceedings is aimed at obtaining a definite judgement which would ensure the possession or ownership of the whole thing in dispute. Thus, in the denuncia di nuova opera, this is due to the fact that one may not only request the indemnity for damages. Once the court has ordered the suspension of the works the judge will have to decide on whether or not to grant a *status quo ante.*

It is up to the plaintiff to decide whether to propose a petitorial or possessory action. If, in the writ of summons, he declares himself to be the owner of the tenement endangered by the new works, such declaration is not of itself sufficient to identify the action as being petitorial. The judge himself has to establish the true nature of the action basing himself upon the pleas and facts presented by the plaintiff. If the denuncia di nuova opera is rendered inadmissable, this is not prejudicial to the proceedings on the merits of the case. The decision of the judge in the second stage of the proceedings relating to the nature of the action (i.e. possessory or petitorial) is subject to appeal, as this may result in an *error in procedendo.*

The judge will summarily take cognizance of the case with particular reference to the legal prerequisites, and if these are found to exist he will order temporary precautionary measures. In the denuncia di nuova opera these measures may consist in a suspension of the works or the continuation of the works upon security being given for eventual damages. If the court-order of the prohibition of the continuation of the works is contravened, the court may then order a *status quo ante* . On the other hand in the denuncia di danno temuto, the measures may consist in obviating the danger or the giving security for damages.

As stated, these actions have a precautionary effect and are used to protect possession or ownership. Their scope is for the magistrate to give provisional measures of security to protect the interested person, which measures **must** be followed by a judgement of a possessory or petitorial nature, and this in order to substitute these provisional measures by a more definite judgement.

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60. As previously stated the judgement on the merits of the case in Roman law proceedings could actually precede the first stage. This however is no longer possible under present Italian law of procedure.

Therefore the denuncia di nuova opera e di danno temuto **do** differ from possessory and petitorial actions. In fact they only aim in protecting a state of fact i.e. the enjoyment of the thing owned or possesed. On the other hand, the immediate object which is judicially safeguarded in both the petitorial and the possessory actions is the **relationship of man over the thing** - a relationship of property *jus possidendi* or *jus possessionis.*

THE *DENUNCIA DI NUOVA OPERA*

Art. 1171 : *Il proprietario, il titolare di altro diritto reale di godimento o il possessore, il quale ha ragione di temere che da una nuova opera, da altri intrapresa sul proprio come sull'altrui fondo, sia per derivare danno alla cosa che forma l'oggetto del suo diritto o del suo possesso, può denunziare all'autorità giudiziaria la nuova opera, purchè questa non sia terminata e non sia trascorso un anno dal suo inizio.*

L'autorità giudiziaria, presa sommaria cognizione del fatto, può vietare la continuazione dell'opera, ovvero permetterla, ordinando le opportune cautele: nel primo caso, per il risarcimento del danno prodotto dalla sospensione dell'opera, qualora le opposizioni al suo proseguimento risultino infondate nella decisione del merito; nel secondo caso, per la demolizione o riduzione dell'opera e per il risarcimento del danno che possa soffrirne il denunziante, se questi ottiene sentenza favorevole, nonostante la permessa continuazione.

This action has three basic prerequisites, these being a new work and fear of eventual or future damages. Then again, the work must not be completed and a year must not have passed since its inception.

The new work undertaken must give rise to an external characteristic of novelty i.e. a material change. This work may be carried out on one's own or another's tenement. It is the person who is carrying out the innovation who must be responsible for the damages which may be caused to an immovable, a real right or any other object. A year must not have elapsed since the commencement of the innovation, and the work must not as yet be complete. The wording of the law may be easily given a wide interpretation which would include any external change to a tenement, i.e. not restricted to construction works but inclusive of demolitions and excavations. Some jurists, principally Bruno [61], basing themselves on the Roman Law interdict *quod vi aut clam* also include the felling of trees. However this is debatable and is contrary to the prevailing opinion of Pisanelli - Scialoja and Mancini [62]. As stated, this action may also be exercised if the new work is being carried out on the tenement of the one making the *denuncia*.

One would observe that this action does not deal with eventual damages - those which might arise in the future - but with damages which have been actually caused, and verified. However, the damage caused does not exclude

61. Bruno, *Denuncia di nuova opera e di danno temuto, Dig. Italiano* n. 42.
62. Pisanelli - Scialoja e Mancini, *Commento al codice di diritto civile,* Vol. II, p. 66, n. 962.

the fear of more serious and impending damages if the work is carried any further. In this latter case the plaintiff would temporarily request the prohibition of the continuation of the work and possibly include a plea for the giving of security for the feared and eventual damages. [63].

The new work must be the cause of eventual damages to an immovable, a real right or any other object possessed [64] by the denunziante. The certainty of the damage is not a necessary requisite of the action. It would suffice if there is reasonable cause to apprehend that such serious and impending damage will be verified. This fear must be such as to produce an impression on a reasonable man. It is the judge who must eventually decide upon this reasonable fear and in so doing he must consider the normal and contemporary methods to be used in carrying out this work together with their eventual effects [65].

Art. 1171 states that the plaintiff [66] must have reasonable cause to apprehend a serious and impending damage to a *''cosa che forma l'oggetto del suo diritto o del suo possesso''*. This helps to smooth out the difficulties of the former art. 698 which stated that damage could be caused to an immovable, a real right or any other object. The first two objects did not give rise to serious problems of interpretation. However, the term ''oggetti'' was the cause of many doubts relating to its extent. Some jurists opined that these ''oggetti'' referred to movable things annexed to a tenement permanently to remain incorporated therewith, even though they had not become immova bles by reason of the object to which they refer. However the prevailing opinion preferred a wider interpretation of the law.

The work must be at a stage between its commencement and completion. Juridically, work is deemed to have been started even though nothing material is as yet apparent i.e. the mere preparations of the work would suffice as a cause giving rise to such an action. Thus the preparatory works would include the carriage and piling of building materials at the place destined for the new work, as yet not commenced. This is substantiated by Roman Law: - *potest autem quis nunciare etiam ignorans, quod opus fieret.* Thus even according to the Sardinian Code of Procedure and other jurists like Pacifici - Mazzoni, the preparatory materials were accepted as a justified apprehension. Notwithstanding this preparatory work, such jurists sustained that the one year time limit envisaged by law began to run from the actual commencement of the work. This is thus very often looked upon as contradictory in terms, which is however clarified by Lucarini who opines that the *denuncia* is made in the case of *''l'attività innovatrice altrui' sopra un immobile, pericolosa pel diritto del denunciante, e non il suo effetto; e che, conseguentemente, se i così*

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63. This was also the principle in Roman law.
64. Article 1171 of the Italian civil code does not limit itself to the possesor but givges equal rights to the owner. Section 575 of the Maltese civil code restricts itself to things possessed
65. It is obvious that this action is outside the scope of building regulations dealing with hygiene and security which, if infringed, would necessitate a suspension of works without any need to recur to the ''denuncia di nuova opera''.
66. Plaintiff may be the owner, possessor or any other person having a right of enjoyment

detti lavori preparatori consistono in una attività univocamente diretta alla innovazione su di un immobile, e in senso pericoloso per il diritto del denunciante, così costituiscono indubbiamente un'opera denunciabile nel termine assegnato dalla legge, mentre non lo sono nel caso contrario, quando cioè non giungano a concretizzarsi un' attività innovatrice nel senso anzidetto'', i.e. the raison d'être of the denuncia di nuova opera is the apprehenion of the damages - and preparatory works **can** lead to such apprehension and one need not wait for the effects of these preparatory works.

Even though the work may have to be developed further, such work is deemed to be complete when this has already given cause to damages. Thus if one had reasonable cause to apprehend the closure of a source of light which would be prejudicial to him, the damage is deemed to be legally complete even though the new work is as yet incomplete. This is because one of the main aims of the *denuncia di nuova opera* is the suspension of those works which result in the damages one would seek to avoid. Thus if all the activities which were prejudicial have already been carried out, there is nothing else one can fear if these works go on any further because the damage has already been caused, and the suspension of the works would be of no avail. The one year period starts to run from the first innovation which is carried out on the place; although the work might occasionally be temporarily discontinued, the one year time limit is still deemed to have commenced regardless of the subsequent changes if these form a unity with the previous ones.

It is not without reason that this one year period has been specifically stipulated by the legislator because it would be extremely unfair if one had to allow the person executing the works to carry on undisturbed for a long time and then suspend his construction when this has reached a considerable stage of development. The undisturbed progress of work would have led the defendant to believe in his right to complete it and thus he would be incurring unnecessary expenses. Today, however, this time limit may sometimes prove too long due to the rapid execution of works with the help of modern building techniques.

However, the commencement of the one year period is deemed to be delayed if the plaintiff is unaware of the inception of the works. Such would be the case involving underground excavations. However, Apicella [67] opines that the one year period starts to run just the same. This he states is due to the fact that if a year has passed without the neighbour having noticed the works, it is possible that no serious damages are involved or at least that they are not so urgent as to require the special precautions of the *denuncia di nuova opera*.

The Corte di Cassazione in 1929 however did not uphold this latter opinion and held that this one year period starts to run only when the new work is apparent in such a way that one can evaluate the possible and eventual resulting damages. This judgement reflects the prevailing opinion.

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67. Apicella, "*Denuncia di nuova opera e di danno temuto*", *Dig. Ital.*, p. 927, n. 7.

THE *AZIONE DI DANNO TEMUTO*

Art. 1172: *Il proprietario, il titolare di altro diritto reale di godimento o il possessore, il quale ha ragione di temere che da qualsiasi edificio, albero o altra cosa sovrasti pericolo di un danno grave e prossimo alla cosa che forma l'oggetto del suo diritto o del suo possess, può denunziare il fatto all'autorità giudiziaria e ottenere, secondo le circostanze, che si provveda per ovviare al pericolo.*

L'autorità giudiziaria, qualora ne sia il caso, dispone idonea garanzia per i danni eventuali.

This differs from the *actio manutentionis* in so far that the former action requires a serious and imminent danger while for the latter action it would suffice the danger itself is a persistent disturbance or molestation of law or of fact. The *denuncia di danno temuto* may also be distinguished from the *denuncia di nuova opera*. Whilst the scope of the former action is the prevention of the continuation of the new work; by means of the *damno infecto* one would seek to obviate the danger arising from something already in existence i.e. unlike the 'denuncia di nuova opera', the 'danno temuto' is concerned with actual damages rather than with eventual damages. Then again, exercising the 'danno temuto' the plaintiff can also request the actual demolition of the works when there is no other way of obviating the danger.

The azione di danno temuto demands the existence of a danger to a thing, and that danger must be serious and impending. All this must give cause to a reasonable fear of damages.

As stated, and according to Edgardo Borselli, the first prerequisite of this action should be "un pericolo di danno da cosa a cosa". It is noteworthy to state that even though art. 1172 specifically makes reference to a building and a tree, these are merely exemplary and should not be given a strict interpretation. In fact the article also mentions "o altra cosa". It is therefore irrelevant whether the danger is caused by the thing itself, by natural causes or by act of man.

It is up to the court to decide on the measures to be adopted to obviate the danger or on any security to be given. It must be remembered however that no security can be given against unforeseeable events i.e. those caused accidentally or through "force majeure" [68] . This notwithstanding, if these fortuitous events are preceded or accompanied by contributory negligence, the plaintiff may exercise this action wherein the court would emphasize on such negligence rather than on "force majeure" - *qui occasionem praestat, damnum fecisse videtur.*

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68. Codovilla, *La denuncia di nuova opera e di danno temuto.*

It is also up to the court to determine which circumstances give rise to a reasonable fear of danger of a serious and impending damage. Thus there is no need of a certain and imminent damage. The term *"serious"* has been interpreted to mean that which is able to destroy, gravely deteriorate or radically change the thing which is in danger, whilst *"imminent"* has been interpreted as being of such nature that it can take place at any moment.

The extent of both these factors is at the discretion of the judge. It is not necessary that the danger be continuous. It is enough that the danger may be verified at any moment or else that it may aggravate an already existent danger.

The proceedings of this action, like that of the "denuncia di nuova opera" are also divided into two stages:- the first stage consists in the taking of conservatory and precautionary measures through urgent proceedings which are necessary for the prevention of the possible and impending damage. The second phase involves a definite judgement based on the merits of the case arising from a possessory or petitorial action aimed at safeguarding ownership or possession.

The *azione di danno temuto* is exerciseable by the possessor of the tenement or object in danger, in order to prevent its loss or damage. On the other hand the "denuncia di nuova opera" may be exercised by anyone who has an interest to avoid damage to an immovable, real right or any other object possessed by him, and which is caused by the new work carried out by someone else. Thus both these actions are exercisable by whosever holds the thing under any title. It is a protection of a state of fact. Even if the thing is held in the name of the others, it is enough that the plaintiff has an interest in the thing. Therefore in sale, for example, when a thing has been seen but not yet handed over, both the buyer and the seller can seek to exercise any of these actions.

The "condomino" can also exercise these actions exclusively for the protection of his property against the danger arising from the thing held in common, even when this results from the lack of due care. However he cannot exercise these actions on his own, in order to safeguard the common property as a whole, without the consent of the other co-owners. Even the possessor "nomine aliena" has the right to exercise the "azione di danno temuto" since he has the responsibility of custody and hence the obligation of diligence of a "bonus paterfamilias".

The lessor has a right to exercise these actions against the work taken by the lessee. The lessee, on the other hand, can exercise these actions both against the lessor and against third parties; but his action is limited to the enjoyment of the thing he holds under title of lease [69]

69. Apicella, *Op. cit. et. loc* .

Some doubt has arisen as far as the right of the hypothecary creditor is concerned. This has been decided in the affirmative. He may exercise the *denuncia di nuova opera* both in "iuribus debitoris" and in his own name, because he is a person entitled to a hypothecary right i.e. a possessor of a real right.

The *denuncia di nuova opera* is an action of a personal nature and it is usually directed against the person who is actually carrying out the new works whether such works is being carried out for himself or on behalf of others. It is irrelevant whether the person carrying out the work is also the owner of the tenement. But once a suspension of the works has been ordered and the second stage, i.e. the stage based on the merits of the case, is reached, then the action must always be directed against the person who has an interest in the work i.e. the actual owner or possessor.

If the work is specifically being carried out for the purpose of modifications or repairs, the *azione di danno temuto* can be exercised against the one who is carrying out the work as the sole person responsible for the damages. This, according to E. Borselli, is a logical consequence of the principle that every person is responsible for his actions.

If the building, tree or thing is to be found in a bad state without the participation of man, this latter action must be exercised against the owner of the thing, even when the cause of the damage goes back to a time before his acquisition. However, if the owner is unknown, the action can be directed against the possessor because possession is a presumption of ownership and in such urgent cases, one cannot really wait to propose any other action.

Codovilla [70] states that the owner and any person holding the thing on his behalf, may exercise both the *denuncia de nuova opera nuntiatio* and the *actio di danno temuto* not only against third parties, but also in their reciprocal relationship.

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70. Codovilla, *Op. cit.*

MALTESE LAW

Actio de Novi Operis

Section 575 : (1) *Where a person has reason to apprehend that in consequence of a new work undertaken by any other person either in such other person's own tenement or in the tenement of others, damage may be caused to an immovalbe thing possessed by him, he may bring an action demanding that such other person be restrained from continuing such new work, provided this shall not have as yet been completed and one year shall not have elapsed from the commencement thereof.*

(2) *The Court, after summarily taking cognizance of the facts of the claim, may, according to circumstances, either restrain or allow the continuation of such new work, ordering such security as it may deem proper.*

(3) *Where the continuation of the work has been restrained, such security shall be in respect of the payment of any damages which may be caused by the suspension of the work, in case the opposition to the continuation thereof shall prove to be groundless.*

(4) *Where the continuation of the work has been allowed, such security shall be for the total or partial demolition of the work, and for the payment of the damages which the plaintiff may suffer, in case he obtains, notwithstanding that the work was allowed to be continued, a final and absolute judgement in his favour.*

The Maltese section 575 is derived from article 1506 of the Codice Sardo and article 698 of the old Italian Code. The phrase "causato ad un immobile" in the old Italian article 698 was followed by "ad un diritto reale od altro oggetto", however the Sardinian Code was limited to "danno ad un fondo". The Maltese section 575 adhered to this latter code and Sir Adriano Dingli, in his "Commenti e fonti all'Ordinanza VII del 1868", states "se il minacciato è una cosa mobile, si deve piuttosto allontanare questa che sospendere l'opera e domandare cauzione". It is important to note that the new article 1171 of the Italian Code replacing the old article 698 has been amended insofar that it is no longer limited to an immovable, a real right or any other object. It is now stated in very generic terms as "danno alla cosa che forma l'oggetto del suo diritto o del suo possesso".

Otherwise, the *actio de novi operis* practically has the same requisites as Italian law. The basis is that a new work has been undertaken on a tenement which belongs either to the person who is carrying out this same work or on another person's tenement. It would seem that according to Maltese law, the expression "new work" is not given as wide an interpretation as in Italian law. This is usually limited to a construction of an immovable to the detriment of another immovable. It is evident that both Italian and French case law abound in other activities which may give rise to this action the most common of which would be excavations of wells, ditches and basements.

junction, such subsequent action must not result from a separate writ of summons, the reason being that whilst the *actio de novi operis* is an action "per se", neither possessory nor petitorial in nature, the warrant of prohibitory injunction must result from an application. One would thus have to conclude that although the Maltese *actio de novi operis* has greatly followed the Italian and French prerequisites, the proceedings of this action slightly differ. It would seem that in this latter respect the Italian and French *denuncia di nuova opera* are closer to the Maltese warrant of prohibitory injunction rather than the action which bears that same name.

ACTIO DE DAMNO INFECTO

Section 576: *Where any person has reasonable cause to apprehend any serious and impending damage to a tenement or other thing possessed by him, from any building, tree or other thing, he may bring an action demanding, according to circumstances, either that the necessary steps be taken to obviate the danger, or that the neighbour be ordered to give security for any damage the plaintiff may suffer therefrom.*

Section 576 was derived from article 1505 of the Sardinian Code and the old Italian article 699 with no substantial differences and amendments.

This section deals with possessors who fear that damage might be caused to a thing in their possession. The words "reasonable cause to apprehend" are once again to be found in this section, similar to those of the "actio de novi operis".

In this case there must not result any actual damage. It is an action based on the fear of a threat of damage. In fact, in Italian law, this action is known as *l'azione di danno* ***temuto***. The danger must be the cause of a threat to the possessor's tenement or any other thing. The causes of the threat is specified in the law, particularly a building or a tree. However, the law then goes on to include "other thing". This may thus be given a wide interpretation.

In fact in **Mifsud v. Borg et.** [77] wherein plaintiff premised that defendants had made a common wall higher without strenghtening the original wall

76. Code of Organisation and Civil Procedure: S. 876(1) - "The object of a warrant of prohibitory injunction is to restrain a person from commencing of continuing the erection of any building or work whatsoever or from demolishing or renovating any building or work, or to restrain a person from entering any premises or place, or from doing anything whatsoever which might be prejudicial to the person suing out the warrant". 876(2) - "The court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to procure any right of the person suing out the warrant, and that prima facie such person appears to possess such right".
Similar to the Roman law principles relating to the inadmissability of "Novi operis nuntiatio" against public works: Section 876(3) severly limits the issuing of any such warrant of prohibitory injunction against the government.

77. Carmelo Mifsud v. Giovanni Borg et. - 11/3/1910 Vol. XXI - II - 12.

The work must be potentially capable of causing a fear of damage to the other person - as stated in the law itself, the person must have "reason to apprehend" damage to an "immovable thing possessed by him". Thus, there need only be fear of damage and there must not have resulted actual damages.

Although section 575 apparently limits the action to the possessor, there is no reason to doubt that the actual owner may exercise this action. In fact there has been an amendment to this effect introduced in the Italian article 1171 [71] . In this case the Italian article is worded in slightly more general terms than our section 575 because whilst Maltese law only refers to damage being caused to an immovable, the present Italian law lays down that it must cause "danno alla cosa che forma l'oggetto del suo diritto o del suo possesso."

The apprehension of damages must arise as a "consequence of a new work". The plaintiff may bring an action demanding that such other person be restrained from continuing such new work. The wording of the law may give one to believe that the work must have actually and effectively commenced. In fact, in the case **Delia v. Cuschieri noe** [72] , the Court had decided that the action of a detentor of some arable land was inadmissable - "Dan għax ix-xogħolijiet ikunu għadhom ma nbdewx." The Court further stated that one of the primary requisites of the *nuntiatio novi operis* is the existance of a new work, and its corollary that such new work must have been commenced - "wieħed mir-rekwiżiti hu li jkun hemm xogħol ġdid li wieħed ieħor ikun beda. Mhux biżżejjed li dan ix-xogħol ikun verament bil-ħsieb, imma jrid ikun mibdni b'mod effettiv." The Court quoted Pacifici Mazzoni [73] is that "l'opera si considera incominciata quando siasene impresa l'effettiva esecuzione". According to the facts of the case, plaintiff's land was accessible in a difficult way by means of a steep slope and defendant, owner of the land which plaintiff was holding by title of perpetual emphyteusis, was contemplating the development of the neighbouring lands and changing the slope, making it steeper, and thus causing damages to plaintiff's rights of enjoyment. Plaintiff did not bring forth any evidence that the work had commenced, nor did he prove that any preparations for such work had been initiated. Although the Court did not seek to define the meaning of preparatory works, it is evident that if this is ever accepted by our Courts, such preparatory works must not be merely contemplated, but must be effectively commenced. This latter opinion is, after all, in conformity with Italian juristic theory [74]

However, the Court further stated that actual damages must result from the illicit act alleged by the plaintiff. This shows that Maltese case law is more stringent than its Italian counterpart and it is probable that the Maltese Court will not accept preparatory works as part of the "opera incominciata effettivamente eseguita".

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71. *Supra*. p. 52
72. Alfred Delia v. Onor, Edgar Cuschieri O.B.E. noe. - 4.8.1955 - Vol. XXXIX - II - 590.
73. Pacifici Mazzoni, *Istituzione* Vol. III §63.
74. *Supra*. p. 53 et seq.

Besides, the works must not be complete when the action is made and a year must not have passed since the undertaking of this new activity. The one year period is quite reasonable for any fear of damage to become manifest. This is common to both Italian and Maltese law.

The scope of this action is to obtain a provisional prohibition of the continuation of the works. Therefore it consists in the taking of provisional measures which are to leave the position open for "a final and absolute judgement", which latter judgement confirms or reverses the original precautionary measures. Thus the plaintiff obtains the interruption of works and the defendant makes a remissionary action in the hope of obtaining a remission to continue the works.

The Court summarily takes cognizance of the facts to decide whether a new work has actually been undertaken and that such illicit work is the cause of reasonable fear of damages together with the fact that the plaintiff has a "prima facie" right to request the interruption of the works. The Court may either allow the continuation of the works or restrain them. If the Court orders the work to be suspended, the plaintiff is obliged to give security. Such security should cover damages resulting from the suspension in case the plaintiff's opposition turns out to be groundless. In the contrary case, the Court imposes the obligation of giving security on the person undertaking the works. This security should guarantee the expenses for the partial or total demolition of works together with the eventual payment of the damages which the plaintiff could suffer. Both these securities are common to Italian and Maltese law.

Section 575 like article 1171 admits this action whether the new work is being carried out on the tenement of the defendant or on that of the plaintiff. This is a clarification of the arguments of the old French jurists amongst whom Dalloz had contended that if the new works were being carried out on the plaintiff's tenement, this would have given rise to the *actio manutensionis* rather than the *actio de novi operis*. The modern opinion in line with the Italian and Maltese sections are in fact in conformity with the principles advanced by Troplong, although Carbonier still adheres to Dalloz's theory.

The *actio de novi operis* is a transitory action and leaves place for a definite judgement, as is in fact stated in sections 575(2) and 575(4). Notwithstanding the lack of Maltese case law it would seem evident that once this action is only precautionary in nature, this would have to be followed by a possessory or petitorial action. However, unlike Italian law [75], the Maltese action is not rigidly divided into two phases. This notwithstanding, basing ourselves on articles 876 to 878 of the Code of Organisation and Civil Procedure relating to warrants of prohibitory injunctions, which are very similar in wording and scope [76], it would seem that the *actio de novi operis* must necessarily be followed by another action. However, unlike the warrant of prohibitory in-

75. Italian and French proceedings of the "Actio di Novi Operis", rigidly divided into two stages, follow the old Roman law system whereby after the preator took summary cognizance of the case, this was followed by a final judgement pronounced by the "judex".

so as to sustain the new weight, the Court decided that the wall was not actually dangerous. Judge Micallef held that ".....non si tratta nel caso di un *interdictum de damno infecto,* perché come estremo se ne debba ricercare un danno prossimo e grave, ma sibbene del diritto che ha il vicino di costringere il vicino ad osservare nella necessaria ricostruzione di un muro comune.

Then again, the *danno temuto* must arise from a human cause. Thus, the Court of Appeal in **Inglott et noe v. Camilleri et noe.** [78] held that "si comprendono le frane tra le altre materie che, oltre all'acqua, il fondo a livello inferiore è di legge tenuto di ricevere dal fondo a livello superiore, perché cadono naturalmente. No si da l'azione *de damno infecto* - qualora il danno temuto non deriva da colpa o dolo, bensì è da ascriversi al caso fortuito".

Similarly to the "actio de novi operis" the scope of this action includes the taking of the necessary steps to obviate the danger. Another effect of this action is the imposition of the obligation on the owner of the building, tree or any other thing to give security for the damages that might be caused. In **Vincenti v. Navarro et.** [79] , the court had decided that this action is only exerciseable against the owner. In fact the Court had stated that "L'azione damni infecti o di danno sovrastante è esercibile contro il proprietario, e non già contro di detentore del fondo vicino in cui esiste la causa del danno temuto, quando anche tale detentore nel contratto di locazione si sia obbligato di fare nello stabile tutto cio che occorresse".

The Court quoted Ricci [80] in its favour who states that "contro colui che possiede *anime domini* la cosa che per il suo state minaccia pericolo di danno alla nostra, puo proporsi l'azione di che ci occupiamo, essendoche è il proprietario d'una cosa che deve rispondere del danno che dalla medesima può ad altri derivare; laonde non crediamo che una tale azione possa proporsi contro il conduttore, l'affittuario o l'usuario dell'altrui fondo, nè contro colui per fatto del quale l'oggetto del vicino addiviene pericolo per le cose nostre".

This after all is in keeping with the Roman law principle. However this is an oversimplification of the true theory. In fact Edgardo Borselli [81] states that plaintiff has to exercise the *azione di danno temuto* against the owner only when the danger is due to the bad state of the building, tree or any other thing, which state of fact must have arisen without any kind of human intervention, even when the cause of the danger existed prior to the actual acquisition of the property by the owner. However, Borselli also states that "se il pericolo del danno deriva da un lavoro attuale intorno alla cosa e all'edificio, per crearli, modificarli, o ripararli, la denuncia (di danno temuto) si può proporre contro l'autore del lavoro, il che, nel silenzio dell' art. 699 [82] , è logica conseguensa

78. Amadeo F. Inglott et noe. v. Sacerdote Giuseppe Camilleri et noe. - 22/1/1932 Vol. XXVIII - I - 222.
79. Vincenti v. Navarro et. - 31/1/1899 Vol. XVII - II - 14.
80. Ricci, *Corso teorico-pratico di diritto civile,* Vol. II, V.
81. Edgardo Borselli, *Op. cit.* §7, p. 723.
82. Similar to section 576 of the Maltese civil code.

del principio che ciascuno è risponsabile dei propri atti o fatti. Cosi, la denuncia può essere promossa contro il conduttore dell'immobile, quando il pericolo sorga dal modo come questo è goduto e sfruttato da lui''.

Tomaso Bruno [83] further states that this action may also be directed against thè possessor, when the owner is not known: ''sia perché il possesso è presunzione di proprietà, sia perché l'urgenza non permette di differire l'esperimento del rimedio, sia perché questa denuncia ha grande affinità di scopo con quella di nuova opera.''

Just like the ''actio de novi operis'', the ''damno infecto'' is an action of precautionary remedies which is generally followed by another action leading to a definite judgement.

Inspite of the practical importance of both these actions, as stated, Maltese case law is very much lacking in explanatory judgements - the main reason being that Maltese advocates tend to opt for a warrant of prohibitory injunction which in this case is necessarily followed by a possessory or petitorial action.

However it is evident that the Maltese warrant of prohibitory injunction and the *actio de novis operis* and *di damno infecto* are different in many ways. Whilst the former is a precautionary warrant worded in very wide terms, the latter are precautionary actions, much more limited in scope and exercisable through a writ of summons. It is probably for these very reasons that the Maltese advocacy generally opts for the warrant of prohibitory injunction rather than these actions. Thus whilst the warrant of prohibitory injunction is generally given immediate effect, even though this must be followed by an actual action through a writ of summons, the appointment of the case through the *actio de novis operis* and *de damno infecto* would surely take much longer. This notwithstanding, it should be noted that both these precautionary actions provide for sufficient security which the warrant of prohibitory injunction does not. Thus, in spite of the many limitations of the Maltese *actio de novis operis* and *de damno infecto*, it is sometimes better to opt for these actions rather than the warrant of prohibitory injunction.

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83. *Digesto Italiano* - ''Denuncia di Nuova opera e di Danno temuto'' - N. 52.