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**PROPERTY AND PROPRIETOR IN THE SETTECENTESQUE *NOMOS*:
AN ESSAY BASED ON DANIEL DEFOE'S ROBINSON CRUSOE¹**

BY RAPHAEL MARTINS

*Seest thou a man diligent in his work?
he shall stand before kings (...)*

Proverbs 22:29

ABSTRACT: Based on Daniel Defoe's novel, *The Life and Strange Surprising Adventures of Robinson Crusoe, of York, Mariner: Written by Himself*, this essay tries to recreate a certain conception of Property Right that took place in the settecentesque *Nomos*. As shown in the article, this *Nomos* represents an axiological spin moment for the proprietor's statute, that changed from a reicentric perspective to an anthropocentric one. Therefore we aim at reconstructing this perspective of Propriety Right with the elements provided by Defoe's book, specially the narrative of Robinson Crusoe's process to claim the island as his own.

KEY-WORDS: Law and Literature; Property Right; and Robinson Crusoe.

INTRODUCTION

Although novels narrate the life of real or fictional characters, they are also a sort of vehicle that transport and connect the readers to an universal level². After all, in a narrative - those webs of plot where the literary characters make their habitat - Medea, Dr. Frankenstein, Mr. Hyde are not simply masks but man in its most incredible hues.

That is the case of the character Robinson Crusoe, protagonist of the novel *The Life and Strange Surprising Adventures of Robinson Crusoe, of York, Mariner: Written by Himself* (1719), of the English writer Daniel Defoe³.

On a first level we find the narrative of the adventures and misadventures of an English sailor who, after shipwrecked in high seas, finds himself stuck for twenty-eight years on a uninhabited island located near the mouth of the great Orinoco River. On this island, that is "affectionately" referred to as *Island of Despair*, Crusoe must learn not only to survive when deprived of all the benefits of living in society, but also to protect himself from a hostile nature.

However, above this first level the novel separates itself from Robinson Crusoe's saga and connects itself with something that is universal. At this second level, we find, on the one hand, the epos of man recreating his identity in the process of conquering a hostile and uncivilised environment; and, on the other hand, the moralising romance that

¹ An extended version of this essay will be published at: MARTINS-COSTA, Judith (org.) *Narração e Normatividade: ensaios de Direito e Literatura*. Rio de Janeiro: GZ, 2011.

² OST, François. El reflejo del derecho en la literatura. *Doxa: cuadernos de Filosofia del Derecho*, Alicante, n. 29, pp. 336, 2006.

³ DEFOE, Daniel. *The life and adventures of Robinson Crusoe: written by himself*. London: Collector's Library, 2007. The book will be referred to as "RC".

seeks to build and justify certain *Nomos* (R. Cover) through reconciliation of the person - and now a proprietor - with a Protestant ethic imbued with a spirit of freedom and free enterprise.

Thus, as epopee, Robinson Crusoe takes on mythic attributes⁴, in that, as Robert Cover points out, the role of a myth is to establish the standards of behaviour for society and to “build relations between the normative and material universe, between the constraints of reality and the demands of an ethic”⁵. In this sense, when Crusoe is undressed of society and is forced to dominate an uninhabited island for his survival sake, he shows us how man - thanks to some ingenuity and hard work - can appropriate the hitherto wild nature.

But Robinson Crusoe is also the moralising novel that penetrates the “dobras da memória, mimetizando-se como inconsciente coletivo ou individual.”⁶ As such, it is proposed to establish and justify a *Nomos* in which an idea about what it means to be a person gives a new meaning to proprietorship⁷. That happens because “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”⁸⁻⁹ This relationship is perceived by Italo Calvino that saw in the matrix of the modern novel - that begins with Robinson Crusoe - the aim of formatting his readers values and morals¹⁰:

Defoe não era de modo algum indiferente a essa exigência. Mas não são as pregações

⁴ “Like Odysseus embarked for Ithaca, like Quixote mounted on Rocinante, Robinson Crusoe with his parrot and umbrella has become a figure in the collective consciousness of the West, transcending the book which [...] celebrates his adventures. Having pretended once to belong to history, he finds himself in the sphere of myth.” (COETZEE, J. M. *Stranger shores: literary essays*, 1986-1999. New York: Penguin. p. 17). Italo Calvino also recognizes the mythic features of Defoe’s work, when he qualifies it as the “autêntica bíblia das virtudes mercantis e industriais, a epopéia da iniciativa individual.” (CALVINO, Ítalo. *Por que ler os clássicos?* São Paulo: Companhia das Letras, 2007. p. 105)

⁵ Nomos and narrative. *Harvard Law Review*, Cambridge, v. 97, n. 1, p. 9, Nov. 1983. And concludes: “[t]hese myths establish a repertoire of moves - a lexicon of normative action - that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law.” (Loc. cit.).

⁶ CALVINO, Ítalo. Op. cit. p. 10. One of the answers that Ítalo Calvino provides to the question “Why Read the Classics?” is: “os clássicos são aqueles livros que chegam até nós trazendo consigo as marcas das leituras que precederam a nossa e trás de si os traços que deixaram na cultura ou nas culturas que atravessaram (ou simplesmente na linguagem ou nos costumes).” (Loc. Cit.).

⁷ As pointed out by Christian Biet: “[I]a question n’est donc pas de montrer que la littérature est le miroir de son temps, mais de saisir les façons dont elle intervient non seulement dans les processus sociaux, politiques et économiques, mais aussi à l’intérieur du champ juridique”. (BIET, Christian. Op. cit. p. 93).

⁸ COVER, Robert. Op. cit. p. 4. He concludes in his famous sentence: “For every constitution there is an epic, for each decalogue a scripture” (Loc. cit.).

⁹ Accordingly, between narrative and norm exists a dialectic relationship, insofar as a legal prescription needs to be contextualized in a particular narrative, which, in turn, requires the discovery of its prescriptions, i.e., its morals. In Cover’s own words: “History and literature cannot escape their location in a normative universe, nor can prescription, even embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.” (Ibidem. p. 5).

¹⁰ “Essa matriz do romance moderno, bem distante do terreno da literatura culta [...]: bem no meio do amontoado da produção livreira comercial, que se dirigia a um público de mulherzinhas, pequenos vendedores, garçons, camareiros, marinheiros, soldados. Mesmo visando reforçar os gostos desse público, tal literatura tinha sempre o escrúpulo, talvez não completamente hipócrita, de promover a educação moral, e Defoe não era de modo algum indiferente a essa exigência” (CALVINO, Ítalo. Op. cit., p. 105).

edificantes, sempre apressadas e genéricas, com as quais de vez em quando são floreadas as páginas do *Robinson*, que fazem dele um livro de sólida ossatura moral, mas o modo direto e natural com que um costume e uma idéia da vida, uma relação do homem com as coisas e as possibilidades ao alcance de sua mão se exprimem em imagens.¹¹

Given these two perspectives, an analysis of Defoe's work is of great interest for the dialogue between law and literature. Through Robinson Crusoe's saga we are "transported" to another *Nomos*¹², specifically the settecentesque one, where we can identify one of the historical answers for the *property* sign¹³. Moreover, in this *Nomos* we locate a moment of transition between two antagonistic conceptions of property: soon thereafter - more precisely by the influxes of the French Revolution¹⁴ - the *property* sign is detached from its old content. Property will no longer identify primarily a relationship man-thing, and will be understood as an absolute power given by law to the subject of law. Such power, as Clovis do Couto e Silva noted, would constitute a "legal unit of valorative neutrality, a result of excessive generalization and loss of empirical content"¹⁵. What remained of the man-thing relationship was transferred to the concept of possession, so that proprietorship has become virtually and simply a notary's creation¹⁶.

The settecentesque *Nomos* thus marks a turn from a reicentric perspective of

¹¹ Loc. cit.

¹² Porto Alegre's scholar Judith Martins-Costa points out that: "[e]ntre Direito e Literatura há algumas semelhanças e muitas diferenças. A maior das semelhanças está na circunstância de a narração literária e a narração jurídica serem forças estruturantes de um mesmo *Nomos*, o universo normativo em que vivemos tanto quando vivemos no Cosmos, o mundo físico em que progressivamente nos inserimos desde o nosso nascimento (R. Cover). O universo normativo é um "universo narrativo": normatizar é inseparável do narrar. Narra-se o texto da lei, narram os que dizem o que a lei diz." (available at: <<http://cuic-ufrgs.blogspot.com/2011/04/direito-e-literatura-um-exercicio-de.html>>. Access: June 1st, 2011). For a brief summary of this perspective for the study of Law and Literature, refer to Guilherme Nitschke's presentation *Literatura, via para a recuperação histórica do Direito*, available at: <http://desarrollo.uces.edu.ar:8180/dspace/bitstream/123456789/897/1/La_literatura_Nitschke.pdf>. Access: June 1st, 2011.

¹³ According to Paolo Grossi: "'propriedade' deve ser somente um artifício verbal para indicar a solução histórica que um ordenamento dá ao problema da relação jurídica mais intensa entre um sujeito e um bem, ou, em outras palavras, a resposta à questão central sobre a consistência mínima do 'meu' jurídico; soluções e respostas são duplamente múltiplas, segundo os vários climas históricos e segundo os vários conteúdos que um mesmo clima histórico dá àquele invólucro aberto e disponível que convencionalmente identificamos como propriedade" (GROSSI, Paolo. *História da propriedade e outros ensaios*. Rio de Janeiro: Renovar, 2006. p. 5).

¹⁴ Cf. CLAVERO, Bartolomé. Les domaines de la propriété. 1789-1814: propriétés y propiedad em el laboratorio revolucionario. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Milano, v. 27, pp. 269-378, 1998. Michel Villey in his studies on the evolution of the concept of subjective right points out that even for legal philosophers of the sixteenth and seventeenth centuries the idea of justice (an intangible asset established by nature) would be the antithesis of property (as something that exists by nature) (Villey, Michel. *Estudios en la around the notional derecho subjective*. Valparaíso: Valparaíso Universitarias Ed, 1976. p. 39). This notion is based mainly, as Villey points out, in the interpretation of this passage from Gaius (D. 39.2.19): *sive dominus, sive is qui ius habet*.

¹⁵ COUTO E SILVA, Clóvis do. O Direito Civil em perspectiva histórica e visão de futuro. In: FRADERA, Vera Maria Jacob de (org.). *O Direito Privado brasileiro na visão de Clóvis do Couto e Silva*. Porto Alegre: Livraria do Advogado, 1997. p. 22.

¹⁶ Significant of this phenomenon is the inability of modern civil codes to define what property means. These codes limit themselves to list what powers proprietorship grants to a proprietor (e.g. art. 1228 of the Brazilian Civil Code, art. 1305 of the Portuguese Civil Code, § 903 of the German Civil Code, art. 544 of the French Civil Code, art. 832 of the Italian Civil Code, among others).

property to an anthropocentric one and Robinson Crusoe seems to be the perfect Virgil to guide us in this universe. Therefore this essay proposes a reconstruction of a certain perception of proprietorship, based on the elements provided by Defoe's novel. In the first part, we analyze the process through which Robinson Crusoe appropriates the *Despair Island* as his own (I). In the second part, reversing our mirror, we look at how the vindication of a proprietorship status by Robinson Crusoe was recognized by a certain *Nomos* (II).

I. Tent, enclosure, crop and circumnavigation: an occupation's narrative

To discover one of the hidden layers of the *property* sign in the work of Defoe, a relevant moment seems to be the arrival of Robinson Crusoe in the *Island of Despair*. At this moment, we find a former plantation owner outcasted from society and devoid of any personal assets, except for "the knife, the tobacco-pipe, and a little tabacco box"¹⁷. This character - stripped of all his possessions – meets nature at its most raw state - the original communal state - i.e. *terra nullius*.

As Wolfram Schmidgen clarifies, *terra nullius* is the term that came to be associated with the idea of occupation of a territory. Although it literally means "land without people", this did not really mean that the land was uninhabited, but simply that, according to the precepts of natural law, it could be occupied¹⁸. It is, therefore, a negative space, not encompassed by anyone else right or privilege.

The tension evoked by *terra nullius* seems appropriate to understand Crusoe's encounter with the island and his reactions towards it. Every time that he confronts this negative space, it becomes evident that something unnatural and terrifying is being sensed, as can be read in the excerpts prior to each expedition to yet unknown portions of the island. For instance:

[...] you may be sure my thoughts run many times upon the prospect of land which I had seen from the other side of the island, and I was not without secret wishes that I were on shore there, fancying the seeing the mainland, and in an inhabited country, I might find some way or other to convey myself farther, and perhaps at las find some means of escape.

But all this while I made no allowance for the dangers of such a condition, and how I might fall into the hands of savages, and perhaps such as I might have reason to think far worse than the lions and tigers of Africa; that if I once came into their power, I should run a hazard more than a thousand to on of being killed, and perhaps of being eaten [...]¹⁹

Robinson Crusoe, confronting this empty nature, feels compelled to occupy it, appropriating it in order to transform this *emptiness* into something *occupied*²⁰. The saga

¹⁷ RC, p. 61.

¹⁸ "Terra nullius is the term that came to be linked with occupation, the natural law notion that proved to be central to the British justification of colonial land claims. It literally means 'no person's land', but in colonial practice this did not imply that such land was uninhabited" (SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*. Cambridge: Cambridge University Press, 2002. p. 33).

¹⁹ RC, pp. 152-153.

²⁰ SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 44.

that begins with the arrival of the character at the island and lasts until approximately half of the novel turns out to be precisely this process of appropriation of nature and the claim of a proprietor status.

Interesting and symptomatic of how this process will develop throughout the novel are his first acts in the island. Crusoe does not bother to perform some ritual (of gratitude or of claims): he does not plant a flag on the sand or on top of a high mountain, he does not plant a cross somewhere on the island, nor he prays or kneels and asks God to be bestowed with that piece of land. On the contrary, after assuring his survival and collecting all the things left in the wrecked ship, Crusoe - probably inspired by the British colonizers²¹ - started the occupation of the land with the mundane idea of fixing his own habitation²². Not a deposit or an observation post, but the place where he will establish his residence during his stay on the island. So, after securing his belongings in the chosen spot, his first efforts are towards creating a house, making it more suitable, comfortable and safe from the - at that point - unknown surroundings²³.

After he finishes his house, two are Crusoe's main concerns along the narrative: create enclosures and crop. The character's own residence is surrounded by a small wall; strong enough to guarantee his safety²⁴, as described in this passage "[I] marked out a semicircle for my encampment, which I resolved to strengthen with a work, wall, or fortification made of double piles, lined within with cables, and without with turf"²⁵. This process is completed soon after the character discovers a footprint in the sand and, for safety reasons, decides to build a second fortification, in front of the first one²⁶. But following this initial enclosure there is a whole narrative highlighted by acts of fencing, encircling, that is, of defining "private" areas, both related to his safety - or rather his sense of insecurity against attacks from intruders - and to avoid that wild (not tamed) animals destroy his crop. But alongside this process of creating enclosures there is a concern for the cultivation of the land. A few days after his arrival on the island, Crusoe already begins to glimpse the possibility of raising sheep in order to avoid having to rely exclusively on his hunting skills²⁷. Later, when Crusoe is able to recover some corn seeds from the shipwreck and "by divine grace" these seeds were still fertile, the character not only starts to believe in Providence²⁸ but also decides to have a crop²⁹.

²¹ This behavior can not be taken for granted, specially if we consider that the book was written under the influence of the cultural universe of the Overseas expeditions. In this period claims over the newly discovered lands involved the definition of the source of property rights over those territories, that is, if by discovery or other criteria. According to Patricia Seed, for English law, the establishment of homes would create an unchallengeable right to the land on which they were built (See *Ceremonies of Possession in Europe's conquest of the New World: 1492-1640*. Cambridge: Cambridge University Press, 1995. pp. 16 ff.). Therefore: "While some of [England's] early efforts at colonization also planted crosses or read sermons, these actions were often omitted. But no English expedition ever omitted mention of setting up a house"(ibid. p. 17). This point will be further developed in section II, below.

²² "I walked about the shore almost all day to fix my habitation [...] I fixed upon a proper place under a rock, and marked out a semicircle for my encampment [...]" (RC, p. 89).

²³ RC, pp. 89-94.

²⁴ "It is sufficient to observe that I was no less time than from the 3rd of January to 14th of April working, finishing and perfecting this wall, though it was no more than about twenty four yards in length, being a half circle from one place in the rock to another place about eight yards from it, the door of the cave being in the centre behind it. RC, p. 95.

²⁵ RC, p. 89.

²⁶ RC, p. 196.

²⁷ RC, p. 95.

²⁸ "It is impossible to express the astonishment and confusion of my thoughts on this occasion. I had hitherto

These acts of creating enclosures and cultivating the land come together when Crusoe finds out that his crop is being attacked by animals of the island and decides to create a small enclosure around it:

[...] I saw no remedy for but by making an enclosure about it with a hedge, which I did with a great deal of toil, and the more, because it required speed. However, as my arable land was but small, suited to my crop, I got it totally well fenced in about three weeks' time [...]³⁰.

In this case, Crusoe's intent to separate what belonged to him from what was still *terra nullius* is quite evident. But it is also relevant his effort in preventing that everything he had worked on and represented the proof of his claim of proprietorship over the island would be sucked back by nature in its process of chaotic expansion. In all these activities (establish his habitation, creating enclosures and cultivating), we find a character animated by the desire to join the human and material spheres as a controlled, continuous, expansive and visible activity. As argued by Wolfram Schmidgen in his seminal work on this subject, this is a man who seeks to establish an undeniable sense of connection between himself and his environment³¹.

Oddly enough, even after establishing his tent, bulding fences and farming the land, the character does not recognizes himself as the owner of the island - something he will say only far down the narrative³². In this process of appropriation of the island Crusoe's lacks an ultimate act, i.e. to delimitate the occupied area. Such an act is represented by the compulsion of the character to circumnavigate the island.

The preemptive intention behind this act is doubtless when Crusoe tries to build a boat to navigate to the continental land. Once the boat is finished, he realizes that his *pariegua* - for its small draft - would be inadequate for the original purpose³³. Nevertheless, Crusoe - always ready to self-criticism and to regret time lost in useless activities - does not appear a little disturbed with his failure when he realizes that his boat would be still suitable for a second purpose: to circumnavigate the island. In his own words:

But as I had a boat, my next design was to make a tour around the island; for as I had been on the other side in one place [...] so the discoveries I made in that little journey made me very eager to see other parts of the coast; and now I had a boat I thought of nothing

acted upon no religious foundation at all; indeed, I had very few notions of religion on my head, or had entertained any sense of anything that had befallen me otherwise than as a chance, or, as we lightly say, what pleases God; without so much as enquiring into the end of Providence in these things or His order in governing events in the world. But after I saw barley grow here, in a climate which I know was not proper for corn, and especially that I knew not how it came there, it startled me strangely, and I began to suggest that God had miraculously caused this grain to grow without any help of seed sown, and that it was so directed purely for my sustenance in that wild miserable place." (RC, p. 98).

²⁹ RC, pp. 97 e ss.

³⁰ RC, p. 143.

³¹ SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 36.

³² RC, p. 269.

³³ "However, though my little *pariegua* was finished, yet the size of it was not at all answerable to the design which I had in view when I made the first; I mean, of venturing over to the *terra firma* (...)" (RC, p. 167).

but sailing round the island³⁴.

This attempted circumnavigation, despite the fact that it was unsuccessful, demonstrates the character's purpose in establishing the boundaries, the limits of what would be the claimed territory. On the one hand, such a gesture is different from the previous ones in a sense that it does not create an appearance of proprietorship over the land. However, on the other hand, if we link the character's claim over the island with the idea of establishing roots, connecting the human with the environment, it can be assessed more adequately that the circumnavigation constitutes the act through which Crusoe's symbolically tries to delimit the area that he claims as his own. When the character gets it done, the island "becomes" his property.

Once defined the elements of the narrative that demonstrate Crusoe's attempt to establish a proprietorship status over the island, it is relevant to connect them with the *Nomos* that justifies and gives shape to this conception of property right underneath Defoe's novel.

2. Fundaments of proprietorship: expressions of settecentesque's *Nomos*

The premises for the appropriation of nature, i.e. the question over how does someone become a proprietor of something, is a recurring theme in literature and philosophy of the seventeenth and eighteenth centuries, especially in England³⁵. After all, since Elizabeth I's reign (1558-1603) the country was already carrying out overseas expeditions, mainly to America, with expansionist and colonialist purposes³⁶. However, as land in England would be property of the Crown, issues related to the acquisition of property and the right property itself were handled almost as a "social data"³⁷, lacking the theoretical foundations of the countries most directly influenced by Roman law tradition.

Although these concerns were already glimpsed in the works of sixteenth and seventeenth centuries jus-naturalists, such as Alberico Gentili and Hugo Grotius, we will find in John Locke the harshest critics to England's common sense about property right. In his *Two Treatises of Government* (1690), Locke refutes the idea that property rights would be something created, or rather, conferred by the state (government) to individuals. On the contrary, for the English jus-philosopher the state was the one created for the purpose of defending individuals property right³⁸. This is because, in Locke's moral philosophy, property is a natural right - not in the sense that men are born with that right, but that property is the result of an individual initiative³⁹. Therefore, the English philosopher believes that God gave the land and the things that exist to all men, but their evolution is given by an act of appropriation of such originally communal nature⁴⁰. At first, only for the

³⁴ RC, pp. 167-168.

³⁵ V. SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. *passim*.

³⁶ RICH, E. E.; WILSON, Charles (ed.). *The Cambridge Economic History of Europe: The Economy of Expanding Europe in the 16th and 17th Centuries*. v. IV. Cambridge: Cambridge, 1967, p. 225.

³⁷ SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 32.

³⁸ "Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws (...)" (LOCKE, John. *Two Treatises of Government*. Available at: <<http://www.efm.bris.ac.uk/het/locke/government.pdf>>. § 3°).

³⁹ WALDRON, Jeremy. *The right to property*. New York: Oxford, 1988. p. 137.

⁴⁰ LOCKE, John. Op. cit. § 26.

purpose of satisfying man's basic needs and ensure some comfort, but later as a way to "express the human capacity for reason and develop his own personality"⁴¹. In his famous § 26, he treated the act of appropriation of nature by man as follows:

Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.⁴²

Thus, in Locke's conception, the right of property is justified insofar as the individual's work qualifies the object in a way that it begins to represent a manifestation of this individual's personality (the object as product and reflection of someone's personality). Therefore, the basic premise to claim proprietorship over certain territory is work, i.e. an human act that transforms nature into something else.

Applying this precept to the claim of proprietorship over a *terra nullius*, a piece of land would be considered someone's property when two forms of work could be found in it: crops and fences⁴³. This is not something at random, but the most evident ways to show that there was, for the crops, an attempt of human labor to increase a land's production output and, for the fences, an act of creating boundaries between what belongs to someone and what does not. A similar idea will be found in another protestant philosopher, Hugo Grotius:

To the means through which acquisition may be accomplished, Paul the jurist addas also this which seems altogether consistent with nature "that we have caused something to come into existence." In nature, however, nothing is produced except from matter which previously existed. If then, the material belonged to us, the ownership of that which is produced will continue, even though a new form is presented. If the material belonged to no one, in that case acquisition will be classed under the head of acquisition by occupation. On the other hand, if the material used was the property of another, the thing produced naturally does not belong to us alone, as will become apparent later⁴⁴.

According to excerpts analyzed in the First Part, above, the process of appropriation of the island is the fulfillment of these two requisites. But - more relevant - Crusoe has some level of consciousness about the importance of these two elements. This

⁴¹ WEST, Edwin G. Property rights in the History of economic thought: from Locke to J. S. Mill. In: ANDERSON, Terry L.; McChesney, Fred S. (ed.). *Property rights: cooperation, conflict and Law*. Princeton University Press: Princeton, 2003. p. 21.

⁴² LOCKE, John. Op. cit. § 27.

⁴³ ARNEIL, Barbara. *John Locke and America: the defense of English colonialism*. New York: Oxford University Press, 1996. pp. 138 e ss.

⁴⁴ GROTIUS, Hugo. The rights of war and peace. Disponível em: <http://www.dominipublico.gov.br/download/texto/0138_Bk.pdf>. Accessed on November 22nd, 2009. p. 103.

becomes evident in the climax of the novel, when he finds the footprints on shore and realizes for the first time that maybe "his" island is not as uninhabited as he thought.

First of all, it is interesting to observe Crusoe's reaction to this footprint. What could be considered good news - after all, at that moment his confinement ended - takes the character to most absolute torpor⁴⁵. This paradoxical state is perceived by himself when he states that "[t]oday we love what tomorrow we hate, today we desire what tomorrow will fear; nay, even tremble at the apprehensions of."⁴⁶

Readers of Defoe's novel usually take Crusoe's contradictory state of mind as a simple expression of his fear of cannibalism that is through the whole narrative pointed out. Nevertheless, cannibalism alone is not sufficient to explain the impact that this discovery had on Crusoe. As Wolfram Schmidgen points out, Crusoe's reaction can only be justified if, together with the possible threat to his life, we associate the doubts about his status as proprietor of the former *terra nullius*. After all, the footprint symbolically represents a threat to his claim of the island, to the extent that, traditionally, putting down the foot is the act which stated the intention to appropriate a particular territory⁴⁷.

Therefore, all the reactions experienced by Crusoe after the discovery of the footprint comes from a personal and cultural need to demonstrate that he occupied a land without former proprietor and, according to the precepts of natural law, could be occupied⁴⁸. This can be seen especially in a passage right before the footprint discovery, when Crusoe make an exhaustive account of his former activities on the island⁴⁹. In this passage - intentionally long and tedious - the character makes his libellus on why he should be considered the sole proprietor of the island.

Defoe starts calling his reader's attention to Crusoe's proprietorship status ("You are to understand that now I had ..." ⁵⁰), not over the island as a whole - something he still did not considered - but on the area he already occupied and some other items: "two plantations" "my little fortification or tent", "stores of provisions", etc.. In this long description, Crusoe justifies his proprietor status based on the work he carried out and that embodies the Lockean ideas of cultivating the land (whether a plantation or animal breeding) and raising fences. Thus, the first concern is to demonstrate that he cultivated the land. To this end, Crusoe tells us of "two plantations on the island", "two pieces of corn, which I kept duly cultivated" his small enclosure for livestock, etc.. And, likewise, tells us the outcome of his plantation, boasting the fact that he had in his cabin "fourteen or fifteen great baskets (...) where I laid up my stores of provision, especially my corn, some in the ear, cut off short from the straw, and the other rubbed out with my hand." He tells us even

⁴⁵ "But after innumerable fluttering thoughts, like a man perfectly confused and feeling, as we say, the ground I went on, but terrified to the last degree, looking behind me at every two or three steps, mistaking every bush and tree, and fancying every stump at a distance to be a man (...)" (RC, p. 188).

⁴⁶ RC, p. 190.

⁴⁷ As Johann Wolfgang Textor notes, for example, "in obtaining possession of an estate there is no need for the party to walk over every particular bit of soil, it being enough that he should enter on some part of it with the intent to possess." (*apud* SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 40).

⁴⁸ SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 36.

⁴⁹ RC, p. 185-187. This passage is analyzed by SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. *passim*.

⁵⁰ RC, p. 185.

about "keeping up a breed of tame creatures [that] would be a living magazine of flesh, milk, butter, and cheese [...]."

Applying the same reasoning of the crops to the "artificial" goods, we find reports of his concern to preserve them and repair them. In this passage, there is even a repetition in the use of the verb "maintain", associated to conserve, "had saved," "kept [...] constantly fitted up" but also that the "tent was always standing", "was always in good condition" and so on. And, given his work and effort, things were always in perfect condition. Crusoe, at this point, uses Grotius idea of justifying proprietorship based on the existence a o present and continuous occupation.

Behind this efforts to cultivate the land and preserve the signs of his occupation we found an eruption of the *Nomos* that justify proprietorship as a result of someone's work transforming nature's raw materials into something identifiable as a human product, in a sense that property is identified with a bound between human and material spheres. This idea opposes the old conception of feudal property, of which the property derives from a right of inheritance, a privilege or any other source connected to the subject⁵¹.

But equally important in this process of appropriation is creation of boundaries, both to delimit the cultivated areas of cultivation and to protect it from intruders (animals or not). In this sense, Crusoe's libellus is full of references to "fortifications", "tents" and "walls." This - note - even if to crete his boundaries Crusoe have had to undergo a "inconceivable deal of pains to fence an enclose this ground," but always with the aim of making them as or "stronger than any wall." So, Crusoe thought, with the realization of these boundaries, he could have forever protected and make available his goods and supplies.

The safety issue is not sufficient to justify the importance of this act of creating boundaries. On the contrary, as we mentioned before it is important to sense an attempt from the character to separate the area and the goods that have already been appropriated from those that we still in a communal state. With that Crusoe manages to demonstrate that, inside the boundaries, there was human labor, there was an act of appropriation and occupation.

Thus, in his libellus Crusoe shows us, with all the strength of Defoe's prose, how does someone acquire a proprietor's status in the settecentesque *Nomos*. The character, due to his work built a junction between the human and the material spheres, turning this material sphere into a projection of the human one.

This appears to be the path that will allow the recognition of a new property right. No longer a static relationship in which something belongs naturally to a person, whether because of a privilege or for any other reason, but still not to be confused with the concept that will be developed in late eighteenth century, when property takes the form of an absolute power of a man / subject over something. The settecentesque *Nomos*, therefore, represents the moment of transition from reicentric conception of property to an anthropocentric one. Here, "proprietorship" begins to take on a dynamic shape, i.e. as a tool for human activity, but it is still and fundamentally a relationship between something

⁵¹ SCHMIDGEN, Wolfram. *Eighteenth-century fiction and the law of property*, cit. p. 38.

human and something not human.

4. FINAL THOUGHTS

Adapting the metaphor used by the Brazilian historian Boris Fausto to justify the importance of microhistory to the field of history⁵², we understand that literature (as a cultural expression) works for the comprehension of law as a flash of light that illuminates the shaded areas of a furnished room. Without this flash of light, a desirable vision of the whole is completely undermined by the blurring caused by a central illumination.

Defoe's novel, a product of what we call the settecentesque *Nomos*, enlightens and enables us to question the very complex and shaded relationship between the sign "property" and its historically situated concepts. Through the narrative of Robinson Crusoe misfortunes, a reader will be able to formulate answers to the questions: "What is to be a proprietor?" "What is property?"; "Why is a property good for?", "How does property and proprietor interact with one another?" among others.

To sketch preliminary answers to such questions, Defoe leads his readers down a path in which the proprietor - with the backdrop of what Max Weber characterized as the deterioration of ascetic protestant mentality⁵³ - is recognized as such only insofar as their property is functionalized, or rather is instrumental to achieve the accomplishments demanded by his *homo faber* nature.

The property is at its most dynamic moment - it certainly has lost that energy, largely with the changes that followed the French Revolution. In the settecentesque *Nomos* the property right is justified only as an instrument of free enterprise and as a means of intervention and transformation of nature. Discussions on proprietorship over things and the recognition of a proprietorship status revolve therefore around these two values, i.e. the manifestation of human (proprietor's) presence (examples of which are in Crusoe's tent and fortifications) and its consequent transformation (plantations and animal breeding), which are summarized in the notion of occupation, so popular XVI to XVIII jus-philosophers.

⁵² FAUSTO, Boris. *O crime do restaurante chinês*. São Paulo: Cia. das Letras, 2009. p 10

⁵³ *A ética protestante e o espírito do capitalismo*. São Paulo: Martin Claret, 2001. pp. 127-128. As François Ost observes: "De este modo, la historia se puede catalogar como un éxito brillante tanto para el emblema del triunfo individual (aquel del hombre autodeterminado que sirve de modelo para innumerables generaciones de adolescentes) como para confirmar la doctrina de la predestinación del hombre, la que ve como signo irrefutable de elección divina el éxito en los negocios. A partir de aquí, en vez de existir una contradicción entre virtud y prosperidad, podemos decir que ambos están implicados." (Op. cit.)