Roman Ideas of Land Ownership

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Roman jurisprudence invented many of the key legal concepts describing land ownership. It can no longer be doubted that the English common law of property was deeply influenced by the Roman doctrines of possession, title and servitudes.[1] It follows that all cultivated law students in common-law as well as Civilian jurisdictions should have some awareness of Roman and Civilian doctrines of land ownership.[2] This chapter will describe the framework of Roman property theory and offer some assessments of its social and historical significance.

The Roman jurists' achievement

The Byzantine Emperor Justinian commissioned the jurist Tribonian in 530 to collate the fruits of classical Roman legal history and compile them into a great Digest. To this project was added the Institutes, a terse guide to the underlying principles of the law based on the earlier Institutes of Gaius. Justinian's Institutes and Digest were promulgated in 533, and turned out to be the most influential works of the Western legal tradition. During the middle ages and renaissance, Institutionalist principles were cross-blended with the legal customs of different European countries to produce much of the law extant in the world today. If the Roman influence on English customary law was less overt, it was still powerful. The Roman ideas about private and public property provide a kind of DNA of legal ownership, the intellectual structure within which most later legal thought has developed.

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[1] Bracton, Blackstone, Austin, Blackburn and Gale are only a small sample of the generations of English jurists who openly avowed their debt to Roman law. See especially Blackstone, *Commentaries on the Laws of England*, 4 vols., 1st ed., 1765-1769, (Clarendon Press, Oxford), vol. I, pp. 1-84; Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, [1990] Duke LJ 1207; Jolowicz, *Some English Civilians*, (1949) 2 CLP 139.

[2] "Civil law" means private-law doctrines derived from the Roman legal system; "Civilian" thus connotes a thing or person connected to Civil law. Civil law embraces German and French law, which in turn influenced continental European law and much of the private law elsewhere in the world, for example in South America and Japan. See further Ibbetson and Lewis, eds., *The Roman Law Tradition*, 1994, (Cambridge UP, Cambridge).

The technique of the classical Roman jurists was to describe categories into which different legal phenomena fell. Conceptual distinctions were evolved which aimed to show the law as rational, coherent and systematic rather than haphazard and accidental. The jurists' approach to law adumbrated the techniques of modern natural and biological sciences. A vast material was observed, analyzed, divided into interrelated categories of genus, species and sub-species, and so brought within the grasp of the human mind. The Roman legal categories were not timelessly "true"; but they had an elegance and facility encouraging the elaboration of legal thought for many centuries.

Roman property classifications

The first book of Justinian's Institutes sets out the fundamental Roman distinction between private law and public law.[3] Book Two makes a distinction between private things (wealth or assets of value) and things which could not be private wealth - that is, those things within and without patrimony.[4] Justinian state that "most things belong to individuals";[5] and the Justinianic law creates an intricate structure of private property-rights embracing much of the physical world (including many human beings such as slaves).

Dominium as "absolute right"

The central concept of Roman ownership was *dominium*. Classically this meant "lordship", in the sense of sovereign, ultimate or "absolute" right to claim title and hence the possession and enjoyment of a thing. *Dominium* was absolute in the sense that one was either owner or else not the owner. In classical law this implied - unlike in English law - that there was no relativity of title whereby one could be owner against some rivals but not against others.[6] Centuries later, *dominium* evolved into a

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[3] *Justinian's Institutes*, Krueger ed., Birks and McLeod eds. and transl., 1987, (Duckworth, London) (cited as Inst.), Inst.1.1.4.

[4] Inst.2.1.pr.; Gaius, *Institutiones Iuris Civilis*, *The Institutes of Gaius*, de Zulueta ed. and transl., 1946, (Oxford UP, Oxford) (cited as G.Inst.) G.Inst.2.1. See further Samuel, *Roman Law and Modern Capitalism*, (1984) 4 LS 185.

[5] Inst.2.1.

[6] This is doubted by Kaser, who believes that the early doctrines of negative prescription later developing into *usucapio* amounted to a system of relative land titles. See Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP,

mystical idea connoting complete and unchallenged domination and control of the land and other objects that were within one's property. Absolute ownership no longer meant a good legal title against all rivals, but was given a highly individualistic, anti-social, libertarian meaning as untrammelled ownership. The new-model *dominium* connoted absolute rights of private ownership free of inherent limitation or control by others, such rights being balanced only by the external restrictions and power of the impersonal state standing above all owners. This model of ownership was fundamentally political rather than legal. It was first propounded by renaissance jurists as a polemic against feudal systems of multiple land titles distributed between lord and tenant and granting the lord power and jurisdiction over the economic and personal lives of the peasantry.[7] An allodial ownership system was propounded in order to cut the link between wealth and social-political power; allodial ownership require that owners buy the labour power of workers in labour markets, rather than command the workforce to farm the landlords' demesnes as an incident of tenure. Thus Roman ownership ideas were claimed as a liberating ideology favourable to capitalism and hostile to feudalism.

In later capitalist societies, absolute property ideas served as a vehicle for debates concerning the ethical bases of capitalism and the relationship between communal and state interests and individual autonomy, notably in Germany in the nineteenth century.[8] Roman jurists of the classical period before Justinian were claimed as the first liberal sociologists and economists, thinkers who contributed to modernity by stressing the importance of clearly defined property rights and

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Cambridge) at pp. 146-147, 153-155; Watson, *Acquisition of Possession and uscapion per servos et filios*, (1967) 78 LQR 205.

[7] See Schulz, *Principles of Roman Law*, 1936, (Oxford UP, Oxford) at p. 151; Schulz, *Classical Roman Law*, 1951, (Oxford UP, Oxford) at pp. 338-355; Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, [1985] Acta Juridica 1 at pp. 1, 19-20, 23-25.

[8] On the nineteenth-century debates between the German schools of von Savigny and von Jhering (and later between Windscheid and Gierke) concerning the ideological content of Roman private law and its bearing on civilian codes, see John, *The Peculiarities of the German State: Bourgeois Law and Society in the Imperial Era*, (1989) 119 Past and Present 105; John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code*, 1989, (Oxford UP, Oxford); Jolowicz, *Political Implications of Roman Law*, (1947) 22 Tulane LRev 62; Rodger, *Owners and Neighbours in Roman Law*, 1972, (Oxford UP, Oxford) at pp. 1-2 ff., 34-37; Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*, 1990, (Princeton UP, Princeton).

describing the conditions for their efficacious trade, freed of political and communal control.[9] Peter Birks has usefully summed up the political uses of the absolute property idea; he identifies "[t]he nineteenth-century tendency to exaggerate the independence of the Roman owner", "the error of contrasting an autonomous Roman ownership with a socially-limited Germanic conception", and continues:

> One source of the exaggeration was the desire, manifested in and after the French Revolution in 1789, to repress and draw a contrast with burdened and restricted feudal interests. The intention was to insist on equality before the law, not to make ownership absolute quoad the general law of the state but to free it from other personal superiorities. However, the reaction against feudalism is not the whole explanation of the absolute doctrine ... We have to add in the rise of the nation state and the need to show that strong governments existed to defend property, not to imperil it.[10]

Legal analysis of the nature of Roman ownership suggests that this historical controversy is misplaced in focus. The pervasive and untrammelled nature of private property rights in mature Roman law must be qualified carefully. Only in a formal or conceptual sense can Roman ownership be described as "absolute". The limited, strictly juristic nature of that "absolutism" may be seen by contrasting Roman with common-law ownership. First, *dominium* was a wholly exclusive, non-relative right, rather than a ranked title in a hierarchy of possessory rights;[11] a Roman owner could never be said to have a title good against later trespassers but void against some superior claimant from whom the land had wrongfully been taken. [12] Secondly, *dominium* was a right indivisible on the plane of time and subject to no doctrine of estates.[13] Unlike English law there

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[9] See Galbraith, *A History of Economics: The Past as the Present*, 1989, (Penguin, Harmondsworth) at pp. 18-19; Schulz, *Classical Roman Law*, 1951, (Oxford UP, Oxford).

[10] Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at p. 24.

[11] Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at pp. 93-94 and ff.; Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at pp. 186-188. *Cf.* the debate over the Kaser thesis, cited above at n. 6.

[12] Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at pp. 142; Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 154-157.

[13] Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at

could be, for example, no *dominium* "for life" (contrast the life estate), or *dominium* so long as a lineal descendant is alive (contrast the fee tail). Thirdly, it was a proprietary right independent of tenurial or contractual relations of superiority - an "allodial" right created independently of any other person's lordship. There was never anything akin to the complex feudal doctrine of tenures which characterised English land law through the medieval ages. Notwithstanding these contrasts and the rhetoric of absolute ownership, there was, in fact, no principled regard for the absolute freedom of ownership in substantive content or practical exercise, beyond the uninformatively circular doctrine stating that owners were as free in their ownership as law permitted them; or so far as they did no legally wrongful harm to others.[14] Roman law, like English law, did not accept that ownership was unrestricted. An owner might be forbidden from building above a certain height, or within a certain distance of his boundary; he might not commit a nuisance against neighbours or the public.[15] The later Civilians proposed a concept of *dominium* as "*ius utendi, fruendi, abutendi*", of the right to use, take profits, change and alienate the thing, amounting to the fullest array of rights over a thing. But this model was an intellectual construction of what it meant in abstract to be an untrammelled owner, and was not part of classical law. The classical concept is that "*[d]ominium* is the ultimate right, that which has no right behind it. It may be a mere *nudum* ius with no practical content ... It is a "signoria"."[16]

The doctrine of *dominium* implies that legal relationships between property-owners are horizontal, in the sense that each has an equivalent status as the sole lord of a piece of land, and none can legally claim jurisdiction over the others. By contrast, the English common law long viewed property relationships as vertical, in that landownership automatically bestowed political and judicial power over others. In the seventeenth century, lawyers such as Coke attempted to remodel the fee simple as something equivalent to *dominium* - a man's house as his castle against lords and kings. But this reading of the historical nature of Roman property-holding suggests that all ownership in Roman law

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pp. 100-101.

[14] This idea was expressed in the maxim *sic utere tuo ut alienum non laedas* ("so use your own as not to injure that of another"); Nicholas, *Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 154-157.

[15] Rodger, *Owners and Neighbours in Roman Law*, 1972, (Oxford UP, Oxford). *Cf.* English planning legislation.

[16] Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 185-188, 188; *cf.* Buckland, *Elementary Principles of the Roman Private Law*, 1912, (Cambridge UP, Cambridge) at pp. 60-64.

was privatized, and this is not the case. Significantly, the Institutes commence discussion of things in Book Two with the categories of *non*-private wealth rather than with any discussion of the nature of *dominium*:

> [T]hings are either in the category of private wealth [*in patrimonio*] or not.[17] Things can be: everybody's by the law of nature; the state's; a corporation's; or nobody's.[18]

The Romans were deeply conscious of the role of public goods as well as private goods in property law. They acknowledged that "natural" or pre-State law allowed many non-private forms of property,[19] and they entrenched both within their fundamental jurisprudential categories. By contrast, the common law could only develop public proprietary interests by developing Crown ownership into a form of State control by a series of fictions and conventions; or by vesting a multitude of individuals with fragmentary feudal claims constituting a group or common right over a resource, such as a field for hunting or gleaning. Roman law was notably more direct in its recognition of State and communal ownerships.

The Institutionalist analysis of public and private goods

Gaius and Justinian's distinction between things *in patrimonio* and *extra patrimonium* suggested that private property was originally defined by heritability; but *in patrimonio* eventually came to be synonomous with *res* as any privately-owned asset.[20] The usual legal term for a thing of economic value - the *res* - was ambiguous, meaning at once physical objects, property rights in those physical objects, and personal rights and obligations applying to economic assets such as personal claims to wealth or payment or compensatory damages. The term *res* had much overlap with the notion of a

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[17] Derived from G.Inst.2.1., 2.10, which draws a similar distinction; followed in Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, c.1225, 4 vols., Woodbine ed., Thorne transl., 1977, (Belknap Press, Cambridge, Massachusetts) at f. 207, vol. III, at p. 128.

[18] Inst.2.1.; Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at pp. 182-186.

[19] Inst.2.1.11.

[20] See Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at pp. 182 n. 8, discussing D.50.16.5. (Paul). All references to D. are to *The Digest of Justinian*, Mommsen and Krueger eds., Watson transl. ed., 4 vols., 1985, (U of Pennsylvania Press, Philadelphia).

legal right - *ius* - which could often be classified as an economic asset or *res*.[21] Thus the Roman *res*, like the law French/common law term *chose*, may translate as either right or thing. *Corpus* was sometimes used to refer to the physical object subjected to legal control or to the physical control itself.[22] In what follows, *res* will tend to be used in the sense of a thing or right of property; and *ius* as all legal rights, proprietary or personal, which have economic value.[23]

The four categories of *res* or things not privately owned are elaborated in Roman law as follows:

1. *Res communes* (Everybody's property).

> The things which are naturally everybody's are air, flowing water, the sea, and the sea-shore.[24]

This is a central text in the history of property law, and requires some exegesis. A right is "natural" according to the Romans because all creatures instinctively recognize it.[25] In addition there is a

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[21] Personal status rights which were not quantifiable assets, such as family authority, were rights but not *res*: Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 98-99.

[22] For the development of the dual concept of *res* by Gaius, see Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at pp. 4-7, 14, 25-27.

[23] Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 98 ff., 140 ff.; Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at pp. 143-144; Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at p.74; de Zulueta, *The Institutes of Gaius*, vol. II, 1946, (Oxford UP, Oxford) at pp. 56-57.

[24] Inst.2.1.1.; and see D.1.8.2.pr., 1. (Marcian); Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at p. 182, n. 9. See further D.1.8.2., 4.-6. (Marcian); D.1.8.1., 5. (Gaius); D.41.1.14.-15. (Neratius), D.41.1.50. (Pomponius); D.43.7.1. (Ulpian); D.43.8.1. (Paul), D.43.8.2. (Ulpian), D.43.8.3. (Celsus), D.43.8.4. (Scaevola), D.43.8.5. (Paul), D.43.8.6. (Julian), D.43.8.7. (Ulpian); D.43.12.1. (Ulpian); D.43.12.3. (Paul); D.43.13.1.; D.43.14.1.; D.43.15.1. (Ulpian). The modern English collective ownership concepts are broached in Gray, *Property in Thin Air*, [1991] CLJ 252.

[25] Inst.1.2.

natural law specific to humans: "the law which natural reason makes for all mankind"; this law "is applied the same everywhere. It is called *ius gentium*, "the law of all peoples", because it is common "to every nation".[26] In one application of this concept:

> The law of all peoples gives the public a ... right to use the sea-shore, and the sea itself ... The right view is that ownership of these shores is vested in no-one at all. Their legal position is the same as that of the sea and the land or sand under the sea.[27]

Thus ownership by everybody is stated to be a particular form of ownership by nobody, where things are naturally unowned by individuals yet in a sense owned by everybody because they are available for all to use and enjoy. *Res communes* can never be owned exclusively because they cannot (or should not, by natural law) be reduced to private control or possession. This contrasts with the specific category of *res nullius*, things naturally unowned which in some cases can be reduced to private ownership, such as wild animals upon capture. The Institutes also specify a type of mixed property where there is a private owner who must afford the public extensive use-rights. The chief case was navigable rivers:

> The law of all peoples allows public use of river banks, as of the rivers themselves: everybody is free to navigate rivers, and they can moor their boats to the banks, run ropes ... and unload cargo. But ownership of the banks is vested in the adjacent landowners. That also makes them owners of the trees which grow there.[28]

This *res communes* can be seen as a type of common usufruct, a fraction of ownership or an incorporeal use-right removed from private into public ownership, whilst leaving *dominium* intact as a residual private ownership.

Access to and use of *res communes* could be protected by interdicts akin to the common law's public nuisance writs:

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[26] Inst.1.2.1. See Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at pp. 186 ff.

[27] Inst.2.1.5.; D.43.8.3.pr.-1., 4. (Celsus).

[28] Inst.2.1.4.; D.1.8.5. (Gaius).

> It is open to anyone to claim for public use what belongs to the use of all, such as public roads and public ways. Therefore, interdicts are available to safeguard these at anyone's demand.[29]

2. *Res publicae* (State property).

> Rivers and harbours are state property. So everybody shares the right to fish in them.[30]

This form of property resembles *res communes* in embracing natural resources, giving use-rights to all, and excluding private or exclusive appropriations. Ownership, however, is not formally given to all private individuals as an incorporate group enjoying common use-rights, but to the state or communal body, as Gaius writes:

> Public things are regarded as belonging to no individual, but as being the property of the corporate body (*universitatis*).[31]

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[29] D.43.7.1. (Pomponius); Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at p. 75. Whilst English law has no direct parallels to *res communes*, ownership of many of the *res communes* are treated differently under English law than ownership of other - more private - things, perhaps making these things a little like the mixed property of Roman law. Airspace can be privately owned, but only up to a point - but there are conflicting views, see Gray, *Elements of Land Law*, 2nd ed., (1993, Butterworths, London) at p. 19 fn 12 - and probably not the air itself. Whilst flowing water may not be owned, the owner of adjacent land does have certain rights concerning the water such as rights of reasonable usufruct and navigation; the public has no such rights unless granted by statute or if the river has been dedicated as a public highway. Again with land adjacent to the sea, the foreshore (the land between high and low water mark) is owned not by the adjacent land owner but by the crown and the public have common law rights of navigation and fishing over the foreshore. The bed of the sea itself is owned by the Crown.

[30] Inst.2.1.2.; D.1.8.4., 5.; 41.1.65.1., 2. (Paul); D.43.12.1.3. (Ulpian). Paul alone treats the river banks as well as the waters as public property: D.41.1.65.1.; 43.12.3.pr. For references, see Buckland, *Textbook of Roman Law*, 3rd ed., Stein ed., 1963, (Cambridge UP, Cambridge) at p. 185.

[31] G.Inst.2.11. *Cf.* Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at p. 10.

The line between this category and the *res communes* and *res universitatis* was not well-drawn.[32]

3. *Res universitatis* (Corporate property).

> Corporate, as opposed to individual, property consists in things in towns like theatres, racecourses and so on, in fact all things vested in the citizen-body.[33]

This category embraces fixed or built capital rather than natural resources owned by the local and municipal collective agencies of the people.[34] The jurist Paul explains the category as follows:

> Citizens of a municipality can possess nothing of themselves, because the consent of all is not possible. Hence, they do not possess the marketplace, public buildings, and the like, but they use them in common.[35]

The jurists Cebus, Celsus and Pomponius distinguished things in public appropriation as things in "permanent appropriation to public uses".[36] This included property and places –

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[32] de Zulueta, *The Institutes of Gaius*, vol. II, 1946, (Oxford UP, Oxford) at p. 56, notes that for Gaius the corporation lacked sufficient legal personality to be described as "owner", so that *res publicae* were a type of *res nullius*. See also D.1.8.2.pr. (Marcian); Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 184-185; Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at p. 75; Sanders, *The Institutes of Justinian*, 1876, (John W. Parker, London) at p. 158; Schulz, *Classical Roman Law*, 1951, (Oxford UP, Oxford) at p. 340.

[33] Inst.2.1.6.

[34] Difficult jurisprudence surrounds this concept: see further Schulz, *Classical Roman Law*, 1951, (Oxford UP, Oxford) at pp. 92-101. In the Christianized empire this category of ownership vastly expanded as significant wealth and social function accrued to the church: see Birks, *The Roman Law Concept of Dominium* [1985] Acta Juridica 1 at pp. 10-11.

[35] D.41.2.1.22. (Paul); *cf.* Gaius Inst.2.11., which treats these things as *res nullius*, implying that a corporation lacks sufficient personality to own.

[36] de Zulueta, *The Institutes of Gaius*, vol. II, 1946, (Oxford UP, Oxford) at p. 56.

> such are not the objects of commerce, but are public property, which, while they do not absolutely belong to the people, are used for public purposes, as for instance, the Campus Martius [the Field of Mars, used for military training and public events].[37]

4. *Res nullius* (Nobody's property).

There were two classes of unowned property within this category:

i. *res nullius, divini iuris*:

> Sacred, religious, and sanctified things are owned by nobody. Things under divine law cannot belong to individuals.[38]

Divini iuris were a species of unowned property which could not be appropriated, nor used and enjoyed by persons either as private individuals or as members of the public; nor could *divini iuris* be subjected to partial ownership controls such as servitudes.[39] Within this class of *res*, the sacred things (*res sacrae*) were things consecrated, dedicated or otherwise made sacred.[40] *Res religiosae*, religious things (such as tombs), were inherently sacred;[41] sanctified things were the city gates and walls, inherently sacred because of their civil importance rather than religious or other-worldly associations.[42]

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[37] D.18.1.6.pr. (Pomponius). English law has no such sophisticated division as between these previous three categories - *res communes*, *res publicae* and *res universitatis*. Many of the examples referred to are subject to ownership by private individuals. In relation to those privately owned there will generally be no public rights of access, even for buildings such as theatres which might be seen as "quasi-public" (see Gray, *Property in Thin Air*, [1991] CLJ 252 at pp. 286-292). Even in relation to things not privately owned, public rights to use may not be general but contractually licensed in order to prevent over-crowding and over-exploitation.

[38] Inst.2.1.7.; G.Inst.2.2, 2.9.; D.1.8.1.,5. (Gaius); D.1.8.2.,4. (Marcian).

[39] D.8.4.4. (Javolenus); D.39.3.17.3. (Paul); *cf.* D.8.5.1. (Ulpian).

[40] Inst.2.1.8.

[41] Inst.2.1.9.

[42] Inst.2.1.10.; G.2.8.; Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963,

ii. *res nullius, humani iuris*:

> Wild animals, birds and fish, the creatures of land, sea and sky, become the property of the taker as soon as they are caught. Where something has no owner, it is reasonable that the person who takes it should have it.[43]

This principle dictated that uncaptured wild animals such as fish in a stream could not be owned. There was an elaborate set of rules defining when animals were to be regarded as wild and unowned, or captive and hence appropriated.[44] Another example of *res nullius, humani iuris* was abandoned property:

> [I]f an owner abandons a thing the property passes straight away to anyone who takes possession of it. The law sees a thing as abandoned when the owner throws it away intending that it shall cease at once to be his property.[45]

Res nullius embraced many disparate property forms; the defining quality of this type of *res* was that it could become privately owned, that is, unlike all the preceding categories of property it was susceptible to appropriation by individuals as their exclusive property. Some texts state that public goods are capable of appropriation, blurring the line between communal and unowned goods; but this is against the main classical tradition of classification.[46]

(Cambridge UP, Cambridge) at pp. 183-184.

[43] Inst.2.1.12.; D.41.1.1.1. (Gaius); D.41.10.2. (Paul).

[44] For example Inst.1.12.-16. The English law took a very different course, with prerogative and feudal claims to wildlife trumping the *res nullius* doctrine; *cf. The Case of Swans* (1592) 7 Co Rep 156 at 176; see further Getzler, *Judges and Hunters: Law and Economic Conflict in the English Countryside 1800-60*, in Brooks and Lobban eds., *Communities and Courts in Britain 1150-1900*, 1997, (Hambledon Press, London) at pp. 199-228.

[45] Inst.2.1.47. *Cf.* the case of treasure trove where there is no abandonment but no known owner, so that ownership passes in equal shares to finder and landowner: Inst.2.1.39.; Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at p. 15.

[46] See for example D.41.1.14.pr. (Neratius): "What a man erects on the seashore are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one's property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they

The primacy of sacred and communal property in early law

The earlier *Institutes* of Gaius[47] describe the two classes of things "subject either to divine right or to human" as "the leading division of things", rather than the private/non-private division. After Gaius discusses the various divine categories in close detail, the non-divine are brusquely dealt with:

> Now what is subject to divine right cannot belong to anyone, whereas what is subject to human right belongs in general to someone, though it may belong to no one ... Things subject to human right are either public or private. Public things are regarded as belonging to no individual, but as being the property of the corporate body. Private things are those belonging to individuals.[48]

The emphasis on the divine-human distinction rather than the public-private distinction in the earlier Roman law provoked Durkheim to a brilliant anthropological speculation concerning the origins of property. He wrote:

> [T]here are things which are not the object of any kind of right of property ... The sacred things [of Roman law] were in fact outside any transactions, absolutely inalienable and could not become the object of any real right or any obligation whatever. They were not owned by anyone. It is true we might say, and it was said, that they were the property of the gods. But the effect of this very formula is that they do not constitute human property, and we are concerned here with the rights of ownership exercised by men. This attributing of the sacred things to the gods was in

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have come." *Cf.* D.41.1.50. (Pomponius) (administrative control of building on the seashore).

[47] Gaius, *Institutiones Iuris Civilis*, *The Institutes of Gaius*, de Zulueta ed. and transl., 1946, (Oxford UP, Oxford). This work was only re-discovered in 1816, but its influence on European law is incalculable as the Justinianic law is imbued with or founded upon Gaius's conceptions: see Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at pp. 386 ff.; Honoré, *Gaius*, 1962, (Oxford UP, Oxford); *Justinian's Institutes*, Krueger ed., Birks and McLeod eds. and transl., 1987, (Duckworth, London) at pp. 16-18.

[48] G.Inst.2.9.-11.

> reality only a way of declaring that they were not and could not be appropriated by any man. But that particular feature is not and could not be confined to this category alone. There was also what was called in Rome the *res communes* ... things which belong to no one because they belong to all and by their nature elude any appropriation: the air, springs and streams and the sea. Everyone may use them, but no individual or group can be pointed to as owner. There exists today what is called property under public ownership - roads, highways, streets, the banks of rivers that are navigable ... the shores of the sea. All these forms of property are administered by the State but they are not owned by it ... What emerges from these facts is that the range of objects liable to appropriation is not necessarily settled by their natural composition but by the law of any nation. It is public opinion in every society that makes some objects regarded as liable to appropriation and others not: it is not their physical nature as natural science might define it, but the form their image takes in the public mind. A certain thing which yesterday could not be appropriated, may be so today and vice versa.[49]

Durkheim took the idea of sacred or taboo objects as the key to the emergence of all property forms. An examination of non-European societies suggested that "[t]o declare a thing taboo or to take possession of it are one and the same ... During the harvest or fishing season, the river or the fields were declared taboo to protect the yield." Durkheim observed that in all systems of law the right to exclude, rather than the rights to the use, the fruits or the disposal of assets, lay at the core of property institutions. The right to appropriate and exclude was based on a communal delegation of exclusory powers to the clan or family gods (and later to the desacralized individual who became a bearer of natural rights). In early societies these exclusive powers were in belief taboos ordained by gods; but in function, institutions by which society preserved and maintained itself:

> The gods are no other than collective forces personified and hypostasized in material form. Ultimately it is the society that is worshipped by the believers; the superiority of the gods over men is that of the group over its members ... If this interpretation is right, the sacred nature of appropriation had for a long time simply meant that private property was a concession by the collectivity.[50]

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[49] Durkheim, *The Nature and Origins of Property*, from Durkheim, *Professional Ethics and Civic Morals*, 1957, Brookfield transl., reprinted in Lukes and Scull eds., *Durkheim and the Law*, 1983, (Robertson, Oxford) at pp. 158-159.

[50] Lukes and Scull eds., *Durkheim and the Law*, 1983, (Robertson, Oxford) at pp. 166, 182, 184.

Durkheim argued that the high sanctity accorded to the walls of towns and the boundaries delimiting farming land in Rome[51] (and in other ancient cultures) was a form of taboo protecting the life of the community or family. It followed that in these societies exclusive rights upon appropriation were not based on some individual natural right to the product of one's labour or some utilitarian protection of and incentive for the individual's labour - the tradition of Hobbes, Locke and Hegel which has so exercised the modern mind. Durkheim held rather that the concept of labour as the origin of property through appropriation was a very late philosophical theory not present in the history of property ideas until comparatively modern times - and then only through the rise of contractarian concepts.[52]

Thus Durkheim derived from early Roman law the theory that "sacrosanct ... communal property is the stock from which the other forms sprang."[53] Durkheim's argument is useful as a corrective to the individualist stereotypes of Roman property law; his thesis suggests that the Justinianic law with its incorporation of the *extra patrimonio* idea of property inherited the collectivism of early law as well as the individualism of classical law. Moreover, Durkheim's ideas can suggest a different model of property institutions in general, across time and place. Non-private, *extra patrimonio* forms of property, appropriated for communal purposes, are seen to be analytically prior to the familiar natural and civil modes for acquiring and holding individual property developed by later law. The theory stresses the group mind over the individual will, communal solidarity and sentiment rather than rational individual utility-seeking, group action before co-operative transactions in pursuit of economic returns.[54] It is valuable to keep in mind these divergent social forms and practices contained within the institution of property as we further investigate the attempts of Roman and English jurists to define a regime of property rights for land resources.

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[51] See D.8.2.14. (Papirus Justus, *Imperial Rulings*).

[52] Lukes and Scull eds., *Durkheim and the Law*, 1983, (Robertson, Oxford) at pp. 189-191.

[53] Durkheim's theory remains to be empirically supported; modern scholarship investigating the emergence of property institutions in early Rome through reconstruction of the forms of action has not reached conclusions as to whether ownership developed from common property or from tribal territorial control: see discussions in Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at pp. 3-7, and Diosdi, *Ownership in Ancient and Preclassical Roman Law*, 1970, (Akadimiai Kiads, Budapest), at pp. 19-30, 62-84, 121-127.

[54] For a fuller discussion of these points, see Getzler, *Theories of Property and Economic Development*, (1996) 26 J of Interdisciplinary History 639.

Personal and real actions

Another divide in the Roman exegesis of the law of things was the split between rights *in personam* and *in rem*. Roman law did not speak strictly of personal rights binding specific obligated individuals on the one hand, and real rights binding all persons on the other; rather a distinction was made between *in personam* and *in rem* actions. According to the Institutes, an action was the "right to go to court to get one's due", and "every action which takes an issue between parties to a trial ... is either real or personal." Ulpian stated the principle as follows:

> There are two kinds of action, real, which is called *vindicatio*, and personal, which is called *condictio*. A real action is one by which we claim our property which is in the possession of another; and it is always brought against the person who is in possession of the property. A personal action is one which we bring against him who is bound to do some act or give something to us; and it always has application against that person.[55]

A personal action typically asserted an obligation arising from contract or wrongdoing,[56] requiring the defendant to do something or give something to the plaintiff; a real action was a dispute not about the defendant's obligations but a real claim for a thing of value, for example a claim for the possession of a corporeal thing or the exercise of an incorporeal property right.[57] There could be a personal obligation with real effects, such as a contractual obligation to deliver[58] or an obligation to surrender possession;[59] but these "real obligations" were not to be confused with rights *in rem*:

> The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.[60]

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[55] D.44.7.25.pr. (Ulpian).

[56] There were of course other categories: quasi-delict (Inst.4.5.) and quasi-contract (Inst.3.27.).

[57] Inst.4.6.pr.-1.; D.44.7.1.pr. (Gaius).

[58] D.44.7.1.1.-2. (Gaius).

[59] D.44.7.28. (Papinian); D.44.7.52. (Modestinus).

[60] D.44.7.3.pr. (Paul).

This meant that Romans saw a gulf between contracts to convey land (*in personam*) and public actions that actually vested the land in the new owner (*in rem*). English law was far more lax in this territory, and allowed private obligations of sale and trust to have public effects in varying ownership; the resulting nightmare for conveyancers called the system of title registration into being.

At Roman law there was a parsimony of actions: "if several actions arise from one obligation, one action alone and not all must be used."[61] This meant that sometimes personal rather than real actions would be used in order to assert real rights. The distinction between the nature of a right asserted and the type of remedy sought to uphold the right was one of the Romans' most sophisticated legal innovations, and deeply influenced the English common law. Thus we use the ancient *in personam* wrong of trespass primarily to defend and assert *in rem* land rights, to take one important example.

Corporeal and incorporeal rights

Roman law did not make a primary distinction between objects in the world (land, water *et al.*), and legal rights over those objects; instead there were the categories of corporeal and incorporeal things or rights. Corporeal things were physical, tangible objects;[62] the ultimate ownership right (*dominium*) of a physical object was identified with the object and was itself a *res corporalis* - the only corporeal right in the law.[63] All other real rights or things were incorporeal, as they were intangible rights that existed only in law; a right was incorporeal even if it brought with it control of physical things, such as a right of inheritance or a usufruct (the right to the use and produce of a corporeal thing).[64] Only corporeal rights could be possessed;[65] incorporeal rights could be used or

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[61] D.44.7.53.pr. (Modestinus).

[62] Inst.2.2.2., borrowing directly from G.Inst.2.12.-14.

[63] Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 185-187.

[64] Inst.2.2.2.; Buckland, *Interpolations in the Digest* (1923-24) 33 Yale LJ 343 at pp. 359-360; Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at p. 84 (inheritance); Inst.2.4.pr.; D.7.1.1. (Paul); D.7.1.2. (Celsus); D.7.1.3.2. (Gaius); D.7.1.4. (Paul); Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 185-187 (usufruct).

[65] D.41.2.3.pr. (Paul).

exercised, but incorporeal things, according to post-classical nomenclature, could be "quasi-possessed" only - possessed metaphorically through use or exercise of the incorporeal right.[66] This distinction has, of course, been adopted by common law systems, for example, the land itself is corporeal and a right of way over the land is incorporeal.[67]

Possession and ownership

A defining feature of Justinanic property law was the strict insistence on the distinction between possession and ownership, or more accurately between the possessory actions and the actions to assert ownership.[68] We trade in similar ideas today with doctrines of prescription, estate contracts and registration of possessory interests in conveyancing. The Roman concepts of possession and ownership were made up of a number of basic ideas including the following:

1. *Possession at its simplest involves physical occupation.*

> Possession is so styled ... from "seat," as it were "position," because there is a natural holding ... by the person who stands on a thing.[69]

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[66] D.8.2.32.1. (Julian).

[67] See Gray, *Elements of Land Law*, 2nd ed., 1993, Butterworths, London) at pp. 31-32.

[68] For the origin of this doctrine see Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at pp. 272 ff.; see further Barton, *Animus and possessio nomine alieno*; Evans-Jones and MacCormack, *Iusta causa traditionis*; Gordon, *The Importance of the iusta causa of traditio*, all in Birks ed., *New Perspectives in the Roman Law of Property*, 1989, (Oxford UP, Oxford) at pp. 43, 99, 123. For comparisons with English law see Pollock and Wright, *An Essay on Possession in the Common Law*, 1888, (Oxford UP, Oxford).

[69] D.41.2.1.pr. (Paul, Labeo); and note Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at p. 111 n. 1: *possessio* is "sitting in power"; Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at pp. 94-96: "physical sovereignty"; Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at p. 104: "possession is ... having effective control of a thing ... *possessio* is a question of fact."

The idea of "natural possession" or physical occupation was sometimes said to be the ultimate origin of ownership, and this idea survived as "a relic ... in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of him who first takes possession of them."[70] As rights and objects of property were defined outside the field of corporeal natural acquisitions, more complex ideas of possession and ownership than mere physical appropriation had to be developed. "All in all, possession as such is one in nature, but its varieties are infinite", observed Paul.[71] Yet the physical nature of possession survived strongly in the exclusory rule that "[t]hose things can be possessed which are corporeal".[72] A number of results flowed from this doctrine. For example, possession as a physical occupation could only be an exclusive possession; and it followed that there could be joint, but not separate and simulataneous possessions:

> [O]nly one person can possess exclusively; exclusive possessions cannot coincide, unless one is lawful the other(s) unlawful.[73]

Specific portions and undivided shares of an estate could be possessed and owned, but non-specific parts or appurtenances could not.[74]

2. *A mental element goes to constitute possession.* Both physical control and intention to possess - *corpus* and *animus* - had to be present to found a legal possession. Paul states the doctrine plainly:

> Now we take possession physically and mentally, not mentally alone and physically alone.[75] ... One acquires possession by an act of the mind and an act of the body

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[70] D.41.2.1.1. (Paul); see also D.41.10.2. (Paul).

[71] D.41.2.3.21. (Paul).

[72] D.41.2.3.pr. (Paul).

[73] D.41.2.3.5. (Paul).

[74] D.41.2.26. (Proculus); *cf.* 41.3.23.pr. (Javolenus); 41.3.26. (Ulpian). In modern trusts law this same attitude is reflected in the requirement of unity of possession for both forms of joint ownership, the tenancy in common and the joint tenancy.

[75] D.41.2.3.1. (Paul); D.8.6.9. (Javolenus) states a similar rule for servitudes.

> (*animo et corpore*); the act of the mind must be one's own, but the act of the body may be supplied by another.[76]

Hence a person who occupied land without the belief that he was taking an exclusive possession in the manner of an owner was not a possessor in law;[77] and an intention to possess in the absence of physical occupation was not enough to create a legal possession of a vacant or unowned *res*,[78] nor a factual possession sufficient to found *usucapio* of an owned *res*.[79]

Both *corpus* and *animus* were required to sustain as well as to commence possession; and absence of either element caused loss of possession:

> Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from.[80]

Some texts, however, emphasize either *corpus* or *animus* by themselves as the essential aspect of sustained possession:

> There is this difference between ownership and possession: that a man remains owner even when he does not wish to be, but possession departs once one decides

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[76] Cited in Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at p. 112; and see D.41.2.3.pr.-1., D.41.2.3.12. (Paul).

[77] See for example D.41.2.6. (Ulpian).

[78] D.41.1.10.pr.-1. (Gaius). There could, however, be possession asserted through the physical occupation of land not by oneself but by another acting on your behalf: Inst.4.15.5.; D.41.1.10.2., D.41.1.32. (Gaius); D.41.2.49.2. (Papinian).

[79] D.41.2.49.2. (Papinian). There are many echoes of this in English law, perhaps most obviously in the rules on adverse possession where both an *animus posidendi*, in the form of an "intention for the time being to possess the land to the exclusion of all other persons" (see Slade LJ in *Buckinghamshire CC v Moran* [1990] Ch 623 at 643), and factual possession are required to acquire title.

[80] D.41.2.8. (Paul).

> not to possess. Hence if someone should transfer possession with the intention that it should later be restored to him, he ceases to possess.[81]

Physical occupation, we have seen, was the factual foundation of possession; but as the law developed, the factor of intention or mental state was increasingly stressed. For example, once possession has been established, it seemed that the mental element alone was sufficient to terminate possession.

> Again, for the loss of possession, the possessor's mental attitude must be considered; if you are on a piece of land and lose the will to possess it, you immediately cease to possess it. Hence, possession can be lost, though it cannot be acquired, by will alone.[82]

Conversely, intention could suffice to sustain a possession in law, even if the physical element of the possession had ended or was replaced by another's occupation:

> But should you be in possession by will alone, you continue to possess the land, even though someone else be physically present on it.[83]

> For summer and winter pastures of which possession is retained by intent ... even though we have no slave or tenant there ... the previous possessor is said to possess even though another has entered the pasture with the object of possessing it, so long as he is in ignorance of the entry. For just as the bond of an obligation is released in the same way that it is normally created, so also possession which is held solely by intention should not be taken away from one ignorant of the facts.[84]

The German jurists von Savigny and von Jhering differed over which element, mental or physical, should be emphasized in distinguishing Roman possession from mere detention;[85] and this ignited a

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[81] D.41.2.17.1. (Ulpian).

[82] D.41.2.3.6. (Paul).

[83] D.41.2.3.7. (Paul).

[84] D.41.2.44.2.-4. (Papinian).

[85] See Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 112-124, especially 112 n. 1; Thomas, *Institutes of Justinian. Text and Commentary*, 1975,

celebrated controversy absorbing the attention of generations of nineteenth-century legal theorists. The whole issue may be circumvented by recognizing that a mental state of occupation is signalled by physical acts, just as the existence of acts of physical appropriation depends upon some state of mind on the part of the actor giving meaning and agency to that act. A good example of this dialectic between physical act and mental state was the important rule that a limited act of appropriation could signal an occupation and intention sufficient to found a more extensive possession:

> But when we say that we must take possession both physically and mentally, that should not be taken to mean that one seeking to possess an estate must go round every part of it; suffice it that he enters some part of the estate, but with the intent and awareness that thereby he seeks to possess the estate to its utmost boundaries.[86]

The civil mode of acquisition known as *traditio* exemplifies this principle, whereby property was transferred by informal, even symbolic delivery of the *res* or control thereof.[87]

3. *Ownership may be asserted without possession.* Ulpian states:

> Ownership has nothing in common with possession; hence, a man who institutes a *vindicatio* for land [a claim of *dominium*] will not be refused the interdict *uti possidetis* [a claim for restoration of possession]; for he is deemed not to have renounced possession by asserting ownership.[88]

In the classical law a preliminary action was normal to determine possessory right before resort to a real action to vindicate ownership or *dominium*:

> The outcome of a dispute is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of

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(North-Holland, London and Amsterdam) at p. 97.

[86] D.41.2.3.1. (Paul); also D.8.6.9. (Javolenus); D.41.10.1.pr. (Ulpian).

[87] Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 117-120.

[88] D.41.2.12.1. (Ulpian).

> possession will take the role of plaintiff when the question of ownership (*dominio*) is contested.[89]

In practice, a person seeking recovery would begin with the simpler possessory action, and leave his opponent to respond with an action of *vindicatio* asserting *dominium*.

The right to use a thing and enjoy its fruits - *usufruct* - could in a sense be "owned" through possession alone. The principle of usufruct will further be analysed below as it casts light on fundamental aspects of the concept of *dominium*.

4. *Possession may be defended without title.* Ulpian states:

> If a person be evicted forcibly from possession, he is treated as still possessing, since he has the ability to recover possession. By the interdict *de vi*.[90]

The doctrine was sometimes expressed by the idea that possession is a fact, regardless of whether one has lost physical control; and that fact of possession is absolutely protected if physical control is lost.[91] The chief concern of this doctrine was to prevent forcible dispossessions, even by a true owner reclaiming his land from a wrongful possessor: by the interdict *uti possidetis*,

> the winner was the party in possession at the date of the interdict itself, as long as his possession had not been obtained from his opponent by force, stealth or licence [*nec vi, clam aut precario*]. It was irrelevant that the possessor had forcibly driven out a third party, had secretly usurped a third party's possession, or had obtained a third party's licence to possess.[92]

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[89] D.41.2.35. (Ulpian); and see also Inst.4.15.4. In Justinian's law the interim interdict was assumed and the substantive issue of title decided directly: the post-classical law is set out in Inst.4.15.4a., 8.

[90] D.41.2.17.pr. (Ulpian).

[91] The distinction between the factual quality of legally-protected possession and the legal quality of *dominium* was expressed in the dictum: "Ownership has nothing in common with possession" D.41.2.12.1. (Ulpian).

[92] Inst.4.15.4a.

Thus immediate possession was generally protected from extra-legal interference, even if it was wrongful or vicious or based on a property-right relatively worse than the opponent's:

> It makes no difference in this interdict whether the possession against others is just or unjust. For every kind of possessor has by virtue of being a possessor more right than the nonpossessor.[93]

The interdictal protection of the possessor against all persons was qualified importantly by the rule that interdicts would only protect a possession that was *nec vi, clam aut precario* as regards one's opponent, though "[a]gainst third parties, even vicious possession is normally of avail".[94] This rule meant that the immediate dispossessor of a claimant would lose possession because his possession fell into the *vi, clam aut precario* catogory. But an assignee of the immediate dispossesor, who had attained possession *nec vi, clam aut precario*, would retain possession under the interdict. Many of these rules were reproduced in the medieval English title actions of novel disseisin.[95]

5. Ownership must be proved as an absolute right, beyond disproof. In the post-classical law, a claimant who could not recover by possessory interdict would have to bring a *vindicatio* asserting not possession but *dominium*: "I am the absolute owner." He might then produce evidence towards establishing his *dominium*; the opponent in possession could defeat the claim only by proof that the claimant was *not* in fact the owner. In other words to maintain a *vindicatio* restoring property, *dominium* had to be proved sufficiently so that the opponent could not disprove it by positive evidence. The action thus did not provide a procedure for asserting a *relative* title based on a superior ranked right to possession, as in English (and possibly earlier Roman law); *dominium* had to be proved absolutely (that is, ultimate ownership beyond the opponent's capacity to disprove it).[96] "Roman law has an action asserting ownership and an action asserting possession but no action asserting merely a right to possession."[97]

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[93] D.43.17.2. (Paul).

[94] D.41.2.53. (Venuleius). For movables, see Inst.4.1.4a.; D.43.31.pr.-1. (Ulpian).

[95] Sutherland, *The Assize of Novel Disseisin*, 1973, (Oxford UP, Oxford) at pp. 20-42.

[96] Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 108-109, 115.

[97] Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 154-157; Thomas, *Institutes of Justinian. Text and Commentary*, 1975, (North-Holland, London and Amsterdam) at pp. 94-96.

6. *A derivative ownership must derive from causa or title, not from mere delivery of possession.* Ownership or *dominium* could be constituted by possession, as through the natural or original modes of acquisition such as occupation of a *res nullius*. Derivative acquisition of an existing ownership required something more than possession: there had to be some recognized legal ground of title acquisition, some *iusta causa*. Where an existing ownership was to be transferred the rule was that -

> [b]are delivery of itself never transfers ownership, but only where there is a prior sale or other ground [*iusta causa*] on account of which the delivery follows.[98]

Thus for contractual transfer it was delivery into possession, rather than the grant or contract or other *iusta causa*, which was the legal fact clinching the constitution of the newly-transferred property right: "the act which creates a right *in personam* does not create a right *in rem* ... a contract creates rights in personam but cannot create or transfer rights *in rem*."[99] But in all cases *causa* or independent source of title was the prerequisite to effective delivery; and it followed that:

> Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient.[100]

The principle can be expressed in more general terms as the distinction between contract and conveyance. There was *causa* or source of title in the form of a legal transaction dealing with ownership; and there was conveyance or constitution of the real right by delivery and possession. The doctrine is an instance of the idea of Roman law that property rights which bind all persons should not be transferred by private transactions alone, but by a public, apparent act. Hence some physical, ceremonial and public act of delivery and appropriation was required to convey property additional to the legal act of contract and grant. The Institutes state the idea that a delivery executes and concludes a contractual transfer of property in the following terms:

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[98] D.41.1.31. (Paul); and see D.7.6.5. (Ulpian) for *usufruct*.

[99] Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 103.

[100] D.41.1.20.pr. (Ulpian). This doctrine - the *nemo dat* rule - survives in heavily qualified form in English sale law.

> Another natural law mode of acquisition is delivery. What could be more in line with natural justice than to give effect to a man's intention to transfer something of his to another? That is why the law allows all corporeal things to be delivered and all deliveries by owners to pass the property in the thing delivered.[101]

The doctrine of *usucapio* employed the concept of *iusta causa* in a different sense to bridge the bright line between possession and ownership. *Usucapio* grounded new titles on the fact of long possession; but the doctrine formally preserved a requirement of *iusta causa* in conjunction with possession rather than taking factual possession as the foundation of the prescriptive ownership.[102] The later doctrines of bonitary ownership and good faith possession were derived from *usucapio* or long possession, and these doctrines created a further melding of possession and ownership rights. The law here provided protection to persons in possession who were on the way to gaining prescriptive titles, but had not yet completed the period of *usucapio*, thus vesting a proprietary right in any person who had good faith possession, a right good against all persons save the *dominus*. This development was transformative, giving rise in effect to a system of relative titles in the post-classical law.[103] But the relativity was restrained by the facilty with which possessory titles could harden into species of *dominium*.

Praedial servitudes

1. *Servitudes as proprietary land-use rights.* Our next concern is with the category of real (not personal) servitudes (*servitutes*), known as praedial servitudes, "[t]he rights which belong to urban and rustic estates (*praediorum urbanorum et rusticorum*)".[104] They may be defined as incorporeal rights *in rem* that gave some benefit to a dominant estate by restraining use of servient neighbouring land in some way.

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[101] Inst.2.1.40., and see Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at pp. 104-112; Buckland and McNair, *Roman Law and Common Law*, 2nd ed. by Lawson, 1952, (Cambridge UP, Cambridge) at p. 59; Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 103-105, 116-120.

[102] D.41.10.5.pr.-1. (Neratius).

[103] See further Nicholas, *An Introduction to Roman Law*, 3rd ed., 1962, (Oxford UP, Oxford) at pp. 125-128, 153-157.

[104] Inst.2.2.3.; G.Inst.2.14., 14a. See generally Schulz, *Classical Roman Law*, 1951, (Oxford UP, Oxford) at pp. 381-399.

2. *The praedial doctrine.* The Institutes state the following central doctrine delimiting the concept of servitude:

> The reason these rights are called servitudes belonging to land is that they cannot exist independently of land. Nobody can acquire a servitude of urban or rustic land unless he has land nor can one without land bear the liability implicit in a servitude.[105]

The praedial doctrine thus has two parts: for there to be a servitude there must be servient land burdened by a restriction; and there must be dominant land correspondingly benefited by the restriction. This dual doctrine had many implications, for example (1) there could be no servitude over one's own property as there was no servient tenement to be burdened;[106] (2) "praedial servitudes are extinguished by merger if the same person becomes owner of both estates", for the same reason;[107] (3) the servitude could only benefit the dominant tenement as land; and could not benefit activities that happened to be conducted on the land,[108] nor benefit non-owners or adjacent lands,[109] so that water drawn under a right of *aquae haustus* could not be sold for industrial use.[110] The praedial doctrine also meant that the servitude right was appurtenant to exclusive ownership of particular land, and could not take effect as a right *in personam*; hence there was a rule that a stipulation to create part shares of a right of way or *aquae ductus* could only create co-owners of a

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[105] Inst.2.2.3.; see also G.Inst.2.29.; D.8.1.8.pr. (Paul), 15.pr. (Pomponius), 19. (Labeo); D.8.2.30. (Paul), D.8.2.32. (Julian); D.8.3.5.1. (Ulpian).

[106] D.7.6.5.pr. (Ulpian); D.8.2.26. (Paul); D.8.6.1. (Gaius); see further Buckland, *The Conception of Servitudes in Roman Law*, (1928) 44 LQR 426.

[107] D.8.6.1. (Gaius).

[108] D.8.1.8.pr. (Paul); D.8.3.5.1.; D.8.3.3.2., 4., 6.pr.; D.8.4.13.pr. (Ulpian).

[109] Buckland, in *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at p. 263 and *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at p. 155, has perceived a possible variation of this rule in D.20.1.2. (Papinian), allowing the enjoyment of a rustic servitude to be pledged to a landed neigbour in security or part-payment of a debt, the pledge allowing sale of the right.

[110] D.8.3.5.1. (Ulpian); D.8.3.24. (Pomponius).

single property right and not multiple obligations in many persons whether owners or not, "because the exercise of such rights is indivisible".[111]

The praedial rule did not apply in the case of personal servitudes, such as the right of usufruct over land which was enjoyed by the usufructary in person rather than as owner of benefited dominant land. Usufruct (being the "right to the use and fruits of another person's property, with the duty to preserve its substance"[112]) was a means of providing income; it was not a transferable property right maintainable by real action, but was merely a personal right against the *dominus*. Later, a type of auxiliary or appurtenant servitude was annexed to the usufruct, giving the usufructary a real action to ensure physical possession or entry of the corpus in order to make good the right.[113]

The rustic praedial servitudes by contrast were originally conceived not as personal rights nor as abstract *res corporalis* or rights over land, but as a *corpus* or physical thing, owned and occupied separately from the land or soil itself. These rights could be described as an ownership of the defined way or watercourse being a physical structure on the land, or of the minerals and produce of the land - an ownership concurrent with the land itself. Hence the rustic servitudes were transferred by the same means as land, at first as *res mancipi* conveyed by a symbolic physical delivery;[114] in later law by *cessio in iure* and *traditio*.[115]

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[111] D.8.1.17. (Pomponius); see also D.8.4.5. (Javolenus); D.43.20.4 (Julian); Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 261-262; *cf.* D.41.2.43. (Marcian), allowing a part-owner to usucapt the other owner's shares by long possession.

[112] Inst.2.4.; D.7.1.1.(Paul).

[113] D.7.6.5.1.,6. (Ulpian). Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 268-276, notes that classification of *usufructus* as a personal servitude is post-classical. Another category of personal right with real qualities were restrictive covenants, described by Ulpian in D.8.4.13.; see further Rudden, *Economic Theory versus Property Law: The Problem of the Numerus Clausus*, in Eekelaar and Bell eds., *Oxford Essays in Jurisprudence*, Third Series, 1989, (Oxford UP, Oxford) at pp. 239, 244-245.

[114] G.Inst.2.14a., 28., 29.; Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at pp. 158 ff.; Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 261-266; Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at pp. 8-9. For a balanced criticism of the orthodoxy that servitudes originated as a form of corporeal ownership rather than as an independent class of incorporeal rights, see Diosdi, *Ownership in Ancient and Preclassical*

The full list of mancipatible rustic servitudes includes rights of way and *aquae ductus* as well as various profits or rights to take elements of the land;[116] all the rustic servitudes exemplify the physical or material origin of such ancient rights in agricultural usage. The urban servitudes governing the use of buildings in towns were later forms of more disembodied or intangible rights, and hence were not *res mancipi* but were real rights transferred by *cessio in iure*.[117] By the time of the classical lawyers, the older rustic servitudes were also losing their "physicalist" quality and were conceived as intangible *iure*, remaining within the class of *res mancipi* as an historical anomaly only.[118]

Traces of the older corporeal conception may be seen in the idea that servitude rights were transferred formally by a metaphoric "delivery" of possession;[119] and also in the rule that servitudes

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Roman Law, 1970, (Akadimiai Kiads, Budapest) at pp. 107-116.

[115] Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at p. 264.

[116] See for example G.Inst.2.14.; D.8.3.1.1. (Ulpian); D.8.3.3. (Ulpian): "Within the category of rustic servitudes must be included the right to draw water, the right to drive cattle to water, the right of pasture, the right to burn lime, and the right to dig sand." See also discussion of D.8.3.30 (Paul), below n. 217. There are occasional references to *aquaeductus* as an urban servitude when appurtenant to houses: Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 262-263; D.6.2.11.1. (Ulpian).

[117] Personal servitudes such as usufruct or personal rights of way were originally non-assignable rights of user or enjoyment, enforceable only against the *dominus* of the burdened land. The personal enjoyment of these rights could be transferred contractually; and then as the rights became more proprietary, there could be transfer by *quasi-traditio* or informal delivery: Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 268-276.

[118] See for example D.8.1.14.pr. (Paul), stating that: "Rustic praedial servitudes even though attached to corporeal property, are nevertheless incorporeal and so are never acquired by usucapion. Or the reason may be that the nature of these servitudes is such as not to engender clear and continuous possession." See also D.8.5.4. (Ulpian), and D.8.1.20. (Javolenus), above; Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at pp. 426-427.

[119] D.8.1.20. (Javolenus); *cf.* D.8.3.14. (Pomponius) and D.39.3.11.pr. (Paul), on the *aquae ductus* as a physical right incompatible with the co-existence of a right of way along the same route.

might survive the alienation[120] or abandonment[121] of a servient (or dominant) tenement to bind (or benefit) the next owner, as if the servitude maintained a physical existence in the land. However, upon merger of a dominant and servient estate, servitudes were extinguished and did not revive upon separation of the estates, because of the strong principle that servitudes as *iure* could not exist in one's own land; in this instance the abstract incorporeal quality of servitudes was more important than their physical, tangible qualities. According to Buckland,

> A servitude is a burden on the land rather than on the ownership. It is an independent *ius* which must be thought of rather as parallel to ownership than as a burden on it. If we reflect on the fact that the earliest servitudes were *res mancipi*, capable of *usucapio* and pledge, the idea that they were thought of as physical things, actual visible tracks and channels, will account for those rules which may look anomalous in classical law.[122]

3. *The in rem nature of servitude actions.* The residual "physicality" of servitudes and usufruct may partly explain why *in rem* or real actions came to be regarded as the proper procedure for claiming these rights. Incorporeal rights such as servitudes were certainly defended as proprietary *res* rather than as personal rights, by means of real actions:

> The action was real ... if someone claims to be entitled to a usufruct over some land or a house; or a right of way for man and beast over his neighbour's land; or a right to lead water from his neighbour's land. The same again with actions for the urban servitudes: claiming e.g. the right of building higher, of prospect, projection, or attachment to a neighbour's wall.[123]

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[120] D.8.6.13. (Marcellus).

[121] Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. by Nicholas, 1972, (Cambridge UP, Cambridge) at p. 427; Thomas, *Textbook of Roman Law*, 1976, (North-Holland, London and Amsterdam) at p. 195; Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at pp. 113-114; Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 259, 268.

[122] Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 260, 268.

[123] Inst.4.6.1.-2.

In another sense servitudes were rights *in rem* because they were rights of property attached to land; rights which all persons were bound to respect independently of contractual or personal relations. This quality has two aspects: first, servitude rights followed or ran with the ownership of the land:

> Now whenever ownership is transferred, it passes to the transferee in the same case as it was with the transferor; if the land was subject to a servitude, it passes with the servitude; if it was unencumbered, it passes in that state; and if, perchance, there should be servitudes due to the land, it passes with the servitudes due.[124]

And servitudes could be defended against all the world:

> This [real] action can be brought not only against a man on whose land the source of the water is situated or across whose land it is channeled, but, in fact, against anyone at all who prevents one from channeling the water, as is the case with servitudes in general. In short, by means of this action, I can proceed against anyone who tries to stop me from channeling the water.[125]

4. *Ius and ius in re aliena.* The right of usufruct was eventually brought within the broader category of servitudes as a so-called "personal servitude".[126] The notion of a unified law of servitudes

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[124] D.41.1.20.1. (Ulpian).

[125] D.8.5.10.1. (Ulpian). On the well-established application of real rather than personal actions for the maintenance of praedial servitudes, see also D.8.5.4., D.8.5.18. (Julian). The classical forms of action for asserting usufruct and servitude rights by *vindicatio* seeking real restitution through the personal sanction of a pecuniary condemnation are discussed in Buckland, *The Protection of Servitudes in Roman Law*, (1930) 46 LQR 447; Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at pp. 3-7, 14, 25-26; Diosdi, *Ownership in Ancient and Preclassical Roman Law*, 1970, (Akadimiai Kiads, Budapest) at pp. 107 ff. Buckland suggests that *iure in rem*, for the purposes of real procedure, were treated fictitiously as if they were a type of *dominium*: *Elementary Principles of Roman Private Law*, 1912, (Cambridge UP, Cambridge) at p. 61; Buckland, *Main Institutions of Roman Private Law*, 1931, (Cambridge UP, Cambridge) at p. 160. Developments of the law after Justinian are traced in Kagan, *The Nature of Servitudes and the Association of Usufruct with Them*, (1947) 22 Tulane LR 94; Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in Birks ed., *New Perspectives in the Roman Law of Property*, 1989, (Oxford UP, Oxford), p. 111.

[126] D.8.1.1. (Marcian). Buckland states that *usufructus* is described as a servitude only six

embracing both usufructs and praedial servitudes can be seen as a move to generalize all rights over land amounting to less than full ownership as burdens upon or fractions of the ownership of another's land.[127] The humanist Civilians made this plain, using the general concept of *iura in re aliena*, incorporeal rights in the property of another, to describe the unified class of personal and praedial servitudes. *Dominium* was then re-defined as the sum of the bundle of abstract rights over land - not the ultimate right of the owner to claim title, to have the thing in his property. The impulse behind this new conceptualization was not solely analytic. The humanist civilians believed that *dominium* as absolute ownership summing all possible rights in land was the more modern institution, preferable to a concept of *dominium* as the superior right amongst many possible rights held over land, a concept too reminiscent of feudal lordship and inequality of status amongst right-holders.[128] These later categorizations were not, however, part of Digest law; both usufruct and servitude were seen simply as *iure* - abstract incorporeal rights entitling the holder to engage in certain uses of, or activities upon the land of another; rights which co-existed with the *dominus*'s ultimate right which was likewise a *ius* over the land. The special ultimate character of *dominium* was expressed in the rule that a *dominus* could not have a separate right of usufruct or servitude over his own land.[129]

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times, and suggests that this description was a late classical or Justinianic idea interpolated into Digest texts; Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at p. 268.

[127] D.7.1.4. (Paul). *Cf.* definition of usufruct in Inst.2.4.pr. and D.7.1.1.; see Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at p. 259; Buckland, *Elementary Principles of the Roman Private Law*, 1912, (Cambridge UP, Cambridge) at pp. 92-114.

[128] Cairns, *Craig, Cujas, and the Definition of feodum: Is a Feu a Usufruct?*, in Birks ed., *New Perspectives in the Roman Law of Property*, 1989, (Oxford UP, Oxford), p. 76; Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in Birks ed., *New Perspectives in the Roman Law of Property*, 1989, (Oxford UP, Oxford), p. 111. On the issues concerning *dominium* and relativity of titles, see Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, (Cambridge UP, Cambridge) at pp. 186-188; Diosdi, *Ownership in Ancient and Preclassical Roman Law*, 1970, (Akadimiai Kiads, Budapest) at pp. 131-136, 180-185; Birks, *The Roman Law Concept of Dominium*, [1985] Acta Juridica 1 at pp. 25-31.

[129] D.7.6.5.pr. (Ulpian); D.8.2.26. (Paul); D.8.6.1. (Gaius); see further Buckland, *The Conception of Servitudes in Roman Law*, (1928) 44 LQR 426.

Diosdi suggests it was not the case that sophisticated concepts of *iure* were developed as extensions of a more primitive concept of ownership as lawfully protected possession and control. Rather the reverse case held:

> The creation of the notion of *dominium* was also dependent on the previous formation of the category of *servitus* and the appearance of the institution of *usus fructus*. A statue is only finished when the chisel of the sculptor has removed the superfluous marble. Likewise, the abstract notion of ownership can only be created after everything not belonging to ownership, has been stripped off. The classical Roman notion of ownership ... is characterized by an utter disregard of those external appearances which represent the very idea of ownership to the layman. Thus *dominium* is not only clearly separated from possession, but also from the use of the thing and from enjoyment of its fruits.[130]

It was the drive to abstraction and technicality in the specification of property rights that made Roman law so significant in world history. Only the English common law developed a rival system of sophisticated, abstract, infinitely malleable and useful rules for the allocation and transformation of property rights. But if we investigate the development of key English property doctrines such as possessory actions, prescription and servitudes,[131] we discover powerful Roman influences that rob the common law of much of its originality.

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[130] Diosdi, *Ownership in Ancient and Preclassical Roman Law*, 1970, (Akadimiai Kiads, Budapest) at pp. 131-136.

[131] Key texts here include Gale, *Law of Easements*, 1st ed., 1839, (Sweet and Maxwell, London); *Benest v Pipon* (1829) 1 Knapp 60 at 69-70; 12 ER 243 (PC, Jersey); *Dalton v Angus* (1881) 6 App Cas 740 at 819, 822 (HL).

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