THE ROMAN LAW CONCEPT OF DOMINIUM AND THE IDEA OF ABSOLUTE OWNERSHIP

The 'absolute' quality of Roman ownership is considered here from two standpoints. The paper looks first at the content of ownership and then at the concept. In relation to the content, the word 'absolute' suggests that the Roman owner was free from restrictions in relation to the things which he owned, that he could do as he pleased. It also carried another overtone. It implies not only that observably his use was unrestricted but also that it was in some sense incapable of restriction. It should, however, be immediately obvious that no community could tolerate ownership literally unrestricted in its content. To take an extreme example, even a society which did not go to the length of forbidding citizens to own firearms could not allow owners to use their guns just as they please: a man could not conceivably justify shooting another by saying that he was merely using his own weapon.

Since ownership literally absolute in content is therefore impossible, a convenient form of inquiry is to ask in what principal ways the content of Roman ownership was in fact restricted and then to see whether those restrictions express a regular attitude to the degree of restriction which was permissible. It can be said at the outset that the word 'permissible' in relation to this last part of the inquiry can refer only to socio-political morality, since no rule of positive law controlled the measure of legislative interference. There was, after all, no written constitution to support a guarantee of private autonomy. 'Absolute' is not, properly speaking, a word which admits of degrees. Hence if Roman ownership was at all restricted in its content, as indeed it must have been and was, it was not, strictly, absolute. However, if a looser usage is admitted, a last question to be asked is whether, if some measure can be said to have been set to the extent of permissible interference with an owner's freedoms, the remaining area of inviolability was so great as to attract the word 'absolute' as a useful description of the quality of Roman ownership.

As applied to the concept as opposed to the content of ownership, 'absolute' sums up qualities which are only revealed by logical analysis. It suggests, first, that the idea of ownership was clearly disengaged in the Roman legal mind from other superiorities, as for instance sovereignty, jurisdiction and patriarchal authority; secondly, that, within the field thus marked out for it on the map of the law, ownership had a unity, or perhaps more accurately a monopoly, in that it neither had any competitors nor could itself be divided into slices of time; and, thirdly, that the relationship between an owner, or co-owners, and the thing owned was conceived as excluding all other people from all possibility of asserting a similar relationship to the same thing. These analytical absolutes are comparatively more difficult to grasp than the idea of absoluteness in relation to the content of ownership. At this stage they are presented only as implications of the word which is in issue. The question whether they are literal truths about Roman ownership will be examined below. The answer depends to some extent on whether praetorian law is excluded from consideration. Once praetorian and civil law are taken together, the truth of the last two of the three propositions certainly has to be qualified.

Prior to the two main sections on the content and concept of ownership, there is a preliminary section in which three points are made which are of general
importance in that they explain the method of approach and warn of certain inherent limitations which the nature of the materials puts upon this kind of inquiry in Roman law.

Here it is convenient to add that the paper is written throughout with the minimum use of Latin, and that, unless it is obvious from the context or something is expressly said to the contrary, the words ‘owner’ and ‘ownership’ are used strictly for dominus and dominium. That is to say, they refer to owning as it came to be understood and defined in the civil as opposed to praetorian law. Also, the focus is for the most part on the classical period—that is to say, on the law of roughly the first two centuries AD.

I THREE PRELIMINARY POINTS

(1) The Non-theoretical Bias of the Jurists

Though justly celebrated as one of man’s great achievements, Roman law was not in every respect laudable. For example, from a socio-political standpoint it scores low marks, since it tolerated slavery and ultimately autocracy. Also, even when the law was at its classical best, it is not obvious that the poor had much hope of effective access to the courts. The intellectual assessment is of course quite different. The merit of the jurists was their ability to reach consistent and reasoned conclusions on all facts. They were not defeated by novel situations. Their skills were sensitive to relevant differences of detail without degenerating into pedantic fussiness. These were the virtues of men whose learning was firmly practical. While it is obvious that a good deal of logical analysis went into the exercise of classification, especially in the creation of elementary literature, almost nothing was done by way of jurisprudence in the narrow sense of that term. Thus those who look for the kind of explicit reflection on the nature and function of legal concepts which goes on in modern jurisprudence will not find Roman law admirable.

From just outside the law itself, a sentence of Frontinus captures the Roman preference for the immediately practical. Of the city’s aqueducts of which he was in charge at the end of the first century AD, he wrote:

'Compare with these great, numerous and necessary structures of our water-supply the useless pyramids or all the other works of the Greeks, irrelevant albeit famously celebrated.'

He himself could set out in detail how an imperial licence to draw water from the city supply was obtained and what happened when such a licence was vacated; and he could say, with a wonderful precision which derives its power from the contrast with the law relating to servitudes:

'The right to an allocation of water does not run to an heir, a purchaser, or any new owner of the land.'

On the other hand, if you had asked him about latent ambiguities in his use of the word ‘right’ or about the social significance of the emperor’s monopoly, he would have referred you impatiently to the Academy.

It is the same with the jurists in relation to the concept of ownership. They write a great deal about the modes in which it may be acquired and transferred and lost, also about wrongs to and by owners. Indeed, either directly or indirectly, the law is overwhelmingly about the institution of private property.
But there is no attempt expressly to articulate a concept of ownership. In particular, there is no attempt to explain and justify the phenomenon of ownership, as for instance there is in Grotius, Pufendorf, and Locke; no attempt to experiment in drawing new lines between private owners and the state, as in modern socialist writers; and no attempt to define, or delineate the essential characteristics of ownership, as in modern analytical jurisprudence. On the contrary, ownership is taken for granted, continually in issue but undefined and unexamined. The contrast with modern times should not be too much exaggerated. The same paradox obtains in most modern legal minds: the law is still preponderantly about property, but the abstract problems are hived off into 'jurisprudence', where the dialogue of legal philosophers is less with their fellow lawyers than with political scientists and philosophers.

However, for the Roman jurists it is not quite enough to put down the absence of learning about the concept of ownership solely to their natural bias against abstract questions. There is more to it. Their habit of mind was to attend to the thing owned, whether corporeal (a cow) or incorporeal (a right). Once the thing owned had been defined—something more difficult where it was abstract—there was in a sense nothing more to say. The rest was a matter for the general law: the rights and duties of an owner were simply the rights and duties of a citizen. One who happened to be an owner would be involved in some legal relations which would not concern a man without property, but ownership was so general in the citizenship and at the same time so diverse in its subject-matter that there was no need or purpose in assembling a legal category specifically comprising the incidents of ownership.

Whatever the precise explanation, the lack of explicit Roman reflection about the phenomenon of ownership means, in an essay of this kind, that one is looking for something which they themselves never worked out.

(2) The Difficulty of the Early Period

Gaius speaks of the need to get back to the beginning of things, and every lawyer knows that to understand a topic in the law of one time you need to begin from the preceding period. New solutions are always developed from old ones, and in the process ideas get pulled about. Legal history is indispensable. In order to understand ownership in the developed law, it would therefore be good to have a clear picture of the earliest arrangements. However, even a single generation before Cicero the evidence becomes fragmentary and has to be supplemented by imaginative use of etymology and comparative legal development. Despite much work in this area, the results remain speculative and unsafe to build on. Nor is there much hope that something more sound can be constructed. Hence a radically historical approach is not possible. We cannot be sure whether there was a time of common property or one in which property in land was indistinguishable from territory under tribal control. We cannot see anything that looks like a beginning of private property. This is equally true both of land and chattels.

(3) The Primacy of Actions

This is the most important of our three preliminary points. Fortunately it goes some way both to relieving the disappointment in relation to the early history and to overcoming the sense of dealing with a topic so vast and ubiquitous as to
defy any attempt to find a single point of focus. There is a point of focus. It is to be found in the words in which plaintiffs made their claims and in which issues were submitted for trial.

It is as certain as that people still use language without fully understanding its grammar that men first made elementary claims such as ‘That thing is mine!’ or ‘You ought to give me that thing!’ long before they could give a detailed account of all the facts which would substantiate such assertions. Nowadays non-lawyers, and even children, make similar claims without being sure what facts are legally sufficient to support them. They are likely to become confused when faced even with quite common variations from the simple case. Thus, a child will think himself justified in saying ‘That’s mine’ when he has bought a thing in a shop and taken it home. But doubts will supervene if you propose that the thing never belonged to the shop in the first place or that the shop assistant had disobeyed an order not to sell it. In the same way, in relation to ‘You ought to give me such and such a sum of money’ a layman will be sure that the proposition is true when a loan stands unrepaid but will probably be unable to make a list of all the other events which would also substantiate it. And, again, he is likely to be uncertain as to the effect of complications, drunkenness at the relevant time, or immediate theft from the borrower by a third party. These examples only show that in the mind of the layman or the child, the artificial process of enlarging the core of certainty within these concepts has never happened. This is not surprising since the facts which plunge laymen into doubt require the law to make selections; and the necessary choices can only be made as an accumulation of experience is authoritatively ordered, and probably only with the stabilizing help of writing.

The elementary claims are likely to be similar in all societies, but we need to know the exact words in which they happened to be presented. For example, with equal plausibility a claim for theft might take the form ‘You unlawfully carried away my cup’, or ‘You committed theft of my cup’, or any one of a number of other intuitive variants. ‘Carried away’ commits the first scientific expositors to a particular version of the necessary act, while ‘committed theft’ leaves that matter open, with all the choices still to be made as experience builds up. No context so compels the ordering of common sense as actual litigation, where doubts have to be eliminated because a real defendant has to be condemned or to be absolved. Of course, they may be resolved from case to case by decision-makers who have power but no anxiety about the regularity of their behaviour. So long as that custom continues, legal science will not develop; and so long as legal science does not develop, it will be impossible to answer in any detail such questions as, What exactly is theft? or, On what facts can a man be said to owe money to another? or, From what facts does it follow that a man owns something?

The words in which issues are joined—that is, the words of the ‘actions’ themselves—constitute a challenge to human powers of reason. It is when the challenge is taken up, that the science of substantive law begins. Since no compelling questions are raised except by the words of the actions, those words are the focus of that development.\(^\text{14}\)

Fortunately we do know the forms of action which gave rise to the developed concept of ownership. Thanks to Gaius’ interest in legal history we know not only the words of the formula on which hung the classical law but also the words of its predecessor, the ancient legis actio per sacramentum in rem.\(^\text{15}\) It cannot be
right to push these focal words aside and to look for a concept of ownership somewhere out in the evidence of social arrangements, ever thinner and less reliable as the date is taken back. 18 Whatever concept of ownership the Romans ever had, it was founded, developed and expounded within the context of these pleadings. Basic questions such as, Who could own? and, What things could be owned? and, On what facts was ownership acquired? and, much more puzzling, How was ownership differentiated from other superiorities? all arose directly out of these words. Other questions, relating in particular to user of things owned, arose from different pleadings, as we shall see below. 17 As for the very early law, perhaps we have after all not lost detail that once existed. It seems more likely that the work of answering the questions inherent in the actions, and the questions behind those questions, only got under way in the last century of the Republic. 16

The words of the relevant actions are essentially very simple. They can be set out in a short space. The most obviously curious feature is that none of them makes any express reference to owning or ownership. That is what creates the puzzle about the differentiation of ownership from other relations of superiority which can be described possessively, 'my house', 'my troops', 'my son' and so on. The name of the action in which the plaintiff’s claim rested on ownership was the 'vindicatio'. Under the formulary system, it carried the issue to trial in these words:

Let Titius be judge. If it appears that the thing which is the subject of this action is Aulus Agerius’s by the law of the Quirites, and if that thing shall not be restored to Aulus Agerius in response to the judge’s decision, for as much as that thing shall be worth, for so much in money let the judge condemn Numerius Negidius to Aulus Agerius. If it does not appear, let him absolve. 19

In actual litigation the real names of the parties would of course appear, and the thing would be properly identified. The translation is cumbersome because deliberately literal. The crucial point is ‘Aulus Agerius’: the pleading does not say the thing belongs to the plaintiff or is owned by him, only that it is ‘of him’. The ‘Quirites’ were simply the Romans, named ceremonially. 20 Hence the formula reflects this claim in direct speech: ‘This thing is mine by the law of the Romans!’

In this example there is no indication whether the ‘thing’ is corporeal, as for instance a farm or a horse, or incorporeal, as for instance an inheritance (a right to inherit), a usufruct (a right to use and enjoy), or a praedial servitude such as a right of way. The formula for claiming an inheritance was exactly the same, with the ‘thing’ described as ‘the inheritance to so and so’. The formula for claiming a usufruct was similar but not identical and had a negative counterpart for denying the right (the actio negatoria). Leaving out the appointment of the judge, the pair went as follows:

If it appears that the right to use and enjoy the parcel of land which is the subject-matter of this matter is Aulus Agerius’s; and if that thing shall not be restored to Aulus Agerius in response to the judge’s discretion, for as much as that thing shall be worth, for so much, etc.

Then, for the actio negatoria, for which it is only necessary to set out the first clause:
If it appears that the right to use and enjoy the parcel of land which is the subject of this action without the consent of Aulus Agerius is not Numerius Negidius’s etc.\textsuperscript{21}

For claiming and repelling a praedial servitude, such as a right of way or water, the wording was exactly the same, except that Lenel there excludes the clausula arbitaria, i.e. the condition which allows the defendant to be absolved if he complies with a decision by the judge for restitution.\textsuperscript{22} The wording for usufruct and for praedial servitudes differs from that for corporeal things and inheritances by the omission of the words ‘by the law of the Quirites’. These minor differences are not easy to explain, but they need not detain us.

The earlier procedure and pleading by the legis actio per sacramentum in rem is described by Gaius at 4.16:

‘In the case of pleadings against a thing, if the thing was movable or self-moving and could be brought to court, it was vindicated in court in this way. The vindicator held a staff. Then he took hold of the thing, say a slave, and said: ‘I affirm that this man is mine by the law of the Quirites according to his condition. As I have spoken, behold, I have laid my claim against you.’ And at the same time he placed his staff on the man. When each had vindicated, the praetor said: ‘Both parties release the man!’ They released him. The first vindicator then put this question to the other: ‘I demand to know on what ground you have vindicated.’ The other answered: ‘I did right when I laid my claim.’ To which the first vindicator responded: ‘Since you have vindicated unlawfully, I call you forth with a sacramentum of 500 asses.’ His adversary then spoke to the same effect: ‘And I you.’ If the thing in dispute was worth less than one thousand asses, they named a sacramentum of fifty asses. The next stage went as in proceedings in personam. Thereafter the praetor made his vindicial declaration in favour of one of them. That is, he put someone into interim possession and made him provide sureties to his opponent in respect of the lis et vindiciae, the subject-matter and its fruits. The praetor himself took further sureties from each party for the sacramentum, since that fell to the state. The use of a staff was in place of a spear, a symbol of lawful ownership dating from the time when the strongest case of having something in lawful ownership was capture from an opponent. For this reason a spear is still put up in trials before the centumviral court.’

It is unfortunate that in this description Gaius incorporates by reference a part of his treatment of the legis actio per sacramentum in personam, for which the surviving text is incomplete. It takes up at the appointment of a judge to try the issue. By virtue of a lex Pinaria that appointment took place 30 days after joinder of issue, but Gaius says it originally took place at once.\textsuperscript{23} The trial took place on the next day but one after the judge’s appointment.

For the sake of completeness one more set of words should be mentioned. There survived into the classical period a technique of raising the issue of ownership obliquely, a practice which goes back to a time when, for tactical reasons, claimants chose to call their opponents to a trial, not by sacramentum but by stipulation ( sponsione, not sacramento, provocare).\textsuperscript{24} The words of this are given by Gaius thus, at 4.93–4:

‘A pleading by sponsio goes like this: ‘If the slave which is the subject of this action is mine by the law of the Quirites, do you solemnly promise (spondes)
to give me 25 sestertes?' Thereafter we propound a formula with an intention which contends that the promised sum ought to be paid to us. With that formula we can only win if we show that the thing in question is ours. But the sum promised is not actually levied. For the promise is not penal but preliminary, made with the sole purpose of getting a decision on the thing.  

The thought will immediately come to mind that an issue so raised would give rise to problems in relation to execution, the judgment being formally for a trivial debt. But the surrounding discussion shows that the defendant must give sureties just as though the issue had been joined directly on the substantial question of entitlement to the thing.  

These pleadings provide the framework within which the Roman concept of ownership had to be worked out. In the formulary vindicatio which occupies the centre of our vision, the judge was given a conditional order to condemn, and in the ordinary case his condemnation would be simply for the value of the thing in money; the primary condition of the condemnation was successful demonstration of the plaintiff's meum esse ('It's mine'). On what facts would a judge condemn? It was the jurists' role to make the answer clear and detailed. On some not very common facts we know uncertainty prevailed even in classical times, as where the plaintiff vindicating a table could show that, though made by the defendant, it had been constructed from his, the plaintiff's, timber. Earlier judges must have had to cope with many more uncertainties.  

II THE CONTENT OF ROMAN OWNERSHIP  

In this part we are not concerned with the analytical properties of the concept of ownership but rather with the powers which ownership conferred. The question is approached negatively, by asking to what extent there were restrictions and inhibitions of the owner's freedom to do as he pleased. There are four sections:

(1) The scope of ownership. However unrestricted, an owner's powers will seem of little account if he may own only a narrow range of things. How much of the material world was susceptible of ownership under Roman law?
(2) The sanctity of ownership. Not much is conceded to owners if the law allows ownership to be easily confiscated or destroyed. How secure was a Roman owner in his rights?
(3) The autonomy of ownership. Owners can never be a law unto themselves, but there are degrees of interference in an owner's power to choose how to use and deal with his property. How did Roman law restrict an owner's autonomy?
(4) The demands of society. Different social systems make different demands on owners and go to different lengths to provide for collective action. What therefore was the general character of the restrictions on Roman owners and, in particular, how do they compare with those found in feudal and collectivist societies?

(1) The Scope of Ownership  

The desire for ownership is a fact of human nature. Honoré rightly began an influential article by observing:
'A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by meum and tuum no more than "what I (or you) presently hold" would live in a world that is not our world.'

None the less ownership can be restricted, or at least attempted to be restricted, and an owner’s powers can be cut, by reducing the range of ownable things. Communist systems recognize ownership by individuals but heavily restrict what may be owned. Thus in the USSR every owner has the right to possess, use, and dispose of property within the limits laid down by the law. Unsurprisingly, for private citizens those limits turn out to be extremely narrow. They consist in part in a reduction of the range of objects ownable. Capital, the means of production, can only be owned by the state or, on allocation by the state, by collective farms and trade unions. In the exclusive ownership of the state are land, minerals, water, forests, the basic means of production in industry, construction, and agriculture, as well as transport, communications, banks and so on. Personal ownership is restricted to what is obtained through income earned by labour and confined within a class of articles of everyday use, personal consumption, convenience, and subsidiary household husbandry. Ownership can also subsist in one dwelling house of closely controlled size, though not in the land, and funds which are savings from labour income. However, the list of privately ownable things is not defined only by reference to the nature of the thing itself but also by looking to its user. The object is to remove the means of production from private hands. Hence a car or garden implements are capable of personal ownership but, if they are used for profitable production, they are liable to be resumed into state ownership. Soviet law can thus be said to exemplify a system which restricts ownership by inter alia cutting down the number of material things which can be owned.

One crucial division in the Roman legal mind was between corporeal and incorporeal things, where corporeals were the material and tangible, and incorporeals were the concepts which we call ‘rights’. That distinction must be put aside at this stage, since the question here is simpler: how much of the material world was a Roman citizen allowed to reduce to private ownership? The class was wide. The most obvious difference from the modern non-communist world is one which makes the Roman class wider, namely slavery: a citizen could vindicate, and recover the money value of, another human being. Free people could not be owned but were subject to a different superiority, namely the patriarchal authority of the oldest living male descendant (patria potestas). Differentiation between ownership and this patriarchal power will be considered later. All animals could be owned, but those which belonged to species wild by nature were owned only while reduced to captivity. Ownership of land did not, for example, imply ownership of the deer ranging over the moor or of the fish in a river running through an estate. Wild animals, while free, belonged to nobody and fell into the ownership of the person who reduced them to captivity. An extension of ‘captivity’ was allowed in respect of animals which, though wild, were customarily kept so as to be free to come and go, as peacocks in a garden or doves in a dovecote. Ownership then persisted so long as the animals retained the habit of returning.

Among inanimate things, almost nothing was removed from the possibility of ownership. For technical, definitional reasons land outside Italy could not be vindicated as 'mine by the law of the Quirites' unless it had been specifically
endowed with the right to be treated as Italic, the ius Italicum. However, a man was protected in relation to such land in the same way as though he had been its owner, albeit with the use of different words. Hence from the standpoint of a socio-economic analysis nothing can be made of the fact that he was not dominus. In the empire provincial land was regarded as actually owned by the emperor or by the people, depending on whether the province was imperial or senatorial. Justinian finally abolished the distinction between Italic and non-Italic land, with the result that all land became technically and substantially capable of ownership.

Another technical, but also doubtful exclusion may have operated in early law. The view has been taken that the vindicatio in its early legis actio form could not be substantiated except in relation to things which were conveyable by mancipation, the ceremony 'by bronze and scale' which originated in a purchase for a price in still uncoined metal, necessarily weighed rather than counted out. Such things, the res mancipi, were listed by Gaius as Italic land, slaves, horses, mules, donkeys; and also rustic praedial servitudes. According to this theory all other things, the res nec mancipi, were originally subject to an 'ownership' which consisted essentially in the fact of lawful possession coupled with the possibility of recourse to the actio furti against thieves. This theory rests on intriguing but uncertain arguments about the early period. The balance of probability is, however, against its being correct. If one bears in mind the words of the vindicator, barely more than 'It's mine!', and also the weakness of early law in imposing definitions on difficult concepts, there is no obvious way in which a magistrate or judge could have been convinced, contrary to the natural meaning of the words in which issue was joined, that the claim was inappropriate for, say, a silver bowl or a store of grain. However, that is admittedly only a starting point, and complicated distortions are certainly not impossible. In the developed law it is beyond doubt that both categories of thing were equally susceptible of ownership, the difference between them being that res nec mancipi could be transferred to a new owner more easily, without the ceremony of mancipation.

From some material things no member of the public could be excluded, so that there was at the least a restriction on their owner's use, as there is nowadays when land is burdened with a public footpath. However, in relation to other things the right of public access and use was arranged by entirely excluding the thing from the possibility of private ownership. There were secondary consequences of this difference of technique, as for instance in relation to useful or desirable objects found by a member of the public in the course of exercising his right of access. Thus, the weaker technique was used in relation to the banks of rivers, allowing those using the river to moor and to load and unload cargo but not entitling them to take wood from trees growing there. On the other hand, the stronger technique—withdrawal of the thing from the possibility of private ownership—was used for the rivers themselves, all running water, the air, the sea, and the sea-shore. In Justinian's Institutes these things are described as common to all people (res communes). If you collected pebbles on the sea-shore they therefore became yours. When the weaker technique is used, what is withdrawn from the private domain is only the use (usus), by the stronger technique the thing itself. It is possible to say in the former case that what the citizenry has is a right less than ownership or is a fraction of ownership, or else
one can say that it has ownership of something less than the corporeal thing itself, i.e., they have the incorporeal thing called usus. Justinian’s language inclines to the second of these approaches which as we shall see was deeply ingrained in the Roman legal mind.42

So far we have seen that some things were excluded from private ownership because of what they were, wild animals while free, provincial land (though with only technical effect since the substance of ownership was recognized under different language), the air, the sea, the sea-shore, running water, rivers, and the use of river-banks. Other things which were by their nature capable of private ownership, such as land or statues or silver or gold, might none the less stand removed from private ownership in particular cases. This could happen for secular or for religious reasons. Thus, on the secular side, some things were vested in the respublica itself, that is, in the state. State property might be let out to private individuals but could not be said ever to belong to any individual: Quae publicae sunt nullius videntur in bonis esse; ipsius universitatis esse creduntur (those things which are public are held to be among the belongings of no one person but are understood to be the property of the collectivity itself).43

Just as the collectivity of sheep is a flock, so the collectivity to which Gaius here accords corporate personality is the whole body of citizens, the populus. Publius is what pertains to the populus.44 In the empire, functions which we think of as being performed by ‘the state’ were at first divided between the corporate populus and the princeps, whose legal status did not differ, save so far as he held republican offices and thus became an organ of the corporate populus, from that of an immensely wealthy private individual. Thus things owned by Caesar, including the slaves of his household who were his bureaucracy, did not need to be put into a special category, nor did the princeps need to be endowed with a special personality either as the state or as a corporation sole. But as the empire moved from principate to dominate, something completed in the late third century, this duality disappeared, and the emperor did become the personification of the state.

From the late republic, the state from time to time brought other public-law entities into being at the local level, colonies and municipalities. These universitats also held property. Also, after Christianization of the empire under Constantine, much wealth began to flow into its corporate ownership; but ecclesiastical ownership, though heavily regulated,45 did not imply removal of things from the regime of private ownership, albeit no individual natural person owned church property. The fact that land and movables could be in public hands is very different from saying that certain types of property were necessarily vested in the state. The picture would be incomplete without adding that the state did of course have a monopoly of the production of money, a necessarily exclusive right protected by the severest sanctions of the criminal law.46

There were also religious subtractions from the scope of ownership. In Christian times, churches and their contents and places of burial, things consecrated to God, were incapable of returning into private ownership. Christianization, however, merely adapted the pagan category of things subject only to divine law, res divini iuris. In legal analysis there was no need for a radically new classification. From earliest times an owner who used part of his land as a burial place thereby dedicated it to the gods below and removed it, as
res religiosa, from private ownership. Similarly land on which a temple was built with proper authority became sacred (res sacra) and thus incapable of private ownership even if the temple itself fell.\textsuperscript{47} Some things such as city walls and gates which might otherwise have been simply res publicae were put under divine protection and thus removed from human law. These were res sanctae.\textsuperscript{48}

We observed at the beginning of this part that the autonomy of ownership would be of little importance in a society in which the range of things ownable was much reduced. We have now seen that in Roman law that range was not cut down but was on the contrary as wide as can well be imagined. The broad truth was that apart from free people the entire material world was capable of private ownership. It is important, however, to end with an observation which though elementary is outside the reach of this paper to examine. The relative roles of the state and of individual property owners in the arrangements of a particular society cannot be assessed simply by measuring the range of things capable of private ownership. In an extreme case a narrow role for ownership will be signalled by a legal restriction of things ownable. But the balance can be changed, as all modern Western societies know, by political decisions which fall far short of legislating to narrow the scope of private ownership. Behind the purely legal question there is therefore a question of quantification which belongs to comparative economic history: how much material wealth was in fact vested in the state and its organs, and how much wealthier was the state than individual owners and combinations of individual owners? Collective activism supposes collective resources as well as collectivist ideology. The minting of money aside, the Roman state not only had no formal monopoly of any category of wealth but also never had, at any time, the resources for an active public sector. However, that bare statement leaves considerable room for discussion of what at different times the state was expected to achieve and what in practice it was able to achieve. Outside the military and administrative fields, it also should not be forgotten that the Church, as it grew stronger, became an agency for discharging many collective social functions for which the modern state has made itself responsible.

(2) The Sanctity of Ownership

We have just seen that the range of ownership was very wide. The next question is whether owners were secure in their rights. Insecurity can emanate from either of two sources. The legal system may be inefficient and thus for one reason or another unable to guarantee the rights which it ascribes to individuals. Or the law may itself lay down that individuals enjoy their rights at the will of the community as a whole or at the will of the sovereign as the personification of the community; in which case they may have to give them up when the good, or the convenience, of the community so requires. Factual insecurity may thus be contrasted with legal insecurity. We shall be concerned with the latter. An extreme example is the case of the prosperous slave. Under one master he may be managing a business, apparently well off and with money to spend. But the law offers him no security. He can be sold off to a new master with quite different ideas of his usefulness, or suddenly put to manual labour. He is alieni iuris in the strongest possible sense: his law is his master's will. The question now is whether, in relation to the community as a whole citizen owners were in substantially the same fragile positions. Could the state take their property as the need arose?
(a) Confiscation and compulsory purchase

Writing in the late eighteenth century Blackstone has a very remarkable passage on this subject in English law. It expresses an attitude which gives us a starting-point:

'So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do such without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good. . . . In this, and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price.'

There are aspects of this which it is easy to find ridiculous: the contrast between what the law forbids and what the legislature nevertheless frequently does; and the attempt, at the end, to minimize the element of compulsion and to assimilate a command to a negotiation. Nevertheless Blackstone's attitude, as opposed to the techniques which he uses to express it, is even now hard to fault. Unlike taxation, which is imposed generally, expropriation strikes selectively and evokes fears not only of insecurity but also of unfairness. It has all the more to be resisted and controlled because so manifestly within the capacity of the state.

It is impossible to reconstruct a full picture of the Roman procedure for compulsory acquisition. However, except that it cannot be shown that specific enabling legislation was invariably required, the law seems to have conformed closely to the spirit of Blackstone's statement. That is to say, though compulsory acquisition in the public interest was permitted, it could not take the form of confiscation but had to be done by purchase for the market value. The straightness of the Roman roads and aqueducts would itself be sufficient evidence of compulsion, but we do not know exactly how the mechanism worked. Frontinus evidently envisages a negotiation with the various owners and compulsory purchase from any who were 'difficult'. No doubt it was not sensible to be awkward, but Frontinus speaks in tones of deep respect for private property. Having referred to rules for clearing a space beside waterways, without compensation for the sterilization, he goes on to say that the old way of dealing with the difficult possessors was to buy the whole parcel of land then to mark off the necessary line and sell back, so that private right and public needs could coexist without any expropriation: pro toto pecuniam intulerunt et post determinata necessaria loca rursus eum agrum vendiderunt, ut in suis finibus proprium ius res publica privataque haberent.

Other evidence from the later republic, especially from the statutes which provided local constitutions, on the Roman model, for provincial municipalities,
indicate a compulsory procedure subject to restrictions going beyond merely the payment of compensation. Private persons are not to suffer any wrong (iniuria) through the public works. Buildings are not to be pulled down.54

There are many other indications that the payment of compensation was assumed to be obligatory. For the repair of aqueducts Frontinus reports a senatusconsult of 11 BC which provided both for access and for the procurement of materials:

‘Then, when those waterways, pipes, and arches, which Augustus Caesar has undertaken to the senate to repair at his own expense, need to be repaired, earth, clay, stones, brick, sand, wood and all other things necessary for that work shall be granted, severed, raised, and transported at a reasonable valuation (viri boni arbitratu aestimata) from such private lands as they may at the least distance without wrong to private persons (sine iniuria privatorum) be severed, raised and transported; and, for the transport of those materials and for the execution of those repairs, necessary access for persons and vehicles shall be made available and be granted over the lands of private persons but without wrong to them (sine iniuria eorum).55

It was the same senatusconsult which provided for a space to be kept clear on either side of an aqueduct. No compensation was provided for the loss of use. This need not indicate a cavalier attitude to private property rights. Even today there are incoherencies in our view of the line between what is and what is not compensatable. For example, we do not compensate owners whose land is zoned as green belt.56 Cicero tells a story of a man who tried to escape the consequences of a demolition order: the augurs found their view of the flight of birds obstructed by his house and ordered that it should be pulled down; he sold it, concealing the order, and the question was whether he was in breach of the obligation to observe good faith.57 This shows that the augurs had power to order demolition and, also, that they did not pay compensation—since the story would lose most of its point if the vendor were not trying to evade a major loss. But again this may not be evidence of an attitude which tolerated expropriation without payment. It is possible that the owner rashly built up into the augurs’ line of vision and therefore had only himself to blame. For the rest, the evidence is that the law required scrupulous regard for property rights, at least in the sense of insisting on payment of compensation for anything taken.58 This conclusion is in line not only with Roman respect for the rule of law generally but also with there being made available even to provincials a procedure through which to complain of governmental extortion.59

This short account leaves out of consideration the case of expropriation—whether by fines or forfeitures—for wrongdoing. That kind of punishment was used at Rome as it is today; but, so long as wrongdoing is so defined that it can be avoided, expropriation cannot be said to threaten the security of property rights any more than punishment in life and limb infringes the right to bodily security. Taxation is also excluded as not threatening proprietary security, not because it is inevitable but, rather the reverse, because it is universal and regular.

Also excluded as part of the factual reality behind the law, but not entirely to be forgotten, are the proprietary disasters at times of political upheaval or tyranny, as for instance in the Sullan proscriptions and their aftermath60 or
Nero's trumped up charges, said to be motivated by the Emperor's need to replenish his purse from the estates of the condemned, a perverted recognition of the rule of law.\textsuperscript{61}

\textbf{(b) Remedial convenience}

Under the formulatory system the rule was condemnatio pecuniaria: if the judge reached the conclusion that the defendant should be condemned, he condemned always in money. Thus in the vindicatio the plaintiff based himself on a right in rem, 'The thing is mine!' but what he would actually get if he won was money, the value of the thing. This is one of the few contexts in which it is possible to see a clear distinction between 'right' and 'remedy'; the relationship between the plaintiff and the thing is a right and not a remedy because the courts will not give effect to it as such but only obliquely. The award of the value is a remedy because it is something that the court actually does for a winning plaintiff. It is, however, not possible to say that the award is a remedy and not a right, because a remedy to which a plaintiff is entitled is also a right, albeit a remedial right. Between the right on which the plaintiff bases himself and the remedial right to the value of the thing comes the mechanism of the clausula arbitatoria: the judge is given a discretion to allow the defeated defendant to surrender the thing. Surrender will lead to absolution, despite defeat. And the inducement to surrender is that the valuation will be made on the basis of an oath taken by the plaintiff himself and likely therefore to favour his own interest.\textsuperscript{62}

This rule was ultimately dropped. Under the cognitio procedure which followed the formulatory procedure the judge could order specific performance, including the specific delivery up of a thing vindicated.\textsuperscript{63} The reason why a universal condemnatio pecuniaria originally seemed attractive is nowhere stated, but it is easy to see it as simplifying and unifying the law relating to execution of judgment.\textsuperscript{64}

The consequence of the remedial rule was that the plaintiff could not be sure of obtaining possession even of a unique or sentimentally valuable item, as for instance a slave who was also his son. Whatever the advantages which made condemnatio pecuniaria attractive they were evidently thought to outweigh the disadvantages of this expropriation.\textsuperscript{65} The assumption must have been that in most cases the defendant would in fact yield up the thing and be absolved.

\textbf{(c) The security of transactions}

All legal systems experience a tension between the sanctity of ownership and the security of transactions. One who gives value for a thing in the belief that he is acquiring title to it will inevitably want to say, if something goes wrong and he turns out to have dealt with someone who had no title to confer, that he should none the less be confirmed as owner and that other claimants should fight out the issue of compensation amongst themselves. Equally certainly the previous owner will want to say that his ownership must be allowed to survive the interruption of his possession and that his title should be confirmed, leaving the purchaser and the non-owning vendor to dispute the issue of compensation. Thus, if Tom buys Ben's car from George, Tom will appeal to the security of transactions to constitute him owner of the car, leaving Ben and George to dispute compensation; while Ben will appeal to the sanctity of ownership to preserve his own title and drive Tom to fight the question of compensation with
George. Tom's claim, based on the security of transactions, requires Ben to be expropriated. The concessions which a system makes to the security of transactions are thus seen in the circumstances, if any, in which the law allows that expropriation to happen.

Roman law resolved this tension by giving absolute priority to the owner, but only for a short time after the transaction. After the expiry of that short time it extinguished the old owner's right in the thing and created a new owner. If that was all there was to it, the law would have been remarkably favourable to the security of transactions. However, a large class of cases was taken out of this regime, and in them the sanctity of ownership prevailed without limit of time. This compromise was effected by the rules of usucapio, acquisitive prescription.66

The periods of possession for usucapio were one year for movables and two years forItalic land.67 Sanctity of ownership prevailed absolutely for those short periods. Thereafter the old owner's vindicatio would be defeated against someone who had acquired in good faith through a transaction such as sale, gift, or legacy, calculated to transfer ownership. Hire by contrast would not count, since it is not in the nature of hire to transfer ownership. Thus far ownership appears vulnerable, being displaced after a short period by a new title in one who acquired honestly (bona fide) and through an ownership-conferring event (iusta causa). However, the next requirement alters this balance: usucapio could not create a title to a thing which had been stolen or taken by force. Land could not be stolen but could be taken by force. In relation to movables this last requirement meant that the old owner's title would only be displaced when the explanation of his being out of possession lay in some honest mistake, since without dishonesty theft could not be committed.68 Before the expiry of the periods of usucapio, and perpetually in the case of things stolen or taken by force, the disappointed acquirer would have to seek compensation from the alienor, either by actio auctoritatis if the alienation had been attempted by mancipatio or by action on a warranty against eviction.

In Justinian's law names and periods were different. Usucapio of movables took three years instead of one; and of land, as longi temporis praescriptio, ten years between parties in the same district and twenty years otherwise. Justinian also conceded that an acquirer in good faith should obtain a good title after thirty years even where the requirements of iusta causa and non-furtivity were not satisfied.69

(d) Treasure trove

One can become owner of a thing which has been abandoned merely by taking possession of it. This does not infringe the sanctity of ownership because the owner divests himself and is not expropriated. In the case of treasure trove it is different. The person who hides treasure does exactly the opposite of dereliction: he intends to preserve the hoard for himself. Then he fails to recover it, taken off perhaps by the very danger which he hoped to guard against. The treasure is not ownerless, except de facto: it is not knowable who the owner was or his successors are. Hence Hadrian's rules, giving the finder half and the owner of the land half, to expropriate some unknown owner.70 However, the loss is unfelt, a merely technical invasion of the sanctity of ownership.
(3) The Autonomy of Ownership

Here the question is whether and to what extent the law placed restrictions on an owner's freedom to do as he pleased with the thing owned. For convenience the discussion is divided between three distinct freedoms: (a) freedom of user; (b) freedom from feudal burdens; (c) freedom of alienation.

(a) Freedom of user

There were many restrictions, somewhat miscellaneous in character. The attempt to present them in an intelligible order raises rather fundamental questions about the assumptions behind familiar legal categories. Most obvious is the question why the matter which the common law calls 'nuisance' and classifies as 'tort' does not appear in the Roman law of delict. Examiners never dare to ask whether Roman law had a law of nuisance. This and similar questions cannot delay us here. The order of presentation contains puzzles which will have to be left largely undiscussed.

(i) Restrictions implicit in the law of wrongs

The law of delict and quasi-delict, and also the criminal law, are aimed primarily at a man's conduct of his person rather than of his property. For example, rules against killing, wounding, or doing damage, imply restrictions on the use of clubs, spears, guns, vehicles and so on. Thus the Roman delict of loss wrongfully caused (damnum iniuria datum) supposes a duty to abstain from all conduct, including use of property, which through malice or unintentional fault (dolus or culpa) might do or bring about damage and hence loss. A farmer for instance may not burn off stubble after the harvest just anyhow but must take all normal precautions. Otherwise, if the fire escapes, he will be liable for the loss caused to his neighbour. Similarly a rider on his horse, or a haulier with his cart. Again, in quasi-delict an occupier of a house which overlooks a street must answer for things poured or thrown down and for things placed or suspended on his eaves and likely to fall. Then again the institution of noxal liability makes the owner answerable for his slaves and animals, thus limiting their activities. Finally, there is a difficult question whether the delict of contempt (iniuria) has any role in limiting the use of property. It is not clear whether it serves to prevent an owner from abusing his rights; that is to say, from exercising them simply to hurt another, as where a shopkeeper refuses to serve a given customer simply to wound him or a rich man competes with a poor trader simply to ruin him, or one owner sinks a well for no other purpose than to interrupt the flow of water to his neighbour.

(ii) Restrictions on land-user outside the law of wrongs

The most obvious source of restrictions is the creation of servitudes, as for instance rights of way and water. But we are concerned with restrictions imposed by law rather than with those granted by owners themselves. We have already seen one example of legislative intervention to restrict user, namely to keep a clear space on either side of aqueducts. As early as the Twelve Tables legislation prevented the demolition of houses which were in sound condition. In later law building regulations multiplied, controlling height and intervening space and so on.
Legislative interventions can easily be shrugged off as somehow irrelevant to the spirit of the system. This is an intellectual trick which is becoming more difficult now that so much of the law is legislative. Nevertheless the non-statutory prohibitions which classical law placed on landowners are doubly interesting because they show that the jurists were not gripped by any dogma to the effect that ownership was illimitable but, on the contrary, took it for granted that sensible moderations of absolute freedom were indispensable. Rodger has shown that, without a doubt, the general law required an owner not to build in such a way as to deprive his neighbour of light. That is, even without a servitude a man was entitled to a reasonable quantum of light. If he wanted more than the law's allowance he would have to buy a servitude preventing his neighbour from building (altius non tollendi) and, correspondingly, the neighbour, if he wanted to build so as to cut into the reasonable quantum of light, would have to bargain for a servitude allowing him to build so as to obstruct the light (altius tollendi). The existence of the automatically protected allowance of light provides the explanation for the existence of the two opposed servitudes, only one of which could be explained in conditions of absolute freedom. Similar regimes are shown to have existed in respect of water running off—a lower owner had to accept a reasonable run-off—and, with rather less certainty, for prospectus, i.e. for views which were an essential part of the amenity of a given villa, as for instance where a villa had been built to take advantage of a view of the sea or of the mountains.

The two main ways in which these restrictions were brought to bear were, first, in the actions usually thought of as aimed solely at vindicating or denying the relevant servitude; and, secondly, through the procedure for threatened loss (damnunm infectum). The first method turns on the fact that, to take one example, in vindicating a servitude against building higher (altius non tollendi) a plaintiff did not specifically name the servitude but said, more generally, that the defendant had no right to raise his building without his, the plaintiff's, consent (se paret Numerio Negidio ius non esse aedes suas tollere invito Aulo Agerio, quanti, etc). This proposition could be substantiated, so the jurists held, not only by showing that the defendant's land was burdened by a servitude against building up but also, even in the absence of a servitude, by showing that building up would infringe the plaintiff's reasonable allowance.

The other method was to summon the neighbour who was beginning to build before the praetor and to exact from him the compulsory stipulation against threatened loss, the cautio damnunm infecti. By the terms of that praetorian stipulation the promisor undertook to pay the money value of any loss which supervened within a given time limit from a fault in the building, land or work in question through something falling, being cut, dug or built up. The jurists then held that an infringement of the reasonable allowance of light did amount to loss within the meaning of the stipulation.

These examples do not exhaust the list of interpretative restrictions recognized in classical law. For example there was a similar regime to that which has just been described in relation to noxious smoke: you had to tolerate the immission of some smoke, but you could resist unreasonable quantities. You had to permit a neighbour to enter to collect fruit fallen from his tree on to your land. You had to allow a neighbour to have access across your land to a road if he had no other way and you had to give access to a tomb lawfully on your land.
(iii) Animate property: cruelty

Not much is to be expected under this head. It is not to be forgotten that infant children could be lawfully exposed to die,91 and that slavery, though it ran partly on the hope of manumission, involved regular flogging and other physical mistreatment, and also torture.92 Against this background laws against cruelty to animals would have been hypocritical, and there were none. However, in the case of slaves a line was drawn, albeit weakly and without precision. Gaius is here guilty of naïve optimism when he says that neither Roman citizens nor any people under Roman rule can indulge in savage conduct towards their slaves 'immoderately or without cause (supra modum et sine causa).'93 The difficulty is more factual than legal. Even if a certain kind of cruelty was technically illegal, it must always have been doubtful whether anyone would do anything about it, and a slave who tried to draw attention to his plight or that of his fellows must have run enormous risks of victimization.

Against this background it is nevertheless true that, though there was no law on the matter in the Republic, imperial enactments made some attempt to curb severe and capricious punishments and some other malpractices. Magisterial approval was required before slaves could be made to fight wild beasts.94 Hadrian required similar authority to be obtained before a slave was put to death by any means though it seems that this condition was later not insisted on, since Constantine exonerates from homicide a master who killed in the course of a punishment not in itself immoderate.95 There is no doubt that where the limits, whatever they were at any one time, were not observed, a master who killed a slave would be liable for homicide.96 Sick slaves abandoned to save the expense of looking after them became free, if they survived.97 Attempts were made to put a limit on sexual abuse, especially prostitution of ancillae and castration. Numerous interventions and severe penalties failed, however, to eliminate the practice of castration or the demand for castrati.98

A slave had no access to the courts. Others would have to accuse savage masters. But in the time of Gaius it had been established that a slave might seek sanctuary at a temple or a statue of the emperor and then, if his or her complaints of immoderate cruelty or sexual abuse were established, he or she would be sold into a new ownership.99 Later, sanctuary could be sought at a Christian church.100

(iv) Waste

Irresponsible extravagance and wasteful neglect are obnoxious from two points of view, namely from the purely private perspective of the family which sees its wealth being frittered away and from that of the community as a whole, which may condemn on merely economic grounds or also on grounds of public morality. Nevertheless in a highly individualistic society one would not expect either the public or the familial anxiety on this score to be armed with legal sanctions. Modern Anglo-American law allows the same to be extravagant.101 Surprisingly in view of its individualistic reputation Roman law was not entirely indifferent to this problem. The praetor, from the time of the Twelve Tables, had jurisdiction to interdict a prodigal from wasting his inheritance and to appoint a curator.102 Nor did this jurisdiction die away. It was on the contrary somewhat expanded, to include all property.103 Sumptuary laws were passed from time to time to inhibit luxury.104 And in later law there is evidence that
neglect of husbandry could lead to loss of ownership in favour of those who could farm better.\textsuperscript{105}

(v) Intruders and intermeddlers

One mark of extreme autonomy is a right to ignore the safety of intruders on one's property; and another is the right to treat even well-meaning intermeddlers as trespassers. If the law gives intermeddlers a claim for the expenses of objectively useful interventions and allows intruders to claim for foreseeable injury and damage, it inclines rather towards an ideal of interdependence. English law has tended towards the extremely individualistic position, though it has now moderated its position at least in relation to intruders.\textsuperscript{106} It is still formally committed; in relation to intermeddlers, to the proposition that liabilities are not to be imposed upon a man behind his back.\textsuperscript{107} But the position is somewhat more fluid than it appears at first sight.\textsuperscript{108} In Roman law uninvited intervention in the interest of another was encouraged,\textsuperscript{109} and the intermeddler (negotiorum gestor) had a claim for his expenses.\textsuperscript{110} As for the intruders, it is rather doubtful that Roman law ever embraced the proposition that a man could not act wrongly (non iure) on his own land, i.e. that he owed no duty to persons entering his land or affected by acts done on his land; and, certainly, if it did start from that position, it early abandoned it, making fault based on foreseeability the only consideration.\textsuperscript{111} Hence in neither of these respects did Roman law defer to an owner's will as though he were in relation to his own property an absolute monarch.

(b) Freedom from feudal burdens

A defining characteristic of feudalism is that land is held by dependent tenure.\textsuperscript{112} This means that land is held of a superior on terms that involve the performance of services and the render periodically of valuable incidents. In true feudalism the services are actually demanded, while in debased or 'fiscal' feudalism they will have been commuted for money payments, themselves rendered valueless by inflation. The tenurial structure then becomes merely an anachronism kept in being to support the demand for such valuable incidents as have retained their value, usually because they have escaped commutation to a fixed sum.\textsuperscript{113} The important characteristic of the right to claim these feudal duties is that it exists in rem, in the land itself: a tenant enters to find himself bound qua tenant, because the land itself is conceived to owe the services and incidents. A comparison can be made with the position of a modern purchaser who enters land already burdened with a right of way, but there is the crucial difference that the right of way merely restricts his user while feudal impositions mostly required positive action. Typically the feudal lord would be entitled to demand so many days' military or personal or agricultural service.

Roman ownership could be burdened with duties to abstain from conduct, as for instance not to build so as to obstruct light or not to obstruct a view, or to permit the dominant owner to do something, as to pass through, to draw water, to dig for lime, and so on. But, though praedial servitudes were not limited in number, they had to conform to certain general characteristics, and one of these was that they could not consist in faciendo. That is, an agreement that one owner would regularly perform some service for another, as for example
ploughing, would operate as a contract between them but could not run with the land; it would not be given effect in rem. Thus Pomponius says:

'It is not in the nature of servitude to make someone do something as for instance to clear overgrown land, or to provide a more pleasant view, or for example of this, that he should paint his own property. On the contrary, their nature is to [make] allow something to be done or to abstain from doing something.'

(c) Freedom of alienation

A preliminary question is whether alienability is a necessary incident of ownership. This question can easily be made more difficult by verbal confusions. First, we can eliminate one source of trouble by establishing that alienability has nothing to do with the distinction between rights in rem and rights in personam. It is possible to have inalienable rights in rem and alienable rights in personam. The difference between in rem and in personam depends on the behaviour of the liability, not the benefit: a right in rem is one whose exigibility is defined by reference to the existence and location of a specific thing, while a right in personam is one whose exigibility is defined by the existence and location of a specific person. 'In' here means 'against', and the distinction turns on the different 'against-ness'. This then allows us to say two further things. The word 'property', as used to denote all rights in rem and to contradistinguish obligations (all rights in personam), does not connote alienability. This follows from the proposition that a right in rem can be inalienable. Next, the word 'property', as used to denote all wealth generally, does not connote alienability. This follows from the propositions that 'all wealth' includes both rights in rem and rights in personam and that rights of both kinds can be inalienable. Hence we have cleared the ground through three assertions which are certainly true: alienability is not a necessary quality of rights in rem, nor of 'property' when used to denote the class of all rights in rem, nor of 'property' when used to denote the class of all valuable rights.

Logic allows us to add one further proposition. Alienability is not an essential characteristic of ownership at least where the object of ownership is a right. This follows because a right can be inalienable, as for example usufruct, the ius utendi fruendi, and can be vindicated as 'Aulus Agerius's'. We have seen the formula. It is thus possible for ownership to be inalienable in respect of an incorporeal thing or which may be a more accurate, or certainly more helpful, way of putting it, there can be ownership of an inalienable incorporeal thing, an inalienable ius. We therefore arrive at the crucial question, whether it is possible to own inalienably a corporeal thing. Very simply, can I say 'I own this horse' if I may not alienate the horse? The answer is negative. For if the case is that despite an attempted alienation by myself, my heir or some other entitled person will be able to vindicate the thing from my intended alienee, I must not say 'I own' but rather 'We own' meaning by 'We' myself together with the other entitled persons, typically my descendants. If I do insist on 'I own', I must change the object, not 'I own this land' but 'I own a limited interest (a life estate, a usufruct, an undivided share) in this land'. The statement 'I own this corporeal thing' entails a power to alienate the thing. On the other hand, incorporeal things, which are creatures of the law itself, can be definitionally temporary, or definitionally inalienable, or both. Hence it is not nonsense to speak of
ownership of a usufruct, a right definitionally temporary and inalienable. If the law declared sheep inalienable, the conclusion would have to be that you could not own sheep but only 'sheepright': 'sheepright' would be definitionally inalienable, whereas sheep are not.

From this logical position it is difficult to contemplate the question whether Roman owners were restricted in their power of alienation, because we appear to be committed to the proposition that an owner who cannot alienate is simply not an owner. There were very few restrictions on the power of alienation in Roman law. It is an important question whether, few as they were, they contradict the proposition which has just been stated.

First, there are the cases of incapacity. The very young, the mentally ill, the irresponsibly extravagant—and also, though increasingly this was a mere formality, easily evaded, even adult women—were deprived of their power to alienate and put under guardians. However, here the inability of these owners to alienate does not arise from their relationship with the things in question but from their own personal condition. Moreover its effect is not to render the things inalienable but only to require the co-operation in an alienation of another independent adult in order to make good the owner's lack of judgment.

Next, there were rights which were definitionally inalienable. We have already said why this type of inalienability is not a problem, instancing usufruct. Praedial servitudes were also inalienable in gross. They were iura praediorum, rights of landed estates, and their benefit passed when the praedium was alienated. But they could not be separately dealt in. This too is a definitional restriction. Rights in personam were also supposedly inalienable, but cession of actions achieved virtually the same results as assignment of the rights themselves. The 'assignee' would simply be mandated to conduct the action in his own behalf, that is without being accountable to his principal.

There were also some specialized restrictions invalidating, or penalizing, certain alienations but leaving the general power intact in other respects. These restrictions are somewhat miscellaneous, aimed at different policy objectives. Manumission was a specialized form of alienation, in which the community as a whole had a considerable interest since it involved the movement of people from private, familial responsibility into the citizen body, possibly to do no more than swell the ranks of the urban poor. Not surprisingly, legislation restricted the freedom of manumission especially by will, a mode which allowed the owner to be generous at the community's expense without personal sacrifice. Another example of a specialized intervention was the Senate's attempt to suppress speculative demolition. Under Claudius buyers who bought with a view to making a profit by demolishing existing buildings exposed themselves to a penalty of double the price paid, and the contract of sale and purchase was rendered unenforceable. Another example, long-standing, dressed up as raising love above the material plane but more likely a technique of preventing the property of one agnatic family from flowing into another across a marriage without manus, was the ban on gifts between husband and wife. Here the technique was not penalty but nullity: no property passed; the donor, or his or her successor, could simply vindicate the thing. In different ways these three examples show the law cutting into the right of an owner to alienate, but, despite the specific subtractions, the power of alienation remains substantially intact.
This type of selective inhibition does not damage the logic of the proposition that ownership entails a right to alienate.

Of essentially the same kind were the various restrictions which were placed on the freedom of testation, that is, on alienation by will. Three policy objectives engendered specific inhibitions. First, the need for what is now called reasonable family provision. The earliest protection consisted only in the rule that a paterfamilias must expressly disinherit his intestate heirs, his will being void if it instituted others without that difficult public act of exheredation. Behind this and developing from a presumption of insanity there evolved a mechanism by which an irresponsible will could be upset by those who ought to have been provided for, the querela inofficiosi testamenti. Secondly, the need to make the position of the heir tolerable led to measures to ensure that the testator could not oblige him to administer an estate which would be entirely consumed in legacies. The lex Falcidia of 40 BC abated all legacies pro rata so as to ensure that the heir had at least one-quarter of the net estate. Thirdly, the interest which a community always has in the alienability of land, or more accurately in the possibility of realizing the capital value of land and thus avoiding the emergence of a caste of impoverished landowners, led to rules against the dynastic urge. The owner who wanted to keep land in his family for ever was not free to do so. The picture is complex, and the law less coherent than that which developed in England around the rule against perpetuities. Attempts to tie up land were at first impeded by the rule which avoided gifts to incertae personae, persons not in existence at the date of the death. But that rule was escaped by fideicommissa, trust-devices which began to be given effect in the early Principate. Hadrian reimposed the rule on these trusts but testators made other attempts to achieve their object. Justinian's later legislation allowed a perpetuity to subsist for four generations.

All the examples given so far are compatible with the proposition that an owner is not an owner unless he is free to alienate. The cases of incapacity are the most difficult. All the others are merely selective inhibitions, restraining alienation of particular types, to particular people, or for particular purposes. The final example is much more of a problem. It concerns land given to a husband as a dowry. Of this Gaius says at 2.62–3:

'It sometimes happens that a person who is owner lacks the power to alienate the thing and that a person who is not owner can alienate. For a husband is prohibited by the lex Julia from alienating dotal land without the woman's consent, even although it is his own, having become his by mancipation as a dowry, or by in iure cesso or by usucapio. There is a question whether this law applies only to land in Italy or also to land in the provinces.'

Gaius obviously regards this bar as quite remarkable. When he turns to cases where a non-owner can alienate he is quick to snatch at an explanation in terms of the owner's consent, but here no such escape is possible. The owner is here barred from alienating without the consent of another person, a non-owner. It seems that the prohibition is not merely personal. That is, the regime contemplated by the lex is not that the conveyance will be valid but will trigger a penalty payable to the wife. On the contrary an attempted conveyance is seemingly void, with the husband retaining the vindicatio. Two types of problem emerge. From a practical point of view this nullity has to be qualified
because the alicence must be made safe in all events except that in which the wife has a claim to the return of her dowry, with the consequence that 'absolute nullity' is not an appropriate description of the consequences of the statutory prohibition. Secondly, and of more immediate relevance here, these are the logical difficulties of allowing one person to say meum esse (here the husband) while another person (here the wife) controls the power of alienation, and does so, not on behalf of the other and to make good the other's incapacity, but rather to defend a positive interest iminal to that of the supposed owner. The reality of this difficulty is evidenced by the fact that by Justinian's time the originally clear analysis, under which the husband indubitably owned the dowry but came in certain events under a personal obligation to reconvey, had given way to a confusion in which the wife is both said to have a personal claim against the husband and, without any indication of a cession by the husband, is conceded the right to vindicate.

(4) The Demands of Society

The acquisition and enjoyment of wealth is a social phenomenon, which means at the simplest that it goes on, not in isolation, but in a context in which a plurality of people with competing interests, have to live in physical proximity. The very language of ownership implies the presence of others, albeit others who are to be excluded. It is observable that at different times and places different arrangements are made for locating the selfish drive for wealth and material security in the context of society as a whole. For the characterization of those arrangements, two questions are crucial. First, does the law compel people to form groups for the purpose of holding wealth? Then, whether the entitled entities be individuals or groups (but supposing there to be more than one such entity), what control does the entire community exercise over these "owners"?

Compulsion to the formation of groups is most easily to be recognized in the concentration of ownership in some persons, with corresponding proprietary incapacity in others, who must therefore look for their material welfare to those who do have capacity. In an extreme case those who cannot be owners will depend entirely on the will of the owners, subject only to the latters' voluntary acceptance of customary regularities, as with English villeins before copyhold tenure was protected in the royal courts. In a less extreme case the non-owners will be protected in rights of use and enjoyment; that is they will be allowed to own incorporeal rights but not corporeal things. This is technically the position of all free feudal tenants below the apex of the feudal pyramid. In either the extreme or non-extreme form, the proprietary incapacity may admit of exemptions, as for instance of corporeal movables. As we have seen, communist society, subject to exemptions, compels the formation of a single group by concentrating proprietary capacity in the state itself. Roman law also compelled the formation of groups by concentrating rights in the head of the family and incapacitating all others. Hence the proprietary group in Roman society was the household. Exemptions developed for sons—the peculium castrense and quasi-castrense—but even in the Principate steps could still be taken to curb de facto emancipation from patriarchal control: the senatusconsultum Macedonianum destroyed the credit of filiusfamilias by making void all loans of money to him, access to money being the path to
liberation.¹³⁵ This household-collectivism can be strongly opposed to the state-collectivism of communist society, but the contrast cannot usefully be expressed through the word ‘absolute’. Of course, the fact of household-collectivism means that there is room for the traditionally perceived individualism of Roman ownership only in relation to the paterfamilias, the apex of the household unit.

Nothing is said here of legal facilities for voluntary grouping. In modern western society the easy availability of incorporation has had the consequence de facto that most people depend for their material welfare on property owning entities—companies, colleges, municipalities—as effectively as ever did sons on Roman fathers; and an economic analysis, as opposed to a legal analysis, can make the company man’s house and car no more than his peculium. Roman law did not recognize commercial corporation and Roman government was wary of all associations.¹³⁶ Roman partnerships were recognized only as regulating relationships between the individual partners.¹³⁷ That is, from the point of view of an outsider, his dealing was simply with an individual, not with a partnership. The absence of commercial companies carries with it the absence of a type of asset essential to the modern Western economy, namely shares in companies.

The second question was about the control exercised over owners by the state. The nineteenth-century tendency to exaggerate the independence of the Roman owner has been recognized now for some time.¹³⁸ Already Jhering stressed the element of interdependence.¹³⁹ Recently Mayer-Maly has examined the error of contrasting an autonomous Roman ownership with a socially limited Germanic conception.¹⁴⁰ 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.¹⁴¹ 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. It cannot for example explain Blackstone’s position.¹⁴² 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.¹⁴³

Most of the restrictions in the content of Roman ownership which we have reviewed can indeed be explained on Mill’s principle that no liberty can be enjoyed unless liberty is restricted to prevent harm to others—and only to prevent harm to others.¹⁴⁴ Such restrictions are compatible with individualism as being for the benefit of individual owners as opposed to being burdens on owners for the benefit of the community as a whole.¹⁴⁵ However, the line between the two is imprecise, and no theory can be elicited from the texts that ‘harm to others’ was the only justification for restricting owners. If there were such a theory of public morality, the word ‘absolute’ might be taken as appropriate to denote the quality of ownership protected by it. The truth, however, seems to be that the proviso for restrictions by the general law which definitions of ownership derived from Roman law always contain—making ownership freedom to use etc ‘save as is by law prohibited’¹⁴⁶—was operated by the Romans, so far as they thought of it at all, entirely pragmatically. No theoretical obstacle can be discerned which would have prevented the Roman state from embarking on collectivist schemes of the kind which, in derogation of owners’ powers, are familiar endeavours of the modern ‘activist state’,¹⁴⁷ as for example schemes for environmental, zoological, or historical conservation, for
town and country planning, public health, or planned agricultural production. It is anachronistic, and a trifle absurd, to carry back projects of this kind into the Roman world, which lacked the resources to contemplate them. But it is not unimportant to recognize that they were not excluded by any rule of law, or theory of constitutional morality, about the actual or natural content of private ownership. Roman law is of course built on certain fundamental assumptions. Private property is one of them. And respect for regularity and the rule of law is another. The combination of the two assures owners of formal justice but creates no substantial barrier against the erosion of their autonomy. Only by adding a further assumption to the effect that the law does not change, is it possible to entrench the freedoms which a Roman owner actually enjoyed. But that assumption, though perhaps part of the medieval outlook, is utterly alien to us; nor does it appear to have been a premise of the Roman legal mind.

III THE CONCEPT OF ROMAN OWNERSHIP

We turn now to the more abstract properties of the concept. Here the adjective ‘absolute’ is better justified. The absoluteness of the concept is considered under three heads: (1) differentiation; (2) singularity; (3) exclusivity. Thereafter a final section—(4) ius honorarium—takes account of the consequences of praetorian intervention.

(1) Differentiation

‘Absolute’ implies that ownership was perfectly differentiated from other relations of superiority, as indeed was, or at least became, the case. The starting point was the ‘It’s mine!’ of the vindicatio. Meum esse is the genus within which dominium was differentiated.

The possessive ‘my’ either does or does not connote superiority and control. ‘My father’, ‘my commander’ and ‘my country’ do not. No more ‘my illness’. ‘My son’ does, but is doubtful in a way that ‘my child’ is not, because a son may be a grown man, and in one society an adult son is automatically emancipated from superiority and control. ‘My wife’, nowadays, implies neither superiority nor control. In Roman society, ‘my wife’, ‘my son’ and ‘my child’ did imply superiority and were not at first clearly differentiated from ‘my slave’, ‘my house’ and ‘my horse’. The old vindicatio per sacramentum is unlikely to have drawn any clear line. At the same time it is inconceivable that a paterfamilias in the early days had no sense of a different relationship between himself and his son (patria potestas, paternal authority), himself and his wife (manus, matrimonial authority) and himself and his slaves, lands, cattle and so on (which may originally have been mancipium). The question is, how was the differentiation of ownership sharpened up? There are really two questions: what was the principle of the differentiation, and when did it first find clear expression?

A principle of differentiation might have been sought in the content of the particular superiority which came to be called ownership. Thus it might have been proposed that the special feature of the meum esse with regard to slaves and horses and silver cups was that it was timed to end only with the extinction of the thing itself, to the extent that, albeit in another ego, it would subsist even after the first speaker’s death; whereas manus and potestas were timed to subsist not for the existence of the object but of the subject: my paternal power or
matrimonial power cannot outlast me. Other content-related principles might equally have been invoked, either independently or in conjunction one with another, for instance alienability and the unspecific or residual scope of user.

However, this kind of thinking is not found. Just as Aristotle says that people become masters and slaves because of who they are, not because of their abilities,\textsuperscript{151} so with Roman ownership it was differentiated simply by subject and object, not by content. Said by a Roman citizen 'My slave' means ownership, because a slave is the kind of thing in respect of which, if a citizen is talking, meum esse means dominium. The differentiation of ownership from other superiorities thus takes us back to the classification of things.\textsuperscript{152} If the thing in view is extra-patrimonial, the relationship is not ownership. Thus meum esse of a free person, or of one's own body,\textsuperscript{153} was not ownership.

The objection can immediately be made that content-related differentiation must have been necessary in order to distinguish ownership from real rights less than ownership. This is something to which we will return.\textsuperscript{154} However, we have already seen that the form of Roman pleadings did not present the problem as a matter of distinguishing dominium and lesser relationships but as a matter of identifying things of which meum esse could be said. This means that the approach to the differentiation of dominium through a list of things ownable is historically valid. That is, the pleadings will have presented to the jurists a variety of things of which meum esse could be alleged, some of them incorporeal (e.g. a usufruct, ius utendi fruendi). The jurists' task was to say of which things, even incorporeals, meum esse meant ownership as opposed to paternal authority or some other superiority. The form of the pleadings shows that differentiation by object is right, while differentiation by content would be alien.

The mechanism which triggered the differentiation is difficult to reconstruct. We have already discussed the nature of the formulary condemnatio, obliging the judge to a money judgment.\textsuperscript{155} This was a feature absent from the earlier procedure. Hence, when the formula displaced the legis actio, there would be an insistent question: which things could be properly valued in money in such a way as to leave the thing itself, if the defendant preferred to pay rather than surrender, in the defendant's hands free of the plaintiff's claim? The second part is as important as the first. It is not just a question of commerce—as for example very recently the question has been raised in the United Kingdom, and answered negatively, whether a woman may trade in her own reproductive capacity\textsuperscript{156}—but rather whether the legal system can properly compel the plaintiff to a substitutionary remedy.

We do not know quite when the language of dominium began to be used by lawyers to mark this differentiation of the specifically ownership-superiority. Dominus appears in the lex agraria of 111 BC, and dominium is used in this sense by Alfenus Varus at the end of the Republic.\textsuperscript{157} This timing is consistent with a sharpening of categories brought on by the proliferation of formulary pleadings.\textsuperscript{158}

(2) \textit{Singularity}

In the ius civile ownership was the single relationship between a citizen and a patrimonial thing. Common lawyers prefer to say that a man owns his car but 'has'—this is clearly evasive—a lease of an office, a fee simple in the land on which his house is built and right of way over his neighbour's farm. A Roman
lawyer preferred to say that a man owned his horse, his land, his right of way, his usufruct over other land and so on. That is, Roman law distinguishes between different objects of meum esse rather than between different relationships to or interests in the material world. This habit of mind can only be sustained by treating some relationships as things, as for example by treating the relationship which allows a man to use and enjoy a farm for his life as a ius utendi fruendi, a usufruct. This is what lies at the root of the crucial classification in the Institutes between corporeal things and incorporeal things, rights such as servitudes, inheritance, and obligations.\textsuperscript{159}

Kaser, than whom there is no weightier modern authority, says that this habit of mind is a feature only of the elementary literature.\textsuperscript{160} However, this is difficult to accept, when it seems also to be built into the foundations of legal thought, namely into the actions, which as we have seen keep the meum esse constant but adapt the 'thing' in question. When the pleadings claim 'rights' it cannot be said that 'incorporeal things' are a pedagogic invention. Certainly, in one respect Gaius developed the system inherent in the actions: he added obligations to the list of incorporeal things. No action claimed a ius obligationis in so many words. On the contrary the relevant pleadings only affirmed that the defendant 'ought to give or do' something, and obligatio was the incorporeal thing brilliantly discovered by asking the question: what is the thing which exists when a defendant ought to give or do something for a plaintiff? Gaius was escaping the forms of action in identifying a concept not explicitly named in any actionable pleadings, but he was extending a scheme hallowed by the actions and at the same time affirming, correctly, that the relationship between a man and his ius obligationis (ie a right in personam) was conceptually the same meum esse as between a man and his ius utendi fruendi or between a man and his horse: the difference lay in the asset owned, not in the relationship between the person and the asset. However, Gaius's extension of the scheme has not had much success, for all modern lawyers draw a line down through his expanded category of res incorporales, so as to separate obligations (ie all rights in personam) from 'property' (ie in all rights in rem).

Gaius's scheme is elegant. Assets are owned, but consist in many different forms. The asset may be a material thing such as a right to use and enjoy a farm or a cow or a right to have a farm or a cow conveyed to oneself by Titius. This is one of the reasons why the content of ownership is itself not analysed. Its content is its 'thing'. Incorporeal things need explaining. You need to know the content of usufruct, via, actus, aquaeductus and so on.\textsuperscript{161} As for the nature of farms and cows, you could be taken to know it without being told.

\textbf{(3) Exclusivity}

The assertion of ownership by an owner or by a plurality of co-owners was absolutely exclusive. It supposed that nobody else at all was owner. In the same way parents who say 'This is our child' mean to assert that it is nobody else's. Absolute or general exclusivity has to be contrasted with particular or relative exclusivity. If I say 'I was possessed of a silver cup as of my own proper goods and you found it and now wrongfully detain it', I need not be saying more than that 'I have a right to exclude you' or 'I have a better right than you'. English law, as is well known, has always preferred to handle proprietary questions relatively, ie by asking which of two competing litigants has the better right.\textsuperscript{163}
However, the Roman approach was different. There is no doubt that the meum esse of the formulary vindicatio was conceptually absolute. Conceptual absoluteness does not exclude evidential difficulties. The statement or allegation that X killed Y is absolute, but the truth cannot be ascertained with absolute certainty. 'Beyond reasonable doubt' is all that can be asked for, and the possibility of incorrect findings cannot be excluded. Similarly with dominium, judges must sometimes have had to make their absolute finding on evidence which as a strict matter of logic only created a strong probability. In other words, though meum esse is absolutely exclusive, some relativism is likely to creep in at the evidential level, simply because courts do not see with an all-seeing eye. This is all the more true in Roman courts, which lacked a sophisticated law of evidence. Suppose I set out to substantiate my vindicatio of a horse by showing that I have usucapted. If the animal has changed hands often its early history may be lost. Perhaps it was stolen when a foal. I cannot be expected to prove that it never was. Absolute proof of such a negative would be impossible. If you do not prove that the horse was stolen, the res furtiva bar to usucapio will not operate. And yet in strict logic I will not have proved that I and nobody else is owner. Judgment will not bar the unknown 'true' owner, if there be one. He may come forward, vindicate, prove the theft and destroy the effect of my supposed usucapio. None of this alters the fact that the element of relativity comes in with the difficulties of proof, not in the concept of meum esse.

For early law Kaser has advanced a quite different picture in which the meum esse of the legis actio was conceptually relative and meant, in effect, 'I have a better right to possession than you'. A major element of this theory is the logic of the wording given by Gaius for the legis actio. Kaser observes that both parties affirm meum esse and that the iudex had to declare one of them to be in the right. With both affirmations brought into issue, an absolute concept of meum esse would have required the judge to be given a third option: neither sacramentum declared iustum. Various attempts have been made to escape this logic by interpreting the form of the legis actio so as to make it put in issue only one meum esse, as did the formulary vindicatio. If only one meum esse is contested the other party wins in all events in which that affirmation is not made out, so that nothing obstructs an absolute interpretation of the single affirmation. Diósdí observes that in fact only one vindicatio is challenged in the legis actio—whereas you have wrongfully vindicated etc—and concludes, somewhat improbably, that the defendant alone was put to proof of his meum esse. Watson, starting from the same observation, contrives to make it the plaintiff's vindication which is put in issue, but has to see the defendant as making the opening vindication, something more remarkable even than Diósdí's transfer of the burden of proof. All these writers assume that the words given by Gaius are the very words in which issue was finally joined, whereas it is possible that the subsequent giving of the sacramentum was done in words which, as with the challenge to a sponsio, themselves expressed the precise issue to be tried.

However, that may be, the balance of probability seems to be against a conceptually relative ownership in early law. The words 'It's mine' are not appropriate to express a relative concept: 'It's more mine than yours!' or 'I have more right to it than you': and a major discontinuity between the legis actio and
the formulary system is unlikely, still more between sacramento provocare and sponsione provocare. Above all it seems wrong to endow early law with the authority necessary to recognize and accept that its form of action, or more accurately its form of defence, committed it to a conceptually, rather than an evidentially, relative ownership. Someone would have had to take the point—and someone other than an inscrutable lay judge would have to pass upon it—that the plaintiff’s failure could not mean the defendant’s victory. An anachronistic degree of sophistication would have been needed for the system to have been conscious of its own relativism. Also it is not impossible that the issue was in the earliest times decided by a battle. If so, the argument as to the nature of the question at issue will have been left to the arbitrament of the gods.

(4) The Ius Honorarium

Some things will be omitted. Even though they do entail real relationships additional to ownership they are for different reasons severable without serious misrepresentation. The right to use, enjoy, hold and possess provincial lands can be omitted geographically.\textsuperscript{111} Real security is naturally separate and self-contained.\textsuperscript{112} Interdictal protection of possession, though it matured into something a good deal more sophisticated than mere stabilization of the factual position, can safely be treated as going on in a different dimension from proprietary right, because, though there was a difference between good and bad possession, calling for and not calling for protection, the protection of possession went on without reference to entitlement: to be a protected possessor was no indication of the rightfulness of the possession. The possessor’s only ‘right’ was to be defendant in the proprietary action which would test the issue of entitlement.

In the late Republic\textsuperscript{113} the praetor allowed the pleadings in the vindicatio to be modified and thus recognized an additional proprietary relationship. The winning proposition in the modified vindicatio was that the thing \textit{would be} the plaintiff’s if the period of usucapio had expired. Gaius, at 4.36, gives a version of the first part of the formula:

‘If Aulus Agerius had possessed for one year the slave whom he bought and who was delivered to him, then on that assumption if the slave the subject of the action ought to be Aulus Agerius by the law of the Quirites, etc.’

The relationship, by nature temporary, between Publician plaintiffs and the thing in question was thus ‘maturing ownership’: a Publician plaintiff was not an owner but a ‘not yet owner’ or a ‘would be owner’. As obvious as it was that someone on the way to becoming owner should have an action if he fell out of possession, it was no less obvious that a ‘would be owner’ could not expect to defeat someone who already was owner. Hence the praetor made available a defence to the modified vindicatio, which allowed the Publician plaintiff to be defeated by a defendant prepared and able to prove that he was already Quiritary owner: the exception iusti dominii.\textsuperscript{114} Hence Publician plaintiffs had claims which were not absolutely exclusive. That is not to say that their claims were conceived as excluding only the particular defendant. They were not relative in that sense. But they were conceived \textit{ab initio} as excluding everyone except the owner: absolute exclusivity subject to one exception.

The simplicity of this picture is broken by the fact that one owner could not be
allowed to defeat the Publician plaintiff, namely one whose Quiritary title was a mere technicality in her in him because he, or perhaps his father before him, had conveyed informally instead of formally. The praetor allowed a further pleading by the plaintiff in order to defeat the defendant who was indeed already owner but was so only because the thing had been delivered and not mancipated: the replicatio rei venditae et traditae. Such a defendant was thus prevented from setting up his technical title. But this meant that Publician plaintiffs fall into two categories: those who could substantiate the principal pleading but would be defeated by the owner’s exceptio; and those who could substantiate not only the principal allegation but also the replication which trumped the owner’s exceptio. The second class constituted a quite remarkable group. Though not owners they defeated the owner. Their claim was absolutely exclusive, without an exception. In a larger, supra-positive sense these Publician plaintiffs obviously were ‘owners’, but they were not within the definition on which the law had settled. Hence some synonym was needed, much as though we might coin the word ‘belonger’ to evade an unwanted restriction on the word ‘owner’. The Roman solution was to say of the Publician plaintiff who could substantiate both the principal pleading and the replication that he ‘held the thing among his goods’; and this ‘habere in bonis’ came much later to be called ‘bonitary ownership’. Gaius observes that in early times ownership was single and undivided but that then divisionem acceptit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere (dominium was divided, so that one person may be dominus ex iure Quiritium and another ‘hold the thing among his goods’). Here it is difficult to avoid the conclusion that the dominium which he says became divided is the supra-positive notion of ownership, the division then being between ownership at civil law and the habere in bonis of the ius honorarium. Only at a level above positive law could he allow himself a usage which implied the possibility of a ‘praetorian dominium’.

As a result of the way in which the pleadings of the actio Publiciana worked, singular ownership gave way to a threefold division: there were people who could win the vindicatio (owners), people who could win the actio Publiciana and by substantiating the replicatio defeat the owner (owners under another name, bonitary owners), and people who could win the actio Publiciana but not against the owner (possessors in good faith on their way to ownership by usucapio). These were consequences, not necessarily deliberately sought.

Usucapio was useful not only to cure defects but also to prove ownership. Cicero and Gaius both emphasize its role in removing uncertainty. Except in relation to servitudes, for which statute ruled out this tactic, a plaintiff would presumably rely on usucapio to prove ownership even if he believed that his title was good by derivation. It was much easier to prove his own acquisition ex iusta causa and the period of possession than to trace his title back from conveyance to conveyance or to a predecessor’s usucapio. A plaintiff whose period of usucapio had not expired when he lost possession would have to make his proof by tracing back and, even if we do not suppose a probabilio diabolica requiring infinite regress, he was likely to expose discontinuities. Cicero’s speech in 63 BC against the agrarian law proposed by Rullus shows that many titles were doubtful because of irregularities under Sulla. Many difficulties could be put before a judge: perhaps the horse which the plaintiff claimed through Titius had
been alienated to Titius by the defendant’s father when drunk, mad, or in fear of his life. The defendant would not be backward to uncover such embarrassing details. The earlier the date the more the resolution of such difficulties would lie in the judge’s discretion. The actio Publiciana allowed people who had not completed the period of usucapio to win by proving the same facts as those who had done so usually proved to win the vindicatio, with the difference that the period of time artificially conceded did not have the same efficacy against the owner as the period actually completed. The reason for introducing the action was probably only to achieve that equivalence, subject to that necessary difference.

The account of the introduction of the actio Publiciana which has been given here is essentially that of Wubbe, proposed more than two decades ago.\textsuperscript{192} It has encountered objections but survives as the most convincing account.\textsuperscript{193} Two of his points cannot be answered: if the praetor had merely wanted to render formal conveyances unnecessary he would certainly have propounded a fiction of mancipatio, not of the period of usucapio; while, if his aim was to help recipients from non-owners, he chose a class of beneficiaries most of whom, by reason of their good faith, had no idea that they needed his help.\textsuperscript{194} The action which broke the monopoly of dominium and brought it about instead that the classical law knew three proprietary relationships—as we now say, Quiritary ownership, bonitary ownership and bona fide possession on the way to ownership—was introduced to save from evidential embarrassment all those who could not fall back on a completed period of usucapio in order to substantiate the meum esse of the vindicatio.

We have seen that Roman ownership was minimally restricted. Most of the material world could be owned, and the owner’s freedom to use and to alienate his property was, broadly speaking, secure and unhampered. However it was not absolutely unhampered; nor was there any legal theory to set a limit beyond which legislative interference could not go. For the content of ownership, ‘absolute’ is not an appropriate word. It suggests some degree of immunity. Conceptually, however, ownership was absolute: distinct, singular, and exclusive. Only the need to give active protection to people on the way to becoming owners—and the curiosity that one class of such plaintiffs could defeat the owner himself—broke up the economy of that picture.

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NOTES AND REFERENCES

\textsuperscript{1} Contrast the constitution of the USA Fifth Amendment: ‘... nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.’ Cf Fourteenth Amendment: ‘... nor shall any State deprive any person of life, liberty or property, without due process of law.’

\textsuperscript{2} ‘The theory of an equal and objective justice was perfectly familiar, but no-one reckoned on finding it applied in practice’: J M Kelly \textit{Roman Litigation} (1966) 61 of 68 and 69ff.

\textsuperscript{3} Especially Gaius; whose passion for logic and rationality is manifest. For ‘The Mind of Gaius’ see Tony Honoré \textit{Gaius} (1962) 97–116; D Nör \textit{Divitto und Partito} (1972) especially 48–50.

\textsuperscript{4} Frontinus, \textit{De Agris} 1.6. Frontinus was curator aquarum AD 97 to 194. He was urban praetor in AD 70: Tacitus \textit{Hist} 4.39.
5 Ius impretratae aquae neque heredem neque emptorem neque tulum novum dominum praediorum sequitur: De Aquis 2.107. For applications and vacation: 2.105, 2.109.

6 Monopoly: . . . in privatis observanda sunt, ne quis sine litteris Caesaris, id est ne quis aquam publicam non impretratam . . . ducat: De Aquis 2.103; earlier period, 2.95.

7 Grotius De jure belli ac pacis (1625) ed F W Kelsey (1925) 2.10; Pufendorf Of the Law of Nature and Nations (1672) tr B Kuenen (1717) ch 4 'Of the origin of dominion or property'; John Locke Two Treatises on Government ed P Laslett (1970) especially Second Treatise ch 5.


10 ' . . . in omnibus rebus animadvertero id perfectum esse quod ex omnibus suis partibus constaret; et certe cuuieumque re potissima pars principium est': D 1.2.1 (Gaius ed legem duodecim tabularum).


12 For a pessimistic condemnation of too much guesswork see V Arango-Ruiz La compravendita in diritto romano (1956) 26.

13 Much disputed whether land was originally the common property of gentes. So T Mommers Römisches Staatsrecht vol 3 (1888) (reprint 1952) 23ff. The debate, referable to a period before the XII Tables, is reviewed by Dötsch op cit (n 11) 31–49.

14 For this approach, see S F C Millon 'Law and fact in legal development' (1967) 17 Univ of Toronto L J 1. Contra A Watson 'The law of actions and the development of substantive law in the early Roman Republic' (1973) 89 LQR 387.


16 Yet the action is always treated afterwards, much as nowadays (ie now that the substantive details are known in sufficient detail to sustain independent discussion) procedure is taught quite separately. Cf Dötsch op cit (n 11) for whom 'The Ancient Proprietary Remedy' is ch 7, after the problems of ownership have been reviewed.

17 Below, section II. Restrictions on the content of ownership are for the most part the subject-matter of proceedings other than the claim to a thing owned, eg damnnum infictum. But expropriation in the interest of security of transactions is worked out within the vindication: section II below.

18 It is impossible to suppose that the jurists whom we know came to a law already fully formed. Their being known—from about 150 BC (Manlius Manilius, Marcus Junius Brutus, Publius Mucius Scaevola)—is the law being born. For the period down to the second century BC, see F Schultz Roman Legal Science (1946) 1–37.


20 Romulus was identified after death with the god Quirinus, a Sabine deity. Quirinus/Quirites were associated with the Sabine town of Cures. A possible etymology derives the word from co-viri-um, meaning 'assembly of the men': Oxford Classical Dictionary 2 ed (1970) s.v 'Quirinus'; Kaser Das Römische Privatrecht I (n 11) 32.

21 Lenel op cit (n 19) 190–1.

22 At 191–4. The clausula arbitraria should possibly not have been excluded: A Rodger Owners and Neighbours in Roman Law (1972) 111.

23 Gaius 4.15. The date of the lex Pinaria is uncertain: Kaser Zivilprozessrecht (n 15) 83.

24 Kaser Zivilprozessrecht (n 15) 76–7.

25 Gaius 2.79; Inst 2.1.25; D 41.1.7.7 (Gaius 2 rerum cotidianarum sive aureorum); J A C Thomas 'Form and substance in Roman law' (1966) 19 CLP 145.

26 Tony Honoré Ownership in A G Guest op cit (n 9) 107.


28 At 139.

29 At 172–6.

30 See below.
31 Inst 2.1.12-15; D 41.1.3 (Gaius 2 rerum cotidianarum sive aureorum).
32 The provincial edict contained a formula in which a plaintiff claimed on these lines:
"If it appears that Aulus Agerius is permitted to hold, possess and enjoy the land subject to this
action (habere possidere frui licere), etc. Lenel op cit (n 19) 189.
33 Gaius 2.7.
34 C 7.31.1; Inst 2.1.40.
35 Cf Bonfante op cit (n 11) 177-83; Kaser Privatrecht I (n 11) 123-4; Dibbsd op cit
(n 11) 56-70.
36 Gaius 1.119. A M Prichard 'Terminology in mancipatio' (1960) 76 LQR 412; Watson
Rome of the Twelve Tables (n 11) 134-149.
37 Gaius 2.14a-16.
38 If mancipatio was essential to transfer Quiritary right, and also res nec mancipi could
not be mancipated, it might be possible to believe that eg early barter did not pass
property, but these premises are improbable. Cicero Topica 10.45, certainly does not
support either; but see the discussion in A Watson The Law of Property in the Later
Roman Republic (1968) 18ff.
39 D 1.8.5 (Gaius 2 rerum cotidianarum sive aureorum); Inst 2.1.4. Contrast Inst
2.1.18. The law about public use of river-banks is not completely clear or stable. Cf W W
40 Inst 2.1.1. D 1.8.2 (Marcianus 3 institutionum).
41 Inst 2.1.18; D 1.8.3 (Florentinus 6 institutionum).
42 See below.
43 Gaius 2.11.
45 C 1.2.12.1,17; 1.3.41.3.
46 T Mommsen Römisches Strafrecht (1899) (reprint 1955) at 672f and 766.
47 Gaius 2.3; Inst 2.1.8; D 1.8.9 (Ulpian 68 ad edictum); cf Pliny Letters 10.49, 50, 68,
69, 70, 71.
48 Gaius 2.8; D 1.8.8 (Marcian 4 regularum).
50 Exactly the same idea in C Th 15.1.50.
51 J W Jones 'Expropriation in Roman law' (1929) 45 LQR 512 at 516.
52 De Aquis 2.127.
53 At 2.128. For a possible example of valuation procedure in the Republic, see the
Tabula Contrebiensis 11. 9-10, 12-14; (1948) 74 JRS 45.
54 Lex Municipii Tarentini cap 5 FIRA 1, 169; Lex Coloniae Genetivae Iuliae seu
Ursonensis cap 99 FIRA 1, 190.
55 De Aquis 2.125.
56 Incoherencies in US compensation policy are examined and exposed in B A
Ackerman Private Property and the Constitution (1977) passim.
57 Cicero De Officinis 3.16.
58 So also Jones loc cit (n 51) 519, observing that in one late case — reception of a slave
of a non-Christian into the church — there was an express provision for freedom without
compensation: C 1.3.54.9 (AD 534).
59 Mommsen Strafrecht (n 46) 705-32; and recently, A Lintott 'The leges de repertundis
60 Cicero Pro Roscio Amerino 21-3. Cicero's client's father's estate illegally added to
the proscription list by Chrysogonus, Sulla's freedman, and auctioned off to cronies at a
fraction of its value. For proscription and confiscation generally, M Crawford The Roman
61 Suetonius Nero 32, 27. The Emperor abused both the criminal process and the law of
succession to finance his extravagance. M Griffin Nero, The End of a Dynasty (1984)
2-205.
62 D 6.1.68 (Ulpian 51 ad edictum) itp. D 6.1.70 (Pomponius 29 ad Sabinium): 'ne in
poteestate cuiusque sui per rapinam ab invito domino rem iusto pretio comparare', Kaser
Zivilprozessrecht (n 15) 261.
63 Kaser Zivilprozessrecht (n 15) 392.
64 The reasons for the rule are much debated; see especially Kelly op cit (n 2) 69-84;
Jolowicz & Nicholas op cit (n 15) at 205 and 213.
65 'Qui iussi aestimationem suffert, emporios loco habendus est': D 25.2.22pr (Julian
9 digestorum). Cf Kaser Zivilprozessrecht (n 15) 291; Rodger op cit (n 22) 112.
66 The historical development is much debated: see A M Prichard 'Early usucapio'
'Reflections on usucapio' (1967) 35 Tvr 191; Watson Rome of the XII Tables (n 11)
157-675.
68 Gaius 3.197. 2.45–51.
70 Inst 2.1.39. Non-treasure: D 6.1.67 (Scaevoila 1 responsorum). Possession: D 41.2.3.3 (Paul 54 ad edictum).
71 Early provisions sometimes name not only the unlawful act but also the instrument. The provision in the XII Tables against bone-breaking may have begun ‘Manu fustive si os freget’. Coll 2.5.5 (Paul lib sing et tit de initiris). Cf Exodus 21.18, 20.
72 Hence, most obviously, the use of weapons was controlled; D 9.2.27.17 (Ulpian 18 ad edictum).
73 D 9.2.30.3 (Paul 22 ad edictum); Coll 12.7.4–6 (Ulpian 18 ad edictum).
74 D 9.2.57 (Javolenus 7 ex posterioribus Labeonis); D 9.2.52.2 (Allenus 2 digestorium).
75 D 44.7.5.5 (Gaius 3 aureorum); Inst 4.5.1.2.
76 ‘But the title on this delict (D 47.10) gives no hint of such a thing’: W W Buckland & A D McNair Roman Law and Common Law 2 ed (1952) 99; cf Kaser Das Römische Privatrecht I (n 11) 221. Yet contumelia unless heavily qualified ab initio by objective unlawfulness does cover the case.
77 See above.
78 Table 6.8: ‘Tignum iunctum aedibus vineaeve ne solvito’ FIRA 1, 46.
79 C 8.10.12 (Zeno) and 13 (Justinian’s generalization); cf Rodger op cit (n 22) 34–7.
80 Cf Blackstone op cit (n 49).
81 Rodger op cit (n 22) 89, summarizing 39–89.
82 At 140–66.
83 At 124–40.
84 At 90–110.
85 ‘If by reason of a fault in your building, land, or work, now the subject of this case, some loss supervenes to my building on the occasion of something falling, being cut, or being dug out in yours [and this happens within such and such a period] do you promise to pay me in money whatever the matter shall be worth and also do you promise that no deceit is being or will be practised? I do so promise.’ Cf Lenel op cit (n 19) 351–2; Rodger op cit (n 22) 54.
86 Rodger op cit (n 22) 42–56.
87 D 8.5.8.5 (Ulpian 17 ad edictum).
88 A right protected by the interdict de glande legenda; D 43.28.
89 For the protection of ways of necessity by administrative and statutory means, see Kaser, Das Römische Privatrecht I (n 11) 407.
90 D 11.7.12 pr (Ulpian 25 ad edictum).
91 Legislation against this in AD 374 C 8.51.1; and in AD 529 C 8.51.3.
93 Gaius 1.52–3 as to which see Honoré Gaius (n 3) 105.
94 D 48.8.11 (Modestinus 6 regularum) referring to a lex Petronia possibly of AD 6.
95 Buckland op cit (n 92) 37. The horrible catalogue of unlawful punishments in Constantine’s rescript of AD 319, C 8.14.1, is indicative of what slaves actually suffered.
96 D 48.8.1.2 (Marcian 14 institutionum); Gaius 1.53.
97 Suetonius Claudius 25; D 40.8.2 (Modestinus 6 regularum).
98 D 48.8.4 (Ulpian 7 de officio proconsulis); 6 (Venneleus Saturninus 1 de officio proconsulis). Mommsen Strafrecht (n 46) 637f; see also K Hopkins Conquerors and Slaves (1978) 172–96.
99 Gaius 1.53; Coll 3.3.3 (Ulpian 8 de officio proconsulis).
100 Inst 1.8.2.
101 For example, Re Brocklehurst [1977] 3 WLR 96.
102 The interdict: ‘Since by your want of self-control you waste your paternal and ancestral property for yourself and bring your children to penury, on that account I interdict you from that property and from commerce.’ Paul Sent 3.4.4.7.
103 Kaser Das Römische Privatrecht I (n 11) at 85 and 278. Tit ex corp Ulpiani 12.3.
104 Reviewed by Aulus Gellius Noctes Atticae 2.24. Cf, also, curbing gifts, the lex Cincia and lex Furia: Thomas Textbook (n 39) at 191 and 505.
105 C 11.59.8 (AD 388–92).
107 Falcke v Scottish Imperial Insurance Co (1886) 34 ChD 234 at 248–9, per Bowen LJ.


D 8.1.15.1 (Pomponius 33 ad Sabinum).

For example, contractual rights in personam assignable in English law, not in Roman (except by cessio actionum): Buckland Textbook (n 39) at 407 and 554ff; and usufruct, in rem but inalienable: Gaius 2.30; Inst 2.4.3.

See above.

Gaius 2.64; 2.80–86. On women and their guardians, Gaius 1.190–195.

'Tutela is, as Servius defined it, right and power over a free person for his protection when unable by reason of his age to defend himself...': Inst 1.13.1. Similarly minors, above puberty but under 25, have curatores because 'despite passing puberty they are not of an age to protect their own interests': Inst 1.23 pr. The different guardianships have different rules: see Buckland Textbook (n 39) 143–73.

See above.

Gaius 4.84–86; D 3.3.55 (Ulpian 65 ad edictum) ip Kaser Zivilprozessrecht (n 15) 157.


Se quis negiandi causa emisset quod aedificium ut diriundo plus adquireret quam antiqui emisset, tum duplum pecuniam... in aerarium inferri...': SC de Aedificis non aliunde, AD 44, FIRA 1, 288.

D 24.1.5.18 (Ulpian 32 ad Sabinum). P E Corbett The Roman Law of Marriage (1930) 117. Gifts had been valid at the time of the lex Cincia 204 BC: Watson The Law of Property (n 38) 229.


Gaius 2.287; (Tit ex corp Ulp 25.13.) Justinian's decision 1 Novel 159.

Gaius 2.64, the case of the pledge-creditor's power to sell.

Corbett op cit (n 123) 181; Kaser Das Römische Privatrecht I (n 11) 334: 'Die verbotswidrige Veräußerung war vermutlich ungültig.'

D 25.3.3.1 (Paul 36 ad edictum); D 25.3.17 (Marcianus 7 digestorum).

CS 12.30 (AD 529).

The early 16th-century developments which subjected the lord to external control are described in C M Gray Copyhold, Equity, and the Common Law (1963) especially 54ff, Similar royal control three centuries earlier for freeholders: S F C Milsom The Legal Structure of English Feudalism (1976) especially 65ff.

So Gray op cit (n 130) 5: 'A fee simple is the maximum estate, or quantity of interest, a man can have in a piece of land,... The fee simple is as close to absolute ownership as a feudal-terminal system can get.'

See above.

Strictly one should say 'persons sui iuris' since 'head of a family' implies the existence of a plurality of persons under the head. Typically that would be the case. But anyone, male or female, without a living male ascendant would be sui iuris and able to own. With the desuetude of manus-marriage, wives were in the potestas of their own male ascendants or, if there were none, were sui iuris.

Peculium was de jure at the will of the pater, de facto under the control of the son. Not so the peculium castrense, the son's military fund and separate property, from the time of Augustus; and quasi-castrense, his public service fund, from the time of Constantine. See Kaser Das Römische Privatrecht I (n 11) 343, II 216; also D Daube 'Actions between paterfamilias and filiusfamilias with peculium castrense' in Studi Albertario Vol I (1950) 445.

Macedo's emancipation had taken or driven him to the length of parricide; D Daube Aspects of Roman Law (1969) 89f; D 14.6.1 (Ulpian 29 ad edictum).

Trayan's hospitality to combinations is evident in his correspondence with Pliny. Pliny Letters 10.34, 93, On non-commercial collegia, see F Schulz Classical Roman Law (1951) 95–102.

The oldest form, ecco non cito, came nearest to having a separate identity, to the extent at least that the act of one party would bind others: Gaius 3.154–154b.

Rodger op cit (n 22) 1–7; F Schulz Principles of Roman Law (1936) 131.

R von Jhering Geist des Römischen Rechts Vol I 5 ed (1891) 5f.

Mayer-Maly ibid shows how the concept of ownership already in the works of the natural lawyers was put to this antifeudal use in the late 18th century and also observes rightly that 'progressive' views which allow the individual essentially a ususfruct from the activist or socialist state merely revive the conceptual structure of the ancien regime.

See above. Cf Pufendorf op cit (n 7) b8 ch 5: 'Of the powers of the sovereign both over the publick patrimony and over the estates of private subjects.'

For the place of Locke in this endeavour see A Ryan Property and Political Theory (1979) 15ff.

J S Mill On Liberty (1859) ch 1. For Mill's views on property in respect of which he was an 'unflinching positivist and utilitarian' see Ryan op cit (n 143) 144ff.

Hence Bonfante's conclusion that the rules expressed a system ‘... della indipendenza rispettiva, non un regime di mutua dipendenza: è il concetto negativo della libertà, non il concetto positivo della solidarietà che ispira l'antico regime’; P Bonfante Corso de diritto Romano 2(i): La Proprietà, Opere Complete Vol 4 (1966) 243.

For example, Bartolus 'ius de re corporali perfecte disponendi nisi lege prohibeat': Commentaria in primam Digesit partem (to D 41.2.7.1) cited by Rodger op cit (n 22) 1 and Mayer-Maly op cit (n 140) n 6. Cf art 544 of the French Code Civil: ‘... le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les reglements.’

This term is coined by Ackerman op cit (n 56) 115f.

See above.

Kaser Zivilprozessrecht (n 15) 67, citing Gaius 1.134. Cf Diosdi Ownership (n 11) 51; Watson XII Tables (n 11) 125. Watson (at 134) nevertheless dissociates himself from those who believe in an undifferentiated 'lordship'.

The state of the question is reviewed, with references, by Diosdi Ownership (n 11) 53-61.

Aristotle Politics 1255b20.

See above.

'... dominus membrorum suorum nemo videtur': D 9.2.13pr. (Ulpian 18 ad edictum).

See below.

See above.

The Surrogacy Arrangements Bill, second reading 16 April 1985, outlaws commerce in surrogate motherhood.

Kaser Das Römische Privatrecht I (n 11) 401; more fully Eigentum und Besitz (n 11) 309ff. 'Proprietas' is said to be later. Diosdi Ownership (n 11) 135 also adopts the view that 'dominium' became differentiated in the 1st century bc.

The period of growth must have followed the lex Aebutia (Gaius 4.30); Kaser Zivilprozessrecht (n 15) 109ff, Jolowicz & Nicholas op cit (n 15) 218ff. The lex Aebutia is commonly put circa 125-100 bc.

Gaius 2.12-14; Inst 2.2. Cf Cicero Topica 5.27.

'Ob diese Einteilung, die in der Philosophie und Grammatik wurzelt, war offenbar auf die Schulpseudozuschriften beschränkt und wird von den grossen Klassik vermieden': Das Römische Privatrecht I (n 11) 376. Cf also his treatment of the trend in modern codifications towards renewed division of the academic unity between corporeal and incorporeal things: 'The concept of Roman ownership' (1964) 27 THRHR 17.

Hence a degree of definition is found which is entirely absent in the case of dominium eg 'Usus fructus est ius alienis rebus utendi etendi salva rerum substantia': D 7.1.1 (Paul 3 ad Vitium). 'Ister est ius eundi ambulandi homini, non etiam iumentum agendi vel iumentum vel vehiculum': D 8.3.1pr (Ulpian 2 instutionum); cf D 8.1.9 (Celsius 3 digestorum).

Abbreviated paraphrase of the count in detinue (later, conversion) sur trover, as near to a vindicatio of movables as the common law came. For the forms: C H S Fipoot History and Sources of the Common Law (1949) at 42-3 and 103-4.


G Pugliese 'La preuve l'époque classique' (1965) 16 Recueils Jean Bodin 277 especially 306ff. For early recourse to rational modes of proof, see Pugliese at 279ff. And G Brogini 'La prova nel processo romano areaico' Coniectanea (1966) 133 at 146ff.

Kaser Zivilprozessrecht (n 15) 293-4.

See above.

Kaser Das Römische Privatrecht I (n 11) 124; Eigentum und Besitz (n 11) passim especially 364; 'Concept' (n 160) 8. For implication elsewhere, as for 'erus' of lex Aquilia, J M Thomson 'Who could sue on the lex Aquilia?' (1975) 91 LQR 207. The theory is not
accepted by Watson *Property* (n 38) 91–93; nor, more recently, by Diosdi *Ownership* (n 11) 96–102.

169 Diosdi op cit especially 102–6.

169 Watson *XII Tables* (n 11) 125–33; cf (1967) 14 *RIDA* 455.

170 Compare Gaius 4.93 where the single sponso which carries the issue is perfectly compatible with a prior 'double' exchange; 'I challenge you ...' followed by 'And I you'.

171 The same set of words was used also for aper publicus: Kaser 'Concept' (n 160) 12.

172 For the 'real' relationship recited in the pledge-creditor's actio Serviana, see Lenel op cit (n 19) 494.

173 Commonly assumed to be of 67 BC there being then a praetor Publicius: Broughton *MRR* 2.143. Watson *Property* (n 38) 105f considers it possibly much later, even AD 93. However, the fiction fits the republican style.

174 D 6.21.6 (Papinian 10 *quaestionum*), 17 (Neratius 3 *membranarum*).

175 D 6.1.72 fin (Ulpian 70 *ad editum*); D 21.3.2 (Pomponius 2 ex *Plautio*).

176 'Bonitary ownership' does not appear in the Roman texts. The inventor of that term—from in bonis habere—was Theophilus *Paraphrase* to *Inst* 1.5.3: Buckland *Textbook* (n 39) n 2.

177 Gaius 2.40; cf 1.54 (*duplex dominium*).

178 '... usucapio fundi, hoc est finis sollicitudinis ac periculi litium ...': Cicero *Pro Caecina* 26.74: '... ne rerum dominia diutius in incerto essent ...': Gaius 2.44.

179 The *lex Scribonia*, perhaps of circa 50 BC; see Watson *Property* (n 38) 22–4.

180 Probatio diabolica: the medieval term for the difficult proof of ownership, in particular the problem of infinite regress. See H Kiefner 'Klassizität der probatio diabolica' (1964) 81 *ZSS* 212. It is, however, not necessary to believe that a Roman iudex would insist on infinite regress—cf F Sturm 'Zur ursprünglichen Funktion der actio Publiciana' (1962) 9 *RIDA* 357 at 363—in order to believe that without usucapio by himself a plaintiff's position in a vindicatio would have been very difficult.


182 F B H Wubbe 'Quelques remarques sur la fonction et l'origine de l'action Publicienne' (1961) 8 *RIDA* 27; 'Der gutgläubiger Besitzer, Mensch oder Begriff?' (1963) 80 *ZSS* 175.

183 Especially Sturm op cit (n 80). Diosdi *Ownership* (n 11) 154–65 favours Sturm's position. Kaser himself, however, has taken a position close to that of Wubbe: 'In bonis esse' (1961) 78 *ZSS* 173 at 185–97: *Das Römische Privatrecht* I (n 11) 438.

184 Wubbe op cit (n 182) 430; op cit (n 182) at 183 and 189.