Owners Beware: Themes and Variations in Property Law

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Within the last twenty years a series of rulings in various Commonwealth countries has had the effect of limiting the once supreme right of ownership. The Canadian Veinot *case was the most recent. The present study attempts to place this case against the background of Roman property law. A historical analysis of the evolution of the Roman law reveals a concept that has not been as stable as one would think. We find that ownership as we would define it today has not always existed. Instead, there was an early form that can hardly be distinguished from possession, followed by various other forms. Our present concept can, therefore, be seen not as an immutable institution but as another such variation upon a theme. Moreover, we may be at the threshold of a new form.*

Private property derives from Roman intellect and Germanic sentiment. (Karl Marx, *Kritik des Hegelschen Staatsrechts).*

Introduction

"Trespassers beware!" may well turn into "Owners beware!" At least to judge from the case of the injured snowmobiler,[1] an Ontario case which was decided by the Supreme Court of Canada in 1974.

A snowmobiler lost his way one night. Without realising it he drove onto a private road. This road belonged to a company and led to their powder magazine. To stop vehicles going as far as the magazine they had placed an overhead pipe across the road. It was unmarked and the snowmobiler crashed into it, suffering injuries. He sued the company for negligence.

The snowmobiler was a trespasser, however. The common law says trespassers must take land as they find it. An owner is not bound to warn a trespasser of hidden dangers on the land. He doesn't owe a duty of care.

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[1] *Veinot* v. *Kerr-Addison Mines Ltd.* [1975] 2 S.C.R. 311.

This was the view of English common law. Victorian England insisted that an Englishman's home was his castle: an owner's rights over his land were absolute — so far at least as regards trespassers. Lord Hailsham stated the principle as follows: "Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care."[2] As late as 1964 an English court[3] reaffirmed this view. Yet in Canada by 1974 an altogether different principle had developed.

In the case of the trespassing snowmobiler the Supreme Court of Canada found the defendant company liable for negligence. An owner does owe a duty of care, the court said, to trespassers. The defendants broke this duty of care by leaving the pipe-gate in its original position and not marking it.

Is this ruling such a break with tradition? There have already been movements towards restriction of property rights. In England itself there was the *Occupiers Liability Act,* 1957. In the Commonwealth the courts have showed signs of a new approach. Beginning with *Commissioner for railways (N.S.W.)* v. *Cardy,*[4] in 1960, more clearly expressed in *Herrington* v. *British Railways Board,*[5] and lately in *Southern Portland Cement Ltd.* v. *Cooper,*[6] the position of the trespasser has been newly defined. As a result, the owner has come to bear increased duties of care. His rights have been restricted.

They have also been restricted in Ontario and other Canadian provinces. Numerous pieces of Ontario legislation have encroached on land owners' rights. *The Municipal Act,* R.S.O. 1970, c. 284, *The Planning Act,* R.S.O. 1970, c. 349, *The Registry Act,* R.S.O. 1970, c. 409, *The Land Titles Act,* R.S.O. 1970, c. 234, *The Landlord and Tenant Act,* R.S.O. 1969, c. 236, *The Expropriations Act,* R.S.O. 1970, c. 154 and a multitude of other acts inhibit the owner in the full and exclusive use of his property.

It appears then that the law of ownership is less settled than we thought. Unsettled law, though, is itself unsettling. We ask, how can rooted principles become questionable? How can the firmly rooted concept of ownership be questioned? Is it perhaps that the concept never was firmly rooted? Indeed, how was the concept of ownership defined?

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[2]In *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 at 365.

[3]In *Commissioner for Railways* v. *Quinlan,* [1964] A.C. 1054.

[4](1960-61) 104 C.L.R. 274.

[5][1972] A.C. 877.

[6][1974] 1 All E.R. 87.

Defining ownership confronts us with the problem: how "absolute" should it be? Should property be an all-encompassing, overriding, absolute concept? Or should it be a right limited by the rights of other individuals and of the community as a whole?

This question turns upon another question. Do we want a society devoted to principles of efficiency or one guided by principles of justice? Efficiency of production and distribution of goods encourages an absolute, untrammelled individual right to property, for this will lead the owner to use it more effectively to produce goods for himself and, indirectly, for society. Justice would urge a limited right of property, restricted by neighbours' rights and by society's needs.

Our constitutions show which we prefer — efficiency or justice. Property, though a legal concept, like all such concepts, is set into a political and economic framework. Thus we may have a constitution that favours the individual and his rights, or one of socialist inclination, or a compromise between the two. The standpoint taken by a constitution will, in turn, often reflect the needs of a society at a given period.

Absolute Ownership

Absolute ownership has a distinguished history. We first meet it as the culmination of a long evolution in Roman law. Then it reappears in the Renaissance with the Commentators, continues into the Enlightenment, and flowers during the Industrial Revolution. This is the individualistic notion of man as the owner of things, having every right to them: the idea of ownership as the unlimited and unrestricted title to a thing.

It was from England that one of the strongest reinforcements of the sanctity of private property came. This was John Locke's inclusion of property rights among the innate natural rights of man, the protection of which is the content of the social contract.[7]

His sentiment took hold particularly in England and in North America, where it became a theoretical basis for the Industrial Revolution. At the same time continental European thought arrived at similar conclusions via the classical Roman law tradition which had somehow persisted through the centuries, and which received a strong new impetus after the beginning of the 19th century, particularly in the school of the German Pandectists.

Thus, during the early decades of the 19th century the second apex of the extreme individualistic notion of ownership as an absolute right was reached. This apex occurred at the meeting of the theories of the

[7]John Locke, *Two Treatises of Civil Government* (London: Everyman's Library, 1962), at 129.

German Pandectists with the simultaneous flowering of the "laissez-faire" economy with its hero the entrepreneur, the owner of the capital and other means of production and the taker of risks.[8] It was quite obvious that he alone should have full control over his property: investment, product and gain. The three modern codes designed during the 19th century all reflect this attitude to some extent — since modified by an increasing social conscience. The definition of property according to Art. 544 of the Code Napoléon is: "La propriété est le droit de jouir et disposer des choses de manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements." Art. 354 of the Austrian civil code, ABGB, defines property thus: "Seen as a right, property is the liberty of using a thing at will, in substance as well as its accrued fruits, and to exclude everybody else from it."[9] Art. 362 adds the rights of the owner: "Following from his right of disposition over this property the absolute owner normally may use or not use a thing; he may destroy it, transfer it fully or partially or he may give it up."[10] The German Code, BGB, describes property indirectly in Art. 903 by defining the rights of the owner: "The owner of a thing may, as far as the law or the rights of others are not violated, deal with his property as he wishes and he may exclude others from interference."[11]

Less than Absolute Ownership

There have been other periods in history, however, when ownership was less clear, less encompassing. The Middle Ages moved away from the Roman idea of absolute ownership. As feudalism developed, there was no longer property in the Roman sense, at least as far as land was concerned, but a rather hazy notion of land-hold, closer to possession than to ownership.[12] This view of landed property lasted particularly long in England and influenced common-law thinking.

After a brief period of extreme individualism and absolute property rights, a reverse movement set in later in the 19th century, both on the Continent and in England. An indication of this shift may be seen in the German Civil Code, passed in 1900, which is almost 100 years younger

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[8]F.C. v. Savigny, *Das Recht des Besitzes* (Wien: C. Gerold's Sohn, 1865).

[9]"Als ein Recht betrachtet, ist Eigentum das Befugnis, mit der Substanz und den Nutzungen einer Sache nach Willkür zu schalten, und jeden andern davon auszuschließen."

[10]"Kraft des Rechtes, frei über sein Eigentum zu verfügen, kann der vollständige Eigentümer in der Regel seine Sache nach Willkür benützen oder unbenützt lassen; er kann sie vertilgen, ganz oder zum Teile auf Andere übertragen, oder unbedingt sich derselben begeben, das ist, sie verlassen."

[11]"Der Eigentûmer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen."

[12]F.W. Maitland, *The Forms of Action at Common Law* (Cambridge: University Press, 1968), at 43; P. Vinogradoff, *Roman Law in Medieval Europe* (Cambridge: Speculum Historiale, 1968), at 88.

than the French and Austrian codes. Following Art. 903 (quoted above) the German Code contains several articles which show greater consideration for the rights of others than the two older codes in their original versions.[13] This reflects a general trend during the latter part of the 19th century away from the notion of property as an unlimited absolute right. Restrictions were of two kinds: those which originated in public law and those based upon private law. In both cases increased consideration was given to society, and less to the individual.

Restraints through the private law consisted in respect for neighbours' rights. In England such theories had existed from early on concerning straying farm animals. The formulation of these theories by Blackburn, J. and their extension to other kinds of damage caused by a property owner made *Rylands* v. *Fletcher,*[14] 1868, an early landmark in the withdrawal from a strictly individualistic attitude of "laissez-faire" economics and the corresponding sanctity of individual property. Similar restraints were, and are, enforced by civilist legal systems, which also enforce prohibitions against malicious or spiteful use of property rights. Under the influence of socialist movements a great deal more consideration is now given to the economically or socially weaker members of the population. This sentiment is reflected in laws to protect the workman, the tenant, the installment buyer. In France postwar legislation to protect the tenant farmer constitutes a serious infringement of the owner's right to contract with a new tenant after expiry of a lease.[15] The *Agricultural Holding Act* of 1948 has also improved the position of the tenant farmer in England.

Public law restraints are becoming even more ubiquitous. There are now numerous restraints dictated by public law which serve the public good and often are of a preventive nature: expropriation laws, antipollution measures, building guidelines and many others. While restrictions which protect and encourage neighbourliness have probably always been basically the same, those in favour of social utility are constantly added to.

But these restrictions on ownership are not simply due to justice being preferred to efficiency. In fact, the old distinction between justice and efficiency may not hold any longer. Efficiency may no longer allow absolute ownership. The public law restrictions of a preventive nature are working, not only towards justice, but also towards greater efficiency of the use of the environment and of resources. Reflecting

[13]Art. 904 demands toleration of trespass to land or chattel if necessary to prevent incomparably greater damage to others (— with compensation); Art 905. Although the code establishes rights above and below the surface of the owned land, it provides legal protection only if actual material interest of the owner is involved; Art. 906. An action in nuisance is only acceptable if the enjoyment of land is gravely disturbed through excessive and severe effluence from adjoining property.

[14][1868] L.R. 3 H.L. 330.

[15]W. Friedmann, *Law in a Changing Society* (London: Stevens, 1959), at 83.

on both absolute ownership and restricted ownership one comes to realise their impermanence and the need for occasional change. This indicates the value of taking a look at the Roman law of ownership. Not only was Roman law a great legal system but one fundamental to many modern legal concepts. The law went through a long evolution which enables us to follow the development of a legal concept like ownership and to draw upon the advantage of past experiences.

Roman Law

A look at early Roman history and prehistory through documentation, and failing this, through extrapolation and conjecture, shows that ownership was a gradually evolving concept. In fact it shows the opposite development to that of our own law — both developments having been caused by socio-economic circumstances. The development of the Roman concept began with a primitive, archaic law which did not distinguish between possession and ownership, and continued until preclassical and classical law with increasing refinements and, after the third century A.D., with increasing vulgarisation and simplification.

Sketching Roman law's slow process from primitive, prehistoric property concepts to the sophisticated view of absolute ownership, we meet various intermediary forms and stages of great historical interest. These may suggest some compromise solutions for ourselves, since for us full property rights may soon no longer be feasible and retreat from almost absolute individual ownership rights may prove necessary. Today there may be more than purely legal relevance in studying periods which knew no private property at all or else knew only limited property rights. Today therefore we need to take a second look at the well-established notion of an individual's property rights, at ancient forms of property in general, and at land occupation in particular.

Prehistoric Development

Anthropological studies show that most primitive societies evolve according to a parallel pattern. At first primitive man is a nomadic hunter. As such he has no theoretical notion of property but relies on actual possession and use derived from peaceful or forceful acquisition. Personal items, like weapons, tools, clothing and slaves, have been "held" by individuals from time immemorial. The personal property-like relationship probably derives from the form of acquisition: such items were either produced by the individual for his own use or acquired by conquest. Later, such economic factors as scarcity of grazing land, denser population, difficulty of moving about, as well as some degree of civilisation pro-

duced the animal breeding stage. At first, it seems the flocks were held communally, though they became the quasi-property of individuals or families. Ultimately, the need for more food resulted in the tilling of land and growing of crops.[16]

These different types of land use affected the form of ownership of land. To herdsmen land is useful if commonly held by tribe or clan, to farmers it is more useful if divided and apportioned to those families who have been working it. Another notable social tendency is that of extending the concept of private property to include things used in the production of wealth, a tendency which will dismay Marxist theorists.

Roman Social Development

We may visualize the very early Romans then as a primitive people in the process of ascending from a cattle breeding society to an agricultural one. Cultivation of land was still in its infancy and barely yielded a subsistence. It was therefore supplemented with the returns from animal husbandry, the only source of surplus. In consequence, the wealthy class was constituted of cattle breeders who alone could amass some wealth using human and animal labour.

We now think of Rome as a typically agricultural society. We think of the Romans when they entered history as being, and as for some time having been, peasants. Indeed they seem to represent in their way of life — and in their law — the agricultural society par excellence. All the same, traces of their earlier stage as cattle breeders may be detected. Especially when dealing with the question of property in very early times, we cannot ignore the remnants of an animal breeder's society. Examples supporting this statement are found in etymology and in law: for instance, the later use of cattle *(pecunia)* for money, or the close relationship between *familia* and *pecunia,* both used for property; also, and especially, the exclusion of land from early private property.

Effect of this Development on Property Law

This brings us to a typical Roman notion which dates from archaic times. It is the subdivision of things into *res mancipi* and *res nec mancipi.* The former were the necessities for the operation of a farm: labour and land. Children, slaves, draft animals, Roman land and servitudes thereon could be transferred only through the formal act of

[16]See Maine's chapter VIII, "The Early History of Property," in *Ancient Law* (London: Everyman's Library, 1972).

mancipatio.[17] *Res nec mancipi* were all other things. It seems *res mancipi* led to real rights ("rights *in rem*"). This at least is the opinion of some of the most authoritative Romanists.[18] According to them *familia* and *pecunia* were both *res mancipi,* that is, property essential for the operation of the farm, namely, labour. They were *familia, i.e.* members of the household including slaves,[19] and *pecunia* meaning cattle (or all domestic animals?). The formal act of *mancipatio* would suggest that land originally was not part of *res mancipi* as the physical presence of the item to be transferred was required. Therefore it seems that land was added to *res mancipi* only later.[20]

Mancipium was the power over *res mancipi.* It contained a combination of patrimonial power over family members and economic power over things. This may derive from the fact that at first both were factual personal powers a man held over things. In both cases it was the actual power, the ability to control, rather than a question of legal title. This strange combination of personal power over family and economic power over things accounts for the construction of *mancipatio* and another ancient formal act of property transfer, *in iure cessio,*[21] both legal acts which lead to the acquisition of authority over persons as well as things.

By the time the Twelve Tables were written down, probably in 450 B.C., the terms *familia* and *pecunia* were used interchangeably and indiscriminately for property and by then land had also been included in *res mancipi.* The Twelve Tables reflect still undeveloped legal thinking and they do not deal with an abstract concept of property, but wherever they refer to the patrimony as a whole they employ the terms *familia* and *pecunia* interchangeably.[22]

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[17]Both parties would appear in front of the magistrate with the thing to be sold (a handful of earth if it was land). They were accompanied by five witnesses and a "holder of scales", whose scales were struck at one point during the ritual by the purchaser with a piece of copper signifying the payment of cash. (The formality of the act and the number of witnesses were no doubt deemed necessary in the absence of written documents.)

[18]Especially Mommsen and following him Kaser. Diosdi, *Ownership in Ancient and Preclassical Roman Law,* (Budapest: Akadémiai Kiado, 1970), at 56.

[19]See the etymological connotation with *famulus* = slave.

[20]Here is an example of a public law principle being realised through a civil law prescription. *Res mancipi* could only be transferred by *mancipatio,* which was a legal act of *ius civile* applicable only to Roman citizens. Therefore, it was impossible for foreigners to purchase any of these essential means of production. See R. Sohn, *Institutionen* (Leipzig: Dunckert Humbolt, 1911), at 376.

[21]*Res mancipi* as well as *res nec mancipi* could be the object of *in iure cessio,* which took the form of a fictional action, an action in which the plaintiff, who was the transferee, claimed the thing which was to be transferred to him. The fictitious defendant, actually the transferor, did not deny the plaintiff's claim and the judge adjudicated the thing to the plaintiff.

[22]Other Roman scholars have maintained various other definitions and distinctions, especially one that sees *familia* used for *res mancipi, i.e.* family property, and *pecunia* for *res nec mancipi, i.e.* the separate personal property of the *pater familias.* See O. Karlowa, *Römische Rechtsgeschichte* II, (Leipzig: Veit & Co., 1901), at 73; P. Bonfante, *Forme primitive ed evoluzione della proprietà romana,* (Scritti giuridici varii II, Unione tipografico editrice torinese, Torinto, 1926), at 213; J. E. Kuntze, *Cursus des römischen Rechts,* (Leipzig: Hinrichs' Verlag, 1879), at 48; *Supra,* footnote 20, at 377.

From Communal Ownership to Private Ownership

Some indications let us form a picture as to when and how the Romans shifted from communal ownership of land to private ownership. It was a gradual process which began when agriculture became more developed and had replaced animal breeding as the main source of wealth.

At that time the essential social unit in which the ancient Romans wandered and settled was the *gens* (tribe), a large group of families believed to have had a common ancestor. Early social relationships were all set within the context of the *gens* and they were guided by *mores, i.e.* habits or morals, rather than by laws. The *gentes* (tribes) acquired certain areas of land by acquisition and began to settle there. The land was communal property for the collective tribe; this was a fact rather than a legally defined situation. It was the result of subjecting and expelling others. In the absence of legal rights and remedies the members of each *genus* would defend their common territory[23] against outsiders.

Within this common territory, however, certain plots of land were allocated to individual families. After the father's death these plots would revert to the tribe, to be issued once more to a member, although quite regularly land would be reissued to the son and hence remain with the same family for generations. Yet the family only had possessory rights to the land it farmed. The working of the land over a period of time established *usus,* the use. This may be seen as the beginning of a nexus between the user and the land, from which derived the first form of *possession civilis,*[24] a legal title instead of mere factual use.

Conceptually no distinction was made between possession and ownership.[25] As preclassical and classical Roman law, however, distinguishes clearly and sharply between possession and ownership, we may conclude that the notion of ownership gradually took over from that of possession, as a consequence of the increasing bond a family may have felt towards land it had worked for generation after generation.

A first incremental step made in the gradual process from communal ownership to absolute property rights came with the *heredium,* a garden plot surrounding the farm house. That step was made in archaic times and we have no historical information, but legend tells

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[23]See Mommsen, *Römisches Staatsrecht* III (Leipzig: Hirzel, 1888), at 15.

[24]*Possessio* may be traced etymologically to *sedere* = to sit, see also German: *Besitz.*

[25]See Kaser, *Eigentum und Besitz im ältern römischen Recht* (Köln: Böhlau, 1956), at 6.

us about it. It is the quasi-historical story of King Romulus[26] who gave to every citizen two *iugera* (acres) of land as his own to be passed on by inheritance (hence the term: *heredium),* but not to be sold outside the family.[27] With this restriction it is still a long way from the later absolute right of ownership. What has puzzled readers at times is the amount of land, which was too small to feed a family even under the best circumstances. It is now generally understood that it was not meant to maintain the family, but was designated for garden farming — as the later use of the word (*heredium* = garden) indicates. It was usually the land adjoining the house and was used to raise vegetables for the immediate consumption of the family. It was worked in addition to the family's share in the common agricultural land. Another innovation is the manner of acquisition: the *heredium* was said to have been obtained from the "king", indicating that it was the central power which bestowed legal title where before it was actual use and the *animus possedendi* (the will to keep) which created possession.

The *heredium* is a transitional form which is found on the Roman road to private property. The same transitional form is found again on the road back to communal property as taken by communistic states. There a small piece of garden land around the house, the *litchnij utshastok,* is the peasants' last piece of property to remain unexpropriated.

Absolute Ownership in Rome

When thinking of the Roman law of property we most often accept the achievements of the classical period, that is, the first two centuries after Christ and we ignore the long period of growth of Roman law as well as the equally long period of ossification and decline. When Justinan had the civil law codified around 530 A.D. he went back past several centuries of decline and vulgarisation of the law by using the jurisconsults of the early third century and the second century Gaius.

Justinian's *Corpus Juris Civilis* thus displays the classical Roman concept of property as an absolute right and it was through his *Corpus Juris* that this way of seeing ownership has become known in Europe and accepted as "Roman".

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[26]Mentioned among others by Plinius, *N.H.* 18, 2, 7 *Bina tunc iugera populo Romano satis erant, nulloque maiorem modum adtribuit.* Varro, *De Re Rustica* 1, 10, 2, *Bina iugera, quod a Romulo primum divisa viritim quae heredem sequerentur, heredium appellarunt.*

[27]Weber, *Gesammelte Aufsaetze sur Sozial und Wirtschaftsgeschichte* (Tübingen: Mohr, 1924), at 198.

In writings of the classical Roman period we find the clear and full description of the essence of property as an absolute right in private law, a right *in rem,* in a thing.[28] It represents a title as untrammelled as possible with a minimum of public and private law restrictions. There were certain basic requirements of neighbourliness, and basic public specifications as to maintaining agricultural land in good condition, or looking after adjoining roads. But the right of ownership was otherwise unlimited in time and scope. It was valid against all comers, permitted full authority over the thing; to use, sell, will and even to destroy it. It was a right which could, in certain ways, become restricted by the owner's act, but initially it was unrestricted[29] and remained as the residuary interest after the owner had given certain partial rights away.

In the classical period, absolute ownership was fully distinguished conceptually not only from the right of possession but also from rights on another's property (*iura in re aliena).* These partial rights included: *servitude* (easement), *usus fructus* (use of the fruits), *fiducia* and *pignus* (two forms of a pledge[30]).

Ownership was transferred either through the ancient formal acts of *mancipatio* and *in iure cessio,* both highly stylised acts dating back to very early times when contracts were made verbally in front of an array of witnesses, or through the later simple *traditio* (transfer) combined with a *iusta causa traditionis* (consideration): Protection of ownership was enforced through the important *vindicatio rei,* the classical action for recovery of property.

Property was a right to a thing excluding any other rights except those given by the owner. Even the extent to which the owner could create self-imposed restrictions upon his property was limited. While he could freely divest himself of his total property right he was limited in chiselling away at that right. The *iura in re aliena* are such voluntarily given rights on one's property. Of these, servitudes — which have no time limit — were limited as to content, and could only be an obligation "to suffer" but not to "do". *Usufruct,* on the other hand, which is legally unlimited as to content, was limited in time, not transferable to other persons and extinguished with the usufructuary's death.

This was the situation in the classical period during the time of the principate.[31] It was the culmination of a long development, which,

[28]This differs from a right *in personam* which is a right against a certain person who has an obligation while a right *in rem* is valid against everybody with respect to a specific thing.

[29]Kaser, *Römisches Privatrecht* (München: C. H. Beck, 1968), at 86.

[30]See *infra* at 172.

[31]The period from Augustus (27 B.C.) to Diocletian (284 A.D.).

incidentally, was unique. No other primitive society, and for that matter no advanced society in ancient times, it seems, had developed such refined legal concepts based on rational thought, separated from religio-magic norms.[32] It was only the Romans of the Bronze Age who had separated *fas* from *ius, nefas* from *iniuria*[33] and formed a concept of law as it applied between men, in the Austinian sense.

Evolution of Roman Absolute Ownership

This long development of legal thinking found its parallel in the political constitution. The tribal predominance in public matters was almost imperceptibly replaced by the ordered political society — the *populus Romanus.* In private matters the tribe's importance was taken over by the family when the farmland had become, for the family, an object of ownership rather than possession. The former authority of the *gens* asserted itself, however, in certain aspects of Roman life until quite late. For instance, the former social pressure as to morals and responsibility, especially of the otherwise unrestrained power of the *pater familias,* after c. 443 B.C. was exerted by the *censors.* Remnants from the predominance of the *gens* are also found in the Twelve Tables: a right of the *gens* to inherit from its member if there are no agnate heirs,[34] and the right and duty of the *gens* to supply a tutor or a curator where needed.

Before the writing of the Twelve Tables, most agricultural land had already become land of the family rather than of the *gens.* The transition, a gradual process, was never completed as even in classical times some common land remained in existence. As Kaser describes it[35] originally all land was *ager publicus;* however, piece by piece large segments were made into *ager privatus.*

Family Property — The *Pater Familias*

When the Roman families extricated themselves from the tutelage of the *gentes* and obtained increasingly more independence their possession of part of the communal land became permanent lawful possession — ownership, under the administration of the *pater familias.* As in other Indo-germanic societies the members of the family were co-owners of the family property. The *pater familias* held the property while the members'

[32]F. Schulz, *Principles of Roman Law* (Oxford: Clarendon Press, 1967), at 20.

[33]*fas* = god-given laws, *ius* = man-made laws, *nefas* and *iniuria* = their respective violations.

[34]Heirs of direct relationship through males only.

[35]*Supra,* footnote 25 at 238.

ownership was a latent one. In case of death of the *pater familias* this latent ownership of the *domestici,* who were *sui heredes,*[36] took over automatically without the formal acceptance which was required from others. Indeed in early times it was impossible for *sui heredes* to renounce their inheritance. The heirs also remained co-owners of the whole family property which they could probably dissolve by mutual agreement. But it seems only the Twelve Tables introduced an action for the brothers to divide the family property and obtain their share (the *actio familiae ercisundae).*[37]

The strengthening of the father's grip on family holdings is a development atypical of other Indo-germanic societies. Gradually the *pater familias* became able to dispose of the family property by means of a testament. The Twelve Tables contain a clause to that effect: *Uti legassit pater familias super pecunia tutelave suae rei ita ius esto.* (It shall be legal whatever the *pater familias* wills for his property and family.) This disposition of property even beyond his death indicates that family property had become the private property of the *pater familias.* Another indication of the *pater familias'* strong hold upon the family property is the fact that a son who was emancipated (released from the father's power) gained his personal freedom but did not receive a proportionate amount of the family property as he normally would after his father's death. Movables and immovables were thus considered the father's private property, which tended to weaken the earlier sense of family co-ownership. But, on the other hand, the claims of family membership were still strong enough to make it necessary for the *pater familias* in his will to disinherit explicitly all children whom he did not want to take part in the inheritance. Implicit disinheritance (by naming someone else heir) did not suffice. In fact, the testament was invalid if every child living at the time of the testator's death was not excluded by name from the inheritance.[38]

By the time of the Twelve Tables the *pater familias* had become the owner of the family property. This transformation from family property to personal property of the *pater familias* was a factual change. The notion of family property seems to have remained in people's consciousness for some time.

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[36]That is, all members of the household who upon the death of the *pater familias* will be *sui iuris, i.e.* gain their freedom.

[37]Diosdi (*Supra,* footnote 14 at 46) thinks this is the point where family property ceases to exist; it has become private property of the *pater familias.*

[38]Later again the *querela inofficiosi testamenti* restricted the right of the *pater familias* to dispose of the family fortune through testament without considering certain members of the family who were entitled to the *legitima portio.*

Terminology

It is not easy to discuss the ancient Roman concept of ownership in the absence of precise terms. In those early times the words *dominium* and *proprietas* were not yet in use, nor had the corresponding institution been invented. While the term and institution of *dominium* corresponds to the modern use, we find, in those earlier periods, only terms that suggest their derivative origin; derivative from the more primitive notion of possession. *Habere* means simply to have, without reference to rights; *licere* implies a right to hold, but does not necessarily mean a legal right; *meum esse* indicates the fact of having, but again does not satisfy the question about a legally derived property right. This suggests that the Romans of those early times either had an unclear notion of ownership or one drastically different from our own. We may assume the latter.

The Roman institution of ownership at the time of the Twelve Tables cannot be compared with the classical Roman or the modern institution because there is no common denominator. Ownership and family relationship were not yet separated. The *pater familias* had personal power *(mancipium)* over the free members of his household, he had the right over life and death, including the property rights to everything any of them might earn or inherit. He also had proprietary power *(mancipium)* over *res mancipi,* which were: slaves, cattle, Roman land and servitudes thereon. This complex of economic and paternalistic power grew out of the farm background of the early Romans. It ensured the most effective operation of the farm if it was governed authoritatively by a single responsible person,[39] who had full powers to direct all the means of production: human labour, animal labour, land and implements. This right of direction translates itself into the closest approximation of modern property right. But it is only an approximation. If we use its corresponding term, *mancipium,* it becomes clear why this is so. It covers, on one hand, a larger area by including paternalistic powers over free human beings, and it covers, on the other hand, a smaller area by not including *res nec mancipi.* One must say, therefore, that *mancipium* cannot be equated with ownership because it does not take care of small farm animals, household goods, farm implements and clothing, which all are *res nec mancipi.* Hence, we must not search in ancient Roman law for the exact parallel to classical or modern civilist concepts. But the study of ancient concepts and institutions will be of profit in revealing the evolutionary process from archaic law to the final product of classical law.

When questioning fundamental rights to property (in Locke's sense) we must distinguish — as Marx did — between property destined

[39]In modern farming societies one may still notice a patriarchal tendency. See the example of the Serbian *Zadruga,* as mentioned by Max Weber in *Economy and Society,* at 69.

for use or consumption and property as means of production. The Romans of certain periods accorded different treatment to those two categories. *Res mancipi* were singled out for special treatment. They were the means of production to the early farming society, and they were held by the family, later by the *pater familias.* Household chattels, clothing and furniture seem to have "belonged" since time immemorial to the individual, but, on the other hand, so have weapons, the "means of production" of the very early period.

Ownership as a Relative Right

An intermediate state in the evolution of absolute ownership might have been the treatment of property as a relative right. Opinions are divided whether the Romans ever saw property as a relative right.[40] Most likely they did.[41] It becomes apparent from the very ancient vindication action, the *legis actio sacramento in rem,* that there was still no full distinction between ownership and possession, that ownership seemed to be rather "the better right to possess" in comparison with somebody else who had a lesser right.[42]

The procedure of the *legis actio sacramento in rem* reveals even earlier usages in dealing with the loss of one's chattels. In those prehistorical times, the proprietary remedy was linked with the pursuit of theft. The offended party would pursue his lost chattel with the help of his family or clan. He might search the house of the suspected thief, a habit which became institutionalised in the *quaestio lance et licio* — the search with dish and belt. When the lost article was found in somebody else's possession there was a fight for it in prelegal times, a fight in which the deities will have figured in one way or another. After society formed a strong enough central legal power, it looked after search and restitution of lost chattels. Even then there are surviving traces of self-help, as well as of the suspicion of theft.

The archaic *legis actio sacramento in rem* reveals some of these ancient rudiments and — for the present discussion — is a prime example of an action that limits itself to establishing the relatively better right to a thing. The action began when the praetor received a statement from each party claiming that the thing was his, *meum esse*

[40]R. v. Ihering, *Geist des römischen Rechts III* (Basel: B. Schwabe, 1954), at 92; E. Levy, *West Roman Vulgar Law. The Law of Property* (Weimar: H. Böhlau Nachfolger, 1956), at 235. Kaser, *supra,* footnote 25 at 8), and others are convinced that they did, a view which is intensely attacked by Diosdi, *(supra,* footnote 18 at 105), De Vissher, *("Auctoritas et mancipium,"* SDHI, 22 (1936), at 263) and several Italian authors.

[41]See Kaser's most convincing expositions in his *Eigentum und Besitz, ibid,* and *Roman Private Law.* (Durban: Butterworth's, 1965), at 93.

[42]*Ibid.,* at 93.

aio. Subsequently, the defendant's claim only was questioned and needed proof. This was based upon the suspicion that the thing had been stolen. How else would it get into another's possession? Simple societies and primitive legal thinking did not admit of other possibilities like holding in good faith.[43] Therefore, the defendant had: 1(to prove that the disputed item was his; or, 2) to clear himself of the charge of theft if he was not successful in doing the first. The plaintiff did not have to prove his claim. At this point the frequently stressed symmetry of the procedure ends. The problem to be solved in the subsequent lawsuit was then the rightfulness of the defendant's *contravindicatio.* The plaintiff offered a wager, the defendant accepted; both deposited an amount of the value of the disputed item. This wager followed closely the form of the earlier prelegal ordeal *(Gottesurteil).* It was in the form of a self-curse: "may God strike me down if this is not so." Instead of the punishment through self-curse the sum of money was offered to the Gods. This was called the *sacramentum* because it was forfeited by the losing party to the adjudicating pontiffs who used it to buy sacrificial animals. The right of the defendant then was the object of the lawsuit, but not only this, it also was the object "of evidence, *i.e.* the burden of proof was borne by him."[44]

A similar form of procedure with reversal of the onus of proof was also known in early Germanic law, and is quite easily explained as primitive justice.[45] This burden of the defendant makes *auctoritas* such an important feature of the Roman Civil law. If the defendant could not prove rightful possession the disputed thing was adjudicated to the plaintiff, with no further questions asked as to whether the plaintiff had a good title — it was deemed established that he had a relatively better title and the judge declared his *sacramentum* (wager) as *iustum* (just) and the defendant's *sacramentum* as *iniustum,* forfeited.[46] There was no possibility foreseen that the judge could declare both *sacramenta injusta.* Yet it was possible that neither was owner, that a third party was the rightful owner whose rights were thus ignored — a possibility which in a community as small as ancient Rome was not likely to occur, especially when considering the publicity of law suits. It is, however, the principle that interests us here. If both parties had at one time obtained possession of the thing by theft, neither would have absolute property in it. Yet the judge in the *legis actio sacramento in rem* was obliged to decide in favour of one of the parties irrespective

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[43]See Schulz, *supra,* footnote 33 at 248: "Acquisition in good faith was in principle unknown to Roman law; (with exceptions)".

[44]Diosdi, *supra,* footnote 18 at 102

[45]See *infra* at 171.

[46]*Supra,* footnote 25, at 7.

of lawful or unlawful acquisition. The criterion by which he chose was then not one of difference in essence: lawful or unlawful, but in degree: the relatively better, closer, more proximate right.

Closely connected with the original *legis actio sacramento in rem* is another feature which points in the direction of relative property rights. *Mancipatio* did not only or even mainly transfer legal power over the goods sold, but it gave *auctoritas;* the seller guaranteed proper legal title. He promised for himself and his heirs not to claim any rights to the thing sold and in case of a vindiction suit to stand by the *emptor* helping him prove his title. According to Roman law principles this title could of course only be as good as the seller's title and it may have been necessary for the prior owner to refer back to the seller from whom he obtained the thing, and further on along the line, which in the simple early Roman economy may not have been difficult. This warranty, though only tacitly implied as part of every transfer through *mancipatio,* was a duty of the seller and could be legally enforced. Kaser[47] cites Rabel saying that this feature "points backwards into an area when real and obligatory rights were one" and the result is "a limited property concept, effective only between the two parties" which, he concludes, is nothing but relative property. It stands between possession and the classical absolute property.

Another intermediary phase is represented by the treatment of land in conquered provinces. When private property in its absolute form had evolved in the pre-classical period it could only be had on Roman (later Italian) land, on *fundus italicus.* There was no private property in this narrow sense of *fundus provincialis* which, after conquest, became communal property of the Roman people, like *ager publicus,* the original common land of Rome. This is the theoretical construction.

In practical life the difference appeared only in the tax situation: the "owner" of provincial land had to pay land tax to the *populus Romanus,* the real owner.[48] But he could alienate his land at will and pass it on to his heirs. The owner of Roman land did not pay taxes (until very much later) and in this sense had fuller ownership than we have now. (Public funds were not required in the early period when the members of the *civitas* would in a co-operative effort maintain roads and defense buildings.) Title on provincial land was termed *uti frui habere possidere* which indicates the private law situation of rightful possession of a portion of the *ager publicus;* it is less than ownership but more than possession.

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[47]*Ibid.*, at 69.

[48]*Supra*, footnote 41 at 95.

Iura in Re Aliena

Dealing with various problems in connection with property brought the Romans to a high level of legal sophistication as they learned to distinguish between ownership and possession, between legal and physical control. Another such fruitful difficulty was the question of the *iura in re aliena:* servitudes, *usus fructus, fiducia, pignus.*[49]

In early thinking servitudes and *usus fructus* were seen as small segments of ownership cut out from the full title over a thing; some scholars[50] call this functionally divided ownership.[51] They believe the recognition of servitudes and *usus fructus* as independent real rights occurred simultaneously with the assertion of the property right as an absolute one — during preclassical times.[52]

Fiducia and *pignus,* the two forms of pledge, were developed near preclassical times and therefore seem outside the era of relative property rights. Both *fiducia* and *pignus* were sureties for debts; *fiducia* was the transfer of a *res mancipi* to the creditor through *mancipatio* or *in iure cessio* with the proviso — *pactum fiduciae* — to remancipate the *res mancipi* as soon as the debt was paid. *Pignus,* whether handed over to the creditor or retained by the debtor, remained within the debtor's ownership with the proviso that it was to be forfeited automatically to the creditor if the debt should be unpaid when due. In both forms of surety one finds an infringement upon property rights, voluntarily given — for cause — by the owner. The restriction was limited in time but during its duration another title was constituted upon the property right, another layer of legal right, namely, the proviso mentioned. Kaser sees this also as functionally divided ownership.

The essential changes in the notion of ownership took place during the preclassical period which corresponds to the late Republic. In that little-documented era, the classical concept of ownership as an absolute right was born. *Mancipium* turned into *dominium* or *proprietas,* both identical, and, unlike *mancipium,* comparable concepts to modern civilist and North American "private property".

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[49]Mentioned *supra,* at 165.

[50]*Supra,* footnote 25 at 17, 302.

[51]Diosdi (*Supra,* footnote 18 at 107) does not agree. He sees servitudes and *usus fructus* originally as non-corporeal independent rights. One may ask how this is to be reconciled with the inclusion of servitudes among the original *res mancipi* which are physically obtainable through *mancipatio, i.e.* gripping with the hand?

[52]Because of their similar nature, both servitude and *usus fractus* were listed by Justinian as servitudes; *usus fractus* was styled as a personal servitude.

The idea of property as a relative right had disappeared when the *legis actio sacramento in rem* was replaced by the more modern *vindicatio rei;* in it there was no longer the symmetry of both parties claiming title to a thing; it was the plaintiff alone who did so. The burden of proof was removed from the defendant and shifted to the plaintiff who had to prove his title first. In this way an absolute right of ownership was recognized.

A form of relative property right continued to exist in the *peregrini* law. It was a new remedy developed by the praetor to take care of less clear cases, when property had been acquired without the required form, as simple *traditio* in the case of *res mancipi,* or when it had been acquired in good faith from a non-owner and the required period of prescription had not run out. The *actio Publiciana* protected property received through an incomplete transaction against everybody but the true owner, thus protecting the relatively better title.

The *actio Publiciana* was, however, only one of the practical solutions to which the Romans often resorted; it does not detract from the notion of absolute property now clearly developed. This notion — the ultimate result of a long development — was not to remain in use for very long; but, as a concept, it set a parameter for all further thought about the problem of private ownership.

Conclusion

In short, then, the Roman development almost follows a full circle from primitive notions which did not distinguish between possession and ownership, to partial ownership in the *heredium* and relative ownership as an obligatory right rather than an absolute right, to the culmination in an absolute concept as it was honed by the jurisconsults in the second century A.D. Then came simplification and confusion to this highly sophisticated concept which was briefly interrupted by the efforts of Justinian's commission. The gradual decay lasted until the 11th century when the Glossators began a reversal which ultimately, in the 19th century, reinstated the highly refined classical concept of absolute ownership. Throughout these centuries counter-movements challenged individual property as a total right. These counter-movements were generated by various religious groups like the Anabaptists and the Diggers, by the feudal system as such, by 19th century Anarchists and by Marxist theories.

However, the idea of property as a total right, for a few decades in the 19th century, seemed the last and final word. But, to many, these sacred property rights have now become a social evil. As we find ourselves more and more retreating from absolute property rights we

may find solace in the recognition that the concept of ownership has never been a stable one. It seems the problem of ownership does not permit a final solution. For one, "all is in flux" — variable components change, new variables emerge and it is extremely difficult to find and to hold the 'right' balance between change and stability. Moreover, it is difficult to find a permanent compromise between public and private interests, and a permanent allocation of values based on either justice or efficiency, or possibly on newly arising principles.

At the present time, the question arises whether the increase in numbers of people on the earth and generally higher expectations may not render the concept of private property an anachronism. Certain parallels with primitive times are taking shape today. In a primitive age, not much land had been cleared, agricultural techniques were undeveloped, resources were hardly above the subsistence level, often below it, in spite of a thin population. Today the enormous increase in population and individual demands offset intensive cultivation of land, modern technology and efficient use of resources.

This brief view of the Roman property concept may help us see our present and future legal institutions concerning property as the response to social utility and it may prepare us to accept changes as they become necessary. The case of the trespassing snowmobiler may be one of such changes.