

OWNERSHIP
IN ANCIENT
AND PRECLASSICAL
ROMAN LAW

BY
GYÖRGY DIÓSDI

AKADÉMIAI KIADÓ
BUDAPEST

GY. DIÓSDI

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AND PRECLASSICAL ROMAN
LAW

Providing a realistic and consistent treatment of the origins and development of private property in the Roman Republic, the monograph recommends itself not only by its completeness — with all the sources and abundant literature carefully analysed — but also on account of its independent approach to the subject. With an acute sense of reality, the author rejects and refutes several current traditional assumptions and theories. He argues among others against the theory of relative ownership and casts doubt upon the existence of bonitarian ownership. The well-balanced conclusions are always based on primary sources, so that the reader can obtain an unprejudiced picture of the history of the different legal forms of Roman ownership. At the same time, a critical survey of the literature offers ground for orientation in the topical sphere. In spite of all its conciseness, a marked clarity of style makes the book accessible not only to professional readers but also to everybody interested in Roman law and history.



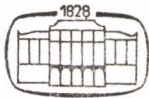
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PREFACE

An attempt to write a monograph on ownership in early Roman law is justified by the subject, since the great importance of this legal institution is generally acknowledged. The undertaking, however, may seem audacious. The scanty and frequently ambiguous sources and the overabundant literature available present in themselves difficulties that can scarcely be overcome. In addition, one of the greatest living romanists, Max Kaser, has already treated the subject in his monograph, *Eigentum und Besitz im älteren römischen Recht*, some twenty-five years ago.

So the boldness of having undertaken this arduous task requires a short explanation. The book of Kaser has neither met general approval, nor managed to finally settle all the questions involved—a sheer impossibility in the field of ancient Roman law. Since its publication, many papers whose authors have either attacked or accepted Kaser's views, have been devoted to special questions of the ancient law of property. New hypotheses have been brought forward, new points of view suggested. A mere summing up of the present state of research would not by any means be superfluous. Originally I intended to merely realize this modest aim in the hope that historical and dialectical materialism would contribute to the clarification of some problems. But it has turned out that even in questions overabundantly treated, new results can be obtained. How far my conclusions will prove to be correct, is of course open to doubt. To what a great extent I am indebted to the works of Kaser, even in points where I have dared to arrive at a different conclusion, becomes, I hope, apparent from the whole of the book.

Literature, which abounds in numerous, frequently fantastic hypotheses, has taught me the lesson that utmost caution must be displayed. The reader of this book will be perhaps disappointed at failing to find in it a handful of bold and surprisingly new suppositions. I have endeavoured, however, to erect a solid and modest house from the scanty material at my disposal, rather than a splendid jerry-building likely to collapse at the slightest breeze. When the sources have failed to provide me with bricks, I have chosen to leave the wall unfinished.

As a consequence I have not arranged the different subjects according to the usual system, in order to avoid doing violence to Roman ideas by pressing them into an inadequate framework. Notions and institutions, which already existed in ancient law, seemed to furnish a more reliable basis.

The book is divided into two parts. The first part deals with the questions of ancient Roman law, while the second is devoted to preclassical law. The two periods have been delimited, as usually, by the third century B.C., i.e. the period of the Punic wars.

I was compelled by the vastness of the material to self-restrictions. First of all I have confined myself to Roman private property, because a detailed analysis of the different types of landed property in republican times would have increased the size of this book tremendously. Secondly, I could not treat every question of detail, in an exhaustive way. It seemed expedient to lay the stress upon notions and institutions which were decisive in the development of the Roman law of ownership.

I have received many useful suggestions and much support in the different phases of my work. I should like to express my sincere gratitude to the late professor Mihály Móra, and to professors Róbert Brósz, Endre Nizsalovszky, Elemér Pólay and Miklós Világhy. I am also indebted to professor Gyula Eörsi for having encouraged the publication of this book and to Mr. Alan Gardiner for his kind linguistic help. Finally, I owe thanks to my wife, not only for her technical assistance—the usual burden of a scholar's wife—, but also for several sound suggestions she has made.

György Diószdi

SPECIAL ABBREVIATIONS

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PART ONE

ANCIENT LAW

THE ORIGIN OF PRIVATE OWNERSHIP ON MOVABLES

I. SURVEY OF THE LITERATURE

1. The title of this, as well as of the next two chapters, may seem at first sight presumptuous. The reader possibly hopes or rather fears that he will be faced with theoretical statements about the origins of private property in general. Nothing of the kind, however, need be expected. Being convinced that such theories lie beyond the competence of a legal historian, I have attempted to realize a more modest aim: that of tracing back, with the help of our extant sources, to the origin of private ownership in Rome.

The origin of private ownership on movables and immovables will be dealt with in two separate chapters, although the two subjects are really quite closely connected. It is to be hoped, however, that the third chapter, devoted to the question of family property, will serve as a link.

2. The earliest traces of private property on movables, nay of private property at all, can be found in the expressions designating the notion of property in our most ancient Roman legal source, the Twelve Tables. The earliest Roman codification employed two words to denote property: *familia* and *pecunia*.¹ Difficulties of interpretation arise, however, from the fact that the two expressions were interchangeable when used by the Twelve Tables. So it is not known for sure whether *familia* and *pecunia* can be regarded as synonymous expressions, or whether they are likely to have indicated two different kinds of property.

Opinions differ widely on this question. Although the meaning of the two words has been discussed for more than a century, no *communis opinio* has been achieved yet. As the literature on the subject is extremely abundant, I shall confine myself to a concise account of the most important views.

3. (a) Mommsen held the opinion that the original meaning of *familia* was "members of the household", above all "slaves", while that of *pecunia* was "cattle". Their original meaning has been obscured by the lapse of time, in the language of the Twelve Tables they were therefore used as synonymous expressions denoting property.²

¹ *Tab.* V. 3; V. 4–5; V. 7a; V. 8; VII. 12; X. 7; *Fr. incertae sedis* 1.

² See Mommsen, *Staatsrecht* pp. 22 f. There is already a reference in his *Römische Geschichte* I. (Berlin, 1868) p. 153. He was followed by numerous authors, e.g. G. Beseler, "Glossen zum Privatrecht der römischen Republik", *SZ* 54 (1934) pp. 322 f; Girard—Senn p. 272 and 854 n. 1; Kunkel, *RPR* p. 63 n. 4 and p. 64 n. 7; Kubitschek, *PWI* 790 ("ager"); Mayr, *RG* pp. 35 f; I. Pfaff, "Zur Lehre vom Vermögen nach römischem Recht", *Festschrift Hanaušek* (Graz, 1925) p. 95; Perozzi, *Istituzioni* p. 621; E. Weiss, *Griechisches Privatrecht* I. (Leipzig, 1923) p. 148 n. 36.

(b) A different explanation was offered by Ihering. Starting out from the consideration that such a tautology would be incongruous with the lapidary style of the Twelve Tables,³ he attributed different meanings to the two words by identifying *familia* with the totality of *res Mancipi* and *pecunia* with that of *res nec Mancipi*.⁴

He was followed by Bonfante, who even conjectured that *familia*, having embraced the most important goods economically (*res Mancipi*), constituted family property, while *pecunia—res nec Mancipi* embraced the goods that had been excluded from this realm.⁵

Their view is still shared by numerous scholars.⁶

(c) Some fifty years later a new hypothesis was advanced by Wlassak.⁷ While agreeing largely with the theory of Ihering and Bonfante, his assumption may rightly be regarded as a new one.

He too identifies the notion of *familia* with the totality of *res Mancipi*, but considers agricultural toil and the products of the soil as belonging equally to this part of the property.⁸

His conclusions about the law of succession upon death are of greater importance. According to Wlassak, since the *paterfamilias* was but the manager of the family property (*familia*), he was not entitled to dispose of it by will provided he had *sui heredes*.⁹ *Pecunia*, however, was the separate individual property of the *paterfamilias*, which he was free to dispose of by legacies.¹⁰ Wlassak even asserts that the object of a *hereditas* could be exclusively the *familia*, whilst that of legacies could only be the *pecunia*. Consequently, if the *paterfamilias* failed to make provisions as to his individual property, it did not pass to the intestate heirs, but became ownerless property open to free occupation.¹¹ Like his predecessors, Wlassak was also followed by many scholars.¹²

³ Ihering, *Entwicklungsgeschichte* p. 87.

⁴ *Ibidem* pp. 81 ff.

⁵ Bonfante, *Proprietà* p. 213, and *Corso* pp. 170 ff. The idea can already be found as a short remark in Kuntze, *Cursus des römischen Rechts* (Leipzig, 1879) p. 48.

⁶ Cf. B. Biondi, *Appunti intorno alla donatio mortis causa* (Perugia, 1914) pp. 11 f; Cornil, *Ancien droit* p. 31 and *Mancipium* p. 423; Costa, *Cicerone* I. p. 96; E. Cuq, *Institutions juridiques des romains* I. (Paris, 1904) p. 87 (with some reserves); Georgescu pp. 361 f; R. Henrion, "Des origines du mot familia", *Antiquité Classique* 10 (1940) especially p. 68; A. Guarino, *SDHI* 10 (1944) p. 409; Karlowa, *RG* pp. 73 ff; B. Kübler, *Geschichte des römischen Rechts* (Leipzig-Erlangen, 1925) pp. 37 f; L. Kuhlenbeck, *Die Entwicklungsgeschichte des römischen Rechts* I. (München, 1910) p. 42; Mitteis, *RPR* pp. 79 ff; R. Sohm, *Institutionen* (Leipzig, 1908) p. 361.

⁷ Cf. Wlassak. At the same time a very similar but less elaborated hypothesis was advanced by Westrup, *Introduction* II. pp. 57 f.

⁸ Wlassak p. 37.

⁹ *Ibidem* p. 15.

¹⁰ *Ibidem* pp. 14 f.

¹¹ *Ibidem*.

¹² Cf. Koschaker I. p. 267 n. 1 and II. p. 452; Leifer I. p. 179 and II. p. 119 nn. 2–3; M. Lemosse, *Iura* 3 (1952) pp. 227 ff; Lübtow, *Erbrecht* pp. 442 ff; E. Rabel, "Erbenge-

(d) The fact that the afore-said views have been severely criticized by Kaser¹³ in recent times deserves special attention. Kaser himself came to a rather sceptical point of view highly akin to that of Mommsen.¹⁴

(e) The problem of *familia* and *pecunia* has also been treated by socialist literature, although no consensus of opinion has yet been achieved. Taubenschlag can be counted among the followers of Mommsen,¹⁵ while Andreev, who has devoted a special study to the question, in essence shares the view of Wlassak.¹⁶

Nor has Hungarian literature remained silent on the problem. Marton, though not without reservations, adhered to the thesis of Ihering and Bonfante, and in some points he even came near to Wlassak.¹⁷ In his paper dealing with the origin of testament Pólay has also tackled the question.¹⁸ While adopting Wlassak's view, he disagrees with him on some points. Thus he excludes agricultural products from the *familia*¹⁹ and links up the coming into existence of the two notions with that of *mancipatio*.²⁰

4. As can be seen from the aforesaid, the main point in question is whether the words *familia* and *pecunia* were employed synonymously by the Twelve Tables or whether the former expression denoted family property viz. the totality of the *res Mancipi*, and *pecunia* the separate individual property of the *paterfamilias* viz. the totality of the *res nec Mancipi*.

meinschaft und Erbeinsetzung", *Mnem. Pappulias* (Athen, 1934) p. 201; H. Siber, *SZ* 54 (1934) p. 41. Previously he adhered to the view of Bonfante. See "Geschichtliches und rechtsvergleichendes über die Haftung für Nachlassschulden", *Acta Acad. Iurisprud. Compar.* 1 (1928) pp. 986 ff; Wieacker, *Hausgenossenschaft* pp. 9 ff; on it: G. Eisser, *SZ* 61 (1941) pp. 421 ff; Wieacker, *Entwicklungsstufen* p. 217.

¹³ See above all Kaser, *AJ* pp. 159 ff. There are already a few critical remarks in *EB* (first edition) p. 168. Previously he followed Wlassak. Cf. "Ruhende und verdrängende Hausgewalt im älteren römischen Privatrecht", *SZ* 59 (1939) pp. 46 f.

¹⁴ Cf. Kaser, *RPR* especially pp. 44 f. and 87. Recently Betti has also taken up a similar position: "Wesen des altrömischen Familienverbandes", *SZ* 71 (1954) p. 7.

¹⁵ R. Taubenschlag, *Rzyskie prawo prywatne* (Warsaw, 1955) p. 15.

¹⁶ Andreev p. 166 and 321. See also *VDI* pp. 144 f. Recently: "Les notions 'familia' et 'pecunia' dans les textes des XII tables", *Acta Antiqua Philippopolitana* (Sofia, 1963) pp. 173 ff.

¹⁷ Marton pp. 131 and 272.

¹⁸ Pólay, *Testament*.

¹⁹ Pólay, *Testament* pp. 19 ff.

²⁰ *Ibidem* p. 24 n. 91. I have not mentioned in the text the views of minor importance which have already been generally discredited. So e.g. Puchta thought that *familia* meant the objects of quiritarian ownership, while *pecunia* the obligations. Cf. *Cursus der Institutionen* II. (Leipzig, 1881) p. 435 n. a; According to Voigt, the two words expressed the antithesis of persons and things Cf. *XII Tafeln* pp. 13 f. A similar opinion has been advanced by Lepri (Cf. the review of Guarino, *SDHI* 10, 1944, pp. 406 ff.). Leonhard, however, thinks that *familia* indicated the immovables, and *pecunia* the movables. Cf. *PW* VI. 1981. ("familia"). Jörs held the opinion that *familia* referred to the whole of the property, while *pecunia* denoted individual goods. Cf. *Geschichte und System des römischen Rechts* (Berlin, 1927) p. 43.

II. THE ETYMOLOGY OF *FAMILIA* AND *PECUNIA*

1. Before turning our attention to the most important relevant sources, the dispositions of the Twelve Tables, it would be useful to cast a rapid glance at the origins of the words *familia* and *pecunia*.

Although in my opinion it is dangerous to overestimate the importance of etymology in the field of legal history, in the given case one may confidently call to aid this expedient. As a matter of fact, we are only interested in the association upon which the earliest notions of property were based, so it is unlikely that we might incur the danger of identifying erroneously a merely linguistic link with a real link.²¹ The somewhat hypothetical character of etymology has of course to be taken into account.

2. According to Festus, the word *familia* is derived from *famulus* (slave), while the latter can be linked with the Oscan *famel*: *Famuli origo ab Oscis dependet, apud quos servus famel nominabatur, unde et familia vocata.*²²

The most authoritative dictionaries likewise adopt this derivation.²³ Consequently, as to the origin of the word *familia*, it is certain that, apart from its far-off and dubious prehistory,²⁴ it is directly derived from the word *famulus*. *Famulus*, however, means slave, of course, not in its classical meaning, but according to the standards of patriarchal slavery.²⁵

As a consequence *familia* denoted primarily persons and not the household as such.²⁶ It can no longer be ascertained whether the word was originally also applied to the free members of the family.²⁷ It is however beyond doubt that its meaning was extended at a very early date to the latter because during the age of patriarchal slavery the position of slaves was hardly different from that of the free members of the family. The power of the *paterfamilias* was homogeneous, so this extension could easily be carried through.

Thus *familia* indicated in its primary meaning the slaves or perhaps also the free

²¹ About the dangers of conclusions based on etymology see W. Wundt, *Völkerpsychologie* IX. *Das Recht* (Leipzig, 1917) p. 26; G. Frenzel, *Die Vorstellung vom Eigentum in den römischen Juristen psychologisch entwickelt* (Königsberg, 1908) p. 47.

²² Festus p. 62. Cf. also p. 61. (to some extent contradictory).

²³ Cf. Ernout-Meillet pp. 329 f; Walde-Hofmann I. pp. 452 f.

²⁴ The derivation from a Sanscrit root is dubious and disputed. Cf. Walde-Hofmann I. p. 453; G. Devoto, *Atti Roma* I. (Pavia, 1934) pp. 27 ff. Contra: Pokorny, *Indogermanisches etymologisches Wörterbuch* I. (Bern—München, 1959) p. 238.

²⁵ On the notion of *famulus* see Isidorus, *Diff.* 1, 525: *inter servum et famulum, servi sunt bello capti, famuli autem ex propriis familiis orti*. Maybe the distinction is at variance with historical development, but it may also cover the facts.

²⁶ As the word is derived from *famulus*, its original meaning does not contain house or land.

²⁷ A connection between the words "slave, servant" and "family" can be found in other languages too. For the Russian see M. Vasmer, *Russisches etymologisches Wörterbuch* II. (Heidelberg, 1955) p. 609. For the Hungarian see *A magyar nyelv történeti-etimológiai szótára* (Historical-etymological dictionary of the Hungarian language) edited by L. Benkő, I. (Budapest, 1967), pp. 471 f.

members of the family. Etymology does not support either the theory of Ihering and Bonfante, or the view of Wlassak.

3. While the derivation of *familia* is in some respects open to speculations, the etymology of *pecunia* is clear and indisputable. The word is derived from *pecus* viz. *pecu*. That was the view held by Festus and Varro,²⁸ and the same view prevails in modern linguistics.²⁹

As the word *pecus* signified equally both the animals broken to draught and the small livestock, and so referred to animals belonging both to the category of *res Mancipi* and *res nec Mancipi*, the etymology in no way supports the view of those who want to identify *pecunia* with the totality of *res nec Mancipi*. This is likewise contrary to the assumption of Wlassak, for it fails to indicate such goods, as e.g. weapons or booty, which would have formed the basic stock of the individual property of the *paterfamilias*, if such a legal institution had ever existed in Rome.³⁰

Thus since *pecunia* designated all domestic animals and those alone, the assumptions which attempt to distinguish between *familia* and *pecunia* as different kinds of property are not supported.

III. THE MEANING OF *FAMILIA* AND *PECUNIA* IN THE EARLY SOURCES

1. In spite of the fact that the linguistic origin of *familia* and *pecunia* lends no support to the views that endeavour to identify the two notions with the family and individual property, the possibility has to be taken into consideration that during the time that has elapsed between their formation and the codification of the Twelve Tables, their meaning might have changed in this sense. The relevant dispositions of the Twelve Tables have therefore get to be examined since the actual use and not the origin of a word is the decisive factor.

2. The *Tab. V.3.* enables the *paterfamilias* to bestow legacies. Unfortunately the provision has come down to us in three different versions, the object of legacies being designated by different expressions in each of the variants:

(a) Ulpian uses the words *pecunia* and *tutela* (guardianship): *Uti legassit super pecunia tutelave suae rei, ita ius esto.*³¹

(b) Gaius mentions only *sua res*: *Uti legassit suae rei, ita ius esto.*³²

(c) According to Cicero, the disposition contained both *familia* and *pecunia*: *Paterfamilias uti super familia pecuniaque sua legassit, ita ius esto.*³³

²⁸ Festus p. 260: . . . *sed inductum est a pecore ut pecunia quoque ipsa*; Varro, *De lingua Latina* 5, 17, 92: *Pecuniosus a pecunia magna, pecunia a pecu: a pastoribus enim horum vocabulorum origo.*

²⁹ See Ernout-Meillet p. 746; Walde-Hofmann II. p. 272.

³⁰ The etymology is discussed more fully in my paper "Familia pecuniaque", *Acta Antiqua Ac. Scient. Hungaricae* 12 (1964) pp. 91 ff.

³¹ Ulp. 11, 14.

³² Gai. 2, 224.

³³ Cicero, *De inv.* 2, 50, 148 and *Auct. ad Her.* 1, 13, 23.

The literature is far from being unanimous as to which of the three versions contains the original text of the Twelve Tables.³⁴ This is not astonishing because each of the three variants can muster arguments. Consequently it is impossible to exclude the genuineness of any of them with certainty.³⁵

The Ulpianic text is supported by a fragment of Paulus,³⁶ and the testamentary guardianship can be also traced back to the Twelve Tables through some other texts.³⁷ The version of Gaius is corroborated by the knowledge that its author was an outstanding specialist on ancient law, and by a fragment of Pomponius, where the same phrase can be found.³⁸ The authority of Cicero is supported by the more remote age of the text, and by the circumstance that the famous orator had to learn the text of the Twelve Tables by heart in his childhood.³⁹ If we also take into consideration the fact that in the course of the reconstruction of the Twelve Tables Ciceronian texts had been accepted as genuine quotations,⁴⁰ without any hesitation, then we have no right to reject this one unthinkingly.

It seems that the question cannot be settled satisfactorily and it is impossible to ascertain the original wording of the statute. It is not even certain that the provision contained the word *pecunia*, and possibly *familia* too was mentioned. Consequently it cannot be proved that the legacies were limited to the *pecunia*, as Wlassak⁴¹ assumed.

Nevertheless it is beyond doubt that the Romans interpreted the text as entitling the *paterfamilias* to bestow legacies without any limitation.⁴² In order to prove the contrary, evidence would be needed, but this is lacking.

3. *Tab. V.* 4. and 5. contain provisions concerning intestate succession: *Si intestato moritur cui suus heres nec escit adgnatus proximus familiam habeto. Si adgnatus nec escit gentiles familiam habento.*⁴³

³⁴ Dirksen accepted the Ulpianic version as the authentic one, Cf. Dirksen pp. 320 ff. So did Schoell, *Legis duodecim tabularum reliquiae* (Lipsiae, 1866) p. 127. The solution is also accepted by the recent editors of the text. The Gaiian version was advocated by Kaser, *AJ* pp. 164 f; Lübtow, Erbrecht p. 438; Pólay, *Testament* pp. 12 f; Wlassak pp. 4 and 19. Some authors have chosen the text of Cicero as the best one. Cf. Beseler, *SZ* 54 (1943) p. 322; Lepri (see: Guarino, *SDHI* 10, 1944 p. 406.). Cornil accepts neither of them but boldly invents a fourth one: "*uti . . . super pecunia suae rei . . .*" See: *Mancipium* p. 431 n. 56.

³⁵ Solazzi rightly says: "È azzardato scegliere fra queste redazioni divergenti". Cf. *Diritto ereditario romano* I. (Napoli, 1932) p. 35.

³⁶ Paul. *D.* 50, 16, 53, pr.

³⁷ Gai. *D.* 26, 2, 1; Paul *D.* 26, 2, 20; Pomp. *D.* 50, 16, 120.

³⁸ Pomp. *D.* 50, 16, 120. Similarly: *Nov.* 22, 2.

³⁹ *Discebamus enim pueri XII, ut carmen necessarium* (Cicero, *De leg.* 2, 23, 59.).

⁴⁰ So e.g. *Tab. V.* 7./a or VI. 3.

⁴¹ Wlassak himself, quite inconceivably, supports the genuineness of the variant given by Gaius (pp. 4 and 19.). The expression *sua res*, however, in the meaning of a separate property is not synonymous with *pecunia*; this should have been proved. Cf. Kaser, *AJ*, pp. 165 f.

⁴² Cf. Gai. 2, 224; *Inst.* 2, 22, pr; Ulp. 19, 7; Pomp. *D.* 50, 16, 120.

⁴³ Cicero merges the two provisions and speaks of *familia pecuniaque*: *Si paterfamilias intestato moritur, familia pecuniaque eius adgnatorum gentiliumque esto* (*De inv.* 2, 50, 148). The text is generally rejected (see e.g. Kaser, *RPR* p. 44. n. 6), but it is still possible, even if the wording is not quite genuine, that both words were used by the Twelve Tables.

The cited text is not very helpful if one wants to distinguish between *familia* and *pecunia* as different kinds of property. If *familia* had meant family property (the *res Mancipi*), the fate of the so-called individual property (or *res nec Mancipi*) would have remained unprovided for.

As already mentioned, Wlassak presumes that in such cases *pecunia* became ownerless property open to free occupation by anybody.⁴⁴ The same solution was chosen by Pólay,⁴⁵ while Siber assumes that *pecunia* must have passed as a pertinency of *familia* to the intestate heirs.⁴⁶

The hypothesis of an occupation has been amply refuted by Kaser.⁴⁷ But there is still a substantial argument against it. It is hard to believe that the ruling patrician class would have given its consent to a solution of this kind, by which precious goods like money, jewels, weapons, and flocks could have been freely carried away by anybody who happened to take them, if the *paterfamilias* failed to dispose of them. Such a rule would have been openly contrary to the interests of the most wealthy stratum of ancient Roman society, so it is not likely to have been ever admitted.

The explanation given by Siber would seem reasonable, if it had already been proved that *familia* and *pecunia* signified two clearly distinguishable types of property. His assumption however would need to be corroborated by these very texts, so it is out of place to interpret them in such a way that the sources are reconciled with an *a priori* theory.

4. Tab. V. 7/a deals with the *cura* of a lunatic: *Si furiosus escit, adgnatum gentiumque in eo pecuniaque eius potestas esto.*

The provision poses unsurmountable difficulties for those who want to interpret *familia* and *pecunia* as two different kinds of property. How would it be possible for the lawgiver to be concerned only with the individual property of a lunatic, without even mentioning the family property (*res Mancipi*) which was surely more important?

Wlassak tried desperately to overcome the difficulty and advanced several explanations, but they did not seem satisfactory even to himself: "The law regarding the *familia* of a lunatic, cannot be approached except by groping assumptions" — he says.⁴⁸

Kaser rightly points to the improbability of the assumption according to which the Twelve Tables would have dealt only with the individual property of a lunatic,

⁴⁴ Wlassak p. 15.

⁴⁵ Pólay, *Testament* p. 28.

⁴⁶ Siber, *Acta Acad. Iurispr. Compar.* 1 (1928) p. 994; Lübtow, *Erbrecht* p. 449.

⁴⁷ Kaser, *AJ* p. 164.

⁴⁸ "... dem Rechte der familia vom Wahnsinnigen können wir nur mit schwankenden Vermutungen näherkommen" (Wlassak pp. 12 f.). He reckons also with the possibility that the provision referring to the *familia* of a lunatic has not come down to us (Wlassak p. 10). The fact that the provision is complete, inasmuch as it contains both control over the person (*in eo*) and over his property (*pecuniaque eius*) is a strong argument against this assumption. So there is no hint of a complementary rule fallen into oblivion.

without providing for the normal case i.e. the fate of the *pecunia* belonging to a mentally sane *paterfamilias*.⁴⁹ Kunkel stresses the improbability of an altruistic solution that can hardly be attributed to ancient Roman law, i.e. one involving the utmost care for the individual property of a lunatic, together with complete neglect of the more important family property.⁵⁰

It is also significant that our sources, including Gaius, do not seem to know anything about a limitation of the *cura furiosi* to a special part of his property.⁵¹ It is hardly credible that such an anomaly could have fallen into complete oblivion.

The conclusion is obvious. In the quoted text the word *pecunia* cannot but mean the whole of the property.

5. In *Tab. X. 7.* we read: *Qui coronam parit ipse pecuniave eius (honoris) virtutisve arduiuitur ei . . .* But for the interpretation given by Pliny the Elder the text would remain a puzzle hardly likely to be solved. Pliny, in commenting on the text, writes: "What has been acquired by slaves and horses (on races) has been constantly regarded as acquired legally by the *pecunia* . . ." ⁵² Consequently in this case both slaves and horses were designated by the Twelve Tables as *pecunia*.

For those who look upon *familia* and *pecunia* as two sharply distinguished types of property, the source is of course rather embarrassing. Mitteis, in order to get round the difficulty, asserts that Pliny was merely referring to the language of his own times,⁵³ and Wlassak plainly denies any connection between this source and the notions of *familia* and *pecunia*.⁵⁴ Jörs, however, rightly objects: "We are not entitled to consider as the personal opinion of the author what he claims to be the generally acknowledged opinion."⁵⁵

Nor are we entitled to simply leave the source out of account as was done by Wlassak, but we must conclude that the provision of the Twelve Tables called slaves and horses expressly *pecunia*, although since both of them were *res mancipi* they must have belonged to the supposed family property.

6. The result is that the Twelve Tables used the words *familia* and *pecunia* to denote property in general, without attributing a special meaning to either of them. It seems that they were used alternatively in an entirely arbitrary way.

⁴⁹ Kaser, *AJ* p. 171.

⁵⁰ Kunkel, *RPR* p. 64. n. 7. Westrup, *Introduction* II, p. 101 argues from this statute for the inalienability of family property, but our sources do not confirm such an assumption. Cf. Kaser, *EB* p. 168 and *RPR* p. 107.

⁵¹ Cf. Gai. 2, 64; *Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege duodecim tabularum . . .*

⁵² Plinius, *N.H.* 21, 3, 7: *inde illa XII tabularum lex: qui coronam parit, ipse pecuniave eius, irutis suae duitor ei, quam servi equive meruissent, pecunia partam lege dici nemo dubitavit.*

⁵³ Mitteis, *RPR* p. 81. n. 21.

⁵⁴ Wlassak p. 5. n. 10.

⁵⁵ "Wir haben keinen Grund, das, was der Schriftsteller als allgemein herkömmliche Auslegung hinstellt, etwa nur als seine Privatmeinung gelten zu lassen" (P. Jörs, *Geschichte und System des römischen Rechts* Berlin, 1927, p. 43. n. 3.). See also Mommsen, *Staatsrecht* p. 22. n. 5.

Mention must be made of the fact that on one occasion the word *familia* is applied by the Twelve Tables with the meaning of persons,⁵⁶ and *pecunia* with that of money.⁵⁷ Since the latter text, however, is not a direct quotation, it is irrelevant from our point of view.

7. Not only the Twelve Tables, but also those ancient expressions which contain the words *familia* and *pecunia* have to be taken into account. Ultimately a text of Cato has to be dealt with too, considering that it was used by Wlassak as an argument for his theory.

(a) The old legacy-testament,⁵⁸ as is well-known, was called *mancipatio familiae*, and the trustee, who had to hand over the legacies to the bequeathed, was correspondingly *familiae emptor*. The goods disposed of were designated in the formula of the act—as attested by Gaius—as *familia pecuniaque*.⁵⁹

Supposing that only the so-called *pecunia* was likely to be disposed of upon death, it is hard to see why the corresponding act was called *mancipatio familiae*?

Some authors tried to overcome the difficulty by suggesting that by the age of the Twelve Tables legacies were still bequeathed without the formalities of *mancipatio*.⁶⁰ This assumption, however, runs counter to the historical development of the Roman law of succession. It is indeed hardly credible that the will would have been informal in ancient law, while at a high stage of development Roman and likewise modern law requires rather strict forms in this realm.

Kaser rightly emphasizes the incredibility of the idea that a type of *mancipatio* ever existed, which could not have been applied to *res Mancipi*.⁶¹ So it is improbable that legacies were ever limited to the *res nec Mancipi* (*pecunia*).

(b) The very name of the action for the division of the inheritance, the *actio familiae erciscundae*,⁶² also constitutes an obstacle to the attempts to delimit *familia* and *pecunia*, since in the course of the partition the small livestock and other *res nec Mancipi* also had to be taken into account.

(c) The text of Cato, dealing with the somewhat peculiar question of how far animals should be made to work on holidays, distinguishes from this point of view between oxen and other animals of draught or burden:

Cato, *De agri cultura* 138: *Bovis feriis coniungere licet. Hoc licet facere, arvehant ligna, fabalia, frumentum, quod non daturus erit. Mulis, equis, asinis feriae nullae, nisi si in familia sunt.*

Unfortunately the second sentence is ambiguous. If we consider the word *feriae*

⁵⁶ Tab. V. 8. (*Ulp. D.* 50, 16, 195): *Ex ea familia . . . in eam familiam.*

⁵⁷ Tab. VII. 12 (*Ulp.* 2, 4).

⁵⁸ The word is a translation of the German term "Legatentestament". On it see: Kaser, *RPR* p. 93; Wieacker, *Hausgenossenschaft* p. 18.

⁵⁹ Gai. 2, 104: *Familiam pecuniamque tuam endo mandata tua custodelaque mea esse aio . . .*
⁶⁰ Lübtow, *Erbrecht* p. 444 and Cuq, *Institutions juridiques des romains* I. (Paris, 1904) p. 127. n. 4.

⁶¹ Kaser, *AJ* p. 163.

⁶² Cf. Gai. 4, 17 a; *D.* 10, 2, 1. On them see Kaser, *RPR*, p. 88.

as its subject, the meaning is that, horses and asses rest only on family holidays.⁶³ If, however, the mentioned animals were the subject, the meaning would be different, namely that these animals have a day of rest only if they belong to the *familia*.

Wlassak has made serious efforts to ascertain the second solution.⁶⁴ In his opinion the animals mentioned only had a day of rest if they were used for work and not kept in herds. The oxen, however, the most important draught animals of the peasant (*bos arator*) belonged in any case to the *familia*.⁶⁵

His interpretation, however, is unacceptable. First, it is obvious that one should consider the word *feriae*, standing in the nominative case and placed immediately before the expression "*nisi si in familia*", as the subject. Secondly, Wlassak's explanation leads to an absurdity. Why should anyone have denied the resting on holidays to animals kept in herds, and not working at all? For those happy creatures every day was actually a holiday.⁶⁶

Wilms suggested a different, but equally unacceptable interpretation. In his opinion what Cato meant was that mules and asses did not belong to the *familia* and he supposed they had been kept for racing purposes. In such a way his interpretation could be brought into line with the above discussed text of Pliny, where slaves and horses participating in races are called *pecunia*.⁶⁷ This assumption, apart from grammatical objections, ignores completely the social and economic conditions of ancient Rome. It is absurd to suppose that by the time of the Twelve Tables, when slavery was still rather undeveloped, special slaves were kept for races and exempted from every-day work. It would have been even more striking, if e.g. asses had also been specially bred for such purposes as their legal fate was different from that of their less distinguished relations.

So, in my opinion, the text does not refer to the property notions of *familia* and *pecunia*, but either distinguishes in an odd way between public and family holidays, or, as recently suggested by Maróti, points to the circumstance that the slaves (*familia*) had a day of rest on a given holiday.⁶⁸

8. The etymology and the sources enable us to draw the following conclusion:

⁶³ Karlowa, *RG* p. 358. Cf. also Bonfante, *Corso* p. 173 and *Proprietà* p. 212; Cornil, *Mancipium* p. 434; Kaser, *AJ* p. 169; Koschaker I. p. 267. n. 1; Siber, *SZ* 54 (1934) pp. 412 f; Pólay, *Testament* p. 16; Wlassak pp. 49. ff.

⁶⁴ Wlassak pp. 50 ff.

⁶⁵ Wlassak p. 58. He tries to link his interpretation with the dispute of the Sabinians and Proculians about the qualification of young animals as *res Mancipi* (pp. 60 ff.).

⁶⁶ Cornil and Siber have already pointed out this difficulty. Cf. n. 63.

⁶⁷ Cf. Koschaker II, p. 448. Wilms' works, being written in Flemish, were not available to me. So I had to rely upon Koschaker's reviews and Cornil's papers.

⁶⁸ An interesting interpretation has been recently brought forward by E. Maróti. In his opinion the word *familia* does not refer to feasts, but to the totality of slaves. Thus the meaning of the text would be: the animals mentioned have only a day of rest, when the slaves enjoy a holiday. Cf. E. Maróti, "Feriae in familia", *Antik Tanulmányok* 16 (1969) pp. 83 ff.

familia meant primarily the totality of the *famuli*, and *pecunia* the cattle.⁶⁹ Since their original meaning had become obscure in the course of time, the Twelve Tables already used both expressions to indicate property, without the slightest distinction.

At a low stage of social and economic development, legal thinking stands at a correspondingly modest level. So the legislators of the Twelve Tables had not yet been able to create an abstract and homogeneous notion of property. In some provisions, especially in those referring to the law of succession, they had, however, to denote in some way or other the totality of goods. Thus, having no other notions at their disposal, they employed the familiar words *familia* and *pecunia* synonymously, in an apparently quite arbitrary way. So, the opinion first advanced by Mommsen and recently underpinned by Kaser has turned out to be the correct one as far as its broad lines are concerned.⁷⁰

IV. CONCLUSIONS

1. Dealing with the economic and social background of the development of *familia* and *pecunia*, two questions have to be answered: why did the Romans designate property with those very words? How could the two words, which originally signified the members of the household and the cattle, become fitting when one wanted to denote the whole of the property?

Kaser offers the following explanation: "Pecunia means 'cattle' as the core of a peasant's property, and consequently the peasant's property itself . . . the two expressions . . . denote simply the members of the household and the cattle as the main objects of the family property."⁷¹

This explanation, however, is not entirely satisfactory, because the stock of a peasant's property is above all the land, and although the importance of human manpower and animal force must not be underestimated, nevertheless, if these words are to reflect the conditions of a peasant-economy, at least one of them should contain the notion of land, too, which both fail to do.

Therefore it seems that when an attempt is made to discover the historical background of these expressions, we have to dig even deeper into the layers of an even more remote age, when, amidst the continuous struggle of the *gens* and the wealthy *paterfamilias*, private property was born.

⁶⁹ Recently I have been inclined to ascribe less importance to etymology than I have done in my paper cited in n. 30. So now I think that the two words were possibly only associations from the very beginning. The final conclusions, however, are not modified by this.

⁷⁰ The subject has been treated much more fully than by Mommsen, who was not yet compelled to have to deal with such an enormous literature. In some points, as concerning etymology or the authenticity of some texts, my opinion is not wholly in line with Kaser's.

⁷¹ "Pecunia ist das 'Vieh' als Kernstück des bäuerlichen Vermögens und danach das bäuerliche Vermögen überhaupt . . . die beiden Ausdrücke . . . nennen einfach 'Gesinde und Vieh' als die Hauptgegenstände des Hausgutes" (Kaser, *RPR* p. 45).

2. My starting point is the same as Kaser's, i.e. *familia* and *pecunia* became the most ancient denominators of property, for having designated the most important goods. Cattle and manpower were at those times, however, the core of property, this was when tillage still stood at a very low level, if it existed at all, and the breeding of animals provided the most important income.

At a primitive stage tillage is not yet able to provide a considerable surplus production, while animal-breeding assures a large surplus production for those who possess sufficient free and slave manpower. Consequently, animal-breeding is likely to become the first source of the acquisition of wealth and will consequently be the starting point for private property.

Thus it seems that the words *familia* and *pecunia* bear witness to the means of production that have first become private property: the slaves and the cattle. The traces of the first objects of private property are preserved in these expressions.

3. The aforesaid permit two further conclusions:

(a) The fact that the notion of property is tied up with the members of the household and the cattle, corroborates the view that the Romans, at least the patricians, were primarily animal-breeders.⁷² The economic preponderance and the leading role of the patrician class in political life is sufficiently motivated by the material advantages assured by this type of economic activity.

(b) The most ancient denominators of property, in failing to refer to the land, justify the view that movables were the very first objects of private property. So we have a valuable argument in favour of the thesis that in Rome, as with many other peoples, the common landed property of the *gentes* preceded the system of private property on land.⁷³

4. The law of the Twelve Tables already reflects different economic and social conditions. A considerable part of the land has already passed over into private property, and the living standards of the peasantry, based on tillage, have become preponderant.

In consequence, the original content of *familia*, as that of *pecunia*, has also changed as private property already included the land, too. As has been shown, the two words in the Twelve Tables denote property in general, without referring in particular to slaves or cattle.⁷⁴

The change of meaning of the two expressions, brought out by the formation of private property on land, was also a consequence of an economic transformation: the transition from animal-breeding to tillage.

⁷² Cf. K. Marx, *Grundrisse der Kritik der politischen Ökonomie* (Berlin, 1953) p. 381: De Martino I. pp. 39 ff. Greater importance is attributed to tillage by G. De Sanctis, *Storia dei romani* II. (Firenze, 1960) pp. 445 ff. It is of course not absolutely necessary for each people to pass through the three consecutive stages of hunting, breeding of animals, tillage, as has been proved by contemporary ethnology. Cf. e.g. K. Birket-Smith, *Geschichte der Kultur. Eine allgemeine Ethnologie* (Zürich, 1946), p. 189. With the Romans, however, it seems that the breeding of animals preceded the stage of tillage.

⁷³ On this see the following chapter.

⁷⁴ Cf. especially *Tab. X. 7*. Cited *supra* p. 26.

THE ORIGIN OF PRIVATE OWNERSHIP
ON IMMOVABLES

I. SURVEY OF THE LITERATURE

1. For over a century now a passionate discussion, not so very unlike religious controversies, has been going on about the origin of Roman landed property. In accordance with the character of the subject-matter, some claim the priority of common property, while others assert that immovables were subject to private ownership from the beginning.

Surely, the idea of a common property of land in Rome is by no means new. It had already emerged in antiquity,¹ and by the seventeenth century Grotius was arguing at great length in its favour, taking his arguments from the Bible, too.²

Why then has discussion recently taken such a sharp turn? How can it be explained that, in the words of Kaser, a "nearly overabundant literature" has grown on the question of landed property in Rome?"³

I think that the fervour of the discussion and the growth of interest has a double explanation. On the one hand, contemporary scholarship can no longer be satisfied with the kind of arguments that were adduced by Grotius. It requires more precise, more reliable data. Unfortunately, however, we have no direct sources on the origin of landed property in Rome, so the indirect sources available are naturally open to discussion. On the other hand, the question has never been devoid of a political colouring, as it has always been suitable for use as a weapon for ideological theories and political tendencies. So Pliny the Elder endeavoured to preach the modesty of the ancestors of his contemporaries by emphasizing the moderate size of the land distributed by Romulus.⁴ Grotius used the priority of common property as an argument in favour of a doctrine considerable for Dutch merchants: the freedom of the sea.⁵ Similarly, a considerable part of contemporary bourgeois literature links the question with propaganda for the per-

¹ Vergilius, *Georg.* 1, 126–128:

*Ne signare quidem aut partiri limite campum
Fas erat. In medium quaerebant; ipsaque tellus
Omnia liberius, nullo poscente, ferebat.*

² Cf. H. Grotius, *De iure belli ac pacis* (Amsterdam, 1646) Book II., Chapter II.

³ Kaser, *EB* p. 230.

⁴ Plinius, *N. H.* 18, 2, 7; *Bina tunc iugera populo Romano satis erant, nulloque maiorem modum adtribuit.* The propagandist tendency is rightly stressed by Pöhlmann II. p. 335. But the fact that tradition was exploited for such purposes does not allow for the legend having been originally invented for propaganda's sake.

⁵ Grotius, *op. cit.* in n. 2. Book II, Chapter II.

petuity of private property,⁶ in some cases even with an open struggle against Marxism.⁷

2. A summary of the complete literature would be not merely impossible, but also superfluous. The two opposing theories having been formulated by two famous scholars, the remainder of the studies generally do nothing more than repeat their arguments, without revising the whole of the problem in a critical way.⁸

The thesis of the priority of common property is not unjustly attributed to Mommsen. Though he could have claimed renowned predecessors, like Niebuhr,⁹ the systematic exposition of this view is still his merit.¹⁰

One cannot state that Mommsen's view was unanimously accepted by his contemporaries,¹¹ but the most powerful attack on it was delivered some fifty years ago by Pöhlmann.¹² Those writers, who propagate the perpetuity of private landed property in Rome, are still wont to adduce Pöhlmann's arguments.

Success was not denied to Pöhlmann. An increasing number of scholars have adhered to his view.¹³ Kaser is somewhat of an exception, because, after a careful analysis of the different arguments, he accepted Mommsen's theory.¹⁴ Special mention should be made of the Marxist De Martino and of Wieacker for having more or less adhered to the view of Mommsen.¹⁵

⁶ It is worth while quoting a sentence of the Italian Salvi, who glorifies private property in the following manner: "Ecco l'uomo col lavoro divenir signore del suolo; e il dominio esser frutto sacro e legittimo della sua libera attività." (E. Salvi, *Storia del diritto di proprietà* Milano, 1915, p. 46.). Obviously Salvi rejects in his amateurish book the idea of a common property on land.

⁷ Salvi (mentioned in the previous note) as well as more authoritative writers. Cf. Pöhlmann I. pp. 3 f. and especially II. p. 507.

⁸ This is also stated by Kaser. Cf. *EB* p. 230.

⁹ Niebuhr, *Roemische Geschichte* II. (Berlin, 1836) pp. 178 ff.

¹⁰ Mommsen, although having already alluded to it previously, dealt with the question systematically in his *Staatsrecht* pp. 22 ff.

¹¹ Against common property there is e.g.: Fustel de Coulanges, *La cité antique* 7th edit. (Paris, 1878) pp. 62 ff. Ihering, *Geist* I. pp. 198 ff. Bonfante must also be mentioned here, although he does not categorically deny the possibility of common property, but in the main he is against it. See *Proprietà* pp. 5 ff. His opinion has influenced Italian scholars to a great extent. Cf. even by the nineties of the last century Brezzo, *Mancipatio* p. 5. For further references see E. Costa, *Storia del diritto romano privato* (Torino, 1925) p. 179, n. 3.

¹² Cf. Pöhlmann especially II. pp. 327 ff.

¹³ The tendency has already been observed. Cf. Koschaker II. p. 270 and De Vissher, *Mancipium* p. 295. Contra the opinion of Mommsen there are among others: Ambrosino, *Mancipatio* p. 577; Costa *op. cit.* in n. 11, pp. 179 ff; De Francischi, *Trasferimento* pp. 26 ff; De Vissher, *Mancipium* p. 295; G. Grosso, *Lezioni di storia del diritto romano* (Torino, 1960) pp. 143 f. (cautiously); Koschaker II. p. 270.

¹⁴ Kaser, *EB* pp. 228 ff and *RPR* pp. 105 f. For the view of Mommsen in older literature e.g. Cugusi, *Teoria della proprietà* (Napoli, 1907) p. 24; Girard-Senn pp. 280 ff; Kubitschek, *PW* I. (1894) especially 790.; E. Laveleye, *Histoire de la propriété* (Paris, 1891) pp. 393 ff; Wilutzky pp. 79 ff.

¹⁵ De Martino I. p. 19; Wieacker, *Entwicklungsstufen* pp. 205 f. There are of course recent writers who, without adducing arguments, profess the view of the priority of common

3. Surprisingly enough, little attention has been paid to the question by socialist literature. Perhaps it was thought that since the derivation of private property on land from common property had been emphasized several times by Engels and Marx,¹⁶ it was a thesis beyond discussion and not in need of evidence. It is obvious however that one can raise objections to this complacent state of affairs. In the course of a century our knowledge has increased considerably and the methods of research have been refined, so the question is surely ripe for a re-examination.

The Soviet text-book, edited by Novitzky and Peretersky, e.g. does not even deal with the problem, except for a short reference of dubious value.¹⁷ The more recent text-book of Novitzky devotes only a sentence to the origin of private ownership,¹⁸ but there is hardly any more to be found in the text-books of Marton and Taubenschlag.¹⁹

Andreev, however, did not follow the majority, but wrote a special paper on the problem, which is also dealt with at length, in his text-book.²⁰ The question is comparatively well treated by Stojčević too.²¹

What socialist literature has in common is that, as far as I know, no doubt has been expressed as to the priority of common property, but the refutation of the contrary arguments has generally been omitted.

4. In tackling the question I shall choose as a somewhat paradoxical starting point a statement of Pöhlmann: "Therefore it is of fundamental importance even to-day to state, that in the case of a settled people, agrarian communism, as the first stage of its economic life, can be assumed with some certainty only, if traces of it can be found in reliable tradition or in the law and economic life of a historical period."²²

I entirely agree with Pöhlmann's statement, but naturally I shall not attempt, as he did, to conceal or to deny all the traces that can in fact be found. I am firmly

property. Cf. Arangio-Ruiz, *Istituzioni* pp. 183 f; Kunkel, *RPR* p. 122 (rather cautiously); Mayer-Maly, *Studien* I. pp. 42 f; Monier, *Manuel* pp. 460 ff; Weiss, *PW* Halbbd. 11 (1921) "Kollektiveigentum" 1078 ff.

¹⁶ F. Engels, "Der Ursprung der Familie, des Privateigentums und des Staats", *Marx-Engels Werke* vol. 21 (Berlin, 1962) pp. 159 and 162; Marx, "Die deutsche Ideologie", *Ibidem* vol. 3. p. 61. A survey is given by Sellnow pp. 783 ff.

¹⁷ "The State gave to each citizen two *iugera* of land for hereditary use" (Nowitzky-Peretersky p. 190). I do not think that we can still believe the legend in so far as to assume that private ownership on land was in fact created by a kind of "allotment by the State". Nor is it clear why the authors speak of "hereditary use" instead of "ownership". The terminology calls for an explanation which however, is not given.

¹⁸ Nowitzky p. 87.

¹⁹ Marton p. 131; Taubenschlag, *Rzyskie prawo prywatne* (Warsaw, 1955) p. 15.

²⁰ Cf. Andreev, *VDI* and Andreev pp. 164 ff.

²¹ D. Stojčević, *Rimsko privatno pravo* (Beograd, 1966) pp. 113 ff.

²² "Wir müssen daher auch jetzt grundsätzlich daran festhalten, dass für das einzelne sesshaft gewordene Volk der agrarische Kommunismus als erste Entwicklungsphase seines Wirtschaftslebens nur dann mit einiger Sicherheit angenommen werden kann, wenn sich Spuren derselben in der echten Überlieferung oder in Recht und Wirtschaft der geschichtlichen Zeit vorfinden." (Pöhlmann I. p. 8.).

convinced that the common property on immovables, like every thesis of historical materialism, is not an irrefutable dogma to be merely illustrated by a few examples, but is a view which concerning the given people, needs to be proved by the sources at our disposal.

II. THE PRIORITY OF THE PROPERTY OF *GENTES*

1. As has already been mentioned, no direct sources have come down to us concerning the common property on land, so we can only rely upon indirect sources, and on traces left behind by the primitive order in legal institutions of a later age. The poetry on the so-called "golden-age" will not be brought up as an argument. In fact, I would not venture to take sides in this question of literary-history,²³ and in any case it is safer for the legal historian not to bother this comparatively recent literary-type problem.

2. It is stated by several sources that the legendary founder of Rome, Romulus, allotted to each citizen a portion of land (*heredium*) of two *iugera*.²⁴

The portioning out of land attributed to Romulus is well commented upon by those sources, which throw some light on the notion of *heredium*. Referring to the legend, Varro emphasizes that *heredium* has to "follow" the heir:

*Bina iugera, quod a Romulo primum divisa viritim quae heredem sequerentur, heredium appellarunt.*²⁵

A text of Pliny the Elder bears witness to the economic character of the *heredium*, when it says that the word had still retained the meaning of garden²⁶ by the age of the Twelve Tables. A similar explanation is given by Festus²⁷ who, in another text, calls the *heredium* "*praedium parvulum*".²⁸

These sources offer the following picture: Romulus allotted to every citizen a parcel of two *iugera* of a hereditary character. The parcel was called *heredium*. The economic character of *heredium* was garden-land according to the majority of our sources, but some sources also mention *ager*.²⁹

²³ Pöhlmann, naturally, thinks that this poetry is but a nostalgia for the beautiful past, which never existed. Cf. I. pp. 300 f.

²⁴ Cf. Plinius, *N.H.* 18, 2, 7 (quoted in n. 4.); Varro, *De re rustica* 1, 10 (quoted in the text *infra*). The "*bina iugera*" as the ancient parcel can be found in very many sources. See Mommsen, *Staatsrecht* p. 23 n. 3. and p. 25. n. 1. Some sources speak about a general distribution of land: *agros quos bello Romulus coeperat, divisit viritim civibus* (Cicero, *De re publica* 2, 14, 26). Cf. Mommsen, *Staatsrecht* p. 25 n. 1. and Pöhlmann II. p. 329. In another source the division of land is attributed to king Numa. See Dion. 2, 62 Cf. Mommsen, *Staatsrecht* p. 25 n. 1.

²⁵ Varro, *De re rustica* 1, 10. Cf. with the previous note.

²⁶ Plinius, *N.H.* 19, 4, 50 (*Tab. VII. 3. a.*): *In XII tab. nusquam nominatur villa, semper in significatione ea "hortus" in horti vero "heredium"*.

²⁷ Festus p. 73: *Hortus apud antiquos . . . villa dicebatur.*

²⁸ Festus p. 71: *Heredium praedium parvulum . . .*

²⁹ So: Cicero, *De re publica* 2, 14, 26. Cited in n. 24.

3. These data, however, cannot claim historical authenticity in every respect, as Romulus himself was probably not a historical person.³⁰ But it would be going too far to deny these strikingly congruous sources any historical value as the opponents of the thesis of common property do. According to Bonfante, e.g., all these sources are simply a casting back of the plebeian *assignationes* into the distant past.³¹ Moreover Pöhlmann brandishes the measure of two *iugera* as an artificial scheme of figures, which is derived from a division of the territory of the *ager centuriatus* (200 *iugera*) in the number of the members of a *curia* (100).³²

Bonfante's argument can be accepted in so far as the idea of a ceremonious division of land by the first Roman king was certainly influenced by later experiences, i.e. by the plebeian assignments. Indeed it seems scarcely probable that private ownership on immovables would have been created by a single act. The formation of *heredium* must surely have been the result of a long development. Still, Bonfante's arguments affect only the surface, the form of the narration, but do not refute the fact that the Romans believed in the priority of common property on land, and that private ownership was first created on a parcel called *heredium*.

The reasoning of Pöhlmann, however, lacks entirely solid foundations, because the number of the members of a *curia* might also be rightly considered "an artificial scheme of figures", from the three data only one—the territory of *ager centuriatus*—being sure. So his deduction is not conclusive.

In my opinion the legend of the allotment carried out by Romulus is only a typical condensation into a narrative form of historical process by which the parcels called *heredium* became private property. The legend is also evidence of the fact that according to Roman traditions land was not always in private ownership.

Great importance must be attributed to the size of *heredium*.³³ On account of the latter being extremely small (even if the traditional two *iugera* are not quite exact), at the given low level of agriculture the subsistence of a family could hardly be assured. So these parcels could not possibly contain the whole of the arable land available, and as only the *heredium* is designated as private property in our sources, the rest was necessarily still common property.³⁴

³⁰ A recent author holds the view that Romulus was a historical person, but fails to give grounds for it. Cf. J. N. Lambert, "Les origines de Rome à la lumière du droit comparé. Romulus." *Studi De Francisci* I. p. 353.

³¹ Bonfante, *Proprietà* p. 12.

³² Pöhlmann II. pp. 334 f. According to Festus, however, the measure of *ager centuriatus* was based upon the *bina iugera: centuriatus ager in duceña iugera definitus, quia Romulus centenis civibus duceña iugera tribuit.* (p. 37.). We are not bound of course to accept this explanation, but the main point in question is not whether the size of *heredium* was exactly 2 *iugera*.

³³ Of course not to its numerical exactness. A great importance is also attributed to it by Kaser, *EB* p. 233.

³⁴ Cf. e.g. Mommsen, *Staatsrecht* pp. 24 f; Kaser, *EB* p. 233.

I think that the sources examined hitherto satisfy the requirements demanded by Pöhlmann for an assumption in favour of the common property on land.³⁵ For the lack of further indications, however, the view of Mommsen would but remain a more or less probable hypothesis. But the original order has left other traces too.

4. (a) The decisive argument in favour of common property on land lies in the fact that nearly all ancient acts of the transfer of ownership and the ancient proprietary remedy—as already emphasized by Mommsen and others³⁶—were originally modelled on movables.

The very name of *mancipatio* is incongruous with immovables,³⁷ and the ceremony of the act clearly shows that it was originally applied only to movables.³⁸ The same can be said for the ancient proprietary action.³⁹ Movable property is indicated by the original meaning of *furtum*,⁴⁰ as well as by the old house-search, the *quaestio lance et licio*.⁴¹

(b) The oldest terms for property—the words *familia* and *pecunia*—also go to show that movables were the first objects of private ownership.⁴² The word *peculium* refers likewise to animals, and not to land.

(c) The law of succession of the *gentes* must also be considered as a remnant of the earlier common property of *gentes*.⁴³

5. After having enumerated the arguments and sources in favour of the priority of common property on land, it is also necessary to deal with the arguments which the writers professing a different point of view are accustomed to bring forward.

(a) Ihering argues that the transition to the system of private property would have been a revolutionary change which would have left its traces in the sources. So he thinks that the private ownership of land was always present in Rome.⁴⁴

It is sufficient to raise the objection that traces of the transformation are not entirely lacking in the sources, and that as the transformation was probably

³⁵ Cf. note 22.

³⁶ Cf. Mommsen, *Staatsrecht* pp. 22 ff. An exhaustive list is given by Weiss, *PW Halbbd.* 21, 1078 f.

³⁷ *Manu capere* is hardly congruous with immovables. Bonfante argues, however, by the expression *ager manu captus* (*Proprietà* p. 14.). But the latter expression is evidently of comparatively recent origin.

³⁸ Cf. Mommsen, *Staatsrecht* pp. 22 ff. Karlowa, *RG* pp. 352 f. and Pöhlmann II. p. 333. draw conclusions from the features of *mancipatio* about the inalienability of land. But no traces of inalienability can be found in the sources, and *mancipatio* is but one of the legal institutions originally created for movable property.

³⁹ Cf. Mommsen, *Staatsrecht* pp. 22 f. The *legis actio sacramento in rem* will be dealt with in the seventh chapter.

⁴⁰ The derivation from the verb *ferre* is obvious.

⁴¹ Cf. Weiss, *PW Halbbd.* 21, 1078 f.

⁴² See *supra* pp. 29 f.

⁴³ Cf. Mommsen, *Staatsrecht* pp. 27 f. Pöhlmann objects that on the same grounds movables would have been equally owned by the *gens* (II. p. 337.). It is indeed possible that the flocks were originally also property of the *gens*. See Mommsen, *Ges. Schr.* III. p. 145. n. 3. and Kaser, *RPR* p. 106. About this also *infra* p. 43.

⁴⁴ Ihering, *Geist* I. p. 199.

a gradual one, and took place in the distant past, clearer traces cannot be expected.

(b) According to Bonfante garden-culture prevailed from the beginning in Italy, and this type of agriculture is hardly in accordance with the system of common property.⁴⁵

In my opinion, however, the argument lacks a solid basis. We do not possess any data for verifying the proportion of garden-culture and corn-culture in Italy before the eighth or sixth century B.C., but there can be scarcely any doubt that since the ancient Romans went in for tillage, they also had to produce corn, as it was impossible for them under the given circumstances to cover their necessities by means of imports.

(c) Some authors, one of whom is Karlowa, refer to the ancient origin of boundary-stones (*termini*) as contradicting the theory of common property on land.⁴⁶ The *termini* are, however, irrelevant to the problem of gentile property, being also congruous with this system. On the other hand, the Romans themselves did not regard boundary-stones as an institution of the immemorial past, but ascribed their creation to the king Numa.⁴⁷

6. After this survey of the easily refutable counter-arguments we can draw the conclusion that the sources referring to *heredium* and other traces left behind in legal institutions satisfactorily prove that the system of private property on land in Rome was preceded by common property.

None of the arguments in themselves would provide conclusive evidence, so the opponents of Mommsen's view tried to discredit the theory by attacking single arguments isolatedly,⁴⁸ but if we examine them as a whole, it can be seen that we are not concerned with isolated data liable to an arbitrary interpretation but with the sediments of a system of property that has disappeared but which has been preserved in different literary forms and legal institutions.

7. The final question to be answered is whether the ancient common property on land was vested in the *gentes* or in the *civitas*. I agree with the prevailing view

⁴⁵ Bonfante, *Proprietà* p. 6.

⁴⁶ Karlowa, *RG* p. 351.

⁴⁷ Cf. Dion. 2, 74 and Festus p. 368: *Termino sacra faciebant, quod in eius tutela fines agrorum esse putabant. Denique Numa Pompilius statuit, eum qui terminum exarasset et ipsum et boves sacros esse.*

⁴⁸ The criticism of Pöhlmann was not, however, entirely sterile, because he succeeded in refuting some of Mommsen's arguments. So e.g. Cicero, *De re publica* 2, 9, 16: (*Romulus*) *et habuit plebem in clientelas principum descriptam, quod quantae fuerit utilitati, post videro, multaeque dictione ovium et bovis, quod tum erat res in pecore et locorum possessionibus, ex quo pecuniosi et locupletes vocabantur . . .* is indeed no evidence for common property, because the word *possessio* is probably not used in its technical meaning, and moreover it can just as well refer to the *ager publicus*. Cf. Pöhlmann II. p. 328; Kaser, *EB* p. 230 n. 7. It also seems reasonable that the later foundations of *coloniae* are no argument for the common property of the *gens* (Pöhlmann II. p. 338). Finally, although Pöhlmann certainly exaggerates, his statement that in so far as common property on land ever existed in Rome it had been liquidated by a very early date (II. pp. 340 f.) is to some extent true.

that can be traced back to Mommsen,⁴⁹ according to which the old common property meant the common property of the *gentes*. This view is also supported by the consideration that common property on land preceded the system of private property, the division of society into classes, and consequently the formation of the state, too. Thus, if we thought that common property was vested in the state, we were either compelled to consider it as a comparatively recent institution—which would be an absurdity—, or we were bound to look into the question of the type of organization that owned the land before the coming into existence of the state.

III. THE LEGAL NATURE OF *HEREDIUM*

I. At first sight one might get the impression that De Francisci is being unnecessarily scrupulous in his use of terminology when he objects to the term “proprietà collettiva” as an anticipation of later concepts,⁵⁰ or when Kaser and Wieacker carefully avoid to term the landed property of the *gentes* as ownership.⁵¹ Actually caution is not out of place in our case.

In contemporary legal language the double meaning of the words “ownership” or “property” has been obscured to a great extent. They are generally used to indicate the *right* of ownership. In modern life no misunderstanding is likely to arise from this, but when dealing with ancient property we have to differentiate between the two meanings. The system of the *gentes* having preceded the establishment of the state, and consequently of Law, we are not entitled to speak of the property of *gentes* as a right of ownership. The property of the *gens* was but an actual (material) relationship and not yet a legal one.⁵²

As far as we know, gentile property was not given any legal protection. Before the establishment of the state, this kind of property probably only meant that a given territory was subject to the rule of a *gens*. In the case of an attack, the members of the *gens* would protect it jointly. Nor do we have any knowledge of a legal protection of gentile property introduced after the establishment of the state.

It is not clear whether the cultivation of the land was practiced in common, or whether parcels were allotted to each family. The latter solution, however, seems more probable, as the natural conditions of Italy do not require joint cultivation. This assumption is also corroborated by the comparatively early dissolution of common property. In the case of joint cultivation it would have possibly happened at a later time. One point, however, is sure. Only the members of the *gens* were

⁴⁹ Mommsen, *Staatsrecht* pp. 24 f.

⁵⁰ Cf. De Francisci, *Primordia civitatis* (Roma, 1959) p. 173. n. 373.

⁵¹ Cf. Kaser, *EB* p. 237. and *passim*. Instead of ownership he uses the word “Gesamtherrschaft”. Wieacker says: “Denn die Zuständigkeit der älteren Verbände können wir noch nicht Eigentum nennen.” (*Entwicklungsstufen* p. 207.).

⁵² For this see Világhy-Eörsi pp. 219 ff.

entitled to use the land. To say anything more detailed about this would be mere guess-work.

2. The private ownership on the small parcel called *heredium* was no longer a mere material relationship, but had already become a legal one, i.e. the first form of a right of ownership on land in Rome. Thus, if we restricted the notion of ownership (property) to the *right* of ownership, the view according to which private ownership had priority in Rome, would be correct, since the property of *gentes* was not yet a legal institution.

It seems that those sources which call *heredium* garden-land⁵³ are more authentic. Obviously the building site and the surrounding garden above all were liable to pass into private ownership and to become the core of private ownership on immovables. Taking up the contrary opinion, i.e. that *heredium* was arable land, we would have to suppose that the building-site and the garden had only passed into private ownership at a later time. This, however, is contradicted by economic considerations and by different historical experiences.⁵⁴ Thus as in the course of the socialist transformation of agriculture the "house-estate" (the garden-land) is the last to lose its private character, so in the course of the transfer to the system of private property, this was the first plot where private ownership appeared.

3. As to the legal nature of *heredium*, different explanations have been offered. Some authors suppose that it was inalienable,⁵⁵ while according to Kaser the peculiarity of *heredium* lay only in its belonging irrevocably to the family.⁵⁶ Striking and rather fantastic assumptions have been recently advanced by Mayer-Maly⁵⁷ and Lambert,⁵⁸ but both of them are arbitrary to the extent that a detailed refutation may confidently be omitted.

⁵³ Plinius, *N. H.* 19, 4, 50; Festus p. 73. Only Cicero mentions expressly *ager* (*De re publica* 2, 14, 26.).

⁵⁴ We might refer to the medieval rural communities, where the garden-land was equally separated. Cf. P. Horváth, *A középkori falusi földközösségek jogtörténeti vonatkozásai* (The Legal Questions of the Medieval Rural Communities) (Budapest, 1960.) p. 230.

⁵⁵ Thus Ambrosino, who thinks rather inconsistently that the land was possibly inalienable but the owner could dispose of it by a will (*Mancipatio* p. 585.). See also Lübtow, *Erbrecht* p. 411.

⁵⁶ Kaser, *EB* especially p. 236.

⁵⁷ Cf. Mayer-Maly, *Studien* I. pp. 40 ff. According to him, in Rome *heredium* was the oldest object of succession upon death (p. 41), and the heir became the occupant of the vacant property (p. 48.). From this he draws the striking conclusion: "... wird die Begründung der Herrschaft über das *heredium* zugleich als Urfall der *usucapio* anzusehen sein." (p. 51.). Even leaving aside Mayer-Maly's rather dubious interpretation of *usucapio* (on it *infra* p. 86.), his opinion is unacceptable, because he ignores the most elementary principles of the ancient law of succession. Still in the Twelve Tables the term *heres* is only used for the *sui*, who, however, obtained the inheritance *ipso iure* later on too. So there was no need for *usucapio*, for taking the inheritance, and there was no "vacant property". And it can hardly be doubted that in ancient law the succession of descendants was the normal case.

⁵⁸ Cf. Lambert, *op. cit.* in n. 30. pp 347 ff. Lambert plainly denies that *heredium* should be considered the first object of private property on immovables, and that the word meant garden or building-site. He even thinks that the word did not refer to a definite parcel, but to "le droit à la parcelle au praedium parvulum" due to those disinherited from the family

The view of the inalienability of *heredium* is based on the sentence of Varro that has already been quoted: . . . *quae heredem sequerentur*.⁵⁹ The passage permits indeed of two possible interpretations. It can be understood that the *heredium* belongs in any case to the heir, and as such is inalienable, but also just as it is due to the heir in any case, so it does not fall back to the *gens*. I think that the second interpretation as expressed recently by Kaser is the more reliable one. Of an inalienability of immovables no traces can be found in the sources,⁶⁰ as a matter of fact and if the *heredium* was created in contrast to the property of *gentes*, then the emphasis was not on the relationship between *paterfamilias* and his descendants, but on that of family and *gens*. Thus the expression "*quae heredem sequerentur*" in my opinion indicates only the private character, the heritability of the parcel without hinting at its inalienability.

IV. AGE AND CAUSES OF THE FORMATION OF PRIVATE OWNERSHIP ON IMMOVABLES

1. The obscure character of the traces of common property on land shows that private ownership on immovables was established at an early date. A reliable *terminus ante quem* can be fixed by 450 B.C., as it is certain that the Twelve Tables were already acquainted with private ownership on immovables.

Apart from the sources referring to *heredium* this is testified by a series of detailed provisions concerning the law of property, bearing witness to the fact that private ownership was an already well-established institution. A number of statutes referring to the relationship of neighbours is contained in the Twelve Tables. Thus the owner is entitled to enter the grounds of his neighbour in order to collect the fruits, which have fallen there.⁶¹ Actions exist for correcting the boundary-line of two grounds, or for damages caused by water or water-conduits.⁶² The *cautio damni infecti* is perhaps of a later origin, but it was already known by the age of the *legis actiones*.⁶³ Provisions can be found for sanctioning the damage caused by pasture on another's land, or for cutting alien wood.⁶⁴

property (pp. 350 ff.). He does not even deem it necessary to prove this arbitrary view in some way or other.

⁵⁹ Cf. n. 25.

⁶⁰ Cf. Kaser, *RPR* p. 109.

⁶¹ *Tab. VII. 9. a.* (Ulp. *D.* 43, 27, 1, 8): *lex XII tabularum efficere voluit, ut XV pedes altius rami arboris circumcidantur*. See also Pomp. *D.* 43, 27, 2. *Tab. VII. 10* (Plinius, *N.H.* 16, 5, 15): *Cautum est lege XII tabularum, ut glandem in alienum fundum procidentem liceret colligere*.

⁶² *Tab. VII. 2.* (Gai. *D.* 10, 1, 13): *Sciendum est in actione finium regundorum illud observandum esse, etc.* Cf. *Tab. VII. 5. a.* (Cicero, *De leg.* 1, 21, 55.)

⁶³ Gai. 4, 31 Cf. Kaser, *RPR* p. 110.

⁶⁴ *Tab. VIII. 6.* (Ulp. *D.* 9, 1, 1, pr.): *Si quadrupes pauperiem fecisse dicetur, actio ex lege XII tabularum descendit . . . Tab. VIII. 11* (Plinius, *N. H.* 17, 1, 17): *cautum est XII tabulis, ut qui iniuria cecidisset alienas (arbores), lueret in singulas aeris XXV*.

These provisions bear witness not only to the existence of private ownership on immovables, but prove at the same time that it was already well-established. Quite considerable experience is needed, especially for the regulation of neighbourhood-relations. A precise date is not likely to be ascertained. Andreev thinks that private ownership on land had appeared by the sixth century B.C.,⁶⁵ but I would prefer an earlier date.

2. The factors which led to the formation of private ownership on land have not yet been sufficiently clarified.

Sometimes the erroneous view is proffered that private ownership on immovables was a consequence of the appearance of tillage.⁶⁶ It is beyond dispute that tillage is indeed a *conditio sine qua non* of private property on land, but it is nothing more.⁶⁷ Tillage as a matter of fact, as can be shown by numerous examples, can very well be carried on under the system of common property and does not necessarily lead to its dissolution.⁶⁸

The legal protection of land, the transformation of landed property into a legal relationship becomes—as in the case of all goods—a necessity only when land is suitable for becoming a commodity, when it already has a value which renders its private appropriation profitable. In order that land should become a commodity three preliminary conditions are in my opinion necessary:

(a) A certain stage of the development of the forces of production, more precisely of agricultural technique is needed,⁶⁹ enabling the producer to achieve a surplus production. In consequence, land is likely to become the source of wealth, the object of private appropriation.

(b) The second factor is that the extent land should not cover the necessities. It is obvious that as long as there is uncultivated land available in abundance, there is no need for private appropriation. This point of view has already been mentioned by Engels⁷⁰ and recently by Andreev.⁷¹ So a certain significance must be ascribed to the increase of the population, but in my opinion this is not the decisive factor in the development of private property on land.

(c) The third and in my opinion the most important condition is the possibility of using alien manpower. The private appropriation of land, the efforts to in-

⁶⁵ Andreev p. 165.

⁶⁶ De Francisci, *Trasferimento* pp. 41 f. The same view is upheld in a more refined way by Weiss, *PW Halbbd.* 21, 1089.

⁶⁷ The opinion was expressed (De Francisci, *Trasferimento* p. 38) that even the Australian natives, while remaining hunters, separated the hunting territories and were consequently acquainted with private property of land. But a separation of hunting territories does not yet mean private ownership.

⁶⁸ It suffices to refer to the medieval rural communities, to the Russian “mir” or the South-eastern-Slavonic “zadruga”.

⁶⁹ The role of agricultural technique is rightly, but to some extent unilaterally, emphasized by Andreev (p. 165.). Besides this he mentions as a factor only the increase of population, so he neglects the most important cause of the formation of private ownership on land.

⁷⁰ Cf. Engels, “Dialektik der Natur”, *Marx-Engels Werke* vol. 20 (Berlin, 1962) p. 454.

⁷¹ Andreev, p. 165.

crease one's landed property are useless, if one can only make use of one's own and one's own family's manpower.

It can also be observed in the medieval rural communities that the decisive factor of their existence, and the condition for participating in them, was personal labour.⁷² My opinion is also corroborated by the fact that medieval rural communities could support themselves for a long time in spite of the increasing population—although their maintenance was influenced by other factors, too.⁷³

On the other hand, a rural community gets necessarily dissolved if some of its members dispose of alien manpower, and are able to cultivate a larger portion of land than their poorer companions. The former naturally endeavour to have more land, if possible, and this can only be realized by appropriation in the form of private ownership.

3. In Rome private ownership, which had already been established previously on slaves and cattle, produced differences of wealth. The wealthier *paterfamilias* had in the person of their slaves, or perhaps even of their *clientes*, sufficient alien manpower at their disposal. In consequence, at a given stage of technical development, they demanded a greater share of the common land. Private ownership was first established on the house and the garden, but later in less definable way it was also extended to arable land. It is not impossible that the institution of *usus auctoritas* also had a role to play in the final liquidation of common property on land.⁷⁴

⁷² Cf. Horváth *op. cit.* in n. 54. p. 227.

⁷³ So e.g. taxation and other considerations.

⁷⁴ About this see the sixth chapter *infra* pp. 85 ff. A remark of Weber, *Römische Agrargeschichte* I. (Stuttgart, 1891) p. 81, gives the opportunity for an assumption which, though tempting, cannot be ascertained. He says as a matter of fact that "*fundus*" was the technical term for "Genossenrecht". And Mommsen refers to the peculiarity that the Twelve Tables denote the object of *usus auctoritas* not with *heredium*, but with *fundus*. (*Staatsrecht* p. 28, n. 3) So it would seem that *fundus* meant the land of the *gentes* as the antithesis of *heredium*. Thus the institution of *usus auctoritas* aimed at realizing the private appropriation of common land. The etymology of *fundus* (cf. Walde-Hofmann I. pp. 564 f.), however, shows that "Genossenrecht" could not be but a translative meaning of *fundus*. On the other hand, we only have a few sources which favour the opinion of Weber (see *Thesaurus* VI. pars prior 1573 f.). So this hypothesis is not firm enough to serve as a pillar for a new theory on *usus auctoritas*.

FAMILY PROPERTY AND INDIVIDUAL PROPERTY

I. THE EXTENT OF THE PROPERTY OF *GENTES*

1. In the previous chapters the origins of private ownership were dealt with, and it was shown that private property on movables preceded the formation of private property on land. It was also shown that in Rome the property of *gentes* was prior to private property. The first one, however, was not yet a legal institution, but only a kind of power-position, a material relationship lacking legal protection.

2. It is a considerably more tricky task to ascertain the extent of gentile property. I believe that land was originally the property of the *gentes*, and I have already pointed to the possibility that perhaps in an even more distant past the herds might have also shared the same fate.¹ The latter of course is only a hypothesis as the traces of the original system have been totally effaced, so only the right to succession of the *gens* enables us to suppose that originally the common property was perhaps not restricted to land.

It is less probable that slaves have ever been common property. The idea is contradicted by the personal character of the relationship between the slave and his master by the age of patriarchal slavery. It is more likely that the slaves were privately owned from the beginning and were, as manpower, liable to become the object of exploitation; consequently, they were the decisive factor of the dissolution of the property of *gentes*. It is perhaps not hazardous to suppose that the first objects of private ownership were the slaves themselves.

Other movables such as weapons, clothing and tools were surely never owned in common, and, as with other people, even in a classless society, they were "individual property".²

3. We have not yet dealt with the question whether private ownership was originally vested in the head of the family or in the family itself as a joint ownership. To put it more simply: did the common property at once become the individual property of the *paterfamilias*, or did there exist in Rome a transitory stage of family property.

¹ Cf. chapter two n. 43.

² This individual property, however, was but a material relationship, and not yet a right of private ownership. The latter expression is used, according to Marxist terminology, to mean ownership on the means of production.

II. FAMILY PROPERTY (*ERCTO NON CITO*)

1. According to the view³ prevailing at the present time, the first form of private ownership in Rome, as well as with other peoples, was family property.

Traces of family property can be found in classical sources too. The *sui heredes* acquire the inheritance, at variance with other heirs, *ipso iure*. This difference is explained by Gaius and Paulus by saying that in ancient law the succession of the members of family was not regarded as the taking of an inheritance, because they did not acquire alien property; only their latent ownership became an actual one on the death of the father.⁴ These traces support the opinion that originally the *paterfamilias* was not yet considered the exclusive owner of the property, as he was later on. The property was vested in the family, and although the *paterfamilias* could dispose of it, the free persons under his *potestas* were treated as co-owners.

2. The aforesaid traces are to some extent of a dubious character. The decisive argument was furnished by the discovery in 1933 of a hitherto unknown fragment of the Institutes of Gaius, where the ancient community of brothers, the *ercto non cito* (*consortium*), is treated.⁵ This same institution was already known previously from some obscure references in non legal sources, but this valuable text also supplies details concerning the legal structure of *ercto non cito*:

Gai. 3, 154 a: *Olim enim mortuo patre familias inter suos heredes quaedam erat legitima simul et naturalis societas, quae appellabatur ercto non cito, id est dominio non diviso . . . In hac autem societate fratrum ceterorumque qui ad exemplum fratrum suorum societatem coierint, illud proprium erat, quod vel unus ex sociis communem servum manumittendo liberum faciebat et omnibus libertum adquirebat: item unus rem communem mancipando eius faciebat, qui mancipio accipiebat . . .*⁶

It appears that originally the brothers continued by law to remain in co-owner-

³ Cf. e.g. Kaser, *SZ* 58 (1938), pp. 63 ff. and *SZ* 59 (1939) pp. 31 ff.; *RPR* pp. 44 ff.; Westrup, *Introduction*. In socialist literature recently, Andreev, "Les notions 'familia' et 'pecunia' dans les textes des XII tables", *Acta Ant. Philippolitana* (Sofia, 1963) especially p. 176.

⁴ Paul. *D.* 28, 2, 11: *In suis heredibus evidentius apparet continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur . . . Itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur*. See also: Gai. 2, 157.

⁵ On this see especially Arangio-Ruiz, *Società* pp. 3 ff.; P. Collinet, "Nouveaux fragments de Gaius", *RHD* 12 (1934) pp. 96 ff.; J. Gaudemet, *Indivision* especially pp. 10 ff. and *Les communautés familiales* (Paris, 1963) pp. 63 ff.; Kaser, *RPR* pp. 87 ff.; E. Levy, "Neue Bruchstücke aus den Institutionen des Gaius", *SZ* 54 (1934) pp. 258 ff.; E. Rabel, "Erbengemeinschaft und Erbeinsetzung", *Mnem. Pappulias* (Athens, 1934) pp. 187 ff.; Wieacker, *Hausgenossenschaft* pp. 12 ff. and *Entwicklungsstufen* pp. 213 ff. For further references see Kaser, *RPR* p. 87 n. 13.

⁶ I have not cited the passage on the artificial creation of the community, because it has a bearing upon the prehistory of *societas*. On this see Arangio-Ruiz, *Società* especially pp. 18 ff.

ship (*legitima et naturalis societas*) after the death of the father.⁷ The common slave could be manumitted by any of them, and every member of the community became a patron of the freedman. Likewise everybody was entitled to alienate goods validly by *mancipatio*.

Scholars were baffled by the lack of a *ius prohibendi*. Some even supposed that Gaius had written in the missing part of the manuscript on it; others thought that one of the brothers had been the leader and as such was entitled to exercise the right of manumission and alienation.⁸

Recent literature, however, has already rejected such assumptions. The view prevails that with the *ercto non cito* there was neither a *ius prohibendi* nor an appointed leader, because the clear and unambiguous text does not permit such interpretations.⁹ The structure of the ancient community seems only at first sight to be unreasonable. If we bear in mind that the manumitted slave became the freedman of every member, and that presumably the acquired goods became common property¹⁰ too, then the *ius prohibendi* is indeed superfluous. On the other hand, as Gaudemet pointed out, the right of alienation was not likely to lead to abuses because the members lived in a community and could easily control each other's acts.¹¹ It is hardly probable that alienation could have been performed in secrecy. *Mancipatio* demanded the participation of eight men so it was impossible to conceal it.

The *ercto non cito* was no mere co-ownership, but was also a family community. On the death of the father his sons became *sui iuris*,¹² and being themselves *paterfamilias* they were entitled to deal freely with the property in the same way that their father had been. A co-ownership divided by individual shares is an individualistic and highly developed solution, but at that time it was still unknown.

According to the prevailing view the action for the division of common property, the *actio familiae erciscundae*,¹³ was a creation of the Twelve Tables. But Arangio-Ruiz suggests that the community could also previously have been liquidated by mutual agreement.¹⁴

⁷ The word "*naturalis*" is, in this case, not the opposite of "*legitima*". It points only to the fact that the community, based on family relationship, was a natural one. Cf. Arangio-Ruiz, *Società* p. 7.

⁸ Thus Solazzi on this, with a refutation and with references: Kaser, *RPR* p. 88. especially n. 18. On *ius prohibendi* *ibidem* n. 19.

⁹ Cf. Kaser, *loc. cit.* in the previous note.

¹⁰ Cf. Gellius, *N.A.* 1, 9, 12. On it e.g. Wieacker, *Hausgenossenschaft* p. 14.

¹¹ Gaudemet, *Indivision* p. 21.

¹² The question whether women too could participate in the community is a moot one. Cf. Arangio-Ruiz, *Società* p. 9. In my opinion they were likely to have participated since they were also heirs of the *paterfamilias*.

¹³ Cf. Kaser, *RPR* p. 88. The view is based upon Gai. *D.* 10, 2, 1, pr: *Haec actio (familiae erciscundae) proficiscitur e lege XII tabularum.*

¹⁴ Arangio-Ruiz, *Società* p. 6. n. 5.

3. It appears from the foregoing that the property of the *gens* was succeeded in Rome by the family property. Although the *ercto non cito* already reflects the stage of the dissolution of family property, it is still based on this idea.¹⁵

It follows that originally both *familia* and *pecunia* belonged to family property,¹⁶ and so did *heredium*. No traces of a separate, individual property of the *paterfamilias* can be found in our sources.¹⁷ The possibility of its existence cannot be excluded with certainty, but, as will be shown, its lack can be explained by strong arguments.

III. THE DISSOLUTION OF FAMILY PROPERTY

1. The question of the very existence of family property has already been settled by recent researches. But, as far as I know, no answer has yet been sought to the question when family property became the individual property of the *paterfamilias*.

I think that the age when the transformation was at least practically realized can be ascertained approximately. Two proofs exist:

(a) As soon as the division of the family-community by means of a judicial proceeding is possible, family property is practically abolished. The creation of such a judicial remedy means the recognition of the right of each member of the family to have individual property, and so the originally compulsory community is henceforth voluntary. The *actio familiae erciscundae*, as has already been mentioned, was a creation of the Twelve Tables.

(b) The possibility of making a last will is in my opinion an even more important fact. The *paterfamilias* was always entitled to manage the family property and to dispose of it *inter vivos*.¹⁸ Obviously, as soon as he is enabled to dispose of it upon death, the family property becomes a formality, the property being already practically the individual property of the *paterfamilias*, even if the ancient principle is maintained for reverence's sake. The provisions of the Twelve Tables on the law of succession furnish sufficient material to answer the question how far the disposal upon death was recognized by this time.

2. (a) From the provision "*uti legassit . . . ita ius esto*"¹⁹ it can be seen that the *paterfamilias* could bestow legacies without any limitation. Since, as I have

¹⁵ "Sans doute l'indivision héritaire est une notion différente de celle de propriété familiale. Elle en est seulement la prolongation naturelle" — writes Gaudemet (*Indivision* p. 20). The rule that each member could dispose of the property implied the germs of dissolution. The community was not likely to be upheld for several generations, because the possession of a peasant could but maintain a limited number of persons. So it is probable that even before the introduction of a special action the community would have been liquidated by mutual agreement. Cf. also with the previous note.

¹⁶ Thus Kaser, *RPR* p. 45.

¹⁷ Cf. Kaser, *RPR* pp. 45. and 106.

¹⁸ Cf. Kaser, *SZ* 58 (1938) p. 64 and *RPR* p. 46.

¹⁹ *Tab. V. 3.* On it *supra* pp. 23 f.

tried to show, legacies were not confined to a special part of the whole property, and the rule is not concerned with the existence of *sui heredes*, there were presumably no restrictions. Consequently the *paterfamilias* could exhaust his fortune by legacies even to the extent that nothing was left to his family, although public opinion might have prevented such abuses. The law at any rate did not interfere. The clear and unambiguous wording of the statute excludes the possibility of legal limitations. Moreover the Romans themselves constantly interpreted the rule in this way.

(b) The interpretation of the provision on intestate succession (*Si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto . . .*)²⁰ is more delicate. It is questionable whether the expression "*si intestato*" refers to the will made at the popular assembly or to that made by a *mancipatio*. I think that Kaser rightly refers it to the latter case,²¹ so we are concerned with the same legal form as in the former provision. If we compare the two rules, the result is that the *paterfamilias* could dispose of the property even if there were *sui* in existence.

It is hard to see why Kaser wants to confine the possibility of making a will to the case where the *paterfamilias* had no *sui*.²² If it were so, the rule *uti legassit* should also contain this limitation, because otherwise the two provisions would be contradictory. Kaser was presumably hindered by some prejudices of contemporary researches in drawing the ultimate conclusions from the interpretation of the notions *familia* and *pecunia*.

Firstly it is rather doubtful whether the sentence *cui suus heres nec escit* has to be understood, according to the prevailing view,²³ as the condition for making a will. The most straightforward translation of it would be: "If he dies without having made a will, and he has no *sui*, then . . ."

It is likewise a prejudice to assume that the freedom of testation has been only gradually recognized, since development is generally not rectilinear, but spiral in shape. If we take into consideration this dialectic regularity, the result concerning the law of succession in the Twelve Tables will be in some respects at variance with the prevailing view.

3. It is true that after the appearance of private ownership, testation was for a time unknown, and family property inevitably passed to the members of the

²⁰ *Tab. V. 4–5*. On it *supra* pp. 24 f.

²¹ Kaser, *RPR* p. 59. I cannot share the contrary view of P. Voci, *Diritto ereditario romano I* (Milano, 1967) p. 16, who denies the existence of the will by *mancipatio* in the age of the Twelve Tables. As a consequence he cannot tell how legacies were bestowed (p. 22.).

²² Kaser, *RPR* pp. 79 and 94. n. 7.

²³ Lévy-Bruhl, however, surely goes too far in assuming that by the Twelve Tables the testamentary succession would have been the normal case in the way that the *paterfamilias* used to appoint one of his *sui* as his heir. The interpretation of the rule "*Si intestato . . .*" is likewise unconvincing ("pour qui aucun suus n'a été désigné comme heres"). Cf. Lévy-Bruhl, "Intestatus", *Studi Albertario I*. p. 547. The view of Stojčević is also unacceptable. He suggests that *sui* could take the inheritance only on the basis of a *testamentum in comitiis calatis*, the intestate heir was the *proximus adgnatus* i.e. the brother. Cf. "La fonction du testament *'calatis comitiis'*" *Syntelesia Arangio-Ruiz I*. (Napoli, 1964) pp. 240 ff.

family upon the death of the *paterfamilias*. Moreover the most ancient form of will, the *testamentum in comitiis calatis*, did not mean a freedom of testation either since it was surely open only to childless persons, and was possibly connected with an *arrogatio*.

The new form, the *mancipatio familiae*, however, was an act *inter vivos*, and since the right of disposal of the *paterfamilias* had never been limited in this respect, so—as soon as this special kind of *mancipatio* was created—he could actually also dispose of the property without any restrictions *mortis causa*. As is shown by the extant provisions of the Twelve Tables, no limits were imposed, the legislators themselves having possibly not yet fully realized the importance and consequences of the innovation. The freedom of testation was limited only at a later age.²⁴

Thus by means of the artful *mancipatio familiae* the Twelve Tables guaranteed a practically unlimited freedom of testation to the *paterfamilias*. From the legal point of view, however, this did not yet mean a real freedom of testation.

As we have seen, only the *suus* is termed an heir by the Twelve Tables, since the idea that an alien person could be a *heres* too, was apparently still unknown.²⁵ An heir could only be instituted at the popular assembly, by a will, and since this meant a kind of adoption, the *paterfamilias* did not yet have the power to deprive his children of their quality as heirs.

We ought also to bear in mind that even the *mancipatio familiae* was not yet a true testament, but only a so-called “legacy-testament”, which did not contain appointments of heirs and *exheredationes*.²⁶

4. From the law of succession of the Twelve Tables and from the *actio familiae erciscundae* we are forced to draw the conclusion that by this time the institution of family property practically no longer existed. The idea that the property belonged not only to the *paterfamilias*, but also to the family might have survived, but actually the property was already the individual property of the *paterfamilias*, since, —apart from some legal differences, he could dispose of it freely upon death. It is quite possible that this new order was created by the Twelve Tables. The action for the division of the inheritance was created according to our sources by the decemvirs. Perhaps the innovations concerning the law of succession can also be ascribed to them.

5. The result was that the property of the *gens* was succeeded by the family property in Rome too. It seems, however, that family property was transformed into the exclusive ownership of the *paterfamilias* as early as by the age of the Twelve Tables.

²⁴ Apart from the formal requirement of an *exhereditio* an actual limitation of freedom of testation was only imposed by the introduction of the *querela inofficiosi testamenti*, and concerning legacies by the *lex Falcidia*.

²⁵ In *Tab. V.* 4–5 characteristically only the *suus* is designated as *heres*, the succession of the other relations and the *gens* is called: *familiam habe(n)to*.

²⁶ Kaser, *RPR* pp. 93; Wieacker, *Hausgenossenschaft* p. 18.

Consequently the separate property of the *paterfamilias* in Rome probably did not take the shape of a legal institution and so its traces cannot be found in the sources. The peculiarity of the Roman development consists in the fact that, unlike other people, the development did not veer towards the economic independence of the members of the family, but, on the contrary, it tended towards a concentration of the family property, which meant the exclusive ownership of the *paterfamilias*.²⁷ Since this happened at an early stage, there was presumably no need to establish the legal institution of separate property for the *paterfamilias*.²⁸

6. What can account for the fact that the exclusive ownership of the *paterfamilias* succeeded family property so early? I think that the decisive ground for it was the peasant character of ancient Roman society. A developed commodity turnover, and a lively commerce require the economic independence of the individual, while the basically autarchic peasant economy necessitates on the contrary the concentration of property. So the *paterfamilias* had to become very soon the sole owner of the family property.

The quite early date of this transformation can possibly be explained by the limited quantity of land available. Because of the increase of the family, the maintenance of family property would have endangered the unity of peasant economy and in consequence the basis of economic life in Rome.

²⁷ Cf. Kaser, *SZ* 58 (1938) pp. 64 ff. Koswen distinguishes between two possible developments of family property: in one case it tends towards the independence of the individual, in the other one towards the concentration of the property. Cf. Koswen, "Semeinaia obshchina", *Sovietskaia Etnografia* (1948) n. 3. pp. 12 ff. and 20 f. The Roman family surely belonged to the second type.

²⁸ According to Kaser it is doubtful whether a separate property of the *paterfamilias* ever existed, and he adds: "jedenfalls wäre anzunehmen, dass diese Sachen schon frühzeitig im Hausgut aufgingen" (*RPR* pp. 106 f.). This assumption, however, is not convincing, because even if a separate property had existed, it is much more likely that the family property had merged with the separate property than *vice versa*.

DENOMINATIONS OF OWNERSHIP AND THE HOMOGENEOUSNESS OF *PATRIA POTESTAS*

I. PRELIMINARY REMARKS

1. Having drawn the outlines of the historical process to show how private property came into existence in Rome, we can now turn our attention to the different questions of the already established ownership. First of all the denominations of ownership and some closely connected problems of *patria potestas* have to be examined. In this way a reliable basis can be obtained for further investigations, and it is hoped that an answer can be found to the question how far ancient Roman law was acquainted with the notion of ownership.

Fortunately we do not have to plough uncultivated land. Outstanding scholars, like Kaser and De Vissher, have achieved valuable results in this field.¹ It is to their undeniable merit that two questions are already beyond any doubt. First that ancient law had no precise notion of ownership, and secondly that *patria potestas* was by this age still homogeneous, their different aspects not yet having been sharply distinguished.²

We are, however, still far from a complete and satisfactory solution to all the problems involved, especially those concerning the character of the ancient *patria potestas*. So an attempt has to be made to examine the most important questions anew.

2. In this field, apart from the usual difficulties of research of ancient Roman law, there is a special danger that has to be reckoned with, namely a confusion between the notion and the institution of ownership. Therefore it should be stressed in advance that the legal institution of ownership existed beyond any doubt in ancient law. Only the existence of the corresponding notion is in question. So we have to carefully avoid identifying the inaccurate terms and primitive ideas with the institution itself, as has been done several times.³

¹ Cf. especially Kaser, *EB* pp. 1 ff, and passim; De Vissher, *Mancipium* and *Auctoritas* II.

² On this see Kaser, *EB* pp. 1 ff; De Vissher, *Mancipium*. Recently Gallo, *Paterfamilias*. Capogrossi-Colognesi denies the unity of *patria potestas* (*Struttura* pp. 137 ff. and 261 ff.). His arguments, however, are not convincing. I think that he did not succeed in refuting the ancient broad meaning of the words *mancipium*, *manus* and *potestas*. I agree with him that *res nec mancipi* were not excluded from ownership, but this is no argument against the homogeneousness of *patria potestas*. The *mancipatio* and the *vindicatio* as uniform legal means are irrefutable pillars of the prevailing view.

³ Thus e.g. the theory that *res nec mancipi* were not objects of ownership in ancient law. Cf. *infra* pp. 58 f. The view of Capogrossi-Colognesi is not quite clear. According to him, the institution of ownership existed in early law (cf. e.g. *Struttura* p. 390), but it seems that the existence of the institution is inconceivable for him without the corresponding notion: "Non vogliamo certo sostenere l'esistenza in Roma di istituti sociali e giuridici senza che il lin-

II. THE DIFFERENT DENOMINATIONS

1. We have to start from the established fact that ancient Roman law had no precise notion of ownership. The words *dominium* and *proprietas* are of later origin,⁴ and the terminology for ownership was still rather vague and loose in early law. Though ancient Romans had some idea of ownership, no precise conception of it was yet in existence.

2. The most general denomination was the expression *meum esse*, which can be found equally in the formula of the *mancipatio* and the *vindicatio*.⁵ It has been shown by Kaser that *meum esse* cannot be looked upon as a precise notion of ownership, because it was applied both to persons and things.⁶ It meant simply the belonging of a person or a thing to the power of somebody. It is not necessary to dwell at length on the question since Kaser has settled the main problem by proving that *meum esse* was by no means a notion that corresponded to *dominium*.⁷

3. The verb *habere* cannot be called into question, though it was sometimes also used to denote lawful (*iusta*) *possessio*.⁸ For ancient law there are hardly any sources, and the verb, as Kaser⁹ has shown, was ambivalent in the classical age, denoting both lawful (*iusta*) possession and ownership. Thus, *habere*, as a technical term for ownership, has to be dropped.

Nor can the word *usus* be identified with the notion of ownership, because as Kaser¹⁰ pointed out, it meant actual holding, not ownership.

4. Besides the expression *meum esse*, the terms used for designating *patria potestas*, especially the word *mancipium*, deserve special attention.¹¹ The term *mancipium* is the more important, because the prevailing opinion used to look upon it as the ancient word for ownership¹², and this view can still be encountered with contemporary writers.¹³

guaggio avesse la concreta possibilità di esprimerli." (p. 509). Cf. also p. 151. If I have not misinterpreted his ideas, he denies the homogeneousness of *patria potestas* and considers the expression "*meum esse*" a notion of ownership (p. 509) precisely because he fails to make a distinction between the history of the institution and its notion.

⁴ Cf. Kaser, *EB* p. 6 and Monier, *Dominium*.

⁵ Cf. Gai, 1, 119 and 4, 16.

⁶ Cf. Kaser, *EB* pp. 6 ff.

⁷ The content of the expression *meum esse* will be dealt with later on. See *infra* p. 83, and pp. 97 f.

⁸ So *Tab. v. 4: Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto*.

⁹ Cf. Kaser, *EB* pp. 13 f. The ambiguity of the term is shown by Ulp. *D.* 45, 1, 38, 9 and Paul. *D.* 50, 16, 188 pr.

¹⁰ Cf. Kaser, *EB* p. 15.

¹¹ Likewise the essentially synonymous expressions *manus* and *potestas*. See *infra* pp. 53. f.

¹² Thus as early as the eighteenth century Charonda and Schulting. Cf. Bonfante, *Proprietà* p. 32. See also Bethmann-Hollweg I. p. 126 n. 4; Bonfante, *Proprietà* p. 76. Brezzo, *Mancipatio* p. 7; W. W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge, 1931) p. 95; Costa, *Cicerone* I. pp. 92 ff; Hägerström p. 373; Krüger, *Capitis deminutio* pp. 108 and 120 f; Pflüger, *Nexum* p. 64; Wilutzky II. p. 128.

¹³ So e.g. De Francisci, *Sintesi storica del diritto romano* (Roma, 1962) p. 122; Westrup,

In the thirties the eminent Belgian scholar, De Vissher, advanced a new theory on *mancipium*.¹⁴ According to him, *mancipium* was the ancient denominator of the homogeneous *patria potestas*, embracing both the free members of the family and the *res Mancipi*.¹⁵ It did not mean ownership, but a kind of political sovereign power, a “puissance de commandement”.¹⁶ The *dominium*, however, was applied originally only to *res nec Mancipi*, and has been extended only later on to *res Mancipi*. *Dominium* was unlike *mancipium*, an institution of an explicitly economic character.¹⁷

His theory has been adopted by his fellow countrymen, Wilms and Cornil. Disciples usually exaggerate their master’s teaching. So did Wilms and Cornil. In their interpretation *mancipium* turned out to be a strictly religious and non-economic institution. The patrimonial power attached to *res nec Mancipi*, however, an institution of Etruscan origin and of base economic character, was looked down upon by them as something contrary to the more spiritual Latin notion of *mancipium*.¹⁸

The new theory has led to violent disputes breaking out.¹⁹ As a matter of fact, De Vissher, in his zeal to ascertain his view, in any possible ways, offered excellent opportunities for attacks. He declared for instance that the word *mancipium* had exclusively meant the power, and never the act of *mancipatio*.²⁰ In order to corroborate this impossible conjecture, he was of course compelled to interpret some sources in a wholly arbitrary way.²¹

The “puissance de commandement”, as the essence of *mancipium*, can also easily be refuted. Kaser rightly pointed out that in the case of a house or land a “power of command” has no sense.²² He has also shown that the suggested

Introduction II. p. 66. To some extent also Kaser, *EB* p. 194, where he calls *mancipium* “Eigentum mit verstärkter Sicherung”. Meanwhile he has somewhat modified his previous view, but he still looks upon *mancipium* as a kind of ownership. Cf. *RPR* p. 39.

¹⁴ Cf. De Vissher, *Mancipium*.

¹⁵ *Ibidem* p. 289.

¹⁶ *Ibidem* p. 294.

¹⁷ *Ibidem* especially p. 289.

¹⁸ Cornil, *Mancipium* p. 415. In his paper he also expounds the views of Wilms. On these see also Koschaker II. and III.

¹⁹ De Vissher has been followed by Amirante, *Auctoritas* p. 378; Arangio-Ruiz, *Compravendita* p. 34 and *Istituzioni* p. 168 n. 1 (with some reserves); Bretonne, *Usufrutto* pp. 19 ff; Grosso, *Lezioni di storia di diritto romano* (Torino, 1960) p. 141. With reserves see Koschaker I. pp. 267 f. Cf. also Schönbauer, *Mancipium* p. 305, who, however, does not give reasons.

Against his theory e.g. Fuenteseca p. 147; Giffard, “*Mancipium. A propos de travaux récents*”, *Revue de philologie* 63 (1937) pp. 396 ff; Gallo, *Paterfamilias* p. 220 n. 2; Kaser, *EB* pp. 181 ff; Leifer II. pp. 149 ff. Recently G. Scherillo, “*Res Mancipi*” e “*nec Mancipi*”, *Syntelesia Arangio-Ruiz* I. (Napoli, 1964) p. 86 f. Previously he had accepted the view of De Vissher. Cf. *Studi Betti* IV. pp. 114 f. Thormann, *Mancipatio* pp. 62 ff. and p. 59 n. 2. is only partly against it. Recently rather sharply Capogrossi-Colognesi, *Struttura* especially pp. 203 ff.

²⁰ De Vissher, *Mancipium* pp. 281 ff.

²¹ So it is especially cunning to interpret the well-known text: *Cum nexum faciet Mancipiumque* . . . as “constituer le droit de Mancipium”. See De Vissher, *Mancipium* pp. 284 ff.

²² So Koschaker II. pp. 267 f; Kaser, *EB* p. 185.

contrast of *mancipium* and *dominium* in ancient law lacks probability, since the latter word cannot be found in the relevant sources.²³ Finally De Vissher related his theory on *mancipium* to a new but unconvincing interpretation of the category of *res Mancipi*, thus adding to the weak points in his theory.²⁴

Although the theory of De Vissher undoubtedly contains some disputable, even unacceptable points, I still think that in spite of all this he has found the right way that leads to the solution of the problem. It is also beyond any doubt that his theory, regardless of its faults, has fundamentally shaken the older view, which identified *mancipium* with ownership.

III. MANCIPIUM - POWER

1. The word *mancipium* had a rather narrow meaning in classical legal language. It denoted the power over free persons not belonging to the family.²⁵ *Potestas* designated the power over children and slaves,²⁶ while *manus* the power over the wife.²⁷

Nevertheless some classical sources bear witness to an older, wider meaning of these expressions. The use of the phrase *in potestate, manu, Mancipioque* points to an out of date system, where these words had not yet found a specialized application in one aspect of *patria potestas*.²⁸

2. Older legal and more recent non-legal sources confirm the impression called up by this phrase, and show that the three expressions were originally the terms for the whole of the *patria potestas*:

(a) It would be superfluous to enumerate all the sources adduced by De Vissher in favour of the original, wide meaning of *mancipium*.²⁹ Several texts of Plautus,³⁰ some passages of Cicero, who by the way was well trained in law,³¹ and texts of

²³ Cf. Kaser, *RPR* p. 107.

²⁴ Cf. e.g. Franciosi, *Res Mancipi* especially p. 382.

²⁵ Cf. Gai. 1, 49; 1, 116 ff; 1, 135; 1, 141; 2, 86 etc. Ulp. 19, 18; 24, 23–24; *Fr. Vat.* 51; 298; 300.

²⁶ Cf. Gai. 1, 52: *In potestate itaque sunt servi dominorum* and 1, 55: *Item in potestate nostra sunt liberi nostri* . . .

²⁷ Cf. Gai. 1, 109: . . . *in manum autem feminae tantum conveniunt*.

²⁸ Cf. Gai. 1, 49; 2, 86; 2, 90. Ulp. 19, 18; 24, 23–24. *Fr. Vat.* 51; 298; 300.

²⁹ Cf. De Vissher, *Mancipium*, especially p. 302.

³⁰ So *Mil. Glor.* 1, 1, 23; *Most.* 5, 1, 43; *Pers.* 4, 3, 63; De Vissher exaggerates of course, when he wants to translate the word *mancipium* in a consequential way as “power” in Plautine comedies. *Mancipium* means in fact the act of *mancipatio* in the following passages: *Merc.* 2, 3, 112; *Curc.* 4, 2, 8–9; for the meaning of “slave”: *Capt.* 5, 2, 1; *Epid.* 5, 2, 20; *Rud.* 5, 3, 39; *Stich.* 1, 3, 57.

³¹ Cicero, *ad Brutum* 1, 16, 4: *an ut esset sui iuris ac Mancipii res publica*. Cf. also *ep. ad fam.* 7, 29 and 7, 30, 2. A different, unconvincing interpretation: Capogrossi-Colognesi, *Struttura* pp. 341 ff.

Lucretius, Seneca and Tacitus³² would have to be listed among them. It is also noteworthy that Gellius describes the power of the husband by the expression *manu mancipioque*.³³

The sources furnish a reliable basis for the assumption that *mancipium* in ancient law denoted the homogeneous *patria potestas*, embracing both persons and the *res mancipi*. It was superfluous and rather unwise of De Vissher to discredit his theory by casting doubt on the two other equally ancient meanings of the word: the act of *mancipatio* and the slave.³⁴

(b) The word *potestas*, as has already been mentioned, was still applied both to children and slaves in classical law. The Twelve Tables, however, as has been pointed out by Gallo, also used the word to designate the power over things.³⁵

(c) *Manus* equally embraced originally the whole of *patria potestas*. It is attested by the word *manumissio*, and by sources, where the power over children or things is also called *manus*.³⁶

3. It would be awkward, if not impossible, to differentiate between the old meaning of the three words, as is shown by the failure of such attempts.³⁷

Although the three words appear to have been synonymous, one has the impression that *mancipium* was mostly used for denoting not only persons, but also

³² Lucretius, *De rerum natura* 3, 969: *vitaque mancipio nulli datur, omnibus usu.*: Seneca, *De ben.* 5, 19, 1: *idem de servo dicam. Mei mancipii res est, mihi servatur.* and: *De cons. ad Pol.* 10, 4: *Rerum natura illum tibi sicut ceteris fratribus non mancipio dedit, sed commodavit; Ep.* 73, 7: *nihil dat fortuna mancipio.* On these sources see Bonfante, *Proprietà* p. 88. n. 2; De Vissher, *Mancipium* p. 289 n. 82. and p. 302; Monier, "Un texte de Sénèque sur le mancipium", *RHD* 4. s. 19 (1940–41), pp. 364 f. About a slave who killed his master Tacitus, *Ann.* 14, 43 says . . . *iniurias suas ultus est . . . aut avitum mancipium detrahebatur?* Cf. Bonfante, *Proprietà* p. 88 n. 2. and Capogrossi—Colognesi, *Struttura*, p. 338.

³³ Gellius, *N.A.* 4, 3, 8: *in cuius manu mancipioque alia matrimonii causa foret . . .* and 18, 6, 9: *matrem autem familias appellatam esse eam solam quae in mariti manu mancipioque aut in eius in cuius et maritus manu mancipioque esset.* According to Gallo (*Paterfamilias* p. 202 n. 1.) it was an unusual terminology. But in the ignorance of the normal one we are not entitled to such statements.

³⁴ Cf. De Vissher, *Mancipium* pp. 281 ff. This has been convincingly refuted by Kaser, *EB* pp. 183 ff.

³⁵ *Si furiosus escit. adgnatum gentiliumque in eo pecuniaque eius potestas esto.* Cf. Gallo *Paterfamilias* p. 212. The word also refers here to the *pecunia*, i.e. to things. By this the contrary view of Capogrossi—Colognesi, *Struttura* p. 285 is refuted.

³⁶ Voigt, XII Tafeln II. pp. 83 ff. See also Gallo, *Paterfamilias* p. 203; Kaser, *EB* pp. 1 ff. and *RPR* p. 50. According to Kaser the word was not applied to things, but this seems to be contradicted by Plaut. *Amph.* 2, 1, 13–14. It is of course true that of the three expressions *manus* was the least applied to things. The statement of Coli (pp. 127 ff.) that in Roman law the notion of *manus* did not exist, is devoid of any basis. Similarly Gaudemet, *Manus* pp. 323 ff. A convincing refutation can be found with Gallo, *Paterfamilias* p. 200 n. 1. Capogrossi—Colognesi, *Struttura* pp. 279 ff. denies the broad meaning of *manus*, but fails to mention *manumissio*.

³⁷ According to Wilms *manus* was a relationship of a more intimate, more personal character than *mancipium* (Cf. Cornil, *Mancipium* p. 419 and Koschaker I. pp. 266 f.). But as Koschaker rightly observes: "Bei manus und mancipium . . . viel leichter das Gemeinsame als das Trennende zu erkennen" (II. p. 267).

things. Its frequent use is also advocated by the consideration that the word *mancipium*, having pointed to the act of *mancipatio*, was likely to express the common feature of the homogeneous *patria potestas*.

So, for the sake of convenience, I shall call *mancipium* the ancient *patria potestas*, but I do not contest the validity of the other terms.

4. In order to describe more closely the features of *mancipium*, its objects have to be envisaged. It is generally acknowledged that *mancipium* as a power embraced the same objects as the act of *mancipatio*: i.e. the free members of the family, the slaves and the other *res Mancipi*. Above all it is the free and unfree persons subject to *mancipium* that are in question.

(a) The wife in *manu* and the children were subject to *mancipatio* even in later law. In earlier law a *vindicatio* could presumably be brought in for their recovery.³⁸

On this question two extreme views have been put forward. The first one, starting from the applicability of *mancipatio* and *vindicatio*, holds that the *paterfamilias* was the owner of his family.³⁹ This view is rooted in a subconscious devotion to modern legal concepts. The underlying idea is that ancient Roman law made the same sharp distinction between personal and property relationships, as modern civil law does. For those who adhere to this view, *mancipatio* is transfer of ownership and *vindicatio* a proprietary remedy in the modern sense. But as ancient Roman law was not yet acquainted with the precise notion of ownership, *mancipatio* was the transfer of a power position that is almost undefinable in modern terms, and *vindicatio* was the legal protection of it. In fact the *paterfamilias* was never the owner of his family, as is clearly attested by the latent ownership vested in its members.⁴⁰ If we wanted to approach ancient law with the help of modern conceptions, this would lead to dangerous misunderstandings.

The other extreme view, as expressed e.g. by Gaudemet,⁴¹ inclines to an idealization of ancient Roman society, and denies the economic importance of the free members of the family. So, according to Gaudemet, *coemptio* was, in spite of its name, never an actual sale,⁴² and the ancient family had no economic features.⁴³

Both of the views criticized above leave out of account the social conditions of the remote age we are dealing with. For, if we are aware of the modest peasant

³⁸ Cf. Gai. 1, 120: *eo modo et serviles et liberae personae mancipantur*. On *vindicatio*: Liv 3, 44. Cf. Franciosi, *Virginia* pp. 20 ff. In classical law free persons could be recovered by a *vindicatio*, only *ex adiecta causa*, but interdicts and the *cognitio* were still available. Cf. Ulp. *D.* 6, 1, 1, 2.

³⁹ So e.g. Thormann, *Mancipatio* p. 146 n. 3.

⁴⁰ Cf. Paul. *D.* 28, 2, 11; Gai. 2, 157.

⁴¹ Gaudemet, *Manus*, especially p. 353.

⁴² Gaudemet, *Manus*, p. 347. According to Kaser the *coemptio* was also the formal survival of an originally real sale. Cf. *RPR* p. 68.

⁴³ Cf. also Cornil, *Mancipium* p. 418. According to him the *mancipium*-power consisted of: "... selon qu'il avait le caractère social et même sacré d'une participation au culte domestique, ou le caractère purement économique." He ascribes an economic character to the power over *res nec Mancipi*. Likewise Wilms, who is followed by him. Reinach (p. 84.) has recently suggested that in Rome the female members of the family never participated in agricultural labour. Against this is Kaser, *SZ* 78 (1961) p. 457 n. 4.

way of life prevalent in early Rome, the twofold character of *patria potestas* can clearly be seen. The members of the family as manpower, had a patrimonial value, so that is why *mancipatio* was applied to them. It can still be observed with some underdeveloped peoples that an economic value is put on the wife and children—and not without reason. In Rome the members of the family were never simple objects of ownership, but they were in former times entitled to the family property, and were at a later time, at least nominally, latent co-owners of it. It would also be unjust to deny totally the personal or even sentimental aspect of ancient *patria potestas*.⁴⁴

The power over the free members of the family was consequently a two-sided phenomenon, since it was made up of patrimonial and personal elements.

(b) During the age of patriarchal slavery, when *mancipium*-power was a living institution, the situation of the slave was practically no different from that of the free members of the household. The personal, human elements of the relationship between master and slave were still vigorous. Even in later sources the slave is regularly called *homo* and not *res*.⁴⁵ At the same time the slave, as manpower, was also goods of economic value. The most conspicuous manifestation of the double character of *mancipium*-power can be found in the case of slaves, with the difference, however, that as the slave is an object of ownership, the patrimonial elements prevail. The fact that the slave belongs to the property is not expressed by the notion of *mancipium*. Since his situation was practically similar to that of the free members of the family, the difference was not conspicuous.

5. After having examined the situation of the persons subject to *mancipium*-power, we may safely conclude that the homogeneous *patria potestas* was an institution of mixed character, being composed of personal and patrimonial elements.⁴⁶ It is, however, still questionable, how the other *res mancipi* found a place in this peculiar, semi-patrimonial power.

IV. RES MANCIPI AND RES NEC MANCIPI

I. A survey of the immense literature on the subject may be left aside. Older literature has been conscientiously collected and treated by Bonfante,⁴⁷ so an account of the more recent views will surely suffice.⁴⁸ In my opinion the question has been dealt with so many times that the possibilities of interpretation are totally exhausted. The only path left open is to stick to the most convincing explanation.

⁴⁴ Cf. Kaser, *EB* pp. 1 f.

⁴⁵ Cf. Gai. 2, 13; 4, 16; Gai. *D.* 1, 8, 11; Afr. *D.* 21, 1, 51, pr. etc.

⁴⁶ A similar view was expressed by Scherillo, *Synteleia Arangio-Ruiz* II pp. 114 f.

⁴⁷ Bonfante, *Proprietà* pp. 31 ff.

⁴⁸ Older views have been convincingly refuted by Bonfante, so it would be superfluous to deal with them.

(a) In the first chapter I dealt at length with the view which tried to identify the category of *res Mancipi* with family property, and I hope to have succeeded in refuting it.⁴⁹

(b) The explanation of De Vissher is also unacceptable. In his opinion the category of *res Mancipi* was determined by military considerations.⁵⁰ This assumption, however, is not in accordance with historical facts. It is certain that slaves, cows and asses had never been employed for military purposes, not to speak of slave-girls. Of *res Mancipi* only horses and mules were used in wars.

(c) Gallo has advanced the idea that the category of *res Mancipi* embraced the most valuable things. A detailed refutation of the view is rendered superfluous by the thorough and convincing criticism of Franciosi.⁵¹ So it is sufficient to point out the fact that a herd of sheep or jewels, neither of them belonging to the *res Mancipi*, were presumably not valueless in ancient times. They might even have been of more value than an ass or a mule.

2. It seems that the prevailing opinion is the soundest one, i.e. that the most important means of production of a peasant economy belonged to the *res Mancipi*.⁵² Slaves, horses, oxen, asses and mules furnished the indispensable manpower, while the land and the appertaining predial servitudes served as a basis for the subsistence of the family.

The other explanations, ingenious as they may be, have to be rejected, because the striking fact that precious things (herds, jewels etc.) did not belong to the *res Mancipi*, can but be explained with the necessities of agriculture.

It is worth while quoting the remark of Bechmann: "And, just as the peasant of to-day, where tillage is not yet mechanized, if asked what belongs to agriculture, would give the simple answer: land and manpower; so the same simple and natural answer is met with in the excellence of the *res Mancipi*."⁵³

3. So I believe that the economic function of the *res Mancipi* falls in line with the features of *Mancipium*-power. It is true that apart from the slave the personal element is not present here, but the necessary link between persons and things is created by the fact that the animals broken to draught or burden are just as much manpower for the peasant economy, as the free and unfree persons. The land, however, is the indispensable basis of the peasant economy, and consequently of the ancient patriarchal family.

We may conclude that those persons and things belonged to the *Mancipium*-power, which were indispensable for the subsistence of the family. Though personal and patrimonial elements were mixed up, it seems that in the idea of *man-*

⁴⁹ See *supra* pp. 22. ff.

⁵⁰ De Vissher, *Mancipium* pp. 264 ff.

⁵¹ Cf. Franciosi, *Res Mancipi* especially pp. 371 ff.

⁵² So e.g. Franciosi, *Res Mancipi* pp. 382 f; Kaser, *RPR* p. 104.

⁵³ "Und wie ein heutiger Bauer, da, wo die Landwirtschaft nicht mit Maschinen betrieben wird, auf die Frage, was zum Ackerbau gehöre, die einfache Antwort geben wird: Land und Arbeitskräfte, so tritt uns dieselbe einfache und natürliche Antwort in der Auszeichnung der *res Mancipi* entgegen." (Bechmann, *Kauf* p. 149.)

cipium the economic considerations dominated. This is shown by the fact that the very word is derived from the common economic and at the same time legal act: the transfer by *mancipatio*.

4. A further problem arises concerning the legal status of the *res nec Mancipi*. It has become almost a prevailing opinion that the latter, being excluded from *mancipium*, could not be objects of ownership in ancient law.⁵⁴ According to Bonfante no quiritarian ownership could be created on them.⁵⁵ Wilms suggest that *res nec Mancipi* were only possessed.⁵⁶ Other authors speak of a factual holding, termed as: "maîtrise effective" or "propriété de fait".⁵⁷ Kaser himself has come to this view without specifying more closely the legal situation of *res nec Mancipi*.⁵⁸

This opinion is rooted in two prejudices. Some authors supposing erroneously that *mancipium*-power was identical with ownership conclude that the *res nec Mancipi* lay beyond the boundaries of ownership. Other writers, starting from a somewhat different consideration, namely the identity of the formula of *mancipatio* and *vindicatio*: *hanc ego rem ex iure Quiritium meam esse aio*, came to the same conclusion. They believe that only those things could be recovered by a *vindicatio*, which could also be transferred by a *mancipatio*;⁵⁹ consequently there existed no ownership on *res nec Mancipi*. It is not astonishing that the supporters of this view also deny the applicability of *usucapio* to *res nec Mancipi*.⁶⁰ In my opinion the underlying ideas are wrong, and the sources refute the *communis opinio*.

5. We have but to cast a rapid glance at the relevant sources in order to see that the prevailing view is not supported by any of them, and several sources expressly contradict it.⁶¹

⁵⁴ Wesener rightly says: "Diese Anschauung ist wohl bereits als herrschende Lehre zu bezeichnen" (*SZ* 78, 1961, p. 491.) Against the prevailing view is De Vissher, *Etudes de droit romain public et privé* III. (Milano, 1966) p. 219. With excellent arguments: Capogrossi-Colognesi, *Struttura* pp. 172 ff. and 256 ff.

⁵⁵ Cf. Bonfante, *Proprietà* pp. 177 f. and *Corso* p. 176.

⁵⁶ Cf. Cornil, *Mancipium* p. 409.

⁵⁷ Cf. Cornil, *Mancipium* pp. 416 ff. and *Ancien droit* pp. 62 f. Cuq speaks of a "propriété de fait" See *Institutions juridiques des romains* I. (Paris, 1904) p. 77.

⁵⁸ See especially *RPR* pp. 107 f. Kaser does not deny utterly that *res nec Mancipi* could be owned; he only emphasizes their exclusion from *vindicatio* and *usucapio*. According to him the legal protection of *res nec Mancipi* was confined to the *actio furti*. This reminds the reader of the apposite remark of Lange: "Das kommt aber nur darauf hinaus eine selbstgeschaffene Lücke durch ein selbstgeschaffenes Ersatzmittel auszufüllen . . ." (p. 8.).

⁵⁹ So especially Kaser Cf. with the previous note.

⁶⁰ So e.g. Mayer-Maly, *Elementarliteratur* p. 486.

⁶¹ Costa (*Cicerone* I. p. 94.) cites two texts of Cicero as an argument for this theory, but neither of them is conclusive: *Pro Flacco* 32, 79: *illud quaero, sintne ista praedia censui censendo, habeant ius civile, sint necne sint Mancipi*. The text obviously points to the difference between private land and *ager publicus* or possibly provincial land. Nothing can be inferred from it in favour of the prevailing view. *Top.* 5, 28: *Abalienatio est eius rei, quae Mancipi est, aut traditio alteri nexu aut in iure cessio*. The sentence, however, is not a definition of alienation in general, but deals with the alienation of *res Mancipi*.

(a) According to Gaius a *vindicatio* could be brought also for *res nec Mancipi*: *itaque velut ex grege vel una ovis aut capra in ius adducebatur . . .*⁶²

(b) A *res nec Mancipi* could already be the object of legacies by the age of the Twelve Tables: *. . . lege nobis adquiritur . . . item legatum ex lege duodecim tabularum sive Mancipii sint sive nec Mancipii.*⁶³

(c) The same applies to the *actio familiae erciscundae*.⁶⁴

(d) Gaius and Ulpianus emphasize that from the point of view of *usucapio* there was no difference between the two categories.⁶⁵ The same idea emerges from the text of Cicero: *. . . ceterarum rerum omnium annuus est usus*. The word *omnium* hardly points to the inapplicability of *usus auctoritas* to *res nec Mancipi*.⁶⁶

(e) The *in iure cessio* was equally applicable to both categories: *In iure cessio autem communis alienatio est Mancipii rerum et nec Mancipii.*⁶⁷

6. The prevailing view could only be maintained, if, in spite of the clearly contrary evidence of the sources, we had very strong reasons for accepting it. Such reasons, however, do not exist. As has been already mentioned, it is erroneous to assume an identity of *Mancipium* and ownership. I hope to have ascertained that the two notions were by no means identical. Free persons were subject to the *Mancipium*-power, but not to ownership, while *res nec Mancipi* were excluded from the former, though they were objects of ownership. Consequently, we are not entitled to suppose that it was only the objects of *Mancipium* that were likely to be legally owned.

It is even less permissible to base the prevailing view upon the identity of the formula belonging to the acts of *Mancipatio* and *vindicatio*. Above all, our main source, Gaius, expressly states that *res nec Mancipi* could also be recovered by the latter, but it is in itself incredible that anyone could have forbidden the *paterfamilias* bringing a *vindicatio* if he wanted to recover valuable goods, like a flock of sheep, jewels etc.⁶⁸ Such a prohibition would have been utterly unreasonable at an age when the state was endeavouring to suppress self-help and assert its supremacy over the *gentes*.

Thus it is clearly shown by the sources and by economic and social considerations that between *res Mancipi* and *res nec Mancipi* the difference was the same in early law as later on, in other words that only the former had to be transferred by *Mancipatio*.⁶⁹

⁶² Gai. 4, 17.

⁶³ Ulp. 19, 17.

⁶⁴ Ulp. 19, 16.

⁶⁵ Gai. 2, 43 and Ulp. 19, 8.

⁶⁶ *Top.* 4, 23. Cf. Gallo, *Paterfamilias* p. 221 n. 2.

⁶⁷ Ulp. 19, 9.

⁶⁸ This has already been stressed by Bozza, *Actio in rem per sponsionem* pp. 601 f.

⁶⁹ Of course one cannot exclude the possibility that occasionally even *res nec Mancipi* were conveyed by *Mancipatio*. A *testamentum per aes et libram* moreover as a rule contained dispositions concerning *res nec Mancipi* too. To be sure, the stress was not upon an exclusion of

V. THE CAUSE OF THE ABSENCE OF A NOTION OF OWNERSHIP

1. Having examined the expressions which could possibly have meant ownership in ancient law, the result was that only the terms *meum esse* and *mancipium*, as well as their synonyms, have to be taken into account. It is also beyond any doubt that neither of them was perfectly identical with the notion of ownership. Thus we may safely conclude that though the institution of ownership existed in ancient law, the precise notion of it was still unknown.

2. Before dealing with the causes of this phenomenon, it is necessary to specify more closely the relationship between *meum esse* and *mancipium*.

Meum esse was a broad and vague notion, embracing all the objects of ownership and, in addition, the free members of the family. Consequently it covered a larger field than the precise notion of ownership. The expression denoted equally personal and patrimonial power.

The field of *mancipium* was considerably narrower. It was applied to the free members of the family in the same way as *meum esse*, but it embraced only the *res Mancipi*. So *mancipium* covered partly a broader, partly a narrower area than the precise notion of ownership, *dominium*, did. The relationship of *mancipium* and *dominium* can best be illustrated by two circles overlapping each other. The common objects, covered by both, are the *res Mancipi*. *Dominium*, however, also embraces the *res nec Mancipi*, while *mancipium* covers the free members of the family.

The conception of *mancipium* was rooted in the homogeneous *patria potestas* which was held together by the interests of the peasant economy. From this point of view it was indeed reasonable to unite free persons and the most important means of production by the same notion. There existed, of course, certain differences between the members of the family and the *res Mancipi*. Thus, from the point of view of succession, the situation of a *filiusfamilias* was never identical with that of a slave, and there always existed social and moral differences according to the character of the various objects of *mancipium*.⁷⁰ Since the notion of *mancipium*, however, was based upon the common features, it was not concerned with the differences.

Both *meum esse* and *mancipium* contained personal and patrimonial elements, undifferentiatedly mixed up, in contradiction to the later notions of *dominium* or *proprietas*.

3. The fact that early Roman law had no precise notion of ownership, cannot simply be explained away by the primitiveness of ancient Romans and their incapacity for making abstractions, though these certainly must have contributed

res nec Mancipi from *mancipatio* (why would Roman law have forbidden the application of more strict forms than were required?), but upon the necessity of *mancipatio* for the valid transfer of *res Mancipi*.

⁷⁰ Cf. Kaser, *EB* pp. 2 f.

to it. I believe that the structure of ancient family and patriarchal slavery were the decisive factors.

Since the ancient family was an economic unit under the autocratic leadership of the *paterfamilias*, where even free persons had an economic value, the differences between personal and patrimonial relationships were not sufficiently apparent to suggest a distinction. On the other hand patriarchal slavery and the small number of slaves contributed to the effacing of the differences between free and unfree persons and to the importance of the labour of free members of the family.

In the last analysis I think that ancient Romans were unable to create the notion of ownership and to distinguish between ownership and family-power, because the very character of their economic life, which also rendered the personal relationships to some extent patrimonial, gave no impulse for doing it. This manifested itself not only in their failing to produce the notion of ownership, but also in legal forms like *mancipatio* and *vindicatio*.

THE *MANCIPATIO*I. THE PROBLEM OF *MANCIPATIO*

I. The author of a treatise on ancient Roman ownership must inevitably face the abundantly treated, but apparently eternal problems of *mancipatio*, especially the question of *auctoritas*. This necessity is not only due to the great importance of *mancipatio*, but also to the rather deplorable situation that it is by now impossible to use the words *mancipatio* and *auctoritas* without indicating the precise meaning one attributes to them.

Mancipatio is surely one of the most discussed institutions of Roman private law. There exist also special monographs on it,¹ and several works contain ample chapters dealing with *mancipatio*.² If we also take into account the shorter papers,³ we cannot fail to agree with Kaser that the literature on *mancipatio* has become "kaum mehr übersehbar".⁴

Auctoritas is likewise a favourite subject-matter for scholarly disputes. A striking number of papers have been published on it, especially during the last thirty years.⁵

As is the case with many questions of ancient Roman law, several sometimes rather fantastic hypotheses can be met with here too. The disillusioned words of Arangio-Ruiz deserve to be quoted: "... allow me to express my regret at seeing so much intellectual energy being spent on the research of mere possi-

¹ Thus Brezzo, *Mancipatio*; J. Ellul, *Etude sur l'évolution et la nature juridique du mancipium* (Bordeaux, 1936); Gimmerthal; Hazewinkel-Suringa, *Mancipatio en traditio* (Amsterdam, 1931). As this work was written in Dutch, it was not available to me. I had to rely upon Schulz, *SZ* 52; B. W. Leist, *Mancipation und Eigentumstradition* (Jena, 1865); Pflüger, *Nexum*; Stintzing; Thormann, *Mancipatio*.

² Cf. especially: Arangio-Ruiz, *Compravendita* pp. 18 ff; Bechmann, *Kauf* pp. 47 ff; Ihering, *Geist* I. pp. 110 ff; Hägerström pp. 35 ff; Kaser, *EB* especially pp. 107 ff.

³ Cf. e.g. Ambrosino, *Mancipatio*; Beseler, *Investitur*; Fuenteseca; Husserl; P. Kretschmar, "Das Nexum und sein Verhältnis zum Mancipium", *SZ* 29 (1908), pp. 227 ff; Lévy-Bruhl, *Nexum* and *Per aes et libram*; Lübtow, *Kauf*; Meylan, *Essai*; Mommsen, *Mancipium*.

⁴ Cf. Kaser, *EB* p. 107.

⁵ From older literature see Burckhardt, *ZRG* 7 (1867) pp. 79 ff; Girard, *Auctoritas*; Mommsen, *Auctoritas*: Umfrid, *ZRG* 9 (1870), pp. 204 ff.

From recent literature see Amirante, *Auctoritas*; De Vissher, *Auctoritas* I. and II. further: *Aeterna auctoritas, Individualismo*; Fuenteseca; Giffard, *Auctoritas*; Horvat; Leifer I. and II.; Lévy-Bruhl, *Auctoritas*; Magdelain, *Auctoritas*; Mayer-Maly, *Studien* I. and II.; Rousier; Thormann, *Auctoritas*. Important too: Arangio-Ruiz, *Compravendita* pp. 310 ff; Archi, *Trasferimento* pp. 77 ff; Kaser, *AJ* pp. 135 ff. and *EB* pp. 115 ff; Klein pp. 237 ff; Rabel, *Haftung*.

bilities, none of which has the slightest documentary proof . . . Each author pursues his own ideas, without having the possibility to meet anyone else, and if he does, then it is at most by chance. So the endeavours of the predecessors are useless for their successors as they fail even to give them an opportunity to challenge their views. And where there is no progress, I am afraid, we cannot speak of knowledge either.”⁶

Arangio-Ruiz’s statement, though pessimistic to some extent, is certainly likely to bring about a sound scepticism: is it at all possible to achieve a really scientific result in this field, which amounts to more than a witty hypothesis, and can serve as a basis for further research?

We are perhaps not overconfident in putting forward the supposition that a modest result concerning *mancipatio* and *auctoritas* can in fact be obtained on the basis of the extant sources, if our data are not put into an artificial vacuum, but into the economic and social conditions of ancient Rome. One must also avoid adventurous trips into a vague, misty “prehistoric age”, of which nothing is known, so nothing can be proved or refuted. It is true that the suggested approach does not promise brilliant and astonishingly new, but disputable theories, but rather aims at a considerably more modest and, I hope, solid result.

2. In the case of *mancipatio* a generally awkward and difficult methodological problem has become of special importance. It can easily be observed that the literature on *mancipatio* scarcely applies the comparative method,⁷ and that most authors are inclined to look upon this institution as an incomparable Roman creation.⁸ Turning, however, to the question of *auctoritas*, the same authors frequently seem to forget their previous approach, and apply the comparative method to excess boldly taking analogies from different legal systems.⁹

If a different method is applied to *mancipatio* and to its legal effect, *auctoritas*, the conclusion must obviously be wrong. So, in my opinion, the reliability of the result depends to a great extent on the appropriate and proportionate application of the comparative method. Legal forms, created by different peoples at an identical or at least similar stage of development, naturally have to be taken into account in both cases. Nevertheless, we must abstain from transplanting foreign legal solutions into Roman law, if the analogy is not supported by Roman sources.

⁶ “. . . vorrei che mi fosse consentito di esprimere il mio rammarico nel vedere speso tanto fervore d’ingegno in una mera ricerca di possibilità, nessuna delle quali ha quel minimo di appoggio documentale . . . Qui ciascun autore segue la propria visione, senza possibilità d’incontri se non casuali, sicchè la fatica dei predecessori non giova ai successori nemmeno nel senso di fornire un punto di attacco: e dove non è progresso io temo proprio che non si possa neppure parlare di conoscenza.” (Arangio-Ruiz, *Compravendita* p. 26 n. 2.).

⁷ Thormann occasionally refers to analogies (*Mancipatio* pp. 98. ff.), but makes hardly any use of them.

⁸ So also Kaser. Cf. *EB* pp. VI f.

⁹ So especially Leifer but also Kaser. Cf. *infra* pp. 76 ff.

Not every question connected with *mancipatio* will be dealt with in this chapter, which is why the difficult and much discussed question of *nexum*, that lies outside the scope of this book, has to be left aside.¹⁰

II. THE ORIGINAL FUNCTION OF *MANCIPATIO*

1. Gaius fortunately gives a detailed description of *mancipatio*, and his testimony is also complemented by other sources,¹¹ so we are not compelled to rely upon etymology. Anyway the etymology of *mancipatio*, or to use its older name *mancipium*,¹² is not too helpful. The derivation from the words *manus* and *capere* reveals only that the grasping of the object was a part of the ritual of the act,¹³ but this we know already from the description of Gaius.

So we have to start from the ritual of the act as preserved by Gaius.

2. Gai. 1, 119: *Est autem Mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: quod et ipsum ius proprium civium Romanorum est; eaque res ita agitur: adhibitis non minus quam quinque testibus civibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur lib-*

¹⁰ The vast literature on *nexum* is summed up by Tomulescu, "Nexum bei Cicero", *Iura* 17 (1966) pp. 39 ff. The problem of *nexum* is above all terminologically connected with *mancipatio*. In preclassical sources, above all with Cicero, the word *nexum* frequently denotes *mancipatio*. Cf. *Parad.* 5, 1, 35; *Ep. ad fam.* 7, 30, 2; *Top.* 5, 28; *De or.* 1, 38, 173 etc. On them see Pflüger, *Nexum* pp. 20 f.

In other sources, however, *nexum* is not equivalent to *mancipatio*. Cf. Cicero, *De re publica* 2, 34; Livius 6, 14, 5; 8, 28, 2; 7, 19, 5; Festus p. 164; Gai. 3, 173–174. The keystone of the problem is the much discussed text of Varro, which reveals that in a broader sense *nexum* denoted all acts performed through the ritual of weighing, whereas in a narrower meaning it did not contain *mancipatio*: Varro, *De lingua Latina* 7, 105: *nexum Manilius scribit omne quod per libram et aes geritur, in quo sint Mancipia. Mucius, quae per aes et libram fiant ut obligentur, praeter quae Mancipio dentur.* This interpretation is accepted by Kaser, *RPR* p. 38; Lévy-Bruhl, *Per aes et libram* pp. 112 ff; Lübtow, *SZ* 56 (1936) p. 245. From our point of view it is sufficient to state that *nexum* especially in older language, denotes *mancipatio* in several cases. It lies beyond the scope of this book to deal with the special, narrower meaning of *nexum*.

¹¹ So especially *Tab.* VI, 1; *PS.* 2, 17, 3; Ulp. 19, 3 and 19, 6; *Fr. Vat.* 50; Isidorus 5, 25, 31; Varro, *De lingua Latina* 5, 163 and 7, 105; *De re rustica* 2, 10; Festus p. 356; Plautus, *Curc.* 4, 2, 8 ff.; *Pers.* 4, 3, 55–56; Cicero, *Parad.* 5, 1, 35; *Ep. ad fam.* 7, 30, 2; *Top.* 5, 28 and 10, 45; *De har. resp.* 7, 14; *Pro Mur.* 2, 3; Boeth. *ad Top.* 5, 28.

¹² So: *Tab.* VI, 1: *Cum nexum faciet Mancipiumque uti lingua nuncupassit, ita ius esto.* The older expression is used by Plautus and generally also by Cicero. In classical legal language *mancipatio* is already the current term, *mancipium* being confined to the expressions *mancipio dare* and *accipere*. Cf. e.g. Gai. 2, 102. On the word *nexum* see n. 10.

¹³ The etymology is also corroborated by the sources. Cf. Gai. 1, 121; Ulp. 19, 6; *Inst.* 1, 3, 3; Flor. *D.* 1, 5, 4, 3; Varro, *De lingua Latina* 6, 8, 85; Isidorus 9, 4, 45. For modern linguistic science see Walde-Hofmann II. p. 23; Ernout-Meillet p. 585. Stintzing rightly points out: "Jedenfalls lässt sich aus der Etymologie kein Beweis für irgend eine Theorie ableiten." (p. 9.).

*ripens, is qui mancipio accipit rem tenens*¹⁴ ita dicit: *HUNC EGO HOMINEM EX IURE QUIRITUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO*¹⁵ *HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.*

The text gives a vivid picture of the transaction. The parties to the *mancipatio*, the balance-holder and at least five witnesses, are present. The transferee grasps the object, recites the ceremonious formula, and strikes the balance with a piece of metal, handing the metal over, as a symbolic price, to the transferor.

Gaius does not fail to explain the significance of the balance:

Gai. 1, 122: *Ideo autem aes et libra adhibetur, quia olim aeneis tantum nummis utebantur . . . eorumque nummorum vis et potestas non in numero erat, sed in pondere . . .*

As has already been mentioned, this description is corroborated and in some points is even enriched by other sources.¹⁶ A text of Varro, however, refers to the ritual of the act:

Varro, *De lingua Latina* 5, 163: *Aes raudus dictum: ex eo veteribus in mancipiis scriptum: "raudusculo libram ferito"*.

Unfortunately it is not quite clear by whom and to whom those words were addressed. They are likely to have been uttered by the balance-holder, as an invitation to the buyer to strike the balance.¹⁷ This explanation nicely falls in line with the text of Gaius.

3. The description of Gaius is open at first sight to three different interpretations: (a) One could interpret the text literally, with *mancipatio* always having been an *imaginaria venditio*; (b) One might suppose that Gaius was describing the original ritual of *mancipatio*, which, however, was originally an actual sale, as is suggested by the weighing; (c) One might think that the ritual, as described by Gaius, is a transformed one, the transaction having been originally quite different, Gaius, however, ignored or failed to mention this.

Scholars dealing with *mancipatio* have adopted one of these three approaches. The third one in particular has always been popular, because it offers good possi-

¹⁴ According to some writers it should be read as *aes tenens*. Cf. Meylan, *Studi Albertario* I, pp. 215 ff. and M. David-H. L. W. Nelson, *Gai Institutionum commentarii* IV, vol. III, (Leiden, 1954) pp. 149 ff. For a convincing counter argument see Arangio-Ruiz, *Compravendita* pp. 31 ff. The version *aes tenens* is not supported by the Veronese manuscript, and there are no substantial arguments for it. The etymology of the word also points to the grasping of the object transferred.

¹⁵ According to some writers *est*. Contra, with references: Kaser, *RPR* p. 38. n. 13. and Thormann, *Mancipatio* p. 4 n. 8. The question is of a moderate significance from our point of view.

¹⁶ Thus especially Ulp. 19, 6: *Res mobiles non nisi praesentes mancipari possunt, et non plures quam quot manu capi possunt. Immobiles autem etiam plures simul et quae diversis locis sunt mancipari possunt*. Cf. also the texts of Gaius on the special applications of *mancipatio*: Gai. 1, 113; 2, 103–104.

¹⁷ Thus Arangio-Ruiz, *Compravendita* p. 22; Karlowa, *RG* p. 371; Thormann, *Mancipatio* p. 5. n. 10.

bilities for interesting conjectures. Accordingly this third group of opinions displays the greatest variety.

It is worth mentioning that each of the fundamental approaches can be traced back to the past century, and can be ascribed to one or another famous pandectists. Recent literature, as a rule, has further developed these theories.

4. Leist considered that *mancipatio* had always been an imaginary sale. The metal had never been actually weighed, so *mancipatio* has never meant a real sale.¹⁸ Leist was followed by Brezzo and Gimmerthal.¹⁹ Kunkel also takes this view, but deviates from his predecessors by defining *mancipatio* as the conclusive act of a real sale (“Schlussstück des Kaufs”).²⁰

There exist powerful arguments against this view. Leist and his followers interpret our most important source (Gai. 1, 119) faithfully indeed, but this amounts—paradoxically—to an unfaithfulness to our sources, because they stick to one of them instead of considering the whole of them simultaneously.

(a) Gaius himself refutes this view, when he explains the role of the balance and speaks of early times when the value of copper depended on its weight.²¹ Consequently, according to Gaius as well, the weighing had once been of practical importance. *Mancipatio* was still a living institution by the second century A.D., so it was not treated by Gaius in his text-book as a historical curiosity, but as actual law. This is why he calls the act an *imaginaria venditio*.

(b) The original reality of the weighing is also corroborated by recent archeological finds, especially by the recent discovery of large quantities of *aes rude*²² in Italy. Thormann rightly pointed out that if Leist had known of them, he would probably have abandoned his idea.²³

(c) The argument of Brezzo hardly needs to be refuted. He thinks that the weighing of the metal during the performance of the transaction would have been too lengthy and troublesome.²⁴ As the transaction served the purpose of transferring essential and economically important goods, we can hardly assume that the ancient Romans would have been reluctant to undertake weighing in spite of the loss of time incurred.

(d) The criticised view is also untenable on general considerations. The statement of Mitteis that imaginary acts are denaturalized remnants of an originally real one²⁵ also holds good for *mancipatio*. Before the introduction of coinage the

¹⁸ Leist, *Mancipatio und Eigentumstradition* (Jena, 1865) especially p. 126.

¹⁹ Brezzo, *Mancipatio* especially pp. 75 ff; Gimmerthal p. 35. The latter even denies that *mancipatio* was a symbolic sale, calling it: “der eigentliche Eigentumserwerb für die res *mancipi*”.

²⁰ Kunkel, *PW* XIV. 1 (1928) 998 ff. Especially 1006. His view is shared by Hazewinkel-Suringa. Cf. Schulz, *SZ* 52, p. 543.

²¹ Gai. 1, 122. Quoted *supra* p. 65.

²² Cf. Thormann, *Mancipatio* pp. 5 ff. and 18 ff.

²³ Thormann, *Mancipatio* p. 24. n. 17.

²⁴ Brezzo, *Mancipatio* p. 70.

²⁵ “. . . für mich sind Imaginärgeschäfte nur begrifflich als denaturierte Reste ursprünglich reeler . . .” (Mitteis, *SZ* 29, 1908, p. 560.).

form of the transaction must have been a rather practical way of performing a sale. The publicity was ensured by the witnesses, and the weighing offered means of checking the quantity of the purchase price. It would be strange indeed if the ancient Romans, in spite of all this, had obstinately stuck to performing the act symbolically, and to paying the price in all secrecy.

(e) Arangio-Ruiz rightly objects that the view of Kunkel means an anticipation of the consensual sale.²⁶ If *mancipatio* had indeed been only the conclusive moment of sale, legal importance should be given to the previous informal arrangement. Consensual sale, however, was recognized considerably later, so *mancipatio* itself must have been the sale. It is of course quite possible that the parties to the act would already bargain in advance, but all this lay outside the sphere of law, as nowadays the preliminary bargaining when an immovable is sold.

So the view of Leist and his followers is clearly unacceptable.

5. The view that *mancipatio* was originally a real sale, and became an imaginary one only in the course of development, is propounded in the special literature on *mancipatio* rather seldom.

None the less in the nineteenth century this view was vigorously defended by Bechmann,²⁷ who even alleged that *mancipatio* remained an actual sale²⁸ in later law, too. In recent literature this view was suggested by Arangio-Ruiz,²⁹ but he does not deny the transformation of the transaction into an imaginary sale. Other writers, one of whom is Kaser, also suppose different preliminary stages of development³⁰ while accepting that at a given stage *mancipatio* was an actual sale. This leads us, however, to the third type of interpretation.

6. One of the most popular and still fashionable theories on the origin of *mancipatio* must be put down to Ihering. In his opinion, *mancipatio* as is shown by the word itself (*manu capere*) was originally a unilateral act of acquisition. The payment by weighing was added to it only later on, so *mancipatio* became a sale, and finally an act of transfer of ownership.³¹ *Mancipatio* became a sale through the fusion of two acts.

He is followed in recent literature by Kaser, who likewise states that *mancipatio* is derived from a unilateral act of acquisition ("einseitiger Zugriffsakt"), suggesting several stages of development.³² The hypothesis of the double origin of *mancipatio*

²⁶ Arangio-Ruiz, *Compravendita* pp. 37 f.

²⁷ Bechmann, *Kauf* especially pp. 47 ff. and 74 ff.

²⁸ *Ibidem* especially p. 109.

²⁹ Arangio-Ruiz, *Compravendita* pp. 18 ff. This view is shared e.g. by Rabel, "Nachgeformte Rechtsgeschäfte", *SZ* 27 (1906) p. 327; Schönbauer, "Zur Frage des Eigentumsüberganges beim Kauf", *SZ* 52 (1932) pp. 239 f; Voci, *Modi* pp. 27 ff.

³⁰ Kaser, *EB* pp. 107 ff.

³¹ Cf. Ihering, *Geist* II. 2. pp. 568 f. and 564 f.

³² Thus especially *EB* p. 137: "Das mancipium ist kein Vertrag sondern ein einseitiger Zugriffsakt des Erwerbers." In his monograph he suggests the following stages of development: (a) unilateral act of acquisition (b) barter (c) sale (d) act of transfer. See: *EB* p. 107 and 136 ff. Substantially he still sustains this view (Cf. *RPR* pp. 39 ff.), but displays more caution concerning the "einseitiger Zugriffsakt". See *EB* Nachträge p. 372.

was stretched too far by Thormann, who, in his otherwise valuable monograph considers racial factors to be behind the double origin. According to him, the violent unilateral act of acquisition was a creation of the brave Indoeuropean warriors, which was united with the peaceful act of sale of the meek inhabitants of Italy. The result of this fusion was *mancipatio* in its well-known form.³³

On the basis of this view the development of *mancipatio* could be described in a somewhat simplified form, in the following way: *mancipatio* was originally a violent unilateral act of acquisition. The act of weighing and the insertion of the words referring to this have been added, it became a sale, and finally an act of conveyance.

Because no sources exist, this view is based on the following arguments. The word *mancipatio* (*manu capere*) does not refer to a peaceful, but to a violent act.³⁴ In the course of the transaction only the acquirer acts and speaks, the other party behaves in an entirely passive way. This complete unilaterality should be at variance with the contractual character of sale.³⁵ Since the formula spoken in *mancipatio* (*Hunc ego hominem, ex iure Quiritium meum esse aio*), is identical with that of *vindicatio*, it also points to violence.³⁶ Some authors even suggest that this was the most ancient element of *mancipatio*, the words (*isque mihi emptus . . .*) and gestures referring to the sale having been inserted only later on.³⁷

These ingenious arguments, however, are not convincing and lack the necessary foundation to be set up as the pillars of a theory, which is not supported by a single source.

(a) In my opinion, one cannot conclude that *mancipatio* was originally a unilateral, violent act, from the etymology of *manu capere*. As the physical seizure of the object belonged to the ceremony of the act, the linguistic derivation is reassuringly explained. On the basis of etymology a handful of other different, linguistically impeccable, but in their substance equally wrong conclusions could be drawn.³⁸

(b) The unilaterality of the act is only incongruous with the character of a sale for the modern mind. It can be shown by several analogies that in the contracts of sale of undeveloped legal systems, the seller generally behaves passively, and

³³ Thormann, *Mancipatio* especially pp. 111 ff. The theory of Ihering is followed among others by Leifer I. pp. 154 f; Lübtow, *Kauf* pp. 113 ff. Recently M. Sargenti, "Per una revisione della nozione dell' 'auctoritas' come effetto della 'mancipatio'", *Studi Betti* IV, p. 57.

³⁴ Thus Ihering, *Geist* II. pp. 568 f; Thormann, *Mancipatio* p. 49.

³⁵ Cf. Kaser, *EB* pp. 137 ff; Thormann, *Mancipatio* p. 45.

³⁶ Thus especially Kaser, *EB* p. 137; Thormann, *Mancipatio* pp. 26 ff. and *Auctoritas* pp. 24 ff.

³⁷ Cf. Ihering, *Geist* II. 2. pp. 568 f; Thormann, *Auctoritas* p. 28. Some authors believe that the part: "*isque mihi . . .*" is the older one. See Lübtow, *Kauf* pp. 121 f; Gioffredi pp. 252 f.

³⁸ As such the "Handsclag"-theory of Beseler should be mentioned (see Beseler, *Investitur*). It has been shown by Kaser that the view, though linguistically correct is unacceptable. Cf. *AJ* pp. 137 ff.

the substance of the transaction is made up of the gestures and statements of the buyer.³⁹

(c) The partial identity of the ceremonious formula of *mancipatio* and *vindicatio* does not permit far-reaching conclusions either. The *mancipatio* was an act of the acquisition of *mancipium*—power, and later on of *dominium* or other types of power over persons.⁴⁰

It lay in the interest of the acquirer to declare it before witnesses. It would have been hard to invent a more simple and concise formula for it than what was also pronounced on different grounds in *vindicatio*. Both in the sale and in the lawsuit this declaration was expedient, so their identity is by no means incidental. But there is no practical reason for supposing that the text has been transplanted from *vindicatio* into the ceremony of *mancipatio*.⁴¹ In addition no one could tell which of the two acts was the older one.

I believe that the aforesaid already suffice to show the unacceptability of the hypothesis of a double origin, but two additional objections can be made.

As far as I know the authors who profess this view consequently fail to tell what kind of economic function should be ascribed to the supposed unilateral act of acquisition. If it ever existed, it must have served some practical purpose. Nevertheless one can hardly imagine what could be achieved by an “einseitiger Zugriffsakt”. Did perhaps the ancient Romans, before looting, bring together their acquaintances, deliver a ceremonious speech and then having terminated the ceremony, take the booty? Legal formulas are only observed by people—and even in such cases with a moderate enthusiasm—if their omission is sanctioned by legal disadvantages. But there is no trace of such measures, and it would be rather presumptuous to suppose that the ancient Roman State lent support to the robber who carried out the undertaking accompanied by solemn rites. It is equally improbable that the unilateral act of acquisition would have been the ancestor of *occupatio*, seeing that the latter was still quite without form in classical law. It is hardly credible that the primitive state could have regulated and controlled the taking of ownerless goods. So the supposed first stage of development is devoid of any practical purpose. It is probably due to this difficulty that the followers of this theory cautiously avoid going into details concerning the “einseitiger Zugriffsakt.”

It is equally objectionable that the criticised view leaves out of consideration the development of the human mind. According to it, in “prehistoric times”, *mancipatio* was a unilateral, abstract act of acquisition. Later on the originally abstract legal act became causal, only to become abstract again after this side-track. It is *a priori* improbable that during the first stage of development, the primitive legal thinking then to be found would be able to create the notion of the abstract act of acquisition. But it is still harder to believe that after completing this stage,

³⁹ On it *infra* pp. 71 f.

⁴⁰ On it *supra* pp. 51 ff. and *infra* pp. 131 ff.

⁴¹ Against an identification with *vindicatio*: Arangio-Ruiz, *Compravendita* pp. 25 f.

the act would have been incomprehensibly transformed into a sale, only to deprive it of its causal character with great difficulties by means of a fictitious price.

It would be tiresome and lengthy if the less widespread and substantially unfounded assumptions were also dealt with in detail here. So I should only like to mention the suggestion of Hägerström, who ascribes a magic character to *mancipatio* as he does to most legal institutions;⁴² the theory of Husserl, who considers the price as the ransom for a violent act;⁴³ the highly similar view of Beseler;⁴⁴ the doubtlessly original theory of Lévy-Bruhl, who derives *mancipatio* from a barter called *nexum*;⁴⁵ and finally the surprising conclusion of Meylan, based on etymology, according to whom the *mancipatio* was an imitation of auction of booty.⁴⁶

7. I think that the foregoing survey of literature has already shown what my opinion is, namely that *mancipatio* was originally a sale. It can be seen that this view does not raise any difficulties, and I have tried to show the unacceptability of the other hypotheses. Of course, we cannot confine ourselves to this negative result. It is also necessary to examine the transaction from the point of view of whether it was suitable for realizing the economic function of sale in ancient Rome.

(a) The fact that *mancipatio* meant originally an exchange of goods for metal is proved by archeological finds and by Gaius, when he writes on the original reality of weighing.⁴⁷

(b) I believe that Gaius describes substantially the original form of the act, and not a transformed one. First, we have no basis for casting doubt on the reliability of Gaius. Secondly the form of *mancipatio*, as described by him, consists of archaic elements preserved by Roman conservatism, although the originally practical actions had become formalities void of substance. It is sufficient to allude to the weighing, the text, the physical grasping of the object conveyed, the lack of a written document.

It cannot be excluded, of course, that in the course of time some slight modifications of the formalities have possibly been carried through, but these are not likely to have concerned its essential points, and cannot be traced back. To reconstruct the stages of its formation would be mere guess-work. The least advisable approach is to take to pieces the spoken formula, to arbitrarily suppose an order of time between its different parts,⁴⁸ and finally to set them up again like domino-pieces.

(c) It is obvious that before the spreading of writing and the introduction of coinage, the sale performed in the presence of witnesses and combined with a weighing of the price, was the most practical, simple, and easily proved way of

⁴² Hägerström especially pp. 35 ff.

⁴³ Husserl pp. 478 ff. His view is shared by Georgescu p. 358.

⁴⁴ Beseler, *Investitur* Cf. n. 38.

⁴⁵ Lévy-Bruhl, *Per aes et libram* pp. 110 f.

⁴⁶ Meylan, *Essai*.

⁴⁷ Gai. I, 122.

⁴⁸ Cf. n. 37.

contracting a sale. Thus the forms of *mancipatio*, were surely suitable for realizing the economic purpose of a sale.

8. As could be seen, several authors maintain the opinion that some features of *mancipatio* are at variance with the characteristics of a sale. So it is expedient to compare the transaction with the ancient contracts of sale of other peoples of antiquity. In such a way the danger of erroneously taking *mancipatio* to be a special Roman product, the problems of which can only be solved by speculations, is avoided.

Having studied the literature on *mancipatio*, which treats this act as if it were entirely isolated from similar solutions to be found with various peoples of antiquity we find it surprising that in ancient contracts of sale of other legal systems, there exists an analogy to nearly every substantial element of *mancipatio*.

(a) Valuable and economically important goods were generally sold in the presence of witnesses in Babylonian⁴⁹ and Hebrew law, too.⁵⁰

(b) Crude ore, as a general means of barter, was generally used by the peoples of the ancient Mediterranean, and correspondingly the ceremonial weighing of the price was also a usual constituent part of the contract of sale in the legal systems of the Ancient East,⁵¹ and in Greek law, too.⁵² It is also emphasized by Thormann that the weighing was a general commercial custom of Semitic people.⁵³ Wilutzky even takes this feature of *mancipatio* to be a reception from Semitic law.⁵⁴ In my opinion a reception, though possible, cannot be proved. There is, however, no need of such an assumption, because at a stage where the role of money is still played by weighed metal, weighing is the only possible way to perform a sale, so this could have also developed without any foreign influence on the basis of the economic conditions of a given people.

(c) The incessantly stressed unilaterality of *mancipatio* is similarly no Roman speciality. It is characteristic both of Hebrew and Babylonian contracts of sale,⁵⁵ and it is often to be found in Greek law too⁵⁶ that the buyer is the protagonist of the contract. He is the one who speaks and acts. The seller, however, generally behaves in a passive way. According to Koschaker, this unilaterality is a regular feature at a certain low stage of development.⁵⁷

⁴⁹ See San Nicolò, *Kauf* pp. 22 f.

⁵⁰ Cf. *Jer.* 32, 9–10. On this see Wilutzky p. 143. and recently B. Perrin, "Trois textes bibliques sur les techniques d'acquisition immobilière", *RHD* 41 (1963) pp. 5 ff. and 177 ff.

⁵¹ Cf. with the previous note and San Nicolò, *Kauf* p. 26 and 76; Thormann, *Mancipatio* pp. 100 ff.

⁵² Cf. W. Erdmann, "Zum Eigentum bei Homer", *SZ* 62 (1942) p. 348.

⁵³ Thormann, *Mancipatio* pp. 100 ff.

⁵⁴ Wilutzky p. 143.

⁵⁵ On Babylonian law San Nicolò, *Kauf* p. 18. Concerning Hebrew law, Perrin (*RHD* 4, 1963, pp. 15 f.) observes: "Nulle mention d'une activité quelconque du vendeur . . . c'est l'acquéreur qui en est "vedette" . . ."

⁵⁶ Cf. Pringsheim, *Sale* p. 103.

⁵⁷ "Ora è un concetto dell'Oriente antico che colui che assiste ad un atto giuridico senza contraddirlo, perde il diritto di protestare contro l'atto. Anzi, questo principio sembra esser

Thus, the "unilaterality" of *mancipatio* does not point to a preliminary stage of unilateral act of acquisition. This trait is simply due to the practical consideration, which exists elsewhere too, that the lawful performing of the sale and the proof of the correctness of the acquisition lie above all in the interest of the buyer. So in ancient contracts of sale it is his declaration and gestures that mainly make up the transaction.

(d) In Babylonian law there also exist analogies to the ceremonious verbal declaration of the acquirer by means of *mancipatio*.⁵⁸

It can be seen that analogies can be found to every substantial element of *mancipatio* in other early laws of antiquity. The differences are confined to less relevant particularities, especially because of the comparatively late appearance of a written document in Roman law, whilst elsewhere this means of proof had appeared rather early.⁵⁹

The comparison between *mancipatio* and the ancient contracts of sale of other peoples not only confirms the view that *mancipatio* was originally a sale, but at the same time supplies an explanation for its features, showing that these harmonize perfectly with the ancient contracts of sale in other legal systems. There is no need to arbitrarily create different preliminary stages of *mancipatio*, as if the act were not the contract of sale of a people of antiquity, but a mysterious and incomparable creation of the Roman genius.

III. THE *MANCIPATIO NUMMO UNO*

1. While *mancipatio* in its original function displays a striking conformity with the contracts of sale in analogous legal systems, later on the similarities vanish abruptly, and the development of the transaction takes an utterly different course from that of Hebrew, Babylonian or Greek sale. It can be observed that societies at a low stage of development, because of the few and simple needs they have, display considerably more identical features than they do when at a higher level. Since the social and economic conditions become more complicated, new and more varied demands appear, and so the differences between societies of corresponding higher levels increase. Accordingly, the legal solutions also become more varied; analogies are more distant, parallelisms are more and more limited to a few general features and tendencies.

This is what happened with *mancipatio*. At a certain stage of the development of commerce sale on credit also appears, and in such cases the synchronism of the two performances ceases. In Greek and Semitic laws ownership passed to the buyer only after the price had been paid, and in this way the transfer of owner-

proprio in generale dei diritti in uno stadio primitivo. Esso ci spiega il "tacere formalizzato" dell'alienante nella *mancipatio* . . ." (Koschaker, *Iura* 4, 1953, p. 32.)

⁵⁸ Cf. San Nicolò, *Kauf* p. 26.

⁵⁹ See on Hebrew law *Jer.* 32, 9-10, where a written contract is made.

ship and the delivery have been separated.⁶⁰ As a consequence no sharp distinction was made between sale and conveyance in these legal systems; the contract of sale did not become an act of conveyance.⁶¹

In Rome, however, conveyance and sale were separated at an early time by the creation of the *mancipatio nummo uno*, i.e. the *mancipatio* for a symbolic price. As a consequence, the act gradually lost its character of a sale, and became an act of conveyance. The acquisition of *mancipium*-power and later on of *dominium* was not dependent upon the payment of the price, but upon the performance of *mancipatio* or another act of conveyance.⁶²

2. As to the time, when *mancipatio nummo uno* was created, literature on the subject has arrived at a *communis opinio* in establishing the Twelve Tables as a *terminus ante quem*.⁶³ As to the causes of its appearance, however, different explanations have been put forward.⁶⁴

In my opinion the appearance of *mancipatio nummo uno* must be explained by a set of different factors. The requirements which exacted this new legal solution, are of three types:

(a) I have already dealt with the question that free persons could also be transferred by *mancipatio*.⁶⁵ It is out of the question that in early times, when slavery was still undeveloped and the members of the family had an economic value as manpower, the transfer meant an actual sale.⁶⁶

As a consequence of the development of slavery, the economic importance of the free members of the family gradually diminished. It is probable that the *coemptio* was the first to lose its character of an actual sale,⁶⁷ and soon the selling of other free persons also became a formality. This tendency had presumably

⁶⁰ Cf. Pringsheim, *Sale* pp. 90 ff; San Nicolò, *Kauf* p. 112.

⁶¹ Pringsheim, *Sale* p. 91.

⁶² The question is much discussed, because of a passage in the Institutes of Justinian: *Inst.* 2, 1, 41: *venditae vero et traditae non aliter emptori adquiruntur, quam si is venditor pretium solverit vel alio modo ei satisfecerit . . . quod cavetur quidem etiam lege duodecim tabularum*. The source has been abundantly treated by literature (on this see Kaser, *RPR* p. 41 n. 28.), and different interpretations have been suggested. It seems probable that Justinian, trying to find a historical precedent of the rule according to which, in the case of *traditio*, the acquisition of ownership requires the payment of the price, refers formally and correctly, but wrongly in essence to the Twelve Tables. *Mancipatio* indeed required immediate payment, at least a nominal one. It is hardly credible that by this age one would have already distinguished between different titles of acquisition and established a different provision for a *mancipatio* based on sale rather than for that performed on other grounds. *Traditio* is out of the question, because goods of lesser value were presumably not sold, but bartered, as with the peoples of the Ancient East. Cf. F. Heichelheim, *An Ancient Economic History* I. (Leiden, 1965) p. 132.

⁶³ Cf. Kaser, *EB* p. 81.

⁶⁴ Bechmann emphasized the sale on credit (*Kauf* pp. 155 ff.), Stintzing and others believe that it was created in order to eliminate the *auctoritas* (see Stintzing pp. 39 f.). Leifer (I. pp. 223 f.) rather astonishingly supposes that the buyer had paid in advance.

⁶⁵ See *supra* pp. 53 ff.

⁶⁶ See *supra* pp. 55 f.

⁶⁷ So also Kaser, *EB* p. 159.

already appeared by the era of the Twelve Tables, and contributed to the formation of *mancipatio nummo uno*.

(b) Sale on credit also had a role in the formation of *mancipatio nummo uno*. It is obvious that it could be realized through the substitution of the real price by a symbolic one, while maintaining the acquisitive effect of the transaction.

(c) As a consequence of the consolidation of the system of private property, the demand for new legal forms emerged. An act was needed for the bestowal of legacies, and the splitting of the property could be prevented by an artificial abolishment of legal bonds: the *emancipatio*. Offering gifts also became more frequent, requiring legal forms.

3. The new needs could have been satisfied in two possible ways: either through the creation of new legal acts, or by an adaptation of *mancipatio* to the new needs. The well-known conservatism and traditionalism of Romans induced them to choose the second solution. The choice was perhaps also influenced by the fact that the law of property and family developed towards a concentration of power in the person of the *paterfamilias*, and the act of *mancipatio* was expedient for safeguarding the homogeneousness of his power.

In history conservatism is generally a factor hindering progress, but, as a consequence of the dialectic of phenomena, it happens that conservatism may—involuntarily—render a service to progress. This is what happened with *mancipatio*. The Pontiffs who rigidly stuck to old formulas chose the solution to deprive *mancipatio* of its character of a sale,⁶⁸ by a symbolic price and other slight modifications and to make it suitable for other legal purposes. This step proved to be of immense historical importance. The brave priests—unconsciously of course—created the first type of an act of conveyance, which was independent of the obligatory contract,⁶⁹ and contributed to the fact that Roman law, instead of a loose mass of different legal remedies, became a concentrated legal system, based upon a few clearly defined legal means, capable of creating general legal forms, which still survive both in capitalist and socialist law. In my opinion *mancipatio nummo uno* is also one of these creations, although it meant only the first step in a long development.⁷⁰

In classical law, *mancipatio* was no longer an actual sale, so it is termed by Gaius as an *imaginaria venditio*.

⁶⁸ So also in the case of *mancipatio familiae*. Cf. Gai. 2, 104.

⁶⁹ It is a debatable question how far *mancipatio* has become an abstract legal act. The view of Hazewinkel-Suringa is the most convincing. He says that *mancipatio* was abstract to the extent that it was not dependant on the obligatory contract, but the *causa* of the act was not concealed. Cf. Schulz, SZ 52, p. 544.

⁷⁰ Cf. n. 129.

IV. THE WARRANTY FOR *AUCTORITAS*

1. According to the prevailing view, the *mancipatio* obliged the seller to a warranty against eviction without any special agreement. The warranty was called *auctoritas*, and if the vendor failed to fulfil his obligation, he had to pay double the price which could be enforced by the *actio auctoritatis*.⁷¹

This view is usually attributed to Mommsen who has dealt with the question in a part of his dissertation.⁷² He was followed by Girard.⁷³ The French scholar has examined thoroughly the questions of *auctoritas*, and has also tried to clarify the basis of this "warranty". According to him, ancient Romans considered the breach of warranty as a *delictum*.⁷⁴ Rabel followed in his footsteps. He suggested on the one hand the relationship of *auctoritas* with the Germanic "Gewährzug",⁷⁵ and on the other hand concluded that, as—according to him—the buyer was compelled to rely upon the help lent by the seller in the case of eviction, the right acquired by *mancipatio* was of a relative character.⁷⁶

For a time the question of *auctoritas* seemed to be definitely settled. In the thirties, however, De Vissher proposed a new solution.⁷⁷ In essence he holds the view that Mommsen and Girard have given a too narrow interpretation to the notion of *auctoritas*, because it not only meant a warranty for eviction, but the totality of the effects of *mancipatio*. He even believes that *auctoritas* was not only a consequence of *mancipatio*, but also of the informal transfer of a *res mancipi*.⁷⁸

De Vissher has drawn attention to the question again. New interpretations have been suggested, and an endless, and, I venture to say, rather fruitless dispute, has arisen. Several scholars, Amirante, Giffard, Lévy-Bruhl, Magdelain, Roussier proceeded in the direction indicated by the ideas of De Vissher.⁷⁹ They widened the concept of *auctoritas*, endeavouring to create a notion which would cover

⁷¹ So in socialist literature Andreev p. 176; Nowitzky p. 176; Nowitzky-Peretersky p. 458; Marton p. 207; Osuchowski p. 313. See also Kunkel, *RPR* p. 231; Monier, *Manuel* p. 529; Perozzi, *Istituzioni* pp. 259 f; Schulz, *Classical* pp. 533 f. The three latter authors, however, do not conceal the hypothetical character of *actio auctoritatis*.

⁷² Mommsen, *Auctoritas*. In fact Cuiacius already interpreted *auctoritas* as warranty. See *Opera omnia* I. (Neapoli, 1722.) pp. 393 f. Nevertheless the theoretical elaboration of this view is rightly attributed to Mommsen.

⁷³ Cf. Girard, *Auctoritas*.

⁷⁴ *Ibidem* pp. 212 ff.

⁷⁵ Rabel, *Haftung* p. 11.

⁷⁶ *Ibidem* pp. 50 ff.

⁷⁷ De Vissher, *Auctoritas* I.

⁷⁸ De Vissher, *Auctoritas* II. p. 108.

⁷⁹ Amirante interprets *auctoritas* as "autorità legittima" and "potere di diritto" (*Auctoritas* p. 377.). According to Giffard the word must be translated "puissance juridique" or "pouvoir de droit" (*Auctoritas* p. 21.). A similar view has been expressed by Horvat (p. 300.) and Lévy-Bruhl (*Auctoritas* p. 21.). Magdelain interprets the expression as "titre de propriété" (*Auctoritas* p. 130.). His follower, Roussier, speaks of "fondement légal de puissance" and "puissance fondée en droit" (p. 233.).

even the most heterogeneous meanings of the word.⁸⁰ For these authors, the warranty of the transferor in a *mancipatio* is but one, secondary application of *auctoritas*.⁸¹

A different approach was chosen by Leifer.⁸² He rejected De Vissher's ideas, and instead of starting from a general notion of *auctoritas*, built up with the aid of Roman sources, as other authors did, he invented—through an arbitrary application of Germanic analogies—a phantasmagoric history of *auctoritas*. In his opinion *auctoritas* originally meant the consent given by the relations to the performance of *mancipatio*, and later on the “warranty” of the whole people (“Samtwährschaft”).⁸³

Kaser has created a synthesis of the different views.⁸⁴ Basically he relies upon the theory of Girard, especially where he also ascribes a delictual character to the *auctoritas*-warranty.⁸⁵ In some respects he also adopts the idea of De Vissher in considering *auctoritas* to be the substance of *mancipatio*.⁸⁶ Though rejecting the bold hypothesis of Leifer,⁸⁷ he does not deny the essential identity of *auctoritas* and the Germanic “Gewährenzug”. Finally he also adheres to the conclusion of Rabel, in that he believes that the “warranty” of the seller testifies to the relative character of ancient Roman ownership.⁸⁸

The surfeit of literature and the frequently fruitless discussions on *auctoritas* have induced some authors to take a sceptical position. In consequence, Arangio-Ruiz rather cautiously accepts the theory of Girard,⁸⁹ whereas Fuenteseca and Sargenti label most scholarship, and deny even that such a warranty ever existed with the *mancipatio*.⁹⁰

2. A question so passionately discussed, and so abundantly treated, can possibly be approached in two ways. One could try to pave a way in the jungle of the wildly growing hypotheses, thereby incurring the danger of increasing the formidable number of theories by a new one. But it seems safer to avoid struggling through the thicket, and instead of meditating hopelessly on the deeper meaning to be attributed to this mysterious word, one ought to cast a glance at our extant sources in order to find the most simple and most probable solution, if any exists.

⁸⁰ Magdelain, while starting from the consideration that no homogeneous conception of *auctoritas* can be ascertained (*Auctoritas* p. 127.), none the less endeavours to discover it.

⁸¹ Cf. n. 79. Amirante, e.g. believes that with a *mancipatio*, *auctoritas* was the consequence of having given up power (*Auctoritas* p. 380.).

⁸² Cf. Leifer I. and II.

⁸³ Cf. Leifer II. pp. 136. ff.

⁸⁴ Cf. Kaser, *EB* pp. 115 ff; *AJ* pp. 135 ff; *Neue Studien* pp. 140 ff.

⁸⁵ So *EB* pp. 120 ff.

⁸⁶ *EB* pp. 129 ff.

⁸⁷ *EB* pp. 117 ff.

⁸⁸ *EB* pp. 9 f. From his followers a special mention is due to Mayer-Maly, *Studien* II. pp. 235 ff; Thormann, *Auctoritas*, who, however, is against the theory of relative ownership. See pp. 60 ff.

⁸⁹ Cf. Arangio-Ruiz, *Compravendita* pp. 310 ff.

⁹⁰ See Fuenteseca, especially p. 142; M. Sargenti *op. cit.* in n. 33. pp. 64. and 77.

This seemingly convenient choice, is due to my conviction that only when new sources are discovered, will it be possible to give the precise and all-embracing definition of *auctoritas*. In the works of Cicero e.g. the word can be met in twelve different meanings,⁹¹ and it would be hopeless to try to find a common denominator.⁹² So the attempt to express in one word the various notions Romans denoted by *auctoritas* must be abandoned. Contemporary terminology is hardly suited to grasping this concept. I am simply looking for an answer to the question whether the act of *mancipatio* involved a "warranty" termed as *auctoritas*.

3. Complete certainty, I am afraid, cannot be achieved. In the ritual of the transaction no word or gesture refers to *auctoritas*,⁹³ and our principal source, Gaius, does not even mention it. However, some texts of Plautus,⁹⁴ a few phrases of Cicero,⁹⁵ a fragment of Valerius Probus,⁹⁶ the much discussed text of the *Sententiae*,⁹⁷ and two fragments of the Digest⁹⁸ enable us to suppose that *mancipatio*

⁹¹ See Costa, *Cicerone* I. p. 324. n. 4.

⁹² One cannot but agree with the statement of Magdelain: "Il est singulièrement malaisé de ramener les divers aspects juridiques de la notion d'*auctoritas* à un concept unitaire." (*Auctoritas* p. 127.). Cf. n. 80.

⁹³ De Vissher (*Auctoritas* I. p. 634.) thinks that the transferor has made a declaration "*auctor sum*", but this assumption lacks evidence.

⁹⁴ In my opinion Plautus refers only twice to the warranty: *Curc.* 4, 2, 8 ff: *Egone ab lenone quidquam mancipio accipiam . . . alienos vos emittitis, alienisque inperatis, nec vobis auctor ullus est, nec vosmet estis ulli.*

Pers. 4, 3, 55–56: *Ac suo periculo is emat, qui eam mercabitur. Mancipio neque promittet, neque quisquam dabit.*

Plautus, however, generally uses the words *auctoritas* and *auctor* in different, non-legal meanings. (a) They often denote "advice". Cf. *Merc.* 2, 2, 41; *Mil. glor.* 4, 3, 1; *Poen.* 1, 3, 1 etc. (b) In other instances the meaning is "I give my word, I assure you". See e.g. *Poen.* 1.1, 18: *Suspende, vinci, verbera: auctor sum sino.* On this see Costa, *Plauto* p. 224. (c) In some cases the meaning is not quite clear, but it has hardly any bearing on *mancipatio*: *Epid.* 3, 2, 21–22; *Nunc auctorem dedit mihi hanc rem Apoecidem.* Some scholars endeavour to ascribe to every passage of Plautus, where these words occur, a reference to *mancipatio*. The result is sometimes outspokenly comical. The above quoted passage (*Poen.* 1, 1, 18) e.g. is translated by Lotmar like this: "ich vertrete dich bei mir selber, wenn ich dich nachher zur Verantwortung ziehen sollte." (Lotmar I. p. 9.). The works of Terence have likewise to be interpreted with the utmost caution. Cf: Bekker, *SZ* 13 (1892), pp. 75 f.

⁹⁵ Thus *Pro Mur.* 2, 3: *Quod si in rebus repetendis, quae mancipi sunt, is periculum iudicii praestare debet, qui se nexu obligavit.* *Top.* 10, 45: *Finge mancipio aliquem dedisse id, quod mancipio dari non potest. Num idcirco eius factum est, qui accepit? Aut num is, qui mancipio dedit, ob eam rem se ulla re obligavit?*

⁹⁶ Val. Prob. 4, 7: *quando in iure te conspicio postulo anne far auctor.* Likewise also Cicero, *Pro Caec.* 19, 54. Cf. Mommsen, *Auctoritas* p. 461.

⁹⁷ *PS.* 2, 17, 1–3: *Venditor si eius rei quem vendidit dominus non sit, pretio accepto auctoritatis manebit obnoxius; aliter enim non potest obligari . . . Res empti mancipatione et traditione perfecta si evincatur, auctoritatis venditor duplo tenus obligatur.*

⁹⁸ Ulp. *D.* 21, 2, 4, pr: *Illud quaeritur an is, qui mancipium vendidit, debeat fideiussorem ob evictionem dare, quem vulgo auctorem secundum vocant.*

Ven. D. 21, 2, 76: *Si alienam rem mihi tradideris et eandem pro derelicto habuero, amitti auctoritatem, id est actionem pro evictione, placet.* Magdelain thinks the text is interpolated (*Auctoritas* pp. 136 f.). I see no reason for it, apart from the fact that it is not congruous with Magdelain's theory.

involved a warranty against eviction, called *auctoritas*, without a special arrangement. The seller was liable to eviction, and if he neglected his duty, this was sanctioned by doubling the price.⁹⁹ The procedural remedy for it is unknown. The *actio auctoritatis*, as it is called in text-books, does not exist in our sources.¹⁰⁰ It is not impossible that, as Mommsen suggested, the remedy itself was called *auctoritas*, but this cannot be proved.¹⁰¹

In my opinion the traditional view has to be accepted, but only as a hypothesis. It is futile to discuss the question whether the underlying idea of *auctoritas* was a contract or a *delictum*.¹⁰² Ancient Roman law was not acquainted with the abstract notions of contract or delict. We would relate later ideas to a primitive age, if we wanted to classify *auctoritas* according to these categories. Ancient Romans, in conformity with the general commercial customs,¹⁰³ accepted the idea of warranty against eviction as natural. They hardly gave its theoretical background a thought.

4. Neither are there any direct sources in existence as to the content of *auctoritas*—warranty. Some authors consider that the liability of the seller consisted in producing evidence of the right of the buyer.¹⁰⁴ According to other writers, however, the seller had to carry on the lawsuit on his own behalf. Moreover, if there were also other predecessors, he could shift the lawsuit on to them. So, *auctoritas* was substantially identical with the Germanic “Gewährenzug”.¹⁰⁵

Having accepted the idea that *auctoritas* had meant in the case of *mancipatio* the “warranty” of the seller for eviction, one of the two solutions proposed has to be adopted, because a third one is inconceivable.

As to the procedural realization of *auctoritas*, a slight hint is given by Valerius Probus.¹⁰⁶ From the fragment it can be gathered that the *actor*¹⁰⁷ had to be sum-

⁹⁹ Cf. *PS* 2, 17, 3.

¹⁰⁰ “La actio auctoritatis es una creación de la doctrina romanística sin base suficiente en las fuentes romanas”—says Fuenteseca rightly (p. 141).

¹⁰¹ Mommsen, *Auctoritas* p. 459. He relies upon the fragment of Venuleius cited in n. 98.

¹⁰² For the delictual character there is especially Girard, *Auctoritas* pp. 212 ff; and Kaser, *BE* pp. 115 ff. A contractual basis is attributed to it by Arangio-Ruiz, *Compravendita* p. 320 n. 3; Bechmann, *Kauf* pp. 123 ff; De Vissher, *Auctoritas* I. pp. 603 ff. (his point of view was not quite clear for me).

The doubling of the price is no evidence for a penal character: “L’inadempimento è sanzionato da una pena: cio è inconsueto ai diritti progrediti, ma è normale nei diritti arcaici.” — says Voci quite correctly (*Modi* p. 37.).

¹⁰³ Cf. Pringsheim, *Sale* p. 86.

¹⁰⁴ Thus Bechmann, *Kauf* p. 115; Girard, *Auctoritas* pp. 188 f; Klein pp. 251 f; Lévy-Bruhl, *Auctoritas* p. 23; Stintzing pp. 32 ff.

¹⁰⁵ Cf. Kaser, *EB* pp. 59 ff. see also his other works; Leifer II. p. 135; Lotmar I. p. 8; Mayer-Maly, *Studien* II. pp. 235 ff; Rabel, *Haftung* p. 11; Thormann, *Auctoritas* p. 9; Voigt, *XII Tafeln* p. 198.

¹⁰⁶ Val. Prob. cited in n. 96.

¹⁰⁷ According to Kaser (*EB* pp. 60 f.) the words were not spoken during the lawsuit, but on the occasion of the formal summoning (“förmliche Streitansage”). In the procedure *in iure* the declaration was but repeated. He even asserts: “Nur so geben die Worte“ quando te

moned formally in the *in iure* part of the lawsuit. The problem we are concerned with, however, is not solved by the source.

In order to interpret correctly the expression, *postulo anne far auctor*, and to clarify the obligation of the transferor, both solutions have to be weighed up.

5. The view that the *auctor* had to enter the lawsuit as defendant, relies on the lack of sources, upon the analogy offered by the Germanic "Gewährenzug". Therefore the assumption can only be accepted if it is completely congruous with the picture supplied by Roman sources. These, however, fail to support the identification of *auctoritas* with "Gewährenzug":

(a) If it had been established that the *auctor* has to enter the lawsuit as defendant, some traces would have been left in the ritual of *legis actio sacramento in rem*, since it could not have been all that rare that an action was brought against a possessor, who had acquired the object by means of *mancipatio*. Gaius, however, fails to allude to the role of *auctor*.¹⁰⁸

(b) In the procedure by *legis actiones*—apart from a few exceptions¹⁰⁹—neither representation nor transfer of the procedural position was permitted. If *auctoritas* had meant the taking over of the lawsuit, this case would certainly have been mentioned, at least among the exceptions.¹¹⁰

(c) There is no doubt that the action was not brought against the *auctor*, but directly against the buyer, i.e. the possessor. Otherwise there would hardly have been any need to summon the former.

In this way, however, a twofold difficulty emerges. On the one hand, it cannot be ascertained in what phase of the procedure the *contravindicatio* would have been repeated by the *auctor*. On the other hand, he was not entitled to declare the formula *meum esse*, because having already sold the object, it was surely not his.¹¹¹

Moreover, given the case that the *auctor* had to summon his predecessors—as is believed by the adherents of the "Gewährenzug"—the *contravindicatio* would have been repeated three or four times, and apart from the plaintiff, several persons would have declared they were owners of the object, whereas it was plain that it could only belong to the plaintiff or the defendant.

in iure conspicio" (sic!) einen rechten Sinn." This view is unacceptable. The expression "*in iure*" points indisputably to the procedure before the magistrate. Elsewhere the defendant could not have said "when I catch sight of you *in iure*, i.e. before the magistrate . . ." Cf. Girard, *Auctoritas* p. 189.

¹⁰⁸ Cf. Stintzing p. 38.

¹⁰⁹ Gai. 4, 82: *cum olim, quo tempore legis actiones in usu fuissent, alieno nomine agere non liceret, praeterquam ex certis causis.*

Inst. 4, 10, pr: *cum olim in usu fuisset alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela.* Ulp. *D.* 50, 17, 123: *Nemo alieno nomine lege agere potest.*

¹¹⁰ Cf. Stintzing p. 39.

¹¹¹ It is also mentioned by Stintzing (p. 38.) that the taking over of the lawsuit is not in conformity with the personal character of *vindicatio*. Against the theory of "Gewährenzug" speaks also the circumstance that in Latin no word exists for the further predecessors. The expression "*auctor secundus*" does not denote the predecessor of the transferor, but the sponsor for eviction. See the fragment of Ulpianus quoted in n. 98.

(d) The theory of "Gewährenzug" cannot even claim that this solution was a general one in primitive legal systems. In fact it was unknown both in Greek and in Egyptian law.¹¹²

In my opinion this view, which is based upon a distant Germanic analogy, is incompatible with the Roman sources.¹¹³

6. So we are forced to conclude that the seller was obliged to prove the right to ownership of the buyer. The conclusion, however, can also be supported by positive arguments apart from the negative conclusion drawn from the unacceptability of the former opinion.

(a) As has been shown by Girard,¹¹⁴ the etymology of *auctoritas* (*augere*) suggests that in its original meaning the word *auctor* designated a person, who "increases, completes, fortifies", so it seems to point to help in the lawsuit.

(b) The word *auctoritas* is rather frequently used in the meaning of "proof, evidence",¹¹⁵ and as can be seen from the careful analysis of Klein, this was possibly its most frequent meaning.¹¹⁶

(c) Support is also furnished by a fragment of Paulus, where the expression "*auctorem fieri*" is explained as "proving, bringing evidence":

Paul. D. 26, 8, 3: *Etiamsi non interrogatus tutor auctor fiat, valet auctoritas eius, cum se probare dicit id quod agitur: hoc est enim auctorem fieri.*

So, we may conclude with an approximate certainty that the obligation of the *auctor* consisted in giving evidence as to the right of the buyer. The seller did not enter the lawsuit as a party to it, but only lent help to the defendant.

7. Rabel and other writers, especially Kaser,¹¹⁷ are of the opinion that in the case of eviction the buyer's only regress was to the seller; he could not defend himself independently, as the right acquired by *mancipatio* was of a relative char-

¹¹² Cf. Kunderewicz pp. 412 and 414. On Rome: pp. 428 f.

¹¹³ The medieval Lombardic practice as can be seen from the *Liber Papiensis* (ad Roth. 232. in: *MGH Legum tomus IV*, Hanoverae, 1868) must not be transplanted without any textual support into early Roman law.

¹¹⁴ "Or, dans cette langue simple et concrète l'auctor n'est celui qui transfère la propriété ni celui qui est tenu à garantie, c'est celui qui intervient dans une situation pour compléter, fortifier, c'est à dire, dans notre cas, celui qui assiste l'acquéreur dans le procès en revendication . . ." (Girard, *Auctoritas* p. 183.).

¹¹⁵ So: Liv. 3, 44, 9: . . . *auctoribus qui aderant, ut sequeretur, ad tribunal Appii perventum est.*; Quint. 5, 11. *Adhibetur extrinsecus in causam et auctoritas: haec secuti Graecos, a quibus κρισιεις dicuntur, iudicia aut iudicationes vocant non de quibus ex causa sententia dictum est, nam ea quidem in exemplorum locum cedunt . . .*; Seneca, *Quaest. Nat.* 4, 3: *Penes auctores fides erit. Ergo si mihi parum credis, Posidonius tibi auctoritatem promittet.*; Cicero, *Top.* 19, 73: *Persona autem non, qualiscunque est, testimonii pondus habet: ad fidem enim faciendam auctoritas quaeritur, sed auctoritatem aut natura aut tempus affert. Natura et auctoritas in virtute inest maxime . . .* Cf. also *Pro Fonteio* 10, 22; 11, 24; 7, 16 and the expression *instrumentum auctoritatis*.

¹¹⁶ Klein pp. 238 ff. The same turns out from the investigation of J. Ph. Lévy, "Dignitas, gravitas, auctoritas testium", *Studi Biondi II*. (Milano, 1965) pp. 63 ff.

¹¹⁷ Rabel, *Haftung* pp. 50 ff. See also Kaser, *EB* pp. 129 ff. and *Neue Studien* pp. 177 f; Krüger, *Capitis deminutio* p. 108; Lévy-Bruhl, *Vindicatoire* p. 103; Husserl p. 483; Mayer, *RG I* 2. p. 46; Pringsheim, *Sale* p. 429.

acter. This relative ownership turned into an absolute one only after the time prescribed for *usus auctoritas* had elapsed. Thus, the warranty for *auctoritas* is used by them as a weapon on behalf of the theory of relative ownership.

(a) To begin with, even the very starting point of this idea is open to doubt, since it is not proved that the buyer, in the case of an eviction, was compelled to summon the *actor*, and could not defend himself independently.¹¹⁸

Though in the case of *mancipatio* it was surely expedient for the buyer to demand defence from the transferor, no rule has come down to us which would have prescribed it in an obligatory way. In many cases the testimony of the witnesses to the act must have been efficient.

(b) The weakest point of this view, however, lies in its rigid unilaterality. If we even accepted the assumption that the acquirer could not defend himself independently against eviction, it does not follow that his right was a relative one.

Rabel and his followers leave completely out of account the case that the buyer might just as well happen to be the plaintiff in a lawsuit. They forget to put the natural question: was the acquirer entitled to bring a *vindicatio* against anybody who had taken the object into possession. The answer can hardly be in the negative, so the buyer had a right against everybody. His position was not dependant upon the benevolence of the *actor*, as he could bring an action against everybody, not only against the seller. The unilaterality of the theory of relative ownership consists in the fact that it envisages exclusively the case of eviction, though the contrary to it, namely a *vindicatio* brought by the buyer, is practically of equal importance.

(c) Moreover, if my interpretation were accepted that in a *legis actio sacramento in rem* the burden of proof was imposed upon the defendant,¹¹⁹ so the buyer needed help from the transferor only in the case of eviction.

The warranty of *auctoritas*, however, is no strong argument in favour of the relative ownership even if one started from the prevailing view that both parties to the procedure had to prove their right. Even so, it is sure that the buyer could sue anybody, and it cannot be proved that he would have been obliged to rely upon the help of the *actor*, if he were to be the defendant. The right acquired by *mancipatio* would only be a relative one, if the acquirer had not been entitled to sue and only the transferor could have done it. But, as far as I know, nobody has yet suggested such an absurdity. Finally, it is hard to see why the warranty of the seller would have meant in early law a relative ownership for the buyer. Nearly all modern legal systems know this institution, without doing injustice to the absolute character of ownership.

¹¹⁸ The view of Kaser is merely a hypothesis lacking textual support (Cf. especially *EB* pp. 50 ff.). *Tab.* VIII. 22. as has been pointed out by Yaron (p. 202.) moreover speaks decidedly against it.

¹¹⁹ On it *infra* pp. 102 ff.

V. THE LEGAL EFFECTS OF *MANCIPATIO*

1. After having taken sides in the vexed questions of *auctoritas*, we can proceed to sum up the legal effects of *mancipatio*.

According to a wide-spread, but not generally accepted opinion, *mancipatio* involved a double result: the acquisition of legal power and the warranty for *auctoritas*. There exist authors, however, who deny the acquisitive effect of the transaction and esteem that the only effect of *mancipatio* was *auctoritas*.¹²⁰ Some scholars, one of whom is Kaser, do not entirely deny the acquisitive effect of *mancipatio*, but sustain that *auctoritas* was the more important, primary effect of the act.¹²¹

So the first question to be settled is whether *auctoritas* was the sole effect of *mancipatio*.

2. In my opinion the creation of *mancipatio nummo uno* by itself refutes the unfounded view that the only effect of *mancipatio* was *auctoritas*. The symbolic price, as a matter of fact, practically eliminated the warranty for *auctoritas* of the seller. Consequently, if the representatives of this theory were right, the act would have been deprived of any possible legal effect, and the *mancipatio nummo uno* would have been an utterly pointless ritual.

Since, by the symbolic price, *auctoritas* was eliminated, *mancipatio* must have necessarily had another legal effect, which could be achieved through a *mancipatio nummo uno*. So it is unquestionable that *auctoritas* was not the sole legal effect of *mancipatio*.

3. The next step is to examine the possibility of whether *auctoritas* was the primary effect of *mancipatio*, whether *mancipatio* came into existence—as many authors believe—for the sake of warranty.

A close reading of Gaius and the other relevant sources reveals that the legal forms of *mancipatio* were expressly aimed at the acquisition of a legal power, and no word or gesture alluded to *auctoritas*.¹²² So it is hardly credible that the ancient Romans would have created an act for constituting the warranty for *auctoritas*, where all the elements of a sale can be found, the buyer declares that the thing belongs to him, but the real legal purpose of the act is slyly hidden. Moreover, it is not alluded to, not even guardedly. Somebody unacquainted with the literature on *auctoritas*, would hardly come to such an idea.

But other considerations also speak decidedly against the priority of *auctoritas*. As is well-known, *mancipatio* could always be applied to free persons. In such a

¹²⁰ Thus De Visser, *Auctoritas* I. pp. 638 f. In his later works he is already less radical. Cf. *Auctoritas* II. p. 94. See also: Leifer I. pp. 162 and 220; Thormann, *Auctoritas* pp. 1 ff. (somewhat inconsistently).

¹²¹ Cf. *EB* p. 109. Even more decidedly: "Die natürlichen Eigentumserwerbsarten im altrömischen Recht", *SZ* 65 (1947) p. 225.

¹²² Cf. Weiss, *RPR* p. 170 n. 74. The declaration "*auctor sum*" is a free invention of romanists. Cf. n. 93.

case, however, — it is sufficient to refer to the *coemptio* — the warranty for eviction was not too practical.

The decisive argument, however, is furnished by our sources i.e. by the very formalities of the act, because otherwise the Romans would have created a legal form distinctly contrary to its real purpose. So the *auctoritas* was but a secondary effect, and the *pontifices* indeed eliminated it without any hesitation by creating the *mancipatio nummo uno*.

4. I am convinced that the decisive and primary effect of *mancipatio* was the acquisition of legal power. In early law this power was termed *mancipium*,¹²³ and later on — after the dissolution of the homogeneous *patria potestas* — *dominium ex iure Quiritium* or the corresponding personal power (*patria potestas*, *manus* etc.)

In my opinion the power was acquired immediately. This must be stressed since, according to Husserl, *mancipatio* created but a *causa usucapiendi*, and until *usucapio* was completed, the buyer was protected only by the “warranty” of the transferor, his position becoming stable after having usucaptured.¹²⁴ One can also come across a similar statement in the monograph of Kaser.¹²⁵

First of all, the declaration of the buyer, *hanc ego rem . . . meam esse aio* is a strong argument against this assumption. The words quoted can only mean that the thing has become his, and not that he has acquired a transitory position based upon the support of the seller. Otherwise the declaration could have been simply omitted, because a contract of sale is easily conceivable without a statement of this kind. The buyer, however, expressly claimed to be the owner of the thing bought, as in *vindicatio*, and this means that normally he indeed acquired ownership.

Our sources do not support the idea of *mancipatio* as constituting only a *causa usucapiendi*. On the contrary, they clearly refute it.¹²⁶ Finally, it deserves mentioning that the ancient *usus auctoritas* was not dependant upon a *causa*.¹²⁷ Consequently, a *mancipatio* creating a *causa usucapiendi* would have been superfluous. So, if anybody denies the immediate acquisitive effect of *mancipatio*, he totally denies at the same time its acquisitive effects, because ancient *usucapio* not having been based on a *iusta causa*, *mancipatio* would have been devoid of any advantages from this point of view.

5. In our opinion *mancipatio* had two legal effects. Its primary effect was the immediate acquisition of legal power, and secondarily it also involved, like ancient contracts of sale in general, a warranty against eviction. In the classical age, when *mancipatio* has already become an *imaginaria venditio*, the secondary effect became even less important.

¹²³ See *supra* pp. 53 ff.

¹²⁴ Husserl p. 483. His view is shared by Georgescu p. 358. A similar view has been expressed by Coli (p. 138.).

¹²⁵ Thus *EB* pp. 133 ff. and *SZ* 65 (1947) p. 225.

¹²⁶ Cf. Gai. 2, 22; 2, 40–42. and Cicero, *Ep. ad fam.* 7, 30, 2: *cuius proprium te esse scribis mancipio . . .*

¹²⁷ Cf. Bonfante, *Usucapio* II. pp. 638 ff. and *infra* p. 90.

VI. CONCLUSIONS

1. I have had to deal at length with the questions of *mancipatio* and *auctoritas*, because both have been mystified by scholars. To the reader of the immense literature *mancipatio* may seem to be a special, incomparable product of Roman law, while *auctoritas* is likely to appear as the substance of ownership,¹²⁸ with other authors as the twin-brother of the Germanic "Gewährenzug" born on Italian soil.

In questions treated almost to satiation it regularly happens that the writers do not care much for the sources, but only for each other's works, endeavouring to corroborate or to refute different opinions, and so they involuntarily distort institutions, underrating or overestimating their significance. This can also be observed in our case.

2. This is why I have tried to turn back to the sources, and the result obtained is rather simple. It appeared that *mancipatio* is not a mystery, not a riddle to be solved, but what it seems to be at first sight, a primitive contract of sale, strikingly congruous with analogous institutions of other legal systems. *Auctoritas*, however, is the warranty against eviction, meaning the obligation of the transferor to remove, or facilitate the burden of proof imposed upon the buyer. It can be seen that many a point generally taken as proven is more or less hypothetical. So the importance of *auctoritas* must not be overestimated, because it was, according to our sources, far from being as important as is supposed by recent literature.

3. I do not deny of course the great importance of *mancipatio*. Nevertheless I believe that this importance does not lie in its origins, but is due to the fact that its development took a different turn when compared with the contracts of sale of other peoples. While elsewhere the payment of the price has become the decisive moment, in Rome the emphasis remained on the act of *mancipatio*, and the importance of the payment diminished. It lies beyond doubt that the creation of *mancipatio nummo uno* is of capital importance for the development of the law of property. The happy invention of the *pontifices* became the starting point for *in iure cessio*,¹²⁹ *traditio* and in the last analysis also for the contemporary acts of conveyance.

¹²⁸ So especially De Vissher, *Individualismo*, where *auctoritas* appears as the central question of the development of the law of property.

¹²⁹ According to the prevailing view, *in iure cessio* is of a later origin than *mancipatio*, but both already existed by the age of the Twelve Tables. Cf. *Fr. Vat.* 50: *et mancipationem et in iure cessionem lex XII tabularum confirmat*. I will not deal with *in iure cessio*, because it is of lesser importance than *mancipatio*, and presents no problems. Substantially I share the view of Kaser. Cf. *EB* pp. 199 ff. and *RPR* p. 117.

THE ANTECEDENT OF *USUCAPIO*: *USUS AUCTORITAS*

I. SURVEY OF THE LITERATURE

1. Our sources mention several times the dispositions of the Twelve Tables on acquisition of ownership by long possession.¹ Two provisions are known which have come down to us presumably in their original wording. Both of them are quoted by Cicero:

Cicero, *Top.* 4, 23 (*Tab.* VI. 3.): *Usus auctoritas fundi biennium est . . . ceterarum rerum omnium annuus est usus.*²

Cicero, *De off.* 1, 12 (*Tab.* VI. 4): *adversus hostem aeterna auctoritas (esto).*³

Unfortunately both texts contain the mysterious word *auctoritas*. If early Romans had not happened to choose this heterogeneous expression for describing the primitive *usucapio*, modern scholars surely would not have given the subject much thought. For the Romans always understood the two provisions, as the first statutes on *usucapio*, the first one having fixed a two and one year's term respectively for *usucapio*, the second one having prohibited *usucapio* to foreigners.⁴ Scholars would have at most discussed the differences between the ancient and the later *usucapio*.

The word *auctoritas*, however, sounding as a war-trumpet, called many a scholar to the battlefield. A great number of papers have been dedicated to the question of *usus auctoritas*, and every author has tried to decipher the precise meaning of *auctoritas*. The task was all the more tempting since it seemed obvious that the same meaning has to be attributed to the word in the provisions on *usus auctoritas* as with *mancipatio*. Practically everybody started from this assumption.

The multiform mass of different hypotheses can be roughly divided into two main types. The authors approach the question either from *usus auctoritas* or from the warranty for *auctoritas* with *mancipatio*.⁵

¹ Thus Cicero, *De off.* 1, 12; *Top.* 4, 23; *De leg.* 1, 21, 55; 2, 24, 61; Gai. 2, 42; 2, 45; 2, 47; 2, 49; 2, 54; 1, 111. Cf. also Boeth. *ad Top.* 4, 23 and Gai. 2, 204. In the text I often describe *usus auctoritas* by the word *usucapio* for want of another term. I am, however, aware of the fact — as can be seen — that the corresponding legal institutions are not identical.

² Cf. also Cicero, *Pro Caec.* 19, 54: *lex usum et auctoritatem fundi iubet esse biennium.*

³ The text in itself does not reveal that it belongs to the institution of *usus auctoritas*. This is why it was placed by Dirksen on a different table (pp. 262 ff. and 727.). The connection becomes only apparent from the wording of the *lex Atinia*, where the prohibition on *usucapio* is equally defined as *aeterna auctoritas*: Gellius, *N. A.* 17, 7, 1: *Legis veteris Atinia verba sunt: Quod subruptum erit, eius rei aeterna auctoritas esto.*

⁴ On this see the references in n. 1.

⁵ Klein, who interprets *auctoritas* in both cases as "power of evidence" (*Beweiskraft*) does not belong to any group. Cf. Klein especially pp. 256 f.

2. Many writers, adhering to Mommsen,⁶ start from the warranty for *auctoritas*. For them *auctoritas* means in both cases the warranty of the seller.

They interpret the provision on *usus auctoritas* in the following way: the warranty of the seller against eviction ceases after the lapse of one or two years respectively. Afterwards he is no longer obliged to support the buyer in a lawsuit. In consequence, when the predetermined time has elapsed the possessor has no need of this assistance, because the one or two year's *usus* by itself is sufficient to prove his right. So, according to them, the limitation of warranty to a short period would have indirectly resulted in *usucapio*.

The provision on *aeterna auctoritas*, however, means that if goods were sold to a foreigner by means of *mancipatio*,⁷ the liability of the seller was unlimited in time, because the *peregrinus* had to be eternally assisted by the transferor since he was unable to *usucapit*.

This opinion is shared by such renowned scholars as De Vissher and Kaser.⁸ Recently Mayer-Maly, having drawn the ultimate conclusions of Mommsen's theory, suggested that these rules originally had nothing in common with *usucapio*. Their only scope was to limit the warranty of the seller, and an exception was made with foreigners. The acquisitive effect has been ascribed to these provisions only later on.⁹

⁶ Cf. Mommsen. *Auctoritas*. In fact Salmas has already expressed a similar view: *De usuris* (Lugd. Bat. 1638). Quoted by Voigt, *XII Tafeln* p. 204 n. 3. See also e.g. Lübtow, *Kauf* pp. 118 f.; Stintzing p. 20; Thormann, *Auctoritas* pp. 63 ff.

⁷ This assumption has been repeatedly attacked. Kaser tries to defend the view of Mommsen by the not altogether convincing argument that *peregrini* endowed with a *ius commercii* were in question. Since the commerce of foreigners was of an early origin, Romans are supposed to have given this right to their business-partners (*EB* p. 93). But it is not likely that by that early age Romans would have been liberal in dealing out citizens' rights to foreigners. Business could be carried on very well without it.

⁸ Cf. De Vissher, *Auctoritas* I. and II.; *Aeterna auctoritas; Individualismo*; "De la défense d'usucaper les choses volées", *RIDA* 5 (1958) pp. 469 f. Kaser, *EB* pp. 86 ff. and 93 ff.; *Neue Studien* pp. 155 ff.; *RPR* pp. 118 ff.

⁹ Mayer-Maly, *Studien* I—III. Especially *Studien* I. p. 17. For the lack of sources it cannot be proved, but it is not even probable that *usucapio pro herede* would have been the prototype of *usucapio*, as he supposed (*Studien* I. pp. 40 f. and *Elementarliteratur* pp. 489 ff.). By the age preceding the Twelve Tables the succession of the *sui* was the typical case. However, they acquired the inheritance *ipso iure*, so *usucapio* was excluded. It must have been infrequent that somebody died childless, and his property was inherited by other persons. For such, so to say, exceptional cases it would have been superfluous to create the institution of *usus auctoritas*, while the acquisition of land was already of great importance. Lübtow's view is more convincing. He suggests that *usucapio pro herede* came into being after the Twelve Tables as a product of the interpretative activity of Pontiffs (*Erbrecht* p. 459.). The special rule of *usureceptio* is equally unlikely to have constituted the kernel of *usucapio*. Authors, who interpreted more widely the notion of "warranty", as "warranty of the legal order" or "warranty of possession", deviate to some extent from the view of Mommsen. In older literature Umfrid, *ZRG* 9 (1870) pp. 198 f.; Recently Kunkel, *RPR* p. 134 n. 1; Leifer II. pp. 124 ff. (refuted by Kaser, *EB* pp. 90 f.); Brogginì p. 81. n. 88. I am afraid, however, that these modern expressions are not fitting to render the ideas of early Roman law.

3. Numerous scholars, Amirante, Burckhard, Giffard, Horvat, Lévy-Bruhl, Magdelain, Roussier¹⁰ approach the question from the opposite direction. Their basic idea is that the rules on *usus auctoritas* and *aeterna auctoritas* bear substantially upon *usucapio*, so they interpret the word *auctoritas* in a different way.

Their view, however, is not entirely identical. Some of them translate *auctoritas* as “ownership”, some as “title of acquisition of ownership”, some as “legal (moral) power”.¹¹ The common feature of their ideas consists in the fact that for all of them *auctoritas* is a kind of power or legal title. According to them *usus auctoritas* means “power acquired by (or lost by) *usus*”,¹² while *aeterna auctoritas* is interpreted thus: “the power against a foreigner is eternal”, in other words the foreigner does not acquire the power by long possession.

Correspondingly they also understand the *auctoritas* with a *mancipatio*, as a kind of power or title of ownership, frequently interpreting the sources rather artificially.¹³

II. THE NATURE OF *USUS AUCTORITAS*

1. No *communis opinio* has yet been achieved. This is not surprising because every interpretation is open to objections and not even the most plausible ones can be proved.

In my opinion the view of Mommsen and his followers is the most disputable. On several occasions scholars have rightly raised the objection that early Roman law is not likely to have regulated *usucapio* in such an intricate way that it limited the time of the warranty of the seller, the *usucapio* having been implied.¹⁴ Once the *usucapio* is accomplished it indeed terminates the warranty, because the buyer

¹⁰ Amirante, *Auctoritas* p. 381; Burckhard, *ZRG* 7 (1867) pp. 91 ff; Giffard, *Auctoritas*, especially p. 356; Horvat pp. 285 ff; Lévy-Bruhl, *Auctoritas* pp. 14 ff; Magdelain, *Auctoritas* pp. 139 ff; Roussier pp. 231 ff.

¹¹ On this see *supra* p. 75. n. 79.

¹² According to Giffard *auctoritas* means the right acquired by *usus* (*Auctoritas* p. 356.). In a similar way Magdelain too, interprets it as the legal title acquired by *usus* (*Auctoritas* p. 141.). For Lévy-Bruhl the extinction of the right of the non-possessor is expressed by the rule (*Auctoritas* p. 26.). He is followed by Yaron, pp. 200 ff. especially p. 208.

¹³ Two passages in particular of Cicero have been constantly turned upside-down and inside-out.

De har. resp. 7, 14: *Multae sunt in hac urbe, patres conscripti, atque haud scio an paene cunctae iure optimo, sed tamen iure hereditario, iure auctoritatis, iure mancipii, iure nexi . . . Pro Caec.* 26, 74: *Fundus a patre relinqui potest: at usucapio fundi . . . non a patre relinquitur, sed a legibus; aquaeductus, haustus, iter actus a patre sed rata auctoritas harum rerum omnium ab iure civili sumitur.*

It is not impossible that the word *auctoritas* in these texts refers to *usucapio*. The meaning of “title” or “power”, as Magdelain supposed, however, is not supported by them, (*Auctoritas* pp. 142 ff.). Even Horvat recognizes it to some extent (p. 295.). For a convincing refutal see Mayer-Maly, *Studien* II. pp. 246 ff.

¹⁴ Cf. Huvelin pp. 283 ff; Magdelain, *Auctoritas* p. 150. n. 41.

no longer has to rely upon the support of the seller. But this conclusion does not hold strong in the inverse case. The expiration of warranty by itself means only that the buyer is no longer entitled to sue the seller in the case of eviction. The consequence, however, that henceforth it is sufficient for the possessor to refer to the continuous possession, is obvious except to a mind well-acquainted with the modern notion of *usucapio*, as happens to be the case with those supporting Mommsen's theory. But we may hardly assume the same of the Roman peasant, living at the age of the Twelve Tables. If the provision on *usus auctoritas* had indeed regulated only the warranty of the seller, another norm would have been enacted on *usucapio*, if such an institution existed in early Roman law.

It is also hard to believe that ancient *usucapio* would have been confined to the acquisition by means of *mancipatio*.¹⁵ The low level of commodity turnover does not favour such an assumption.

One could further object that if *usus auctoritas* had been designed to limit warranty, what is the word *usus* to be put down to. From the point of view of liability for eviction it is irrelevant whether the other party is or is not in possession of the thing bought.¹⁶ This consideration discredits at the same time the clever but ungrounded hypothesis of Mayer-Maly.¹⁷

Finally if *usus auctoritas* was a rule designed to limit the warranty, why were the terms different depending on whether it was an immovable or a movable? The distinction is important with *usucapio*, but it would have been rather meaningless in the case of a limitation of warranty.¹⁸

2. The opposite view is certainly favoured by a higher degree of probability. If the much disputed word is interpreted as a kind of legal power in the provisions on *usus auctoritas* and *aeterna auctoritas*, a reasonable solution can be obtained. The warranty for *auctoritas*, however, as has already been mentioned, can hardly be reconciled with this interpretation. The early Romans would have to be credited with rather complicated ideas, if we supposed that they understood the liability for eviction as a kind of power-position.

¹⁵ See Lévy-Bruhl, *Auctoritas* pp. 15 f. De Vissler tried to side-step the difficulty by asserting that the informal delivery of a *res mancipi* was also sanctioned by *auctoritas* (*Auctoritas* II. pp. 98 ff. and *Individualismo* p. 32.). Contra see Mayer-Maly, *Elementarliteratur* p. 486.

¹⁶ Cf. Lévy-Bruhl, *Auctoritas* pp. 15 f.; Yaron pp. 200 f.

¹⁷ It is unacceptable that ancient law should have called *usucapio* the acquisition by long possession (*Studien* I. pp. 22 f.). Our sources supply no evidence for it. Moreover his assumption is contradicted by the fact that the *lex Atinia* issued by the III. century B. C. still uses the clumsy expression *aeterna auctoritas* for denoting the prohibition on *usucapio* (see: n. 3.). Mayer-Maly also draws from a dubious inscription and a passage of Gellius the rash conclusion that *usucapio* was a genitive structure, meaning originally the "acquisition of *usus*" (*Studien* I. pp. 26 ff.). The material carefully collected by Bonfante proves that Romans always understood *usucapio* as an acquisition by *usus* (Bonfante, *Usucapio* I. p. 472. nn. 1–3.). For the views of Mayer-Maly see also n. 9.

¹⁸ I do not agree with the assumption that the Twelve Tables only fixed the two-years' term, the provision "*ceterarum rerum omnium annuus est usus*" being of later origin, as suggested by Mayer-Maly (*Studien* II. pp. 233 f.) and Kaser (*RPR* p. 118 n. 1.). It is unlikely that Cicero and Gaius would both have invented a nonexisting decemviral rule.

It must be also taken into consideration that the interpretations as “title of a right” or “legal power”¹⁹ are based merely upon intuition, and cannot be ascertained by our scarce and ambiguous sources.²⁰ So it would be hazardous to rely upon these assumptions.

3. I am obliged to state with great regret that none of the numerous views hitherto expressed seems acceptable. So two ways are open: either to try to enrich the abundant literature by inventing a new hypothesis which would be as objectionable as the existing ones, or to take a sceptical position. Experience shows that the second course is the wiser one.

If the immense endeavours of so many, even great scholars have proved to be futile, if nobody has succeeded in discovering the precise meaning of *auctoritas*, then the obvious explanation is that the extant sources do not enable us to answer the question. Therefore, as in the case of *auctoritas-warranty*,²¹ I have to give up trying to discover the underlying meaning of *auctoritas*.

Auctoritas could have possibly meant the same in both cases, but with regard to its rich content it is equally possible that the meaning was quite different with *usus auctoritas* and with *mancipatio*. Therefore I shall simply speak of *auctoritas* without trying to describe more closely this woolly concept which can scarcely be defined with the language available today.

4. Comparatively more is known about the word *usus*, though its meaning is also debated. Burckhard understands it as “right of use”,²² whereas Lauria, if I have not misunderstood his not altogether clear analysis, identifies it with *usucapio* itself.²³

In my opinion the interpretation of Kaser is the most convincing. According to him, *usus* meant actual power, and as such anticipates the later notion *possessio*.²⁴ His definition could be complemented by the remark that *usus* was of course not yet clearly distinguished from ownership, like *possessio*.²⁵ I believe that its meaning can be adequately rendered by the expression, suggested by Yaron,²⁶ “actual use”. This interpretation is not only advocated by the circumstance that it lies close to the original meaning of the word, but also by the consideration that it is congruous with the ideas of early law, which has not yet clearly delimited possession from ownership. The word *usus* could, in my opinion, have equally denoted the possession of an owner and of a non-owner.

5. The words *auctoritas* and *usus* together surely meant that the user of the thing has obtained an unquestionable legal position.²⁷

¹⁹ Cf. *supra* p. 75. n. 79.

²⁰ Cf. e.g. n. 13.

²¹ *Supra* pp. 75 ff.

²² *ZRG* 7 (1867) p. 118. A similar view has been expressed by Leifer II. pp. 131 ff.

²³ M. Lauria, “*Usus*”, *Studi Arangio-Ruiz* IV. pp. 131 ff. For a similar opinion see Bonfante, *Usucapio* I. pp. 471 f. Against it see Kaser, *EB* p. 88.

²⁴ Kaser, *EB* pp. 313 ff.

²⁵ Cf. Mayer-Maly, *Studien* II. p. 253.

²⁶ Yaron, p. 212.

²⁷ In some cases, as with the acquisition of *manus*, perhaps *usus* alone too.

The later term *usucapio* cannot be applied to *usus auctoritas* without some hesitation. We would cast back the legal conceptions of classical law into early law, if we supposed that by the age of the Twelve Tables the notion of acquisition of ownership by long possession was already known. It is not likely that the *decemviri* would have understood *usus auctoritas* as a means of turning an originally non legal situation into a legal one, the non-owner having become an owner.

Obviously *usus auctoritas*, like all ancient legal forms, was not born as a result of theoretical speculation, but as a solution to practical needs. These needs arose probably with the *legis actio sacramento in rem*. In my opinion the burden of proof in the ancient proprietary lawsuit fell upon the defendant who possessed the thing.²⁸ After the lapse of a certain time this burden became not only insupportable, but also contrary to the interests of the ruling class. The patrician class, having acquired wealth, endeavoured to keep their fortune and prevent it from being evicted from them.²⁹

Therefore the Twelve Tables—either sanctioning an already existing practice, or introducing an innovation—relieved the possessor of the burden of proof after the lapse of the predetermined period. He was no longer compelled to prove the lawful acquisition of the thing possessed. This right became indisputable, regardless of the way he had acquired the thing, by the continuous *usus*. This assumption is also advocated by the consideration that given the modest measures of early Rome, the one or two years' period must have been sufficient for anybody to ascertain where his property he had eventually lost had got to and to vindicate it. After the time had elapsed he was deprived of the possibility of recovering it, because the possessor could efficiently defend himself by relying upon *usus*.

Klein and Kaser are surely right in suggesting that *usus auctoritas* was originally a provision bearing upon the law of evidence.³⁰ The actual and continuous use of the thing discharged the possessor from having to prove his title. In such a way *usus auctoritas* at the same time also performed the function of the later *usucapio*. The original idea, however, did not yet stress the acquisition of ownership, but the discharge from producing evidence. This idea can still be found in Cicero:

Pro Caec. 26, 74: . . . *at usucapio fundi, hoc est finis sollicitudinis ac periculi litium . . .*

6. *Usus auctoritas* was generally available to everybody who could claim a *usus* of one or two years. The requirements of *bona fides* and *iustus titulus* did not yet exist in early law.³¹

Some exceptions, however, have been already established by the Twelve Tables:

²⁸ *Infra* pp. 102 ff.

²⁹ On it *infra* pp. 92 f.

³⁰ Klein pp. 256 f.; Kaser, *EB* especially pp. 86 f.

³¹ This is the prevailing view. The divergent opinion of Mayer-Maly (*Studien* III. pp. 97 ff.) is unconvincing. Cf. Yaron pp. 214 f.

(a) *Usus auctoritas* was not available to foreigners.³²

(b) The boundary-lines and—probably from religious considerations—the places where corpses had been buried or cremated could not be *usucapied*.³³

(c) It is much disputed whether *usus auctoritas* was available to the thief. Some sources trace the prohibition back to the Twelve Tables, whilst others attribute it to the *lex Atinia*, and finally there exist some, which mention in fact both statutes.³⁴

I think that the most plausible explanation is the one given by Kaser.³⁵ According to him the Twelve Tables probably only prohibited *usucapio* to the thief himself, and the prohibition was also extended by the *lex Atinia* to those who had acquired the stolen thing.

III. ECONOMIC AND SOCIAL BACKGROUND

1. Scant attention has so far been paid to the economic and social background of *usus auctoritas*. Wilutzky, it is true, expressed the opinion that *usucapio* had meant the appreciation of labour, on the principle that the land belongs to the cultivator.³⁶ A thorough explanation, however, was only given, as far as I know, by the Marxist Horvat. He thought that the main task of the institution was the realization of a concentration of land in favour of the ruling class, the short terms having facilitated above all the legalization of violent acquisition. In the later republic, however, since the ruling class had already taken possession of the land, *usucapio* was made more difficult by the introduction of several requirements.³⁷ “Therefore—he concludes—*usucapio*, which was originally a weapon of attack in the hands of the ruling class, became a defensive weapon.”³⁸

2. I agree with Horvat in so far that it is probably the acquisition of immovables, above all of agricultural land, that has led to the setting up of this institution. This is also corroborated by the Twelve Tables, which originally referred only to the *fundus*. Buildings were included in the provision only later on by means of an extensive interpretation.³⁹

³² According to *Tab. VI. 4*.

³³ Cicero, *De leg.* 1, 21, 55 (*Tab. VII. 4*): *usu capionem XII tabularum intra V pedes esse noluerunt De leg.* 2, 24, 61 (*Tab. X. 10*): *forum bustumve usucapi vetat* Cf. Mayer-Maly, *Studien II.* p. 257.

³⁴ Cf. Gai. 2, 45 and 49. Both statutes are mentioned in *Iul. D.* 41, 3, 33, pr; *Inst.* 2, 6, 2. Only *lex Atinia* can be found in *Paul. D.* 41, 3, 4, 6 and 50, 16, 215. Pomponius speaks only in general terms about *lex* (*D.* 41, 3, 24), which however for Romans meant first and foremost the Twelve Tables.

³⁵ Kaser, *RPR* p. 119.

³⁶ Wilutzky p. 85.

³⁷ Horvat pp. 300 ff.

³⁸ “Ainsi pourrait-on dire en bref, que l’*usucapio*, autrefois une arme offensive dans les mains de la classe dirigeante, devint plus tard, dans des circonstances changées, une arme défensive.” (Horvat p. 302.)

³⁹ Cicero, *Top.* 4, 23.

Two interests seem to have required that the lands should belong indisputably within a comparatively short time to the actual cultivator. First, it lay in the interest of the whole society that land should be cultivated, since agriculture was the main economic basis of the Roman State. The two years' period equally shows that *usucapio* was closely connected with cultivation. With respect to crop-rotation two years were needed for it to become apparent who was the actual cultivator of a given plot of land.⁴⁰

The interest of the whole Roman society, however, coincided at the same time with the special aspirations of the ruling class, which, as has been rightly pointed out by Horvat, wanted to concentrate land in its own hands. This was facilitated by the circumstance that the wealthier people, having sufficient manpower and agricultural tools at their disposal, were able to cultivate a larger area than the poor citizens. The institution of *usus auctoritas* favoured the concentration, because it averted the danger of eviction.

I disagree, however, with Horvat concerning the importance of violent acquisition. No violent expulsions of farmers during early times have been recorded. Moreover it is unlikely that the ruling class needed to take such drastic steps. It is even improbable that the ruling class would have been in the position to do so, since the differences of wealth and power were not yet as considerable as later on. The occupation of uncultivated land, however, must have played an important role at an age when, as a consequence of the frequent local wars, large plots of land were left uncultivated. Wilutzky is also right when he emphasizes the importance of labour, but I think that the decisive factor was not the labour of the owner but that of his slaves and of his other subjects. It is even possible that the institution of *usus auctoritas* served as a weapon in the struggle between the *gentes* and the wealthy *patresfamilias*, and so contributed to the final liquidation of common property.⁴¹

3. The acquisition of movables required different legal provisions. As the ruling class had already previously acquired the majority of them, the weapon of *usus auctoritas* could have been easily turned against them. In order to prevent undesirable results, the prohibition of *usucapio* on stolen goods was introduced, since by this important limitation *usucapio* on movables was to a large extent restricted, and the wealthier could prevent the diminution of their fortune, endangered by the short term of *usus auctoritas*.

4. To sum up, *usus auctoritas* was an institution born as a provision bearing upon the law of evidence, but at the same time it performed the function of the later *usucapio*. It was probably introduced to ensure for the ruling class the

⁴⁰ This is the prevailing view. Mayer-Maly, however, denies the connection, because—according to him—“decken sich Usukapionszeit und Anbauperioden zu selten.” (Studien I. p. 37 n. 92). This holds good for contemporary law, but in the early agricultural Roman society, the two happened to coincide. Cultivators take possession of agricultural land by the very fact of cultivation.

⁴¹ Cf. *supra* p. 42 n. 74.

acquisition of land as well as movables. The prohibition of *usucapio* on stolen goods, however, was even in early law a provision already of a defensive character favouring the wealthy citizens. But it is undeniable that *usus auctoritas* also fell in line with the general economic interest of the whole society. It furthered the cultivation of land, and as such has surely contributed to the development of Roman agriculture.

THE ANCIENT PROPRIETARY REMEDY

I. SURVEY OF THE LITERATURE

1. The title of this chapter should have been put in inverted commas, because the *legis actio sacramento in rem* was not entirely the same thing as the proprietary remedies of advanced legal systems.¹ It also helped to recover free persons so its field of application was considerably broader.² None the less, in order to avoid an artificial and complicated terminology, I shall use the expressions "proprietary remedy" and "owner", but it must not be inferred from this that I have any desire to put the *l.a.s.i.r.* on the same level as the proprietary remedies of later law.

2. For the contemporary lawyer the structure of the *l.a.s.i.r.* is quite peculiar. It is well-known that not only did the plaintiff have to claim to be the owner, but also the defendant had to reply with the same assertion (*contra vindicare*).³ Both parties to the lawsuit had to deposit a wager-sum (*sacramentum*). The victorious party got his money back (*sacramentum iustum*), while the defeated rival lost it to the state (*sacramentum iniustum*).

It seems that in a *l.a.s.i.r.* the object of the lawsuit had to be declared the property of one of the litigants, otherwise the matter could not be settled. The question is obvious: what happened if neither of them could prove right of ownership and if it turned out that the thing belonged to neither of them? Whose *sacramentum* was declared *ustum* in such a case?

3. Scholars have been striving for a century now to find a satisfactory solution. Several suggestions have been put forward:

(a) Some authors tried to eliminate the difficulty by denying the double character of the lawsuit. They thought that the interim decision of the magistrate, as to which of the parties should possess the thing during the lawsuit (*vindicias dicere*), determined the procedural position of the parties. The party not in possession thus became the plaintiff, and he was under the burden of proof, while his adversary could confine himself to denial.⁴ This view, which is characterized by the endeavour to reconcile the ancient *vindicatio* with modern conceptions, has been already convincingly refuted.⁵

¹ For the sake of brevity, the action will be designated by the initials *l.a.s.i.r.* This chapter is an abridged version of my paper "Vindicatio und relatives Eigentum", *Gesellschaft und Recht im griechisch-römischen Altertum* I. (Berlin, 1968) pp. 65 ff.

² Cf. *supra* p. 55.

³ The *contravindicatio*, as a noun, did not exist in Roman legal language. (Cf. Gai. 2, 24). Still, in some cases, I shall use this familiar, though non-Roman word.

⁴ Thus E. I. Bekker, *Die Aktionen* I. (Berlin, 1871) p. 209; Bethmann-Hollweg I. p. 144.

⁵ Cf. E. Eck, *Die sogenannten doppelseitigen Klagen des römischen und gemeinen deutschen Rechts* (Berlin, 1870) pp. 10 f; Ihering, *Geist* III. p. 404 n. 129/c; Roth pp. 121 ff.

Lotmar submitted a rather bold idea. Interpreting the sources in a completely arbitrary way, he came to the conclusion that there was not any *contravindicatio*, the defendant was not bound to assert ownership.⁶ This interesting, but unfounded opinion was unanimously and deservedly rejected.⁷

An original suggestion was made by Roth. From the text of Gaius he drew the conclusion that only the right of the *contravindicans* was examined; sentence was passed only on this party's right. Being, however, unable to accept a solution that is contrary to modern law, he surprisingly suggested that the *contravindicans* was the plaintiff. So, according to him, the *vindicatio* was brought by the possessor against somebody who did not possess.⁸ No attention was paid to Roth's unacceptable, but, in a certain way, remarkable view.

(b) Other writers, including outstanding scholars like Ihering and Mitteis, followed a different course.

Ihering thought that both parties were obliged to prove their right, but the judge was entitled to declare both claims unfounded, both *sacramenta iniusta*.⁹ He also suggested that the *l.a.s.i.r.* performed at the same time the function of what was later the *actio Publiciana*, i.e. the protection of the comparatively better right.¹⁰

The idea of Ihering led several scholars to the conclusion that the identical position of the parties to the lawsuit bears witness to the relative character of ancient Roman ownership.¹¹ Their trend of thought is deceptively simple: Both parties declared they were the owner. The judge, however, had in any case to take a decision,¹² so he was bound to adjudge the object to one of the parties, even if both had failed to prove full ownership. In consequence, the process was won by the party who could prove a better right. Therefore ancient Roman ownership was not yet an absolute right, but only a better right to possession with respect to a given adversary.

Kaser not only took up this view, but he developed it in many ways, applying it consequently to the whole history of ancient Roman ownership.¹³ His analysis

⁶ Cf. Lotmar I. and II.

⁷ Cf. Jobbé-Duval p. 323; E. L. Keller, *Der römische Civilprocess und die Actionen* 6. ed. revised by A. Wach (Leipzig, 1883) p. 67 n. 204; Roth pp. 126 f.; H. Siber, *Die Passivlegitimation bei der rei vindicatio* (Leipzig, 1907) p. 4.

⁸ Roth, especially pp. 134 ff. The same idea has been advanced recently by Watson apparently in the erroneous belief of having invented a new solution. See A. Watson, "Towards a New Hypothesis of the legis actio sacramento in rem", *RIDA* 14 (1967), pp. 455 ff.

⁹ Ihering, *Geist* III. p. 93.

¹⁰ *Ibidem* p. 105.

¹¹ Cf. F. Bernhöft, *Staat und Recht der römischen Königszeit* (Stuttgart, 1882) pp. 167 f.; Eck, *op. cit.* in n. 5 pp. 16 f.; Krüger, *Capitis deminutio* p. 135; Leifer II. p. 141; G. A. Leist, *Der attische Eigentumsstreit im System der Diadikasion* (Jena, 1886) pp. V–VIII; Lévy-Bruhl, *Vindicatoire* p. 103; Lübtow, *Kauf* pp. 118 f.; Mayr, *RG* pp. 46 ff.; Mitteis, *RPR* pp. 87 f.; Rabel, *Haftung* p. 12; although his view is above all based upon the liability for eviction. For Kunkel's cautious approach, see *RPR* pp. 122 f.

¹² In this point they expressly deviate from the view of Ihering.

¹³ Cf. Kaser, *EB*.

has caused lively interest. Many scholars fell in line with this theory,¹⁴ but numerous scholars expressed their disagreement.¹⁵ The discussion is still being carried on. Kaser himself, probably influenced by some critical remarks, has to some extent modified his original view, but in the basic argument he still firmly believes in the relative character of ancient ownership.¹⁶

4. An argument adduced in favour of the theory of relative ownership the warranty for *auctoritas*, has already been dealt with in a previous chapter, and the result was a negative one.¹⁷ So I hope that this hypothesis has been deprived of an important argument, but, without a thorough examination of the structure of the *l.a.s.i.r.*, it would be venturesome to form a definite opinion on relative ownership. The most important pillar of this theory as a matter of fact, as has been stressed by Kaser,¹⁸ is the structure of the *l.a.s.i.r.* It is for this reason that the ancient *vindicatio* has to be carefully analysed from the point of view of the relationship that existed between the lawsuit and the right of ownership. Procedural questions cannot be treated here. The latter will be taken into consideration only if this seems indispensable in trying to clarify the problem of relative ownership.

II. ANALYSIS OF GAI. 4, 16.

1. The form of the *l.a.s.i.r.*, the oral formulas and the main principles of the lawsuit are preserved in the fourth book of the Institutes of Gaius.¹⁹ Though his description is complemented by some, mostly non legal sources,²⁰ if Gaius' work

¹⁴ Thus Brogini p. 78; Fuenteseca p. 147; Levy, *Vulgar Law* p. 235; Mayer-Maly, *Elementarliteratur* p. 455; Weiss, *RPR* p. 158 n. 61 and p. 201 (somewhat ambiguously); Wieacker, *SZ* 67 (1950) p. 530 and *Entwicklungsstufen* pp. 208 f.; Wubbe, *Usureceptio* pp. 35 ff. In socialist literature available to me, I have found only two statements on it: Benedek, *Iusta causa* p. 38 f. and Kunderewicz p. 427. Both writers accept Kaser's view.

¹⁵ Cf. G. G. Archi, "Il concetto della proprietà nei diritti del mondo antico", *RIDA* 6 (1959) p. 235. and *SDHI* 22 (1956) p. 412; Bozza, *Iura* 1 (1950) pp. 401 ff.; Capogrossi-Colognesi, *Struttura* pp. 122 ff. and 396 ff.; Grosso, *SDHI* 23 (1957) pp. 387 ff.; M. Talamanca, *TRG* 26 (1958) pp. 243 ff.; Voci, *Modi* pp. 276 ff. Recently also De Vissher. Cf. *Auctoritas* II. p. 110.

Even before Kaser published his book, several authors refused to accept the theory of relative ownership. Cf. Bekker, *SZ* 5 (1884) pp. 149 f.; Beseler, *SZ* 50 (1930) pp. 439 f.; De Francisci, *Trasferimento* p. 78 n. 3; Giffard, *Auctoritas* p. 360; T. Kipp, *SZ* 9 (1888) pp. 165 ff.; Roth p. 126.

¹⁶ Kaser admitted recently that absolute ownership also existed in ancient law, e.g. in the case of *usus auctoritas*. Cf. *Neue Studien* especially pp. 186 ff.; *RPR* pp. 108 and 120; *EB Nachträge*.

¹⁷ See *supra* pp. 80 f.

¹⁸ "Die entscheidenden Beweisgründe zugunsten des relativen Eigentums bleiben die Gestalt des Vindikationsverfahrens und das Sachbedürfnis . . ." (*EB Nachträge* p. 364.)

¹⁹ Gai. 4, 16.

²⁰ Thus Cicero, *Pro Mur.* 11, 25 ff.; *Pro Caec.* 33, 97; *Pro Mil.* 27, 74; *De domo* 29, 78; *De or.* 1, 10, 42; Festus pp. 393, 516, 574; Gellius, *N. A.* 20, 10; Livius 3, 44; Val. Prob. 4, 4; 4, 6; 4, 7; Varro, *De lingua Latina* 5, 36, 180.

had not come down to us, we would hardly know anything about the ancient *vindicatio*. Nobody would have been able to reconstruct the *l.a.s.i.r.* from the other fragmentary references and ambiguous allusions.

Therefore we shall have to start from a detailed analysis of Gaius. This is not only advocated by the incidental fact that fortunately his description happened to have come down to us, but also by the experience that Gaius was well acquainted with ancient law, so one may rely on him with confidence.

2. The proceeding was opened by the words and gestures of the plaintiff.²¹ He grasped the object of the dispute, recited the prescribed formula, and laid the ritual rod on the thing:²² *qui vindicabat, festucam tenebat; deinde ipsam rem adprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM SICUT DIXI ECCE TIBI VINDICTAM INPOSUI. Et simul homini festucam inponebat.*

(a) The formula poses a grammatical problem. It is questionable whether a full stop should be put before or after the expression *secundum suam causam*. In the first case, the words would refer to the gesture i.e. the laying of the rod on the thing, while in the second case they would refer to the oral formula, i.e. the declaration of being the owner.

Since Huschke, the second solution has usually been accepted²³ although some authors still cling to the older view.²⁴ The question is only of moderate importance, because the expression *secundum suam causam* can quite reasonably be attached to both parts of the formula, and in addition neither of the two possible solutions facilitates interpretation.

Nevertheless it seems that these words are likely to belong to the second sentence, so the full stop should be put before the word *secundum*. From a formula quoted by Valerius Probus (*secundum suam causam sicut dixi ecce tibi vindicta*) it can be inferred that for the Romans these words were a unit.²⁵

(b) The declaration of being the owner: *ego . . . meum esse aio* poses an incomparably greater problem of interpretation. One might very well ask: could these words mean—according to the theory of relative ownership—the better right of possession? Is it possible to translate the expression as “I own the thing more than you do”, or rather “I declare that the thing, with respect to you, is mine”?²⁶

²¹ Bertolini rightly stresses that Gaius avoids using the expressions “plaintiff” and “defendant” and designates the parties only as “*qui prior vindicaverat*” and “*adversarius*”. Cf. *Appunti didattici di diritto romano. Il processo civile I.* (Torino, 1913) p. 113 n. 1. For the sake of convenience, I shall use, however, the familiar terms.

²² In the text I usually speak of a “thing”, though the object of *vindicatio* could just as well be a person. It is not possible to discuss here the thorny question of *vindicta*. For details see Kaser, *RPR* p. 112 nn. 12–14. Cf. also Gioffredi pp. 105 ff; and M. Staszków, “Le commentaire de Gaius sur la “vindicta”, *Labeo* 8 (1962) pp. 317 ff.

²³ It was proposed by Huschke in the second edition of the Institutes of Gaius (Lipsiae, 1867). See also the more recent editions: Krüger-Studemund (Berolini, 1884); Seckel-Kübler (Lipsiae, 1908); *FIRA II*; M. David (Leiden, 1948).

²⁴ Noailles, “Vindicta”, *RHD* 1940 pp. 1 ff; Kaser, *EB* p. 367.

²⁵ Val. Prob. 4, 6.

²⁶ Thus Kaser, *EB* p. 117: “Das meum esse aio bedeutet aber . . . lediglich eine Behauptung

I think that such interpretations are impermissible. One might also add that nobody who is not acquainted with the theory of relative ownership would hit on the idea of attributing this complicated meaning to the simple expression. First, it cannot be supported from a linguistic point of view. On the contrary, the harsh and decisive declaration of ownership obviously speaks against it. Lévy-Bruhl rightly points out that ancient Roman law was not even satisfied with a simple *aio*, but for no apparent reason, the pronoun *ego* also had to be added. This bears witness to the fact "that the idea of an exclusive right on a thing . . . already existed".²⁷ Secondly, it is inconceivable that ancient Roman peasants would have understood this simple and clear declaration in such a sophisticated way.

The words "*ego . . . meum esse aio*" consequently mean exactly what they say, i.e. the thing is mine.²⁸ The expression fails to corroborate the theory of relative ownership.

(c) The interpretation of the word *causa* also presents difficulties. I shall return to the problem later on, because the word also appears in another part of the formula, and it has presumably the same meaning in both cases.²⁹

(d) Several authors, including Kaser, think that in the expression "*sicut dixi*" the perfect tense does not point to the proceeding *in iure*—one would expect the imperfect form—but refers to a preliminary, extrajudicial proceeding, which was carried out by the parties in the same formal way as the *vindicatio* itself. So the proceeding before the magistrate was but a mechanical reproduction of this preliminary ceremony.³⁰ Later on, the preliminary ceremony passed into oblivion, so neither Gaius, nor any other Roman author knew anything about it.³¹

It is difficult to accept this assumption. I think that the use of the perfect tense can be adequately explained by the significance of the *vindicatio*. This tense emphasizes in fact the irrevocability, the solemnity of a given act, without referring to a distant past.³² There is no justification for concluding from this tense that

besseren Rechts zur Sache . . ." Lübtow, *Kauf* p. 132 likewise believes that the expression had several degrees. Wubbe does not refrain from translating it by the words of the Common Law "I own it more than you do" (*Publiciana* p. 439 n. 72).

²⁷ Lévy-Bruhl, *Recherches* pp. 38 f. The absolute character of the formula is rightly stressed by De Francisci: ". . . ammettere che questi litiganti . . . asserissero e credessero di avere solo un diritto migliore a quello dell'avversario parmi un errore di visione . . ." (*Trasferimento* p. 78 n. 3). See also: Betti, *Studi Arangio-Ruiz* IV, pp. 93 ff.

²⁸ The same resulted with the *mancipatio*. On this *supra* p. 83.

²⁹ The view of Lévy-Bruhl (*Recherches* p. 44 n. 4), who attributes a different meaning to the word in the two phrases, is unconvincing. No result can be hoped for if one refuses to rely upon the few *points d'appui*.

³⁰ See Kaser, *EB* pp. 50 ff. especially p. 57. For a similar assumption consult Ihering, *Geist* III. p. 102 n; Krüger, *Capitis deminutio* p. 181. Against this view see Kunderewicz pp. 428 f.

³¹ Kaser, *EB* p. 58.

³² A similar use of the perfect tense is rather frequent. Occasionally Virgil uses it when referring to the future as well: *Aen.* 1, 278—79: *his ego metas rerum nec tempora pono, imperium sine fine dedi*.

there was a purely imaginary preliminary proceeding, no traces of which can be found in the sources.

The hypothesis of a legally prescribed and regulated preliminary proceeding, however, is in itself rather improbable. It is hardly credible that at an age when the state could but imperfectly control social relationships; and found great difficulty in limiting self-help, a broader area would have been regulated by law than at a higher stage of development.

3. The defendant uttered the same words and performed the same gestures;
adversarius autem similiter dicebat et faciebat.

Up to this point the lawsuit displays a perfect symmetry. Both parties assert ownership, both perform the same gestures. Thus the state of affairs is clearly defined: two persons stake a claim to the possession of the same thing as owners, consequently one of them is necessarily in the wrong, and the dispute has to be decided.

4. Afterwards the magistrate orders the litigants to release the object of the lawsuit:

cum uterque vindicasset, praetor dicebat: MITTITE AMBO HOMINEM

These words indicate the intervention of the state in the dispute of the parties. The *praetor*, who hitherto behaved passively, prevents symbolically by his order the private struggle; he removes the object from the parties, and takes in hand the decision making of the matter himself.³³

5. After the order of the magistrate the plaintiff has to speak again, and he asks the defendant the following question:

POSTULO ANNE DICAS QUA EX CAUSA VINDICAVERIS?

The hitherto undisturbed symmetry of the proceeding is now upset, because the defendant does not return the question, but gives the following answer:

IUS FECI SICUT VINDICTAM INPOSUI

(a) From the text of Gaius it can be clearly seen that only the plaintiff inquires after the *causa* of *vindicatio*, and thus the stress is laid upon the rightfulness of the *contravindicatio*.³⁴

(b) The interpretation of the word *causa* is rather tricky here, just so it is in the expression *secundum suam causam*. Different solutions have been put forward.

It has been suggested that *causa* denoted the state of the object of the lawsuit.³⁵ This interpretation could be accepted in the first case, because in the expres-

³³ Lévy-Bruhl thinks that the part "*mittite . . .*" is of later origin (*Recherches* pp. 51 f. and p. 172). His assumption is, however, unfounded and improbable.

³⁴ Though the text of Gaius is clear and hardly likely to be misunderstood, several authors believe that both parties had to put the question. Cf. Ihering, *Geist* III. p. 95; Lévy-Bruhl *Vindicateiro* p. 98; Thormann, *Auctoritas* p. 63. For a correct view see: Kaser, *EB* p. 55.

³⁵ Cf. Bethmann-Hollweg I. p. 139; Lévy-Bruhl, *Recherches* p. 4. The latter scholar, however, thinks that in the question *qua ex causa*, the word means "why"? (*Ibidem* pp. 59 f.) Cf. n. 29.

sion *secundum suam causam*, the word could well denote the state, the legal situation of the *homo* or *res*, provided the expression referred to the declaration of ownership, which, however, is open to objections.³⁶ But if one tries to apply this meaning to the question: “*qua ex causa . . .*” it can be seen that the suggestion must be rejected, for it fails to make reasonable sense in both cases.

According to Noailles the word *causa* refers to the ritual power of *vindicatio*.³⁷ Apart from the fact that no such meaning of *causa* can be attested in Latin, the question of the plaintiff would become entirely senseless if one adopted this translation. And I should not think that ancient law invented formulas devoid of any meaning.

Some scholars think that *causa* means here—as it does in advanced legal language—the title of acquisition.³⁸ The objection might be raised that since the expression *secundum suam causam* refers either to the object of the lawsuit or to the *vindicatio* itself, the enigmatic word could denote the *causa* of either the thing or the lawsuit, but on no account that of the acquisition of ownership.³⁹ In the question of the plaintiff this translation would surely give a reasonable meaning, but—as has been pointed out by Koschaker⁴⁰—this interpretation is too rational for the low level of development of the *l.a.s.i.r.* Indeed, it is hard to believe that though no clear notion of ownership was yet in existence at the age the legal protection of ownership was created, and the boundaries of the institution were still uncertain, a hierarchy and system of modes of acquisition would have been known, as is implicitly supposed by this view.

I think that in our case the word *causa* was used in its original meaning “cause”. In the first expression it denotes the cause of the *vindicatio*, in the second one, however, the cause of the *contravindicatio*.⁴¹ This interpretation is not only advocated by the fact that in such a way both expressions have a sound meaning, but also by the experience that in case of doubt, archaic texts can best be interpreted if one relies upon the original meaning of the words.

(c) The answer given by the defendant (*ius feci sicut vindictam inposui*) also corroborates my view.

³⁶ See *supra* p. 97.

³⁷ Noailles, *RHD* 1940, pp. 1 ff. On this see Koschaker IV.

³⁸ Thus Ihering, *Geist* III. p. 102; Mayr, *RG* p. 49; Kaser, *EB* pp. 53 ff; and *Neue Studien* p. 142.

³⁹ According to Kaser (*EB* p. 54) *causa* not only denoted the title of acquisition, but also legal grounds of later origin (e.g. *usus auctoritas*). But if it were so, the word would refer to the past and not to the *vindicatio* itself.

⁴⁰ Koschaker IV. p. 467. n. 25. Cf. also Krüger, *Capitis deminutio* pp. 169 f. and Lotmar I. p. 107.

⁴¹ Krüger refers the word *causa* rather vaguely to the ownership created (!) by *vindicatio* (*Capitis deminutio* p. 170.). According to Lévy-Bruhl, the word here means “why”? (Cf. n. 33), but, arbitrarily enough, he thinks that the question, nay, the whole proceeding was but an empty formality, where the rightfulness of the statements was not dealt with. Cf. n. 44.

According to Kaser, the question and the answer are incongruous, and he supposes that originally the defendant had to specify the actual title of acquisition.⁴² In the course of development, when the burden of proof gradually became incumbent upon the plaintiff, the reasonable answer was replaced by this vague formula, by which the defendant practically refused to give information, shifting the burden of proof upon the plaintiff.

Thormann brought up the objection that no evidence had been produced in the proceeding *in iure*, so there was no need to specify the title of acquisition.⁴³ But even more conclusive arguments can be adduced against the conjecture of Kaser.

First, it is entirely without foundation to state that Gaius is not reliable in this point. The words of the defendant (*ius feci . . .*) are of the same archaic character as are the other oral formulas of the proceeding; nothing points to their possibly later origin.

Secondly, an objection can be raised regarding the logic of Kaser's assumption. The conjecture that the lawsuit was—in a modern sense—rational because the defendant had to specify the title and thus give a logical answer, and at a higher stage of development, this rational element was eliminated, only to be substituted for by an empty, out-of-date and deliberately archaized formula is at variance with general experiences and with the development of Roman law. It is true that Romans sometimes stuck to old legal forms, which had lost their meaning and practical advantages, but no case is known, when they substituted rational forms for empty ceremonies.

If one does not obstinately stick to the idea that the word *causa* necessarily means in this case the title of acquisition, but translates it according to its original meaning by "cause", there is no need to arbitrarily cast doubt on the reliability of Gaius. The plaintiff asks: "I demand, tell me why did you vindicate the thing." The defendant, however, replies "I did it according to law . . ." So he does not specify any title of acquisition, but asserts the lawfulness of his *vindicatio*, he asserts his right.

6. The plaintiff does not recognize the right of his adversary, and declares:
QUANDO TU INIURIA VINDICAVISTI D AERIS SACRAMENTO TE PROVOCO.

The defendant, as could be seen, declared that his *contravindicatio* was lawful; the plaintiff, however, thinks that the *contravindicatio* is unjustified.⁴⁴

⁴² Kaser, *EB* pp. 84 ff. and *Neue Studien* p. 142. A similar view is held by Mayr, *RG* p. 49. Against this view see Gioffredi pp. 55 f.

⁴³ Thormann, *Auctoritas* p. 64. n. 198.

⁴⁴ It is not easy to define more closely the meaning of *iniuria* in this connexion. Presumably it does not denote the delict of libel, but "delict" in general—"contravention of law". I cannot accept the view of Kaser: "Das iniuria vindicare bedeutet nicht mehr als die materiell ungerechtfertigte Behauptung besseren Rechts zum Besitz." (*EB* pp. 69 f.). In his more recent writings, he himself does not completely deny the delictual quality of *iniuria*. Cf. *Neue Studien* p. 142. Against the delictual quality see D. V. Simon, "Begriff und Tatbestand der "iniuria" im altrömischen Recht", *SZ* 82 (1965) p. 138. A rather peculiar view was expressed by Lévy-

The declaration of the defendant: *ius feci* . . . was not an empty formality, but the logical introduction to the next statement of the plaintiff (*quando tu iniuria* . . .). These two contradictory statements specified more closely the object of the lawsuit: the lawfulness of the *contravindicatio*. This was the object of the wager offered by the plaintiff.

7. The defendant accepts the proposal, saying:

ET EGO TE.

Roth rightly stresses that only one wager was entered, and this on the lawfulness of the *contravindicatio*.⁴⁵ The symmetry of ancient Roman law would have required the depositing of four sums if the wager had been entered on the right of both parties.⁴⁶ It has, however, been proved that the parties had to deposit only one sum of money,⁴⁷ and from the aforesaid it can be deduced that the lawfulness of the *contravindicatio* was the object of this single wager.⁴⁸

8. The analysis of the description given by Gaius has led us to the conclusion that the structure of the *l.a.s.i.r.* was only symmetrical in the first part of the proceeding *in iure*. With the question of the plaintiff (*postulo anne dicas* . . .) the symmetry was upset, and the right of the defendant became the object of the wager, and so of the lawsuit.

This leads to the second conclusion that the right of the defendant was the object not only of the lawsuit, but also of evidence, i.e. the burden of proof was borne by him.

III. THE BURDEN OF PROOF

1. The rule that in a lawsuit on ownership the right of the plaintiff is left out of account, and only the right of the defendant is examined, contrasts sharply with contemporary legal ideas, and one is reluctant to accept this conclusion. It is

Bruhl (*Recherches* pp. 53 and 61 f.). He thinks that by the statement *ius feci* the defendant declared he had only duly performed the ritual of *vindicatio*, and the plaintiff charged him with a violation of the formalities. It is, however, hard to believe that a judicial proceeding, the forms of which were simple enough, and which took place before the largest publicity, could have been based on the hope that one of the parties would violate its ritual. For, if both of them performed everything properly, and this must have been the typical case, the charge would have been pointless. But, as I have already had the opportunity to point out, even ancient law did not invent senseless forms. Against Lévy-Bruhl see Gioffredi p. 56.

⁴⁵ Roth p. 134.

⁴⁶ See the equally remote rules of the procedure by interdicts, where in the case of an *interdictum duplex* four *sponsiones* were needed.

⁴⁷ Thus Varro, *De lingua Latina* 5, 36, 180: *Qui petat et qui infitiat, de aliis rebus uterque quingenos aeris ad pontem deponebat . . . qui iudicio vicerat suum sacramentum e sacro auferebat, victi ad aerarium redibat.*

⁴⁸ From here onwards (4, 16–17), Gaius deals with procedural questions which are irrelevant to our problem.

probably due to this psychic fact that although this possibility has already been weighed up by literature, writers did not dare draw the inevitable conclusions.⁴⁹

2. This peculiarity of the *l.a.s.i.r.* is likely to be explained by the consideration that in ancient Rome—as in other undeveloped legal systems—the proprietary remedy was closely connected with the pursuit of theft. This connection is generally recognized, especially since Kaser has clarified this point.⁵⁰

The proprietary remedy was originally connected with a suspicion of theft. If the owner was informed that some goods of his were in another's possession, the first idea that came to his mind was that the possessor had stolen them from him. So it was the possessor's duty, nay his right, to clear himself from suspicion. This, however, could be done only by proving a right to the thing in question. Provided the plaintiff had been obliged to bring evidence, as happens nowadays, this purpose could not have been realized, since even if the plaintiff had failed to prove his ownership, his adversary would not have been freed from suspicion.

This was also the underlying idea of the *l.a.s.i.r.*, although the lawsuit—in the form it has come down to us—was already separated from the pursuit of theft. Notwithstanding the statement of the plaintiff: *quando tu iniuria vindicavisti*, without referring expressly to theft, is still a charge of unlawful conduct.⁵¹

3. This view, based upon Roman sources, is also confirmed by the experience that undeveloped legal systems generally adopt this solution. Though one is not entitled to fill in the gaps of our knowledge with analogies, nevertheless parallels confirm conclusions drawn from the sources of a given legal system.⁵²

(a) Greek law had no action corresponding to the Roman *vindicatio*,⁵³ but possibly in Greece too there existed a kind of lawsuit on ownership where the burden of proof was borne by the defendant.⁵⁴

⁴⁹ Thus Munderloh, "Ueber Schein und Wirklichkeit in der legis actio sacramento in rem", *ZRG* 13 (1878) p. 467. The sudden fear of the inevitable conclusion is characteristically displayed by Roth and Watson, Cf. n. 8.

⁵⁰ Thus Kaser, *EB* pp. 68 ff. and *Neue Studien* pp. 135 ff. Cf. also Mayr, "Das sacramentum der legis actio", *Mélanges Girard* II. (Paris, 1912) p. 200. He thinks that the *l.a.s.i.r.* and the Germanic "anefang" were analogous institutions. A convincing refutation comes from Kunderevich pp. 426 ff. Voci (*Modi* p. 281) denies without giving grounds, the connection that existed in ancient law between the proprietary remedy and the pursuit of theft.

⁵¹ Cf. n. 44. The delictual character is strongly emphasized by Rabel, *SZ* 38 (1917) pp. 314 f.

⁵² On this see Diódsi, "A jogösszehasonlító módszer alkalmazásának hasznáról és veszélyeiről az ősi római jog kutatásában" (On the use and dangers of adopting the comparative method in researches in the field of ancient Roman law), *Acta Fac. Pol.-Iur. Universitatis Scient. Budapest* 10 (1968) pp. 133 ff.

⁵³ Cf. Leist, *op. cit.* in n. 11; J. H. Lipsius, *Das attische Recht und Rechtsverfahren* II. a. (Leipzig, 1908) pp. 674 ff.; Kaser, "Der altgriechische Eigentumsschutz", *SZ* 64 (1944) pp. 134 ff. Recently see Kränzlein pp. 138 ff.

⁵⁴ Leist and Kaser try to find a similarity between the "*diadikasia*" and Roman *vindicatio*. See Kaser, *op. cit.* in n. 53 pp. 179 ff. Kränzlein argues, however, convincingly that this procedure was not applied to the protection of ownership (pp. 141 ff.). The traditional view is professed by A. R. W. Harrison, *The Law of Athens* (Oxford, 1968) pp. 214 ff.

(b) A more striking similarity exists between ancient Germanic law and the *l.a.s.i.r.*⁵⁵ The defendant here also had to declare he was the owner, and it was both his duty and his right to bring evidence.⁵⁶

(c) An analogous solution can also be found in Babylonian and Egyptian law.⁵⁷

These analogies touched upon show clearly that in undeveloped legal systems the idea that the defendant has to prove his right in a proprietary lawsuit is the natural one.⁵⁸

Despite this it would be certainly wrong to identify the ancient Roman *vindicatio* with the analogous legal remedies of Germanic or Babylonian law in every respect. Roman law at this stage had already surpassed the solutions of other equally undeveloped legal systems, because it disposed of a uniform legal remedy for the protection of patrimonial and personal relationships. The uniform *vindicatio* contributed a great deal to the formation of the classical notion of ownership.

4. I think that my view is sufficiently corroborated by the analysed text of Gaius and the adduced analogies, and so it is proved that in the *l.a.s.i.r.* only the right of the defendant was taken into consideration; the defendant had to bear the burden of proof exclusively. But there is still another possible objection to be reckoned with.

What happened if the defendant failed to prove his right? Was the thing adjudged to the plaintiff regardless of whether he was the owner of the thing or not?

In modern times this objection would not be completely unfounded, though even to-day in a lawsuit on ownership—inversely—the same results if the plaintiff happens to be unable to prove his right of ownership. In this case the defendant may keep the thing, although it is not at all sure that he is its owner. In the case of the ancient *vindicatio*, however, we have to take into account the social conditions, for which the forms of the lawsuit were made. By the age, that *l.a.s.i.r.* had taken shape, Rome was a small community of, say, ten or twenty thousand citizens.⁵⁹ The lawsuit, however, took place before the greatest publicity, so it was practically out of the question that two persons could have quarrelled for something which actually belonged to a third person. It was a sheer impossibility that the owner would be unaware of the lawsuit. So, if he had a claim to the thing, he was surely not willing to let other people vindicate it. Consequently, nobody was likely to take the risk of bringing a *vindicatio* for an alien thing.

Theoretically, the *l.a.s.i.r.* was of course but an imperfect proprietary remedy, but the proceeding was not shaped by abstract legal considerations, but by practical needs. Since it could bring about the desired result in a small community,

⁵⁵ See Bethmann-Hollweg IV. pp. 23 ff. It deserves mentioning that Lotmar (II. pp. 174 ff.), having shown the analogy, quite inconclusively drops the idea.

⁵⁶ Bethmann-Hollweg IV. p. 40.

⁵⁷ San Nicolò, *Kauf* pp. 23 f., 106, 165 f., 168.

⁵⁸ The thought that the culprit has to show evidence is still alive in undeveloped societies. Cf. G. Lepointe, "Une ordalie privée en pays Malgache", *Mélanges Lévy-Bruhl* (Paris, 1959) pp. 431 ff.

⁵⁹ Cf. Kunkel, *RG* p. 1. For further details see De Martino I. pp. 68 ff.

it proved to be a satisfactory solution for a certain time. As long as the *l.a.s.i.r.* was in line with social relationships, nobody urged a greater refinement of the protection of ownership. New proprietary remedies were created only in pre-classical law.

IV. CONCLUSIONS

1. The right to ownership, as soon as it is enforced in a lawsuit, becomes relative,⁶⁰ so the relativity of the judicial decision does not amount to the relativity of the substantial law. The sentence in a contemporary lawsuit on ownership is equally relative in the sense that the decision is taken with respect to the parties. It may even happen that the thing is adjudged to the plaintiff as the owner, although actually it belongs to a third person who had not been party to the lawsuit. Nevertheless, as far as I know, nobody holds the view that at the present time the right of ownership would therefore be a relative one.⁶¹

Consequently, even if in the *l.a.s.i.r.* the judge had taken his decision after having examined the right of both parties, this would not bear witness to the relative character of ownership. Since, however, the object of the dispute was in all likelihood exclusively the right of the defendant, the structure of the ancient *vindicatio* contradicts expressly the theory of relative ownership.

2. The other features of the *l.a.s.i.r.* are likewise hardly congruous with the theory of relative ownership:

(a) The declaration *meum esse* is of an exclusive character. It can be understood as the claim to a relative title only by an unnatural interpretation.⁶²

(b) Those who profess the theory of relative ownership, are generally inclined to neglect an important feature of the lawsuit. As is well known, the judge decided upon the rightfulness of one of the wagers (*iustum*), and declared the other one *iniustum*. Our sources exclude the possibility of leaving the debate undecided, or of judging both *sacramenta* as *iusta* or *iniusta*.⁶³

⁶⁰ Cf. Világgy—Eörsi I. p. 268.

⁶¹ Kaser tries to eliminate this weak point of his view by the assumption that in ancient law the judicial decision was also valid against third persons (*AJ* pp. 104 ff.). His hypothesis, however, is devoid of any basis in the sources, and contradicts his own theory, because the absolute validity of the sentence would have meant absolute ownership. His assumption also lacks probability. The absolute validity of a judicial decision would mean in fact that if a lawsuit had once been brought for a given thing, nobody could have vindicated it in the future. Kaser himself is aware of this difficulty, because he declares that the absolute validity was dependant on the fact that "sich inzwischen nichts geändert hatte, und nur dann lag eadem res vor" (*AJ* p. 115). The rule *bis de eadem re ne sit actio* is not likely to have been understood in such a sophisticated way. Contrary to the view of Kaser see Arangio-Ruiz, *Istituzioni* p. 115 n. 2.

⁶² On this *supra* pp. 97 f.

⁶³ See the sources mentioned in n. 20. and Cicero, *Rosc. com.* 4: *Ad iudicium hoc modo venimus ut totam litem aut obtineamus, aut amittamus*. Cf. also Jobbé-Duval pp. 360 f.

The proceeding is clearly based upon the idea that only one of the two contradictory statements can be true. This speaks, however, against the assumption of a relative ownership. If the ancient ownership had been of a relative character, this would be inconceivable, because both statements would have been true and only the right of one of the parties would have been comparatively better than that of his adversary.

The object of the wager, however, was the right of the defendant. If he could prove it, his wager was *iustum*, if he failed, so the statement of the plaintiff that the *contravindicatio* was not rightful, the defendant *iniuria vindicavit*, was true.

(c) It is equally awkward from the point of view of relative ownership to explain why the plaintiff charges his adversary with *iniuria*. This charge would have been pointless, if the defendant, even if he had a relative title, could have been defeated. The confrontation of *ius* and *iniuria* is clearly based upon the idea that the defendant is either owner, or he is not. A third possibility is not envisaged by the proceeding.

3. Beside the features mentioned a further, and I think, insurmountable difficulty for the theory of relative ownership arises from the indisputable fact that absolute rights were also protected by the *l.a.s.i.r.*

(a) Kaser himself had to admit that several titles of acquisition, like *usus auctoritas, in iure cessio* or *occupatio*, had already created an absolute ownership in ancient law.⁶⁴

(b) It is generally acknowledged that personal power was always an absolute right,⁶⁵ and it is equally beyond doubt that this absolute power was protected by the *l.a.s.i.r.*⁶⁶ In addition, it is not likely that the *paterfamilias* had an absolute right over some objects of the homogeneous *mancipium*-power, and only a relative right over others.

(c) It has been proved and also admitted by the authors who profess the view of relative ownership that the *l.a.s.i.r.* was also used for the protection of absolute rights. It is in itself hardly imaginable that the same judicial proceeding could have been suitable for the protection of both absolute and relative rights, but the fact that the *l.a.s.i.r.* served also the enforcement of absolute rights, excludes the possibility of concluding from its structure that ownership had a relative character.

4. The analysis of the *l.a.s.i.r.* has led us to the conclusion that only the right of the defendant was examined, and, consequently, the defendant bore the burden of proof. From this, and from other considerations, we may safely conclude that the ancient *vindicatio*, instead of supporting the theory of relative ownership, is in several points irreconcilable with it.

⁶⁴ Kaser, *Neue Studien* p. 165 and *RPR* pp. 108 and 120.

⁶⁵ This is also admitted by Kaser (*EB* p. 6). This argument against the theory of relative ownership has been already adduced by Bozza, *Iura* 1 (1950) p. 402 and Voci, *Modi* p. 282.

⁶⁶ See *supra* p. 55.

THE ORIGIN OF SERVITUDES, *FIDUCIA* AND *PIGNUS*

I. PRELIMINARY REMARKS

1. Dealing with the formation of Roman ownership, one also has to examine those rights on a thing belonging to another (*iura in re aliena*),¹ which came into existence during the period of ancient law.² In fact, according to a widespread, nay, prevailing view, ownership which originally had been the only *ius in re*, embraced also the servitudes and pledge. The latter have been recognized as independent rights only gradually, so their formation was but the process of a dismemberment of ownership.

The theory advanced by Koschaker³ and developed by Kaser⁴ is of special importance. They hold the view that the *iura in re aliena* were originally conceived as a functionally divided ownership. What is meant by this artificial expression is that the person entitled to a servitude or a right of pledge was the owner of the given object,⁵ but his ownership was confined to the exercise of the corresponding functions (e.g. to using the neighbour's water etc.).⁶ So, ancient ownership was

¹ This chapter is a modified version of my paper published in Hungarian: "A telki szolgálomak és a zálogjog keletkezéséről a római jogban" (On the origin of predial servitudes and pledge in Roman Law), *Acta Fac. Pol-Iur. Universitatis Scient. Budapest* 8 (1966) pp. 91 ff.

² *Ususfructus* will be dealt with in the first chapter of part two, because, according to the prevailing view, this institution had come into existence only by the third century B. C. Cf. Bretone, *Usufrutto* p. 20; Kaser, *RPR* p. 376.

³ Cf. Koschaker I. Concerning Greek law, see *SZ* 51 (1931) pp. 427 ff. and: "Über einige griechischen Rechtsurkunden aus den östlichen Randgebieten des Hellenismus", *Abh. d. Akad. Leipzig. Phil.-hist. Kl.* vol. 42, N. 1. The latter, however, was not available to me.

⁴ Cf. Kaser, *Geteiltes*; *EB* pp. 16 ff. and 302 ff. He has been followed by E. Weiss, "Zwei Beiträge zur Lehre vom geteilten Eigentum", *Pragmateiai tes Akademias Athenon* vol. 14, 3 (1949) pp. 1 ff. and *RPR* p. 220; Wubbe, *Usureceptio*.

⁵ In the first edition of his *EB* Kaser thought the same of *ususfructus*. In his *RPR* (p. 126) he already displayed the utmost caution, and recently he abandoned his original view. See *Labeo* 9 (1963), pp. 366 ff.

⁶ "Wir lernen hier mithin eine neuartige Mitberechtigung kennen, die sich vom Miteigentum des späteren Rechts durch die Unbestimmtheit der lediglich vom Zweck abhängigen Anteile, von der Gesamthand des Gaius von Antinoe durch die inhaltliche Beschränkung der Befugnisse der Beteiligten unterscheidet" — writes Kaser in *Geteiltes* p. 457. The following sentence reveals another aspect of his theory: "Jeder ist neben dem anderen als Eigentümer berechtigt, und weil die beiden Eigentumsrecht nicht in einer Rechtsgemeinschaft stehen, sind zwischen den beiden *mancipatio* und *vindicatio* möglich." (*Labeo* 9, 1963, p. 369). Kaser links the theory of divided ownership with his view on relative ownership, and considers divided ownership to be a consequence of the supposed relativity of *meum esse*. In fact if this expression denoted every right to possession, so "ist die Existenz selbständiger Sachenrechte neben dem Eigentum zu verneinen." (*EB* p. 17). Wubbe goes even further, and regards divided and relative ownership as the same notion (*Usureceptio* p. 38.).

a broad category which embraced all forms of domination over things ("Sachherrschaft").⁷ Numerous attacks have been launched at this theory,⁸ but mostly by authors who themselves believe in the derivation of *iura in re aliena* from ownership, and disagree solely with the idea of a functionally divided ownership.

2. It is true that the prevailing view starts from the correct thesis that among real rights ownership has historical precedence. But this does not necessarily mean that the *iura in re aliena* are derived from ownership. Such a conclusion would be merely an impermissible retrojection of modern ideas on the structure of real rights into history.

It is well established among continental specialists of civil law that the *iura in re aliena* are, as far as their dogmatic structure is concerned, individualized partial rights, separated from ownership.⁹ This thesis, however, is not a historical statement, for the *iura in re aliena* are not partial rights separated from ownership in the sense that they are historically derived from an originally all-embracing ownership. This explanation holds true only for the dogmatic structure of a given, concrete *ius in re aliena*.

Notwithstanding, the prevailing view, although probably not deliberately, conceives this thesis as a genetic principle, and thus involuntarily deduces the origin of Roman *iura in re aliena* from contemporary legal dogmatics. This may surely appease the intellectual craving for the formal perfection of scholars devoted to systematization, but it is hardly suitable for supplying a reliable basis for the reconstruction of historical development.¹⁰

⁷ "Als blosses Recht zum Besitz ist dieses (namely ownership) so umfassend, dass es auch die Funktionen der beschränkten Sachenrechte in sich schloss." (Kaser, *EB* p. 17.).

⁸ Against Koschaker there is E. Schönbauer, "Paramone, Antichrese und Hypothek", *SZ* 53 (1933) pp. 422 ff. Cf. also G. G. Archi, *SDHI* 22 (1956) pp. 412 f; Bretone, *Usufrutto* pp. 33 f; Grosso, *Problemi* pp. 37 f. and *SDHI* 23 (1957) pp. 386 f. Gioffredi too shows scepticism: "se pure colgono un aspetto della realtà che si studia, possono valere solo come approssimazione." (p. 215).

⁹ This view was already expounded by Donellus. See *Donelli iurisconsulti commentaria de iure civili* I. (Francofurti, 1589) pp. 426 ff. In the nineteenth century it was vigorously sustained by Vangerow, *Lehrbuch der Pandekten* I. (7. ed.) (Marburg-Leipzig, 1863) p. 686. n. 1. Contra: Windscheid, *Lehrbuch des Pandektenrechts* I. (9. ed. Bearb. v. T. Kipp. Frankfurt a. M., 1906) p. 1022 n. 3 with references. Mention should be made of Schönemann, who equally criticised the conception of ownership as the "Mutterrecht" of *iura in re*, but he erroneously put it down to the historical precedence of servitudes. See O. Schönemann, *Die Servituten* (Leipzig, 1866) pp. 15 ff. From more recent literature: R. De Ruggiero, *Istituzioni di diritto civile* II. (Milano, 1934) p. 483; M. Planiol-G. Ripert, *Traité élémentaire de droit civil* I. (Paris, 1939) p. 954; P. Tuor, *Das neue Recht. Eine Einführung in das Schweizerische Zivilgesetzbuch* (Zürich, 1912) p. 429. In Hungarian literature too the view of Vangerow prevails. Cf. E. Nizsalovszky in *Magyar Magánjog* (Hungarian Private Law) edited by K. Szladits V. 3 (Budapest, 1939) pp. 322 f. and Világhy-Eörsi I. p. 314.

¹⁰ On the dangers of this type of approach see M. Móra, "Bemerkungen zu der historischen Betrachtungsweise im römischen Recht", *Acta Juridica Acad. Scient. Hungaricae* 7 (1965) especially p. 22.

3. It is perhaps not out of place to recall some well-known facts, which throw light on the fundamental differences between the system of Roman private law and contemporary continental civil-law systems, in order to stress the inapplicability of the modern category of "Sachenrecht" to Roman law.

Roman law was not acquainted with the notion of *ius in re aliena*,¹¹ and it did not even clearly separate the law of property ("Sachenrecht") from the law of obligations ("Obligationenrecht").¹² The procedural notions of *actio in rem* and *actio in personam* were but a preliminary step towards a differentiation between these two areas of private law.¹³

Faced with these fundamental differences it is obvious that the modern dogmatics of civil law can hardly lend support to the reconstruction of the history of *iura in re aliena* in Rome. We must bear in mind that the view expounded above on the structure of *iura in re aliena* is merely a theoretical explanation, and one cannot expect history to comply with our legal ideas. I am inclined to conceive the development of the *iura in re aliena* in a way different from the prevailing view. It is likely that the ancient servitudes and *pignus* have come into existence as independent rights,¹⁴ and were originally rather heterogeneous as regards their legal nature. So, Roman lawyers, instead of dismembering an all-embracing ownership, approached heterogeneous institutions, which were designed to meet different economic demands, and thus they progressed from the concrete towards the abstract. This is not only congruous with the general regularities of the development of the human mind, but explains at the same time the lack of a notion of *iura in re aliena*. For if the supposed dismemberment of ownership had really taken place, it is inconceivable that Roman lawyers would not have realized the affinities and differences of ownership and *iura in re aliena*, and they would have certainly saved later lawyers the trouble of having to invent the notions of "Sachenrecht" and *ius in re aliena*.

II. THE ORIGIN OF SERVITUDES

1. The literature on the origin of servitudes might very well be divided into two classes. According to the majority, the servitudes are derived from ownership while some writers are of the opinion that they have come into existence as independent rights.

¹¹ Cf. e.g. A. B. Schwarz, *Rechtsgeschichte und Gegenwart* (Karlsruhe, 1960) p. 18.

¹² Cf. e.g. Arangio-Ruiz, *Istituzioni* p. 173; Kaser, *RPR* p. 316 n. 1; Perozzi, *Istituzioni* pp. 612 ff. Recently, Scherillo has taken a different stand. Cf. G. Scherillo, "Il concetto di diritti reali. Considerazioni storico-dogmatiche", *Studi Betti* IV pp. 81 ff. His view, however, is not convincing.

¹³ Hunter rightly points out that this distinction is not yet the equivalent of "Sachenrecht" and "Obligationenrecht". See W. A. Hunter, *A Systematic and Historical Exposition of Roman Law* (London, 1903) p. 451.

¹⁴ So, I agree in essential points with the authors referred to in nn. 19–21, though not on every point.

2. Authors belonging to the first group believe that the right of passage originally meant ownership of the corresponding strip of land, and the right of water, ownership of the water and the pipes viz. channels as of corporeal things.¹⁵ This theory, however, has been expounded in three different fashions.

In the opinion of Biondi and other, for the most part, Italian scholars, ownership was exclusive.¹⁶ Grosso supposes a co-ownership between neighbours,¹⁷ while Koschaker and Kaser conceive it as a functionally divided ownership. According to Kaser, both neighbours had ownership of land or water, but in a given lawsuit the party entitled to the "servitude" had a better right.¹⁸

3. Those authors who think that the servitudes were independent rights from the beginning, equally disagree among themselves on several points. Perozzi e.g. sought the origin of the servitudes in the relationships that had existed between the *gentes*.¹⁹ Ofner was of the opinion that servitudes were derived from neighbourship-relations,²⁰ whereas other authors sought their origin in the lawsuit on the division of the inheritance.²¹ In Hungarian literature Brósz seeks a connection between the origin of the servitudes and the dissolution of common property on land, attributing a great importance to state intervention.²²

4. Unfortunately no sources exist that would give any information about the origin of servitudes. This is why we have to choose a different method from that adopted in the previous chapters. Obviously the servitudes are either derived from ownership, or they have come into existence as independent rights: *tertium non datur*. So, if we examine the arguments usually adduced for and against the theory of ownership, an acceptable conclusion may be hoped for. Of course, the result will be hypothetical to some extent, but in this case even a higher degree of probability is of some value.

¹⁵ As far as I know the theory was founded by Voigt. Cf. "Ueber den Bestand und die historische Entwicklung der Servituten und Servitutenklagen während der römischen Republik", *Sb.d. Kön. Sächs. Ges. d. Wiss. Phil-hist. Kl.* (Leipzig, 1874) and: *XII Tafeln* pp. 345 ff. See also Ambrosino, *Mancipatio* pp. 588 ff; Aru pp. 3 ff; Biondi, *Servitutes* and: *Servitù prediali* (Milano, 1944) pp. 20 ff; Bretone, *Usufrutto* pp. 26 ff; Cornil, *Ancient droit* p. 70; Grosso, "L'evoluzione storica delle servitù nel diritto romano e il problema della tipicità", *SDHI* 3 (1937) p. 274 and "Sulla servitus di aquae haustus", *BIDR* 40 (1932) p. 419, further *Problemi* pp. 35 ff. Cf. also n. 4.

¹⁶ Thus Aru p. 7; Biondi, *Servitutes* pp. 659 ff; Bretone, *Usufrutto* p. 32, and two recent Italian monographs, which I unfortunately could not get hold of: G. Franciosi, *Studi sulle servitù prediali* (Napoli, 1967) Cf. Kaser, *SZ* 85 (1968) pp. 517 ff. and L. Capogrossi Colognesi, *Ricerche sulla struttura delle servitù d'acqua* (Milano, 1966) Cf. D. Medicus, *SZ* 85 (1968) pp. 522 ff.

¹⁷ Grosso, *Problemi* p. 36. A similar view: Ambrosino, *Mancipatio* p. 590.

¹⁸ See nn. 4-7.

¹⁹ Perozzi, *Istituzioni* pp. 753 f.

²⁰ J. Ofner, *Der Servitutenbegriff nach römischem und österreichischem Recht* (Wien, 1884) p. 34.

²¹ Thus Girard-Senn p. 382.

²² Brósz pp. 6 ff. and 10.

The following arguments are adduced in favour of the prevailing view. It is asserted that ancient law conceived the servitudes as corporeal things. This would follow from their belonging to the category of *res mancipi*, and from their transfer by *mancipatio*.²³ The conception of corporeal things, it is said, corresponds better to primitive mentality than does the idea of servitudes as rights. The *lex Scribonia*, which abolished the *usucapio* of servitudes, was issued because servitudes already fell into the category of *res incorporales*.²⁴ The applicability of *vindicatio* to servitudes equally points to their derivation from ownership.²⁵

Surprisingly enough these scholars refer with predilection to classical texts, where the lawyer emphasizes that a servitude is not a corporeal thing, and that it is different from ownership.²⁶ Koschaker and Kaser quote a single text as an argument for their theory, which will be discussed later on.²⁷

It can be seen that the theory of ownership is based above all on different considerations, and not on sources. So thought has to be given to the validity of these considerations.

5. Before going into details, I should like to point out some general shortcomings of the prevailing view, which are partly due to the neglect of the economic background and the practical purpose of servitudes.

(a) Those scholars who consider that the ancient servitudes meant an exclusive ownership on land or water, as a rule cautiously abstain from dwelling on the practical consequences of such a solution.

Seidl and Brósz rightly object that exclusive ownership would be incongruous with the economic purpose of a servitude. This would mean in fact that the owner of the serving plot would not have been allowed to tread on the path leading through his land and his plot would have been split up into two parts.²⁸ It is equally inconceivable that anyone would give up using the water of a well situated on his own land.²⁹

²³ Thus Biondi, *Servitudes* pp. 660 ff.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ Biondi, *Servitudes* pp. 660 ff. e.g. refers to the two following fragments: Lab. *D.* 50, 16, 86: *Quid aliud sunt iura praediorum, quam praedia qualiter se habentia: ut bonitas, salubritas, amplitudo?* Brósz rightly objects (p. 7) that Labeo does not identify the plot with the servitude, but the servitude with its qualities. In addition, all this is said about the serving plot, not the dominant one. The fragment of Ulpian in *D.* 8, 5, 4, pr. (*Loci corpus non est domini ipsius cui servitus debetur, sed ius eundi habet*) is equally irrelevant.

²⁷ Paul. *D.* 8, 3, 7, pr. Quoted and discussed in the text. *Infra* p. 113.

²⁸ E. Seidl, *BIDR* 46 (1939) pp. 432 f. and Brósz p. 7.

²⁹ Bretone wants to eliminate objections of this kind by denying the economic importance of servitudes in ancient law (*Usufrutto* p. 32). This desperate attempt to save the theory, must, however, necessarily fail, because without a serious economic demand no legal institution is likely to be created. Bretone (*ibidem* p. 33) also considers the possibility that the owner of the serving plot, though not entitled to do so, was in practice allowed to use the path (p. 34). But what happened if the other party, sticking obstinately to his right, forbade him to use the path?

None the less, one must admit that in a certain way the view of an exclusive ownership is the most consistent one. If one starts from the consideration that servitudes meant originally ownership, so one is compelled—in spite of oneself—to draw this conclusion. Otherwise, the applicability of *vindicatio* is hard to explain. If both parties had been owners, then the *contravindicatio* would have been justified. The plaintiff in a *l.a.s.i.r.*, however, declares that his adversary has an unjust claim to the object of the lawsuit.³⁰ It is quite possible that these authors were driven by the features of the *l.a.s.i.r.* to the economically impossible assumption of an exclusive ownership.

(b) We should not dwell at too great a length on the view of a co-ownership. Though this solution is to some extent more reasonable than the previous one, it is contradicted, as Seidl and Kaser³¹ have pointed out, by the consideration that undivided co-ownership is as a principle based on the common interests of the parties, while the parties to a servitude have contrary interests.

In addition, this assumption is also unacceptable because it is not suitable for realizing the economic purpose of a servitude. For eventual disputes would have been settled by an action on division, which, however, could not have served the interests of the parties to a servitude. The water-conduit is by its very nature indivisible, and the path divided into two parts becomes useless.

(c) The theory of a functionally divided ownership is not inconceivable economically, because a solution of this kind would indeed meet the interests of both neighbours. Its main difficulty consists in my opinion in its being based upon the supposed relativity of the ancient proprietary lawsuit, and as I have tried to show in the previous chapter, the *l.a.s.i.r.* was not designed for the protection of the comparatively better right.

But apart from this consideration, the assumption of Kaser has another serious defect. It is hard to see why the party entitled to a path or to a water-conduit should have had a better right than his adversary.³² Kaser himself admits that both of them could have the use of the path or the water.³³

Finally it is open to doubt whether—as has been already pointed out³⁴—the rather complicated and artificial legal construction of a functionally divided ownership, frequently misunderstood even by contemporary scholars, should be in conformity with an undeveloped mentality. I think that the considerably simpler solution of independent rights stands nearer to the given low level of legal thinking.

Of course, in spite of everything, one would have to accept Kaser's view, if it could be proved by sources. But the only source which according to him contains traces of a functionally divided ownership with the servitudes, has a quite different meaning:

³⁰ On this see the previous chapter.

³¹ Seidl, *BIDR* 46 (1939) p. 433, Kaser, *SDHI* 13–14 (1947–48) p. 393.

³² Kaser, *EB* p. 18.

³³ This is rightly stressed by Grosso, *SDHI* 23 (1957) p. 387.

³⁴ Cf. n. 8.

Paul. *D.* 8, 3, 7, pr: . . . *qui actum habet . . . quidam nec hastam rectam ei ferre licere, quia neque eundi neque agendi gratia id faceret et possent fructus eo modo laedi. Qui viam habent, eundi agendique ius habent: plerique et trahendi quoque et rectam hastam referendi, si modo fructus non laedat.*

Koschaker and Kaser interpret the text in the following way: as the spear is the symbol of ownership in ancient law, the person entitled to *viam*, may carry it through the site, because he is the owner. But, as his ownership is not exclusive, he must not hoist it.³⁵

This interpretation may seem striking enough to the ingenuous reader. Apart from the fact that the word *hasta* denotes also a simple pole³⁶ beside "spear", it can be clearly seen from the context that Paulus is elaborating on a practical rule not a symbolic act. The person entitled to *actus* must not carry a spear (or pole), because he would damage the fruit hanging on the trees. A right of *viam*, however, includes also the transportation of poles or other things, because *viam* is a broader way. Nevertheless he is obliged to be careful and avoid damaging the fruit. To interpret this simple and practical rule as a symbolic act requires a bias not far removed from wilful blindness. In addition, if the text spoke of a spear-symbol as the remnant of a functionally divided ownership, there would not be any difference between *actus* and *viam*, as both of them are supposed to have been conceived in this fashion. Finally, a symbolic act of carrying a spear would have been somewhat ridiculous by the age of Paulus.

6. Having enumerated the general considerations which speak against the theory of ownership, we may go into details. The first question to be answered is whether ancient law indeed conceived the servitudes as corporeal things. In this formulation the question in itself lacks precision, because ancient law was not yet acquainted with the notions of *res corporalis* and *incorporalis*. More correctly, one has to ask whether the words *viam*, *actus*, *iter* and *aquaeductus* denoted originally the strip of land and the water, or the right to them.

(a) The negative statement of some classical lawyers that a servitude is not a corporeal thing, is quite irrelevant³⁷ because such statements must not be considered contrary evidence for ancient law. One could at most conclude that the classical lawyers wanted to repress the vulgar tendencies of their own age.³⁸ But even this assumption is shaky because it does not necessarily follow from a statement that it was designed to rebuke a contrary opinion.

(b) The point of view that the idea of servitudes as corporeal things stands nearer to the primitive mentality than the seemingly more advanced notions of independent rights, is deserving of more consideration.

³⁵ Thus Koschaker I. p. 258. n. 2, Kaser *Geteiltes* p. 455. Kaser recently attributes a more limited significance to this source. See *Labeo* 9 (1963) p. 369. For Aru (pp. 4 ff.) and Bretonne (*Usufrutto* pp. 32 f.) the "spear-symbol" is a sign of exclusive ownership.

³⁶ Cf. Heumann-Seckel p. 235.

³⁷ Cf. n. 26.

³⁸ Vulgar tendencies surely already existed in the classical age. See e.g. Lévy-Bruhl, *Labeo* 7 (1961) pp. 57 f.

This argument, however, is only convincing at first sight. It is indeed questionable whether the idea of walking or going or the strip of land designed for it was the primary meaning of *via*. In other words in this case, I think that the act is a more concrete idea than the thing necessary for realizing it. This is even more obvious with a water-conduit, because this, as an act, is surely primary to the water-pipes or drains. If ancient Romans had not thought of the right of water-conduit, but of the water itself, this servitude would have been probably called *aqua* instead of *aquaeductus*.³⁹

(c) There also exist sources, which refute the assumption that ancient law conceived the servitudes as corporeal things.

Tab. VII. 7: Viam muniunto: ni sam delapidassint, qua volet, iumento agito.

This provision of the Twelve Tables is quoted by Festus, and it is shown from the context that the rule does not refer to public ways but to the right of *via*.⁴⁰ From it we may infer that the person entitled to passage was not the owner of the strip of land, but had a mere right of way. Otherwise the owner of the land would not have been obliged to keep up the way, and the other party would not have been entitled to go elsewhere if the owner had failed to fulfil his obligation.⁴¹

No attention is usually paid to another provision: Gai. *D. 8, 3, 8: Viae latitudo ex lege duodecim tabularum in porrectum octo pedes habet, in anfractum, id est ubi flexum est, sedecim.*

This source is confirmed by other texts too,⁴² so there can be no doubt that the Twelve Tables contained a provision, which fixed the latitude of *via* at eight feet and in the curves in sixteen feet.

This leads to the conclusion that *via* did not mean the ownership of a given strip of land, but the right of passage, because otherwise the provision would have been superfluous. If the ownership of the path rather than the right of passage had been acquired, no legal disposition as to its latitude would have been required, because when land is bought, the territory is usually defined. If, however, the right of way is bought, the marking out of the territory is needless. The solution adopted

³⁹ Legal terms of ancient law generally point to an act, as *mancipium*, *nexum*, *manus in-ictio*, *in iure cessio*. Expressions denoting an object, like *manus*, are less frequent.

⁴⁰ *Viae sunt publicae, per . . . e omnibus licet, et privatae, quibus neminem uti . . . praeter eorum quorum sunt: et ita privatae VIII pedes in latitudine . . . iure et lege, publicae quantum ratio utilitatis permittit . . . lex iubet XVI . . . XV que esse vias, ut vias muniunto etc.* (Festus p. 564). According to the conjecture of Mommsen the original text was *praeterea lex iubet XVI in anfracto flexuque pedes latas esse vias et adiciat: viam muniunto . . .* (Cf. *FIRA I* p. 50 n. 7/A.). If we confront the text of Festus with the fragment referred to in n. 42, it can clearly be seen that it points to the servitude of *via*.

⁴¹ The interpretation of Aru (pp. 10 ff.) is quite arbitrary. In his opinion the word *muniunto* signifies "to surround with walls" (!), and *delapidassint* the destroying of the wall. His interpretation is absurd, from a practical point of view, and it is linguistically unacceptable. *Munire* in fact means "to render passable" but, since Ennius it has meant "to erect a dam", and *lapidare* means "to pave". Cf. Walde-Hofmann I. p. 761 and II. p. 100.

⁴² Thus *Iav. D. 8, 3, 13, 2*; *Paul. D. 8, 3, 23, pr.*

by the Twelve Tables was at the same time the more practical one, because the parties were not compelled to undertake complicated surveys.⁴³

7. Notwithstanding, the fact that the ancient servitudes belonged to the *res Mancipi* still seems to support the prevailing view. But I do not think that this points to their conception as corporeal things.⁴⁴ They were simply put in the category of the *res Mancipi* in order that *Mancipatio* could be applied to them. It is known that servitudes were usually purchased in Babylonian law too,⁴⁵ and one could hardly suppose that ancient Roman peasants would have granted a servitude by mere generosity. As the servitudes were economically important, and *Mancipatio* was the only legal act of sale, furnished with a warranty for eviction, it was reasonable to extend it to servitudes.

Consequently, servitudes belonged also to *Mancipium*-power, which, however, was not identical with the notion of ownership,⁴⁶ so from this fact one cannot infer that they have ever meant ownership.

8. The legal protection of servitudes in ancient law remains: it is to be feared, a riddle. From their belonging to the *Mancipium*-power and from the applicability of *Mancipatio*, one is inclined to think that *vindicatio* could also be brought for servitudes.

Nevertheless no *legis actio* is known that would have been suitable for their protection. The *l.a.s.i.r.* does not seem to have been suitable.⁴⁷ A text of Ulpian, where we are told that the legal protection of predial servitudes was shaped according to the pattern of the action arising from usufruct, also raises doubts:

Ulp. *D.* 8, 5, 2, pr: *De servitutibus in rem actiones competunt nobis ad exemplum earum, quae ad usum fructum pertinent.*

It is of course not at all certain that the source can claim historical authenticity, but still it deserves attention. In ancient law, when commodity turnover stood at a low level, and land was not frequently sold, a dispute on a servitude was likely to arise only between the two original owners, the buyer and the seller. It is possible that perhaps the warranty arising from *Mancipatio* was sufficient to protect the buyer.⁴⁸

To sum up, no certainty can be achieved as regards the protection of servitudes in ancient law. One can but conjecture with more or less probability. Because it is

⁴³ Besides the age of the Twelve Tables was no longer so primitive—as has been pointed out by Seidl—that people could not have distinguished between the path and the right of passage. Cf. *BIDR* 46 (1939) p. 432.

⁴⁴ According to Brósz (p. 8) servitudes have been put in the category of the *res Mancipi* only later on. His assumption, however, is not convincing, because this category has never been extended, but rather has been restricted in the course of development. Cf. G. Nicosia, "Animalia quae collo dorsove domantur", *IURA* 18 (1967) p. 93.

⁴⁵ Cf. San Nicolò, "Ein Beitrag zu den Grunddienstbarkeiten im neubabylonischen Recht", *Studi Arangio Ruiz* I. pp. 57 ff.

⁴⁶ On this see *supra*: Chapter Four.

⁴⁷ See the previous chapter.

⁴⁸ Brósz suggests (p. 12) that servitudes were protected in ancient law by interdicts. But the servitudes were of a "private" character, while the interdicts probably served the protection of *ager publicus* by this age. Cf. Kaser, *RPR* p. 327.

questionable whether *vindicatio* was applied to servitudes in ancient law, this cannot be used as an argument for the theory of ownership.⁴⁹

9. We have come to the conclusion that the servitudes are not derived from ownership, but have come into existence as independent rights. The ancient servitudes: *via*, *actus*, *iter* and *aquaeductus* appeared probably shortly after the dissolution of common property on land, or perhaps simultaneously.⁵⁰ The lack of a network of public ways and water-conduits must have called for this expedient.

In ancient law servitudes were surely still rather rudimentary, as regards their legal nature. They were not united under a common notion,⁵¹ and perhaps they lacked definite forms of legal protection. However in practice they were hardly different from the classical servitudes. The person entitled to a servitude was not interested in the fact that the owner of the neighbouring plot should not go across his own land or use his own water, while the latter was surely not inclined to deprive himself of water or allow his land to be cut into two pieces by the path, so the outward appearance of servitudes has not undergone substantial changes in the course of development. Progress was confined to a more precise legal elaboration of them.

III. THE ORIGIN OF *FIDUCIA* AND *PIGNUS*

1. It goes without saying that it would be impossible to treat all the questions of the origins of the two ancient forms of pledge, *fiducia* and *pignus*. As in the case of servitudes our task is to ascertain the relationship that existed between them and ownership.

Older and more recent literature equally admit that both *fiducia* and *pignus* are products of ancient law. There also exists a view that *pignus* is even older than *fiducia*.⁵² Surely, both of them existed by the age of the Twelve Tables.⁵³

2. *Fiducia* poses practically no problems at all. This form of pledge, in fact, still meant in the classical age a transfer of ownership, so *fiducia* never became a *ius in re aliena*. Thus it would seem superfluous to dwell on it, but there exist good reasons for discussing it briefly.

⁴⁹ There is no need to deal with the mysterious *lex Scribonia*, because it cannot be adduced for or against the prevailing view. It is not altogether clear, why the *usucapio* of servitudes was abolished. I do not believe that it has to be connected with the notion of *res incorporalis*. *Usucapio pro herede* was also applied to incorporeal things.

⁵⁰ This is why I cannot agree with Perozzi (*Istituzioni* pp. 753 f.), and with Schönemann. Cf. n. 9.

⁵¹ Cf. Biondi, *Servitutes* p. 653.

⁵² On the age of *fiducia* and *pignus*: Bachofen, *Das römische Pfandrecht* (Basel, 1847) pp. 4 ff; W. Erbe, *Die Fiduzia im römischen Recht* (Weimar, 1940) p. 2; Kaser, *RPR* pp. 126 f; Pappulias p. 218.; A. Watson, "The origins of fiducia", *SZ* 79 (1962) pp. 329 ff.

⁵³ As far as I know, Visky is the only author who denies the existence of *fiducia* in the age of the Twelve Tables. See K. Visky, *Fiduciarius ügyletek* (Contracts of fiducia) (Miskolc, 1944) p. 7.

First, the structure of *fiducia* in itself refutes the hypothesis of a functionally divided ownership. Secondly, an argument for this theory was tried by the special kind of *usucapio* granted to the debtor: the *usureceptio*.

(a) Kaser himself admits that *fiducia*, in the form it has been preserved by the sources, did not create divided ownership.⁵⁴ If, however, Roman law had ever been acquainted with this solution, it would have been applied here above all, because it lies in the interest of both the creditor and the debtor to enjoy a legal protection *erga omnes*.

But the creditor to a *fiducia* acquired in virtue of *mancipatio* or *in iure cessio* an *exclusive* ownership of the object of the pledge, in analogy to the Greek *πράσις, ἐπὶ λύσει*,⁵⁵ and originally he was obliged only by the *fides* to return it, after the debt had been paid.⁵⁶ It is inconceivable that if ancient law had already regulated *fiducia* in the refined way of divided ownership, classical law would have returned to the more primitive solution of an exclusive ownership vested in the creditor. So we may safely conclude that Roman law never adopted the solution of divided ownership.

(b) Inspired by a remark of Kaser,⁵⁷ Wubbe has advanced the assumption that *usureceptio* preserved traces of divided ownership.⁵⁸ He rightly points out that *usureceptio* was not impeded by theft. The debtor, having stolen back the thing from the creditor or from anybody else, could once more acquire ownership of it by long possession.⁵⁹ This peculiarity, however, has nothing to do with divided ownership.

We need not cite the whole of the well-known text of Gaius on *usureceptio*;⁶⁰ it will suffice to quote its most important part:

Gai. 2, 60: *Si quidem cum amico contracta sit fiducia, sane omni modo competit usus receptio; si vero cum creditore, soluta quidem pecunia omni modo competit, nondum vero soluta ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogaverit . . .*

It can be seen clearly from the text that *usureceptio* was designed to replace the fact that there was no possibility of recovering the thing by a lawsuit. With a *fiducia cum amico*, which meant probably a deposit,⁶¹ *usureceptio* was open to the former owner without any limitations, since there was no credit at stake to be secured by *fiducia*.

The rules of a *fiducia cum creditore*, however, were more carefully elaborated. If the debtor had already paid his debt, there was no restriction of *usureceptio*.

⁵⁴ Thus *RPR* p. 127.

⁵⁵ On this analogy see E. Weiss, *Pfandrechtliche Untersuchungen I.* (Weimar, 1909) pp. 9 ff. The Greek institution—like *fiducia*—did not create divided ownership. Cf. Kränzlein pp. 79 f.

⁵⁶ Pappulias thinks that the Twelve Tables had already sanctioned *fiducia* with an action (p. 240). The *actio fiduciae*, however, is of later origin. Cf. Watson, *op. cit.* in n. 52.

⁵⁷ Kaser, *RPR* p. 127.

⁵⁸ Wubbe, *Usureceptio* especially pp. 35 ff.

⁵⁹ Wubbe, *Usureceptio* pp. 17 ff. With a convincing refutation of older literary views.

⁶⁰ Gai. 2, 59–60 and 3, 201.

⁶¹ So it is the prevailing view. Cf. Wubbe, *Usureceptio* pp. 24 ff.

Before the fulfilment of his obligation, however, he could recover the thing by *usureceptio* only if it had not been given back to him by the creditor for use.

The explanation is simple. The debtor could recover the thing even by theft, and after the lapse of a year the creditor lost his right to it. This rule did not endanger the creditor, because he knew his debtor, and he had plenty of time, a whole year in fact, to bring an action against him. The creditor, however, who had given back to the debtor the thing for lease or for gratuitous use, had to be protected, for after the lapse of a year, his right would have run out. This would have led to unnecessary mistrust, the creditors would not have dared to grant a long-term use to the debtor. The latter, however, would many a time have been unable to pay his debt if he had been deprived of an important means of production, say, his oxen, so it was to their common interest that temporary use granted by the creditor should not lead to *usureceptio*.⁶²

Thus, in my opinion, *usureceptio* does not testify to divided ownership, because otherwise Romans would have hardly distinguished between the two types of *fiducia*. Besides, in a system of divided ownership, there would not have been any need of *usureceptio*, as in the case of fulfilment the ownership of the debtor would have become automatically an exclusive one.

3. The origins of *pignus* are still obscure in several points.⁶³ The following remarks cannot claim to settle the difficult questions hitherto unanswered, as *pignus* will be dealt with from a single point of view.

The majority of scholars hold the view that *pignus* was originally a “Verfallspfand”, i.e. if the debt had not been paid, the creditor became owner of the pledge.⁶⁴ Apart from this, *pignus* has had, during its long history, nothing in common with ownership. The creditor did not become the owner of the thing.

(a) It is astonishing that Kaser⁶⁵ and Lübtow⁶⁶ suppose divided ownership for the early history of *pignus*. It is difficult to argue against this view, for—apart from a single source⁶⁷—no evidence was brought for it. Kaser relies upon a passage of the agricultural work of Cato, where the author advises the application of *pignus conventum* to the lessor:

⁶² Not because of the rule *nemo sibi ipsi causam possessionis mutare possit*, as is supposed by Wubbe, *Usureceptio* p. 22. First, this rule is of later origin, and secondly, the *fiducia* was not based upon abstract theoretical considerations, but upon practical requirements.

⁶³ So the relationship between *pignus* and *pignoris capio* is a particularly delicate question. The latter is supposed by the majority to have been an institution of public character. Cf. Pappulias p. 216; Kaser, *RPR* p. 127. However, it is doubtful, whether the distinction between public and private law is true for ancient law.

⁶⁴ Thus Erbe, *op. cit.* in n. 52 p. 2; Kaser, *RPR* p. 127. Contra: P. Frezza, *Le garanzie delle obbligazioni* II. (Padova, 1963) pp. 82 ff. His arguments are, however, unconvincing.

⁶⁵ Kaser, *SDHI* 13–14 (1947–48) p. 395 and *RPR* p. 127.

⁶⁶ U. Lübtow, “Catos leges venditioni et locationi dictae”, *Symbolae Taubenschlag* III. (Warsaw, 1957) especially pp. 309 ff.

⁶⁷ Lübtow also quotes a text of Festus (*si quid pignoris nanciscitur, sibi habeto*). Cf. *op.cit.* in the previous n.p. 319. By this passage, however, only the existence of a “Verfallspfand” is attested, and not divided ownership.

Cato, *De agri cultura* 146: *Donicum solutum erit, aut ita satisdatum erit, quae in fundo illata erunt, pigneri sunt. Ne quid eorum de fundo deportato. Si quid deportaverit, domini esto.*

The text does not permit the conclusion that a divided ownership was created by the contract of lease viz. the agreement on *pignus*. What Cato suggests is more simple: the lessee obliges his things, and it is agreed that he must not carry them away until the rent has been paid. If he fails to fulfil his obligation, the lessor acquires ownership of them by this very agreement. It is a typical case of “Verfallspfand”, a solution adopted, because in early law the creditor to a *pignus* had probably not yet got an *actio in rem* at his disposal, so if the lessee had carried away the objects of pledge, the lessor could not have enforced his right of pledge. There is no allusion in the text to a kind of ownership on behalf of the lessor before the agreement would have been broken. Nor does the word *dominus* point to it, for in the work of Cato this expression denotes the lessor and not the owner of the thing pledged.⁶⁸ Thus the interpretation of Kaser and Lübtow is unacceptable.

(b) Wubbe expresses his genuine astonishment at the difference existing between *pignus* and *fiducia* in respect of theft.⁶⁹ While in the former case the stealing back of the thing pledged was punished as *furtum*, the debtor to a *fiducia* was allowed to recover the thing by theft. This difference, however, has in my opinion a reasonable and simple explanation. As a matter of fact, if the thing was given in *pignus*, the debtor retained ownership, whereas the creditor had neither a proprietary remedy, nor a special *actio in rem pignoratitia*. So, after having paid, the debtor could bring a *vindicatio*, while the creditor would have remained without any legal protection if the debtor had stolen back the object. So this act had to be sanctioned by the *actio furti*. The situation with *fiducia* was quite different, because the proprietary remedy was not available to the debtor, and the creditor could recover the thing by a lawsuit in the case of theft. This is why *usureceptio* was created. The debtor to a *pignus*, however, had no need of this expedient. The lack of *usureceptio*, and the punishment of the arbitrary recovering shows clearly that by a *pignus* the ownership of the debtor had not elapsed, and the creditor did not enjoy the proprietary remedy.

4. In my opinion, *pignus* did not create ownership for the creditor in early law, nor did it result in a divided ownership. Originally the creditor possibly did not even have a special *actio pignoratitia*, and he was protected solely by the *actio furti*, viz. by the possession of the object of pledge. *Fiducia*, however, never became a *ius in re aliena*, and the creditor was always considered as the exclusive owner of the thing. So the structure of *fiducia*, instead of supporting the theory of divided ownership, shows the unacceptability of this hypothesis.

⁶⁸ Cf. Cato, *De agri cultura* 147; 148. On this see also H. Kreller, “Pfandrechtliche Interdikte und formula Serviana”, *SZ* 64 (1944) pp. 306 ff; M. Sargenti, “Il ‘de agricultura’ di Catone”, *SDHI* 22 (1956), pp. 158 ff; P. Frezza, “I formulari Catoniani e le forme della protezione del creditore pignoratizio”, *Studi Betti* II. p. 435 ff.

⁶⁹ Wubbe, *Usureceptio* p. 19.

To sum up, we may safely conclude that no traces of a functionally divided ownership can be found either with the servitudes, or with *fiducia* and *pignus*.⁷⁰ Nor can this solution be found in other fields of Roman law.⁷¹ It seems that the theory of Kaser does not comply with the material furnished by our sources, and it fails to give a reliable explanation to the origin of the *iura in re aliena*. So I think it would be superfluous to analyse the different inconsistencies of it as some authors have done.⁷²

⁷⁰ Even analogies fail to support Kaser's view. Neither Greek nor Germanic law adopted the solution of a divided ownership with pledge. Cf. Kränzlein pp. 79 f. In Germanic law, pledge was the first to take the shape of a *ius in re aliena*. Cf. O. Gierke, *Schuld und Haftung im älteren deutschen Recht* (Breslau, 1910) pp. 22 f.

⁷¹ It cannot be proved that the expressions *mandatela* and *custodela* in the formula of the *mancipatio familiae* should point to divided ownership, as was suggested by Weiss, *op. cit.* in n. 4. pp. 1 ff.

⁷² Cf. n. 8.

THE NATURE OF ANCIENT OWNERSHIP GENERAL AND SPECIFIC FEATURES

I. THE MOST IMPORTANT THEORIES

1. Before summing up the final conclusions about ancient ownership, it is worth while casting a cursory glance at the path that lies behind us. The first three chapters were dedicated to the birth-process and formation of private property in Rome. In the following chapters the ancient notion of ownership, *mancipatio*, *usus auctoritas*, the ancient proprietary remedy, and—as an appendix—the origin of the most ancient *iura in re aliena* were dealt with.

It is striking that several questions, which are considered by the contemporary lawyer to belong to a systematic treatise on ownership, have not been included. Above all the lack of a chapter on the so-called “original”, or, to use a more adequate term, “natural” modes of acquisition might be felt to be a sinful omission. I have, however, confined myself to legal institutions whose traces can be found in the sources of ancient law. As for the natural modes of acquisition, the Twelve Tables and other sources alike fail to throw up material. So what can be written on their early history, is mere speculation. Though it is quite possible, even probable, that some of those modes of acquisition already existed in the period of ancient law, I have refrained from substituting logical deductions for historical analysis.¹

Furthermore, I have not dealt comprehensively with questions which, though mentioned in our sources, are of moderate importance for the development of ownership. That explains why it did not seem necessary to dwell at length on *in iure cessio*.²

2. Since in the introductory part of the different chapters I have tried to sum up briefly the most important views, and to refute them if they seemed to be incongruous with the sources, it is only consistent, if I begin my conclusion by enumerating the most important theories that have a bearing on the whole of our subject-matter, but which seem unacceptable to me.

3. Undoubtedly it is above all in the passionately discussed question of relative ownership that one has to take sides. In the previous chapters, the different arguments of this theory have been, I hope, carefully examined, and it has turned out that this hypothesis does not conform with the features of ancient Roman forms of conveyance and the proprietary remedy.

¹ In spite of a nearly total lack of sources, Kaser has tried to reconstruct the natural modes of acquisition in ancient law Cf. “Die natürlichen Eigentumserwerbsarten im altrömischen Recht”, *SZ* 65 (1947), pp. 219 ff.

² See *supra* p. 84 n. 129.

It has been already mentioned that several authors disagree with this theory, but they confine themselves mostly to adducing a single argument. So Thormann rejects relative ownership, because in his opinion ownership became a relative right only in the course of judicial procedure, so substantially ancient Roman ownership was also of an absolute character.³ Sargenti and Grosso object that Kaser wants to define substantial law on the basis of procedural law,⁴ while Archi emphasizes the artificiality of this view.⁵ An irrefutable counter-argument has been suggested by Bozza, when she stresses the incompatibility of the absolute character of *patria potestas* with the supposed relativity of dominance over things.⁶

It can be seen that many scholars disagree with Kaser, but it is equally obvious that the arguments hitherto adduced against his view, though apt to arouse serious doubts, are hardly sufficient for confuting this carefully and consistently elaborated theory.

The analysis of ancient ownership—especially of the ancient *vindicatio*—has led us to the conviction that the theory of relative ownership lacks solid foundations, moreover it is incompatible with our sources.

(a) In the ancient *vindicatio*, I think, only the right of the defendant has been examined, so the decision of the judge was not based upon a comparison of two rights.⁷ If my interpretation is correct, the theory of relative ownership is deprived of its main argument. But apart from this, the confrontation of a *sacramentum iustum* and *iniustum* would be inconceivable, if the decision had been taken on the comparatively better right to possession.⁸

(b) The lack of a precise notion of ownership is due to other factors than the supposed relative character of ownership.⁹ On the contrary the homogeneousness of *patria potestas* surely excludes the possibility of an absolute right on persons, and a relative one on things.¹⁰

(c) Neither linguistic, nor other considerations support the interpretation of the simple and plain expression *meum esse*, as the assertion of a comparatively better right.¹¹

(d) The warranty for *auctoritas* with *mancipatio* equally lends no support to this view.¹²

(f) Kaser also argues for his theory by saying that those “who had a better right than the concrete adversary, but still were not absolute owners”, i.e. who were protected in later law by the *actio Publiciana*, must have also enjoyed some pro-

³ Thormann, *Auctoritas* pp. 60 ff.

⁴ Grosso, *SDHI* 23 (1957) p. 389; M. Sargenti, “Il ‘de agri cultura’ di Catone”, *SDHI* 22 (1956) pp. 176 f.

⁵ Cf. G. G. Archi, *SDHI* 22 (1956) pp. 412 f.

⁶ Bozza, *Iura* 1 (1950), p. 402.

⁷ On this *supra* pp. 99. ff.

⁸ Cf. *supra* p. 105.

⁹ See *supra* pp. 60 f.

¹⁰ Cf. n. 6.

¹¹ See *supra* p. 83. and pp. 97 f.

¹² *Supra* pp. 80 f.

tection in ancient law. This has been necessarily supplied by the *l.a.s.i.r.*¹³ But the *l.a.s.i.r.* was not suitable for performing the function of the *actio Publiciana* and it is not altogether sure that there was any need of this kind of legal protection. First, the *actio Publiciana* was created to protect those buyers who had acquired a *res Mancipi* without a formal act of conveyance—a probably rather unusual situation in ancient law—and not for the protection of relative ownership.¹⁴ Secondly, given the autarchic economy of ancient Rome, there was hardly any need of a refined analysis of different degrees of legal titles characteristic of a lively commerce, which would—in addition—require a high level of legal culture, hardly to be ascribed to the peasants of early Rome.

The above arguments justify perhaps the statement that the theory of relative ownership is unacceptable. Ancient Roman law did not conceive ownership as a relative right.

4. The other thesis of Kaser, that of the functionally divided ownership, is closely connected with the theory of relative ownership, because it is substantially based upon the assumption that in the lawsuit on ownership the comparatively better right was at stake. So the interpretation of the *l.a.s.i.r.*, which I have suggested, also refutes the hypothesis of a divided ownership.

Nevertheless in the previous chapter I have examined the origin of servitudes, *pignus* and *fiducia* from this point of view, and I have come to the conclusion that this theory does not fit in with the extant material.

(a) No traces of a divided ownership can be found in the sources. The two texts adduced by Kaser do not support his view.¹⁵

(b) The structure of *fiducia* in itself refutes the assumption of a divided ownership. If Romans had ever known this solution, they would have surely adopted it in this case.¹⁶

(c) As has been already objected, the structure of a functionally divided ownership is too complicated for an undeveloped legal system.¹⁷

5. The wide-spread view that ancient Roman ownership was confined to *res Mancipi*, has also proved to be unacceptable. As has been shown,¹⁸ this theory is based partly upon an erroneous identification of *mancipium* and ownership, partly upon the assumption that the field of application of *mancipatio* and *vindicatio* was the same in ancient law. The sources clearly attest that *res nec Mancipi* were always treated by Roman law as objects of ownership.

Finally, the central idea of De Visser has to be mentioned. In his opinion the notion of *auctoritas* was the very essence of ancient Roman ownership. But

¹³ Kaser, *EB Nachträge* p. 365.

¹⁴ On this *infra* pp. 164 f.

¹⁵ Paul. *D.* 8, 3, 7, pr. and Cato, *De agri cultura* 146. See *supra* p. 113 and 119.

¹⁶ *Supra* p. 117.

¹⁷ *Supra* p. 112.

¹⁸ *Supra* pp. 56 ff.

as can be seen from the sources, the importance of *auctoritas* has been grossly exaggerated by Romanistic literature, so it is surely excessive to consider it as the key issue of ancient ownership.¹⁹

II. THE NATURE OF ANCIENT OWNERSHIP

1. Since in my opinion the theory of relative ownership is unacceptable, we are led to the inevitable conclusion that Roman ownership has always been, to adopt a contemporary terminology, an absolute right. As is clearly shown by the structure of ancient *vindicatio*, only a single alternative was known: the defendant was either the owner of the thing in question, or he was not the owner. Intermediate degrees were totally left out of account.

This conclusion complies perfectly with the peasant-character of economic and social life. The autarchic peasant-economy requires above all, in respect to ownership, the safeguarding of an exclusive power over the means of production. Ancient Roman law indeed strove to meet this demand with its rudimentary legal means. The declaration *meum esse*, i.e. the assertion of an exclusive power acquired before witnesses, was placed in the centre of the ritual of *mancipatio*, though a contract of sale does not necessarily require this element. The *l.a.s.i.r.*, on the other hand, gave a paramount protection, because the defendant mercilessly lost the lawsuit, if he could not prove ownership.

2. The absolute character of ownership is not contradicted by the lack of a precise notion of ownership. Beyond any doubt, the position of an owner meant more than actual control over the thing. Both *vindicatio* and *auctoritas*, and also the sanctioning of theft are already based upon the idea that the owner has a right to the thing, even if he was deprived of the actual power over it.

Ownership and possession, however, were not yet entirely separated from one another in a clear way. This is shown above all by the lack of corresponding technical terms. The word *usus* could mean lawful and unlawful use alike,²⁰ and *usus auctoritas* was not yet the acquisition of ownership by long possession, but simply the consolidation of an actual position that was lawful possibly from the beginning.

On the other hand, ancient law did not strictly draw a line between ownership and family relationships. The expressions *meum esse* and *mancipium*, or its synonyms, embraced both of them. *Mancipatio* and *vindicatio* were equally applicable to persons and things.

To some extent the boundaries of ownership and the later *iura in re aliena* also lacked precision. Though the servitudes and *pignus* did not create ownership, nevertheless the former were counted as *res mancipi*, and thus belonged to the *mancipium*-power. *Fiducia*, as in classical law, created an exclusive ownership for

¹⁹ *Supra* p. 84.

²⁰ See *supra* p. 89.

the creditor, and presumably no *actio in rem* was yet in existence to protect the creditor to a *pignus*. He could but rely on the actual control over the thing and the *actio furti*.

So the conclusion can be drawn that the institution of ownership already existed in ancient law, but it was not yet precisely distinguished from possession, family relationships and the later *iura in re aliena*.

3. Finally, a few words must be said about the content of ancient Roman ownership. As is already generally acknowledged, ownership has never been conceived by Roman law as an unlimited power, though its content underwent considerable changes in the course of history.²¹

As for ancient ownership, very little is known. As far as I know, no sources have come down to us, which would prove that its content would have been narrower than in classical times. So, from a strictly legal point of view, the institution of ancient ownership was rather similar to the classical one²² as far as its content is concerned. No significant limitations are recorded, but it seems that as the institution was not yet as clearly shaped as in classical times, the single rights of the owner were also less clearly conceived and defined.

On the other hand, the social and moral burdens and restrictions imposed upon the owner were probably more significant than in classical law.²³ This is partly due to the patriarchal form of slavery, and to the moderate size of ancient Rome, where the social control over the exercise of owner's rights must surely have been more efficient than in the individualistic climate of the vast empire that came later.

III. GENERAL AND SPECIFIC FEATURES OF ANCIENT OWNERSHIP

1. In order to get a plastic picture of ancient Roman ownership, it has to be compared with the corresponding legal solutions of other equally early peoples. In addition, if we can succeed in defining the general and specific features of ancient Roman ownership, i.e. the features which are in accordance with the general pattern of legal development, and those which are peculiar to Roman legal history, we can also obtain an explanation for the unrivalled excellence of classical Roman ownership.

²¹ "Am wenigsten kann das römische Recht jetzt noch gedeutet, verurteilt oder gefeiert werden als Ausdruck des politischen und wirtschaftlichen Individualismus, zu dem das Zeitalter des Pandektismus sich bekannte . . ."—writes Wieacker, *Entwicklungsstufen* p. 220. Cf. also pp. 187 f.

²² Apart from the fact that by the Twelve Tables the freedom of testation as such, was not yet recognized. It existed only in practice. On this see *supra* pp. 46 ff. The power of *institutio heredis* and *exhereditatio*, was, however, bestowed to the *paterfamilias* during the period of ancient law. Cf. Kaser, *RPR* p. 95.

²³ Cf. Kaser, *RPR* p. 108.

2. It must be admitted that ancient Roman ownership does not lack features that characterize undeveloped legal systems in general:

(a) In Rome, as elsewhere, private ownership was preceded by the property of *gentes*, and at the beginning private ownership was vested in the family.

(b) Undeveloped legal systems have generally no clear notion of ownership.²⁴ The same can be observed in Roman law.

(c) In spite of the view that prevails at the present *mancipatio* was not a specifically Roman institution, but in its primitive form it was in most respects a contract of sale typical for the peoples of early antiquity. The warranty, by which it was accompanied, belongs likewise to the general features of early law of sale.

(d) Some features of *vindicatio*, as for example its connection with the pursuit of theft, and the fact that the burden of proof was imposed upon the defendant have also much in common with other legal systems.

(e) Some analogies to the ancient forms of servitudes and pledge, also exist in other legal systems.²⁵

3. The specific features of ancient Roman ownership may be summed up as follows:

(a) The early appearance of individual private ownership, and instead of a dissolution of family property, the system of a concentrated, homogeneous *patria potestas*.

(b) The transformation of *mancipatio* into an act of transfer.

(c) The *vindicatio* as a general remedy for the protection of patrimonial and personal power.

(d) The existence of a primitive *usucapio*. This legal institution, in fact, cannot be found everywhere, as it is rather exceptional.²⁶

(e) Finally, I am inclined to doubt whether the total lack of magic and religious elements with ancient Roman ownership, are as exceptional as it is generally supposed.²⁷ Anyway, it is sure that—apart from the religious character of boundary stones—I could not discover any rule of ancient Roman ownership, which would not have been entirely practical and rational. It seems that mysticism has been always alien to the sober Roman mind.

4. It is a pardonable scholarly weakness to look in any case for an explanation. So one cannot help reflecting on the problem of what factors the general and

²⁴ Cf. San Nicolò, *Kauf* p. 19; Voigt, *XII Tafeln* II. p. 87 n. 13; Westrup, "Quelques remarques sur la propriété primitive devant l'histoire comparative", *RHD* 4. s. 12 (1933) pp. 5 ff.

²⁵ Thus with the servitudes in Babylonian law, with *fiducia* in Greek law. See *supra* p. 115 n. 45 and p. 117 n. 55.

²⁶ Cf. Mayer-Maly, *Studien* I. p. 21; Pringsheim, *Sale* p. 9. n. 2; D. Nörr, *Die Entstehung der longi temporis praescriptio* (Köln-Opladen, 1969) p. 10. with references.

²⁷ It is fashionable to interpret nearly everything primitive people did as magic or religious acts. I am afraid that these interpretations frequently express the predilection of scholars for religious cults and magic instead of the ideas of the given people. To form a definite opinion lies naturally beyond the field of my competence and the scope of this book.

special features of ancient Roman ownership have to be put down to. The explanation, I am going to suggest, is of course only one of the possible ones.

I think that the general features are rooted in the common traits of primitive societies, above all in the patriarchal form of slavery. Some general features, however, can be explained by other conditions. For example the ritual of balancing with the *mancipatio* and other contracts of sale are simply the consequence of the lack of coinage.

The special features, on the other hand, have perhaps to be ascribed to the peculiarity of early Roman society, i.e. to the fact that ancient Romans were peasants and not tradesmen or sailors. The concentrated *patria potestas* was surely built upon the peasant economy, and as a consequence the homogeneous legal acts of *mancipatio* and *vindicatio* too rest upon this economic basis. Agriculture is also likely to have played an important role in the formation of *usus auctoritas*. Finally, the peasant way of life has undoubtedly also influenced the mentality of early Romans, and so it had an indirect influence on ancient law.

5. It seems that the germs of classical ownership can be found above all in the special features of ancient ownership. The early appearance of individual private ownership, the creation of the acts of conveyance, the tentative delimitations of ownership and *iura in re aliena* have surely contributed to the high standard of classical ownership.

It is true that the picture of ancient ownership, as furnished by our sources, is imperfect. Several points remain obscure. The loss, however, is not as serious as might have been supposed at first sight. Ancient Roman ownership is important for us only as the preliminary stage of classical Roman law, and indirectly, of contemporary law. As could be seen, the germs of classical law are clearly recognizable, and generally only the traces of solutions, which were not fit for life and therefore have not been incorporated into classical ownership have been obliterated, probably for ever. One must not complain about this, because the foundations of the classical building are quite well preserved. It is the fate of these progressive elements of ancient ownership which will be examined in the second part of the book.

PART TWO

PRECLASSICAL LAW

THE CREATION OF THE CLASSICAL NOTION OF OWNERSHIP

I. FACTORS OF DEVELOPMENT

1. Very few questions of older Roman law have definitely been settled. Most of the results achieved up to now are hypothetical and disputed to a lesser or greater extent. The date and the process of the creation of the classical notion of ownership, *dominium*, is fortunately one of the rare exceptions. Theory is chiefly indebted to Kaser and Monier for having put its appearance at the end of the Roman Republic; and now this has become a generally accepted and well-founded thesis.¹

However, certain details of this process, the causes and the importance of the creation of *dominium*, have not yet been sufficiently clarified. I should like to mention just a few of these moot points. Monier holds the view that the appearance of *dominium* meant a shift from the limited *mancipium*-power to a total power over things.² Kaser, however, conceives it as the victory of absolute ownership over relative ownership.³

The underlying factors of this terminological change have been cleared up even less. Monier links the change with the introduction of the categories of *res corporales* and *incorporales*.⁴ But the invention of the purely theoretical notion of incorporeal things could have hardly led to a revolutionary change like this.

Kaser offers a different explanation. He thinks that the creation of *dominium* was due to the transformation of the proprietary remedies, and to the spread of individualism.⁵ It is easy to realize that since ownership is closely connected with the changes of the economic system, explanations of this kind, even if they may hold true in some respects, touch only the surface of the historical process. In addition, the reasons adduced by Kaser are to some extent questionable. First of all I have serious doubts about his view on the development of the proprietary

¹ Kaser, *EB* pp. 306 ff; Monier, *Dominium*. Cf. also Capogrossi-Colognesi, *Struttura* pp. 492 ff.

² "C'est même à ce propos qu'à notre connaissance, la notion d'un *dominium* donnant maîtrise complète d'une chose, et non d'un pouvoir limité, apparaît pour la première fois dans les textes." (Monier, *Dominium* p. 357.)

³ "Das relative Eigentum liess die Ausbildung einer technischen Bezeichnung für dieses Recht nicht zu. Für das absolute Recht stellten sich alsbald zwei Namen ein . . . *dominium*, und . . . *proprietas*." (Kaser, *EB* pp. 307 f.).

⁴ Monier, *Dominium* p. 357.

⁵ "Es liegt im Zeitgeist, im Bedürfnis des immer stärker individualistisch denkenden Zeitalters, die private Völlherrschaft rechtlich von den Tatbeständen geringerer Sachgewalt abzusondern . . ." (Kaser, *EB* p. 307.)

remedies.⁶ Secondly, I think that the undisputed spread of individualism in Rome in the course of the last centuries of the Republic could have at most contributed to the formation of the classical notion of ownership without having ever been the decisive factor.

2. In order to form an opinion about the creation of *dominium*, about the causes and importance of this change, it is necessary to start from the economic and social transformation that took place in Rome during the third and second centuries B.C.

As has been pointed out,⁷ the institution of private ownership already existed in Rome by the age of the Twelve Tables, but the precise notion of it was still unknown in ancient law. The words *mancipium* and *manus* denoted the homogeneous *patria potestas*, and united both personal and patrimonial elements under the same notion. The expression *meum esse*, however, was applied to everything including the objects of *mancipium*-power. This conceptual primitiveness has been attributed first and foremost to the patriarchal slavery and to the peasant-economy prevailing at those times in Rome.⁸ The slave was at the same time an inferior member of the family and an object of ownership, while the free members of the family had economic value as valuable manpower, too. The lawyers of that age, endowed but with a limited power of abstraction, were not yet capable of expressing conceptually the duality in the seemingly homogeneous *patria potestas* and the identity in the seemingly different categories of *res Mancipi* and *res nec Mancipi*.

3. In the course of the well-known economic and social change of the third and second centuries B.C., the circumstances which in the past had hindered the creation of a precise notion of ownership, disappeared:

(a) The immense increase in the number of slaves put an end to the patriarchal form of slave-holding. Slaves ceased to be inferior members of the Roman family, and gradually became simple objects of property. The patrimonial elements, as a rule, overshadowed the personal features of the relationship that existed between the slave and his master.⁹

(b) The large-scale using of huge numbers of slaves in production deprived the free members of the family of their economic value as manpower. In the relationship between them and the *paterfamilias* the personal character became exclusive, and the economic features gradually vanished.

(c) The economic life of Rome was no longer based on the peasant-economy, but on the market producing *latifundia* and on an extensive trade. So, the economic unit, which has been the basis of the *mancipium*-power, ceased to exist.¹⁰

⁶ I conceive the character of the *l.a.s.i.r.* differently, so the further development of the proprietary remedies will also be interpreted in a different way. On this *infra* pp. 149 ff.

⁷ On this see *supra* pp. 40 f.

⁸ Cf. *supra* pp. 60 f.

⁹ This becomes at least characteristic for slaveholding. Of course, there have existed at all times slaves who had close personal relations with their master.

¹⁰ The system of the agnatic family became equally obsolete, but it was preserved by

(d) As a consequence, the chief means of production of the ancient peasant-economy, the *res Mancipi*, gradually lost their paramount economic importance. Certainly slaves and land continued to retain their former significance, but the animals of draught were pushed into the background by other means of production, such as ships or provincial land, which were considerably more important for the trade and in general for the economic life of the Empire, that already embraced the Mediterranean world.

From all this it can be clearly seen that the social and economic foundations of the *Mancipium*-power have faded away, and the conditions for separating patrimonial and personal power, for creating the unified notion of ownership, were already present.

Although economic and social changes played the decisive role in bringing this about, other factors must also be taken into consideration.

4. The creation of the notion of *dominium* was also dependent on the previous formation of the category of *servitus* and the appearance of the institution of *usus fructus*. A statue is only finished when the chisel of the sculptor has removed the superfluous marble. Likewise, the abstract notion of ownership can only be created after everything not belonging to ownership, has been stripped off. The classical Roman notion of ownership, as a matter of fact, is characterized by an utter disregard of those external appearances which represent the very idea of ownership to the layman. Thus *dominium* is not only clearly separated from possession, but also from the use of the thing and from the enjoyment of its fruits. The turning into independent legal institutions of some rights of an owner, and the distinction between legal and actual power necessarily belong to the creative process of the notion of ownership.

(a) It has been shown by Kaser¹¹ that, from the third century B.C. onwards, possessory remedies were also extended to private land and to movables.

(b) It is a prevailing view that in the course of the preclassical age the number of servitudes increased, urban servitudes appeared, and the collective notion of *servitus* was created by the lawyers of this period.¹² The prevailing view is confirmed by a handful of sources. On occasions Cicero mentions servitudes and he also uses the expression *servitus*.¹³ Several fragments in the Digest dealing with questions of servitudes refer to Quintus Mucius Scaevola, or even quote him directly.¹⁴ By these two layers of our sources it can be proved that the notion of *servitus* was already known in the preclassical age.¹⁵

Roman conservatism. Cf. Lévy-Bruhl, "Sur l'abandon noxal", *Mélanges Meylan* I. (Lausanne, 1963) pp. 193 ff. Especially p. 209.

¹¹ Kaser, *EB* pp. 277 ff.

¹² Cf. e.g. Biondi, *Servitudes* pp. 666 ff; Kaser, *EB* pp. 302 ff; Monier, *Dominium* pp. 358 ff.

¹³ Cf. Cicero, *De leg.* 1, 4, 14; *De. or.* 1, 38, 173; 1, 39, 178; *Pro Caec.* 26, 74. He also uses the word *servitus*. See *ad Att.* 15, 26, 4; *ad Q. frat.* 3, 1, 3; *De off.* 3, 16, 65. These sources have been collected by Costa. See *Cicerone* I. pp. 130 ff.

¹⁴ Cf. Cels. *D.* 18, 1, 59; Pomp. *D.* 8, 3, 15; 18, 1, 66, pr; 39, 3, 21; Ven. *D.* 21, 2, 75 and Scaev. *D.* 43, 20, 8. Cf. O. Lenel, *Palingenesia Iuris Civilis* I. (Lipsiae, 1889) pp. 761 ff.

¹⁵ According to Biondi, *Servitudes* p. 670., by the age of Cicero servitudes were still called

(c) Though some details of the origin of *usus fructus* are still argued over,¹⁶ it has already been generally accepted that the institution was a creation of the third and second centuries B.C.¹⁷ This can be proved—as with the servitudes—by Ciceronian texts, and according to a fragment in the Digest, questions of *usus fructus* have already been discussed by preclassical lawyers.¹⁸

It has been convincingly shown by Bretone that *usus fructus* was never conceived of as a kind of ownership, and it came into existence as an independent institution.¹⁹ Nevertheless I am inclined to suppose that in the beginning a right of *usus fructus* was first and foremost created by a *legatum sinendi modo*, instead of a *legatum per vindicationem*, because the latter kind of legacies supposes a real right that already exists and is enforceable, a well-established legal institution.²⁰ The introduction of the institution and the notion of *usus fructus* was beyond any doubt an important step towards the creation of *dominium*.

5. Finally, we should also take into account mental factors. But I think that of the different factors the greatest importance should be attached not to individualism but to Greek science and philosophy, which fruitfully influenced preclassical legal theory, especially in the creation of abstract notions.²¹

So it is obvious that all the economic, social, legal and spiritual conditions for creating the precise notion of ownership were already present in Rome at the very latest by the second century B.C.²² It is surprising that preclassical legal science refrains from drawing the legal conclusions of this development for a considerable time and creates the notion of *dominium* only after a certain delay.

iura, the word *servitus* being used by Cicero only with a rather general meaning. In fact, Cicero uses the word with a precise, legal meaning: *ad Q. frat.* 3, 1, 3: *iure constituto et servitute fundo illi imposita*. The opinion of Schulz, *Geschichte* p. 112, who thinks that Quintus Mucius Scaevola did not yet distinguish between obligations and *iura in re aliena* is also unconvincing. This assumption is based upon a rather hypothetical reconstruction of the system of Scaevola's *libri decem et octo iuris civilis*.

¹⁶ Cf. e.g. R. Ambrosino, "Usus fructus e communio", *SDHI* 16 (1950) pp. 183 ff.; P. Masson, "Essai sur la conception de l'usufruit en droit romain", *RHD* 13 (1934) pp. 36 ff.; Kaser, *Geteiltes* p. 461. The vast literature (until 1960) can be found: G. Wesener, "Usus fructus", *PW* IX A 1 (1961) 1172 ff. Recently Bretone, *Usufrutto* (with a convincing refutation of earlier theories). On this see F. Gallo, *BIDR* 3. ser. 5 (1963) pp. 196 ff.; Kaser, *Labo* 9 (1963) pp. 367 ff.; D. Medicus, *SZ* 81 (1964) pp. 424 ff.

¹⁷ Cf. Bretone, *Usufrutto* p. 20; Kaser, *RPR* p. 376.

¹⁸ Cicero, *Top.* 4, 21; *Pro Caec.* 4, 11; *ad fam.* 7, 29, 1. Ulp., *D.* 7, 1, 68, pr; *Vetus fuit quaestio, an partus ad fructuarium pertineret: sed Bruti sententia optinuit* . . .

¹⁹ Bretone, *Usufrutto* pp. 35; 49; 54 etc.

²⁰ Thus already F. Kniep, *Gai institutionum commentarii* II. (Jena, 1912) p. 152 and III. (1913) pp. 360 ff. Recently F. Gallo, *BIDR* 3. ser. 5 (1963) pp. 208 f.

²¹ Cf. Schulz, *Geschichte* pp. 73 ff.

²² On the social and economic transformation cf. e.g. from the immense literature: F. Altheim, *Epochen der römischen Geschichte* II. (Frankfurt, 1935) especially pp. 203 ff.; De Martino II. 255 ff. Capogrossi-Colognesi, *Struttura* 451 ff. rightly points out that in the plays of Plautus the word *dominus* is not restricted to slaves, but is also applied e.g. to a house. However, I do not think that the word has already got with Plautus the technical meaning of "owner".

II. DOMINIUM

1. The word *dominus* can be already found in sources dating back to the third and second centuries B.C., but instead of "owner" its meaning was still "slaveholder, master".²³ In the book of Cato on agriculture it could perhaps be already translated as "landowner", but it is more accurately rendered by "master", or "lessor".²⁴ *Dominus* in the technical meaning of owner appears only with authors of the first century B.C., such as Varro or Cicero.²⁵

In the language of the statutes, the expression appears first of all in the *lex agraria*, which was published in 111 B.C.:

*Is ager locus domneis privatus ita, ut ei optima lege privatus est, esto.*²⁶

Kaser thinks that this single instance does not justify us in coming to the conclusion that the word was used technically.²⁷ Though caution is by no means out of place, if one considers the conservative language of republican statutes²⁸ and the scantiness of extant republican legislative material, the importance of the text quoted must not be underestimated. So I think that the occurrence of *dominus* meaning "owner" can be dated to the second half of the second century B.C. on the basis of the *lex agraria* and Ciceronian texts.

2. *Dominium*, in its technical meaning, appeared even later. Cicero does not yet seem to know this word,²⁹ nor is it contained in republican statutes.³⁰ Monier supposes that it was first used by the lawyer Alfenus Varus,³¹ while Kaser ascribes its first application to Labeo.³² These statements are of course hypothetical in so far as we are not acquainted with the works of preclassical lawyers apart from the few republican texts incorporated in the Digest, and possibly distorted. So it is quite possible that *dominium* became a current term in legal writings even earlier.

Taking into consideration the fact that the word was possibly already used by Varus and was so without any doubt by Labeo, who lived at the time of Augustus, and who surely did not adopt *dominium* as a recent invention, the first

²³ Kaser, *EB* p. 308.

²⁴ Cf. Kaser, *EB* p. 308; Monier, *Dominium* p. 359.

²⁵ For the sources see Kaser, *EB* p. 309 n. 15.

²⁶ *Lex agraria* line 27 (in: *FIRA I.* p. 109). Cf. Mommsen, "Lex agraria", *Ges. Schr. I.* pp. 65 ff.; Kaser, "Die Typen der römischen Bodenrechte in der späten Republik", *SZ* 62 (1942) pp. 6 ff.; De Martino III. pp. 15 ff.; F. T. Hinrichs, "Die lex agraria des Jahres 111 v. Chr.", *SZ* 83 (1966) pp. 252 ff.

²⁷ "... doch lässt dieser vereinzelte Gebrauch noch keinen Schluss auf eine technische Bezeichnung zu." (Kaser, *EB* p. 309.)

²⁸ Cf. Schulz, *Geschichte* pp. 113 f.

²⁹ Cf. Monier, *Dominium* p. 358. He admits himself that an "argumentum ex silentio" is generally a weak argument, but so many works of Cicero have been preserved that if *dominium* had been a current term by his age, one should have to find it in his writings. Cf. also Capogrossi-Colognesi, *Struttura* pp. 480 f. On the formation of the noun see *Ibidem* pp. 477 ff.

³⁰ Cf. Kaser, *EB* p. 310.

³¹ Cf. Monier, *Dominium* p. 359. So does Capogrossi-Colognesi, too, *Struttura* p. 493.

³² Cf. Kaser, *EB* p. 309.

appearance of this notion may be safely dated to the first century B.C. In essential points Kaser and Monier come to the same conclusion.³³

The other classical expression denoting ownership *proprietas*, is probably of a later origin. It appears only in texts dating back to the first century of the Empire.³⁴ Of course it is not impossible that *proprietas* had already got a precise, legal meaning by the end of the Roman Republic, but this cannot be proved.

3. It is a rare case that the considerable delay of Roman law in registering the economic and social changes, and the development of legal institutions, can be as clearly shown as with the notion of *dominium*.

As has been already stated, it lies beyond any doubt that by the second century B.C. the social, economic and legal conditions which are necessary for the creation of a notion of ownership, were not only present, but exacted this step. None the less, the notion of *dominium* was only created, or at least became a current term, about a century later, in the course of the first century B.C.

The delay is surely due to the circumstance that, as far as is known, no contemporary legal system, including Greek law, had a notion corresponding to *dominium*.³⁵ Preclassical Roman lawyers did not possess a model. They were compelled to create the notion of *dominium*, as an unprecedented novelty in the history of law.

It has to be also borne in mind that lawyers were above all engaged in practical tasks. They had to develop new legal institutions like *usus fructus*, to adapt the proprietary remedies and the legal forms of conveyance to the changed conditions. As long as they could manage this without the notion of *dominium*, the thought of creating it did not occur to them.

The appearance of *usus fructus*, the creation of the category of servitudes, the gradual passing of *ager publicus* into private hands, the unification of the notions *usus* and *possessio*,³⁶ and the informal *traditio* as a mode of conveyance,³⁷ made the notion of ownership finally indispensable. The older terminology, given the totally changed conditions, became quite unsuitable. It seems that the preclassical lawyers decided themselves to take the final step only under the heaviest pressure of different practical demands.

³³ Kaser, *EB* p. 312; Monier, *Dominium* p. 357.

³⁴ Cf. Kaser, *EB* p. 311. Capogrossi-Colognesi thinks (*Struttura* p. 503) that the two words came into being simultaneously.

³⁵ Cf. Kränzlein pp. 13 ff. It appears from his terminological investigations that Greek law had no unambiguous technical term for ownership. It is not altogether clear what his reasons were for asserting that in spite of this there existed a clear distinction between ownership and possession in ancient Greece. Cf. H. J. Wolff, *SZ* 81 (1964) pp. 337 f.

³⁶ On this see Kaser, *EB* pp. 320 ff.

³⁷ See *infra* pp. 139 ff.

THE DEVELOPMENT OF THE TRANSFER OF OWNERSHIP

I. FACTORS OF DEVELOPMENT

1. The manifold changes of Roman economic and social life in the course of the last centuries of the Republic obviously required not only the creation of a precise notion of ownership, but also called for reforms concerning the transfer of ownership and, what is closely connected with it, the proprietary remedies. Roman legal history shows that preclassical lawyers did not fail to realize these demands, and endeavoured to adjust the different legal rules on ownership to the new situation. Though the rigid framework of *ius civile* imposed certain limits on their efforts, they more or less succeeded in carrying through the most urgent reforms.

2. The transformation of the modes of conveyance, however, was called for by a different aspect of the social and economic changes than the creation of the notion of *dominium*. The latter, as could be seen,¹ was a consequence of the dissolution of the homogeneous *patria potestas*, of the decline of the peasant way of life, of the disappearance of patriarchal slavery. Changes concerning the transfer of ownership, however, were dependent on a lively commodity-turnover, on the development of trade.

In any case these changes did not amount to a radical break with the past. The two ancient legal acts, the *mancipatio* and the *in iure cessio*, continued to be the prescribed modes of conveyance of a *res Mancipi*. But the informal delivery, the *traditio*, was ranked among the modes of transfer, as a legal act, and the institution of *usucapio* also underwent important changes.

II. MANCIPIATIO AND IN IURE CESSIO

1. The ritual and the function of *mancipatio* were not subject to any substantial change in preclassical law. Its modified form, the *mancipatio nummo uno*, by which the former contract of sale became an act designed for the transfer of ownership, was a creation of ancient law.² Notwithstanding, this form of *mancipatio*, invented by the Pontiffs about the age of the Twelve Tables, meanwhile grew more rigid and having lost its flexibility, became unsuitable for further alterations. Nevertheless, Roman conservatism cherished faithfully the inveterate, already void and impractical rules of *mancipatio* for several centuries. Its remnants can still be found in the documents from Ravenna, which date back to the sixth century A.D.³

¹ Cf. the previous chapter. Especially pp. 132 ff.

² See *supra* p. 72 ff.

³ Cf. Kaser, *RPR* II. (München, 1959) p. 197 n. 7.

There is absolutely no doubt that even by the last centuries of the Republic the practical importance of *mancipatio* was no longer the same as it was before. Nevertheless, one must not exaggerate this eclipse, because two or three centuries later Gaius still speaks of *mancipatio* as of a practical institution:

*Plerumque tamen et fere semper mancipationibus utimur.*⁴

At any rate it can be shown that the informal delivery of *res Mancipi* was already a common practice in the preclassical period. So, Varro takes into account the possibility that a slave could be transferred without the formalities of *mancipatio*:

*In horum emptione solet accedere peculium aut excipi, et stipulatio intercedere sanum esse furtis noxisque solutum, aut si Mancipio non datur, dupla promitti, aut si ita pacti, simpla.*⁵

The introduction of a new proprietary remedy, the *actio Publiciana*, in the last century of the Republic, likewise proves that a demand existed for the protection of the informal acquisition of a *res Mancipi*.⁶

2. The formalities of *in iure cessio* have likewise been preserved unaltered, and as a principle its field of application has not diminished. It was suitable for the acquisition both of *res Mancipi* and *res nec Mancipi* as in ancient law. Roman lawyers stuck as obstinately to *in iure cessio* as they did to *mancipatio*, although the performing of the former act was considerably more circumstantial. The parties were bound to appear before the magistrate, which—as a consequence of the territorial expansion of Rome—must have frequently caused considerable difficulties in the transport conditions of the time.⁷ If one also considers the growing official engagements of the *praetor*, then it seems that in some cases an *in iure cessio* might have been simply impracticable.

So, though there is a lack of direct evidence, one may safely suppose that the *in iure cessio*, especially in the case of a transfer of single objects, has lost its importance to an even higher degree than *mancipatio*.

3. So it is obvious that the maintenance of *mancipatio* and *in iure cessio* was not reasonable. These forms of conveyance were no longer fitting to warrant those advantages which were required by the security of turnover in the preclassical age.

Literature unanimously celebrates the victory of the informal delivery over *mancipatio* and *in iure cessio* as a sign of progress, under the false impression that the development of law means the abolishment of strict forms. Bonfante was somewhat of an exception, when he objected to the prevailing view. He pointed out that the generalization of *traditio* (which took place of course only in the classical and, partly, in the postclassical period, although its germs can already be found in preclassical law), cannot be counted as one of the praiseworthy features of the development of the Roman law of property. Advanced commerce requires forms of transfer which are suitable for warranting the security of acquisition,

⁴ Gai. 2, 25.

⁵ Varro, *De re rustica* 2, 10, 5.

⁶ See *infra* pp. 154 ff.

⁷ The practical difficulties of *in iure cessio* are also mentioned by Gaius. Cf. Gai. 2, 25.

so it was not a wise step to replace *mancipatio* by the informal *traditio*, instead of creating new, corresponding legal forms.⁸

In this case too the keen eyes of the great Italian romanist saw the truth, a truth frequently veiled by an uncritical enthusiasm for Roman, especially for classical Roman law. One has only to think of the unsuitability of *traditio* for the transfer of immovables, and of its fatal consequences for the security of landed property in order to refrain from overpraising the hegemony of *traditio* in Roman law of ownership.

The inherent shortcoming of preclassical and classical Roman law is clearly manifest in this field. The inviolability of the provisions of *ius civile*, the stubborn conservatism, which—it is true—sometimes involuntarily fostered progress,⁹ hindered the creation for the transfer of ownership of such forms that would have been appropriate for a society based upon a lively commodity-turnover. Preclassical lawyers, although they apparently realized the demands of life, instead of replacing *mancipatio* and *in iure cessio* by flexible and up-to-date legal forms, confined themselves to inventing pretexts in order to avoid the difficulties of the two obsolete modes of conveyance. They did not dare, or perhaps they were even unable to create new institutions in this field. The rather unsatisfactory solution of preclassical law has been accepted by classical law without thinking. Classical lawyers carefully polished up the products of the previous age; they meticulously developed the rules of *traditio*, but refrained from radical innovations. So, though the recognition of *traditio* as an independent legal act is an undeniable merit of preclassical law, the rules of conveyance remained to some extent imperfect in Rome right up to the end. For long centuries the obsolete and rigid forms of *ius civile* and the altogether informal *traditio* stared each other in the face.

III. TRADITIO

1. The informal delivery, *traditio*, is richly documented by classical and Justinianic sources. Although several questions of detail, especially the different aspects of the *iusta causa traditionis*, are still disputed,¹⁰ the substance of the classical and Justinianic position is clear. The delivery of the object was required for the transfer of ownership, and the existence of a *iusta causa* was called for, too.¹¹

⁸ "... non è consentaneo alla normale evoluzione che la *mancipatio*, che la *in iure cessio*, che in generale gli atti formali d'acquisto dovessero scomparire, cedendo il posto alla tradizione: quelle forme dovevano svolgersi in nuove forme più rispondenti a una costituzione veramente civile." (Bonfante, *Proprietà* p. 309.) Schulz also disapproves of the fact that no new forms were created for the transfer of ownership. See: *Geschichte* p. 152.

⁹ So with the *mancipatio nummo uno*. Cf. *supra* p. 74.

¹⁰ Cf. e.g. A. Erhardt, *Iusta causa traditionis* (Berlin-Leipzig, 1930); Lange. On these and on the work of Hasewinkel-Suringa see Schulz, *SZ* 52. Recently Benedek, *Iusta causa*; Kaser, "Zur *iusta causa traditionis*", *BIDR* 3 (1961) pp. 61 ff; G. Jahr, "Zur *iusta causa traditionis*", *SZ* 80 (1963) pp. 141 ff. with rather astonishing conclusions.

¹¹ Cf. Gai. 2, 19–20; Paul. *D.* 41, 1, 31, pr.

The formation of *traditio*, however, is still rather obscure,¹² and no *communis opinio* has yet been reached regarding its "date of birth". Surprisingly enough, literature has paid very little attention to the question. Some authors mention only in a few sentences that *traditio* is one of the products of the preclassical age,¹³ and those who also dealt specially with its history, like Kaser and, in Hungarian literature, Benedek,¹⁴ approach the question in a speculative fashion. They do not even attempt to look for the traces of *traditio* in republican sources.

It must be admitted that very little data can be collected from our sources concerning the origins of *traditio*, as an independent legal act, but what is at hand supplies sufficient material for not having to rely upon mere assumptions. Therefore the outlines of the formative process of *traditio* will be drawn here on the basis of the sources.

2. Before examining these sources, a few preliminary considerations have to be advanced.

(a) There is no doubt at all that *traditio*, as a fact, has always existed. Since the coming into existence of commodity turnover, the ware has been necessarily delivered to the buyer. In this meaning *traditio* is by no means a product of advanced legal systems.

(b) It may be safely presumed that in ancient law *traditio* was not yet an act provided with legal effects. First, we have no sources for attesting the contrary. Secondly, it is quite improbable that ancient law would have ranked *traditio* among legal dealings, because in early law legal effects, as a rule, could only arise from formal acts. So *traditio* was necessarily excluded.

Res nec mancipi were at those times obviously alienated by a real-sale or by barter, so the acts of sale and the transfer of ownership were not yet distinct, the *traditio* was still—to use the expression of Kaser¹⁵—a "colourless phase". These transactions of small economic importance did not even need a regulation concerning the rights and duties of the parties, because both the ware and the price were immediately delivered. Of course, it is not only consumer goods that were alienated in this fashion, as is supposed by Kaser and Benedek,¹⁶ because sheep or goats, as well as other things, were also sold informally, though these do not entirely come under the notion of consumer goods.

(c) Finally, it is certain that in classical law *traditio* already existed as an independent legal act, so its formative process can be dated to the preclassical period.

3. This conclusion can be corroborated by an enumeration of the conditions that are necessary for the recognition of delivery as an independent legal act in

¹² The statement of Lange (p. 6.) still holds true: "Die Entwicklung der Eigentumstradition in vorklassischer Zeit ist ins Dunkle gehüllt."

¹³ Thus Archi, *Trasferimento* pp. 90 ff; Lange, *loc. cit.*; Voci, *Modi* p. 67. By an artificial interpretation Watson unconvincingly asserts that preclassical law did not require *traditio* for the transfer of ownership: *The Law of Obligations in the Later Roman Republic* (Oxford, 1965) pp. 59 ff.

¹⁴ Kaser, *EB* pp. 195 ff; Benedek, *Iusta causa* pp. 38 f.

¹⁵ Cf. Kaser *BIDR* 3 (1961) p. 63.

¹⁶ Kaser, *EB* p. 195; Benedek, *Iusta causa* p. 38.

order to see whether these were already in existence by the preclassical period.

Obviously, the *traditio* can be recognized as a legal act only if commodity-turnover has progressed up to the point when the contract of sale and the time of fulfilment do not necessarily coincide. This factor doubtlessly already existed in the last centuries of the Roman Republic.

The recognition of the informal consensual sale is also one of the legal conditions for the independence of *traditio*. As the prevailing view rightly has it, the consensual sale came into existence in the course of our epoch, so this condition was not absent either.¹⁷

In addition, Roman law had another factor stimulating the recognition of the *traditio*. By the creation of the *mancipatio nummo uno*, there already existed an act of conveyance that was distinguished from the act of sale. The importance of this factor is stressed by the negative evidence of Greek law. Greeks, in spite of their lively commercial life, did not recognize delivery as an independent legal act.¹⁸

Though these considerations corroborate the assumption that *traditio* was recognized as a legal act in the course of the preclassical period, nevertheless they serve only as *conditiones sine qua non* and thus do not render superfluous textual evidence.

4. (a) *Traditio* is already mentioned several times by the third century B.C. in the plays of Plautus:¹⁹

Asin. 3, 3, 99: *mihī trade istuc*
Merc. 2, 2, 7: *Pisto ipsi facito ut tradas in manum*
Most. 1, 1, 16: *Quod te in pistrinum scis actutum tradier*
Trin. 3, 2, 16: *Hanc maiores famam tradiderunt tibi tui*

In the last of the passages cited the verb *tradere* is obviously not used in its legal meaning, but in the other three texts it is quite possible, though not absolutely certain that *tradere* refers to an already existing technical term. Costa asserts that in the texts quoted the word has a legal content.²⁰ His view is supported by the consideration that Plautus could not have taken the notion from his Greek models, for Greek law was not acquainted with the notion of delivery,²¹ but one has to be cautious, because the texts of comedies are not reliable witnesses of legal history. So, in my opinion, it is possible, but can hardly be ascertained that *traditio* had already acquired legal independence by the third century B.C.

¹⁷ Cf. above all Kaser, *RPR* p. 456.

¹⁸ On this see J. Demeyere, "La formation de la vente et le transfert de la propriété en droit grec classique", *RIDA* 1 (1952) pp. 215 ff. The author draws the following conclusion (p. 228); "... aucun de nos documents ne fait allusion même incidemment à une institution comparable à la *traditio*."

¹⁹ The texts have been collected by Costa, *Plauto* p. 254.

²⁰ Costa, *Plauto* p. 251.

²¹ Cf. n. 18.

(b) The edict of the *aedilis curulis* has also to be considered, for here the word *traditio* is used in connection with the warranty for latent defects.

Ulp. *D.* 21, 1, 1, 1: . . . *Si quid autem post venditionem traditionemque deterius emptoris . . . factum erit . . .*

Unfortunately the fragment quoted cannot be accepted as reliable evidence. First, it is doubtful whether Ulpian commented upon the original text of the edict or upon a later version of it. Secondly, as the sale of slaves is in question, the possibility of an interpolation cannot be excluded. The compilers might have substituted for the expression "*mancipationemque*", "*traditionemque*". Finally it can be argued whether any importance should be attributed in this case to the word *traditio*. Arangio-Ruiz supposes that it was used in its technical meaning,²² whereas Pringsheim prefers a different view.²³

The date of the issuing of the edict is also debatable. Pólay, unconvincingly puts it at the third century B.C.,²⁴ while Monier dates it to the middle of the second century B.C.²⁵

In the face of so many uncertainties, we are forced to come to the tentative conclusion that the text of the edict of the *aedilis curulis* in itself does not prove the recognition of *traditio*.

(c) While the previously cited sources contained only a certain degree of probability, the agricultural treatise of Varro furnishes irrefutable evidence for the recognition of the *traditio* as an independent legal act by preclassical law. Though Varro wrote his book by the first century B.C., being but a layman, he did not report legal innovations, but probably tried to register in his book the practice that already existed. From his statements we can deduce how things might have been in the second century, without running risks.

Varro, dealing with the sale of sheep, describes the usual text of the pertinent stipulation and adds: *Cum id factum est, tamen grex dominum non mutavit, nisi si est adnumeratum; nec non emptor pote ex empto vendito illum damnare, si non tradet, quamvis non solverit nummos: ut ille emptorem simili iudicio, si non reddit pretium.*²⁶

It can be seen from the text that the agreement did not yet convey the ownership of the flock to the buyer. He acquired ownership only if the sheep had been

²² Arangio-Ruiz, *Compravendita* p. 370 n. 2 and p. 190.

²³ F. Pringsheim, "The Decisive Moment for Aedilician Liability", *RIDA* 1 (1952) pp. 545 ff.

²⁴ Cf. E. Pólay, "Az eladói kellékszavatosság a preklasszikus római jogban" (The Liability of the Seller for Latent Defects in Preclassical Roman Law), *Acta. Jur. et Pol. Szeged* tom. 11 fasc. 9 (1964). p. 11. His view is based upon the development of Roman slavery. In my opinion, however, he puts the dissolution of patriarchal slavery at a too early date. The fact that in the work of Cato the notion of *morbus* is already dealt with, does not furnish a definite argument either. The liability for latent defects might have been stipulated by a special agreement by an early time.

²⁵ R. Monier, *La garantie contre les vices cachés dans la vente romaine* (Paris, 1930) p. 24. Cf. Pólay, *loc. cit.* in the previous note.

²⁶ Varro, *De re rustica* 2, 2, 6. The expression *adnumeratum* does not refer to the payment of the price, as is understood by Frezza (*BIDR* 7, 1965, p. 355.), but — as can be clearly seen from the context — it refers to the "counting" of the flock.

“counted”, which, in the case of a flock, is the usual and natural performing of delivery. In the second part of the sentence Varro explains that the contract of sale enables the buyer to sue for the delivery of the animals (*si non tradet*), while the seller may sue for the payment of the price.

The evidence furnished by the above text is corroborated by another statement of Varro: *Quod enim alterius fuit, id ut fiat meum, necesse est aliquid intercedere, neque in omnibus satis est stipulatio aut solutio nummorum ad mutationem domini(i).*²⁷

It is said that the stipulation and the payment of the price are not sufficient for the acquisition of ownership. Something, i.e. the act of conveyance, must be added. The expression “*in omnibus*” presents some difficulties of interpretation, if it is understood as the short form of “*in omnibus rebus (casibus)*”. I think, however, that *in omnibus* means here simply “altogether”.

(d) Finally the edict on the *actio Publiciana* also has to be taken into account. Here the word *traditio* is used beyond any doubt in its technical meaning. As the action was probably introduced by the first century A.D.,²⁸ and the *praetor* is not likely to have used this expression as a new notion, but adopted the practice already existing, the edict points to the second century.

5. From the sources it can be inferred that the *traditio* became an independent legal act in the course of the third and second centuries B.C. For the third century evidence can only be found in a few lines of Plautus, but it is above all the texts of Varro and the edict of the *actio Publiciana* that testify reliably in favour of the second century.

The highly polemical problem of the *iusta causa traditionis* will be left aside, because the pertinent texts — apart from the edict of the *Publiciana*, which perhaps contained this expression²⁹ —, are all classical, so we do not know the view taken by republican jurisprudence. Therefore we will not touch on the question how far *iusta causa traditionis* and *usucapionis* were connected.³⁰

6. In the history of the transfer of ownership, the decisive step was already taken by ancient law, when the act of *mancipatio* was separated from the payment of the price, and thus from the act of sale or gift. In the later Republic the economic importance of the sale of *res nec mancipi* grew, and the informal transfer of *res mancipi* also became rather frequent. Preclassical law had to decide the question whether the contract of sale, the payment of the price or the delivery of the thing should be relevant for the transfer of ownership. It is understandable that the third solution was accepted, as the *mancipatio nummo uno* had already shown the path to follow. So *traditio* was recognized as an act of conveyance. This probably happened in the second century B.C. with a certain delay as compared with the development of commodity-turnover.

²⁷ Varro, *De re rustica* 2, 1, 15.

²⁸ See *infra* p. 156.

²⁹ See *infra* p. 157.

³⁰ Cf. Schulz, *SZ* 52, pp. 547 f; Kaser, *RPR* pp. 351 f.

IV. USUCAPIO

1. It may seem odd that the development of *usucapio* is treated in the chapter on the different acts of conveyance. I think, however, that this unusual system is not unjustified, because the Romans themselves, as was recently shown by Sturm,³¹ conceived of *usucapio* as a kind of alienation.

Roman *usucapio*, especially in preclassical and classical law, has quite close links with the transfer of ownership. We have to bear in mind that the consolidation of the informal acquisition, i.e. the transfer of a *res Mancipi* by *traditio*, was an important function of *usucapio*. On the other hand, the restrictions imposed upon *usucapio* in the preclassical age in many respects bring this institution into line with conveyance.

2. *Usus auctoritas*, unlike *mancipatio* or *in iure cessio*, was subject to a far-reaching transformation in preclassical law. This is most strikingly manifested by the alteration of its name. Thenceforth it was called *usucapio*.³² The new terminology was more than anything a consequence of the changed function of the institution, and bears witness to the fact that the ancient *usus auctoritas* was transformed into a real, acquisitive *usucapio* by the preclassical age. On the other hand severe limits were imposed on acquisition by long possession, by the introduction of several requirements.

My opinion about the preclassical development of *usucapio*, it must be said, contrasts with the view expressed by De Vissher.³³ He thinks that *usus auctoritas* was based upon *auctoritas*, which he interprets as a kind of social solidarity, whereas *usucapio* reflects individualistic ideas, because the stress is laid upon the *bona fides*.³⁴ It has been already mentioned that I disagree with De Vissher's interpretation of *auctoritas*, which is devoid of any basis in the sources and in addition amounts to an idealization of the conditions of early Rome.³⁵ It also seems to me doubtful whether *bona fides* was indeed the pillar of *usucapio*, to the extent the Belgian scholar supposes. I think that *bona fides*, instead of being the basic idea of *usucapio*, was in fact only an important requirement for it.³⁶

3. As has been already mentioned, the term *usucapio* is a product of preclassical law.³⁷ The issuing of the *lex Atinia*, i.e. at the end of the third or at the beginning of the second century B.C., may serve as a *terminus post quem*, because this statute

³¹ F. Sturm, "Alienationis verbum etiam usucapionem continet", *Mélanges Meylan* I. (Lausanne, 1963) pp. 299 ff.

³² For the sources see nn. 38–41.

³³ Cf. De Vissher, *Individualismo*.

³⁴ De Vissher, *Individualismo* pp. 32 f.

³⁵ See *supra*, especially pp. 123 f.

³⁶ It is true that when Gaius in his text-book deals with *usucapio*, he lays stress upon *bona fides* (2, 45–61), and hardly pays any attention to *iusta causa*. This, however, does not permit far-reaching conclusions, because Gaius was but one of the classical lawyers, and his exposition is obviously determined by didactic points of view.

³⁷ Cf. Kaser, *EB* pp. 301 f.

still uses the old terminology.³⁸ Signs of a change, however, can already be observed by the third century. In a play for example, Plautus uses the expression *usu suum facere*.³⁹ Though it would be risky to attribute a technical meaning to the text,⁴⁰ nevertheless it shows that in non-legal language the elements of the new terminology had already appeared, although the conservative style of legislation was still reluctant to adopt it.

In the works of Cicero and Varro the institution is already called *usucapio*, just as it is in the edict of the *actio Publiciana*.⁴¹ So by the first century B.C. the new terminology was already generally used, both in legal and non-legal writings. Therefore the change of the terminology may be presumably dated to the second century, i.e. approximately to the time when *traditio* was recognized as an independent legal act.

4. The new terminology bears witness to the changed function of the institution, to its new content. This also follows from the very word, as the compound *usu capere* (to acquire by *usus*)⁴² shows clearly that in preclassical law the acquisitive effect of long possession was realized and emphasized, so it became a real *usucapio*.

This transformation was dependent on several conditions which had not yet existed in early law, but were already present in the last centuries of the Roman Republic. Thus the notion of ownership, as distinguished from personal relationships, was created,⁴³ and a distinction was made by legal science, between ownership and possession. Henceforth *possessio* meant factual holding, and *dominium* a total right over a thing.⁴⁴

Usucapio naturally continued to be of importance for bringing evidence in a proprietary lawsuit, but in preclassical law it was already definitely ranked among the modes of the acquisition of ownership. This is shown by Varro, who, enumerating the ways by which the buyer of a slave could acquire ownership, also mentions *usucapio*:

*In emptionibus dominum legitimum sex fere res perficiunt . . . aut si usu cepit . . .*⁴⁵

The text quoted confirms the conclusion that can be drawn from the terminological change.

5. Preclassical law not only created the classical notion of *usucapio*, but at the same time the institution itself was considerably transformed by the introduction of several requirements, which meant a limitation of *usucapio*. So the field of application of *usucapio* became considerably narrower, as compared with that of *usus auctoritas*.

³⁸ *Quod subruptum erit, eius rei aeterna auctoritas esto* (Gell., *N.A.* 17, 7, 1.).

³⁹ *Amph.* 1, 1, 219.

⁴⁰ Cf. Costa, *Plauto* p. 244 n. 118.

⁴¹ Varro, *De re rustica* 2, 10, 4; Cicero, *De leg.* 1, 21, 55; 2, 24, 61. On the terminology of the edict of the *actio Publiciana* see the following chapter.

⁴² See *supra* pp. 88. n. 17.

⁴³ See *supra* pp. 131 ff.

⁴⁴ On this see above all Kaser, *EB* pp. 320 ff.

⁴⁵ Varro, *De re rustica* 2, 10, 4.

According to the prevailing view,⁴⁶ the requirements of a *iusta causa* and of *bona fides* were introduced by preclassical law. There is also no doubt at all that the *lex Atinia* also prohibited *usucapio* for those who had acquired a stolen thing in good faith, until it was recovered by the owner.⁴⁷ I think that in this case the prevailing view can be accepted without hesitation.⁴⁸ A detailed analysis of *iusta causa* or *bona fides* has to be left aside, because this would require a voluminous treatise, and in addition the sources referring to *iusta causa* and *bona fides* are of classical or even later origin, so not much could be inferred from them regarding the ideas of preclassical lawyers.

None the less we have to deal with these innovations from two points of view. First we have to weigh up how far the possibility of *usucapio* was limited by them and secondly we have to reflect about the significance of the new provisions.

6. It has been rightly stressed by Bonfante and Kaser that the new requirements involved a restriction of *usucapio*.⁴⁹

The prohibition of *usucapio* on *res furtiva* had as a consequence that a movable thing could virtually only be usucapted, if its owner collaborated somehow in its alienation, since the broad concept of *furtum* embraced every wilful disposition with an alien thing without the consent of the owner.⁵⁰

Although the *usucapio* of land acquired by violence was prohibited by the end of our period by the *lex Iulia* and *Plautia*,⁵¹ in the case of immovables more room was left for usucaptation than with movables.

Therefore the prohibition of *usucapio* on stolen goods almost excluded the possibility of acquisition from a non-owner, at least with movables, but neither could land be acquired easily without the consent of the owner.

Though *usucapio* was already considerably restricted by the above prohibitions, in addition the possessor also had to prove a good title *iusta causa*, and even this could be invalidated if his adversary brought evidence for his *mala fides*, i.e. he had been conscious at the moment of having got hold of the thing that he had not acquired ownership.

In my opinion there can be hardly any doubt that preclassical law restricted acquisition by long possession to a rather narrow field.

7. Surprisingly enough, literature—apart perhaps from the article of Horvat⁵²—has failed to analyse the underlying causes and ideas of this extremely severe

⁴⁶ Cf. Bonfante, *Usucapio* I. p. 503; Kaser, *EB* pp. 293 ff. The view expressed by Lombardi is quite unacceptable. According to him by the time of the introduction of the *actio Publiciana*, *bona fides* was not yet a requirement of *usucapio*. See L. Lombardi, *Dalla "fides" alla "bona fides"* (Milano, 1961) p. 238.

⁴⁷ See *supra* p. 91.

⁴⁸ It is consistent with the introduction of *actio Publiciana* and with the infiltration of *bona fides* into different fields of private law.

⁴⁹ Bonfante, *Usucapio* I. p. 474; Kaser, *RPR* pp. 354 ff.

⁵⁰ Cf. Gai. 2, 50.

⁵¹ Cf. Gai. 2, 45. These were probably two statutes, but the time of their issuing cannot be ascertained. Cf. Kaser, *RPR* p. 354 n. 8.

⁵² Horvat, especially pp. 300 ff.

restriction of *usucapio*. The usual explanation is a reference to more refined legal conceptions, to moral development.⁵³ But authors usually forget that the imposition of severe limitations on *usucapio* is by no means a necessary corollary of legal development. It is true that primitive mentality, as a rule, is incapable of realizing the importance of the subjective element, the *bona fides*, but this does not hold true inversely. An ungenerous regulation of the objective and subjective requirements of *usucapio* is not characteristic of progress.

This is clearly shown by contemporary civil law codes. The Austrian civil law code, which was issued at the beginning of the nineteenth century, still regulates *usucapio* in conformity with Roman law,⁵⁴ but the typical example of bourgeois codifications, the Code Civil, excludes from *usucapio* only those who possess *alterius nomine*.⁵⁵ The BGB requires *bona fides*, but fails to mention the *iusta causa*.⁵⁶ The Hungarian civil code only prohibits *usucapio* if the thing has been acquired by delict, by violence or treacherously.⁵⁷

These few examples taken at random show clearly that the restriction of *usucapio*, the imposing of several requirements, is not connected with the stage of development of a legal system. This is why the causes for the attitude of pre-classical Roman law have to be sought elsewhere.

8. The theoretically much more interesting and delicate problems of *bona fides* or *iusta causa* have completely diverted attention from an examination of the period of time required for the completion of *usucapio*. Preclassical, nay classical law, left unaltered the one- and two-year terms, respectively, of the Twelve Tables. There is scarcely any doubt that these terms are rather short.⁵⁸

As long as Rome was a small community both territorially and in terms of population, these periods were certainly sufficient for the owner who had lost possession of the thing, to find it and to take the necessary measures for its recovery. By the end of the republican age, however, given the immense territory and the number of inhabitants of the Empire, it became rather doubtful whether the owner would be able to recover his property. The situation was aggravated by the

⁵³ "Eine verfeinerte Rechtsauffassung konnte sich indessen in der Folge nicht mehr damit zufriedengeben, dass . . . abgesehen von gestohlenen Sachen, auch bei unrechtmässigem Erwerb eintreten sollte" — writes Kaser, *EB* p. 294.

⁵⁴ ABGB §§. 1460—1477. The possession has to be "rechtmässig, redlich und echt" (§. 1460). In addition *iusta causa* (§. 1461.), good faith (§. 1463) and faultless possession (§. 1464) are required. Also the provisions concerning the period of *usucapio* follow Justinianic law, prescribing three years for movables (§. 1466).

⁵⁵ Code Civil §§. 2236 ff.

⁵⁶ BGB §§. 937 ff. As for land the rules are different (§. 900).

⁵⁷ Hungarian Civil Code § 121 par. 2. In addition means of production owned by the State or by other socialist organizations are excluded from *usucapio* (*Ibidem* par. 3).

⁵⁸ Though Gaius says that this time was sufficient: . . . *cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium* (2, 44), but this does not contradict what is stated in the text. First, the lawyer uses the past tense (*receptum videtur . . . sufficeret*), so his statement refers to the age of the Twelve Tables instead of his own time. Secondly, Gaius obviously also considers the restrictions imposed on *usucapio*. Thirdly, if the time had been sufficient, postclassical and Justinianic law would not have prolonged it.

fact that since the most important means of production, the slave, was ranked among the movables, he was definitely lost for the owner after a year had passed. It would have been hopeless to recover runaway or stolen slaves. The ruling class, especially its upper stratum—as has been stressed by Horvat⁵⁰—was, however, already “within possession”, so the short period of *usucapio* endangered their interests in particular.

It seems that in theory two possible solutions existed, either to prolong the period fixed for *usucapio*, or to restrict the possibility of usucapting. The former solution, though it would have been more convenient, was not practicable. The *praetor* and the lawyers in fact were not entitled to alter the rules laid down by the venerated Twelve Tables. Even a project of a new statute of such contents would have surely been regarded as a serious crime against the sacrosanct traditions of Rome. In addition, the audacious legislative innovations were alien to the style of preclassical and classical law.

Therefore preclassical law chose the other way. Having left the short periods unaltered, they tried—in a properly Roman way—to weaken or even to turn round the provisions on *usucapio*. If one examines closely and without prejudice the provisions on *usucapio*, it becomes evident that they are not designed to assure the possessor the acquisition of ownership, but to protect the owner who had lost possession. The rules of *usucapio* tried to allow acquisition of ownership only in cases where this did not violate the interest of the former owner.

As has been already mentioned, preclassical law wanted to safeguard the interests of the ruling class, and to maintain the existing order of property. But preclassical lawyers also endeavoured to satisfy the needs of the lively commodity-turnover. Characteristically they did not forbid *usucapio*, if a *res Mancipi* was acquired by the omission of the prescribed formalities, though in such cases, strictly speaking, the acquirer did not act in good faith, because he knew that without a *mancipatio* or *in iure cessio* ownership could not be acquired. Preclassical law, however, cautiously avoided putting obstacles in the way of the informal acquisition, and regarded such transfers as being carried out in good faith. This served equally the interests of the wealthy stratum, i.e. the same social group the interests of which demanded the limitation of *usucapio* in the case of acquisition from a non-owner.

Preclassical lawyers achieved a really praiseworthy result with the elaboration of the new rules on *usucapio*. The value of their achievement lies in my opinion not in the fact that they recognized the requirements of *iusta causa* and *bona fides*, but in their cleverness in having entirely satisfied the demands deriving from the changed economic and social conditions and from the interests of the ruling class. In the narrow space offered by the obsolete rules of the Twelve Tables they succeeded in harmonizing two seemingly opposite interests: the protection of the possessors, through the limitation of *usucapio*, and the demands of commodity-turnover, through making *usucapio* possible if a *res Mancipi* was acquired by delivery. Their brilliant achievement can hardly be praised too highly.

⁵⁰ Horvat pp. 300 ff.

THE DEVELOPMENT OF PROPRIETARY REMEDIES

I. INTRODUCTION

1. The questions which have been dealt with in the two previous chapters are scarcely at the centre of attention now. Solid and substantially undisputed results have been achieved by recent research in the fields both of the formation of the notion *dominium*, and of the preclassical development of the transfer of ownership. So our task was merely to clarify some questions of detail and to assess the main lines of preclassical development.

The task of this chapter, however, is to treat questions which have been argued about for a long time. Though comparatively little attention is paid at present to the formation of the *formula petitoria*, the *actio Publiciana* continues to be one of the most vexed and disputed problems of preclassical law. Therefore, this proprietary remedy has to be dealt with in comparative detail.

2. The preclassical development of the legal protection of ownership followed two parallel paths. Protection according to the *ius civile*, starting out from the *l.a.s.i.r.* finished up with the classical action, the *formula petitoria*. On the other hand a special praetorian remedy was created: the *actio Publiciana*. In conformity with this parallelism, the development of the proprietary remedies according to *ius civile* will be examined first, and then a special section will be devoted to the most important questions of the *actio Publiciana*.

This action is frequently tackled together with so-called bonitarian ownership. However, it seems wrong to link the two questions, so "bonitarian ownership" will be dealt with in a separate chapter. This solution is advocated by considerations of substance. I am partly inclined to hold the habit of treating the two subjects together responsible for the lack of satisfactory solution. I think that in order to get an insight into the Roman conceptions, it would be unwise to draw conclusions from a mention of the *actio Publiciana* about "bonitarian ownership", and inversely, from the expression *in bonis esse* about the availability of this action.¹ So, if one tries to get rid of deeply-rooted prejudices, one has to deal with the two subjects separately.

II. FORMULA PETITORIA AND AGERE PER SPONSIONEM

1. It is not only the ancient forms of conveyance that began to become obsolete in the course of the Republic, but also the ancient proprietary remedy, the

¹ On this see the next chapter.

l.a.s.i.r., ceased to be a suitable legal weapon.² This lawsuit, sticking rigidly to the regurgitation of a prescribed text, compelled the magistrate and the parties to perform a primitive drama which seemed senseless and even ridiculous to the Romans imbued with Greek culture.³

It was, of course, not only a certain haughtiness derived from a higher culture, which induced the Romans of the preclassical age to look upon the *l.a.s.i.r.* with disdain, but above all the experience that the originally expedient legal form had—under the changed conditions—totally lost its content. So the ancient proprietary lawsuit, like every act which had lost its *raison d'être*, became a mere ceremony.

What became obsolete was above all the main underlying idea of the lawsuit, i.e. that the defendant, as a person charged with theft, has to bear the burden of proof, whereas the plaintiff is not obliged to prove his title. It has been shown by Kaser⁴ that, as a consequence of the spread of possessory remedies, the defendant to the proprietary lawsuit had as a rule already proved his faultless possession previously and had thus averted the suspicion of theft. It would have been henceforth unfair to demand that he should prove his title in lieu of the plaintiff.

The counterpart of this rule, namely the plaintiff's advantageous position, did not seem reassuring any longer either. As has been pointed out,⁵ in the ancient small community the possibility of somebody vindicating a thing which did not belong to one of the litigants, did not have to be taken into account. But in the vast Empire where people did not know each other any longer, the publicity of the lawsuit obviously could not remove possible abuses of this kind.

One would be inclined to suppose that the Romans also adopted the usual method in this case and transformed the *l.a.s.i.r.* according to the changed conditions. The sources, however, fail to confirm this assumption. No traces exist of the *l.a.s.i.r.* having been altered. Instead of manipulating the old lawsuit, the praetor created new legal forms which led to a gradual withering away of the obsolete *l.a.s.i.r.* Here preclassical law did not follow the traditional method of the Pontiffs, but satisfied the changed needs of Roman society by the creation of new legal means.

2. Notwithstanding, in the first century B.C., as can be seen from the writings of Cicero, the *l.a.s.i.r.* was not yet entirely out of use.⁶ But it can also be gathered from the works of the same author that the classical legal remedy, the *formula petitoria*, was already in existence. The ancient lawsuit was regarded as obsolete, and its days were apparently numbered.⁷

² The question of the *legis actio sacramento in rem* has been dealt with in Part I., Chapter 7. I continue to use the abbreviation *l.a.s.i.r.*

³ Cicero already mocks ruthlessly at the formalities of the *l.a.s.i.r.* (*Pro. Mur.* 11, 25–26) using expressions like *Haec iam tum apud barbatos ridicula, credo, videbantur, or fraudis autem et stultitia plenissima.*

⁴ Cf. Kaser, *EB* pp. 285 ff.

⁵ See *supra* p. 104.

⁶ Cf. Cicero, *De or.* 1, 10, 41.

⁷ Cf. Cicero, *In Verrem* 2, 2, 12, 31. See also n. 3.

Two centuries later, Gaius was already dealing with the *l.a.s.i.r.* explicitly as an institution of historical interest,⁸ so it seems sure that, apart from some sporadic exceptions,⁹ the *l.a.s.i.r.* ceased to be applied by the first century A.D. at the latest.

3. Nothing is known about the formative process of the *formula petitoria*. Cicero, in a speech of his, is the first to quote it and the wording of the formula is in the main identical with the text that can be reconstructed from classical sources.¹⁰

Arangio-Ruiz suggested that originally the *formula petitoria* had not contained a monetary *condemnatio*, but simply an order to restore the thing.¹¹ Though his assumption is by no means absurd, it is not supported by a single text, so the contrary opinion of Kaser seems to be preferable.¹²

In my opinion the total lack of any traces of a formative process is simply due to the fact that there was no formative process. Though the idea may seem blasphemous to the legal historian, the *formula petitoria* was in all likelihood not formed in various phases, but came into being in its final form as the happy invention of an unknown praetor. Classical law has possibly refined the formula to some extent, but no substantial alterations can be observed. The text of Cicero, as compared with the classical sources, leads to this simple conclusion at any rate.

The *formula petitoria* obviously cannot be prior to the *lex Aebutia*, which was issued about 150 B.C. The territorial expansion and the increase of the population of Rome, however, date back to an earlier time, so the shortcomings of the *l.a.s.i.r.* must have become apparent at the latest in the course of the third century.

Since the archaic *l.a.s.i.r.* did not undergo any alterations, and the *formula petitoria* is not likely to have been introduced before 150 B.C., we are in a position to suppose there is a link between the two procedures, an intermediate proprietary remedy meeting the new demands even before the issuing of the *lex Aebutia*.

4. The idea that the mysterious *agere in rem per sponsionem* had served as a link between the two forms of procedure, was consistently expounded by Kaser.¹³

One can come across the *agere in rem per sponsionem* only in the Institutes of Gaius. It is also mentioned by Cicero, but only with respect to lawsuits on succession upon death.¹⁴ So it seems useful to quote the important description given

⁸ Gaius consistently uses the past tense, when describing the procedure: *Si in rem agebatur . . . adprehendebat . . . vindicaverat* etc. (4, 16). It is to be seen from his other statements that he did this intentionally: *Sed istae omnes legis actiones paulatim in odio venerunt* (4, 30), *Quia olim cum lege agebatur* (4, 94), *Actiones quas in usu veteres habuerunt, legis actiones appellabantur . . .* (4, 11).

⁹ By the age of Gaius a procedure by *legis actio* could only take place in connection with the *cautio damni infecti* and before the *centumvirale iudicium* (Gai. 4, 31).

¹⁰ *L. Octavium iudex esto. Si paret fundum Capenatem, quo de agitur, ex iure Quiritium P. Servilii esse, neque is fundus Q. Catulo restituetur* (Cicero, *In Verrem* 2, 2, 12, 31.). The same formula appears in the Institutes of Gaius Cf. 4, 41; 4, 51; 4, 163.

¹¹ Arangio-Ruiz, "Studi formulari", *BIDR* 32 (1922) pp. 5 ff. especially pp. 46 ff.

¹² Kaser, *EB* p. 284 n. 21.

¹³ Kaser, *EB* pp. 277 ff. On older literature see Bozza, *Actio in rem per sponsionem* p. 592.

¹⁴ Cf. Cicero, *In Verrem* 2, 1, 45, 115–116.

by Gaius: Gai. 4, 91–95: *Ceterum cum in rem actio duplex sit, aut enim per formulam petitoriam agitur, aut per sponsionem. Si quidem per formulam petitoriam agitur, illa stipulatio locum habet, quae appellatur IUDICATUM SOLVI, si vero per sponsionem, illa quae appellatur PRO PRAEDE LITIS ET VINDICIARUM . . . Per sponsionem vero hoc modo agimus: provocamus adversarium tali sponsione: SI HOMO, QUO DE AGITUR, EX IURE QUIRITIUM MEUS EST, SESTERTIOS XXV NUMMOS DARE SPONDES? deinde formulam edimus, qua intendimus sponsionis summam nobis dari oportere; qua formula ita demum vincimus, si probaverimus rem nostram esse. Non tamen haec summa sponsionis exigitur. Non enim poenalis est, sed praeiudicialis, et propter hoc solum fit, ut per eam, de re iudicetur . . . Ideo autem appellata est PRO PRAEDE LITIS ET VINDICIARUM stipulatio, quia in locum praedium successit, qui olim, cum lege agebatur . . . petitori dabantur. Ceterum si apud centumviros agitur, summam sponsionis non per formulam petimus, sed per legis actionem sacramento . . . eaque sponsio sestertiorum CXXV nummum fit . . .*

The text permits several conclusions which corroborate the assumption that the lawsuit *per sponsionem* served as an intermediate stage between the *l.a.s.i.r.* and the *formula petitoria*:

(a) There can be no doubt that during the age of Gaius, beside the *formula petitoria*, there still existed another proprietary remedy, the *agere in rem per sponsionem*.¹⁵

(b) The procedure *per sponsionem* results only indirectly in a lawsuit on ownership, because it takes the shape of a wager. According to Gaius, this, however, was basis for a decision on the fate of the thing.¹⁶

(c) This lawsuit was also connected with the procedure *per legis actionem*, since, if brought before the *centumvirale iudicium*, it had to be initiated by a *sacramentum*, and the *cautio pro praede litis et vindiciarum*, as is expressly told by Gaius, also points to the ancient procedure. The *agere in sponsionem*, however, at the same time, also contains elements of the formulary procedure, since the praetor issued a *formula*.¹⁷

(d) The procedure is probably prior to the creation of the notion of *dominium*, because, instead of this term, we find an expression somewhat akin to that of the *l.a.s.i.r.*: *Si homo . . . ex iure Quiritium meus est . . .*

¹⁵ The view of Bozza, who believes that the procedure *per sponsionem* applied only to lawsuits on succession, is unacceptable. She supposes that the procedure was extended to lawsuits on ownership by the *edictum perpetuum*. Therefore the Institutes of Gaius speak about it as a proprietary remedy (Bozza, *Actio in rem per sponsionem* pp. 613 ff.). Apart from other difficulties of her hypothesis (—on them see Kaser, *EB* p. 285 n. 24 and *passim*)—it is incredible that some two centuries after the introduction of the *formula petitoria* a new, archaic proprietary remedy would have been created only to disappear with an incredible rapidity.

¹⁶ It is of course quite possible that originally the defeated party had to pay the sum of the *sponsio*. Cf. G. I. Luzzatto, "Spunti critici in tema di actio in rem per sponsionem", *Studi Albertario* I. pp. 187 f.

¹⁷ I do not see quite clearly with what reasons Luzzatto wants to relate the whole procedure to the *legis actiones*. Cf. *op. cit.* in the previous note p. 193.

(e) Finally, the *agere per sponsionem* displays a fundamental difference compared with the *l.a.s.i.r.*, because the burden of proof is already incumbent upon the plaintiff: . . . *ita demum vincimus, si probaverimus rem nostram esse* — writes Gaius. It represents a lower stage of development than the *formula petitoria*, for it contains no hint at a *restitutio*.¹⁸

5. The analysis of our basic source thus corroborates the opinion of Kaser, and shows that the procedure *per sponsionem* is a transitory stage between the *l.a.s.i.r.* and the *formula petitoria*. Fundamentally, however, it is nearer to the latter, as the burden of proof is already borne by the plaintiff. These conclusions are also confirmed by the fact that in classical law the procedure *per sponsionem* has been pushed into the background by the *rei vindicatio*, and the Digest no longer deals with it.

Nevertheless a further point has to be considered. The objection might be raised, and Bozza, an opponent of Kaser's view does not fail to bring it up,¹⁹ of how the procedure *per sponsionem* could exist beside the *l.a.s.i.r.* To put it more simply: what could induce the plaintiff to choose the considerably more disadvantageous lawsuit.

It is, of course, inconceivable that the plaintiff would have voluntarily taken over the burden of proof from the defendant, out of altruistic motives. Presumably, as Kaser pointed out,²⁰ if the lawsuit on ownership was preceded by a possessory litigation, the praetor simply refused to concede the procedure *sacramento*, and as the possessor had already proved to some extent that his position was a right one, he permitted only the procedure *per sponsionem*. A casual remark of Cicero seems to point to the incompatibility of a possessory lawsuit and the *l.a.s.i.r.*: . . . *qui aut interdicto tecum contenderent, aut ex iure manum consertum vocarent...*²¹

So the procedure *per sponsionem*, together with the possessory interdicts, paved the way for the *formula petitoria*, which was probably created shortly after the issuing of the *lex Aebutia*.

A characteristic feature of the development of Roman law can also be observed in this case. When, presumably in the third century B.C., the shortcomings of the ancient proprietary remedy had become apparent, and the possessory remedies had been extended to all things, the preclassical lawyers created the proprietary lawsuit, *per sponsionem* although this was for the time being only within the framework of *legis actiones*.²² Nevertheless they also preserved the old procedure of *ius civile*, in the same way that later on the *agere per sponsionem* also coexisted for

¹⁸ Cf. Kaser, *RPR* p. 366.

¹⁹ Bozza, *Iura* 1 (1950) p. 404.

²⁰ Cf. Kaser, *EB* pp. 285 f. In my opinion, however, the innovation consisted in the fact that henceforth the plaintiff had to bear the burden of proof instead of the defendant, while Kaser sets out from the assumption that formerly both of them had to bring evidence.

²¹ Cicero, *De or.* 1, 10, 41. On this see Kaser, *EB* p. 287 n. 30. I attach more weight to this source than Kaser does.

²² To this extent I agree with Luzzatto. Cf. n. 17.

a time with the classical *formula petitoria*. It is puzzling how this intricate manifoldness, which can also be observed in other realms of Roman law, functioned in practice.

III. *ACTIO PUBLICIANA*

1. The *actio Publiciana* is apparently one of the everlasting problems of romanistic researches. Older literature has already given a lot of thought to this question. According to the list made by Gimmerthal, thirty-two works were devoted to the *actio Publiciana* between 1553 and 1866.²³ The last hundred years brought no change, and a considerable mass of more recent writings was published on the subject. For a time, romanists were chiefly interested in textual questions, and endeavoured to reconstruct the original drafting of the edict and the formula as faithfully as possible.²⁴ The last years, however, showed a change in the attitude of scholars. The most recent literature is no longer very interested in the reconstruction of the original text, but discusses passionately the causes of the introduction and the original function of the *actio Publiciana*, together with the question of the so-called *probatio diabolica*.

A survey of the whole of the literature, one can state without exaggeration, would practically require a special monograph and this would be a rather hopeless or even fruitless undertaking. Apart from that, the older literature was not available to me. Since, however, the discovery of the Institutes of Gaius has considerably altered and enriched our knowledge about the *actio Publiciana*, I do not think that the old literature could be of much use. A treatise on it would be a collection of scholarly curiosities. More recent literature until 1926 has been carefully gathered and analysed by Bonfante in his article.²⁵ This discharges me from having to give a survey of the tiresome disputes about supposed interpolations. The most important views will be considered in the proper place. It is, however, indispensable to give a short account of the recent dispute about the *actio Publiciana*.

2. The debate was opened by the interesting and original article of Wubbe.²⁶ The author rejected the traditional view, supposing that the original function of the *actio Publiciana* was not the protection of those who had acquired without the prescribed formalities, but the protection of the *bonae fidei possessor*. In such a way, the action was also available from the beginning to those who had acquired a thing from a non-owner.²⁷ According to Wubbe, the *actio Publiciana* was introduced because of the difficulties of bringing evidence with the *rei vindicatio*.²⁸ He ascribes the supposed difficulties to the creation of the notion of absolute

²³ Cf. Gimmerthal pp. 1 ff.

²⁴ On this cf. Bonfante, *Publiciana* pp. 391 ff.

²⁵ See the previous note.

²⁶ Cf. Wubbe, *Publiciana*.

²⁷ *Ibidem* p. 430.

²⁸ *Ibidem* p. 422.

ownership, by which the burden of the *probatio diabolica* would have been imposed on the plaintiff.²⁹ On this point he adheres to the view of Kaser, who, twenty years ago, suggested that after the introduction of the *formula petitoria*, the *actio Publiciana* had taken over the role of the *l.a.s.i.r.*, which had meant, according to his well-known conception, a protection of relative character.³⁰

The treatise of Wubbe was followed by the equally original reply of Sturm.³¹ Sturm returns to the traditional view, and supposes that the action was created for the protection of informal acquisition, so originally it was available only to those who had acquired the thing from the owner.³² He denies the supposed difficulties of evidence with the *rei vindicatio*, and points out that the medieval theory of the *probatio diabolica* is not supported by Roman sources.³³ He suggests that with respect to the difficulties of evidence there was no difference between the two actions.³⁴

The debate of the two scholars has not yet been wound up, because Wubbe, in an article bearing upon a different subject, returned again to the question of *actio Publiciana*,³⁵ and others also joined in the dispute. It seems that the theory of the *probatio diabolica* is quite deeply rooted in the minds of romanists because both Feenstra³⁶ and Kiefner³⁷ attack the view of Sturm. Feenstra takes his arguments mainly from medieval sources, and though he does not deny the medieval origin of this theory,³⁸ he still rejects the opinion of Sturm.³⁹ Kiefner, as he himself puts it, takes an intermediate position between Wubbe and Sturm concerning the *probatio diabolica*, but basically he defends the traditional view.⁴⁰

Anyone dealing today with the questions of the *actio Publiciana*, must necessarily take sides in this discussion, but first of all it seems expedient to examine some preliminary questions.

3. The date of the introduction of the *actio Publiciana* cannot be exactly ascertained. The prevailing view puts it—I suppose rightly—at the second and first

²⁹ *Ibidem* p. 422 and p. 426.

³⁰ Cf. Kaser, *EB* p. 298.

³¹ Sturm, *Publiciana*.

³² *Ibidem* pp. 397 f. and 415.

³³ *Ibidem* pp. 363 ff.

³⁴ *Ibidem* p. 385.

³⁵ Wubbe, "Der gutgläubige Besitzer, Mensch oder Begriff?", *SZ* 80 (1963) p. 203 and passim.

³⁶ Cf. Feenstra, *Publiciana*.

³⁷ Cf. Kiefner, *Probatio diabolica*.

³⁸ Feenstra, *Publiciana* p. 98 and elsewhere.

³⁹ *Ibidem* p. 109.

⁴⁰ "Die Antwort wird wohl etwas differenzierter ausfallen müssen als sie von Sturm aber bis zu einem gewissen Grade auch von Wubbe je einseitig gegeben wird" — writes Kiefner (*Probatio diabolica* p. 213.) However, elsewhere, he declares: "Dass die Problematik des Verhältnisses von *rei vindicatio* zu *actio Publiciana* weithin in der Beweissituation des Klägers liegt, kann m. E. ernstlich nicht mehr bestritten werden" (p. 229 n. 78).

centuries B.C.⁴¹ This is also advocated by the economic and social conditions, because the development of commodity-turnover and of commerce made the forms of conveyance prescribed by the *ius civile* obsolete, and so the protection of those who had acquired a thing without these formalities or from a non-owner became a necessity.

However I suppose that the action was introduced only in the first century B.C. Surely, this means a certain lagging behind as compared with the development of the economic conditions, but a similar lagging behind can be observed in pre-classical law.⁴² One has also to take into account the fact that as has been pointed out by Kaser,⁴³ the *actio Publiciana* was modelled according to the *formula petitoria*, and the latter had been probably created after 150 B.C. It is unlikely that the praetor would have immediately introduced the other action, too.

This dating is also corroborated by the fact that a praetor called *Publicius* is recorded in Cicero's age, and it is possible that the invention of the new proprietary remedy must be attributed to him.⁴⁴ Although Cicero does not mention the *Publiciana*,⁴⁵ this is no strong argument against the prevailing view. A statesman busy with different matters and exercising a rich literary activity must not be supposed to register faithfully every innovation in the realm of private law. The development of economic life at any rate obviously excludes putting the date of the *actio Publiciana* at a later point of time.⁴⁶

4. The text of the original edict, by which the action was promulgated, and the precise text of the formula, are strongly disputed. The sources are contradictory to some extent, so several attempts have been made to reconstruct the original version, among which, as so often happens, there are some rather daring and arbitrary suggestions.⁴⁷

The following sources give support for a reconstruction of the edict.

(a) Ulp. *D.* 6, 2, 1, pr: *Ait praetor: "Si quis id quod traditur ex iusta causa non a domino et nondum usucaptum petet iudicium dabo"*

(b) Ulp. *D.* 6, 2, 7, 11: *Praetor ait: "qui bona fide emit"*

(c) Gai. 4, 36: *... datur autem haec actio ei, qui ex iusta causa traditam sibi rem nondum usu cepit eamque amissa possessione petit. Nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usu cepisse, et ita, quasi ex iure Quiritium dominus factus esset, intendit, velut hoc modo: IUDEX ESTO. SI QUEM HOMINEM A.A. EMIT ET IS EI TRADITUS EST, ANNO POSSEDIS-*

⁴¹ Cf. Sturm, *Publiciana* pp. 414 f.

⁴² A delay has been also observed with respect to the creation of the notion *dominium* and the recognition of *traditio* as an independent legal act.

⁴³ Kaser, *EB* p. 298.

⁴⁴ Cicero, *Pro Cluentio* 45, 126.

⁴⁵ Cf. Costa, *Cicerone* I. p. 118.

⁴⁶ Cf. Sturm, *Publiciana* p. 415.

⁴⁷ The reconstruction suggested by Karlowa, deserves a special mention as it is completely independent from the sources: "Ei, qui bona fide emit, si eo nomine sibi traditam et nondum usucaptam amiserit, proinde atque si res usucapta esset, iudicium dabo." (*RG* p. 1211.)

SET, TUM SI EUM HOMINEM, DE QUO AGITUR, EIUS EX IURE QUIRITIUM ESSE OPORTERET . . .

In the first text, the expression “*non a domino*” is generally and justly held to be interpolated, but the part “*id quod traditur*” is also suspect.⁴⁸ The chief difficulty lies in the fact, that while here and in the Institutes of Gaius the expression “*traditio ex iusta causa*” can be found, the second Ulpianic text contains a reference to purchase in good faith, but even the formula quoted by Gaius mentions *emptio*. Therefore the debate is concentrated upon the question whether the original edict viz. the formula contained the expression *bona fides*,⁴⁹ and whether the praetor spoke generally about *traditio ex iusta causa* or about *emptio* and *traditio*.⁵⁰

I think that one should start from Gaius, for his work is for the most part an original classical text.⁵¹ This, however, leads us to the conclusion that the edict spoke about a *traditio ex iusta causa*, while in the corresponding formula the *causa* was more closely specified. The very words of Gaius: *velut hoc modo* reveal that the formula is only cited as an example. Like every good teacher, Gaius, out of didactic considerations, chose the most frequent and the simplest case the sale.

The first Ulpianic text basically corresponds to the one of Gaius, but it is hard to see how the fragmentary and obscure *qui bona fide emit* (D. 6, 2, 7, 11) was related to the text of the edict or perhaps the formula of the *actio Publiciana*.⁵² It is true that the preserved casuistic material bearing upon the action deals primarily with problems connected with sale,⁵³ but this can easily be explained by the outstanding practical importance of acquisition *causa emptio*, and thus does not necessarily lead to the conclusion that the action was originally confined to this case alone. However, it is not impossible, though unlikely, that the original preclassical edict mentioned merely *emptio*.

In my opinion the original wording of the edict cannot be reconstructed with absolute certainty. The suggestions made up to now are all more or less of a hypo-

⁴⁸ Cf. O. Lenel, *Das edictum perpetuum* 3. ed. (Leipzig, 1927) pp. 170 f.

⁴⁹ For *bona fides* e.g. see Karlowa (see n. 47); Kaser, *RPR* p. 369; Perozzi, “L’editto publiciano”, *BIDR* 7 (1894) pp. 45 ff. Contra: Beseler, *Beiträge* III. pp. 197 f. and IV. pp. 87 f.; Bonfante, *Publiciana* p. 402; H. H. Pflüger, “Zwei Rätsel”, *SZ* 42 (1921) pp. 469 f.

⁵⁰ Perozzi suggested that the edict had contained only the purchase in good faith (Cf. *loc. cit.* in n. 49). His assumption has been soundly refuted by Pacchioni, “Una nuova ricostruzione dell’editto publiciano”, *BIDR* 9 (1896) pp. 118 ff.

⁵¹ Surprisingly enough Feenstra praises Wubbe for belonging to those “qui ne se laissent plus aveugler par le texte de Gaius” (Feenstra, *Publiciana* p. 104). I am not ashamed to confess that I am ready to be “duped” by a classical source.

⁵² The possibility that the fragment originally did not refer to the *actio Publiciana* but to the contract of sale is excluded, because it was taken from the same book of Ulpian’s commentary upon the edict, as the first fragment.

⁵³ In the *sedes materiae* (D. 6, 2), of seventeen fragments seven refer almost exclusively to sale, and so does the longest one, (7) too. The formula in the Institutes of Gaius concerns sale equally (4, 36).

thetical character.⁵⁴ Fortunately, the substance of the edict is clear: the action was based upon *traditio* and the fiction of *usucapio*. It is a question of minor importance whether the text expressly mentioned *iusta causa* or *bona fides* as well, since these requirements—being indispensable for *usucapio*—were already inherent in the fiction of *usucapio*.⁵⁵

5. From the aforesaid we may conclude that the *actio Publiciana* could be brought by a person, to whom the thing had been delivered *ex iusta causa*, and who, though the requirements of *usucapio* were present, had not yet usucapted, so he was not yet the owner according to the *ius civile* (*rem nondum usu cepit . . . non potest eam ex iure Quiritium suam esse intendere . . .*)

Some relevant questions are still open to debate:

(a) First of all, it is questionable whether only those who had acquired the thing from the owner were entitled to sue by *actio Publiciana*, or whether it also applied to possessors to whom the thing had been delivered by a non-owner. The majority of writers side with the first solution,⁵⁶ but Wubbe has rightly protested against the prevailing view.⁵⁷

The *communis opinio* is based more than anything upon the undisputed interpolation of the expression *non a domino* in the Ulpianic text quoted.⁵⁸ The compilers, however, did not complement the original text with this expression in order to extend the action to those who had acquired the thing from a non-owner.⁵⁹ The interpolation was motivated by the fact that since *traditio* had become the only act for the transfer of ownership in Justinianic law, a justification was needed to explain why ownership in the given case was acquired in spite of the delivery, by *usucapio* alone. So we are faced not with an extension, but on the contrary, with a restriction of the field of application of *actio Publiciana*.

This interpretation is corroborated by several genuine texts to be found both in the *sedes materiae* and elsewhere where cases of an acquisition from a non-owner are discussed.⁶⁰ In such a way one may safely draw the conclusion that

⁵⁴ Pacchioni rightly concludes: "Veniamo così alla melanconica conclusione, che in materia di publiciana, per ciò che si attiene alla ricostruzione dell'editto poggiamo sempre in un terreno di ipotesi." (*Op. cit.* in n. 50. p. 130.)

⁵⁵ This was the main argument of Beseler (see n. 49), but—as has been pointed out by Erman—"superflua non nocent". Cf. H. Erman, "Beiträge zur Publiciana", *SZ* 11 (1890) p. 248. The unfounded assumption of Lombardi, who thinks that the *actio Publiciana* applied originally to peregrines with the fiction of *usucapio* having been inserted into the formula later on, is unacceptable. See Lombardi, *Dalla "fides" alla "bona fides"* (Milano, 1961) pp. 243 f.

⁵⁶ Thus recently De Visser, *Auctoritas* II. pp. 105 ff. This view is also sustained by Sturm, *Publiciana* p. 415.

⁵⁷ Wubbe, *Publiciana* p. 438.

⁵⁸ Cf. n. 48.

⁵⁹ See also Kaser, *RPR* II. (1959) pp. 214 f.

⁶⁰ Cf. Ulp. *D.* 6, 2, 9, 4: . . . *et Iulianus libro septimo digestorum scripsit, ut si quidem ab eodem non domino emerint, potior sit cui priori res tradita est, quod si a diversis non dominis, melior causa sit possidentis quam petentis.*

the action was not extended by Justinianic law to those who had acquired the thing from a non-owner.

Sturm argued for the prevailing view by pointing out that in classical law, as a consequence of the broad concept of *furtum*, a *usucapio* must have been rather rare, if the thing had been acquired from a non-owner.⁶¹ In the case of movables this certainly holds true, but with immovables the possibilities of *usucapio* were somewhat more favourable.⁶² In addition Sturm leaves out of account the case when the thing which had been bought from the owner, was sold shortly afterwards by the acquirer to a third person. There can be hardly any doubt that the latter was entitled to sue by *actio Publiciana*.

So from the arguments of Sturm it follows only that in preclassical and classical law, the cases when the plaintiff of the *actio Publiciana* had acquired from a non-owner, must have been comparatively rare. If the causes of the introduction of the *actio Publiciana* are in question, this is rather important, but from the point of view of the legitimation to the action ("Aktivlegitimation") it is absolutely irrelevant. The fiction of *usucapio* automatically excluded the examination of the right of the former possessor, so the plaintiff to the *actio Publiciana* was not obliged to bring evidence for the ownership of his predecessor, apart from the case when the judicial decision depended upon the particular circumstance, namely which of the litigants derived his title from the owner.⁶³

I suppose that those who had acquired the thing from a non-owner were entitled to bring *actio Publiciana* from the beginning, providing the requirements of *usucapio* were not lacking.

(b) The second question is even more delicate. Could someone who had acquired the thing by means of a *mancipatio* or *in iure cessio* bring an *actio Publiciana*?

There is no doubt that, according to the edict, *traditio* was required for the *actio Publiciana*. Wubbe, however, suggests that the possessor could sue by this action, even if the delivery had been followed by an act of conveyance of *ius civile*.⁶⁴ Unfortunately, no evidence exists for settling this question. Gaius fails to consider this point, and in the Digest all references to the formal acts of conveyance have been carefully eliminated. In such a way all that can be said does not amount to more than a mere hypothesis.

I should begin with the indisputable fact that the action was based upon the fiction of *usucapio* and upon the fact that the plaintiff had not yet acquired owner-

Pomp. *D.* 6, 2, 15: *Si servus meus, cum in fuga sit, rem a non domino emat, Publiciana mihi competere debet . . .*

Ner. *D.* 19, 1, 31, 2: *Uterque nostrum eandem rem emit a non domino . . . is ex nobis tuendus est, qui prior ius eius adprehendit . . .*

⁶¹ Cf. Sturm, *Publiciana* pp. 397 ff.

⁶² On this *supra* pp. 146.

⁶³ As in the case which was dealt with by Neratius (*D.* 19, 1, 31, 2).

⁶⁴ Wubbe, *SZ* 80 (1963) p. 189.

ship.⁶⁵ So, in the case an *in iure cessio* had taken place the praetor presumably refused to deliver this formula. A person, who had acquired by *mancipatio*, however, was likely to have brought a *rei vindicatio*, because in practice it turns out for the most part only in the course of the lawsuit that the transferor had not been the owner. It is not inconceivable, though the case must have been rather infrequent, that somebody got acquainted with the fact that the transferor had not been the owner after having acquired by *mancipatio* and before the time prefixed for *usucapio* had elapsed. This seems to have been the only case when someone reasonably would have asked for the *actio Publiciana*, which possibly was not denied to him, because he had not yet acquired ownership.

(c) Having been based upon the fiction of *usucapio*, the *actio Publiciana* was in my opinion not available to those who had already usucapted. Otherwise the formula would have contained a falsehood.⁶⁶

As a consequence, though the contrary is frequently believed,⁶⁷ the quiritarian owner, after the time of *usucapio* had elapsed, could surely not sue by *actio Publiciana*. Besides, this would have been utterly unreasonable, for the completed *usucapio* discharged him in the same way from proving the title of his predecessors, as the fiction of *usucapio* did.

On the other hand the *bonae fidei possessor* could not sue by *actio Publiciana* either, if the period of his possession had exceeded the time prefixed for *usucapio*. In such cases, he had either usucapted, and so the *vindicatio* was available to him, or some requirements for *usucapio* had been lacking, and as a consequence the *actio Publiciana* could not be expedient. Thus, the *actio Publiciana* was not simply the action of the *bonae fidei possessor*, as has been suggested by Wubbe,⁶⁸ but only that of such *bonae fidei possessores*, who were at the same time "Ersitzungsbesitzer", before the period of one and two years respectively had elapsed.

(d) I am convinced that the *actio Publiciana* was available only to those who were not entitled to bring a *rei vindicatio*. In such a way the field of application of the two actions was clearly delimited, and, in order to motivate this duality we need not suppose difficulties of evidence with the *rei vindicatio*. Actually, as has been already mentioned, the thesis of the *probatio diabolica* became the issue of passionate debates. So we have to take sides in the recent discussion.

6. The question can be posed in the following way: was the plaintiff of the *actio Publiciana* in a more advantageous position, than that of a *rei vindicatio* regarding the burden of proof? Did the latter action involve considerable difficulties in this respect?

⁶⁵ See the sources cited *infra* in the text p. 165.

⁶⁶ This was already emphasized by W. Seeler, "Das publicianische Edict", *SZ* 21 (1900) pp. 58 ff. Seeler, however, failed to draw the conclusions from his idea, and contradicted himself by quoting the maxim: *in eo, quod plus sit, semper inest et minus* (Gai. *D.* 50, 17, 110, pr.). This rule, however, does not apply to such cases. Romans never applied the *fictio legis Corneliae* on behalf of those who had not suffered captivity, and in general fictions were not applied to persons who had no need of them.

⁶⁷ Thus also Kaser, *In bonis esse* p. 195.

⁶⁸ Wubbe, *SZ* 80 (1963) p. 203.

According to the still prevailing view, the task of a plaintiff vis à vis the *rei vindicatio* was rather difficult. He had to prove the right of his predecessors up to the point where he arrived at an original acquisition. Therefore the civilian owner frequently brought the less burdensome *actio Publiciana* instead of suing, as he was entitled to, by a *rei vindicatio*.

Attacks on the theory of the *probatio diabolica* have already been launched in the past century by Pflüger, but his sober arguments failed to convince romanists, who are sometimes as conservative as their Roman predecessors.⁶⁹ Recently Sturm clearly pointed out the untenability of this view.⁷⁰ After having read his article, I was sure that his arguments have given the *coup de grâce* to this misbelief of medieval scholastic origin. But to my great astonishment, the generally convincing—though in some details questionable—arguing of Sturm provoked only embarrassment and a violent reaction.⁷¹ Without any delay Feenstra and Kiefner hurried to reinforce the positions of the traditional view.

I should like to start from the unanimously acknowledged fact that the theory of the *probatio diabolica* was created by medieval lawyers. Our sources not only ignore this expression, but they do not even hint at the fact that the plaintiff to a *rei vindicatio* would have been obliged to prove the right of his predecessors up to an original acquisition.⁷²

An unprejudiced outsider would thus naively ask what the prevailing view can be based on. If our sources fail to lend any support to it, it is entirely superfluous to discuss the point. A deeply rooted misbelief, however, thoughtlessly repeated throughout centuries, does not shrink from such obstacles.

(a) In essence, Feenstra confines himself to a single argument. He argues that the medieval lawyers knew Roman law very well, and their statements have proved to be correct in many a case, so we must not assume that they did not hit the point in this case too.⁷³ It would be obviously wrong to underrate the achievements of the glossators, but the way in itself in which they interpreted a given question, can by no means be accepted as evidence for Roman law. In addition, they were not yet acquainted with the Institutes of Gaius, so they could hardly have seen clearly in the question of the *actio Publiciana*. It has been already pointed out by Pflüger that the theory of the *probatio diabolica* was a consequence of the impossibility of delimitating the field of application of the two actions with the help of the Digest.⁷⁴ Medieval lawyers, indeed knew nothing about the consequences of an informal transfer—the interpolated Justinianic sources fail to give any information

⁶⁹ Cf. H. H. Pflüger, "Über die probatio diabolica", *Arch. f. Civ. Praxis* 77 (1891) pp. 16 ff. and "Über das Verhältnis von der rei vindicatio und actio Publiciana", *Arch. f. Civ. Praxis* 78 (1892) pp. 311 ff.

⁷⁰ Cf. Sturm, *Publiciana* pp. 363 ff.

⁷¹ For the arguments of Sturm see nn. 86–87.

⁷² Cf. Sturm, *Publiciana* pp. 364 ff.; Feenstra, *Publiciana* p. 98; Kiefner, *Probatio diabolica* pp. 212 f.

⁷³ Feenstra, *Publiciana* p. 97.

⁷⁴ H. H. Pflüger, *Arch. f. Civ. Praxis* 78 (1892) pp. 316 ff. Quoted by Sturm, *Publiciana* p. 369 n. 29.

about it—so the *actio Publiciana* was inevitably obscure for them. Feenstra, anyway, does not care much for ancient Roman sources.⁷⁵ The protection of those who had acquired a thing without the prescribed formalities, is not even considered by him as a possible motive for the introduction of the *actio Publiciana*. He sticks to the explanation that the action was introduced because of the difficulties of evidence with the *rei vindicatio*.⁷⁶

(b) Kiefner, to be sure, argues more thoroughly. He admits that the burden of proof with the *rei vindicatio* was in practice perhaps not as heavy as it seems to have been from the point of view of the *probatio diabolica*, but he still firmly believes that the plaintiff was compelled to prove the right of his predecessors until there was an original acquisition.⁷⁷ This rule is, in his opinion, a necessity of legal logics (“rechtslogische Notwendigkeit”); textual evidence is not needed.⁷⁸

This argument, however, is hardly apt to convince those who are sceptical. It may at most reassure the believers. It is of course quite possible that for a theoretically-trained mind it seems indispensable that the ownership of the predecessors should be proved in a proprietary lawsuit one by one, until original acquisition is reached, but in practice such a rule is utterly superfluous. Rather the contrary is obvious. When the plaintiff has succeeded in proving the legitimate acquisition of his predecessor, he fulfils his duty with respect to evidence. If the defendant denies the ownership of the predecessor, the burden of proof becomes automatically incumbent upon him. The scholarly idea of the plaintiff anxiously struggling with bringing evidence, and the defendant sitting by with a contemptuous smile, is devoid of any reality. But be this as it may concerning the abstract “rechtslogische Notwendigkeit”, legal history cannot be fully based upon logical speculations. Sources are needed, too.

Kiefner indeed quotes a text from the *Codex Theodosianus*.⁷⁹ But the enactment only points out that in a lawsuit on ownership the burden of proof was hitherto incumbent upon the plaintiff. The emperor, however, instructs the judges to examine also the legal title of the defendant. The text contains not the slightest hint at the necessity of bringing evidence regarding the right of the predecessors.

(c) As could be seen, the arguing of Feenstra and Kiefner is not capable of rescuing the theory of the *probatio diabolica*.

7. Since, according to the prevailing view, classical law had no rigid rules re-

⁷⁵ He fails to cite Gaius, and confines his attention to C. 4, 19, 12 (Feenstra, *Publiciana* p. 98).

⁷⁶ Feenstra, *Publiciana* p. 109.

⁷⁷ Kiefner, *Probatio diabolica* pp. 213 f.

⁷⁸ *Ibidem* p. 214.

⁷⁹ C. Th. 11, 39, 1: *Etsi veteris iuris definitio et retro principum rescripta in iudicio petitori eius rei quam petet, necessitatem probationis dederunt, tamen nos aequitate et iustitia moti iubemus, ut si quando talis emerit causa, in primordio iuxta regulam iuris petitor debeat probare, unde res ad ipsum pertineat: sed si deficiat pars eius in probationibus, tunc demum possessori necessitas inponatur probandi, unde possideat, vel quo iure teneat, ut sic veritas examinetur.* Cf. Kiefner, *Probatio diabolica* p. 218.

garding the law of evidence,⁸⁰ the theory of the *probatio diabolica* is at any rate deprived of its basis. However it would not be superfluous to mention some classical and postclassical sources that have a bearing upon the question of evidence in a proprietary lawsuit. These sources do not enable one, of course, to draw any definite conclusions about preclassical law, but one is by no means entitled to assume that there was a quite different system of evidence for this age.⁸¹

Two fragments of the Digest declare that in a proprietary lawsuit the plaintiff has to bring evidence, and in one of them the *rei vindicatio* and the *actio Publiciana* are expressly juxtaposed from this point of view.⁸² From these sources one cannot come to conclusions about a *probatio diabolica* or a difference concerning the law of evidence between the two actions. Contained in an imperial enactment is even what the plaintiff precisely had to prove in a lawsuit on ownership:

C. 4, 19, 12: . . . *factam emptionem et in vacuum possessionem inductum patrem tuum pretiumque numeratum quibus potes iure proditis probationibus docere debes.*⁸³

Feenstra himself admits that the source fails to mention the necessity of proving the right of the predecessors, the enactment having been complemented in this sense only by the glossators.⁸⁴ Concerning another enactment Kiefner also has to admit that the text seems to contradict the theory of the *probatio diabolica*.⁸⁵

Obviously, instead of lending support to the theory of the *probatio diabolica*, the sources expressly contradict this assumption.

8. So it would be in vain to repeat the numerous arguments which have been adduced by Sturm.⁸⁶ As has been already mentioned, some of them, certainly

⁸⁰ Cf. Kaser, "Beweislast und Vermutung im römischen Formularprozess, SZ 71 (1954) pp. 221 ff; G. Longo, "L'onere della prova nel processo civile romano", *Iura* 11 (1960) pp. 149 ff.

⁸¹ So Kiefner supposes — without any textual basis — that the law of evidence with the early *formula petitoria* and the procedure *per sponsionem* was rigid (Kiefner, *Probatio diabolica* pp. 227 f).

⁸² Gai. D. 6, 1, 24: *Is qui destinavit rem petere animadvertere debet, an aliquo interdicto possit nancisci possessionem, quia longe commodius est ipsum possidere et adversarium ad onera petitoris compellere quam alio possidente petere.*

Ulp. D. 6, 1, 73: *In speciali actione non cogitur possessor dicere, pro qua parte eius sit: hoc enim petitoris munus est, non possessoris: quod et in Publiciana observatur . . .*

⁸³ On this see Kiefner, *Probatio diabolica* pp. 215 f. It is scarcely credible that the text does not bear upon the *rei vindicatio*, as is assumed by him.

⁸⁴ Feenstra, *Publiciana* p. 98. According to him, the original text was first complemented with the rule of the *probatio diabolica* by Johannes Bassianus (p. 98 n. 40).

⁸⁵ C. 4, 19, 4. On this see Kiefner, *Probatio diabolica* pp. 216 ff. His interpretation is artificial and unconvincing. Even if the text deals with a lawsuit between a usufructuary and an owner, it still contradicts the theory of the *probatio diabolica*.

⁸⁶ His main arguments are the following: (a) The expression is not Roman, and it is not even based upon Roman sources. (b) There is no trace of difficulties which are supposed to have arisen as a consequence of the introduction of the *formula petitoria*. (c) Classical law lacked rigid rules as far as the law of evidence was concerned. (d) Why should the buyers have endeavoured to secure themselves by a warranty against eviction, if the position of a plaintiff to a lawsuit on ownership had been as awkward. (e) Ownership was the basis of several actions (e.g. the *actio legis Aquiliae* or the *condictio furtiva*) and no difficulties of evidence are recorded in this respect. Cf. Sturm, *Publiciana* pp. 364 ff.

those of minor importance, are more or less inconclusive,⁸⁷ but these are not needed to reject the theory of the *probatio diabolica*. Not only the sources, but the failure of the counter-arguments, which have been suggested by Feenstra and Kiefner, show clearly that this assumption is incongruous with the sources. There are instances when the arguments of the other party supply even better evidence than the positive ones.

What can be gathered from all this regarding the position of the plaintiffs of the two actions with respect to the burden of proof? It seems that the answer given by Sturm corresponds to the historical truth, i.e. in this respect there was no difference between them.⁸⁸

(a) The plaintiff to the *actio Publiciana* had to prove the *traditio* and the title (*causa*). The requirements of a *res habilis* and of the good faith were probably presumed,⁸⁹ so in the given case, the defendant had to prove that the object of the lawsuit was a stolen thing, or the bad faith of the plaintiff. If, however, the matter in question was which of the litigants had acquired the thing from the owner, the right of the predecessor also had to be proved.

(b) The plaintiff to a *rei vindicatio* had, if *usucapio* was completed, only to prove the possession, the title, and the time. If the two other requirements were presumed with the *actio Publiciana*, then the situation must have been the same in the case of a *rei vindicatio*. It has been rightly pointed out by Sturm that in the face of the silence of our sources, we are not entitled to suppose different rules.⁹⁰ If, however, the thing was not yet usucaptured by the plaintiff, then as can be seen from the quoted enactment of Diocletian,⁹¹ he had only to prove the right of his immediate predecessor, as with the other action. The Roman law of evidence, as far as can be inferred from the sources, never required the proving of the title of the more distant predecessors.

9. Having dealt with the question of evidence, we are in the position of trying to ascertain the motives for the introduction of the *actio Publiciana* and its original function.

(a) Praetorian law was induced by the development of commodity-turnover to create the *actio Publiciana*. As the omission of the prescribed formalities in the commerce with *res mancipi* had become rather frequent,⁹² a protection had to be given to those who had not formally acquired ownership, and were thus only in a position leading to *usucapio*.

⁸⁷ Thus his suggestion that the judge was entitled to search for the truth independently of the intentions of the parties. His opinion is based upon a text of Suetonius (Suet. *Galba* 7. Cf. Sturm, *Publiciana* pp. 379 ff.). One must not attach too much weight to this story. The argument that the parties were frequently represented by orators, is equally irrelevant (pp. 374 ff.). Against these arguments with justification see Kiefner, *Probatio diabolica* pp. 219 ff.

⁸⁸ Sturm, *Publiciana* p. 385.

⁸⁹ Thus Wubbe, *Publiciana* p. 421 n. 13; Kaser, *EB* p. 297.

⁹⁰ Sturm, *Publiciana* p. 385.

⁹¹ C. 4, 19, 12.

⁹² See the two previous chapters.

Since the *actio Publiciana* was based upon the fiction of *usucapio*, this remedy was necessarily also available to those who had acquired from a non-owner. It is an inherent feature of *usucapio* that the title of the predecessors is left out of consideration, so the *actio Publiciana* must surely have also protected from the beginning those who were only *bonae fidei possessores*. So far I agree with Wubbe.⁹³ On the other hand, Sturm is also right when he emphasizes that the decisive motive of the introduction of the *actio Publiciana* was the informal conveyance, and not the difficulties of bringing evidence with the *rei vindicatio*.⁹⁴

(b) In my opinion the *actio Publiciana* was by no means a facilitated variant of the *rei vindicatio*. As could be seen regarding the law of evidence, there was no essential difference between the two actions, and there is hardly any need for such an explanation.

It can be clearly seen from the text of Gaius that the action was available to those who were not owners (*nam quia non potest eam ex iure Quiritium suam esse intendere*),⁹⁵ and who can only sue with the help of the fiction of *usucapio*. This is corroborated by a fragment of Paulus:

D. 20, 1, 18: Si ab eo, qui Publiciana uti potuit, quia dominium non habuit, pignori accepti . . .

The supposed alternative application of the two actions is not attested by a single source. It is also worth mentioning that this alternativity, which has become an accepted statement without thinking, was in actual fact still a matter of dispute with the glossators.⁹⁶ In addition, it may be inferred from a text of Gaius that the idea did not even exist in classical law: *Ceterum, cum in rem actio duplex sit, aut enim per formulam petitoriam agitur, aut per sponsonem*.⁹⁷

Apparently Gaius does not even consider the possibility that the owner might bring an *actio Publiciana* instead of a *vindicatio*. Of course there was no need of their alternative employment, because—as has been pointed out—the position of the plaintiff to a *rei vindicatio* was not at all at a disadvantage from the point of view of the law of evidence.

(c) Thus, in preclassical law, the protection of those who were in a position to *usucapt*, became a necessity, so that is why the *actio Publiciana* was introduced. In practice it was primarily available to those who had acquired without formalities, but sometimes it could also efficiently be brought by those who could not claim to have acquired from the owner. The action was applicable to both cases, for the interests of commerce required the protection of both groups. By the protection of informal transfer the praetor fostered the speed of commodity-turnover, while the protection in case of an acquisition from a non-owner, amounted to a cautious and limited recognition of the purchase in good faith as a valid title.

⁹³ Wubbe, *Publiciana* p. 437.

⁹⁴ Sturm, *Publiciana* p. 415.

⁹⁵ Gai. 4, 36.

⁹⁶ Cf. Feenstra, *Publiciana* p. 103. The older view of Azo and Accursius denied the alternativity.

⁹⁷ Gai. 4, 91. Quoted *supra* in the text p. 152.

“IN BONIS ESSE” AND “NUDUM IUS QUIRITIUM”

I. THE PROBLEM OF BONITARIAN OWNERSHIP

1. It has already been pointed out in the previous chapter that the question of *in bonis esse* (*habere*)¹ has to be dealt with separately. This solution is dependent upon two considerations. First, it seems that the literature constantly exaggerates the relationship between the so-called bonitarian ownership and the *actio Publiciana*. Secondly, the prevailing view is, in my opinion, not entirely congruous with the sources, so the question of *in bonis esse* has to be examined thoroughly.

The dominant view could be summarized in a concise and to some extent simplified way thus: by the introduction of the *actio Publiciana* praetorian law protected those who had acquired a *res Mancipi* without the formal acts of conveyance. Possessors to whom this action was available were considered bonitarian or praetorian owners until the completion of *usucapio*.² As a consequence, the *actio Publiciana* is frequently defined by the literature as the action of the bonitarian owner.³

2. This view can be met with in nearly all textbooks and manuals. One gets the impression that perhaps nobody takes very much heed of the sources, but transmits unhesitatingly to the following generations what he has been taught. This impression becomes a conviction after a close reading of the treatise of the great Italian scholar Bonfante on the notion of *in bonis esse*, where the pertinent sources are carefully examined.⁴ His analysis reveals that the expression *in bonis esse* was

¹ This chapter is a slightly modified version of my article “In bonis esse” und “nudum ius Quiritium”, *Studi Volterra* II. (Milano, 1969) pp. 125 ff. The expressions *in bonis esse* and *in bonis habere* are alternatively used by the sources as synonyms. In the text, for brevity's sake, I use only the former expression.

² Thus e.g.: Arangio-Ruiz, *Istituzioni* p. 220; Girard-Senn p. 287; Monier, *Manuel* pp. 471 ff; S. Riccobono, *Corso di diritto romano* II. (Milano, 1933) pp. 86 ff; Schulz, *Classical* p. 340; F. Schwind, *Römisches Recht* I (Wien, 1950) p. 206; Weiss, *RPR* p. 158. In socialist literature see: Andreev p. 168; Marton pp. 132 f; Nowitzky-Peretersky pp. 197 f; Osuchowski p. 303; D. Stojčević, *Rimsko privatno pravo* (Beograd, 1966) p. 131. Kunkel, without giving his reasons for doing so, deviates from the dominant view, and avoids the terminology “praetorian viz. bonitarian ownership”. Instead he uses the expression “Spaltung zwischen formellem Recht und tatsächlicher Rechtslage”. Cf. Kunkel, *RPR* p. 123.

³ Thus e.g. Arangio-Ruiz, *Istituzioni* p. 220; Andreev p. 186; Girard-Senn pp. 375 ff; Marton p. 159; Osuchowski p. 303; Schwind, op. cit. in the previous note pp. 225 f; Stojčević, *loc. cit.* in the preceding note. The *actio Publiciana* is defined by several writers as the action of the bonitarian owner and the *bonae fidei possessor*. Cf. Kaser, *RPR* p. 368; Monier, *Manuel* pp. 490 ff; Nowitzky-Peretersky pp. 217 f. Kunkel and Schulz, however, define it as the action of the *usucapiens*. Cf. Kunkel, *RPR* pp. 142 f; Schulz, *Classical* pp. 375 ff. In a similar way also Weiss, *RPR* pp. 213 ff.

⁴ Cf. Bonfante, *Bonitario*.

not one of the technical terms of Roman legal language, having been used by our sources in different meanings.⁵ It has been also shown by Bonfante that *in bonis esse* and the *actio Publiciana* do not always correspond to each other.⁶ Unfortunately he failed to weaken the prevailing view. His failure was possibly due to his reluctance to be consistent when drawing the final conclusions from his observations. In fact, in spite of everything, he concluded that the terminology "praetorian ownership" can be applied to *in bonis esse*.⁷ So the prevailing view continued to flourish, and nobody paid any attention to the terminological investigations of Bonfante.

Some eight years ago Kaser also devoted an article to the question.⁸ As a principle, he follows Bonfante—this is expressly told in his treatise⁹—but he is apparently less sceptical toward the prevailing view than his Italian predecessor was. He concludes that *in bonis esse* is justly called a bonitarian ownership.¹⁰

Bonfante and Kaser have paved the way for a general revision of the theory on bonitarian ownership. Their works call attention to the extreme inconsistency of the Roman terminology, and to the need for an unprejudiced examination of every pertinent text.¹¹ Their results are not definitive, possibly because they were to some extent still influenced by the dominant view. So both of them draw conclusions from a mention of the *actio Publiciana* in the sources about *in bonis esse*,¹² and by this involuntary concession made to the traditional theory their conclusions are bound to suffer. In addition, Kaser is also inclined to leave texts out of account which would contradict the theory of bonitarian ownership.¹³

3. I have already referred to my doubts concerning the reliability of the prevailing view. These can be resumed as follows:

(a) Those who support the dominant theory, which include to some extent even Bonfante and Kaser, presume there is a close connection between the *actio*

⁵ "Da tutto ciò risulta, che *in bonis* non era termine tecnico per designare l'istituto pretorio, bensì una frase, tanto dell'uso editale, quanto del linguaggio comune dei giuristi, esprimente in ordine alle cose l'esser proprietario. Questa frase veniva adoperata a significar l'*in bonis* pretorio, ma in guisa, che ciò riuscisse chiaro dalle relazioni del discorso." (Bonfante, *Bonitario* p. 386.)

⁶ Bonfante, *Bonitario* pp. 376 f.

⁷ *Ibidem* p. 387.

⁸ Kaser, *In bonis esse*. The treatise is at the same time a review of the work of Wubbe published in Dutch: *Res alieni pignori data* (Leiden, 1960).

⁹ Kaser, *In bonis esse* p. 177.

¹⁰ "Es ist hiernach gerechtfertigt das *in bonis esse* ein prätorisches, oder wenn man der von Theophilus angeregten Terminologie folgen will, ein bonitarisches Eigentum zu nennen." (Kaser, *In bonis esse* p. 184.)

¹¹ Kaser, modestly, concludes his treatise with the following remark: "... wagen doch auch wir nicht zu hoffen das letzte Wort gefunden zu haben" (*In bonis esse* p. 220). This sounds almost like a call to progress further in the direction indicated by him.

¹² Thus e.g. Bonfante (*Bonitario* p. 374) interprets Ulp. *D.* 6, 2, 7, 7 as a case of *in bonis esse*, though the fragment mentions only the *actio Publiciana*. In the same way Kaser, *In bonis esse* p. 181.

¹³ Thus e.g. Ulp. *D.* 50, 16, 49—according to Kaser, *In bonis esse* p. 184.—does not refer to the subject. On this see *infra* p. 169.

Publiciana and *in bonis esse*, although our sources fail to justify this assumption.¹⁴

It is unimaginable that literature, as far as I know, has not yet considered the important point that the sources, apart from a single fragment,¹⁵ never mention *in bonis esse* together with the *actio Publiciana*. Surprisingly enough, the expression *in bonis esse* does not appear in the title of the Digest on *actio Publiciana*,¹⁶ and Gaius, though he deals with both questions, carefully avoids linking them.¹⁷

As a consequence, neither classical nor Justinianic law¹⁸ related *in bonis esse* and *actio Publiciana* as closely as contemporary romanists are wont to do. Obviously, if we want to get acquainted with Roman conceptions, we have to examine the use and the meaning of *in bonis esse* in itself, we must abandon the prejudices of modern research and not link it to the *actio Publiciana*.

(b) It is equally astonishing that literature has paid comparatively little attention to those sources which deal with the legal consequences of the separation of *nudum ius Quiritium* and *in bonis esse*.¹⁹ It is to be hoped that new results can be obtained from these neglected texts.

(c) Being convinced that the literature has overestimated the connection between *in bonis esse* and *actio Publiciana*, I suppose that the causes of the splitting up of quiritarian ownership and *in bonis esse* have not been sufficiently clarified. According to a widespread view, the term *in bonis esse* was limited to designating the position of those who were protected by the *actio Publiciana*. This view, however, seems to be unfounded.

4. These considerations demand a thorough examination of the problem. First of all, I shall try to ascertain the meaning of the expression *in bonis esse* in the different sources, and thus find an answer to the question whether the term "bonitarian ownership" is a suitable one for rendering the conceptions of

¹⁴ Cf. n. 53. The erroneously supposed connection between *in bonis esse* and *actio Publiciana* has been grossly exaggerated by Feenstra in his recently published article: "Duplex dominium", *Symbolae Martino David dedicatae* I. (Leiden, 1968) pp. 55 ff. He comes to the peculiar conclusion that the enactment of Justinian (C. 7, 25, 1) did not abolish bonitarian ownership, because otherwise the *actio Publiciana* could not have subsisted in the Digest (p. 69). I hope that the previous and the present chapter will properly show the untenability of his view.

¹⁵ Ulp. D. 44, 4, 4, 32. Cited in n. 28.

¹⁶ Cf. D. 6, 2.

¹⁷ Gaius pays much attention in particular to the separation of *dominium ex iure Quiritium* and *in bonis esse*. Nonetheless, when dealing with the *actio Publiciana*, he fails to mention the *in bonis esse*. Moreover he emphasizes that the plaintiff to it is no owner. See Gai. 4, 36.

¹⁸ This can be also seen from the title on *Publiciana* in the Digest. Justinian, anyway, abolished the contrast of *nudum ius Quiritium* and *in bonis esse*. However the *actio Publiciana* was maintained.

¹⁹ Bonfante does not deal with the question, and Kaser devotes only a few lines to the point. (*In bonis esse* p. 183). Buckland mentions the peculiar provisions concerning the rights of a slave-holder in cases where quiritarian ownership and *in bonis esse* were separated, but finds them inconceivable. Cf. W. W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge, 1931) p. 97.

classical Roman law.²⁰ As a second step, the texts in which the legal consequences of the splitting up of *nudum ius Quiritium* and *in bonis esse* are treated have to be looked at, in order to be able to establish the causes of this division.

As with the *actio Publiciana*, the sources relating to *in bonis esse* have come down to us from classical and partly from post-classical age, but unfortunately we lack immediate texts of preclassical law. The available sources naturally contain the classical ideas. However, they also enable us to draw conclusions about preclassical law. Obviously, some degree of uncertainty has to be reckoned with but, as will be seen, the dangers of distorting preclassical law are rather small. In fact, if the result is a negative one, then this also holds good *a fortiori* concerning the less developed earlier period of Roman law.

II. "IN BONIS ESSE" IN THE SOURCES

1. First of all, the sources where the expression *in bonis esse* viz. *in bonis habere* can be found, have to be examined. Thus it will be possible to establish what meaning Romans attributed to the expression, and whether there ever existed a homogeneous notion of *in bonis esse*, as a term for a precisely defined legal position.

2. The pertinent texts in the Digest contain a rich variety of different meanings. The positions for which the expression *in bonis esse* is employed can be roughly divided into three groups:

(a) In twenty instances *in bonis esse (habere)* is employed in a completely broad meaning, designating generally belonging to someone's property, also the claims included.²¹

This use of the expression is characteristically displayed by an Ulpianic text:

Ulp. *D.* 50, 16, 49: . . . *in bonis autem nostris computari sciendum est non solum, quae dominii nostri sunt, sed et si bona fide a nobis possideantur vel superficiaria sint. Aequae bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutio-nibus; nam haec omnia in bonis esse videntur.*

It is quite possible that the text quoted also contains interpolations.²² Nonetheless it lies beyond any doubt that, in spite of possible alterations of the text, the

²⁰ The terminology "bonitarian owner" is based upon a passage of the commentary upon the Institutions of Justinian attributed to Theophilus. See *Theoph. Paraphr.* 1, 5, 4: ὁ δεσπότης βωνιτάριος. The source, however, does not bear witness to the conceptions of preclassical and classical law. Justinian himself, fails to adopt this terminology. The dogmatic disposition of the eastern law-schools strove also in other respects to theoretical generalization, and thus deviated considerably from the views of classical lawyers.

²¹ *Gai. D.* 36, 1, 65 (63), pr; *Maec.* 35, 2, 30, 5; *Pap.* 35, 2, 11, 3; *Paul.* 21, 2, 41, 2; 31, 12, pr; 33, 2, 1; 31, 49, 3; 42, 5, 6, 2; *Scaev.* 20, 1, 34, 2; 35, 2, 95, 2; 36, 1, 80, 16; *Ulp.* 5, 4, 6, pr; 35, 2, 62, 1; 35, 2, 82; 37, 1, 1; 37, 6, 1, 11; 42, 8, 10, 9; 50, 12, 2, 2; 50, 16, 49; *Ven.* 42, 8, 8.

²² For supposed interpolations see *Ind. Itp.* volume III. pp. 583 f. According to Kaser, *In bonis esse* p. 184 the text does not bear upon the praetorian *in bonis esse*. Cf. n. 13. One

classical lawyer himself employed the expression in this wide meaning. This is confirmed by other fragments too, where a similar use of *in bonis esse* can be observed.

(b) In twenty-four fragments *in bonis esse* designates a right to a thing—including quiritarian ownership—without specifying it more closely.²³ A good example for this is offered by Modestinus:

D. 41, 1, 52: Rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem aut amittentes ad recipiendam eam actionem habemus.

This definition embraces equally ownership, the right of pledge, but also usufruct or *emphyteusis*.²⁴

The same meaning has to be attributed to the expression in two other fragments, where the quality of being withdrawn from the exercise of ownership of a thing is expressed by the words “*nullius in bonis est.*”²⁵

(c) I have succeeded in finding only three texts in the Digest where the expression *in bonis esse* designates a legal situation protected or created by the praetor.²⁶ Two fragments refer to the case of a *ductio ex noxali causa iussu praetoris*,²⁷ the third one, however, points to the duality of formal right of ownership and actual ownerlike position.²⁸

The clear confrontation of *nudum ius Quiritium* and *in bonis esse* is obviously lacking from the Digest, because—as is well-known—this duality was abolished

must not, however, start from an *a priori* notion of *in bonis esse*, but one has to obtain the notion from the sources. It lies of course beyond any doubt that the quoted text is hardly reconcilable with the theory of bonitarian ownership.

²³ Afr. *D. 37, 6, 4*; Cels. 50, 17, 190; Gai. 20, 1, 15, 1; 20, 4, 11, 3; Lab. 36, 4, 14; Marc. 20, 6, 8, 12; 34, 5, 18 (19), 1; Mod. 41, 1, 52; Paul. 5, 3, 32; 39, 2, 18, pr; 40, 12, 38, 2; 50, 1, 21, 4; Pap. 20, 1, 3, pr; Pomp. 21, 2, 16, 2; Tryph. 23, 3, 75; Ulp. 4, 2, 9, 6; 23, 3, 7, 3; 37, 1, 9; 38, 2, 3, 20; 43, 32, 1, 5; 47, 2, 12, 2; 47, 4, 1, 10; 47, 8, 2, 22; Ven. 42, 8, 25, 4.

²⁴ On this see Kaser, *In bonis esse* pp. 183 f. I do not think that the source would point to the *actio Publiciana* and the *exceptio rei venditae et traditae*, as its wording is quite general.

²⁵ Gai. *D. 1, 8, 1*; Marc. *D. 1, 8, 6, 2*.

²⁶ Cf. Bonfante, *Bonitatio* p. 386. He, however, also considers Ulp. *D. 4, 2, 9, 6* (Cf. n. 23) as belonging to this group. But the text shows that the expression *in bonis esse* embraces here every position entitling one to bring an *in rem actio*: *Licet tamen in rem actionem dandam existimemus, quia res in bonis est eius, qui vim passus est, verum non sine ratione dicetur, si in quadruplum quis egerit, finiri in rem actionem vel contra*. There is no hint at a situation specially protected by the praetor.

²⁷ Paul. *D. 2, 9, 2, 1* and 9, 4, 26, 6.

²⁸ Ulp. *D. 44, 4, 4, 32: Si a Titio fundum emeris qui Sempronii erat isque tibi traditus fuerit pretio soluto, deinde Titius Sempronio heres extiterit et eundem fundum Maevio vendiderit et tradiderit: Iulianus ait aequius esse praetorem te tueri, quia et, si ipse Titius fundum a te peteret, exceptione in factum comparata vel doli mali summo veretur et, si ipse eum possideret et Publiciana peteres, adversus excipientem “si suus non esset” replicatione uteris, ac per hoc intellegeretur eum fundum rursus vendidisse, quem in bonis non haberet.*

Characteristically the expression *in bonis esse* is adopted in a negative fashion, i.e. we are not told that the land belonged to the property of the buyer, but, on the contrary, we learn that it did not belong any longer to that of the vendor. So the source fails to support the theory of bonitarian ownership. Cf. also n. 15.

by an enactment of the emperor Justinian.²⁹ Characteristically enough the title and the text of the enactment speaks of the abolishment of *nudum ius Quiritium* instead of that of *in bonis esse*.

So the fragments of the Digest confirm the view of Bonfante. It can be seen that the expression *in bonis esse* could not be counted among the technical terms of classical legal language.³⁰ This can already be safely stated on the basis of the Digest, for, as far as I know, nobody has yet suggested that all the fragments examined are interpolated from this point of view. As a consequence, we may conclude that classical lawyers adopted the term in various meanings.

3. But we also have to consider the texts, particularly the Institutes of Gaius, which have not been revised by the commission of Justinian.³¹

(a) Gaius himself uses the word in a wide sense, because in the Institutes too the expression "*nullius in bonis est*" is used for designating things which are withdrawn from the exercise of ownership.³²

(b) The situation of the *bonorum possessor* and the *bonorum emptor* is also included in the notion of *in bonis esse* with Gaius.³³

(c) Finally, Gaius also applies the expression to the quiritarian owner, if the latter is really in the position to exercise the rights of an owner. So, e.g.: . . . *semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse*.³⁴

As can be seen, the expression lacks a precise meaning in the Institutes of Gaius too, and it fails to designate a "praetorian ownership" as distinct from civilian ownership. When he wants to designate the position of a quiritarian owner, Gaius unhesitatingly uses the words *in bonis esse*, and the expression *nullius in bonis est* also includes civilian ownership, of course in a negative fashion. As in some fragments of the Digest, *in bonis esse* also denotes a position which was protected by the praetor, but without further explanation it does not mean any more than the belonging of something to someone's property.

4. Gaius and other pre-justinianic sources, however,³⁵ are also acquainted with instances where *dominium ex iure Quiritium* and *in bonis esse* are separated.

It is worth while quoting the much discussed text of Gaius, because it was frequently used as an argument on behalf of the theory of the supposed bonitarian ownership:

²⁹ C. 7, 25, 1: *De nudo iure Quiritium tollendo*.

³⁰ Bonfante, *Bonitario* p. 386. Cited in n. 5.

³¹ Cf. Gai. 1, 35; 1, 54; 1, 167; 2, 9-11; 2, 40-41; 2, 88; 2, 222; 3, 80; Ulp. 1, 16; 19, 20; 22, 8; *Fr. Dos.* 9.

³² Gai. 2, 9 and 2, 11.

³³ Gai. 3, 80: *Neque autem bonorum possessorum neque bonorum emptorum res pleno iure fiunt, sed in bonis efficiuntur*.

³⁴ Gai. 2, 41. In the same way also: 1, 54. The important circumstance that the *in bonis esse* did not cease after the thing had been usucaptured, has been already observed by Wubbe. Cf. Kaser, *In bonis esse* p. 185.

³⁵ Cf. n. 31.

Gai. 2, 40–41: *Sequitur ut admoneamus apud peregrinos quidem unum esse dominium; nam aut dominus quisque est aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebatur: aut enim ex iure Quiritium unusquisque dominus erat aut non intellegebatur dominus. Sed postea divisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. Nam si tibi rem Mancipi neque Mancipavero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium vero mea permanebit, donec tu eam possidendo usucapias: semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse, ac si ea Mancipata vel in iure cessa esset.*

Unfortunately the expressions *divisionem accepit dominium* and *duplex dominium*³⁶ are likely to arouse misunderstandings. Misinterpretations can be found e.g. in the works of Ciapessoni and Feenstra who think that Gaius is writing about two types of ownership.³⁷ A close reading of the text quoted, however, leads us to reject such interpretations, and to adhere to the view of Bonfante and La Rosa.³⁸ According to them, *duplex dominium* does not mean two kinds of ownership, but the splitting (*divisio*) of ownership into two. This view is also corroborated by the fact that *in bonis esse* is never termed *dominium* by Gaius.³⁹ It must be mentioned as a decisive argument that after *usucapio* had been terminated, *in bonis esse* did not cease. It was not transformed into quiritarian ownership, but the *usucapiens* became a quiritarian owner who had the thing at the same time *in bonis*.⁴⁰

The splitting into two of quiritarian ownership and the actual patrimonial situation (*in bonis esse*) took place not only if a *res Mancipi* had been transferred by delivery, though this must have been the most important case.⁴¹ Apart from the already mentioned instances⁴² this situation could also arise as a consequence of a definite assignment of possession by the praetor.⁴³

³⁶ Gai. 1, 54.

³⁷ Ciapessoni, "Duplex dominium", *Studi su Gaio* (Pavia, 1934) pp. 91 ff. Contra: F. La Rosa, "In tema di 'duplex dominium'", *Annali Catania* 3 (1949). The view of Ciapessoni is also sustained by Feenstra, *op. cit.* in n. 14. pp. 62 ff. Quite inconceivably he also extends the notion of *duplex dominium* to those who had acquired from a non-owner. The text of Gaius unambiguously speaks only of the acquisition of a *res Mancipi* from the owner by delivery.

³⁸ Bonfante, *Bonitario* p. 378; La Rosa, *op. cit.* in n. 37 pp. 3 ff.

³⁹ It is true that in Gai. 1, 54 we find the expression *in potestate domini*, but the word *dominus* does not mean "owner" in this case. It denotes "master" with respect to the slave. Cf. La Rosa, *op. cit.* in n. 37. p. 2.

⁴⁰ On this see n. 34 and *infra* in the text.

⁴¹ Bonfante and Kaser (*Bonitario* p. 374 and *In bonis esse* p. 182.) underrate the importance of this case. Though I admit that the transfer by delivery was not the only case, it is likely to have been the most typical one.

⁴² Cf. nn. 27–28.

⁴³ Bonfante, *Bonitario* p. 374 has made a list of these cases, although objections can be raised about it: (a) After paying the *litis aestimatio* quiritarian ownership and the actual situation became probably separated, in so far I adhere to the view of Bonfante. (b) However it is doubtful whether the same situation arose, with an *adiudicatio* in a lawsuit *imperio continens*. The pertinent source (Ulp. *D.* 6, 2, 7, pr) fails to mention *in bonis esse*. (c) Although

If the given thing does not actually belong to the property of the quiritarian owner, if the rights of the owner are exercised by another person, then his ownership is termed *nudum ius Quiritium* by classical sources.⁴⁴

5. The sources show clearly that the expression *in bonis esse* was not one of the technical terms of Roman legal language. It was used both in a narrower and wider meaning, without denoting a precisely defined legal position. The expression simply meant belonging to somebody's property, and nothing more.

This conclusion obviously calls for the abandonment of the prejudice about the existence of a technical and a non-technical *in bonis esse*. Such a monster would not be in accordance with the strict classical legal language, and in addition, no expression can be regarded as a technical term if it is applied in the most various meanings. In the case where quiritarian ownership and the actual patrimonial situation were separated, *in bonis esse* also means this and not praetorian ownership. If it had meant praetorian ownership, at least in this instance, our sources would confront it with the *dominium ex iure Quiritium*. The texts, however, fail to do so, and apply the expression *in bonis esse* unhesitatingly to the quiritarian owner as well. Thus there did not exist an alternative between quiritarian and bonitarian ownership, but between quiritarian owners who could exercise the rights of an owner, and between quiritarian owners who were not entitled to do so. Instead of *in bonis esse*, it is rather the expression *nudum ius Quiritium* that seems to have been a technical term, because the latter clearly and unambiguously denoted a formal right of ownership, where the object of it actually already belonged to the property of another person.⁴⁵

This is why I think that the designation "bonitarian ownership" is wrong, for Roman law, at least until the age of Justinian, was not acquainted with this notion. In addition, I am inclined to deny even the existence of a corresponding legal institution. Its absence is shown by the lack of a uniform legal remedy, which could have been applied to all cases of the supposed praetorian ownership.⁴⁶

a *missio in possessionem* could lead to *usucapio* (Cf. Paul. *D.* 39, 2, 5, pr.), the expression *in bonis esse* cannot be found in the text. (d) In my opinion, it is not correct to interpret the cutting of wood on alien land with the permission of the praetor as a case of the praetorian *in bonis esse*. There is no reference to it in the relevant source. Cf. Ulp. *D.* 43, 27, 1, pr. (e) It can likewise be objected that Bonfante considers the *restitutio fideicommissaria* based upon the *SC. Trebellianum* as a case of the praetorian *in bonis esse*. Gaius uses the expression in fact quite vaguely, without indicating a special situation protected by the praetor: *D.* 36, 1, 65 (63), pr: *Facta in fideicommissarium restitutione omnes res in bonis fiunt eius, cui restituta est hereditas, etsi nondum nactus fuerit possessionem*. Characteristically enough, it was not even necessary to acquire possession. (f) Finally the *addictio bonorum libertatum servandorum causa* was only a case of the *bonorum possessio* Cf. Ulp. *D.* 40, 5, 4, 21.

⁴⁴ Thus Gai. 1, 54; 3, 166; *C.* 7, 25, 1. In *Fr. Dos*, 9 the words *tantum ex iure Quiritium* are used. The expression *nudum ius Quiritium* is not attested for the republican age. However, I am inclined to suppose that it had come into existence by the first century B.C. At any rate, even if these words were of later origin, the rules concerning it are surely creations of pre-classical law.

⁴⁵ See nn. 29. and 44.

⁴⁶ Cf. nn. 14 and 53.

This conclusion is also corroborated by the fact that so far nobody has succeeded in giving an adequate definition of "bonitarian ownership". The cautious definition of Kaser can also be found fault with "it embraces those cases which were . . . protected by the praetor against anybody".⁴⁷ It is sufficient to mention that the *bonorum possessor sine re* was not protected against anybody, while the quiritarian owner—if the thing belonged actually to his property (*in bonis esse*)—had no praetorian, but an action *iuris civilis*.

The theory of bonitarian ownership can be accepted only to the extent that, without any doubt, there used to be cases when the praetor denied protection to the quiritarian owner, and gave it to another person. These cases, however, have not been united under a general conception. The vague notion *in bonis esse*, was also used here but occasionally other denominations were employed, too.⁴⁸

6. It seems that Roman lawyers consistently used the expression *in bonis esse* in cases when they wanted to express the belonging of a thing or a claim to a given patrimony, without specifying more closely the legal title.

As is well-known, classical lawyers always strove to use terms like *dominium*, *usus fructus*, *bonae fidei possessor* etc. in their precise legal meaning.⁴⁹ It happened, however, that a collective noun, embracing several titles, was required. In such cases the expression *in bonis esse* was used. So, in order to safeguard the precise terminology, classical lawyers occasionally employed this vague and unprecise expression. This is very characteristically illustrated by a fragment of Gaius:

D. 20, 1, 15, 1: *Quod dicitur creditorem probare debere cum conveniebat, rem in bonis debitoris fuisse . . .*

In the case of a real security, the debtor, who had bestowed a *pignus*, was not necessarily the owner. He could have been himself creditor to a real security, or possibly a *bonae fidei possessor*. For this reason Gaius does not use the words *rem debitoris fuisse*, because this expression would have excluded every other possibility apart from ownership. Instead, he used the expression *in bonis esse*, which embraced all possible legal titles.⁵⁰

A similar situation arose if quiritarian ownership and the actual patrimonial position were split into two, since the actual holder could not have been called owner.⁵¹ His position could best be expressed by the vague *in bonis esse*, a term

⁴⁷ " . . . es schliesst alle Fälle ein, die der Prätor mit dinglichem Schutz gegen jedermann . . . schützt." (Kaser, *In bonis esse* p. 184).

⁴⁸ Thus e.g. *bonorum possessor*, *bonorum emptor*.

⁴⁹ On this especially see Levy, *Vulgar Law* pp. 19 ff; 61. etc.

⁵⁰ From another point of view, Wubbe basically came to the same conclusion (Cf. Kaser, *In bonis esse* p. 198). Kaser, however, considers, in conformity with the traditional view, that *in bonis esse* has to be understood as praetorian ownership (*Ibidem* pp. 200 f.). This view is unacceptable, because—as Kaser himself admits—the expression embraces quiritarian ownership here as well. So Gaius is likely to have used the expression because he did not want or could not define the legal title of the debtor to the *pignus* more closely.

⁵¹ Cf. n. 39. The terminology of Theophilus, as has been already pointed out, does not bear witness to the conceptions of classical law. H. Erman, "Beiträge zur Publiciana", *SZ* 11 (1890) pp. 212 ff. wanted to show by some fragments of the Digest that the *in bonis esse*

which embraced equally those who had acquired a *res mancipi* by *traditio*, the *bonorum possessor*, or those who in a lawsuit on property had paid the *litis aestimatio*.

III. THE SPLITTING OF “*IN BONIS ESSE*” AND “*NUDUM IUS QUIRITIUM*”

1. We have already dealt with the cases where quiritarian ownership and the actual patrimonial situation (*in bonis esse*) were separated, and the owner had only a legal title, without being entitled to actual enjoyment.

To the question what this peculiar duality of ownership and actual patrimonial situation in Roman law has to be ascribed to, the following answer is usually given. By means of the *actio Publiciana* and the *exceptio rei venditae et traditae* the praetor protected those who had acquired a *res mancipi* by simple delivery against the owner, too, and thus made them bonitarian owners.⁵² So, according to the prevailing view, the splitting of ownership into *nudum ius* and *in bonis esse* took place only because the situation of those protected by *actio Publiciana* had to be termed somehow.

2. This explanation is a hardly satisfactory one in my opinion.

(a) *In bonis esse* was not the technical term for a special situation protected by the praetor, so the demand for a term was not satisfied by it.

(b) Legal situations which were called *in bonis esse*, were protected by different legal means, not only by the *actio Publiciana*.⁵³

(c) As has been shown in the previous chapter,⁵⁴ the *actio Publiciana* was available also to those who had acquired the thing from a non-owner, though their position was not identical with the supposed “bonitarian ownership”.

(d) I have already pointed out⁵⁵ that the sources fail to establish any connection between *actio Publiciana* and *in bonis esse*.

had been conceived as *dominium*. The texts: *D.* 9, 4, 26, 6; 23, 5, 1, pr. and 7, 1, 7, 1 (“*iure domini possessorum*”) are, however, obviously interpolated. In *D.* 39, 2, 7, pr. the word is applied to the land of the neighbour, while the other sources on *cautio damni infecti* are irrelevant, for ownership is acquired by *usucapio*. The same holds true for *D.* 23, 5, 1, pr. *D.* 50, 16, 49 has been already analysed. In *Ulp.* *D.* 37, 1, 1 and *Paul.* *D.* 47, 2, 47 the *bonorum possessor* is indeed called *dominus*. But these sources are suspect.

⁵² See the literature referred to in nn. 2–3. This idea, as an obvious one, is frequently implied in a tacit way, without being expressly told.

⁵³ If the plaintiff was at the same time quiritarian owner, the *rei vindicatio* was available to him. The *bonorum possessor* was protected by the *interdictum quorum bonorum* (*Gai.* 4, 144), the *bonorum emptor* by the *actio Rutiliana* (*Gai.* 4, 35). If there were any claims, the corresponding *in personam actio* could be brought. As has been shown, *in bonis esse* was a broad notion, embracing various legal titles. The field of application of the *actio Publiciana*, however, was considerably narrower.

⁵⁴ See *supra* p. 159.

⁵⁵ See *supra* p. 168. Cf. also nn. 15–17.

In bonis esse, of course, was such a vague and broad notion that it would have been foolish to declare that the *actio Publiciana* served its protection. Roman lawyers, anyway, never stated anything of the kind.

It can be seen that the duality of *nudum ius Quiritium* and *in bonis esse* cannot simply be explained by the introduction of the *actio Publiciana*. I think that the causes of this phenomenon lie deeper.

3. If one casts but a cursory glance at the texts where the division of ownership is dealt with, it becomes at once apparent that practically all of them concern ownership on slaves.⁵⁶ Other kinds of things are never mentioned, and even the word *res* is only used when the notion of the division is expounded and not the legal consequences of it.⁵⁷ There only exists a single text where Gaius, with regard to legacies, speaks about *res* in general instead of slaves.⁵⁸ Astonishingly enough, the literature, as far as I know, has not yet paid any attention to this peculiar fact.

The legal consequences of a splitting of *dominium ex iure Quiritium* and *in bonis esse* were—according to the sources—the following:

(a) The *potestas* on the slave is always conferred on those who have him *in bonis*. The *nudum ius Quiritium* does not entitle one to *potestas*:

Gai. 1, 54: . . . *ita demum servum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit: nam qui nudum ius Quiritium in servo habet, is potestatem habere non intellegitur.*

(b) As a consequence, the slave's acquisitions are always due to the person to whose property he actually belongs:

Gai. 2, 88: *Dum tamen sciamus: si alterius in bonis sit servus, alterius ex iure Quiritium, ex omnibus causis ei soli per eum acquiritur, cuius in bonis est.*⁵⁹

It is also emphasized by other sources that the slave does not acquire anything for the person who has merely a *nudum ius Quiritium*.⁶⁰

Gai. 3, 166: *Sed, qui nudum ius Quiritium in servo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur, quam usufructuarius et bonae fidei possessor. Nam placet ex nulla causa ei adquiri posse . . .*

(c) The rules concerning the manumission of the slaves were not as simple. As a principle, the slave could be manumitted by the person to whose property he actually belonged:

⁵⁶ Gai. 1, 35; 1, 54; 1, 167; 2, 88; Ulp. 1, 16; 19, 20; 22, 8; *Fr. Dos.* 9. Also in *C.* 7, 25, 1 the slave is specially mentioned: *sed sit plenissimus et legitimus quisque dominus servi sui sive aliarum rerum ad se pertinentium.*

⁵⁷ So: Gai. 2, 40–41 and 3, 80.

⁵⁸ Gai. 2, 222: *Secundum hanc igitur opinionem, si ea res ex iure Quiritium defuncti fuerit, potest a legatario vindicari . . . quod si in bonis tantum testatoris fuerit, extraneo quidem ex senatus consulto utile erit legatum, heredi vero familiae herciscundae iudicis officio praestabitur . . .* It is worth mentioning that *in bonis esse* also fails here to involve *actio Publiciana*.

⁵⁹ In the same way: Ulp. 19, 20: *Si servus alterius in bonis, alterius ex iure Quiritium sit, ex omnibus causis acquirit ei, cuius in bonis est.*

⁶⁰ Cf. Ulp. 19, 20. On the position of the usufructuary and the *bonae fidei possessor*: Gai. 3, 164 ff. and Ulp. 19, 20–21. Cf. C. Salkowski, *Zur Lehre vom Sklavenerwerb* (Leipzig, 1891) pp. 116 ff.

*Fr. Dos. 9: Sed et illud observandum, ut is qui manumittitur, in bonis manumittentis sit . . .*⁶¹

If the *manumittens* was at the same time also the quiritarian owner, the former slave acquired the status of a Roman citizen. Otherwise he became only a *Latinus*:

Gai. 1, 35: *Ergo si servus in bonis tuis, ex iure Quiritium meus erit, Latinus quidem a te solo fieri potest . . . Quod si cuius et in bonis et ex iure Quiritium sit, manumissus ab eodem scilicet et Latinus fieri potest et ius Quiritium consequi . . .*⁶²

(d) The *bonorum possessio* on the inheritance of the manumitted slave was likewise the right of the person who formerly owned the slave *in bonis*.⁶³

(e) To those who had but a *nudum ius Quiritium*, only two rather insignificant and formal rights were left: to bestow Roman citizenship upon the already manumitted slave by *iteratio*,⁶⁴ and the right to exercise the *tutela* over the manumitted female slave.⁶⁵

4. It can be seen that the rights of the slaveholder were bestowed upon the person who had the slave *in bonis*, whether he was the quiritarian owner or not. He had *potestas*; the slave's acquisitions belonged to him; he was entitled to manumit the slave; and he could also claim the *bonorum possessio* if the manumitted slave died.

If he lacked the title of a quiritarian owner, this meant only that the slave manumitted by him did not become a Roman citizen, and as a consequence, the slave manumitted in this way could not be appointed an heir.⁶⁶

Nudum ius Quiritium, on the other hand, contained only two rights of a moderate economic importance.

5. The analysed texts, though they are of classical and even of postclassical origin, give an unambiguous answer to the question why in the course of the last centuries of the Roman Republic, the division of ownership into *nudum ius Quiritium* and *in bonis esse* was introduced. The solution lies in the fact that nearly all pertinent texts concern ownership on slaves.

The progress of commodity-turnover and of slave-holding⁶⁷ in the last two centuries B.C. resulted—as has been pointed out⁶⁸—in the spread of informal conveyance, among other things. The praetor reacted to this—probably in the first century B.C.⁶⁹—by the introduction of the *actio Publiciana*. As a consequence,

⁶¹ Gai. 1, 167: *unde si ancilla ex iure Quiritium tua sit, in bonis mea, a me quidem solo non etiam a te manumissa Latina fieri potest . . .*

⁶² Cf. Ulp. 1, 16: *Qui tantum in bonis, non etiam ex iure Quiritium servum habet, manumittendo Latinum facit. Cf. n. 66.*

⁶³ Gai. 1, 135: *Ergo si servus in bonis tuis, ex iure Quiritium meus erit . . . bonorum autem quae cum is morietur, reliquerit, tibi possessio datur, quocumque ius Quiritium fuerit consecutus. Cf. also Gai. 1, 167 and n. 61.*

⁶⁴ Gai. 1, 35.

⁶⁵ Gai. 1, 167.

⁶⁶ Ulp. 22, 8.

⁶⁷ On the development of slavery see W. L. Westermann, *The Slave Systems of Greek and Roman Antiquity* (Philadelphia, 1955) pp. 69 ff. See also the references on p. 182 n. 10.

⁶⁸ See *supra* pp. 138 f.

⁶⁹ See *supra* p. 156.

if a *res Mancipi* was acquired from the owner by simple delivery, the buyer enjoyed a paramount procedural protection. He could also recover the thing from the owner by means of the *actio Publiciana* and a *replicatio*, and if sued by the owner, he could paralyse the *vindicatio* by the *exceptio rei venditae et traditae*.⁷⁰ Being protected also against third persons, his legal position was seemingly firm.

The procedural remedies indeed proved to be efficient if the different *res Mancipi* were in question. If, however, the object of transfer was a slave, grave problems are likely to have arisen. Though the acquirer of the slave had all the necessary procedural means at his disposal if the delivery had been carried out by the owner, it soon turned out that these remedies failed to furnish sufficient security. As a consequence of the peculiarities of slave-property, in fact, the transferor, having retained quiritarian ownership, was in the position to deprive the buyer of the slave, despite the fact that the buyer enjoyed procedural protection. He could not be prevented from manumitting the slave, and he could raise a claim to the property which had been acquired by the slave.

Thus, the *actio Publiciana* and the *exceptio rei venditae et traditae* failed to give adequate security to the acquirer of a slave. As soon as this was realized by pre-classical law, the quiritarian owner was deprived of the rights of a slave-holder. According to the new principle, the rights of a slave-holder were granted only to those who actually had the slave *in bonis*. The quiritarian owner, who had alienated the slave by *traditio*, or who had been definitely deprived of the slave by the praetor, had only a *nudum ius*, but no *potestas*. The protection of informal conveyance in the case of slaves, required beyond the procedural remedies, further measures too, namely special provisions concerning the rights of a slave-holder, and this was realized by the creation of the notion *nudum ius Quiritium*.

The separation of quiritarian ownership and *in bonis esse* did not remain confined to slaves. As can be seen from our sources,⁷¹ it was also extended later on to other things, although the slave continued to be the most important case.

IV. CONCLUSIONS

1. The result is that the expression *in bonis esse* was not a technical term, and did not denote "bonitarian ownership". *In bonis esse* meant simply the belonging of a thing or a claim to a given property. The expression *nudum ius Quiritium*, however, had a precise meaning. It denoted a void title of ownership, deprived of the right to actual enjoyment.

So the prevailing view that preclassical law created two different types of ownership, quiritarian and bonitarian ownership, is not confirmed by the sources. Both

⁷⁰ Cf. Bonfante, "Sulla exceptio rei venditae et traditae", *Scritti* II, pp. 450 ff; J. Goussier, *L'exceptio rei venditae et traditae* (Lausanne, 1939). Cf. Wenger, *SZ* 63 (1943) pp. 484 ff; Koschaker, "Fr. 4, 32, D. 44. 4. Contributo alla dottrina della convalida nel diritto romano", *Iura* 4 (1953) pp. 1 ff.

⁷¹ So e.g. Gai. 2, 222 and C. 7, 25, 1.

in preclassical and classical law there was only one right of ownership, apart from the *dominium ex iure gentium*. A bonitarian ownership did not exist.

Nevertheless there were instances when the praetor lent protection not to the *dominus ex iure Quiritium* but to the person who had the thing *in bonis*. This, however, was no more than a recognition of the actual patrimonial situation, and did not amount to praetorian ownership. These cases were so diverse that there was not even a uniform procedural protection.

Instead of the distinction between quiritarian and bonitarian ownership, Romans distinguished rather—within the quiritarian ownership—between *plenum ius* and *nudum ius*.

Finally, we came to the conclusion that the distinction between *nudum ius Quiritium* and *in bonis esse* had been introduced in order to protect the acquirer of a slave against the intrusions of the quiritarian owner.

2. The splitting into two of ownership, into a formal title and actual ownerlike position, was the inevitable consequence of the fact that the preclassical lawyers—and in this respect they were followed by their classical successors—failed to create new forms of conveyance which would have met the demands of the changed conditions. Instead they stuck obstinately to the already obsolete *mancipatio* and *in iure cessio*.⁷²

This solution cannot be counted among the splendid creations of preclassical Roman law. It was rather an emergency measure, a compromise between the demands of commodity-turnover and the sometimes inconceivably obstinate conservatism of Roman law. Classical lawyers possibly accepted this not altogether fortunate solution because the division of ownership meant only a transitory stage. As a consequence of the comparatively short period of *usucapio*, the *nudum ius* automatically ceased within one or two years and the title of ownership and the actual situation were united again.

This practical but theoretically imperfect solution misled later lawyers, who were inclined to theoretize, and thus the contrast between a void legal title and an actual patrimonial situation was interpreted as quiritarian and bonitarian ownership.

⁷² On this *supra* pp. 138 f.

THE NATURE OF PRECLASSICAL OWNERSHIP

1. The reader might be surprised at the moderate size of the second part of this book as compared with the first one which is devoted to ancient law. It seems obvious that a later age should furnish material of greater abundance than a more remote one. One is inclined to suppose that the quantity of sources steadily grows as one approaches one's own time. Unfortunately the facts do not always coincide with logical deductions of this kind.

Of course, the documentation of ancient law is rather scanty. Nevertheless, the extant fragments of the first Roman codification, the Twelve Tables, offer a point d'appui for nearly all questions, and other sources, especially the works of Cicero and Gaius, also contain valuable information concerning ancient Roman law.

In the last centuries of the republic, however, no codification took place. Though the many-sided genius of Caesar considered also the necessity of a codification of private law, his design was condemned to failure.¹ Legislative activity in the field of private law was scanty and unsystematic,² and from the writings of preclassical lawyers, apart from some minor fragments in the Digest, practically nothing has been preserved.

So the number of direct sources for preclassical law is very small, and even those available are mostly non-legal ones. In addition, some of them — especially certain texts of Cicero — bear witness to ancient law, instead of the law of the late Republic. We have of course some indirect information about preclassical law, for classical sources sometimes refer to the views of the *veteres*.

2. As soon as one steps across the threshold of the classical age, a rich material reveals itself. The vast literature of classical law, though only a modest part of it has come down to us, offers us, merged with the achievements of preclassical lawyers, a well-documented picture of the classical Roman law of ownership.

The preclassical period of Roman law was the age of industrious, quiet creative work, the fruits of which have been preserved only by the writings of the classical lawyers. This, however, must not mislead us. In a similar way the public gets acquainted with the results of many diligent rehearsals only at the performance, though the successful artistic achievement depends on these less spectacular earlier rehearsals.

¹ Thus e.g. Suetonius, *Iulius Caesar* 44. Cf. Schulz, *Geschichte* p. 71; E. Pólay, "Der Kodifizierungsplan des Iulius Caesar", *Iura* 16 (1965) pp. 27 ff.

² On this above all see Wieacker, "Lex publica. Gesetz und Rechtsordnung im römischen Freistaat", *Vom römischen Recht* (Stuttgart, 1961) pp. 45 ff.

Notwithstanding the great difficulties, one has to try to discover the achievements of the preclassical lawyers, in order to avoid the error of attributing results to classical lawyers, which they having inherited from their successors have at most polished and perfected to some extent. Therefore I have tried to find, if possible, an immediate republican source³ on every question in order to distinguish between preclassical and classical law. If the coming into existence of a given institution could be ascertained for the preclassical age, classical sources too have been used to complement this. Obviously, this method has its shortcomings, so the conclusions are sometimes hypothetical.⁴ Nevertheless I have tried to avoid grave errors by using only moderately classical material, and in case of doubt the innovation has been attributed to a later age.

As a consequence, I often did not deal with questions where preclassical sources are entirely lacking. For this reason I left out of the discussion the so-called natural modes of acquisition – apart from the *traditio* – though presumably some of them were already known in preclassical law.⁵ In any case these are far less important for the history of ownership than the forms of conveyance or *usucapio*.

3. So it is not at all surprising that the literature on the preclassical history of ownership is not as abundant as that of ancient ownership.⁶ Besides the scantiness of sources this can also be explained by the fact that the later republican age, being better known than the more remote centuries, offers less possibilities for freely displaying phantasy than ancient law does. Scholars, who prefer exact data, however, are generally lured by the richly documented classical law. As a consequence, most writers either finish their treatises with the ancient law, or begin with classical law. Preclassical law is frequently reduced to being a cursory outlook or a summary introduction.

The disinclination to treat preclassical law can also be observed in the works of Kaser. In his “Eigentum und Besitz” e.g. the part devoted to the preclassical history of ownership amounts to but one-eighth of the abundantly treated ancient ownership.⁷ In his manual, however, preclassical and classical law are dealt with together, and this method frequently results in the passing over of preclassical

³ On *actio Publiciana* and *in bonis esse* we have no immediate sources from the preclassical age. However, it can hardly be denied that the introduction of the action and the recognition of the actual situation took place by this age. According to the prevailing view, the praetorian edict was already fully developed in the republican age. On this see Schulz, *Geschichte* p. 149. The restrictions imposed upon *usucapio* – apart from the *lex Atinia* – are not attested by preclassical sources. But as the introduction of the new terminology is proved for the republican age, the dominant view could be accepted.

⁴ Thus e.g. with the *agere in rem per sponsionem*, where I adhered to the view of Kaser.

⁵ The *occupatio* and the acquisition of fruits were certainly already recognized by preclassical law. The second one is attested by the institution of *usus fructus* and the fact that preclassical lawyers were already discussing the position of the offspring of a female slave. Cf. Ulp. *D.* 7, 1, 68, pr. A reference to *occupatio* in Plautus, *Rud.* 4, 3.

⁶ Apart from the question of the *actio Publiciana*. See *supra* p. 154.

⁷ Ancient ownership is dealt with on pages 1–238 of the monograph, while the part on preclassical ownership takes thirty-five pages (pp. 277–312). See Kaser, *EB*.

development.⁸ Recently a certain change in the usual attitude can be observed. The monograph of Capogrossi-Colognesi deals with problems of preclassical ownership, and Watson is also going to publish a volume upon the subject.⁹

The following pages will be devoted to the nature of preclassical ownership, but this will be at odds with the concluding chapter of the first part as it will not be compared with the legal solutions of other peoples, but with ancient and classical Roman law.

4. The task of preclassical lawyers was by no means easy. They had to face a radical change in the former social and economic conditions. The small city-state became a world-empire; the peasant society was transformed into a society of landlords and rich merchants; economic life was no longer based upon autarchy but upon a lively commodity-turnover, and the character of slave-holding also changed radically.¹⁰

It must be admitted that preclassical lawyers basically succeeded in performing their task. The rules on ownership were adequately developed, though in some cases a certain delay can be observed.¹¹ Their task was facilitated by the influence of Greek culture, which contributed to the fact that the legal profession became a science capable of conceptual reflection.¹²

5. The enumeration of the different innovations of preclassical law results in a long list. New notions, legal institutions and means were created. The notions of *dominium* and *servitus*, the creation of *traditio* and *usus fructus*, the *usucapio* in its classical meaning and the introduction of the new proprietary remedies, the *formula petitoria* and the *actio Publiciana*, are all results of the creative genius of preclassical lawyers.

Nevertheless their achievement was not entirely even, their creative power had its limits. In this productive age, too, the traditional Roman cumbersomeness and conservatism exercised an unfavourable influence. The obsolete *mancipatio* and *in iure cessio* were regarded as taboos by preclassical lawyers who tried to get round the difficulties by means of the entirely formless *traditio*, instead of creating up-to-date forms of conveyance. This inconsistency fatally led to the fact that in a given case the rights of an owner were separated from ownership, the owner "*de iure*" and "*de facto*" becoming two different persons. Unfortunately they hesitated to draw the ultimate consequences from this situation. With the *usucapio*,

⁸ The second part "Vorklassisches und klassisches Recht" (pp. 159 ff.) deals practically with classical law, apart from hints at the preclassical development. Cf. Kaser, *RPR*.

⁹ Cf. Capogrossi-Colognesi, *Struttura*. The work of Watson has in fact appeared, but I was unable to obtain a copy. So, unfortunately, I could not take his results into account. Nevertheless, it is to be hoped that the present book and his work will complement each other since our methods and approach are different.

¹⁰ Cf. e.g. F. Altheim, *Epochen der römischen Geschichte* II. (Frankfurt, 1935) pp. 203 ff; De Martino II. p. 255 and elsewhere.

¹¹ Delay can be ascertained with the notion of *dominium*, the recognition of *traditio* as an act of conveyance, the introduction of *actio Publiciana*.

¹² Cf. Schulz, *Geschichte* especially pp. 73 ff; M. Villey, *Leçons d'histoire de la philosophie du droit* (Paris, 1962) pp. 23 ff.

preclassical lawyers were compelled by the superstitious reverence they had for ancient institutions to indulge in real acrobatics, to have to conciliate the short terms with the demands of the original owners.

To sum up, the achievement of the preclassical lawyers in this field, was, in spite of some defects, extremely valuable. Their results, though they have been transmitted by classical legal literature, were decisive for the development of continental law.

6. From a comparison between preclassical and ancient ownership, it can be stated right away that the legal forms which had belonged to the special features of ancient ownership were incorporated into preclassical law almost exclusively.¹³ The explanation lies probably in the fact that the Roman state and Roman society gradually took on a special character, and the Roman Empire, ruling over the ancient world, became specific when compared with its historical and geographical surroundings.

From a survey of the most important innovations, it can be concluded that preclassical law reacted properly to the transformation of the economic and social life, although sometimes with a certain delay.

(a) Ownership, which is at variance with ancient law, is no longer of a peasant, patriarchal character. The last remnants of family property disappear, and instead of the *mancipium*, the expression of the homogeneous *patria potestas*, the notion of *dominium*, which is already confined to things, appears. At the same time the other aspects of the *patria potestas* also become individualized. The creation of the notion of *usus fructus* likewise meets the demands of the changed family system.

(b) Preclassical ownership is no longer based upon autarchy, but upon commodity-turnover, and, when compared with the static character of ancient ownership, it is dynamic. This transformation is displayed, among other things, by the *traditio*, as an independent legal act, by the more elastic proprietary remedies, above all by the *actio Publiciana*, but also by the creation of the category *servitus*.

(c) Compared with ancient law, preclassical law is already capable of making distinctions at a high level. This can be seen from the creation of the notions *dominium* and *possessio*, or the development of the *iura in re aliena*.

(d) The content of preclassical ownership was, from an economic point of view, radically different from that of ancient ownership. But as regards the relevant legal rules, the changes are insignificant. Ownership neither became unlimited, nor were severe limitations imposed on it.¹⁴

To sum up, while ancient ownership differed only in some respects from the

¹³ See *supra* p. 127.

¹⁴ The statutes forbidding luxury can perhaps be understood as limitations imposed on ownership. On them see Kaser, *RPR* p. 343. Nevertheless the content of ownership did not change considerably. The owner could, both by ancient and preclassical law freely dispose of the thing. He could possess it and a legal protection was granted him. In the *mancipium*-power, of course, this content was only imperfectly expressed as compared with *dominium*.

legal solutions of other peoples at the same level of development, in the pre-classical age it became both conceptually and according to its rules, the specific Roman ownership, which surpassed in every respects the corresponding legal institution of other ancient people.

7. It is much more awkward, nigh impossible, to discover the differences between the preclassical and classical law of ownership. The conceptions, the system, the main rules, the forms of conveyance and the proprietary remedies are completely identical. Differences exist at the very most in details and perhaps in the more refined character of classical ownership.

In the field of the law of ownership, the classical lawyers were not really creative. Those questions which the preclassical lawyers were not able to settle satisfactorily, lacked a solution throughout the three centuries of classical law. Classical lawyers failed to create new forms of conveyance; they continued to employ the counterpoles of the *traditio* and the obsolete civilian forms of conveyance. The contrast of formal ownership and *in bonis esse* was also maintained. Classical lawyers could not make up their minds to declare the actual owner to be owner. They did not even try to reform the short periods of *usucapio*. This was only carried through at a rather late date by imperial legislation.

So one can safely conclude that the preclassical development of ownership was not a prehistory of classical law, but the process of the creation of the classical law of ownership.

8. The dominant view, as a rule, admits that preclassical law displayed a greater productivity than classical law. Nevertheless, significant differences can be observed between the views of Schulz and Wieacker.¹⁵ According to Schulz, classical law was no longer productive in the proper sense.¹⁶ It was not able to carry through comprehensive reforms,¹⁷ and the glitter of classical legal science is but "the shine of an autumnal sun".¹⁸ Wieacker, however, holds the view that one cannot apply the attribute of decadence to classical law.¹⁹ The undeniably diminished productivity of classical law is—according to Wieacker—due to the fact that the most important tasks were performed by the preclassical lawyers, so nothing more was left for them to do than refine the details.²⁰

¹⁵ Cf. e.g. Kaser, *Römische Rechtsgeschichte* (Göttingen, 1950) p. 151; Schulz, *Geschichte* pp. 149 ff.; Wieacker, "Über das klassische in der römischen Jurisprudenz", *Vom römischen Recht* (Stuttgart, 1961. pp. 161 ff.) especially pp. 171 ff.

¹⁶ Schulz, *Geschichte* p. 149.

¹⁷ *Ibidem* p. 151.

¹⁸ "Der Glanz in dem die klassische Jurisprudenz vor uns liegt, war der Glanz der Herbstsonne" (*Ibidem* p. 152.)

¹⁹ "Gegenüber solcher Vielseitigkeit, Intensität und Qualität noch der spätesten klassischen Jurisprudenz wirkt eine Anwendung herkömmlicher Dekadenzformeln für den "Herbst des Altertums" auf die spätklassische Jurisprudenz fast sinnlos." (Wieacker, *op. cit.* in n. 15. p. 184.)

²⁰ "Blickt man freilich auf die Kraft, die die Grundlagen bildet, so ist die republikanische Jurisprudenz der kaiserzeitlichen eher überlegen. Gerechter geurteilt: sie liess auf dem überlieferten Gebiet nicht mehr elementare Leistungen zu tun übrig, sondern nur Bereicherung und Durchklärung des Details." (*Ibidem* p. 182.)

It seems that, at least with respect to the law of ownership, the opinion of Schulz holds strong. Preclassical law was far from having settled every question, and the omissions were not made good by classical law.

9. If, from the threshold of preclassical and classical law we look back upon the path Roman ownership had taken in the course of, say, six centuries, it can be seen that its progress attained the most rapid speed by the second and first centuries B.C.

It would be obviously wrong to allege that a complete stagnation took place from the Twelve Tables until the second century, for traces of progress can be discovered.²¹ Radical changes, however, are not likely to have taken place in the intermediate period, as is attested by the archaic wording of the *lex Atinia*, which was issued by the third century. Here, however, the clumsy terminology of the Twelve Tables can be met with.

The acceleration and slowing down of the speed of progress with ownership conforms in a remarkable way with the speed of Roman economic and social development. As long as the life of Roman society remained enclosed within the narrow limits of a city-state, no great changes concerning ownership can be observed. However, as soon as the ancient pattern was abandoned, shortly afterwards the development of ownership moved rapidly, and more was done in the course of a century than had previously been accomplished over three-hundred years.

In a hundred years ownership lost its archaic features. Classical Roman ownership was born.

²¹ Thus e.g. with regard to freedom of testation. The extension of the two-year period to buildings could also be mentioned. On this see *supra* p. 91.

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