

CHAPTER V

PROPERTY

Perhaps more than with anything else the function of the law is concerned with distinguishing *meum* from *tuum*, that is, with the rights of property, its ownership and conveyance, with those rights other than ownership which people may have over things, such as life interest or tenancy, and with the protection of property against assaults on it like theft or damage. The fundamental concept is obviously ownership or 'title', *dominium*, and of this the Roman law in our period took what one might call a 'strong' view. Jurisprudentially speaking, ownership is a complicated notion to analyse (the question being basically 'right to the thing, yes, but as against whom?'), and different legal systems do so in different ways, even if the results they reach are not always so very different. Such problems arise, for example, as: does there here exist relative ownership (as in a feudal society, where one man owns land, but owns it 'of' his lord, who, so to speak, owns it even more)? Or how far is lawful possession of a thing the same as—or as good as—ownership of it? Ownership is an abstraction, a term of art of the law, the relationship of which to the practical fact of holding something has to be determined for any given legal system; and possession also may be—and in Roman law was—no less a legal term of art, so that you were not necessarily possessor of a thing merely because you had it in your pocket. Or again, how far is ownership good as against the government, the state, the community? We cannot begin to examine things here from this jurisprudential point of view,¹ though something will be said about the last of the above questions in Chapter VIII; by saying that the Romans took a 'strong' view about ownership, what we mean is, first, that they distinguished it

sharply from possession—*dominium* was ‘title’, abstracted from the facts of holding. It was also, except as against the state, absolute; the Roman jurists hardly developed at all a notion of a hierarchy of ownerships, though they had it beneath their noses all the time in the regime of municipal and public land, as we shall see.² On the other hand they gave substantial protection to lawful possession short of ownership, sometimes even as against the owner—which is indeed a necessary corollary of regarding ownership as absolute; and this meant that there were many situations in which a man might have over things only ‘bare’ ownership or title, *nudum dominium*, that is to say ultimate title but nothing more, while someone else had all the practical rights enabling him to hold and make use of the things.

Many things were not susceptible of private ownership at all. Gaius gives a list of them (which is rather inadequate and needs to be supplemented from the *Digest*);³ they are a very mixed bag. *Res religiosae*, tombs, we have met already; *res sacrae* were things publicly dedicated to the gods—temples and altars; and *res sanctae* were the walls and gates of cities. Then there were things belonging to all men (and hence individually to no one): the air, the sea, rivers and most harbours, and the seashore and riverbanks as far as use (fishing, towing) was concerned. And there were things belonging to the (or to a) community, like public roads and buildings. Even of those things that were susceptible of individual ownership it must be realized that full private absolute *dominium ex iure Quiritium* was a strict civil law conception. Peregrines could not own anything in this full sense. What is more, the only real estate that could be thus fully owned, even by Roman citizens, was real estate in Italy, except that by a legal fiction certain communities of Roman citizens in the provinces (of which a list, though not systematic or exhaustive, is given in the *Digest*—roughly it was the bigger *coloniae*)⁴ were allowed to count their land as ‘Italian soil’ and so have full *dominium* over it and pay no land-tax on it.⁵ However, it must not be concluded that peregrine possession was unprotected or peregrine land rightless (any more than that peregrines were all unmarried because they could not have *iustae nuptiae*).⁶

Amongst those things susceptible of private ownership a natural practical distinction lies between real estate and movables. It did inevitably play a part in Roman legal arrangements, but it was unhappily overshadowed by a quite different distinction, deriving from the primitive habits of early Rome, which had in our period no real economic or social basis but survived as a useless but ubiquitous complication. According to this division, things were either *res mancipi* or not. Gaius tells us what things were *res mancipi*:⁷ land and houses (provided on 'Italian soil', of course), slaves, certain animals (oxen, horses, mules and donkeys are named), and one kind of easement, the 'rustic praedial servitude' (which will be explained later). The name means 'subject to *mancipium*', and the crucial feature of the distinction was that whereas ownership of all other things could be passed from one person to another by simple delivery, *traditio*, ownership of *res mancipi* could only be passed by one or other of two elaborate formal acts, either *mancipatio* (the 'imaginary sale' with the coin and balance which we have met already)⁸ or 'cession in court', *cessio in iure* (a sort of 'imaginary vindication').⁹ Thus, if you merely delivered a slave you did not transfer ownership of him. If we add to this the natural point that no man could transfer more right to a thing than he himself had (*i.e.* if a man who had not got *dominium* of something conveyed it to you, however correctly as to form, even by *mancipatio*, you did not become *dominus* of it either), it will be seen that some further principle was needed to cover two situations that might regularly arise in good faith: first the situation of the man to whom a *res mancipi* was delivered without *mancipatio* by someone who was properly its owner (the recipient had it 'in his goods', *in bonis*, but how could he ever obtain full ownership of it?), and secondly the situation of the man to whom anything whatever had been delivered or mancipated by someone who was not and perhaps could not be its owner *iure Quiritium*, for example a peregrine slave-trader (the recipient was *bona fide possessor* of the thing delivered, but how could he ever obtain full ownership of it?). The principle was found in the concept of 'ripening' ownership—becoming owner by having unchallenged actual control of the thing, based upon a proper transaction in

good faith that intended to pass the ownership, for a specified time. This was *usucapio*, 'acquiring (*dominium*) by use'. The specified time was quite short: two years for real estate, one year for movables. At the end of it you were full *dominus ex iure Quiritium* of anything capable of being so owned. Proof of title was therefore reasonably simple in Roman law. There was no need to go back to title deeds of the distant past, for all you needed to prove was undisturbed control for the relevant short period, and the nature and genuineness of the transaction by which you had acquired. One exception is important: ownership of anything that had been stolen could not be acquired by *usucapio* even by someone who had obtained an object of this description in good faith.

There were other ways of acquiring title to things besides conveyance (quite apart from inheritance, which we have already seen, and assignation by the authorities, to which we shall come). For example, there being no game laws, game and fish were the property of those who caught them; though in the case of creatures such as bees, pigeons or deer, so long as they had their hives or cotes or natural haunts on a man's land they were his, but if they moved permanently away they were then open to first taking.¹⁰ Of what was found underground, in the sense of mining rights, we shall speak later; for treasure trove a rule was laid down by Hadrian (the earlier state of the law is much disputed).¹¹ Hadrian's rule was that what a man found on his own ground was his own, but in what he found elsewhere he must go halves with the landowner. This leaves difficult questions about what constituted treasure trove and how far searching for it was allowed (in ancient graves, for example; would a Roman Schliemann have been allowed to dig Grave Circle A at Mycenae?). The subject is too controversial to go into here. Another mode of acquisition was *alluvio*, increment of land resulting from silting or the shifting of rivers, important in an agricultural society whose rivers were 'not the placid, orderly streams to which we are accustomed'.¹² And yet another, about which the jurists loved to wrangle, was 'accession and specification': who was owner of the resulting object if A wrote in gold lettering (with his own

gold) on B's paper, or painted a masterpiece on B's wooden panel, or made wine out of B's grapes or a ring out of B's silver? The wrangles were very abstract, and the important practical question was the one least discussed, namely how you could obtain compensation for your materials if they were incorporated in something which the law held now to belong to the other fellow. It was achieved by a combination of the *exceptio doli* which you could oppose against his claim to have the thing handed over if he did not reimburse you,¹³ and the *actio ad exhibendum* by which you could sue for return of your material or the value of it.¹⁴ Premises, finally, were the object of two rules of some consequence. *Superficies solo cedit*, 'that which stands on the land goes with it', was the Roman rule; a house built on my land, by whomsoever, belonged to me. A corollary of this is that ownership was, so to speak, vertical—from the ground up to the sky *ad infinitum*; so you could divide ownership up vertically, e.g. divide a house into two by a party wall,¹⁵ but not horizontally—you could not own one floor of a house. You can in English law, though it has not hitherto been common ('the thing exists in various places, notably on the south side of New Square, Lincoln's Inn'),¹⁶ and you could in Greek and Egyptian law, and at least in Egypt it continued to be done, even by Roman citizens.¹⁷ But in Rome itself the strict rule applied; we find it being bluntly reasserted by Caracalla to some petitioner in AD 213.¹⁸

'If you can prove that the lower floor of the building, which rests on the ground, belongs to you, there is no doubt that the floor above, which your neighbour has added, accrues to you as owner.'

And the public (muddled perhaps, as usual) applied it to parts of tombs:¹⁹

'Ti. Claudius Buccio in his lifetime mancipated to C. Avillius Leschus 4 *columbaria*, 8 urns, from ground to ceiling.'

The existence and persistence of the rule is extraordinary in view of the fact that most people in Rome lived in blocks of flats (as at

Ostia); but it is so. Of upper stories nothing was to be had but tenancy.²⁰

For the protection of title Roman law gave a famous action; a man who claimed that he was *dominus* of something had for its recovery the *vindicatio*, the most ancient form of which is described by Gaius:²¹

‘the claimant, holding a rod and seizing the thing, said “I claim that this thing is mine by the *ius Quiritium* according to its title. As I have declared, so, behold, I have placed the rod upon it.” And the opposing party did the same . . .’

The *vindicatio* was a powerful action:²²

‘for when I have proved that the thing is owned by me the possessor must restore it, unless he has pleaded an *exceptio*.’

And if the possessor refused to defend the thing (which—or a bit of it—had to be produced in court) the praetor simply handed it over to its vindicator; there was an interdict called *quem fundum* to secure that land thus undefended was restored.²³ Vindication had, however, a weakness, brought out by the fact that, as Gaius says, the opposing party had to ‘do the same’, *i.e.* had also to claim that he was owner; this meant that it was only available against someone who had possession in the formal legal sense. People who actually physically controlled things were not, in Roman law, necessarily possessors—particularly those who controlled them under subsidiary rights such as loan or tenancy or life-interest;²⁴ it has been said that possession was controlling a thing ‘in the manner of an owner’.²⁵ Consequently, against your tenant or the holder of your thing under a life-interest you could not have a vindication,²⁶ but must proceed by some other means. Also it might be hard to discover who *was* the present possessor in the formal legal sense (if, for example, a thief had passed something quickly on to a fence, who had sold it to someone, who had resold it . . .). To remedy this defect one could indeed make use of the *actio ad exhibendum*, which would oblige whoever actually had the thing to produce it or pay up, and would no doubt in

most cases effectually lead you to the possessor, but there is a very important warning given by Gaius:²⁷

‘Anyone who has decided to have an action to recover something ought to consider whether he can obtain possession by some interdict; for it is much more convenient to be in possession oneself and make the other man take on the difficulties of being plaintiff than to be plaintiff when the other man is in possession.’

Possession was ‘nine points of the law’; if you could get it you had no need to worry about proving title, for it was the other fellow who must prove his.

Ownership was protected by the *ius civile*; legal possession as such was under the protection of the praetor and his *ius honorarium*. He used it most notably in the two cases of ‘ripening ownership’, by giving the *actio Publiciana*, a remedy invented probably in Cicero’s time, to the man who had acquired a *res Mancipi* without *mancipatio* and held it *in bonis* and to the *bona fide* possessor of something obtained from a non-owner, if they were deprived of their thing during the time while their *usucapio* was running (since vindication was not open to them because they could not yet say ‘I claim that this thing is mine by the *ius Quiritium*’). The *formula* of the *actio Publiciana* was a legal fiction; you vindicated ‘as if’ your period of *usucapio* was complete. And there was more; the main danger for the man who held a thing *in bonis* might be from the *dominus* himself, who although he had, say, sold it, still had title and could therefore vindicate it. So the praetor gave the *exceptio rei venditae et traditae* which could be set up against such a vindication. (It is in this case that Gaius, though he alone of the jurists, and in no other case but this, does use language of relative ownership; he says that A ‘owns *ex iure Quiritium*’ and B, the purchaser, while *usucapio* is proceeding, ‘holds *in bonis*’ and ‘the ownership is divided’.²⁸ Nowadays the rather unfortunate term ‘bonitary owner’ is used. In any case, it was an ephemeral position, because full ownership would ‘ripen’ by *usucapio*.) It is clear that already by Cicero’s day *mancipatio* had become a bore, and the praetor, by granting the Publician action,

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‘transformed Roman ownership. Henceforward the recipient of a *res Mancipi* by *traditio* was for nearly all practical purposes in the position of an owner.’²⁹

This is not the end of praetorian protection of possession. There were the famous interdicts, known by the opening words of their announcements in the praetor’s edict (and indeed, the only way ultimately to define legal possession in Roman law is to say that it was such possession as would have the protection of the Publician and the interdicts). There was, for example, *quorum bonorum*, given to people to whom the praetor allowed ‘entry to an estate’ on intestacy so that they could actually get in the assets from whoever had them.³⁰ There was *unde vi*, to get back possession of what had been seized by force; Cicero’s speech *pro Caecina* was in a suit under this heading.³¹ And there were the two interdicts to settle the vital question who was to be possessor and who plaintiff in a vindication: *utrubi* for movables and *uti possidetis* for real estate (which will serve as a specimen):³²

‘as you [plural] now possess, I forbid force to be used to stop you now possessing.’

This, then, is what you actually did if you wanted to recover something you claimed to be yours: you went to the praetor and put to him a *prima facie* case for possession; if satisfied, the praetor granted you possession and the interdict to prevent its disturbance—and then it was up to the other man. It must be noticed, however, that these interdicts were not just ‘injunctions’ (though some others in effect were); they were themselves a kind, a very elaborate and complex kind, of lawsuit.³³ The complexities are of no modern interest, but one point is important—they involved the ancient ‘wagers of law’, the money that you forfeited if you lost the case,³⁴ and hence the disincentive or penalty for litigation that was spoken of in Chapter III. Consequently one wonders whether the poor man could risk an interdict on these terms against a rich one (which may be relevant to the expropriation of yeomen farmers which troubled the Gracchi), even supposing he could actually get possession (which is even more relevant).

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Overwhelmingly the most important kind of property in the Roman world was land. It was upon the rents of land that a man must live if he was to cut a respectable figure in the community, and those who made money in trade or manufacture hastened to invest it in real estate, like Trimalchio and Trimalchio's friend, the 'son of a king':³⁵

'I don't owe anyone a penny. I've never had to compound; no one's ever said "pay up" to me in the forum. I've bought a bit of land and some plate, and I feed twenty bellies and one dog.'

One interesting demonstration of this was made by looking at the rules about what guardians must do to administer a ward's property; they had to purchase land as far as they could, and, for this purpose only, they were allowed to accumulate money in a deposit account instead of putting it out at interest.³⁶

The enormous work begun by Augustus, the taking and maintaining of a full census in all parts of the empire, produced a system of land registration, of which a little is told us in the *Digest* title 'on the census':³⁷

'name of property, in what state and locality situated, with names of two adjoining properties; arable: acreage sown in past ten years; vines in vineyards: number; olives: acreage and number of trees; ley: acreage cut in past ten years; pasture: acreage; commercial woodland. Valuation: by person making the return.'

The same kind of return can be seen in the 'Table of Veleia', the list of landholders on the basis of whose property Trajan's scheme for the maintenance of poor children was based:³⁸

'P. Atilius Saturninus, by his agent Castricius Secundus, returns the property called Fonteianus in the territory of Veleia, sub-district Iunonius, neighbours Atilius Adulescens, Maelius Severus, and public land.'

From early times, whenever Rome gave new land (whether in Italy or abroad) to Roman citizens she did so by the strict appor-

tionment of lots on a grid system, the so-called 'centuriation', done by surveyors, traces of which are still being seen from the air and on the ground all over the lands of what was once the Roman empire.³⁹ The resulting cataster was not merely listed by names and drawn out on paper but incised as a map on bronze, one copy kept locally and one in Rome; large sections have turned up of the catastral map (on stone) of the territory of *colonia Arausio*, Orange in Gaul,^{39a} in which rivers, roads and other features can be seen winding across the inexorable grid which largely ignores them. In each section of the grid the acreages of private land, city's rent-paying land (*ager vectigalis*) and Roman public land are indicated. The tenants of the *ager vectigalis* are named, and their rents given, and one can see their holdings sometimes spreading into several sections of the grid; unfortunately, of the private land no individual plots or owners are mentioned—presumably either because it was 'Italian soil' and paid no land-tax, or else because this particular document was only concerned to regulate the rents of *ager vectigalis*—so we cannot tell whether account was taken in the cataster (which is of Vespasian's time) of changes in the ownership pattern of private land since the original distribution of lots. Except in Egypt, which had, as usual, a minutely pedantic system of land registration,⁴⁰ conveyances were not (or not everywhere) registered as they took place,⁴¹ so rectification of the register would have to wait till the next full census. Consequently, if land-tax was in question, interim arrangements about its payment would have to be made in contracts of sales:⁴²

'If a vendor of land makes no mention of land-tax, knowing it to be subject to such tax, he will be liable on the contract.'

Land-tax seems to have been thought of as a charge on the fruits,⁴³ and therefore normally fell to be paid by whoever had the right to them, *i.e.* a tenant if there was one—but not always,⁴⁴ and not if the lease specified that the landlord was to pay, as seems to have been regular in Egypt.⁴⁵ In litigation about boundaries of land (which evidently could not always be settled by the good offices of an *arbiter ex compromisso* such as we have met at Herculaneum) the judge, we are told, must look to ancient records, if any,

otherwise he must follow the evidence of the most recent census unless subsequent alienations or other changes are proved;⁴⁶ it is interesting that this shows that even the census-list, being based on individual declarations, was only evidentiary, not automatically proof. In all these catastral matters there appears on the scene the rather grand professional figure of the surveyor, the *agrimensor*:⁴⁷

‘Against a land-surveyor [*i.e.* who is alleged to have surveyed wrongly] the praetor gives an action on the facts. For we ought not to be cheated by surveyors; it is very important not to be misled in statements of area if, for example, there is boundary litigation or if a buyer or a vendor wants to know what area is up for sale. It is an action on the facts because in former days it was held that there was no contract of hire of services with a surveyor but that his services were rendered as a gratuitous benefit and any remuneration was an honorarium. . . . And the action is only for fraud; it is thought to be quite enough pressure on surveyors if they are liable for fraud only, since they have no contractual liability. If a surveyor has just been incompetent the man who employed him has only himself to blame; even if he was negligent he will be safe, and even if he has taken a fee he will not be liable for negligence because of the words of the edict [for the praetor of course knows that surveyors do sometimes in fact take fees].’

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A certain inroad upon ownership was made by those very necessary sets of rights known by the Romans as *servitudes*, *servitutes*. Many of these were connected with real estate, ‘*praedial servitudes*’, and were of great antiquity; rights of way and water are the characteristic cases—the right to go across someone’s property or drive a cart or cattle over it:⁴⁸

‘Private road of C. and Q. Largus, sons of Lucius, and C. Olius Salvus. Owes right of way to the estate known as Enianus and . . .’;

the right to draw water from it, or dig sand or lime on it, or to

make a neighbour's building bear the weight of your wall. Some of them were negative rather than positive—to prevent a neighbouring property from obscuring your light or its rain-water spouts from dripping on your building. But none could be *in faciendo*, that is, you could have a servitude to make someone put up with acts done by you,⁴⁹ or to restrain him from acts affecting you, but not to make him do something himself. Another main rule was that servitudes, once established, ran with the land; whoever was, or became, owner of the 'servient' property must for ever allow the holder of the 'dominant' property the relevant right. The right must, however, be 'useful' to the dominant property—perhaps we should rather say 'necessary', *i.e.* for its proper running; for servitudes could not be used for a commercial advantage. You could create them against your property by will or by formal conveyance ('rustic' praedial servitudes were *res mancipi*), or you could alienate your property retaining a servitude over it (*e.g.* sell half your estate but keep a right of way over the piece sold). Provincial land only admitted of contractual arrangements, 'pacts and stipulations',⁵⁰ but in all other cases the man who had a servitude had a 'real' right to it, a right *in rem*, like an owner, not just a contractual right, and could vindicate his servitude against the holder of the servient property. To protect some of the ancient servitudes there were also interdicts given by the praetor: *de itinere*, *de aqua*, even *de cloacis*.⁵¹

'I forbid force to be used to prevent A from clearing and repairing the drain that leads from his building into yours, object of suit.'

Some praedial servitudes, again probably because they were the ancient agricultural ones, could be brought into being by use from 'time out of mind';⁵² all could be lost by non-use, or non-resistance to breaches of them, for two years.⁵³ The *Digest* titles on servitudes also contain some discussion of the problems of the common wall (a source of urban friction). It was perhaps thought of as servient and dominant on both sides; neither party has a right of demolition for repair, says Gaius,⁵⁴ because both parties are *domini*. Thus, someone wrote to the jurist Proculus:⁵⁵

‘A man called Hiberus, who has a block of flats behind my grain-store, has built a bath-house against the common wall. But he is not allowed to attach pipes to a common wall . . . and besides, they are making the wall red-hot. I wish you would have a word with him and stop him committing this illegality.’

Proculus agreed that this was illegal, but we are told in another passage⁵⁶ that he was also quite firm that having a bath-house against a common wall was not in itself an offence, even if it led to dampness (*i.e.* that the law did not recognize an offence of ‘nuisance’). Neratius seems to have disagreed ‘if the wall was perpetually wet and harmed the neighbour’. It is really ‘nuisance’ again that is being discussed in the diverting passage about the cheese-factory:⁵⁷

‘Aristo gave an opinion to Caerellius Vitalis that he did not think smoke could legitimately be allowed to penetrate from a cheese-factory into buildings higher up the road [unless there is the possibility of a servitude of such a kind]. Aristo also says: no more can you throw water or anything else from a building higher up on to those lower down. You may only so behave on your own property as not to send things down on to someone else’s, and smoke is just the same as water. So the higher man can have an action against the lower “that he has no right to perform this act”. He says that Alfenus somewhere remarks that you can have an action to stop a man hewing stone on his land if the chippings fall on yours. And so Aristo says that the man who ran a cheese-factory under license at Minturnae could be stopped from allowing his smoke to penetrate a building higher up; but he would have an action on his contract against the town of Minturnae.’

There was a second main class of servitudes, which seem so unlike rights of way that one might well wonder what they did have in common; the answer is that they also were *iura in re aliena*, ‘real’ rights, not just contractual ones, over something of which someone else was *dominus*, protected by a vindication—modifications of ownership, in fact. These were the ‘personal’ servitudes:

usufruct, the right to enjoy property and take its produce; *usus* without the *fructus*; and *habitatio*, the right to occupy a dwelling. The interest could be for the life of the beneficiary, one's widow, for example, or for any shorter term, such as 'for my widow until she remarries', and it could be set up in numerous ways but especially by will. It ran with the beneficiary, not with the property, and was extinguished with the beneficiary's death, which raised a problem about usufruct to municipalities (which do not die), settled at hundred years.⁵⁸

'because that is the term of a very long-lived individual.'

The most interesting rule about usufruct matches that about praedial servitudes, and illustrates the ancient lack of interest in property development. Not only could you not use the property for commercial purposes (unless it was already so used), but you could not use it for any new purpose at all, nor improve it. A passage characteristic of many is:⁵⁹

'If there was a legacy of usufruct of a house, the younger Nerva says you can put in lamps and pictures and ornaments, but you cannot change the internal partitions . . .'

There could be a usufruct over other things besides real estate—over slaves, for example, who must be used according to their accustomed functions.⁶⁰ Moreover, a *senatusconsultum* (of uncertain date) caused the lawyers a good deal of trouble by allowing what seemed logically contradictory—usufruct of fungibles (things consumed by the very fact of using them, notably money); the embarrassment of trying to make working rules for this monstrosity conceived by the legislature is apparent in the *Digest* title about it, but it no doubt met a perfectly sensible social need, as can be seen if one thinks of a man leaving his widow a life interest in his entire estate (which might naturally include consumable as well as non-consumable items).⁶¹

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Praedial servitudes were essentially subsidiary to the economic exploitation of property; personal servitudes were essentially alimentary in function. Only with tenancy do we come to the heart

of the economic structure. Now a place such as this is not where Roman lawyers would have discussed the law of landlord and tenant; for them it was pure contract, to be dealt with under 'obligations: contract of letting and hiring'. And this is a significant fact; the tenant of land and premises had no 'real' right, no *ius in re aliena*, over his land or premises, as the usufructuary did, but only a contract of tenancy; neither did he have possession in the legal sense. Consequently, if there was controversy over lights or nuisance, or even if he was ejected from his tenancy by someone, he had no 'locus standi' to bring any proceedings; they were the affair of the *dominus*. His only redress was to sue the *dominus* on his contract. 'Sale breaks tenancy' is one aspect of this; if the *dominus* sold the property over your head he was not obliged to sell it 'subject to existing tenancy' (though he normally would),⁶² and the moment the purchaser became owner he could do what he liked with it, and you had no redress against him because you had no contract with him. The point has often been made⁶³ that the law of landlord and tenant, like that of hire of services—indeed, all the parts of that strange confederation of legal rules subsumed under the 'contract of letting and hiring'—reflects the power of the rich over the poor in Rome and the lack of interest of the lawyers, who were rich, in developing protections for the poor. Being a rather facile point it is not always given the qualification it deserves.

Let us begin with a little about tenancy of houses and flats. An advertisement in a street at Pompeii runs thus:⁶⁴

'Apartment block known as Arriana Polliana: landlord Cn. Alleius Nigidius Maius. To let from 15th July next: shops with porticoes, high-class flats and one house. Potential tenants [? in chief] apply to Primus, slave of Cn. Alleius Nigidius Maius.'

All the more, in the big cities like Ostia and Rome, were people normally flat-dwellers, as can be seen from the archaeological remains. The jostling, insanitary life of those narrow streets can be savoured not only in Juvenal⁶⁵ and Petronius but equally in certain titles of the *Digest*, especially 9. 3, 'concerning things

poured or thrown down'. It must be borne in mind that not only the humble were so accommodated; so were quite well-to-do people, perfectly capable of litigating over their rights, such as the bachelor sons of the nobility.⁶⁶ What those rights were in detail would depend on the terms of the contract, and so on the bargaining strength of the parties, but in general for the tenant they were confined to justifications of various sorts for withholding his rent. (Thus, he was entitled to vacant and undisturbed possession for the whole of his term, and to unblocked light.)⁶⁷ The literary sources are full of well-known references to fires and collapses; here are just two:⁶⁸

'Two of my shop properties have collapsed and the rest are full of cracks. The tenants have decamped—so have the mice.'

'Town property brings good returns, but it's terribly risky. If there were any way of stopping houses perpetually burning down in Rome I'd sell up my farms and buy town property every time.'

This feature is reflected in the *Digest*, for example in 19. 2. 19. 6 (from which it also appears that rent was sometimes paid for a long period in advance). People like Cicero did not, of course, collect their own rents. It looks as if the normal arrangement was for the owner to let *en bloc* to a contractor or tenant in chief, *conductor*, who then sub-let for profit:⁶⁹

'A man took a lease of a block of apartments at a rent of thirty and sub-let individual flats for a total rent of forty. The owner demolished the block on the ground that it was unsafe. Query, for how much can the tenant in chief sue?'

It was also a principle that the lesser had a lien, even if not specifically contracted for, on the tenant's household effects, his *invecta et illata*, not only against the rent but to cover dilapidations as well.⁷⁰ Martial maliciously mocks an enemy 'moving out', as he watches the little procession with a few sticks of broken furniture trail off down the road:⁷¹

'O blot upon the Kalends of July! Vacerra, I've seen your luggage; I've seen it—the bits that weren't held back in lieu of two years' rent . . .'

A vital, but controversial, figure on the Roman scene is the *colonus*, the tenant of land. In our period he is not the tied serf of late Rome, though what connexion he has with the latter, and how far early symptoms of serfdom are to be found in his condition, are much argued questions.⁷² There are, of course, many possible regimes of land management: the subsistence farmer on his small plot, working it with his family (or the joint family, though that is more associated with pastoralism); the cash-crop farmer with a big acreage farming by means of plantation-slaves; the same big landlord letting to free (or part-free) tenants and living on the rents; the state enterprise. It can be seen that there was a history of change in these regimes in Italy, but it was a very complex history. The decline of subsistence and simple cash-crop farming and the rise of the *latifundia* is an oft-told tale of the middle Republic;⁷³ the *latifundia* of the late Republic were characteristically slave-plantations, but they were far from being the only farming regimes in Cicero's day.^{73a}

Free tenants undoubtedly existed. In the agrarian writers it is only with Columella in Nero's time that they appear as a substantial alternative to the plantation, but a lot depended on geographical location.⁷⁴ The younger Pliny, in Nerva's and Trajan's day (from whom we learn most on this subject), let his land to tenants as a matter of course; his only other form of management was an experiment—of which he was clearly nervous—in putting his tenants on to a metayage system instead of a money rent.⁷⁵ However, as long as care is taken not to muddle this question up with the quite different question of the survival (or revival) of free small owner-farmers, we can fairly make the generalization that our period saw some increase, beginning perhaps at the end of the Republic, of tenant farming in Italy.⁷⁶ Reasons would take us too far from the subject of the present book—except to say (because the legal evidence is relevant) that, since the tenants often used slave labour themselves,⁷⁷ the rise

of the tenant system need not have any direct connection with a decline in the availability of slaves; it was a change of management.

The law relating to the *colonus* is usually emphasized as showing him to have been a humble fellow—no ‘gentleman farmer’—scraping a living under the eye of his landlord’s bailiff. No actual contract of tenancy from Italy survives, but the picture is by and large fair, as long as care is taken to see that it is not overdrawn. Here, first, are the main rules:

1 The contract could be in any terms, depending on the bargaining position. We do find oppressive conditions, such as ‘no fires liable to damage the neighbour’, or even ‘no fires’,⁷⁸ but the shortage of tenants of which Pliny constantly complains must have given them, at least in his time, a scarcity value, the effect of which will be seen when we come to abatements.

2 There was no right *in rem* and no possession, so no security of tenure. The regular tenancy period was short—the old censorial *lustrum* of five years (it was at the end of a *lustrum* that Pliny rearranged his rental system);⁷⁹ but if the tenant continued in occupation afterwards and his landlord acquiesced there was an implied continuing tenancy from year to year, not a mere ‘occupation at will’.⁸⁰

3 The tenant must cultivate. If he decamped without cause he was liable for the full rent of his term.⁸¹

4 He only acquired ownership of the produce when it had been gathered, for it belonged to the landlord and required gathering as a sort of *traditio*.⁸²

5 He must restore the property exactly as it was, though, unlike the usufructuary, if he made necessary improvements even without express agreement he could claim their cost in an action on his contract.⁸³

6 The landlord had an automatic lien on the produce against the rent.⁸⁴

7 The normal system, to judge from the *Digest*, was a money rent, though there is probably nothing the matter with D. 19. 2. 19. 3, which envisages part of it at least being in produce; this was regular in Egypt, at least for wheat and barley land.⁸⁵ The

alternative was metayage or the 'partiar' colonate, whereby landlord and tenant each took an agreed share of each actual crop (we hear of half).⁸⁶

Given these rules, it comes as a surprise to find scholars saying that 'the privileged position of the English landlord seems to stand out' (as against the Roman).⁸⁷ The main point here is that the Roman tenant, except under metayage, had a legal right to abatement of rent if 'Act of God' destroyed crops or made use of the land impossible,⁸⁸ though it is added that it was just because the parties were economically on such unequal terms that the law had to make a rule and not just leave it to the terms of the contract.⁸⁹ Pliny's letters make it clear that abatements were the landlord's great bogey;⁹⁰ precisely for this reason he determined to try the metayage system, and it looks as if this was a lowering of the status of the *coloni*, for Pliny was going to put in slaves or freedmen over them to keep an eye on their work and on the crops. They do not seem to have been able (or wanted?) to offer any resistance to the change. On the other hand, there is some evidence throughout our period of tenants of a less humble kind. Columella refers to the 'urban *colonus*, who prefers to farm with a slave staff', and quotes the judgment of a much older agriculturalist on such tenants.⁹¹ In some passages of Pliny we hear of tenants of substantial properties: he writes to a tenant (obviously sole tenant) of a 'little farm' worth one hundred thousand sesterces; and he says that his big alimentary estate, worth well over five hundred thousand, will always find 'a *dominus* to manage it'—though it is true that that property had become *ager vectigalis*.⁹² The most significant remark comes in a letter to his wife's grandfather about restoring the economic health of a derelict property, because it shows that tenants of larger holdings were not necessarily just agents subletting,⁹³ nor just absentees:⁹⁴

'Your Villa Camilliana in Campania is in a bad state. But all my friends are urban intellectuals; administering a rustic property needs a rough, country sort of chap who won't find the work heavy and the duties sordid and the remoteness bad for the nerves.'

Finally, *instrumentum fundi* must not be allowed to mislead. It was the equipment of a farm, from olive-presses and wine-vats to slaves, and it is minutely defined, both in the *Digest* title about letting and hiring and in other texts about legacy or usufruct.⁹⁵ Landlords often let their farms 'with all equipment'; but it cannot be assumed that they were under a duty to do so or that all tenants were so humble as to require it. The texts never say this; they are concerned only to define *instrumentum*, that is, to settle what it included if it did appear in a contract or a will.

The substantial tenant of land turns up in another way; but this time, though his position was technically a tenancy, in terms of economic exploitation he was really more of a *dominus* than a *colonus* (an ambiguity reflected in the ancient texts, and in the passionate and deeply opposed modern arguments).⁹⁶ Much land belonged either to the Roman state or to individual municipalities—*ager publicus* and *ager vectigalis*, respectively. The normal way of exploiting it was to let it to tenants at a rent. In Julius Caesar's colony of Urso the tenancy was for the ordinary censorial *lustrum*,⁹⁷ but the most widespread arrangement, at any rate in the time of the Principate, was to let for a very long period or in perpetuity, which made the tenant to all intents and purposes *dominus* provided the rent was paid. This system, which had parallels in (but was not necessarily derived from) Greece and Egypt,⁹⁸ was widespread and important.⁹⁹ The cataster of Orange reveals large portions of the territory of that colony under a municipal rent,¹⁰⁰ and many of the landholders in the Table of Veleia declared their estates 'subject to deduction of vectigal' (the rent).¹⁰¹ Such properties could be very large, for it was a particularly satisfactory way of exploiting marginal land. In spite of controversy, it is reasonably probable that in our period, so long as the rent was paid, the tenant had a 'real' right to the property and could transmit it by inheritance;¹⁰² there was a suit *de fundo vectigali* available to him, like the Publician.¹⁰³ Consequently, one is not surprised to find that the words 'selling' and 'buying' are used of these properties quite as commonly as 'letting' and 'hiring'. Pliny merely says of his alimentary estate,

which he has turned into *ager vectigalis*, that it will be 'worth a bit less because of the rent-charge'.¹⁰⁴

Much the same kind of anomalous arrangement was *superficies*, the 'building lease', perpetual and heritable on payment of a rent called *solarium*.¹⁰⁵ There was an interdict to protect it, and an action, according to the *Digest*—again, much disputed and no less energetically defended.¹⁰⁶ An interesting inscription records the grant of such a lease to the custodian of the column of Marcus Aurelius.¹⁰⁷ First comes his petition to the emperor, evidently successful, then a letter from the finance department to the works department, dated 6 August, AD 193:

'Aelius Achilles and Cl. Perpetuus Flavianus Eutychus to Epaphroditus, greeting. Assign to Adrastus, the curator of the column of the deified Marcus, all tiles and building materials from huts, cottages and appropriate structures, for him to build a dwelling-house as he wishes, to be his property and transmissible to his heirs.'

There follows a letter to the timber department, to let Adrastus have timber at treasury cost price, and finally a letter to the surveyor's department:

... 'we therefore require you to order assignment to Adrastus, freedman of the emperor, of the area indicated by him. He will pay *solarium* in the usual manner.'

The emperors, if they were not at the start, soon became the biggest landowners of all. The mode of exploitation of their lands, which were necessarily run as a government department, is revealed at least for a part of Tunisia (how far it can be generalized is uncertain) by a celebrated series of inscriptions, too long to quote here.¹⁰⁸ Here is a piece of the earliest one:

'For the safety of our Augustus, Imperator Caesar Trajan, princeps, and of all the divine household of him who is entitled best of emperors, Germanicus, Parthicus. Rules laid down by Licinius Maximus and Felicior, freedman of the emperor, procurators, on the precedent of the *lex Manciana*. To those

persons dwelling on the estate of the Villa Magna of Varianus, viz. Mappalia Siga, it is permitted to cultivate lands left unsurveyed on the terms of the *lex Manciana*, namely that the cultivator shall have right of enjoyment (*usum proprium*). Of the produce of the said land they shall be required to give fractions to the owners, lessees or bailiffs of the estate on the terms of the *lex Manciana*, . . . a third part of the wheat from the threshing-floor, a third part of the barley ditto, a fourth part of the beans ditto, a third part of the wine from the vat, a third part of the pressed oil, a sextarius of honey per hive . . .'

There follows a mutilated section referring to *superficiei usum* and the right to leave by testament, and then:

'... the *coloni* who live on the estate of Villa Magna or Mappalia Siga shall be required to give to the owners, lessees or bailiffs of the same, fully, annually, two days' work per man for ploughing, (. . .) days' work for harvest, and for cultivation of each kind one day's work, viz. two in all.'

Here we have great tracts of country under the oversight of treasury officials, the procurators. There seem to be still some private landowners about, but being surrounded by treasury property they are simply brought under the same rules. The treasury lands are let to tenants in chief or contractors, *conductores*, who sublet to *coloni* (here certainly humble and oppressed, according to their own complaints). On *subseciva*, uncatastrated land of a marginal kind, in order to make cultivation worth while, the *coloni* are given a kind of *superficies*, a heritable and alienable perpetuity subject to rent. The rent here is in kind (indeed it is metayage, on the basis of roughly a third of the produce), but there is also a corvée obligation of six days' work annually on the landlord's or contractor's own portion. It was this latter that got overstepped and was the subject of complaints and petitions, and one can see how easily a tied peasantry might develop.¹⁰⁹ Perhaps the most interesting feature of these documents is the recurrence in them of the *lex Manciana* or *cultura Manciana* as a precedent for this type of exploitation (with the three features of 'partitary'

tenancy, perpetuity and *corvée*); it goes right on into Vandal times, for in the 'Tablettes Albertini' contracts are for the sale of plots 'from the *culturae Mancianae* of X on the estate which is owned by Y' (*i.e.* private as well as treasury land). The usual conjecture is that Mancian must have been one of the great Tunisian landlords in pre-Flavian days, before the state took over most of the African estates, and that he must have invented this regime for his own properties.

Ownership of what lay beneath the surface of private land went with ownership of the land, on the 'vertical' principle. This is important for minerals, especially the precious metals of the coinage, but we know practically nothing else about the matter as far as private land is concerned, which is a great pity, because in Cicero's day some important mining areas were still privately owned.¹¹⁰ The little we do know is a mixed bag, and unhelpful: a much suspected *Digest* text appears to say that Ulpan thought—and perhaps therefore others disagreed—that a usufructuary could not only work mines on a property if such was the normal exploitation of it, but even open new ones if not to the detriment of cultivation;¹¹¹ on the other hand, the elder Pliny refers more than once to a senatorial prohibition of mining in Italy, perhaps confined to precious metals, apparently still in force in his day.¹¹² Under the Principate mining properties rapidly passed into the hands of the emperors,¹¹³ and of the regime of mines under this dispensation we are better—though still tantalizingly—informed by two inscriptions from the state mining district of Vipasca, Aljustrel in Portugal.¹¹⁴ They are usually quoted in books on social life for their general regulations governing life in a 'fiscal' community—grants to concessionaires to run baths and barber's shops, freedom of the schoolmaster from rates, and so on; but something has also been wrung from them about the property situation.¹¹⁵ Here is a brief quotation:

'Silver workings are to be exploited according to the regulations in the present code. The prices shall be governed by the liberal decision of the most sacred emperor Hadrian Augustus, viz. that ownership of that part which belongs to the treasury shall

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pass to him who first deposits the price of the working and pays four thousand sesterces to the treasury.'

The schema was somewhat as follows: the land belonged to the treasury; by what is described as 'ancient custom' half of what it yielded was a 'treasury part', belonging automatically to the treasury—which reminds one, perhaps significantly, of Hadrian's rule about treasure trove. The staker of a claim could have ownership of the other half of the yield by paying down (*a*) his license money and (*b*) a standard sum of four thousand sesterces which, as it were, 'bought out' the treasury's half and made him owner of the whole yield. This is really very like the 'partiary' tenancy of the emperor's agricultural land. The concession had a time-limit, and was withdrawn if the concessionaire failed to work the mine, but while it was valid he had a 'real' and not merely a contractual right to what it yielded. What we are unfortunately not told is what happened to the precious metals so mined; presumably the treasury bought them from the *coloni*.

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The main offences against property are damage and theft, and the *Digest* titles on these are, next to that on 'letting and hiring', the most interesting of all from the historian's point of view.¹¹⁶ The law of damage to property was regulated by a statute, the *lex Aquilia*, enacted before the beginning of our period, and extended in its scope and effectiveness by juristic interpretation and by the *ius honorarium*. The offence was *damnum iniuria datum*, 'loss caused contrary to the law', and the original statute dealt very baldly with two cases: killing of a man's slave or cattle, and destroying any other property of his by burning or breaking. It was soon held that 'breaking' could cover any kind of ruining; and though the statute concerned only the direct causing of physical injury by a man with his own hands, the praetors increasingly allowed so many *actiones utiles* (that is, actions granted not by the statute but by the praetor on the analogy of the statute) that it came to cover many indirect ways of causing damage, harm, or loss. For anyone interested in the arguments of the law there is great fascination in studying the extent to which the

Romans conceived and worked out notions about remote causes of damage, damage by negligence, contributory negligence (*i.e.* when both parties are partly to blame), damage by doing nothing at all or by doing something you were entitled to do, and so on. It can be seen from the *Digest* fragments that the lawyers discussed and decided many cases of all these kinds, though they did not produce a general 'theory of negligence', but it is beyond our scope here to give a proper account of the topic from this standpoint.¹¹⁷ The offence was not a crime; it grounded an action in the civil courts. Roman law did not draw the line between civil and criminal in quite the place where we are accustomed to draw it, and the action for damage was like the action for theft, a civil action, but for a penalty. This comes out in the fact that if the defendant admitted the damage he had to pay just the simple assessed value, but if he contested, and lost, he had to pay double; and also in the fact that liability did not pass to a man's heir (as a debt, for example, would). How the value of the damaged object was arrived at involves much-disputed problems,¹¹⁸ but it certainly took into account such things as the inheritance a slave would have come into if he had not been killed, or the decline in value of a chariot team if one of the horses was killed. Only a *dominus* was entitled to a statutory Aquilian action, but the praetor gave *utiles actiones* to others, for example to peregrines (and against them), with a fiction that they were Roman citizens,¹¹⁹ and to usufructuaries, holders of a thing in pledge and *bona fide possessores*.¹²⁰ One text gives a father an Aquilian action for damage done to his *filius familias*, and another (usually held to be post-classical) to a free adult for his own personal injuries.¹²¹ But the best way we can suggest the scope of the law of damage is by quoting a few of the fragments (all, therefore, from *Digest* 9. 2):

4 pr. 'If I kill your slave when he is making a burglarious attack on me I shall not be liable, for natural reason allows self-defence against danger.'

7.4. 'If someone kills another in a wrestling match or the pancratium or boxing, if it is in a public contest no Aquilian

action lies, because the damage is held to have been done for the sake of glory and valour, not with intent to injure. But this is not true of a slave, because it is freeborn people who go in for contests. It applies, however, to a *filius familias*.'

7.6. 'Celsus raises the case of someone who gave poison instead of medicine, and says he furnished a cause of death [*i.e.* did not actually kill] like one who gives a sword to a lunatic; neither of these, he said, is liable under the Aquilian, only an "action on the facts".'

11 pr. 'Mela says, if some people were playing a ball game and someone knocked the ball harder than usual and propelled it against the hand of a barber, so that a slave under the barber's hand had his throat cut by a jerk of the razor, that the Aquilian lies against whoever was to blame. Proculus says it is the barber; and certainly if he was shaving people in a place where people customarily played games or where many people passed by, blame attaches to him; but one might also reasonably say that a man who commits himself to a barber who has his chair in a dangerous place has only himself to blame.'

27.29. 'If you give a glass cup to have glass filigree attached; if the workman breaks it through incompetence he will be liable for wrongful damage, but if the glass had faulty cracks he can be excused. So craftsmen, when things of this sort are given to them, usually put into the contract that the job is not at their risk.'

33 pr. 'If you have killed my slave I do not think that personal feelings can be brought into the reckoning—as for example if someone has killed your natural son on whom you would put an extremely high value—but only his market value to the public.'

44.1–45 pr. 'When a slave wounds or kills with his master's knowledge the master is undoubtedly liable to an Aquilian action. Knowledge here means sufferance, *i.e.* he who could have stopped it is liable if he failed to do so.'

52.1. 'A shopkeeper had put a lamp on a stone in the road one night. Some passer-by abstracted the lamp, and the shopkeeper pursued him. . . . The man began to beat the shopkeeper with

a spiked whip which he carried, and this exacerbated the fight, in which eventually the shopkeeper poked out his adversary's eye. He said "Surely I shall not be held to have done wrongful damage? For it was I who was first struck with the whip." I replied that unless he had put the man's eye out deliberately he did not seem to have committed wrongful damage.'

The protections against damage were not exhausted by the possibilities of the Aquilian action. The praetor offered the action which we have met already, for damage from things poured or thrown down into the streets:¹²²

'Against the person dwelling in that place from which something has been thrown or poured on to a place where the public walk or stand, I will give an action for double the damage caused.'

This, says Ulpian,^{122a} is unquestionably a most valuable provision, for it is in the public interest that people should be able to walk the streets without fear or danger; it does not seem to have been very effectual in Rome, to go by Juvenal.¹²³ But a remarkable feature of this edict is that there was a penalty if a free man was killed by the falling object—not 'double the damage', because you could not put a money value on a free man, but a fixed sum—and if injured he could have medical expenses and loss of earnings taken into account. Another very ancient remedy of the law was the *actio de pauperie*, for damage by animals—not wild animals, who had no *dominus*, but ordinary animals misbehaving themselves (dogs biting, horses kicking and so on); again you could recover for medical treatment and loss of earnings.¹²⁴

The crash of falling *insulae* (or the menace of rising *insulae*) might be deleterious to neighbours; two interestingly developed sets of rules gave people an opportunity to anticipate damage to their property or amenities. They were already fully in existence in Cicero's day,¹²⁵ and lasted all through our period. The first was 'denunciation of new building', *operis novi nuntiatio*: if anybody appeared to be about to erect or demolish some structure¹²⁶ on his or other (even public) land, and you believed you had

some right to prevent him, such as servitude or potential damage to your property, you must go to the spot and serve notice upon the workmen or whoever was there. The work must then stop, and the man who had ordered it must give security or promises that the work was not inconsistent with your rights, and that if it was adjudged so to be he would undo it; if he refused, the praetor would make him undo it at once, but if he did give security you could not stop him proceeding but only take him to court on his promises afterwards.¹²⁷ (Incidentally, the praetor might require you to take an oath that your denunciation was not merely vexatious.) The second set of rules went under the title of *damnum infectum*, 'damage not yet done'. If you had reason to fear that someone's neglect of his building or other property was likely to do harm to yours you could apply to the authorities and (having sworn that your proceedings were not vexatious) require him to give security or make promises to make good any damage caused; his refusal in this case would lead to your being given possession of the property concerned.¹²⁸ It is proper to say 'the authorities' here because, as Ulpian points out:¹²⁹

'Since the case of anticipated damage requires haste, and the praetor thinks it might be a dangerous delay if he reserved jurisdiction for himself, he rightly thought that this could be reasonably delegated to municipal magistrates.'

Some of what Ulpian says about *damnum infectum* comes from the part of his treatise on the edict which dealt with the powers of local magistrates; and the surviving portion of the *lex Rubria*, the statute setting out the powers of local magistrates in the citizen towns of Cisalpine Gaul, begins with two prolix paragraphs about their competence in *damnum infectum*.¹³⁰ There is also a papyrus, dated 26 January, AD 121:¹³¹

'To Demetrius, controller of the Oxyrhynchite district, from Tasionys, also known as Dionysia, daughter of Dionysius, of Oxyrhynchus, and Ammonius son of Paseis, of the Little Oasis—Tasionys with authority of her guardian Demetrius Theon, son of Theon, of Oxyrhynchus: We own adjoining

houses in the Metroon quarter, and a neighbouring house is owned by Philo son of Dionysius and [several other names]. This house is in danger of collapse through extreme age; wherefore, foreseeing danger to ourselves and families, especially since the said house overlooks both our courtyards, we request that a copy of this notice be served on each of them by the court runner, so that having warning in writing they may put their house in a safe condition or else know that they will be responsible for all future danger and consequent loss.' (The notice was served on all parties, the same day.)

For works liable to divert flood-waters on to your land there was an ancient suit *aquae pluviae arcendae*; Cicero used its definitions as examples of a mode of argument in the treatise *Topica* written for his jurist friend Trebatius.¹³² If a man's property had already been invaded and mishandled, we are back in the sphere of the interdicts, notably that called *quod vi aut clam*.¹³³

'What has been done by force or by stealth, object of suit, provided that less than a year has elapsed since suit was possible, I order you to restore.'

This was not only for building or demolishing on your land, but also for cutting trees, polluting wells, and numerous other things, as long as they were directly connected with the soil. Any sort of protest by you, if your adversary persisted nevertheless, justified the claim of violence, and you could have an Aquilian action against him as well. The interdict *unde vi*, to get back into possession of property if expelled from it, we have met already; in the disturbed period after Sulla there was added a further interdict for expulsion by force of arms, *vi hominibus armatis*, which figures prominently in two of Cicero's orations,¹³⁴ and was designed to put a man back quickly with all questions about rights left till later. For violence, affray and rapine there was also, from Sulla's time onwards, a criminal prosecution available;¹³⁵ the same concurrence of criminal prosecution with civil suit applied, under the Principate, to theft, to which we must now come.

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Of the civil law of theft, *furtum* (another good *Digest* title to read),¹³⁶ it is often said nowadays that it was in classical times ‘of little practical importance’.¹³⁷ Theft was, like damage, a tort—though a penal one; you sued the thief in the civil courts, for your property plus substantial penalties (the thief caught in the act and the robber with violence were liable for fourfold, most other thieves for double). But, of course, thieves are not usually solvent, not worth the trouble of suing civilly—a modern as well as an ancient problem:¹³⁸

‘Most citizens would probably say “amen” to the wish of Sir Peter Rawlinson, a former Solicitor-General, to see thieves and robbers be made to pay—in the most literal sense—for their crimes. . . . The trouble is that no one (not even Sir Peter Rawlinson) has yet discovered such a method. It is open to an aggrieved loser to sue the convicted man for the loss of his property or money. In practice this is seldom done. The chances of recovering either the property or money, or the costs of the case, are slight . . . Of all cases of larceny in 1964, only 3% involved sums of £100 or more.’

The interest of the public is partly in recovering its economic loss and partly in the repression of theft by means of a coercive kind, and faced with the perennial difficulty of achieving the former it is likely to concentrate on the latter. Now under the Principate theft did become a crime as well as a civil wrong, though it never had a standing jury-court (not being regarded as an ‘upper-class’ sort of offence):¹³⁹

‘The man who has haled a thief before the prefect of the watch or the governor of a province is taken to have made his choice of means to pursue his right; and if the matter is concluded in that court and he gets his thing back or his money singlefold, that is the end.’

Perhaps what the prefect of the watch did under the Principate the *tresviri capitales* had already done a good deal of in Cicero’s day; but at any rate under the Principate it is suspected that the civil procedure for theft was little used,¹⁴⁰ though the lawyers

went on amusing themselves with it, including a lot of primitive complexities¹⁴¹ which frequent practical application would soon have abolished. It is said of all these anomalous 'penal torts' that in Roman as in English law they were the product of an age when the remedies of criminal procedure lagged behind those of civil—only English law abandoned them when it acquired something better.

Now we do not know the relative frequency of civil actions and criminal trials for theft during our period. The one remark, attributed to Ulpian, that:¹⁴²

'one must remember that nowadays theft is usually punished in the criminal courts'

is very probably an interpolation by someone of a later age. Furthermore, there were two respects in which the civil law rules gave people a better chance to recover their losses than anything anyone has invented since. First, since upon civil judgment the thief (and his accomplice) became a judgment-debtor, he could ultimately be haled off into private bondage to work off his debt.¹⁴³ And secondly, since the action for theft was one of the class known as 'noxal actions', which meant that if the offence had been committed by a slave you sued his *dominus*, who had the choice of paying up or handing over the slave, you could in such a case recover something, if only a saleable slave.¹⁴⁴ These possibilities may well have been enough to give the civil procedure an abiding attractiveness, so that people wanted both. They wanted, and could have, more than one civil action cumulatively against the thief, namely, in addition to the *actio furti* for a penalty, a vindication of the stolen object or *condictio furtiva* for its value. For there was, as Gaius says, a 'hatred of thieves'.¹⁴⁵ You could legitimately kill a burglar, or even a day-time thief if he produced a weapon. And yet in our period the Roman law was not as savage to thieves as English law was down to the nineteenth century. Death or transportation for tiny sums was unknown; deportation (for *honestiores*) and the mines (for *humiliores*) were the outside limit even for aggravated theft such as burglary.¹⁴⁶

The offence was very broadly (or, as some might say, never adequately) defined, though it was minutely partitioned into special cases. It was not confined to 'taking something away with intent to deprive of whole interest', but any unauthorized dealing with something could be theft, such as receiving stolen goods, appropriating things lost, or even taking something of which you were *dominus* away from the man who held it in legal possession (you could, in fact, steal your own thing). There was a much quoted illustration of theft in the form of misuse of something borrowed:¹⁴⁷

'a man was convicted of theft because, having borrowed a horse to ride to Aricia, he rode it up the hill beyond.'

It was even theft to use at all something deposited for safe keeping. (And, given this scope of the offence, some thieves would not be humble insolvents.) However, there did have to be proved an intention to do something wrong; you could not commit theft by mere inadvertence, and in fact when people came into possession of something they tended to put up a notice.¹⁴⁸ There were many categories of action, according to the special types of theft,¹⁴⁹ such as 'manifest' theft (thief caught in the act), non-manifest theft, stolen objects found on premises, theft by a slave *familia*, robbery with violence, pillaging from fires, shipwrecks and riots,¹⁵⁰ larceny in inns and ships, and so on. The person who had the right of action against a thief was he who had a (pecuniary) interest in the thing not being stolen, but what that meant is the subject of much learned argument;¹⁵¹ at any rate it was not necessarily in all cases the owner of the thing. The *condictio furtiva*, on the other hand, was available only to an owner.¹⁵² Fairly early in our period there was great legal dispute whether there could be theft of land; the view prevailed (as in English law) that there could not. So theft was of movables only, though that included not only slaves but also free persons in a man's *potestas*.¹⁵³

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There is another way in which a man can lose his property—debt. It is well known that indebtedness was an acute problem in the age

of Cicero;¹⁵⁴ there were features of Roman Republican society over and above the threat (and sometimes the reality) of civil war which made it unstable from the point of credit. The dominant class was land-owning, living on rents. Its members had, on the other hand, very heavy cash expenses, to maintain a grand standard of living and to play the game of politics which involved huge stakes in bribery, bread and circuses. Hence they borrowed, on the credit, ultimately, of their lands, and the liquid funds went the rounds, constantly changing hands according to who needed cash at any moment. (New funds came in from the mines and from provincial tribute, when not in kind; on them the *publicani* had a hold, so they tended to be big creditors and sources of liquid funds.) Another element in the pattern was *officium* again. If you were to be well regarded it was incumbent on you to help your friends in their temporary embarrassments, either with money, even if that meant borrowing on your own credit, or at least by being a surety, pledging your credit, for their borrowings. It can be seen that this was a vicious circle, a nexus of paying one debt by incurring another, all ultimately dependent on the secure market for land.¹⁵⁵ In times of invasion or political insecurity or agitation for the redistribution of land there might be a calling in of debts all round, and chaos could result. Just a few passages from the correspondence of Cicero will illustrate the whole network:

In 50 BC Cicero's political freedom of speech was menaced by the fact that he owed Caesar money. He writes to Atticus:¹⁵⁶

'What should I do? Pay up, you say. All right; I'll borrow from Caelius.'

In 49 his brother Quintus was being pressed by Atticus himself:¹⁵⁷

'Quintus is very anxious to get what he owes you settled by substituting Egnatius as your debtor, and Egnatius is quite willing to take over the debt, and is no pauper. But in times like these, when even Titinius says he can't find the money to travel, and has had to let his debtors go on owing at the same rate of interest [*i.e.* he cannot actually get them to pay up]—

and Ligus is in the same position—Quintus hasn't a penny in cash and can't get any cash out of Egnatius or raise a loan anywhere.'

After Caesar's murder, Cicero from Puteoli begged Atticus:¹⁵⁸

'Please, my dear fellow, look after my affairs in Rome—but without hoping for anything from me. I've got plenty coming to me on paper to pay my debts, but my own debtors often don't come up to scratch; and if something of the kind occurs, think above all of my reputation. You must put me right not only by borrowing but even by selling, if things force it.'

During Cicero's exile in 58 a lot of his property was destroyed by the authorities and he was very straitened. His wife thought of selling property of her own to meet claims. 'No', writes Cicero:¹⁵⁹

'let others, who are able enough if the will is there, take on the burden' . . . 'if our friends stand by their duty [*officium*] there will be no lack of funds.'

The same pattern can be observed in Pliny, a century and a half later. He is attracted by a property, and considers buying it:¹⁶⁰

'You may ask whether I can scrape together even three hundred thousand. It's true I'm almost wholly in land, but I've got a bit out at interest, and should have no trouble in getting a loan. I can get it from my mother-in-law, whose funds I can call on as freely as my own.'

In Pliny's day there is no air of crisis; the 'Augustan peace' had removed some of the prime causes of uncertainty. Yet small beginnings could still under the Principate cause a panic, as can be seen from the curious tale in Tacitus of the financial crisis of AD 33.¹⁶¹

How does the law of debt relate to this pattern? The antique law, based on the Twelve Tables, is notorious for its harshness. If judgment was given against you for a debt you had thirty days to pay. If you failed you were brought before the magistrate, and you must either produce a *vindex* (doubtless your patron) who

would be sued for double your debt, or you were 'addicted' to your creditor, who could keep you in private bondage for another sixty days, producing you in public at certain statutory intervals (in case anyone would come forward to relieve you); after that he could sell you into slavery abroad. A *lex Poetelia* of 326 BC abolished *nexum*, by which men in need deliberately contracted debts on the security of their persons,¹⁶² and is supposed to have laid down that only a man's goods, not his person, were liable for debt. But whatever may be the authenticity of this latter provision, there is abundant evidence that 'addiction' for unpaid debts continued all through our period.¹⁶³ The rise of the formulary system substituted the *actio iudicati* for the old 'seizure by hand', but the practical effects were the same. We can hardly imagine the Roman nobility doing this kind of thing to one another, and it is natural to suppose that attachment for debt was what happened to the poor who (like the thief) had no assets but could be made to pay off by labour.¹⁶⁴ Quintilian talks of 'the addicted man, whom the law requires to be a slave till he has paid'.¹⁶⁵

Already before our period began an entirely new procedure had been developed for judgment debts. (P. Rutilius, at the end of the second century BC, played some part,¹⁶⁶ though he probably did not invent the whole institution.) This was 'selling up', *bonorum venditio*;¹⁶⁷ the better view, though this has been much argued, is that it was not an alternative to attachment but could be employed as well in appropriate cases.¹⁶⁸ As soon as a man was adjudged debtor his creditors could apply at once for entry into his entire property (for custody, to prevent his disposing of any of it):¹⁶⁹

'Those who have entered into possession on the basis of my edict [said the praetor] must be in possession in the following sense: what can be properly guarded on the spot, let them there guard; what cannot, they may remove and carry off. The owner must not be expelled if he wishes to remain.'

At the end of thirty days they could meet and appoint a kind of liquidator—or several, if the property was in different provinces¹⁷⁰—to auction everything off to whoever offered to pay to all of

them the highest 'figure in the pound' on the debt (it could be the debtor himself). Cicero's speech *pro Quinctio* is by far the most detailed text on this institution. He describes how his client's creditors went to the praetor and got an order for entry the moment he failed to turn up to a promised confrontation, and dilates upon the appalling humiliation and infamy that resulted to a man from being 'sold up'.¹⁷¹ This powerful and severe procedure, total selling-up for an unpaid debt, however small, could be applied also to the debtor who absconded.¹⁷²

'The praetor says: "He who hides for the purpose of defrauding, if he is not defended according to what a good man would think reasonable, I will order his goods to be entered upon and sold". . . . And this is a very common case of possession, for it is regular for the goods of absconders to be possessed.'

What is more, being sold up did not extinguish any part of your indebtedness that remained; you were still liable, could still be 'addicted' and sued again later for the balance: 'a man owed his debts till he had paid them'.¹⁷³ Now clearly, unless tricked by some enemy, as Cicero claims that Quinctius was, no solvent debtor would get into this position. The law's severity would be sufficient pressure to make him pay up. And once again it is hard to see the nobility, constantly in debt to one another, inflicting such humiliation on their peers. It has been noticed,¹⁷⁴ in the kind of Ciceronian passages quoted above, that the anxious creditors did not seem to contemplate taking their debtors into court; and though Cicero was in deadly earnest about getting the last penny of Tullia's dowry back from Dolabella in 44, he turned over all sorts of possibilities for avoiding a direct suit against him.¹⁷⁵ The penal harshness of the law had, partly as consequence and partly as corollary, that it was not much used as between members of the upper class, though they may well have wielded it mercilessly against debtors of lower status. In the civil war period, however, there were nobles who reached rock-bottom, insolvency; probably for them, a *lex Iulia de cessione bonorum* (whether of Augustus or of Julius Caesar—

who passed a number of measures to relieve the acute debt problem of his day—remains uncertain)¹⁷⁶ gave some further relief to those who could make a case to the praetor that their insolvency was due to misfortune.¹⁷⁷ The debtor could make voluntary cession of all he had to his creditors; he was still sold up,¹⁷⁸ but he did not incur *infamia* and was not liable to attachment;¹⁷⁹ and though he still owed any balance he could not at any given time be sued for a greater part of it than he had means to pay.¹⁸⁰

Naturally, debtors did their best to defeat all these rules and their creditors by disposing of property quickly:¹⁸¹

‘Most of the family property he transferred into his wife’s name by a cunning fraud, and so, pauper, denuded, protected only by his ignominy, nevertheless he left Rufinus here, without a word of a lie, thirty thousand sesterces. For that’s what Rufinus got from his mother’s estate, net of debts.’

Cicero tried a dodge when his property was sold up after he had gone into exile: he informally manumitted his slaves, warning them that they might lose their freedom if the manumission was held to be in fraud of creditors.¹⁸² For the only allowance was that mentioned in an earlier chapter; property sold up did not include a man’s concubine or natural children. Various other wangles are heard of, and various remedies were available to the liquidator to put a stop to them.¹⁸³

A characteristic feature of the ‘act of bankruptcy’ in the technical modern sense is that the insolvent who has paid his dividend, his ‘so much in the pound’, can in the end be discharged; the balance of his debt is obliterated and he can begin again with a clean slate. Was any such arrangement possible in Roman law? We hear several times in the *Digest* of the pact of composition made by an heir to a *damnosa hereditas* with the creditors of the estate, by which they take a dividend and give him a ‘pact not to sue’.¹⁸⁴ The advantage sought by the creditors was to persuade the heir to take the inheritance (which they might wish him to do in order that particular legacies might be good,

and so on); the *quid pro quo* was full discharge on only part payment. The advantage to the heir was that by taking the inheritance and having a pact he protected the memory of the testator from infamy without suffering insolvency and infamy himself. There is reason to think that the ordinary insolvent was sometimes allowed a pact of the same kind; and if one wonders why creditors should have granted a man such an arrangement when they had the alternative of selling him up, the answer may well lie in the notorious difficulty and trouble involved (not only in Roman times) in recovering anything worth the effort from an insolvent debtor. It might simply be less bother for a man's sureties and his creditors to meet, arrange what could be paid, and be rid of him altogether.¹⁸⁵

There appears frequently in the literature (but only once by name in the classical legal writings)¹⁸⁶ a process called *decoctio*, done by a *decoctor*, who *decoxit creditoribus suis*.¹⁸⁷ The standard meaning of this 'decoction' was declaration of insolvency. It might simply be followed by *cessio bonorum* (if allowed); the honourable thing to do if you could not meet your debts was to let yourself be sold up¹⁸⁸ (naturally under the provisions of the *lex Iulia* when they became available)—to 'take it on the chin', continue to owe your balance, and (it may be conjectured) not involve your sureties. Equally, 'decoction' might be what the heir to an insolvent estate had to do if he accepted it; he could expect a pact in exchange, and this was admitted not to be dishonourable.¹⁸⁹

'Do you remember that when you were only a lad you were a *decoctor*? "That was my father's fault", you will say. Very well, for loyalty to your father's memory is a full defence. But the thing that shows you were no gentleman is that you went on sitting in the Fourteen Rows in the theatre, although the *lex Roscia* had appointed a special place for *decoctores* even if a man had done it through fortune's fault and not his own.'

But the *decoctor* is often spoken of in terms of contempt and infamy:¹⁹⁰

'Some debtors a moneylender will not pursue—the ones he knows to have *decoxisse*; for their honour has reached rock-bottom and to appeal to it would be a waste of effort.'

'When people were flinging bills at him on all sides and he was grabbed by everyone he met and driven crazy, he said 'Pax!' [*sic*], admitted he couldn't pay, gave up his gold rings and all the insignia of rank, and made a pact with his creditors.'

These passages bring out the notion that it was no use pursuing a man who had 'decocted', and also the possibility of pacts of discharge.¹⁹¹ Not having actually sued the debtor, the creditors were not debarred from applying to his sureties for what they could not get out of him;¹⁹² and herein probably lay the real heinousness and disesteem of 'decoction': it 'let the side down'. Hence the Table of Heraclea includes amongst those persons not allowed to stand for municipal office:¹⁹³

'the man who has declared to his sureties or creditors that he cannot pay in full, or has made a pact with them on the basis that he cannot pay in full, or on whose behalf money has been given or expended.'

The social system involved pledging dignity and reputation as well as financial credit on behalf of others; if they proved unsatisfactory it reflected on the surety as well as the debtor; and it threw into confusion the whole nexus of mutual obligations on which credit depended.

It will seem surprising that the law of our period does not appear to have developed that sensible institution for dealing with the solvent but contumacious debtor, distraint by court order upon such pieces of his property as will cover the debt, and it is in truth the more surprising in that in early Roman law certain special cases had been met in that very way.¹⁹⁴ Something akin to it was established, characteristically in a context of class-distinction, by a *senatusconsultum* of unknown date. We learn from a fragment of Gaius in the *Digest*¹⁹⁵ that:

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‘where a *clara persona* such as a senator or senator’s wife is in a position in which his or her property would be sold up,’

the authorities would put in a *curator bonorum* to distrain upon particular items of their goods up to what was needed to satisfy the creditors. Beyond this the execution of civil judgments under the formulary system never went, but the *cognitio extraordinaria* did. A rescript of Antoninus Pius set up at long last a wholly new general arrangement by which the magistrates in Rome were to execute the judgments of judges and arbiters themselves instead of making plaintiff and defendant go through the *actio iudicati* (and this was extended to the provinces by Septimius and Caracalla).¹⁹⁶ They seized *pignora*, i.e. distrained on such items of property as would meet the judgment debt, and after two months the *pignora* were sold under the magistrate’s direction and the proceeds handed to the creditor. It was, in fact, the administrative law that found the intelligent solution.