Fundamental Concepts of the Roman Law

(This concludes the series of articles on Roman Law written by Professor Radin.)

XV

"All the law which we use," the Institutes of Gaius assert, "concerns either persons or things or actions."\(^1\) The words are literally copied by Justinian\(^2\) and the classification in some modified form has remained the fundamental division of law in all the civil law systems.\(^3\)

The law which pertains to things is further divided. Some things are corporeal, others incorporeal and among incorporeal things, obligations are expressly placed, as are inheritances and testamentary successions.

The scientific difficulties of the division were perfectly clear to Gaius. All law is inevitably a law pertaining to persons and a very great deal of it is a law pertaining to things. The purpose of most of the obligations we have examined is the exercise of some sort of power over concrete objects. Certainly the "real" contracts proclaim that in their name, and sale and letting do so no less in their more important applications.

And yet the classification is not a purely traditional one. It was a successful attempt to cut through a chaotic mass of material that had been collected from practice and commentary, and it was a logical feat of considerable importance to have accomplished it, however and whenever it was done. "Ownership," "use," "enjoyment" are relations between persons in respect of things, relations that are common to many situations, and it is highly proper to deal with these elements separately before the special situations in which they occur are considered.

\(^1\) Gaius, 1, 8. Dig. 1, 5, 1.
\(^2\) Just. Inst. 1, 2, 12.
\(^3\) The German Civil Code (B. G. B.) has five divisions: 1, General; 2, Obligations; 3, Things; 4, Family Relations; 5, Inheritance. The Swiss Code has 1, Persons; 2, Inheritance; 3, Things. There is, besides, a separate Code of Obligations. The French Code and those based upon it have 1, Persons; 2, Property; 3, Modes of Acquiring and Transferring Property, under which there are titles dealing with Inheritance and Obligations. In all cases the "Law of Actions" is in a separate Code.
But that the main body of the law is the "law of things" is a
tradition—perhaps an inevitable tradition—of organized societies. Each important class of things becomes the centre of legal customs
and it would have been conceivable that all possible situations to be
dealt with in courts should be grouped about the concrete things
they referred to.

In England the social and political importance of landed property
made land an obvious centre for such grouping. The "law of real
property" takes up pretty completely all transactions in which land
is involved. Contracts in relation to land, injuries caused by de-
terioration or occupation of land were treated under this head as well
as the more general question about degrees of ownership, possession
and user. Logically the law of non-landed property could be treated
in the same way and the two classes would exhaust almost all the
law, but here we find new categories that disregard subject matter,
the categories named contracts, sales, torts, agency and the like.

In recent times economic importance has reclassified certain
groups. We have textbooks on the Law of Mines, of Oil, of Auto-
mobiles, each one being a fairly complete summary of the law as it
affects these several classes of things. If any one of these things
should ever attain the overwhelming importance of land in medieval
and modern England, it is plain that the law of that particular thing
would not be merely the title of a textbook but an important cate-
gory in which lawyers and courts would almost instinctively classify
the legal doctrines they set forth.

The Roman law began with a classification that had a similar
economic origin. A category of things was called res mancipi. It
consisted of land, certain rights of user over land, slaves, cattle and
horses. These things were transferred by an elaborate ceremony
called mancipation, in which a public official and witnesses, as well
as a scale and a bronze weight, were essential elements. No other
thing could be so transferred and all other things were therefore
called res nec mancipi. Formally the classification lasted centuries
after its practical importance had disappeared but long before Justini-

\footnote{It was abolished by Justinian in 530. (Cod. Inst. vii, 25, 1) and the
distinction referred to as antiquae subtilitatis ludibrium and as a vacuum et
superfluum verbum of which the only effect was to frighten the tender minds
of beginners at the law.}
No classification really took its place. Of the many classes of things that are mentioned in the title of the Institutes and Digest, none have a real legal significance beyond the few cases in which certain pieces of property were for a longer or shorter time withdrawn from ordinary commercial transactions, because they were public or quasi-public.

The distinction between movables and immovables, despite its transcendent practical importance, was not made the basis of a legal classification. In practice, however, we may be sure land was treated as a very different thing from a transportable chattel, and in the modern systems of Europe, transactions involving immovables are subjected to a very large number of special rules. This is doubtless in part due to the fact that Europe has only recently emerged from a feudal organization with its violent emphasis on land tenures.

The "law of property," the law of "things" might justify a separate treatment for a wholly different reason. We generally think of an obligation as the most characteristic of legal relations—the situation in which one person is tied up with reference to another so that a given act is the only method of loosing the bond.5 We have taken up one way after another in which this tying up is effected and found that, in spite of notable exceptions, they correspond fairly closely to the methods still in vogue to secure this same result. But in old Roman law the first suggestion of ius was something quite different. The ius Quiritium, the peculiar right of a Roman, was a summary statement of the fact that a Roman and only a Roman could without legal let or hindrance perform a number of acts about these things of which he asserted such a ius. He was dominus, the house-master, just as he was paterfamilias, the head of the household. The ius Quiritium was his privilege, in the strictest sense of the word, that range of possible activities which could form the basis of no suit at law against him in a Roman court.

What was this range of possible activities? It is described in very absolute terms and is said to consist of the ius utendi fruendi abutendi, the privilege, that is, of using a res while keeping its corpus intact (utendi), of using it by diminishing its corpus or its outgrowths (fruendi),6 of completely consuming it and therefore ending its effective existence as that particular res (abutendi). These are

5 Cf. § 4 of these articles, 12 California Law Review, 406 seq.
6 Uti and frui have in this connection the meanings ordinarily attached
three degrees of a process of exercising power over a concrete object, and if *dominium* "ownership," "title," "property" meant just this sum of *iura* and no other, it would be perfectly clear.

However, *dominium* in this exclusive sense really existed only in respect of some objects and by no means of all. It fell a good deal short of containing all possible activities in connection with the two economically most important kinds of res, slaves and land. At any rate, beginning with the Empire, ill treatment of slaves was increasingly limited and the killing of them wholly prohibited. Land was subjected to a number of restrictions by the presence of neighbors, especially if the neighboring property was a public road.\(^7\) By a *senatus consultum* of 43 A. D. buildings might not be destroyed for the purpose of speculation in land.\(^8\) Indeed it may be seen that the *ius utendi fruendi abutendi*, by virtue of its climactic arrangement, is rather an analysis of the idea of ownership than a real statement of what the elements of Roman dominium actually were.

Not only did the elements of abstract dominium vary with the objects on which it was exercised, but they varied with the relations of the persons affected. Tutors were called *domini* when they did certain things and not when they did others.\(^9\) Those who had restricted rights over a thing were called *domini* when that particular complex of right was considered. To what *dominium* might be reduced may be seen by considering the *res mancipi*. These, as has been said, were things which could be transferred only by a special and elaborate ceremony. Suppose they were transferred and the ceremony for one reason or another was omitted. The acquirer would be protected in his "title." He was said to have the thing *in bonis*. If it was a thing which by its nature was susceptible of *usus fructus abusus*, he might completely and wantonly destroy it or consume it, without leaving the former owner any claim enforceable in a court. Yet all this time the former owner was the *dominus*; he held the *dominium ex iure Quiritium*. Maitland called

to the words in Latin and not the specific meaning of the servitudes called *usus* and *ususfructus*, for which cf. infra.

\(^7\) Ulpian, *Dig.* 43, 8, 2.

\(^8\) Riccobono, *Fontes Iuris Anteustinian*, i, p. 233.

\(^9\) "Tutors" were guardians appointed to take care of the interests of *pupilli* (minors less than fourteen years of age). A transaction made by a *pupillus* without the tutor's active participation was wholly void. The assumption of the duties of a tutor was compulsory in many cases. Tutors were held to the strictest liability and there was an implied mortgage on all their property for obligations arising out of their misfeasance. A corresponding function was exercised by a *curator*, the guardian of a minor between fourteen and twenty-five or of an adult incompetent.
his "title" the driest of dry trusts conceivable. So it certainly was, but equally certainly it was as much *dominium* as before the transfer was attempted.

The special characteristic of *dominium* as a complex of privileges rather than of claims may be inferred from a sentence of Ulpian, when he compares *dominium* with possession. *Differencia inter dominium et possessionem haec est quod dominium nihil minus eius manet qui dominus esse non vult, possessio autem recedit ut quisque constituit non possidere.* "Dominium remains even when he who has it does not wish to be dominus; possession however disappears as soon as the possessor has determined not to possess."\(^\text{10}\) Ulpian has in mind a situation in which the "mental" element in possession was important. His distinction is not sound except as far as the acquisition of the two forms of proprietary relations is concerned, but the characteristic of *dominium* is well brought out in what he says. A man cannot really be said to have a claim, to own an obligation, if he has decided not to enforce it. He may change his mind and the obligation may or may not have been destroyed by his temporary disinclination for it. But a *dominus*, who in the very moment of repudiating title, acts in relation to a thing advertently or inadvertently has none the less acted as dominus. He has exercised a privilege. He cannot be sued for his act.

A word which is frequently used with *dominium* is *proprietas*, but more frequently *proprietas* has a special meaning. It denotes what is left when various rights of use and enjoyment are taken from the dominus and conferred upon others. These uses might be considerable. By usufruct, by emphyteusis, a person not the dominus might have privileges in connection with a res which all but exhaust the benefits that could be derived from it. But the point was that they did not quite do so. Something was left and that something was the *proprietas*. This was a real thing and not the *vacuum et superfluum verbum* of Justinian's constitution, the "empty and superfluous word" which had no concrete existence as far as producing effects was concerned. The owner of the residuum was properly called the *dominus proprietatis*.

But the characteristic of *proprietas* was really a different thing from that of *dominium*. The point of view suffered a complete change. What was it that the *dominus proprietatis* wished to do or could do with the res? Primarily he was interested in preventing

\(^{\text{10}}\) Dig. 41, 2, 17, 1.
acts on the part of the possessor which impaired the residuum. The usufructuary, for example, had his privileges determined by the transaction that created the usufruct. He might not transgress them and above all he might not deal with the corpus in such a way that it became useless, when, and if, the usufruct terminated. Roughly speaking he might not commit waste. A usufructuary completely irresponsible for waste was really a grantee.

The *dominus proprietatis* accordingly was thought of as a person who could prevent uses of the res beyond those actually vesting in the holder of the special right. It was as a group of these claims to forbearance that his "title" was commonly viewed. These claims could be enforced largely by existing actions of delict, the action on the Lex Aquilia being the one most frequently employed, or the interdicts.

**XVII**

Since *proprietas* was a residuary dominium, these claims were as much a part of the latter as of the former but they were not in the foreground of the concept of *dominium* either as it was in men's minds or as it was consciously applied. In dominium, however, there was another class of possible activities that seemed as characteristic as the privileges already mentioned. This was the capacity of abandoning the privileges involved altogether, or of abandoning some of them while retaining others, or of transferring all or part of them.

These powers, especially the power of transfer, are legally and popularly associated with the idea of dominium as fundamental parts of it. It need hardly be pointed out that the term "transfer" is a figure of speech, and that the process of transferring is really the process of creating in the transferee hitherto non-existing rights, which bear only a general resemblance to those rights in the transferor which are simultaneously extinguished. However, figure of speech or not, it is a very old one and it dominated both expert and lay imagination. The easiest way to conceive of a person becoming dominus was to fancy the various groups of rights and powers inherent in the term as though they formed a concrete object which was capable of being physically carried from the grantor's hand to the grantee.

How was the transfer made? The oldest form demanded a series of ritual acts, the *mancipatio*. The later law had a general and much cited rule to the effect that ownership was changed not by mere consent but by delivery or by adverse possession. This certainly was not the only way in which dominium was transferred and there were
cases in which a mere agreement did have the effect of transferring *dominium*. Two examples may be cited. A has lent B some property by way of *commodatum* or has leased B land by a *locatio-conductio*. Later a contract of sale between A and B concerning that same property is entered into. Title passes by the contract since B already has the res. This is called *traditio brevi manu*, "short-hand delivery," but of course it is not a delivery at all and can be made one only by retroactive fictions of the approved form. Again suppose A wishes to sell certain property to B but to remain there as the tenant of the new owner. An agreement to that effect, called the *constitutum possessorium* will produce this result and again title will change without delivery. But in general where concrete objects were concerned the delivery, that is, the placing the object under the physical control of the transferee, or better, the withdrawing on the part of the transferor of any obstacles to such control by the transferee, was the way in which the transfer was effected.

We are expressly warned that a mere delivery, a *nuda traditio*, was not enough.\(^{11}\) A *iusta causa* must precede, says Paul, that is, a situation of which the natural incident is that the transferee is to be put in the position of the transferor. That mere delivery could not of itself convey ownership must be apparent in the case of such contracts as deposit, *commodatum*, letting and hiring. The fact of delivery is ambiguous and needs an explanation. The *iusta causa* is the required explanation. The situation that preceded the delivery might show that the parties had entered into a contract of sale or that a stipulation had been entered into or the object was a legacy owing to the transferee, or the transferor had indicated an intention to make a gift. Any one of these things would make it apparent that a delivery following them was meant to confer upon the transferee whatever the transferor had to give.

Suppose the explanation is not clear. That is to say, the situation is such that it may be interpreted in one of two possible ways. There is a famous antinomy—a so-called contradiction—between two passages in the Digest, one of Julian and one of Ulpian.\(^{12}\) The situation involved is the transfer of money by A to B. A meant it as a gift.

\(^{11}\) Julian, Dig. 41, 1, 36; Ulpian, Dig. 12, 1, 18, pr. Cf. Buckland's discussion, op. cit., p. 230 and Wenger-Mitteis-Sohm, *Institutionen des Röm.*
B understood it to be a loan. Julian holds that the title to the money passed, Ulpian, that it did not. It seems hard to justify Ulpian’s decision, since whether the basis is loan or gift, title to money passes. And it is apparent that Julian’s decision prevailed and that the contrary view of Ulpian, hidden in a qualifying clause, was retained by the sort of inadvertence which even the most careful compilations will show. But if the doubt had been whether the situation was one of commodatum or gift, I think there can hardly be any doubt that title would not pass, if the ambiguity arose from the situation itself.

But there was another condition necessary to make delivery, traditio, a vehicle for conveying title. The deliverer must himself be dominus. The power to convey a title by one who does not possess it is familiar to modern European and American law. In France and Germany, the old Germanic principle that bona fide purchasers of moveables were in general preferred, has found expression in the codes, in the famous possession vaut titre of the French Code Civil section 2279 and section 932 of the German Bürgerliches Gesetzbuch. The common law knows the principle in the rules of market overt and, since the statute of Elizabeth, in the laws governing retention of possession by a vendor. At Rome, such a power was apparently granted only to the sovereign during the Empire. A sale by the fiscus or a private conveyance of the Emperor or the Empress passed title without regard to claims of third parties or previous holders.

Except for this last circumstance—almost inevitable in a state organized like the Roman Empire—the Roman held rigidly to the doctrine that the transfer of rights over a res was a sort of succession,—a “singular” succession, by way of contrast to the “universal” succession to be mentioned later. One holder of this complex of rights stepped out and another man took his place. The characteristic of the Roman law of sale really flowed from this idea. The contract of sale did not, as in the modern common law, have as its mark the engagement to convey a title. At Roman Law the transfer of title was an incidental matter that might or might not follow. The seller engaged to put the buyer in control of the res. If the seller was the owner, this putting in control would pass the title, but that result would or would not follow ex opere operato.

For a long time the doctrine was current that the transaction of sale was quite exceptional, that even tradition did not pass title there,

Rechts. (1923) p. 288. Of the passage in Ulpian, the note (probably by Mitteis) says that the second sentence is unverkennbar interpoliert, “unmistakably interpolated.” Alas, few unmistakables in legal history have maintained their character for more than one generation.
but that a further condition was required, the payment of the price. Justinian makes a statement that seems to say just this, but there are other passages which distinctly imply that tradition alone was enough. A very extended discussion has been conducted about this matter.\(^8\) I do not think that the seeming discrepancy justifies the important inferences that have been drawn from the passages. Justinian (Institutes, 2, 1, 41) and Pomponius (Digest, 18, 1, 19) say that title will not pass unless the price has been paid, or credit given with or without security. Now it is obvious that every sale is either a sale for cash or credit, so that Justinian and Pomponius are stating no more than the rule of common sense and ordinary experience, that in the absence of an understanding to the contrary, delivery and payment are mutually concurrent conditions. What both have in mind is the situation in which a sale intended to be a cash sale in possession of the res has been gained by the buyer, either in good or in bad faith without payment. The seller may have handed the goods over for inspection, for temporary detention or in some other way indicated that the surrender of control is not meant to transfer title, or else in a cash sale he may have turned over the res in the expectation of simultaneous payment and payment may be refused. Such transfers of the goods do not pass title, and the assertion that they do not, scarcely qualifies the rule that title is regularly passed by delivery. The passages quoted certainly do not put the contract of sale in a special class in this respect.

XVIII

The transfer of dominium was, we have said, a succession. A, the former dominus, with his complex of privileges, powers and negative claims in respect of a res, is succeeded by B, the new dominus, who has almost precisely the same group of privileges, powers and claims. But it is obvious that A need allow B to succeed only as to some of them. Some may be left in the hands of A. They may be so few as to be a mere proprietas with all the substantial rights of present enjoyment gone. Or they may comprise all but one limited privilege which has been conferred on B. This power of separating the dominium-unit into its component parts and making a separate transfer of the components is a power essentially like the general power of transfer.

A number of cases in which the owner of a res has for a limited
time surrendered the control to others have already been considered. The commodatum, the deposit, the *pignus* are all cases of this sort. Another case was that of lease, *locatio rei*. To distinguish them from the transactions that are called servitudes in Roman law, and easements or profits at the common law, is not altogether easy. The latter, however, seem at first glance to be a very different type of thing because of the fact that we have always treated them apart from these former transactions and in respect of a wholly different class of things.

Both in Roman and English law it was in connection with land that the servitude or easement chiefly developed. The privilege of passing or driving or riding over one's neighbor's land, of drawing water from it, of watering stock in it, is often practically essential in the effective use of one's own land. The neighborliness of friends and kinsmen may have supplied it originally until in the growth of the community greater security was needed. The ceremony of mancipation was as applicable to the passing of these factors of dominium as it was in transferring the entire dominium.

When mancipation had gone out, the method of transfer became exceedingly difficult. Delivery of an abstract privilege is not easy to imagine in the same concrete way as delivery of a res. However, delivery of land had never been a real delivery but a bringing of the grantee to the land and the withdrawal of the grantor. Something like that could after all be done in the case of such servitudes. The person entitled might be permitted to begin his use, perhaps be formally escorted to the place where he could do so. This quasi-delivery was in use in later time though it cannot have been general before the third century. Or else in spite of the rule that conveyances are not made by agreement, agreements enforced by stipulations were declared to make the stipulator owner of the servitude. This in all likelihood was influenced by the fact that in the Eastern part of the Empire it had long been customary to convey title by the delivery of written documents, much as is done in our own system at the present day. The Roman stipulation was frequently the representative of the East-Mediterranean formal contract which was regularly in writing, although in this case it seems rather to have been the agreement itself, the pact, that had the effect of conveying.

A form of acquiring servitudes which has played a large role in the English legal history, was apparently of less importance. That was adverse possession. Paul implies that servitudes could not be
acquired that way in the old law. But in the praetorian law it was undoubtedly permitted. The only qualifications were user for the prescriptive period of ten or twenty years to which was added the ancient formula quod nec vi nec clam nec precario, "provided the user did not take place by force, nor by stealth nor as a license of the owner." This covers at once the requirements of "open and adverse use" of the common law, and, as we shall see, makes this form of adverse possession essentially different from the ordinary type.

Adverse user is still a common way of creating easements in Anglo-American law. The Germanic law of Europe, curiously enough, specifically prohibited it for so-called discontinuous servitudes, such as rights of way and the like. The principal French Coutumes, those of Orleans and Paris, make this prohibition a fundamental rule and it has been taken into the Code Civil (section 690). The German Code likewise abolishes (by adverse possession) acquisition of servitudes except in the form of a wrongful recording of an easement in the Register of Titles acquiesced in for 30 years (the so-called Tabularersitzung, section 900). The Swiss Code has the much smaller period of ten years (section 661).

What we call easements the Romans called praedial servitudes. They were classed as rustic and urban according to the nature of the privileges to be exercised and not according to the location of the estate. The servitudes of right of way, of drawing water, etc., were rustic servitudes; the servitude of support (onoris ferendi), and of receiving drip (stillicide) were urban. Like easements they were all appurtenant; there had to be a servient and dominant tenement. Again like easements they were rather obligations to refrain than to do something, although some of the urban servitudes seem rather of the latter variety and would be classed in our terminology as covenants running with the land. However, some at least of the rustic servitudes were commons or profits, such as the servitude of burning lime or pasturing cattle. The number of these servitudes was really unlimited. Any group of privileges might be conferred on a neighbor or in his behalf any privilege may be surrendered, and the privileges could be as various as the uses to which land can be put.

14 Paul Sentences, 1, 17, 2, Dig. 41, 3, 4, 28 (29). This was true particularly after the lex Scribonia, concerning which we may quote the words of Cuq. Inst. Jur. des Rom. i, 92, La date n’est pas connue et la portée—est discutée. Cf. also, op. cit., ii, 289.
Some of the special rules as to easements, that a servitude is a negative claim, that a servitude cannot exist over one's own land, were taken over by the common law together with a great deal of Roman law terminology. The rule that a servitude cannot be merely burdensome without giving the dominant estate a corresponding advantage probably is present in the common law doctrine that when the purpose of the servitude is gone, the servitude itself disappears.

There was further a type of servitude that the Romans called personal, i.e., in gross, that had no estate to depend upon and could be applied to realty as to personalty. The most characteristic form of it was the *usufructus*, which has been defined as such a use of it which leaves the corpus intact, *salva rerum substantia*. That is not quite accurate since a good many uses will deplete or deteriorate the corpus and there was even a sort of spurious usufruct of fungible goods which is really a special kind of *mutuum*. The importance and frequency of usufruct have already been indicated. What gave it its particular value to Romans was that it enabled interests in the res itself to be created which the contracts of letting and hiring, of mandate, and the "real" contracts, were generally unable to effect. This was due to the fact that the usufruct conferred "possession" and these contracts did not, and it is to this term as mysterious and protean as its Norman congener seisin, that we must turn.

XIX

The ideas contained in the Roman term *possessio* are, to say the least, not clear. What the term meant at Roman law has been the subject of heated controversies. What the essentials of the concept are, whether in its historical development or in its present form, is an equally agitated topic. On the continent the names of Savigny, Ihering, Saleilles, Huber, are particularly associated with this discussion but in fact every jurist of note has at some time or other been compelled to address himself to the problem.

The usual and the simplest way of stating the characteristics of possession is to distinguish it from ownership. The one, we are told, is a relation of law, the other of fact. This distinction is expressly asserted in the Swiss Code, sections 641 and 919. Almost every discussion of the subject begins in that fashion.

Of course this cannot really be so at all. Possession is a relation of law quite as much as ownership and it would be proven to be such by the very fact that lawyers discuss it. Whether it is more of a fact than ownership depends solely on what our method is of deter-
mining fact. As far as law goes both possession and ownership are
either relations between persons in respect of things or they are
not relevant facts at all, and if they are such relations, it is difficult
to see how one can be more of a fact than the other.

Let us look at a number of cases in which the question arose. The usufructuary is stated to have possession but not the conductor, i.e., the tenant or hirer. The emphyteuta had possession; so, generally, the pledgee. The commodatary, the depositary, had no possession, nor, we must suppose, the mandatary or negotiorum gestor, who often had physical control of another's property. On the other hand, the tenant at will (precario rogans), the sequester (stakeholder or escrow-holder) did have possession, and certainly the bona fide holder of property which had not been stolen. However, even the mala fide occupant of an unclaimed inheritance was a possessor, although a thief was not, nor anyone who claimed through a thief, however undoubted his own good faith.

Now every one of the persons described certainly had the physical control of a res of which he was not dominus. The possession which is accorded some and denied others at Roman law was accordingly a technical term and taken in its strict sense meant something over and above physical control. Paul long ago found a formula to distinguish this technical and proper possessio from any other, by declaring that this type demanded a holding both animo and corpore. The possessor must think himself dominus. All other possession was merely "natural" or "corporal" possession and received the designation of "detention."\(^{16}\)

In its unqualified form, the distinction is obviously defective. The sequester, the pledgee, the usufructuary do not think of themselves as domini, but do possess, at least for some purposes. The bona fide purchaser of a stolen article does not possess although he has undoubtedly the animus required by Paul. The difficulties could be resolved only by fictions and constructions and presumptions and were so resolved by Savigny who gave the theory of Paul an almost universal currency. Ihering's criticisms of Savigny have been widely accepted in what may be called the upper strata of legal theoreticians but the apparently clear and simple cleavage made by Savigny is still tenaciously maintained by a certain number, even to a certain degree by M. Girard. To Ihering the necessary animus

\(^{16}\) A very recent discussion of the subject is to be found in G. Rotondi, Possessio quaee animo retinetur, Bull. dell' Inst. di Dir Rom. (1921) pp. 1-153, written before the author's untimely death in 1918.
is simply the consciousness of those particular acts which one is doing in connection with a res.

There are difficulties here as well. Somehow the control exercised by a slave or filius familias must be excluded from this, and again we must include the situation in which the thing we call our own and deem we possess, is as a matter of fact at some distance. All this requires mental constructions although they are less complicated and violent than those offered by Savigny. We can hardly do otherwise than accede to the statement of Buckland and Girard that the Roman theories on the subject were not completely coherent.¹⁷

As a matter of fact the two degrees of possession did not suffice the Romans. They had a kind of control called “in possessione esse,”¹⁸ which Ulpian said was vastly different from “possidere.” He had in mind the custody of one who takes charge of property in order to prevent loss. And again there was a possession pro possessore which might be predicated of a highway robber.¹⁹

The Romans, therefore, had exactly the same difficulties as those we encounter when we attempt to restrict the meaning of a term which has wide currency in non-legal contexts. Possidere was a common word in Latin and unqualified it frequently meant just what the lawyers wished it to mean only with the adjectives “natural” or “corporal” added to it. And again in ordinary usage, “possessio” often suggested something precise and limited, the quasi-ownership of public lands leased out to certain persons on long leases.²⁰

XX

The really important matter is quite a different thing. Why should Roman lawyers have attempted to force the word into this special meaning? Are these degrees of possession merely the result

¹⁷ Buckland, op. cit., p. 201; Girard, Man., p. 274.
¹⁸Dig. 41, 2, 10, 1.
¹⁹Dig. 5, 3, 11, 1.
²⁰In his discussion of Ihering, Buckland gives the following illustration (p. 200, n. 4) “I possess my carriage in the roadway in front of my house. I should not possess my watch lying in the same place.” What is the difference between the two kinds of “possession” involved? In both cases, the “possessor” deems himself the owner. Shall his ignorance of the fact that the watch is there and his knowledge that the carriage is there, be the basis of the distinction? That will hardly prove a practicable test. However, it is evident that we can say the following: almost any person taking the carriage and driving off in it would be a thief, subject to actions of furtum and those associated with it, subject to criminal action at the owner’s instance, subject to the interdicts concerning movables. In the case of the watch, on the other hand, all these claims would exist only on the precedent condition
of analyzing a concept or have they a function to perform? Obviously the second alternative is the right one and the function is in general perfectly apparent.

We have noted in the case of servitudes an acquisition by adverse possession. This played a relatively unimportant role in that connection but in the matter of acquiring general ownership, such acquisition, called *usucapio* in both the old and the later law, was of frequent occurrence. The importance of *usucapio* rested upon the distinction of *res mancipi* and *nec mancipi*, a distinction as fundamental as that between reality and personality at the common law. The informal grantee of a *res mancipi* was protected by the praetor but he could easily turn his equitable title into a legal one after the lapse of one year in the case of movables and two in the case of immovables. During this time he was, from the point of view of the *ius civile*, the possessor and by being the possessor he acquires the title, *possidendo usucapit*, says Gaius.\(^2\)

The extremely short period of prescription is as old as the Twelve Tables and made the effects of informality less serious than they would otherwise be. For *res nec mancipi*, which included such vitally important things as provincial land, wine and grain, an institution called prescription had been established apparently by imperial constitutions rather than by praetorian law. The periods were ten years *inter praesentis*, i.e. domiciled in the same province; twenty years, if they were not.\(^2\)

When the distinction between *res mancipi* and *nec mancipi* was finally abolished, *usucapio* and *prescription* were amalgamated, the period being three for movables and ten or twenty for immovables.

Striking and vital characteristics of both *usucapio* and prescription were that there must be good faith and a *iustus titulus* and that the thing must not be stolen property. This, it will be noticed, is a very marked difference between this institution at the Roman law and at the common law. Nor is the reason for the difference difficult to discover. Adverse possession at the common law seems to be primarily concerned in preventing the neglect of landed property of demand and refusal, or similar acts which would make a continued retention unlawful. The relation accordingly between the owner and other persons in respect of these two articles is different. In the former case it is made up of a complex of rights, etc., that is not identical with the complex in the latter case, but is very similar to it.

\(^2\) Gaius, Inst. 2, 41.

\(^2\) In a rescript of Septimius Severus of the year 199 A. D. the prescriptive period of twenty years is mentioned and is based upon imperial constitutions, not on praetorian law. This date is earlier than any Digest fragment mentioning the twenty year limit. Cf. Riccobono, *Fontes Iuris Anteist.* 1, p. 328.
by giving a certain premium to any one who would use it in the place of the negligent owner. At Roman law the institution grew out of an attempt to validate fully a merely equitable title. To claim such validation it was, of course, necessary to show equities in one's favor.28

Now if the possession which can become ownership by mere lapse of time is taken as typical, we can readily see the basis of Paul's statement. Such a possessor certainly has the animus dominantis, he regards himself as dominus. The class of bona fide possessors of property passing through a thief was of little importance. Land could not be stolen property and in small communities the holder of a stolen slave would rarely be bona fide. If therefore Paul's possession was this type of possession we can see why a tenant, a commodotary, a depositary did not have it. Plainly they could never lay claim in equity to a title superior to that of the source of their interest. Their holding adverse to the dominus could never be bona fide.

But what shall we say of the usufructuary, the emphyteuta, the pledgee, the sequester, who are all said to have possession? As a matter of fact in the case of the first three, possession in some texts is denied them though specifically granted in others. The point is that possession proper, the strict technical possession, was in fact, if not in terms, divided into two classes. There was the possession which by usucapion might become title, and the possession which could not. The possession of the usufructuary, the emphyteuta, the pledgee, the sequester, was not usucapion-possession.

What was the second kind? Its characteristic was that it gave the right to use the interdicts, that special form of action of which brief mention has already been made.

The effectiveness of interdictal procedure has been disputed. Its origin is equally in doubt. It is maintained by some that the interdicts were special forms of action delictual in their nature. Others, principally Pernice, have seen in them primarily measures of police intended for general security. It is certainly not impossible that both ideas contributed to their growth. The system may have been devised to secure for quasi-owners, viz., praetorian owners of res mancipi and particularly the long term lessees of state lands, the protection of which their lack of title deprived them at the civil

28 Gaius states (Dig. 41, 3, 1) that it was introduced bona publico not to prevent property from lying disused, but to prevent titles from being uncertain for too long a time.
procedure. But once established the interdicts were turned very early into a means of maintaining the proprietary status quo in all cases in which a judicial determination of ownership was available.

The possession that is ascribed to the pledgee, the usufructuary and the rest, was interdictal possession merely, the right to use the interdicts, or more correctly, the right to use two of them, those named *uti possidetis* and *utrubii*, from the opening words of their formulas.

Unfortunately for the validity of the distinction, a tenant or a depositary whose possession was *naturalis*, i.e. properly not possession at all, but merely detention, could use one of the interdicts, the *interdict unde vi*, if he had been forcibly dispossessed. More than that, a brigand whose tenure was violent as well as wrongful could use this latter interdict. A kind of interdictal possession was therefore to be asserted even of these groups.

Were they protected because possession is the usual badge of ownership or because possession is in itself a social good deserving of maintenance? We are again in the heart of the controversy but for our present purposes the various reasons proposed are immaterial. It is not too bold a statement that the attempt of making *possessio* a technical term of law with a specific content failed at the Roman law, whatever may have been its success in the modern civil law or at the common law. What we have is a series of relations which ranged from the almost complete legal capacities of a man holding a *res mancipi* without mancipation to the temporary and precarious tenure of a thief, in every one of which the powers, privileges and claims were somewhat different. If it served any useful purpose these relations might all be called possession. But the only meaning we can have when we apply this general term is to assert that in no one of these cases could the person entitled bring a special type of action known as vindication.

That there should be many classes of persons having physical control over a thing whose complex of privileges, powers and claims in respect of it are all different, is not in the least surprising. There were certainly many more classes than any we have so far enumerated and the nature of the situation and the character of the thing involved can generally be made the basis of a new classification, because they will generally modify the complex of rights and powers which the possessor has.

The result is precisely the same as in the case of dominium. The dominus of a slave has privileges notably different from the owner of an ox. Further such characteristic elements of dominium as the
power of transfer may be wholly or partially limited without depriving the owner of his designation. Restraints on the amount of gifts, the manner of making them, the persons who could receive them were quite general. A fiduciary or beneficiary who had title could make transfers only to a limited extent. Similar limitations existed against a prodigal who had been placed under wardship. That is to say, while large general groups existed in which the complex of rights were nearly identical, there were a great many smaller groups in which the number and kind of these rights were slightly different and in all of them dominium was said by law to be present.

XXI

The paterfamilias was mortal. What happened when he died? He had, at least potentially, every claim, privilege, power and immunity that a member of the Roman community could have. Where did these go on his death? The rules concerning such matters are certain to be extremely technical because they are likely to be the outgrowth of the special conditions in which the community developed. We have taken over into the common law in a mass a certain number of the Roman rules and a still larger number of Roman terms, but we have not taken what was the most striking element in this part of the Roman system, the idea of universal succession.

We need not trouble ourselves to consider whether a period of communal ownership lay behind the well-developed system of private property that we find in Rome in the earliest period of which we know. The paterfamilias both in theory and fact owned for himself a great many rights and claims and powers, owed many obligations and was subject to many liabilities. On his death they remained a unit and passed completely to some other persons or to several other persons jointly. But these persons were themselves owners of claims and powers, debtors of obligations. The new group coalesced completely with the old one, so that a solvent estate might become insolvent by being acquired by a hopelessly indebted heir or the acquisition of an insolvent estate might bankrupt a solvent heir.

But the unit was maintained. If there were several heirs they took jointly. The principle of Roman public law that consular imperium or tribunician potestas were indivisible units no matter how numerous the holders were, applied here. Each of two heirs did not take half the estate. Each took the whole inheritance. If either died it may be said that the other gained nothing, but merely
that a possible check on his free disposition of his property was removed.

Now, how were the heirs, the successors of the defunct paterfamilias, determined?

There were three stages in the history of the subject. First the ancient law, stated and to some degree perhaps established in the Twelve Tables. Secondly, the praetorian law and thirdly, the imperial reforms culminating in the radical reorganization of the whole matter by Justinian in the 118th Novel published in 543, ten years after the corpus proper was completed.

The basis of succession of the ancient law was the patria potestas. The unemancipated sons of the paterfamilias succeeded. Failing sons, the nearest agnate, i.e. the nearest of the male kinsmen who if the intermediate generations were alive, would be subject to the same patria potestas as the deceased, took the hereditas. This automatically excluded emancipated sons and their descendants and all related through females. Finally, the gentiles took, an indefinite group whose constitution was disputed and whose claims were rarely enforced.

The praetorian law made four classes, 1⁰, children, whether emancipated or not, 2⁰, legitimi, principally the agnates, but including among other additional groups parents of emancipated children and patrons of freed slaves, 3⁰, cognates, relations on the female side, 4⁰, husband or wife. Most of those changes had been made by the time of Cicero.

Finally by the 118th Novel the succession was as follows. First: descendants, without regard to sex or emancipation. Second: ascendants and brothers and sisters of the whole blood. Third: brothers and sisters of the half blood, and fourth: collaterals, and perhaps as a fifth class, husband or wife. In all cases, as at the common law, the nearest class excluded the more remote one and in general, if the co-heirs were in the same degree, they took per capita, otherwise per stirpes.

But the paterfamilias might appoint his successor, his heres or heredes. The rule of universal succession applied here as well. The heredes, even if a specific proportion was assigned to them, all took jointly. The specified proportion merely meant the particular share that would belong to him if he or others chose to divide the estate.

The appointment of the heir was made by a will, testamentum. It was in fact the chief purpose of the will. But in the will the testator might also give specific directions to the heir to give certain
pieces of property or some share less definitely ascertained to named persons. These directions were *legata*, legacies, and they constituted obligations of the strictest sort between the heres and the legatary.

Since the payment of the ordinary debts and the legacies might make the inheritance unprofitable, the heir was allowed by the *lex Falcidia* of 40 B. C. to deduct a quarter and to abate all legacies accordingly.

Toward the end of the Republic a large number of persons were excluded from taking under a will. Perhaps it was for their benefit that the custom arose of attempting to bind the heir's conscience to do what he could not be compelled to do by ordinary legacy. This was done either in the will itself or in a separate document and the institution was called *fideicommissum*. He might even be asked to transfer the entire inheritance to a third person. In a famous instance, Augustus decided that *fideicommissa*, as well as the codicils that embodied them were valid and legally enforceable. From that time on they were more and more assimilated to legacies, until Justinian finally abolished completely all remaining differences between the two.

At the common law, the making of a will of lands was a late privilege, but once granted it began to be frequently asserted that testamentary disposition must be unrestricted. At Roman law, testaments, as has already been seen, were drastically modified by law. Not only was there a large class of persons who could not take at all, not only was a certain amount set aside from the estate despite the legacies and *fideicommissa*, but a certain proportion, a *legitim*, was reserved for the family of the deceased. This *legitim* ran in favor of children and in certain circumstances in favor of brothers and sisters. It varied from one-quarter to one-half the estate after debts were paid. This was entirely apart from the inheritance tax, the *vicesima hereditatis*, a tax of 5 per cent established in 6 A. D.

**XXII**

In the preceding pages I have attempted briefly to review what seemed to me the most important institutions of the Roman legal system. For reasons given at the beginning, a general characterization is, I think, certain to be futile. One thing, however, can hardly be questioned, Roman law is one of the great achievements of the

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human mind, the elucidation of which, since the eleventh century has
worthily employed the energies of thousands of great men. The
literature of the subject in German, French and Italian alone is
almost interminable.

To this literature men of English speech have made a relatively
slight contribution. Adequate study of Roman law for those who
command only English is extremely difficult. Fortunately it can be
undertaken in some measure with the aid of Mr. Buckland's, A Text
Book in Roman Law, published in 1921, alike admirable for its
originality, its learning and its arrangement. Earlier manuals of
Roman law, Mr. Morey's, for example, and the rest, are hopelessly
 antiquated, representing a point of view almost pre-Savigny.

An exception must be made in favor of W. A. Hunter's Roman
Law of which the second edition appeared in 1885. The mass of
material is astounding. Its arrangement is complicated to an extent
that makes its usefulness very questionable. Gibbon's famous chap-
ter formed an extraordinary feat for the time in which it was written
but, even with Bury's notes, is scarcely a reliable method of securing
a general orientation on the subject at the present time.

Of manuals in other languages, there is first of all the completely
indispensable work of Girard, Manuel de Droit Romain, now in its
sixth edition. An English translation is still one of the great desid-
erata in the field. Further—much briefer and much more of an
introductory manual—is Sohm's Institutionen des Römischen Priva-
trechts, of which the seventeenth edition was completely revised by
Mitteis, and published in 1923 after Mitteis' death by Leopold
Wenger. An excellent English translation by Ledlie (from the 8th
and 9th German editions) now in its third edition, is widely used.

But for those who wish to deal with the matters thoroughly a
knowledge of the sources, principally in Latin, is indispensable. A
brief statement of them follows:

1. The Corpus Juris Civilis, consisting of the Institutes, The
Digest, the Code and the Novels. The Institutes have often been
translated into English. Of the Digest, the first fifteen of the fifty
books were translated by Mr. C. H. Monroe (Cambridge University
Press, Volumes I and II, 1909) and the project of a complete trans-
lation was interrupted by his untimely death. There are a few
translations with notes of other books. No translation of the Code
or Novels into English has ever been made.25

25 The Corpus Iuris Civilis continued to be the law of the Empire even
after the Western half was completely separated politically from the Eastern.
2. The Institutes of Gaius, almost completely recovered in a single manuscript. The best known English version with an elaborate commentary is that of Mr. Poste. A short summary of Gaius was found at Autun, and has materially assisted our understanding of him.

3. The fragments of other Roman lawyers not contained in the Corpus. These, consisting of quotations in other Latin writers, and larger parts of law treatises, some embodied in later Codes and some found in manuscript form, are most readily found in *Fragmenta Anteiiustiniana*, by Huschke (5th edition) and in Volume II of Riccobono, *Fontes Iuris Anteiiustiniani*.

4. Latin and Greek inscriptions of various kinds. These, including statutes, documents, judgments, in their original form, dating from the third century B. C. till after Justinian, are with the Institutes of Gaius chiefly responsible for the profound change which the nineteenth century made in our methods of studying Roman law. They are collected in Bruns, *Fontes Iuris Romani*, Girard, *Textes* and Riccobono, *Fontes Iuris Anteiiustiniani*, Volume I.

5. The papyri, mostly Greek and nearly all from Egypt, which are constantly adding, as the inscriptions did, to our detailed knowledge of the law and correcting our misconceptions of it.

6. The works of non-legal Roman and Greek writers gives a great deal of additional material. Some of them are ancient lexica like that of Festus, others are by writers with a particular antiquarian bent, like Varro and Aulus Gellius. But most of them have other purposes in view than legal exposition. Cicero’s writings, the Republic, the Laws, and chiefly his speeches are of prime importance. Three of them, the *pro Quinctio*, the *pro Caecina*, the *pro Tullio* are elaborate and extensive pleas on matters of technical private law. The excerpts which have legal importance have often been collected separately. That is particularly true of the comic poets Plautus and Terence whose casual references are very important because of the light they throw on the conditions of the second century B. C., a period that preceded by a century the oldest fragment of the Digest.

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In the ninth and tenth centuries a Greek revision was made, known to us as the Basilica, to which we must often look for elucidation of textual difficulties. A Greek paraphrase of the Institutes, ascribed to Theophilus, the collaborator of Tribonian, and prepared shortly after the Corpus, performs a similar service.