Section 1. PROPERTY AND SOCIETY

A. PRIMARY SOURCES

1. Servitudes

a. D.8.1.15
(C.H. Monro trans., vol. 2, p. 67)

POMPONIUS, On Sabinus, book 33: Wherever a [supposed] servitude cannot belong to any person or attach to any estate, then, inasmuch as no neighbour has any interest therein, it has no valid existence; take, for example, a servitude to the effect that you shall not walk over your own estate or be upon it. Hence, if you grant me a servitude to the effect that you shall have no right to the use and produce of your own estate, this is inoperative; it would be a different thing if it were to the effect that you should have no right to take water on your own estate in order to diminish my supply. It is not of the nature of servitudes that a man should [have to] do anything; for instance, remove shrubs so as to afford a more pleasing view, or, with the same object, paint something on his own ground; but only that he should submit to something being done or abstain from doing something.

b. Lex Coloniae Genitivae Juliae [Urso, Spain] (B.C. 44), cc. 72–79
(H.C. Johnson trans., pp. 99–100)
[footnotes omitted, but footnote numbers retained]

72. Respecting all money presented or brought to the sacred temples under the category of religious offerings and respecting any portion of such money as remains from the sacrifices performed in accordance with this law in honor of the god or the goddess, to whom any such temple belongs: no person by act, or order, or intercession shall prevent such surplus from being expended in that temple to which the said money is presented or brought under the category of religious offerings, nor shall any person expend the said money or cause the said money to be expended for any other object.

73. No person within the boundaries of the town or the colony or within the area marked round by the plow shall introduce a dead person, or bury, or cremate the same therein, or build therein a monument to a dead person. If any person acts in contravention of this regulation he shall be condemned to pay to the colonists of the colony Genetiva Julia 5,000 sesterces and he shall be sued and prosecuted by any person at will for that amount. Any monument so built a duumvir or an aedile shall cause to be demolished and if, in contravention of this law, a dead person has been introduced and placed therein, they shall make the proper expiation.

74. No person shall construct a new crematorium, where no dead person has been cremated, nearer to the town than half a mile. Any person acting in contravention of this regulation shall be condemned to pay to the colonists of the colony Genetiva Julia 5,000 sesterces and shall be sued and prosecuted by any person at will for that amount in accordance with this law.

75. No person shall unroof or demolish or dismantle any building in the town of the colony Julia, unless he furnishes sureties, at the discretion of the duumvirs, that he has the intention of rebuilding the same, or unless the decurions allow such act by decree, provided that not less than fifty are present when the said matter is discussed. If any person acts in contravention of this regulation he shall be condemned to pay to the colonists of the colony Genetiva Julia the value of the said building and shall be sued and prosecuted by any person at will for that amount in accordance with this law.
76. No person shall possess within the town of the colony Julia pottery works or a tile factory of larger size than to produce 300 tiles per day. 4 If any person possesses such works or factory, the said building and ground shall become the public property of the colony Julia, and any person at will shall have the right to claim such building and any magistrate charged with jurisdiction in the colony Genetiva Julia shall pay without malicious deception into the public funds a sum of money equivalent to the value of the same. 4a

77. If any duumvir or aedile desires in the public interest to make, to dig, to alter, to build, or to pave any roads, dikes, or sewers within the boundaries belonging to the colony Julia, it shall be lawful for the said persons to do the same, provided that no injury is done to private persons.

78. Respecting public roads and footpaths within the boundaries assigned to the colony: all such thoroughfares, roads, and footpaths that exist or shall exist or have existed in the said territories shall be public property.

79. Respecting all rivers, streams, fountains, lakes, springs, ponds, or marshes within the territory divided among the colonists of this colony: the holders and possessors of such land shall have the same rights of access, carriage, and drawing of water in respect to the said streams, fountains, lakes, springs, ponds, and marshes, as belonged to former holders and possessors. In like manner the persons who own or possess the said land shall have legal right of way to the said waters.

c. D.8.1.1
(C.H. Monro trans., vol. 2, p. 64)

MARCIANUS, Rules, book 3: Servitudes are either attached to persons, as in the case usus and usufruct, or to things, as in the case of rustic and urban estates.

d. D.8.4.1
(id., p. 90)

ULPIAN, Institutes, book 2: Buildings are called urban praedia, and it may be observed that, even where buildings are part of a country-house, it is still possible to create servitudes of urban praedia. 1. The reason why these servitudes are said to be of praedia (estates, tenements), is that they cannot be created without praedia, as no one can acquire a servitude over urban or rustic praedia, unless he has got a praedium himself.

e. D.18.1.47–49
(S.P. Scott trans., vol. 5, p. 17) 47.

47. ULPIAN, On Sabinus, book 29: If the servitude of a water-course is attached to a field, the right to take the water passes to the purchaser, even though nothing had been said with reference to it; just as the pipes through which the water is conducted also do,

48. PAULUS, On Sabinus, book 5: Even though they are outside the house.

49. ULPIAN, On Sabinus, book 29: And even though the right to take the water does not follow for the reason that it has been lost; still, the pipes and the ditches, so long as they are connected, belong to the purchaser as a part of the premises. This Pomponius also stated in the Tenth Book.

f. Gaius, Institutes 2.14, 17, 29–30
(see above pp. Error! Bookmark not defined., Error! Bookmark not defined., Error! Bookmark not defined.)

g. D.7.1.56
(C.H. Munro trans., vol. 2, pp. 25–6)

GAIUS, On the provincial Edict, book 17: It has been made a question whether an action in respect of a usufruct ought to be allowed to a municipal body; the point being that there seemed to be a danger of the usufruct becoming perpetual, as, it would not be lost by death, and hardly by capitis diminutio, and the consequence would be that the ownership would be valueless in consequence of the usufruct being always
outstanding. However the law now is that an action must be allowed. This leads to a further doubt, viz. as to how long the municipality is to be protected in the enjoyment of the usufruct; but it is held that it will be protected for a hundred years, because that is the utmost extent of the life of a man, however long he lives.

h. D.18.1.81.1
(S.P. Scott trans., vol. 5, pp. 24–25)

SCAEVOLA, Digest, book 7: 1. Lucius Titius promised to furnish a hundred thousand measures of grain annually from his own land to that of Gaius Seius. Lucius Titius afterwards sold his land, and inserted the following words in the contract: “The land of Lucius Titius is sold today, and is to be held subject to the same rights and the same conditions as it is now held by the vendor.” I ask whether the purchaser is responsible to Gaius Seius for the delivery of the grain. The answer was that, according to the facts stated, the purchaser is not bound to furnish it.

i. D.33.1.12
(id., vol. 7, pp. 160–61)

PAULUS, Opinions, book 13: Gaius Seius devised to Maevius and Seia certain tracts of land in different localities, and provided as follows, “I wish three hundred thousand reeds to be furnished annually by the Potician to the Lutatian Estate, together with a thousand pounds of well-cleaned osier, also, every year.”

I ask whether this legacy will be extinguished by the death of the legatee. Paulus answered that a servitude, either personal or real, does not seem to have been created in accordance with law; but that an action on the ground of a trust will lie in favor of the party to whom the Lutatian Estate was devised. Therefore, as the legacy was to be paid annually, it is considered to terminate with the death of the legatee.

j. Lex Julia Municipalis, cc. 7–21 (B.C. 44)
[notes omitted, but footnote numbers retained] (H. C. Johnson trans. pp. 94–95)

7. Each owner of property fronting on the streets of Rome or on streets within a mile of Rome, on which there is continuous settlement now or in the future, shall keep such portion of the street in repair at the discretion of that aedile who has jurisdiction in this quarter of the city by this law. The aforesaid aedile, at his discretion, shall provide that each owner of property fronting on the street shall keep in repair that portion of the street which by this law it is proper1 for him to maintain and he shall provide that no water shall stand there to prevent the public from convenient passage.

8. The curule and the plebeian aediles now in office and those who shall be appointed or elected or who shall enter upon this office after the passage of this law shall agree among themselves or shall cast lots, within the next five days after they have been designated to or have entered upon this office, to determine in which part of the city each shall have charge of the repair and the paving of the public streets in Rome or within one mile of Rome, and he shall have the oversight of such work. Whatever part of the city becomes the responsibility of any aedile by this law, the said aedile shall have the oversight of repairing and maintaining the streets which are in that part as is proper1 by this law.

9. Whatever street lies between a temple, a public building, or a public area on one side and a private building on the other, the aedile who is in charge of this region of the city shall lease the maintenance of half of the said street, where the temple or the public building or the public area is situated.

10. If anyone, who in accordance with this law properly1 should maintain the public street in front of his property, does not maintain it as he properly1 should in the judgment of the aedile concerned, the latter at his discretion shall lease the contract for its maintenance. For at least ten days before he awards the contract, he shall post in front of his tribunal in the Forum the name of the street to be maintained, the day on which the contract shall be given, and the names of the property owners on that portion of the street. To the aforesaid owners or their agents at their homes he shall give notice of his intention to lease the
contract for the aforesaid street and of the day on which the contract shall be given. He shall make this contract publicly in the Forum through the urban quaestor or whoever is in charge of the treasury. The urban quaestor or whoever is in charge of the treasury shall provide that, in the public records of money due, entry shall be made of that sum for which the contract was awarded in the name of the person or persons, before whose property the street runs, in proportion to the length and the breadth of the street in front of each property. He shall assess this amount, without malicious deception, on the owner or owners, for the benefit of the person who contracts for the maintenance of the aforesaid street. If the owner on whom this assessment has been imposed, or his agent, does not pay this money or give security therefor to the contractor within the next thirty days of his notification of the assessment, he shall be obliged to pay the amount assessed and a penalty of half of the amount to the contractor. In a suit for this by money the magistrate, on application, shall appoint a judex and grant an action in the same way as it is proper for a judex to be appointed and an action to be granted in a suit for the recovery of a money loan.

11. If it is proper for a contract for street maintenance to be let in accordance with this law, the aedile who properly should do so shall award the contract for the maintenance of this street through the urban quaestor or whoever is in charge of the treasury, with the proviso that the maintenance of this street shall be subject to the approval of the aedile responsible for the giving of the contract. The urban quaestor or whoever is in charge of the treasury shall provide that the amount of the contract, for which each street is so leased, shall be awarded and assigned to the contractor or to his heir, to whom it is proper it should be awarded in accordance with the terms of the contract.

12. It is not the intent of this law to prevent the aediles, the quattuorvirs in charge of cleaning the city streets, and the duumvirs in charge of cleaning the streets outside the city walls within a mile of Rome, whoever are appointed hereafter, from caring for the street-cleaning or from having jurisdiction in the matter as is proper by laws or plebiscites or decrees of the Senate.

13. Wherever a building abuts on an alleyway, the owner shall keep this alleyway properly paved along the whole face of the building with whole, durable, well joined paving blocks to the satisfaction of the aedile who has jurisdiction over roads in that district in accordance with this law.

14. After January 1 next no one shall drive a wagon along the streets of Rome or along those streets in the suburbs where there is continuous housing after sunrise or before the tenth hour of the day, except whatever will be proper for the transportation and the importation of material for building temples of the immortal gods, or for public works, or for removing from the city rubbish from those buildings for whose demolition public contracts have been let. For these purposes permission shall be granted by the this law to specified persons to drive wagons for the reasons stated.

15. Whenever it is proper for the vestal virgins, the king of the sacrifices, or the flamens to ride in the city for the purpose of official sacrifices of the Roman people; whatever wagons are proper for a triumphal procession when any one triumphs; whatever wagons are proper for public games within Rome or within one mile of Rome or for the procession held at the time of the games in the Circus Maximus, it is not the intent of this law to prevent the use of such wagons during the day within the city for these occasions and at these times.

16. It is not the intent of this law to prevent ox wagons or donkey wagons that have been driven into the city by night from going out empty or from carrying out dung from within the city of Rome or within one mile of the city after sunrise until the tenth hour of the day.

17. Respecting public areas and public arcades in Rome or within a mile of Rome, which are by law under the jurisdiction of the aediles or of those magistrates in charge of cleaning the streets and the public areas in Rome or within a mile of Rome, no one shall have any structure built or erected in these areas or arcades, nor shall anyone acquire possession in any way of these areas or arcades, nor shall he enclose or bar off any part of them, to prevent free use and access of such areas or arcades by the people, except for such persons to whom permission has been granted by statutes or plebiscites or decrees of the Senate.
18. When the censor or any other magistrate in accordance with the terms of the contract proclaims that certain areas are to be set aside or to be used to yield public revenue or for the production of tribute, and when provision is made in the terms of the contract for those who lease the reservation and the use of such areas that they may use and enjoy them, or that these areas shall be guarded by the lessees, it is not the intent of this law to prevent these lessees from the use and the enjoyment of these areas, as shall be allowed each one to do so without malicious intent in accordance with the terms of the contract.

19. If any one provides games in Rome or within one mile of Rome it is not the intent of this law to prevent him from building or erecting in public places a stage or a platform or other structures that are required for such games, or from using public areas on those days on which he gives the games.

20. It is not the intent of this law to prevent clerks and copyists attending magistrates from using public areas for purposes of such attendance, wherever the magistrate commands their services.

21. If the censors assign certain areas to public slaves for dwelling or for use it is not the intent of this law to prevent such use of these areas.

k. D.8.5.6
(C.H. Munro trans., vol. 2, pp. 99–100)

ULPIAN, On the Edict, book 17: And if it happen that the intervening owner, seeing that he is under no servitude; raises the height of his buildings, the result being that I cannot now be held to obstruct your light if I build myself, it is in vain for you to contend that I have no right to keep up such building without your consent; at the same time, if within the prescribed period, the neighbour takes his building down again, your right of action (vindicatio) will be resuscitated. 1. It should be understood that in these servitudes the person who is in possession of the easement still be plaintiff. Now, if it so happen that I have not raised the height of any building on my land, then the other party is in possession of the easement, as, no innovation being yet made, he has got possession, and, if I proceed to build, he can resist me by a civil action or by an interdict quod vi et clam, or he can stop me equally well by the throw of a pebble. But if I build without any interference on his part, then I myself will become the possessor.

2. Furthermore, a right of action exists in respect of a servitude which was imposed with a view to support (oneris ferendi causa), the object being to make the servient owner keep up the support and also keep his building in repair in such manner and form as was defined at the time when the servitude was created. Gallus, no doubt, is of opinion that no servitude can be created to the effect that a man shall be compelled to do anything, but only that he shall not prevent me from doing something; in fact, in every servitude, the execution of repairs is the business of the person who claims the servitude, not of the person whose property is subject thereto. However, the view of Servius has prevailed, to the effect that he has a right to compel the other party to repair his wall so as to support his burden: though what Labeo says is that this servitude binds not the person, but the property, and he makes it come to this that the owner is free to abandon the property. 3. And in fact the action is in rem and not in personam, and is open only to the owner of the [dominant] house and against only the [other] owner, agreeably to the statement of claim in servitudes in general. 4. If a [dominant] house belongs to several co-owners, such is the question discussed by Papinianus (Questions 3), can proceedings be taken in respect of the servitude in its entirety? To this his answer is that the co-owners can proceed each separately in respect of the whole, as in the case of other servitudes, setting aside usufruct. But this, he says, is not the right answer to give where the house which has to support a burden which a neighbour lays upon it belongs to several co-owners. 5. The kind of repair that can be sued for in this action depends on the question what kind of repair was mentioned when the servitude was created: the arrangement may have been that the party should repair with rectangular blocks or with built up stones, or any kind of work that was mentioned in the terms of creation. 6. Profits are taken into account in the action, in short the advantage which the plaintiff would have gained if the neighbour [i.e. the defendant] had furnished support to the weight imposed by the plaintiff’s house. 7. The servient owner is at liberty to make the wall better than was required by the terms
in which the servitude was created; but, if he proceeds to make it worse, he can be stopped, either, by means of this action or by “notification of novel structure.”

l. D.8.3.1
(id, pp. 79–80)

ULPIAN, Institutes, book 2: The following are servitudes of rustic estates *iter, actus, via, aquae ductus* (footpath, drift-way, roadway, water-course). *Iter* is the right of passing or walking for a man, but not of driving a beast of draught as well; *actus* is the right of driving a beast of draught or a vehicle; so that one who has [only] an *iter* has no *actus*, and one who has an *actus* has an *iter* too, even without a beast of draught. *Via* is the right of passing or driving or walking; *ria* in fact includes both *iter* and *actus*. *Aqua ductus* is the right to convey water over another person’s ground. 1. Among rustic servitudes must be reckoned the right to draw water, the light to take cattle to water, the right to pasture, the right to burn lime or to dig for sand. 2. There is no doubt that the delivery of servitudes and acquiescence in them will constitute sufficient ground for the aid of the praetor.

m. Justinian, Institutes bk. 2, tit. 3
(see above p. Error! Bookmark not defined.)

n. D.8.2.2
(C.H. Munro, trans., vol. 2, p. 68)

GAIUS, On the provincial Edict, book 7: Rights attached to urban estates are such as follows: that of raising a building higher and stopping the neighbour’s lights, that or preventing such raising, also that or discharging eavesdrip on to the roof or the vacant ground belonging to a neighbour, or the servitude of not being free to discharge it; also the right of letting beams into the neighbour’s wall, lastly that of having a projecting house or other structure and other similar rights.

o. D.8.3.2
(id., p. 80)

NERATIUS, Rules, book 4: Among servitudes or rustic estates are the right to raise the height or a building and thereby to obscure the neighbour’s residence, or to maintain a drain under the house or residence or a neighbour, or to maintain projecting eaves. 1. The right to have a water-course or to draw water to be conveyed by a water-course across the same place can perfectly well be granted to a number or persons; again, the grant may be that the water-course should be used on different days or at different hours; and, if the water-course or the means of drawing water should give a large enough supply, the right may even be granted to a number or persons to take the water across the same place, and that on the same days or at the same hours.

p. D.50.16.198
(S.P. Scott trans., vol. II, p. 287)

ULPIAN, On all Tribunals, book 2: We understand by the term “urban estates” not only all buildings which are situated in towns, but also inns, and such houses as are used for trade in the suburbs, and in villages, as well as palaces intended only for pleasure; but the materials, and not the location, are what constitute an urban estate. Hence, if there are any gardens attached to these buildings, it must be said that they are included under the term “urban estates.” It is clear that if these gardens afford more revenue than they do pleasure, that is to say, if they contain vines or olive-trees, they should not be designated “urban estates.”

q. D.33.10.12
(id., vol. 7, p. 227)

LABEO, Possible Views Epitomized by Paul, book 4: Just as urban and rustic slaves are distinguished, not by the place in which they are, but by the nature of their employment, so, likewise, urban provisions and household goods should be classified according to their use in a city, and not from the mere fact of
their being situated there, or elsewhere; and it makes a great deal of difference whether provisions and household goods which are in the city are bequeathed, or where they are bequeathed as belonging to the city.

r. D.8.3.5–6
(C.H. Munro trans., vol. 2, p. 81–2)

5. ULPIAN, On the Edict, book 17: Consequently, in his opinion, such a servitude can be recovered by a vindicatio. 1. Neratius says in his books on passages from Plautius that there can be no such thing as a right to draw water, or take cattle to water, or to win chalk or burn lime on another man’s ground, except where the party has an adjoining estate, and this he says was the doctrine of Proculus and Atlicinus. At the same time he adds that, however true it may be that there can be a servitude created of burning lime and winning chalk, still it cannot be given for a greater quantity than is required for the purposes of the dominant estate;

6. PAUL, On Plautius, book 15: it might exist, for instance, where a man had a pottery at which earthenware vessels were made which served for carrying off the produce of the same land (just as on some estates it is the practice for wine to be dispatched in jars, or for vats to be made), or one at which bricks were manufactured for building a country-house 2 If however the pottery were worked to produce vessels for sale, this would amount to a usufruct. 1. Again, a right to bum lime or to take stones or dig for sand for the sake of building something which is [to be] on the estate falls a long way short of a usufruct, and does a right to take coppice in order that there shall be no want of props for vines. How then if the rights described improve the prospective value of all estate? 2. There can be no doubt that they may be the subject of a servitude; Maecianus himself is so much in favour of this view that he holds that a servitude can be established to the effect that I shall have a legal right to set up a hut on your land, that is to say, assuming that I already have a servitude of pasture there or of watering cattle, so as to enable me to have a place of shelter if a storm comes on.

2 del. vel after tegulae. Cf. M.

s. D.8.1.8
(id., p. 65.)

PAULUS, On Plautius, book 15: A servitude cannot be created to the effect that a man shall be at liberty to pluck apples, or to walk about, or to dine on another man’s ground 1. If your land serves me, then if I come to be owner of a share in your land or you of a share in mine, the servitude is in both cases retained as to a part [per partes], though it could not have been originally acquired as to a part.

t. Vatican Fragments c. 45
(Baviera ed., FIRA, vol. 2; p. 473; CD trans.)

PAUL, Handbooks, book 2 (of 3): Although a usufruct of land is not res mancipi, nonetheless a woman cannot alienate without the authority of her tutor, since she cannot do it other than by ceding in iure and in iure cessio, cannot be done without the authority of the tutor. The same [is true] for praedial urban servitudes.

u. D.41.3.4
(S.P. Scott trans., vol. 9, pp. 198–201)

PAULUS, On the Edict, book 54: In the next place, we must speak of usucaption; and, in doing so, we must proceed in regular order, and examine who can acquire property by usucaption, what property can be acquired in this manner, and what time is necessary. 1. The head of a household can acquire by usucaption; a son under paternal control can also do so; and this is especially the case where, as a soldier, he obtains by usucaption property acquired during military service. 2. A ward can acquire property by usucaption if he takes possession of it with the consent of his guardian. If he takes possession without the consent of his guardian, but still has the intention of doing so, we say that he can acquire the property by usucaption. 3. An insane person, who takes possession before his insanity appears, acquires the property
by usucaption; but such a person can only acquire it in this manner if he has possession by a title through which usucaption may result. 4. A slave cannot hold possession as an heir. 5. If the crops, the children of slaves, and the increase of flocks did not belong to the deceased, they can be acquired by usucaption. 6. The Atinian Law provides that stolen property cannot be acquired by usucaption, unless it is restored to the control of the person from whom it was stolen; and this must be understood to mean that it must be restored to the owner, and not to him from whom it was secretly taken. Therefore, if property is stolen from a creditor to whom it was lent or pledged, it should be returned to the owner. 7. Labeo also says that, if the peculium of my slave is stolen without my knowledge, and he afterwards recovers it, it will be held to have been restored to my control. It is more accurate to say, provided I was aware that the property had been returned to me. For it is not sufficient for the slave merely to recover the property which he had lost without my knowledge, but I must also have intended it to form part of his peculium, for if I did not wish this to be done, it will then be necessary for me to obtain actual control of it. 8. Hence, if my slave steals anything from me, and afterwards returns the article to its place, it can be acquired by usucaption as having been restored to my control, just as if I did not know that it had been stolen; for if I did know it, we require that I should be aware that it had been returned to me. 9. Moreover, if the slave should retain as part of his peculium the same property which he stole, it will not be considered to have been returned to me (as is stated by Pomponius), unless I have possession of it in the same way that I did before it was stolen; or if, when I learned that it had been taken, I consented that the slave should include it in his peculium. 10. Labeo says that if I deposit any property with you, and you sell it for the sake of gain, and then, having repented, you repurchase it, and retain it in the same condition in which it formerly was, whether I am ignorant or aware of the transaction, it will be considered to have been restored to my control, according to the opinion of Proculus, which is correct. 11. Where the property of a ward is stolen, it must be held to be sufficient if his guardian was aware that it had been returned to the house of the ward. In the case of an insane person, it will be sufficient if his curators know that the property has been returned. 12. Property must be considered to have been restored to the control of the owner when he recovers possession of it in such a way that he cannot be deprived of it. This must be done just as if the property was his; for if I purchase an article, not knowing that it has been stolen from me, it will not be held to have been restored to my control. 13. Even if I should bring suit to recover property which has been stolen from me, and I accept payment "Of the amount at which it was appraised in court, it can be acquired by usucaption, even though I did not obtain actual possession of it. 14. The same rule must be said to apply even if the stolen property has been delivered to another with my consent. 15. An heir who succeeds to the rights of the deceased cannot acquire by usucaption a female slave whose mother had been stolen, and was found among the property of the deceased, provided the latter was not aware of the fact, if she conceived and brought forth the child while in his possession. 16. If my slave steals a female slave and gives her to me in return for his freedom, the question arises whether I can acquire by usucaption the child of said female slave who conceived while in my possession. Sabinus and Cassius do not think that I can, because the illegal possession which is obtained by the slave would prejudice his master; and this is correct. 17. If, however, anyone gives me a female slave who has been stolen, in order to induce me to manumit my slave, and the female slave conceives and has a child while in my possession, I cannot acquire that child by usucaption. The same rule will also apply if anyone gives me the said female slave in exchange, or by way of payment, or as a present. 18. If the purchaser ascertains before she has the child that the female slave belongs to another, we say that he cannot acquire the child by usucaption, but he can do so if he was not aware of this. If, however, he should learn that she belongs to someone else, when he had already begun to acquire the child by usucaption; we must take into consideration the beginning of the usucaption, as has been decided in the case of property that has been purchased. 19. If stolen sheep have been sheared while in possession of the thief, the wool cannot be acquired by usucaption. The rule is otherwise, however, in the case of a bona fide purchaser, as there is no need of usucaption, since the wool is a profit, the right to which immediately vests in the purchaser. The same rule can be said to apply to lambs, if they have been disposed of. This is true. 20. If you make a garment of stolen wool, the better opinion is that we should consider the original material, and therefore the garment is stolen property. 21. If a debtor steals anything given by him in pledge, and sells it, Cassius
says that it can be acquired by usucaption, because it is considered to have come under the control of the owner who pledged it, although an action for theft can be brought against him. I think that this opinion is perfectly correct. 22. If you forcibly deprive me of the possession of land, and you yourself do not take possession, but Titius, finding it unoccupied, does he can acquire it by usucaption through lapse of time, for although it is true that an interdict on the ground of violence will lie, because I have been forcibly ejected; still, it is not true that Titius obtained possession by violence. 23. But if you should eject me from land which I possess in bad faith, and sell it, it cannot be acquired by usucaption, for while it is true that possession has been obtained by force, this has not been done by the owner. 24. The same rule must be said to apply to the case of one who ejected a person having possession as the heir, although he knew that the land formed part of an estate. 25. If one man should knowingly eject another who is in bona fide possession of land belonging to someone else, he cannot obtain it by usucaption, because he forcibly obtained possession. 26. Cassius says that if the owner of land forcibly ejects the party in possession, the land will not be considered to have again been brought under his control, as he who was ejected can recover possession of it by means of an interdict based on violence. 27. If I have a right of way through your land, and you forcibly prevent me from using it, I will lose the right of way by not making use of it for a long time, because an incorporeal right is not considered susceptible of possession; and no one can be said to be deprived of a right of way, that is to say, of a mere servitude, in this manner. 28. Likewise, if you take possession of land which is vacant, and afterwards prevent the owner from entering upon the same, you will not be considered to have taken forcible possession of the property. 29. It is true that a release of a servitude can be acquired by usucaption, because the Scribonian Law, which established a servitude, prohibited the usucaption of one; but it does not grant a release if the servitude has already been extinguished. Hence, if I owe you a servitude, for instance, that which prevents me from building my house any higher, and I have kept it built higher for the prescribed time, the servitude will be extinguished.

v. D.8.2.26
(C.H. Munro trans., vol. 2)

Paulus, On Sabinus, book 15: In a case of common property it is not open to either owner, in virtue of a servitude, to construct anything without the consent of the other or to prevent the other from constructing anything; as no one can have a servitude over his own property. Accordingly, seeing the endless contests that might arise, it generally comes to a partition. However, by means of the action communi dimundo, one part-owner can prevent works being executed by the other or procure that the other shall remove any work that he has executed already, provided such removal is advisable in the joint interest of both.

2. Locatio Conductio

[Beginning with Subsection i, the materials are derived from B. W. Frier, Landlords and Tenants in Imperial Rome. They are arranged in the order in which Frier presents, where they are designed to support an argument that there was indeed a Roman law of urban lease.]

a. D.19.2.19.7
(C.H. Monro trans. 1891) p.28

19. Ulpian, On the edict, book 32: [...] 7. A shipmaster engages to carry a woman by ship, and in the course of the voyage the woman is delivered of a child; it is clear that nothing need be paid for the child, as carrying it is no great business, and the child makes no use of the appliances provided for passengers.

1 The source of these initial texts is unclear to me, probably Schulz.
b. D.43.16.1.22
(S.P. Scott trans. 1932) vol. 9, p. 310

ULPIAN, *On the edict*, book 59: […] 22. An owner is considered to have possession of property which is held by his slave, his agent, or his tenant. Therefore, if any of these is forcibly deprived of possession, he himself is also considered to be dispossessed, even if he did not know that those by whom he had possession have been ejected. Hence, if anyone else, by whom I held possession, should be ejected, no one can entertain any doubt that I will be entitled to the benefit of the interdict.

c. D.19.2.25
(C.H. Monro trans. 1891) pp. 35–39

25. GAIUS, *On the provincial edict*, book 10: If the payment to be made for a locatio is agreed to be of such amount as shall be determined by a third party, not specified, it is held there is no locatio at all: if however it is to be for such value as shall be awarded by Titius, it is a conditional locatio, viz. on these terms, that if Titius settles what the payment is to be, then it becomes a final arrangement, so that the money must be paid over according to the award, and the contract will be regarded as fully made: but if the referee is unable or unwilling to determine the sum, then there is no contract of lease at all for want of fixed terms as to payment. 1. A man who has let a farm, or let chambers, if for any reason he should afterwards sell the property, is bound to secure that the farmer or lodger shall be able to continue to occupy on the same terms, as if the tenant should be interfered with by the new owner, he will have an action on the contract against the original lessor. 2. If a room is let and the neighbour builds out the light, the law is that the lessor is liable to the tenant; there is certainly no doubt at all that it is open to the tenant in this and the preceding case to consider the contract at an end, and if he should be sued for rent he has a right to set off damages. The same holds if doors and windows are in a thoroughly bad state of repair, and the lessor refuses to put them into a proper condition. 3. A conductor is bound to carry out the terms of his contract in every respect, and above all things a farmer is bound to take care that he performs the regular agricultural operations at the proper time of year, so as not to damage the land by unseasonable cultivation. Besides this he must look after the farm-buildings, and take care to keep them in good repair. 4. It is reckoned a case of negligence on his part if he should fall out with his neighbour and the latter should in consequence cut down his trees out of spite. 5. Should he cut them down himself, he is not only liable on his contract, but on the *lex Aquilia* and also on the Twelve Tables for trees cut by stealth, lastly, on the interdict *quod vi aut clam*: however the judge of the action on the contract is bound to see that the landlord who brings that action shall confine himself to it, even without the defendant raising the point. 6. A lessee ought not to suffer by *vis major, ðeouy ß%a*, as the Greeks call it, if his crops are damaged beyond what he can reasonably be expected to bear; still a moderate degree of loss a farmer ought to make up his mind to put up with, as he is not prevented from putting in his pocket exceptional gain. We are of course only considering the case of a farmer who is tenant at a fixed rent: if he holds on the *métayer* principle, the tenant is very much on the footing of a partner, and shares both profit and loss with the landlord. 7. If a man has engaged for carriage of a column, and in the course of removing, carrying or re-erecting it, the column gets broken, he is only held answerable for the risk if the mischief occurs by some negligence of his own or of those whom he employed; and there is no negligence if all precautions were taken which any perfectly careful person would have observed. We may apply the same rule if the contract is to carry jars or building materials; in fact it applies to carrying anything. 8. If a man who cleans or mends clothes loses his customer’s property, but gives the owner security that the loss shall be made good, the latter is bound to assign him his rights of action, both *in rem* and *in personam*.

d. D.43.16.12
(S.P. Scott trans. 1932) vol. 9, p. 316

12. MARCELLUS, *Digest*, book 19: A tenant refused to permit a man to whom the lessor had sold the land and directed to take possession to enter upon it; and this tenant was afterwards forcibly dispossessed by another. The question arose, who would be entitled to the interdict *Unde vi*? I held that it did not make any difference whether the tenant prevented the owner himself, or the purchaser to whom the owner had ordered possession to be given, from entering upon the premises. Hence the interdict *Unde vi* would lie in
favor of the tenant, and he himself would be liable to a similar interdict in favor of the lessor, whom he was considered to have ejected, when he refused to give possession to the purchaser, unless he did so for a just and reasonable cause.

e. D.19.2.60.9
(C.H. Monro, trans. 1891) p. 74

60. JAVOLENUS, Epitomes of Labeo, book 59: 9. I am of opinion that when a man lets out a whole warehouse he does not incur the same liability towards the lessee for the custody of goods warehoused as the lessee himself does towards sub-lessees of separate compartments,—in default of special agreement.

f. D.19.2.9
id., pp. 6–7 [edited]

9. ULPIAN, On the Edict, book 32: If the bona fide purchaser of a house or land lets it, and the true owner recovers it without any collusion or negligence on the lessor’s part, Pomponius holds that the latter is still liable to an action on the contract on the part of his lessee to compel him to procure him the power of enjoying what he hired. It is true, he adds, that if the owner will not allow this to be done, and the lessor is prepared to provide another habitation which is equally convenient, the action must in all justice be dismissed.2 1. To this may be added the following opinion of Marcellus (Dig. lib. vi.) “If a usufructuary lets land for 5 years and dies, his heres is not compellable to procure the lessee enjoyment, any more than a lessor would be liable to his lessee if a block which he had leased should be burnt down.” However Marcellus raises the question whether the lessee is not liable, under the contract, to pay rent in proportion to the time of his actual enjoyment, just as he would do if he had hired the services of a slave held in usufruct, or had hired a lodging. On the whole his conclusion is that he is so liable, and this is thoroughly just.

g. D. 19.2.33
(see above, p. Error! Bookmark not defined.)

h. D.19.2.30.1
id., p. 42

30. PAUL, Epitomes of Alfenus’Digests, book 5: […] 1. An aedile took a lease of baths in a town, in order to enable the townspeople to enjoy baths for a year free of charge; the baths were three months later destroyed by a fire:—Held, the lessor of the baths was liable to an action on the contract with the lessee for return of money paid in proportion to the time during which he had failed to supply means of bathing.

i. Reconstruction of the Actio Locati
From B.W. Frier, Landlords and Tenants in Imperial Rome (1980), p. 223

Whereas the plaintiff leased to the defendant the farm (or the work; to be done. or his services) under dispute, which transaction is disputed, whatever on account of this transaction the defendant ought in good faith to do for or give to the defendant let the iudex condemn the defendant to pay to the plaintiff its value if it does not so appear, let him absolve him of liability.

j. Clause in the Lease of a Warehouse (CIL 6.33747)
id., p. 224

Whoever holds space under hire within these warehouses does not have the right to lease it out or to assign the contract.

2 Professor Frier (Landlords and Tenants in Imperial Rome, p. 236) offers the following translation: “If a person leases to me a house or a farm which he has purchased in good faith, and he is then evicted with no bad faith or blame on his part, Pomponius says that he is nonetheless bound on the lease to provide the lessee with the right to enjoy the leasehold. Obviously, if the owner does not allow this and the lessor is ready to provide another dwelling no less comfortable, he (Pomponius) says that the most equitable course is that the lessor be released (from his obligation).”
**k. Clause in the Lease of a Warehouse** (*CIL* 6.33747)

*ibid.*

We do not accept responsibility for the safekeeping of things brought into these warehouses. ... If the lessee of a storeroom leaves his property there and does not entrust it to a guard, the warehouseman will be blameless.

**l. Clause in the Lease of a Warehouse** (*CIL* 6.33747)

*ibid.*

In these warehouses things brought in or moved in are pledged to the warehouseman unless security is (otherwise) provided for rental payments.

**m. Clause in the Lease of a Warehouse** (*CIL* 6.37795)

*ibid.*

If in these warehouses a lessee builds anything in, he shall have no right to remove it unless this power is accorded him.

**n. D.19.2.25.1**

*ibid.*

*Gaius*, *On the Provincial Edict*, book 10: ... Where someone has leased to another a farm for his exploitation or as a dwelling, if for some reason he sells the farm or the buildings, he should provided that through the same agreement, the tenant farmer be permitted by the buyer too to exploit, or the urban tenant to dwell; otherwise he (the tenant), if excluded, will sue him (the lessor) on the lease.

**o. D.19.2.60pr**

*ibid.*

*Labeo*, *The Posthumous writings as epitomized by Javolenus*, book 5: If a house is leased out for many years, the lessor ought to provide not only that the lessee be able to dwell in it from July 1 of each year, but also that during his term of lease he be able, if he wishes, to lease it out to an occupant. And so if this house was under repair from January 1 and remained so on June 1, such that no one can live in it or show it to another, (Labeo says that) the lessee will owe the lessor nothing, so much so that he cannot even be forced to dwell in the repaired house from July 1, except if the lessor be ready to give him a comfortable house to live in.

**p. C.4.65.3**

*Id.*, p. 225

*The Same* [Caracalla] to *Flavius Callimorphus* [A.D. 214]

You say that you have a room under lease; if you pay rent to the owner of the apartment building, it is not right that you be expelled unwillingly unless the owner shows that it is required for his own purposes, or he wishes to repair the house, or you have behaved improperly in the leasehold.

**q. D.19.2.30pr**

*ibid.*

*Alfenus*, *The Digests as Epitomized by Paul*, book 3: ... If the demolition was unnecessary, but (he did it) because he wished to improve the building ... .

**r. D.19.2.28.2**

*ibid.*

*Labeo*, *The Posthumous Writings as Epitomized by Javolenus*, book 4: ... But if the lessor does not furnish the lessee with the power of taking a house under lease, and he (the lessee) then rented a place to dwell in, (Labeo) thinks that as much is owed to him (the lessee) as he (the lessor) would have furnished had bad faith not been present. Yet if he (the lessee) obtained a free dwelling, deduction should be made from the house’s lease for this portion of the term.
s. D.19.2.7  

ibid.

Paul, On the Edict, book 32: If I lease to you another person’s apartment building for 50 (coins) and you lease the same building to Titius for 60, and Titius is then forbidden to dwell in it by the owner, the prevailing view is that you ought to obtain 60 in a suit on the lease, since you yourself are liable to Titius for 60.

D.19.2.8  

ibid.

Tryphoninus, The Controversies, book 9: Let us examine whether neither 60 nor 50 is owed, but rather as much as it lay in his interest to enjoy the leasehold and the middleman should obtain as much as he must provide to the one who rented from him, since the profit from the contract, which was concluded for the purpose of a higher rent, raises the sum adjudged. But nevertheless the chief lessor will have a counterclaim for the 50 which he would have received from him if the owner of the apartment building had not forbidden the sublessee to dwell in it. This rule is currently in use.

u. D.19.2.48.1  

id., p. 226

Marcellus, The Digests, book 8: If a person did not return a hired slave or some other moveable thing, he will be condemned for as much as the oath on the suit is.

v. D.43.17.3.3  

ibid.

Ulpian, On the Edict, book 69: When an urban tenant forbids access to the owner who wishes to repair his building, the prevailing view is that the interdict uti possidetis properly lies, and that the owner gives a public oath that he prevents the urban tenant not from dwelling in it, but from possessing it.

w. D.19.2.24.2  

ibid.

Paul, On the Edict, book 38: If a home or a farm is leased out for payments over a period of five years, and if a tenant farmer abandons cultivation of his farm or if an urban tenant (abandons) his dwelling, the owner can sue them forthwith.

x. D.19.2.27.1  

ibid.

Alfenus, The Digests, book 2: Again, (Servius) was asked whether or not a person owes rent if he moves out because of fear. He answered that if there was reason for him to fear danger, then, even if there really was no danger, he still does not owe rent; but if there was no legally acceptable reason for fear, then he owes rent nonetheless.

y. D.19.2.13.7  

ibid.

Ulpian, On the Edict, book 32: At the approach of an army the lessee moved out, with the consequence that soldiers stole windows and other things from their lodgings. If he moved out without giving notice to the owner, he will be liable on the lease; but Labeo says that he is liable if he could resist and did not resist, and his view is correct. But likewise, if he was unable to give notice, I do not think him to be liable.

z. D.19.2.15.2  

ibid.

Ulpian, On the Edict Servius says that the owner ought to be responsible to the tenant farmer for all force which cannot be resisted, as for example … if an enemy invasion occurs; … but if nothing out of
the ordinary occurs, the tenant farmer bears the loss. The same should be said if a passing army wantonly
steals something. ...

aa. D.39.2.28

ulpian, On the Edict, book 84: Similarly treated is also loss on account of urban tenants’ moving out,
if this occurred because of a legally proper fear. Aristo quite aptly adds, however, that just as Cassius
requires that a legally proper fear furnish a reason for moving out, so too Cassius ought to say the same
for the case of one who propped up a building, if he was compelled to prop it up due to a legally proper
fear of its collapse.

bb. D.39.2.13.6

ulpian, On the Edict, book 53: The question is raised as to whether the owner of a building can
provide security to his own urban tenants. Sabinus says that security may not be given to urban tenants;
for either they rented a building defective from the outset and have what they sought, or the building fell
into disrepair and they can attempt to sue on the lease. This view is the better one.

c. D.39.2.33

ulpian, On Sabinus, book 42: The suit on impending loss is not accorded to an urban tenant, since he
can sue on the lease if the owner prevents his moving out.

dd. D.19.2.25.2

ulpian, On the Provincial Edict, book 10: If a neighbor builds and the windows of an apartment are
thereby darkened, (a jurist held) that the lessor is liable to his urban tenant; indeed there is no doubt that a
farm tenant or an urban tenant can abandon the leasehold. Also, if suit is brought against him about the
rent, the balance of the off-set should be calculated. We will understand the same to be true if the lessor
does not repair doors or windows which are excessively broken.

ee. D.39.2.37

ulpian, On the Edict, book 42: So also, if any revenue is lost because of the demolition, by the same
logic Sabinus wanted it to be recompensed. If, for example, the residents moved out or they cannot dwell
in it so comfortably, this can be charged to the builder.

ff. D.7.1.30 and D.8.2.10

ulpian, On Sabinus, book 3: … a modest light. … as much as is required for the occupants in the
normal course of their daily life … .

10. marcellus, The Digests, book 4: … it is possible to dwell even in a darkened building … .

gg. D.43.32.1pr

ulpian, On the Edict, book 73: The Praetor says: ‘If the person in question is not one of those things
concerning which you and the plaintiff have agreed that whatever is moved or brought into the dwelling
in question, or originates or is made there, acts as a pledge to you for that dwelling’s rent; or if he is one
of the things and you have been paid the rent, or security has been provided on this account, or you are
responsible for nonpayment then I forbid the use of force to prevent the person who moved him in on
account of the pledge from moving him out.’
hh. D.43.32.1.3

ibid.

ULPIAN, On the Edict, book 73: However, if a person has a free dwelling, an analogous form of this interdict will avail him.

ii. D.20.2.5pr

ibid.

MARCIANUS, Monograph on the Action of Hypotheca: In the thirteenth book of his Sundry Lessons in Law Pomponius writes that if the lessee provides me with free dwelling, my furnishings are not pledged to the owner of the apartment house.

jj. D.20.2.7.1

ibid.

POMPONIUS, Sundry Lessons in Law, book 13: One should note that not all furnishings are pledged but just those brought in to be there; this is the better view.

kk. D.20.1.32

ibid.

SCAEVOLA, The Responses, book 5: ... that they be there permanently, and are not suited to the needs of the moment.

ll. C.4.65.5

ibid.

The Same [Alexander Severus] to Aurelius Petronius [A.D. 223]

It is settled as law that things which tenant farmers bring into a farm, if their owners have agreed, are bound by the law of pledge to the owners of the property. But when a house is leased, the owners’ knowledge is not required in the case of things brought in or moved in, for these things too are held by the law of pledge.

mm. D.20.2.5.1

ibid.

MARCIANUS, Monograph on the Actions for Hypotheca: The same author (Pomponius) says: ‘It should he noted that, if its owner wishes, a pledge can be brought in to be obligated for part of a debt.’

nn. D.43.32.2

id., p. 229

Gaius, On the Provincial Edict, book 26: This interdict is undoubtedly of use to the urban tenant also regarding things which are not his, but were, for example, loaned or leased to him or deposited with him.

oo. D.43 32.1.5

ibid.

ULPIAN, On the Edict, book 73: It should be observed that the Praetor does not require that the object be in the lessee’s estate (?), nor that it be moved in as a pledge, but ‘if it was brought in on the account of pledge.’ Therefore if things belong to someone else and if they are such that they cannot be held on the account of pledge, but nonetheless they are moved in on the account of pledge, this interdict is pertinent; for if things were not brought in on the account of pledge, the lessor will also be unable to retain them.

pp. D.20.2.6

ibid.

ULPIAN, On the Edict, book 73: Although in the case of urban property we usually accept it as tacitly agreed that furnishings are bound, just as if this had been agreed to for each object, still a pledge of this kind does not stand in the way of freedom—a view approved also by Pomponius; for he says that it is no obstacle to manumission that (a slave was) obligated for the dwelling.
qq.  D.20.1.14 pr

ibid.

ULPIAN, *On the Edict*, book 73: The question arose as to whether, if the due-date of a payment has not yet arrived, it should be allowed to seize pledges even in the middle of a term. I think that seizure of a pledge should be accorded for I have an interest (in the pledge); Celsus writes the same.

rr.  D.43.32.1.1

id., p. 230

ULPIAN, *On the Edict*, book 73: This interdict is set up for the urban tenant who wishes to move out after his rent has been paid; it does not avail the farm tenant.

ss.  D.43.32.1.4

ibid.

ULPIAN, *On the Edict*, book 73: If a rental payment is not yet owed, Labeo says that this interdict fails unless he (the tenant) is ready to pay that payment. Therefore, if he has paid a six-month payment and a six-month payment is outstanding, he will employ the interdict in vain unless he pays also for the following six months; but this is true if a special agreement was made in the lease of a house that it not be permitted to move out for a year or for a specified time. The rule is the same if a person rents for many years and the term has not yet expired. For since pledges are obligated for the entire lease, it follows that the interdict will (not) pertain unless they are freed.

tt.  D.39.2.33

(see above, p. 15)

ULPIAN, *On Sabinus*, book 43: The suit on impending loss is not accorded the urban tenant, since he can sue on the lease if the owner prevents his moving out.

uu.  D.39.2.34

ibid.

PAUL, *On Sabinus*, book 10: ... at any rate if he was ready to give security for past rent; otherwise the owner’s retention of the pledge would seem to become legally proper. Still, if he (the owner) retains things as pledges and they perish when the neighboring building collapses, one can say that the lessor is liable by the action for pledge if he could have moved these things to a safer place.

vv.  D.20.2.9

ibid.

PAUL, *Monograph on the Duties of the Prefect of the Watch*: There is a distinction between things obligated because of a pledge and things which due to an evident agreement are bound on the account of pledge, in that we cannot manumit slaves obligated as a pledge, but we (successfully) manumit (slaves in the latter category) so long as we remain in the dwelling, i.e. before we are locked out on account of rent. For we will not free slaves retained on the account of pledge. Nerva, the jurist, was mocked when he pointed out that slaves detained for rent can be freed through a window.

ww.  Martial, Epigrams 12.32.1-5

id., p. 231

Vacerra, you disgrace to the First of July / I saw your luggage, I saw it / what was not retained for two years’ rent / your wife carried it, she of the seven red hairs / and your white-haired mother with your enormous sister. …

xx.  D.12.6.55

ibid.

PAPINIAN, *Legal Problems*, book 6: If a possessor in bad faith leases out urban property, what he collects in rent may not be reclaimed from the one who paid it, but is owed to the owner. … But if he receives passage money on ships leased out by the owner, or (if he receives) the rental payments from
apartment houses, he is liable to him (the payer) for money not owed, and the latter was not freed of his obligation by his payment. …

yy. D.13.7.11.5

_Ulpian, On the Edict_, book 28: It should be accepted that money has been paid not only if it is paid to him to whom the thing is owed, but also if (it is paid) to another by his will, or to one from whom he inherits, or to his procurator, or to a slave he ordered to collect money. Wherefore if you rent a house and then lease a portion of it to me, and I pay a rental payment to your lessor, I can engage you in an action on pledge—for Julian also writes that it can be paid to him; and if I pay part to you and part to him, the equivalent should be true. Obviously my furnishings are bound only up to the amount for which I rented the apartment; beyond doubt it was not agreed that my trifles be bound for the whole rental payment of the apartment house. But what was tacitly agreed upon also with the building’s owner was obviously this, that it is not the arrangement of the apartment dweller which advantages the owner, but rather his own (arrangement).

zz. D.19.2.56

_id., p. 232_

_Paul, Monograph on the Duties of the Prefect of the Watch_: When their lessees are long absent and pay no rent for this period, and the owners of warehouses or apartment houses desire to open them and inventory their contents, they should be granted a hearing by the officials charged with this (i.e. the Prefect of the Watch). In a matter of this kind a period of two years ought to be observed.

aaa. D.20.2.2

_id._

_Marcianus, Monograph on the Action of Hypotheque_: In the fortieth book of his _Sundry Lessons in Law_ Pomponius writes: ‘Furnishings are bound as a pledge not only for rental payments, but also if an urban tenant’s dwelling deteriorates through his own fault, on which account a suit on the lease will lie against him.’

bbb. D.19.2.11.2

_id._

_Ulpian, On the Edict_, book 32: Likewise the lessee should take care lest in any way he worsen the legal or physical condition of the thing (leased), or allow it to become worse.

ccc. C.4.65.29

_id._

_The Same Emperors [Diocletian and Maximianus] and the Caesars to Aurelius Julianus [A.D. 293 X 305]_

Since you assert that the lessee demolished buildings which he took in good condition, the provincial governor will order his heirs to restore them after an assessment of the buildings has been held between you.

ddd. D.9.3.5.4

_id._

_Ulpian, On the Edict_, book 23: A person is liable for this through an action under the Aquilian law; on this ground, Labeo says that when someone is condemned because his guest or a third party threw something from an apartment, he should be granted a specially adapted action against the thrower. This view is correct. Obviously if he was the thrower’s landlord he will have an action on the lease as well.
D.19.2.11.4

ibid.

ULPIAN, *On the Edict*, book 32: Lessor and lessee had agreed that no hay be stacked in an urban villa; he (the lessee) stacked hay; then a slave put a fire to it and set it ablaze. Labeo says that the lessee is liable on the lease, because he himself furnished the cause by bringing in (hay) against the lease.

fff. D.19.2.12

id., 233

HERMOGENIANUS, *The Condensation of Law*, book 2: But also if some third party sets the fire, assessment of the loss will be made in a trial on the lease.

ggg. D.19.2.11pr

ibid.

ULPIAN, *On the Edict*, book 32: Let us examine whether a lessee ought to be responsible for the fault both of his slaves and of whomever he admits. And to what extent is he liable, whether that he surrender slaves noxally or that instead he be liable on his own account? And will he just transfer the suits against those whom he admits, or will he be liable as if for his own fault? My own view is that he is responsible on his own account also for the fault of those he admitted, even if nothing is agreed upon (in the lease), provided that in admitting them he shows fault in that he has such people as members of his household or guests. Pomponius in his sixty-third book *On the Edict* also approves this view.

hhh. D.9.3.6.2

ibid.

PAUL, *On the Edict*, book 19: The occupant ought to be responsible for his own fault and for that of his household.

iii. Coll. 12.7.9

ibid.

ULPIAN, *On the Edict*, book 18: But if some slaves of an urban tenant burn down an apartment house, according to Urseius in Book 10 Sabinus responded that the owner may be sued, on the account of his slaves, by a noxal trial under the Aquilian law; but he (Urseius) denies that the owner is liable on the lease. But Proculus responds that when a tenant farmer’s slaves burn down a farmhouse, the tenant is liable either on the lease or from the Aquilian law, with the conditions that the tenant can surrender the slaves noxally, and that if the matter is adjudged in one trial there should be no further suit by the other.

jjj. D.9.2.27.11

(see above, p. Error! Bookmark not defined.)

kkk. D.19.2.27pr

id., p. 234

ALFENUS, *The Digests*, book 2: It is not right that occupants immediately deduct from their rent when their use of some part of the apartment is a bit less comfortable. For (Servius responds that?) the occupant is subject to the condition (?) that if something unfortunate (?) occurred, on account of which the owner properly demolished something, he should suffer a little part of the inconvenience, though not to the extent that the owner had opened the part of the apartment in which the occupant has a large part of his use.

lll. D.19.2.28pr–1

ibid.

LABEO, *The Posthumous Writings as Epitomized by Javolenus*, book 4: But if the lessee was not hindered from using his dwelling in a house, he (Labeo) thinks that rent is owed for that part even of a house which had become defective.
mmm. D.19.2.19.5  
ibid.

ULPIAN, *On the Edict*, book 32: If an urban tenant brings a bronze strongbox into a building and the owner then narrows the building’s entrance, the better view is that he (the owner) is liable on the lease and (also) by the suit to deliver up, and this whether or not he was aware of it (the problem); the duty falls to the *iudex* that he compel him to furnish to the tenant an entrance and an opportunity to remove his strongbox, this of course at the lessor’s expense.

nnn. D.19.2.19.4  
ibid.

ULPIAN, *On the Edict*, book 32: If an urban tenant adds a door or some other things to the building, what action should lie? The better view is what Labeo wrote, that an action lies on the lease to permit him to remove it, provided that he gives security for impending damage, so that he in no way worsen the building’s condition during the removal, but that he restore the original aspect to the building.

ooo. D.6.1.59  
id., p. 235

JULIAN, *From Minucius*, book 6: The occupant placed windows and doors into another’s buildings; the buildings’ owner removed them a year later. My question is whether the person who had placed them can (now) claim them as his property. He (Sabinus?) responded that he could; for things connected to another’s buildings belong to these buildings so long as they remain joined, but as soon as they were removed they return at once to their original legal state.

ppp. D.19.2.5  
ibid.

ULPIAN, *On the Edict*, book 25: If I lease to you a dwelling and then remit a rental payment, the proper action is on lease and hire.

qqq. D.19.2.13.11  
ibid.

ULPIAN, *On the Edict*, book 32: If a person remained in his leasehold after the term of lease expired, not only will he have apparently rehired it, his pledges also apparently continue to be bound. This is true, to be sure, unless a third party obligated the things on his behalf during the earlier lease; in this case a new agreement will be required. The situation will be identical if properties in the public domain are leased. But as for our view that the tenant farmer seems to rehire through the silence of both parties, this should be understood to mean that they seem to have renewed the same lease for the year when they are silent, but not for subsequent years, and this even if, for example, a five-year lease had originally been provided for the leasehold. But also if nothing to the contrary is done in the second year after the five-year period ends, (I think that?) the same lease was apparently continued in that year; for they seem to have agreed by the very fact that they were silent. And this rule should be observed for each successive year. But for urban properties we employ a different rule, that a person is obligated for as long as he resides, provided that a fixed term for the hire was not included in the written document.

rrr. D.43.32.1.4  
(see above, p. 17)

sss. D.19.2.9 pr  
(see above, p. 12)

ttt. D.19.2.60pr  
(see above, p. 13)
3. The Problem of \textit{causa traditionis} \(^1\)

\textbf{a. Gaius, Institutes 2.19-21}

(see above, p. Error! Bookmark not defined.)

\textbf{b. Tituli ex corpore Ulpiani 19.7}

(CD trans.)

\textit{Traditio} is the form of conveyance proper to \textit{res nec mancipi}. We acquire ownership of these things by the very \textit{traditio}, that is to say, if they are handed over to us \textit{iusta causa}.

\textbf{c. D.41.1.31pr}

(Watson trans.)

\textit{Paul}, \textit{Edict}, book 21: Bare delivery of itself never transfers ownership, but only when there is a prior sale or other ground \((\textit{aliqua iusta causa})\) on account of which the delivery follows.

\textbf{d. D.41.1.36}

(Watson trans.)

\textit{Julian}, \textit{Digest}, book 13: When we agree on the thing delivered but disagree over the grounds \((\textit{in causis})\) of delivery, I see no reason why the delivery should not be effective; an example would be that I think myself bound under a will to transfer land and you think that is it is due under a stipulation. Again if I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is no barrier to the transfer of ownership.\(^2\)

\textbf{e. D.12.1.18pr}

(Watson trans.)

\textit{Ulpian}, \textit{Disputations}, book 1. If I give you money as a gift but you receive it as a loan for consumption \((\textit{mutuam})\), Julian writes that there is no gift. But is it a loan for consumption? In my view it is not. Furthermore the property in the coins does not pass to he recipient, albeit his belief at the time of the receipt was the contrary. If he uses up the money, the \textit{condictio} lies against him, but he will be able to meet it with the defense of fraud on the ground that it was in accordance with the will of the giver that the coins were used.

\textbf{f. D.12.5.2}

(Watson trans.)

\textit{Ulpian}, \textit{Edict}, book 26. By way of example, take the case in which I pay you not to commit sacrilege, not to steal, or not to kill a man. In Julian's writings, ti is held that in this kind of case, where I give to stop you killing someone, a \textit{condictio} does lie. Similarly, in the case where I pay to make you give me back something deposited. Indeed, it has been held that \textit{condictio} lies where, when I have a winning cause of action, I pay to make the judge pronounce in my favor. However, then the payer commits an offense (for he corrupts the judge), and not so long ago our emperor held that he loses his case.

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\(^2\) Schulz would read after “it is settled law” “that there is no gift.” For the large literature on this topic, see Kaser, RPR, 417 n.41.
g. D.18.1.41.1
(see above, p. Error! Bookmark not defined. [An example of traditio pecuniae?])

h. D.18.1.57pr
(see above, p. Error! Bookmark not defined.)

i. Gaius, Institutes 2.84
(see above, p. Error! Bookmark not defined.)

j. Gaius, Institutes 3.91
(see above, p. Error! Bookmark not defined.)

k. D.13.1.18
(Watson trans.)

SCAEVOLA, Questions, book 4: Since it is theft knowingly to receive coins which are not owed, it is a question whether if my agent pays with his own coins, the theft is committed against him. And Pomponius, in the eights book of his Letters, holds that he can himself bring the condictio for theft but also that I can have the condictio if I ratify his payment of what was not due. However, the one condictio excludes the other.

l. JI.2.1.40-2
(see above, p. Error! Bookmark not defined.)

m. D.24.1.3.10-13
(Watson trans.)

ULPIAN, Sabinus, book 24: 10. Remember that gifts between husband wife are prohibited, the effect of this rule being that any transaction involved is completely void. So if property is donated, its delivery will not be valid, and if a promise is made to someone by stipulation or if a formal release is granted, the transaction will be void. For this rule says that any transaction entered into by a husband and wife which involves a gift will have no effect. 11. If, then, a husband gives to his wife, it will not be held to be hers, because clearly no property passes to her. 12. But if he directs his debtor to pay her, will the money become hers and will the debtor be released? According to Celsus, in the fifteenth book of his Digest, it would seem that the debtor cannot be held released and the money becomes the husband's property, not the wife's. For if the gift had not been prohibited by civil law the result of the transaction would have been that the money passed to you from your debtor, and then from you to your wife. But because of the short time between the two actions, one of them is obscured. There is nothing new or strange in your receiving what you obtain from someone else; for if a man who pretends to be your creditor's procurator receives money from your debtor on your instructions, it is settled that you will have an action for theft and that the money is yours. 13. this follows from the view taken by Julian; for he says that if I order someone who is about to give something to me to give it to my wife, the transaction will be void; for the position would be held to be the same as if I had received it myself and when it became mine, I had given it to my wife. This opinion is correct.

3 More texts on this in Kaser, RPR, 418.
4. Wild Animals

a. GI.2.66–68
(See above, Sec. 3A, p. Error! Bookmark not defined.)

b. JI.2.12–16
(See above, Sec. 3B, pp. Error! Bookmark not defined.–Error! Bookmark not defined.)

c. .D.41.1.1–7pr
(S.P. Scott, Watson and CD trans.)

1. GAIUS, Diurnal or Golden Matters, book 2: Of certain things we obtain ownership by the law of nations, which is everywhere followed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the civil law, that is to say, by the law of our own country. And because the law of nations is the more ancient, as it was promuligated at the time of the origin of the human race, it is proper that it should be examined first. 1 All animals, therefore, which are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.

2. FLORENTINUS, Institutes, book 6: The same rule applies to their offspring, born while they are in our hands.

3. GAIUS, Diurnal or Golden Matters, book 2: For what does not belong to anyone by natural law becomes the property of the person who first acquires it. 1 Nor does it make any difference, so far as wild animals and birds are concerned, whether anyone takes them on his own land, or on that of another; but it is clear that if he enters upon the premises of another for the purpose of hunting, or of taking game, he can be legally forbidden by the owner to do so, if the latter is aware of his intention. 2 When we have once acquired any of these animals, they are understood to belong to us, as long as they are retained in our possession; for if they should escape from our custody and recover their natural freedom, they cease to belong to us, and again become the property of the first one who takes them.

4. FLORENTINUS, Institutes, book 6: Unless, having been tamed, they are accustomed to depart and return.

5. GAIUS, Diurnal or Golden Matters, book 2: [Wild animals] are understood to recover their natural freedom when our eyes can no longer perceive them; or if they can be seen, when their pursuit is difficult. 1 It has been asked whether a wild animal which has been wounded in such a way that it can be captured is understood immediately to become our property. It was held by Trebatius that it at once belongs to us, and continues to do so while we pursue it, but if we should cease to pursue it, it will no longer be ours, and will again become the property of the first one who takes it. Therefore, if during the time that we are pursuing it another should take it with the intention of himself profiting by its capture, he will be held to have committed theft against us. Many authorities do not think that it will belong to us, because many things may happen to prevent us from doing so. This is the better opinion. 2 Bees, again, are wild by nature and so those which swarm in our tree are, until housed by us in our hives, no more regarded as ours than birds which make a nest in our tree. Hence, if another should house or hive them, he will be their owner. 3 Again, honeycombs which they make can be taken by anyone with no question of theft though, as said earlier, one entering upon another’s land can be lawfully barred by the owner who becomes aware of it. 4 A swarm which flies away from our hive is deemed still to be ours so long as we have it in sight and its recovery is not difficult; otherwise, it is open to the first taker. 5 The wild nature of peacocks and doves is of no moment because it is their custom to fly away and to return; bees, whose wild nature is universally admitted, do the same; and there are those who have tame deer which go into and come back from the woods but whose wild nature has never been denied. In the case of these animals which habitually go and return, the accepted rule is that they are held to be ours so long as they have the instinct of returning; but if they lose that instinct, they cease to be ours and are open to the first taker. They are deemed to have lost that instinct when they abandon the habit of returning. 6 Poultry and geese are not wild by nature; for there obviously exist other species which are wild fowl and wild geese. Hence, if my geese or chickens be disturbed and fly so far away that I do not know where they are,
nonetheless they remain my property so that anyone who takes them with a view to gain will be liable to me for theft. 7. Again, property taken from the enemy is forthwith the property of the taker under the law of nations,

6. FLORENTINUS, Institutes, book 6: so also are the young of animals which we own under the same law,

7. GAIUS, Common Matters or Golden Things, book 2: so that also freemen are reduced to slavery but those who escape the power of the enemy regain their original freedom.

d. D.41.1.44
(Watson trans.)

ULPIAN, On the Edict, book 19: The following case is discussed by Pomponius: When wolves were carrying off pigs from my swineherd, a farmer on a neighboring estate, with strong and powerful dogs which he kept to protect his own herd, pursued the wolves and snatched the pigs away from them; that or the dogs tore them away; but when my swineherd claimed the pigs, the question arose whether the pigs had become the property of their rescuer or remained mine; for, in a way, the dogs got them by hunting. He, however, used to wonder whether, since animals caught on land or sea cease to belong to their captors on regaining their natural freedom, so also things captured from a man’s property by wild animals of land or sea cease to be his, when the beasts elude his pursuit. Who indeed can say that what a bird, flying by, takes from threshing-floor or land or snatches from me myself remains mine? If, then, ownership is so lost, the thing will belong to the first taker on being freed from the beast’s mouth, just as a fish, a wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it. But he thinks that rather is it the case that the thing remains ours so long as it can be recovered; what he writes about birds, fish, and wild animals, however, is true. He also says that what is lost in a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value. And it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved. If, then, it does so remain, I am of the opinion that event the action for theft will lie; for even if the farmer did not give chase with the intent to steal, though he may have had that intent, still, even assuming that he did not give chase with that intent, nevertheless, when he does not restore on request, he appears guilty of detaining and appropriating. Accordingly, I am of the view that he is liable to both the action for theft and that for production; and the pigs, when produced, can be reclaimed from him by a vindicatio.

e. D.41.1.55
(De Zulueta and CD trans.)

PROCULUS, Letters, book 2: A wild boar fell into a trap set by you for game, and when he was stuck there I extricated and carried him off (abstulit); do you think the wild boar I carried off was yours? And if you think he was yours, suppose I had turned him loose into the woods, would he in that case have ceased to be or have remained yours? And, I ask, ought the action which you would have against me, supposing he had ceased to be yours, to be given as an actio in factum? The answer given was: let us see if it makes a difference whether I have set the trap on public or private land, and if on private land, whether on mine or some one else’s, and, if on some one else’s, whether with or without leave of the landowner; moreover whether the boar has stuck so fast in the trap that he cannot get out by himself, or whether by further struggles he would not have got loose. Still I think the governing principle to be this, that if he has come into my power he has become mine. But if you had released to his natural liberty a wild boar who had become mine and he had thereby ceased to be mine, then an actio in factum ought to be accorded to me, according to the opinion given when a man had thrown another’s cup overboard.2

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1 Mommsen suggests that the “he” here is not Pomponius, but Quintus Mucuius or some such.

2 See D.19.5.14.4 (Ulpian, On Sabinus, 41): “[I]f a man, intending to do harm and not to make a profit, tossed another’s silver cup into the sea, Pomponius, in the seventeenth book of his Sabinus, wrote that neither the action on theft nor that for wrongful harm (lex Aquilia) lies; an action must be brought in factum.”
f. D.8.3.16
(Watson and CD trans.)

CALLISTRATUS, *On cognitionibus [extraordinariis]*, book 3: The deified Pius wrote to the fowlers in a rescript: ³ “It is not reasonable (*eulogon*) for you to go fowling on other people’s land without the permission of the landowner.”

g. D.47.10.13.7
(CD trans.)

ULPIAN, *On the Edict*, book 57: If someone prohibits me from fishing in the sea or from laying a drag-net (which is called in Greek), can I sue him for *iniuria*? There are those who say that I can bring an action of *iniuria*; and thus Pomponius and many say that he is like someone who does not allow me to bathe in a public bath, or sit in a public theatre, or do something or sit or walk about in some other public place, or if someone does not allow me to use my own property. For here too an action of *iniuria* will lie. (The older jurists, however, gave a tenant, if he was a public tenant, ⁴ an interdict, for it is forbidden to use force to prevent a tenant from enjoying his leasehold. If, however, I prohibit someone from fishing in front of my house or country seat, what is to be said? Can I be sued for *iniuria* or not? Now the sea is common to all and the shores, like the air, and there are many imperial rescripts to the effect that no one can be prohibited from fishing, and also not from fowling, unless he can be prohibited from entering another’s land. So it is a usurpation and by no right that someone can be prohibited from fishing before my house or country seat. Wherefore if someone is prohibited he can still sue for *iniuria*. I can, however, certainly prohibit someone from fishing in a lake that belongs to me.

h. D.43.8.2.9
(CD trans.)

ULPIAN, *On the Edict*, book 57: … ⁹ If someone is prohibited from fishing or sailing in the sea he does not have the interdict (*ne quid in loco publico*), nor does he who is prohibited from playing on a public sports ground or bathing in a public bath or watching a theatrical performance, but in all these cases the action for *iniuria* is to be used.

3 The rescript is in Greek.

⁴ This may also mean “if he made his lease publicly.”

5. Other “Original Modes of Acquisition”¹

a. GI.2.65–69
(See above, pp. Error! Bookmark not defined.–Error! Bookmark not defined.)

b. JI.2.1.11–48
(See above, p. Error! Bookmark not defined.–Error! Bookmark not defined.)

c. D.41.1.7.1–13, 8
(Watson trans.)

7. GAIUS, *Common Matters or Golden Things*, book 2: … ¹. Furthermore, what the river adds to our land by alluvion becomes ours by the law of nations. Addition by alluvion is that which is gradually added so that we cannot, at any given time, discern what is added. ². But if the force of the river should detach part of your land and bring it down to mine, it obviously remains yours. Of course, if it adheres to my land, over a period of time, and trees on it thrust their roots into my land, it is deemed from that time to have become part of my land. ³. An island arising in the sea (a rare occurrence) belongs to the first taker, for it is held to belong to no one. An island arising in a river (a frequent occurrence), if indeed it appears in the midstream of the river, is the common property of those who have holdings on either bank

¹ After the initial cross-references, the order of this material is that of D.41.1. Material on acquisitions through others is omitted, but material on acquisition by *traditio* is included.
of the river to the extent that those holdings follow the bank; but if it lies to one side of the river rather than the other, it belongs only to those who have holdings on that bank. 4. Now if a river should burst one bank and partly begin to flow in another channel and then this new stream return to the old channel, the land converted into an island by the two streams naturally remains the property of its former owner. 5. But if, wholly abandoning its natural bed, a river begins to flow along another course, the original bed becomes the property of those with holdings on the former banks to the extent of those holdings along the bank; the new bed, though, acquires the same shape as the river itself, that is, it becomes public under the law of nations. But if, after some time, the river reverts to its former bed, the later bed again becomes the property of those with holdings along its bank. However, if the new bed occupies the whole of some person’s land, then, even though the river returns to its original bed, the man whose land it was, strictly speaking, has no right in the newly abandoned bed, because the relevant piece of land ceased to exist with the loss of its shape and form and, since the erstwhile owner has no neighboring land, he cannot have any interest in the bed by right of proximity; but it is scarcely likely that this argument would prevail. 6. It is quite a different matter when one’s land is wholly flooded; for inundation does not change the aspect of the land; and so, when the waters recede, the land manifestly remains the property of its existing owner. 7. When someone makes something for himself out of another’s materials, Nerva and Proculus are of opinion that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be owner of what is made from them, since a thing cannot exist without that of which it is made. Let us say, by way of example, that I make some vase from your gold, silver or copper or a ship, cupboard or benches from your timber, a garment from your wool, meal from your wine and honey, a plaster or eye-salve from your drugs, wine, oil, or flour from your grapes, olives, or ears of corn. There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but that if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus, a finished vase can be again reduced to a simple mass of gold, silver, or copper; but wine, oil, or flour cannot again become grapes, olives, or ears of corn; no more can mead be reconstituted as wine and honey or the plaster or salve as the original drugs. In my view, however, there are those who rightly say that corn threshed from someone’s ears of corn remains the property of the owner of the ears; for since the corn already has its perfect form while in the ears, the thresher does not make something new, but merely uncovers what already exists. 8. When two owners willingly mix their goods, the resultant whole is their common property, whether those goods be of the same kind, as when wines are mixed or bars of silver worked together, or different, as when one contributes wine and the other honey or one gold and the other silver; this, despite the fact that the mead or the alloy has a new identity. 9. The same holds good, even if this should happen without the consent of the two owners, whether of different or of similar materials. 10. When someone builds on his own site with another’s materials, he is deemed to be owner of the building because all that is built on it becomes part of the soil. However, the owner of the materials does not thereby lose his ownership of them; but he meanwhile cannot bring a vindicatio for them or an action for their production by reason of the Law of the Twelve Tables which provides that no one is required to give up materials of another built into his premises but that he must pay double their value. The term used is “beam” but, in fact, covers any building materials. Hence, if the house should collapse for some reason, the owner of the materials can have a vindicatio for them and have an action for their production. 11. The very proper question has been raised whether, if the builder sells the premises and the building collapses after the purchaser has usucapted it, their owner can still have a vindicatio for the materials. The occasion for doubt is whether, when the whole is usucapted as such, its individual parts are also usucapted. That idea did not commend itself. 12. Conversely, if a person were to build with his own materials on someone else’s site, he would make the building the property of the owner of the site, and if he knew that the site belonged to another, he would be treated as voluntarily parting with his materials so that even if the house should collapse, he would have no vindicatio for them. Of course, if the owner of the site were to claim the building but was unwilling to pay the value of the materials or the workers’ wages, he could be resisted with the defense of bad faith, assuming the builder to have been unaware that the site belonged to someone else and to have genuinely built as though on his own land; but, if he knows the facts, his own fault will be imputed to
him; for he rashly built on what he knew to be another’s land. 13. If I plant someone else’s cutting in my land, it will be mine; conversely, if I plant my own cutting in someone else’s land, it will be his, provided, in each case, that it roots itself. For until it takes root, it remains the property of its former owner. It follows that if I so pack earth around a neighbor’s tree that it puts forth its root into my land, the tree becomes mine; for reason does not tolerate the idea that a tree should belong to anyone other than the person in whose land it is rooted. Hence, a boundary tree, if it extends, roots into the adjoining land, belongs to both neighbors in common.

8. MARCIAN, Institutes, book 3: to the extent of their holdings. But if a stone appears on a boundary and the lands are common in undivided shares, then the stone will similarly be common property, if removed from the earth.

d. D.41.1.9
(Watson trans.)

9. GAIIUS, Common Matters or Golden Things, book 2: By the same reasoning that cuttings implanted in land become part of it, so seeds and corn sown in land become part of it. But just as one who builds on another’s land can defend himself with the plea of bad faith, if the owner of the site claims the building, so can a man have the same defense who has sown another’s land at his own expense. 1. Letters, even in gold, accede to the paper or parchment just as things built or sown become part of the land. Thus, if I wrote verse or a story or a speech on your paper or parchment, not I but you would be held to own the finished work. But should you claim your book or parchment from me but be unwilling to pay my writing expenses, I can, if I acquired your materials in good faith, resist you with the defense of bad faith. 2. Pictures do not accede to the tablets on which they are painted in the same way as writing to paper or parchment. On the contrary, the view established itself that the tablet accedes to the picture, Still it is appropriate that the owner of the tablet should be given an actio utilis, which he can bring to effect against the painter in possession of the tablet, if he pays the cost of the painting; in other circumstances, he will be met by the defense of bad faith; if it were a possessor in good faith who paid for and painted the tablet, we would give him a direct vindicatio against the owner of the tablet on his paying the value of the tablet; otherwise, he could be resisted with the defense of bad faith. 3. Those things, again, which are delivered to us become ours under the law of nations; for nothing is so conformable to natural equity as that effect should be given to the wishes of an owner wanting to transfer his thing to someone else. 4. It is of no consequence whether the owner delivers the thing personally or through someone acting on his behalf. Hence, if that other has been given free administration of the affairs of the owner, who is going on a journey, and he sells and delivers something, he makes it the property of the recipient. 5. Sometimes, indeed, the bare intent of the owner, without actual delivery, is sufficient to transfer a thing, as when I sell you something that I have already lent or let to you or deposited with you; for although I did not place the thing with you for that reason, now the fact that I allow it to remain with you on the ground of sale makes it yours. 6. Again, if someone sells the contents of a warehouse and, at the same time, hands over the keys of the warehouse to the purchaser, he transfers to him ownership of the contents. 7. Going even further, the will of the owner may confer ownership on an unidentified person; this is so when he showers largesse on a mob; he does not know who will pick up what, but because he wishes anyone who picks something up to keep it, he makes him owner thereof forthwith. 8. It is another matter with those things which are jettisoned in stress of seas to lighten the vessel; they remain the property of their owners; for they are not cast overboard because the owner no longer wants them, but that the ship may have a better chance of riding the storm. Consequently, if anyone finds any such things washed up by the waves or, for that matter, in the sea itself and appropriates them with a view to gain, he is guilty of theft.

e. D.41.1.12
(Watson trans.)

12. CALLISTRATUS, Institutes, book 2: Although a lake or pool may sometimes spread, sometimes dry up, it still retains its bounds and so no right of alluvion is recognized. 1. If something be made from the fusing of my copper and your silver, the thing is not our common property because, though copper and silver are different elements, they can be separated by craftsmen and returned to their original nature.
14. NERATIUS, Parchments, book 5: What a man erects on the seashore belongs to him; for shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one’s property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they have come. We have then to consider the legal position of the site, if the building erected on the shore comes down; does it remain the property of the builder, or does it revert to its original state, so that it is public again as though nothing was ever built upon it? This latter is the better way of looking at the matter, so long as the original form of the shore is restored.

15. NERATIUS, Rules, book 5: But one who builds on the bank of a river does not make it his own.

16. FLORENTINUS, Institutes, book 6: In the case of lands measured out, it is generally agreed that the right of alluvion has no place. The deified Pius ruled to this effect and Trebatius says that land granted to defeated enemies on the condition that it becomes civic property does have the right of alluvion and is not measured out; but, in the case of land taken by force it is measured out so that it might be known what was given to whom, what was sold, and what remained public property.

g. D.41.1.20

20. ULPNIAN, Sabinus, book 29: Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. Now whenever ownership is transferred, it passes to the transferee in the same case as it was with the transferor; if the land was subject to a servitude, it passes with the servitude; if it was unencumbered, it passes in that state; and if, perchance, there should be servitudes due to the land, it passes with the servitudes due. Hence, if someone declared land to be unencumbered when he conveyed it and it was in fact subject to a servitude, he would in no way affect the validity of the servitude; but he would place himself under an obligation and have to make reparation for his assertion. If Titius and I buy something and it is delivered to Titius as being my procurator, I think that I also acquire ownership because it is accepted that possession and, through it, ownership of anything can be acquired through a free person.

h. D.41.1.24–6

24. PAUL, Sabinus, book 14: It must be said of all things which cannot be restored to their original form that if the material remains though the form only is changed, as if you make a statue from my copper or a goblet from my silver, I remain owner of the objects,

25. CALLISTRATUS, Institutes, book 2: Unless what was done was done in another’s name with the owner’s consent; for then, because of the owner’s consent, the thing belongs wholly to him in whose name it is made.

26. PAUL, Sabinus, book 14: But if you make a ship with my planks, the ship is yours because the cypress wood no longer exists, as is also the case when some garment is made from wool; for there is now a thing made of cypress or of wool. Proculus intimates that we accept the view of the law which commended itself to Servius and Labeo. For them, we have to look at the overall character, so that if something be added, it becomes part of the whole. Thus, if a foot or a hand be added to a statue, a base or handle to a goblet, a post to a couch, a plank to a vessel, stone to a building, the whole belongs to the erstwhile owner of the statue, and so forth. A tree, wholly uprooted and put in another place, remains the property of its former owner until it takes root, but once it takes root, it becomes part of the land where it does so, and should it be again uprooted, it does not revert to its former owner; for it has conceivably altered through nourishment in other soil. If you dye my wool, the now purple wool
nonetheless remains mine according to Labeo; for there is no distinction between dyed wool and that which, falling into mud or mire, loses its original color.

i. D.41.1.27–31
(Watson trans.)

27. POMPONIUS, Sabinus, book 30: It is not to be said that the whole of the silver is yours, if you add some of another’s unwrought silver to your own; but if, on the other hand, you solder your goblet with someone else’s lead or you weld it with another’s silver, there is no doubt that the goblet is yours and that you can lawfully bring a vindicatio in respect of it. 1. When several ingredients are contributed together to produce a single medicament or if we produce an unguent from various essences, neither former owner can say that the resultant product is his; it is thus overwhelmingly better to say that it belongs to him in whose name the compound was made. 2. If it be asked which cedes to the other, when elements belonging to each of two owners are welded together, Cassius says that an assessment is to be made of the respective portions of the final product or of the value of each element. But if there be no obvious accession of the one element to the other, we have to consider whether the product should not be declared the property of both, as in the case of a conflated mass, or rather that of him in whose name the welding was done. Proculus and Pegasus, however, hold that each retains his own material.

28. POMPONIUS, Sabinus, book 33: If your neighbor builds upon your wall, Labeo and Sabinus say that the product belongs to the builder. Proculus, however, says that it is yours alone, as that becomes yours which another builds on your soil. And his opinion is the more correct.

29. PAUL, Sabinus, book 16: An island arising in a river does not become the undivided property of those who hold lands on one bank of the river, but is divided according to their particular areas. For each of them will hold it in appropriate areas to the extent that each previously held the bank, as though a straight line were drawn through the island.

30. POMPONIUS, Sabinus, book 3.4: Hence, if an island arising should pertain to my land and I sell the lower part of the plot to which no part of the island was fronting, no part of the island will belong to the purchaser for the reason that it would not have become his even if, at the time that the island arose, he was then owner of that part of the plot. 1. The younger Celsus says that if a tree should grow up on the bank of a river which marches with my land, it is mine because the land is my exclusive private property, although its use is regarded as public. Hence, when the riverbed dries up, it becomes the property of the neighboring owners because the public no longer avails itself of it. 2. There are three ways in which an island arises in a river: One is when the river flows around land which was not part of the bed; another is where land, part of the riverbed, is left dry by the river which begins to flow round it; the third is when the river, by gradual deposit, creates a higher part above the bed and augments it by alluvion. In each of the latter two cases, the island belongs only to him whose land was the closer when the island first appeared; for it is the nature of a river that a change in its course changes the character of its bed. And it matters not whether the issue be one only of the change of the riverbed or of the overflowing of ground and land; for each is in similar case. But, in the first case no alteration in ownership is thereby effected. 3. Alluvion restores the land which the river wholly removed. Hence, if land lying between a public road and the river had been flooded by the river, whether gradually or not, but reappeared with the recession of the river waters, it would belong to its original owner; for rivers serve as public functionaries, making public that which was private and private that which was public. Thus, just as this land was public while it formed the riverbed, so on becoming private, it should belong to its former owner. 4. If I drive piles into the sea and build upon them, the building is immediately mine. Equally, if I build on an island arising in the sea, it is mine forthwith; for what belongs to no one is open to the first taker.

31. PAUL, Edict, book 31: Bare delivery of itself never transfers ownership, but only when there is a prior sale or other ground on account of which the delivery follows. 1. Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner; thus, what does not belong to another becomes the property of him who finds it. For the rest, if someone should hide something in the ground for gain or out of fear or for safekeeping, it is not treasure and to take it would be theft.
j. D.41.1.36
(Watson trans.)

36. JULIAN, Digest, book 13: When we indeed agree on the thing delivered but differ over the grounds of delivery, I see no reason why the delivery should not be effective; an example would be that I think myself bound under a will to transfer land to you and you think that it is due under a stipulation. Again, if I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is no barrier to the transfer of ownership to you.

k. D.41.1.38
(Watson trans.)

38. ALFENUS VARUS, Digest, Epitomized by Paul, book 4: Attius had a property adjoining a public road; beyond the road lay a river and the holding of Lucius Titius. The river gradually flowed over and ate away the land lying between the road and the river and made way with the road and then gradually receded and, by alluvion, returned to its former bed. The opinion was that the river having destroyed the land and the public road, the land so destroyed became the property of the man who held the land beyond the river [that is, Lucius Titius]; but later, when the river slowly receded, it took the restored land away from the man who had acquired it and added it to that of the owner beyond the road [that is, Attius], since his land was nearest to the river; but what had been public became no one’s property. And he said further that the road did not prevent the land again exposed, with the recession of the river, on the other side of the road from becoming the property of Attius, since the road itself was part of his land.

l. D.41.1.41–2
(Watson trans.)

41. ULPIAN, Edict, book 9: It is the case that statues set up in a civitas do not belong to the citizens; so, Trebatius and Pegasus; still the praetor should ensure that what has been set up in a public place with the intent that it should be public should not be allowed to be removed by a private individual, not even by the person who erected it. The citizens, therefore, are to be protected, being given a defense against one who claims the statue and an action against one who possesses it.

42. PAUL, Edict, book 11: A substitution which does not yet lie is no part of a man’s estate.

m. D.41.1.46
(Watson trans.)

46. ULPIAN, Edict, book 65: There is no novelty in the fact that one who does not have ownership may yet confer ownership upon another; a creditor, for instance, in selling a pledge, gives title to an ownership which he does not himself have.

n. D.41.1.48
(Watson trans.)

48. PAUL, Plautius, book 7: A purchaser in good faith undoubtedly acquires ownership for the time being by gathering fruits, even those of someone else’s property, not only the fruits which are produced by his care and toil but all fruits, because, in the matter of fruits, he is virtually in the position of an owner. Indeed, even before he gathers them, the fruits belong to the purchaser in good faith as soon as they are severed from the soil. And it is of no consequence whether what I purchase in good faith can be acquired by long prescription or not; as would be the case if it belongs to a pupillus or was taken by force or presented to the governor in breach of the lex repetundarum and alienated by the governor to a purchaser in good faith. 1. Conversely, the question is raised, assuming that when the thing is delivered to me, I believe it to belong to the vendor and subsequently discover that it belongs to another, can I make the fruits mine, seeing that the period of prescription continues to run? Pomponius says that it is to be feared that although he may usucapit, such a person is not a possessor in good faith; usucapion is a matter of law, while the question whether a person is a possessor in good faith or in bad faith is a matter of fact; and there is nothing perverse in the continuance of prescription since, on the other hand, a man who cannot usucapit by reason of a flaw in the thing yet makes the fruits of it his own. 2. The young of sheep
count as fruits and so belong to the purchaser in good faith, even if the sheep were pregnant at the time of sale or had been stolen. And, certainly, there can be no doubt that he takes ownership of their milk, even though they were sold with full udders; the rule is the same for their wool.

o. D.41.1.50–2
(Watson trans.)

50. POMPONIUS, From Plautius, book 6: Although what we erect on the shore or in the sea becomes ours, a decree of the praetor, nevertheless, should be obtained, authorizing the erection; indeed more, one should be physically prevented, if he builds to the inconvenience of the public; for I have no doubt that he has no civil action in the matter.

51. CELSUS, Digest, book 2: We recover a deserter by right of war. 1. And property of the enemy, which is on our territory, becomes not public property, but that of the first taker.

52. MODESTINUS, Rules, book 7: We are deemed to have a thing among our assets whenever, being in possession of it, we have a defense or, on losing it, have an action to recover it.

p. D.41.1.56
(Watson trans.)

56. PROCULUS, Letters, book 8: An island arose in a river, so facing the frontage of my land that its length did not extend beyond the frontage of my land; subsequently, the island gradually grew and extended opposite the frontage of both my superior and lower neighbors. My question is whether the accretion is mine, because it has been added to what is mine, or is it in the same position at law that it would have been if the island had been of its present length when it arose? PROCULUS replied: If that river in which, you write, an island arose, not exceeding the length of your frontage, is subject to the right of alluvion and the island arose nearer your land than that of the owner on the other bank, the whole island is yours, and the subsequent accretion to it, by alluvion, is also yours, even though it be such as to extend the island beyond the frontages of your neighbors on either side or even to bring it nearer to the land of the owner on the other bank. 1. I have another question: The island having arisen nearer my bank, should the whole river subsequently begin to flow between me and the island, abandoning the former bed over which the main stream formerly flowed, do you in any way doubt that the island remains mine and equally that the soil which the river deserts also becomes mine? I ask you to write me your opinion. PROCULUS replied as follows: Assuming the island to have arisen nearer to your land in the first place, then, if the whole river, leaving its principal bed, which lay between the island and the land of your neighbor on the other bank, begins to flow between the island and your land, nonetheless, the island remains yours. But the bed previously existing between the island and your neighbor’s land should be divided down the middle, so that the part nearer to your island should be deemed to be yours and the part nearer to your neighbor his. I naturally take the point that when the riverbed on the other side of the island has dried up, it ceases to be an island, but to make the issue more readily intelligible, the land which was an island is still styled an island.

q. D.41.1.58
(Watson trans.)

58. JAVOLENUS, From Cassius, book 11: Nothing salvaged from the sea becomes the property of the salvor until its owner has begun to treat it as abandoned.

r. D.41.1.60
(Watson trans.)

60. SCAEVOLA, Replies, book 1: Titius erected his new mobile barn, made of wooden planks, on Seius’s land. The question is: Which of the two is owner of the barn? The reply was that on the facts as stated, it has not become the property of Seius.
62. PAUL, Handbook, book 2: Those things which cannot be alienated individually may pass as part of the estate to the heir, for example, dotal land and things which cannot be the object of acquisition by a given person; although these last could not be bequeathed as legacies to him, nevertheless, as the instituted heir, he becomes their owner.

63. TRYPHONINUS, Disputations, book 7: When someone in another’s power finds treasure, this must be said in relation to the person for whom he acquires it, that if he finds it on a third person’s land, he acquires part for that person, but if he finds it on the land of his head of household, the whole belongs to the head of household, but if it be found on another’s land, only part. 1. If a slave owned in common finds treasure on a third person’s land, does he acquire for his masters in proportion to the share that each has in him or for all of them equally? The case is similar to that of an inheritance or legacy or a gift to the slave by third parties; for treasure too is regarded as the gift of fortune, so that the part of it which falls to the finder belongs to the slave’s co-owners in proportion to their respective shares in the slave. 2. Should a slave owned in common find treasure on the private land of one of his owners, there is no doubt that so far as concerns the share which always falls to the landowner, it belongs exclusively to the owner of the land; but we have to consider whether his co-owner gets a share in the other half and whether the case is not similar to that where the slave stipulates at the direction of one master alone or takes delivery of something or does so specifically for one; this is the more probable view. 3. But if a slave, in whom someone has a usufruct, finds treasure on the land of his real owner, does it all go to that owner; and if he finds on someone else’s land, does he acquire the finder’s share for his owner or for the fructuary? The question to be considered is whether it is acquired by the slave’s labors. Suppose that he found it while digging the land; it might be said to be the fructuary’s; but what he comes across by chance in a secluded spot, while simply rambling aimlessly, would go to his owner. Myself, I think that, not even in the former case, does the half go to the fructuary. Hence, even if he found it on the fructuary’s own land, I think that the latter would get only the half that goes to the landowner, the other half going to the slave’s owner. 4. If a creditor should find treasure [on land pledged to him], he is held to find it on someone else’s land, and he allocates half for himself and half to the debtor; and when the debt has been paid, he will not have to yield up that half of the treasure which was his as finder and not as creditor. Things being so, even when a creditor begins, by imperial decree, to hold for himself as owner, the case is still one of pledge, while the time for redemption is still running; but once that period has expired without payment having been made, he will keep the whole of the treasure. But if the debt be tendered within the appointed period, since all must be made good which must be given back in the case of an ordinary creditor, the treasure too must be restored, but only half of it because it is settled that the finder always retains half.

64. QUINTUS MUCIUS SCAEVOLA, Definitions, sole book: Someone else’s property, which a person enters as his own in the census, does not thereby become his.

65. LABEO, Plausible Views, Epitomized by Paul, book 6: If I send you a letter, it will not be yours until it has been delivered to you. PAUL: Quite the contrary; for if you send your letter-carrier to me and I send you a letter in reply, it will become yours as soon as I hand it to the carrier. The same is true of any letter which I send you exclusively for your own purposes, say, if you have asked me to give you a testimonial and I send you the testimonial. 1. If some island in a river is your property, there is no public right. PAUL: No; with islands of this kind, the riverbanks and seashore are public, no differently from that which applies to the mainland. 2. If an island should arise in a public river nearer to your land, it is yours. PAUL: Let us consider whether this is not wrong in respect of an island which does not cohere to the actual riverbed, but which is held in the river by brushwood or some other light material in such a way that it does not touch the riverbed and can itself be moved; such an island would be virtually public and part of the river itself. 3. PAUL: If an island arising in a river is yours and then another island arises between it and the opposite bank, measurements should be taken in respect of it from your island and not from your riparian holding; for what is the relevance of the character of the land on account of proximity...
to which the issue of ownership of the second island arises? 4. Labeo, same book. If that which arises naturally or is built in a public place is public, an island arising in a public river ought to be public too.

66. Venuleius, Interdicts, book 6: If a pregnant woman be bequeathed or usucapted or alienated in some other manner and then gives birth, her issue will belong to her owner at the time of the birth, not to him who then owned her when she conceived.

6. A General Theory of Property?\(^1\)

a. GL.1.1 = D.1.1.9
(See above, p. Error! Bookmark not defined.)

b. D.41.1.1
(See above, p. 23)

c. D.41.1.9.3
(Watson trans.)

9. Gaius, Common Matters or Golden Things, book 2: ... 3. Those things, again, which are delivered to us become ours under the law of nations; for nothing is so conformable to natural equity as that effect should be given to the wishes of an owner wanting to transfer his thing to someone else.

d. D.1.1.11
(See below, p. Error! Bookmark not defined.)

e. D.12.6.64
(Watson & CD trans.)

Tryphoninus, Disputations, book 7: Suppose an owner has a debt to his slave and pays it after manumission. He cannot recover (in the condicio indebii), not even if he believed that other could sue him by some action. For in the sense that freedom is a condition of natural and subjection the invention of the law of the world (gentium iure), so for the condicio the question whether there is or is not a debt is to be taken on the natural plane.

f. D.1.5.4
(Watson & CD trans.)

Florentinus, Institutes, book 9: Freedom is one’s natural power to do what one pleases, save insofar as it is ruled out by coercion or by law. 1. Slavery is an institution of the ius gentium, whereby someone is against nature made subject to the ownership of another. 2. Slaves (servi) are so-called, because generals have a custom of selling their prisoners and thereby preserving rather than killing them: and indeed they are said to be mancipia, because they are captives in the hand (manus) of their enemies.

g. D.1.1.4
(See below, p. Error! Bookmark not defined.)

h. D.1.1.1.2–4
(See below, p. Error! Bookmark not defined.)

i. D.1.1.5
(See below, p. )

j. D.41.2.1pr–1
(Watson trans.)

1. Paul, Edict, book 54: Possession is so styled, as Labeo says, from “seat,” as it were “position,” because there is a natural holding, which the Greeks call κατοχή by the person who stands on a thing. 1. The younger Nerva says that the ownership of things originated in natural possession and that a relic

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thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them. In like manner, things captured in war, islands arising in the sea, and gems, stones, and pearls found on the seashore become the property of him who first takes possession of them.

k. JI.1.2.2

(See above, p. Error! Bookmark not defined.)

B. SECONDARY MATERIAL

1. Crook, Property

J. A. Crook, Law and Life of Rome ch. 5 (pp. 139–52)

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 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 not 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, three 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 god 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 doloī 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 the 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 the 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 this think 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’.) 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, ‘transformed Roman ownership. Henceforward the recipient of a *res mancipi* by *traditio* was for nearly all practical purposes in the position of an owner.’

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. 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. And there were 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):

> ‘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. 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, and hence the disincentive or penalty for litigation that was spoken of in Chapter III. Consequently one wonders whether the poor man could risk and interdict on these terms against a rich one (which may be relevant to the expropriation of yeoman farmers which troubled the Gracchi), even supposing he could actually get possession (which is even more relevant).

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’:

> ‘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.

The enormous work begun by Augustus, the taking and the 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’.
‘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 Velcia’, the list of landholders on the basis of whose property Trajan’s scheme for the maintenance of poor children was based:38

‘P. Attilius Saturninus, by his agent Castricius Secundus, returns the property called Fonteianus in the territory of Velcia, sub-district Iunonius, neighbours Attilius 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 apportionment 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, a 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].’
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:

‘Private road of C. and Q. Largus, sons of Lucius, and C. Olius Salvus. Ows 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, 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 macipi), 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’, 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:

‘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’; all could be lost by non-use, or non-resistance to breaches of them, for two years. 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, because both parties are domini. Thus, someone wrote to the jurist Proculus:

‘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 passage 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:

‘Aristo gave an opinion to Caerellius Vitalis that he didn’t 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 form 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

2. The Jurists’ Treatment of Urban Lease Law


III. Introduction to the Jurists’ Treatment of Urban Leasehold

Within a system of private law, the law of procedure has the primary purpose of providing individuals with a mechanism whereby they may realize their legitimate claims against one another. Nonetheless, it is extremely probable (in the ancient world no less than in the modern) that many claims, and perhaps the great majority, never come to the attention of a court of law. A potential plaintiff may have a variety of reasons for not pressing a claim:

(1) he may not realize that he has a claim;1

(2) he may lack access to skilled authority who can help him to formulate and pursue his claim, or who will represent or help him before a court of law;2

(3) he may be deterred from litigation by the initial outlay involved;3

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† Prof. Frier’s translations, given in the Appendix of the book have been substituted for quotations from the Latin that he gives in the text. CD


(4) he may be unable (or may fear that he is unable) to carry through a summons of the defendant;  

(5) he may believe that pursuit of his claim would be in itself degrading to him personally, or an  
offense against social convention;  

(6) he may fear that pursuit of his claim would expose him to public humiliation of an unacceptable  
magnitude;  

(7) he may believe, with or without justification, that his claim would not be given a fair hearing due  
to the bias or corruption of the court system;  

(8) he may be indifferent or apathetic about courts in general;  

(9) he may have alternative methods of settling the claim, as for’ instance through self-help or private  
settlement;  

(10) or, finally, he may believe that the reward he would be likely to obtain through a suit simply does  
not suffice to warrant his investment of the time, expense, or trouble required.  

Many considerations act to discourage litigation, today as in antiquity. Of these factors, the last one,  
namely the ratio of “reward” to “investment,” is perhaps crucial. As this ratio increases, the other factors  
predictably dwindle in importance: the plaintiff is likelier to know of his claim and likelier to overcome,  
if at all possible, the obstacles to realizing it. However, realization of a claim is not simply a matter of  
court judgment; the plaintiff must also be able to collect his reward, and, as Gaius dryly remarked (D.4.3.6),  
a valid claim is the same as no claim at all when the defendant is insolvent. Such a defendant is, in the  
modern idiom, “judgement-proof.”  

In Rome, most of the factors listed above acted to deter members of the lower classes from bringing  
suits; they were probably ignorant of the law, and they were also the victims of a social structure that  

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3 See P. A. Brunt (cited n. 2) 169; also E. Parks, *Roman Rhetorical Schools* (1945) 56ff., on fees to orators (and there were  
other costs); but also J. M. Kelly (cited n. 2) 84 n. 1. Note that the condemned defendant did not normally recompense the  
plaintiff’s procedural costs: Kaser, *RZ* 288.  

4 Cf. J. M. Kelly (cited n. 2) 7–12; substantially modified in P. Garnsey (cited n. 2) 187–194; and cf. A. S. Hartkamp, *Der  


6 Cf. J. M. Kelly, *Studies* (cited n. 5) 98–102 (rhetorical vituperation). While private *iudicia* could take place in the homes of  
iudices (esp. Vitruv. 6.5.2), we should not follow Kelly in thinking of them as therefore closed to the public; Vitruvius specifies  
the need of spacious halls, obviously to accommodate crowds. By ca. 70 A.D. most *iudicia* were held in auditoriums and registry  

7 In the work cited in n. 2, J. M. Kelly conducted a preliminary study of this problem, and his conclusions were extended by  
P. Garnsey. There is, however, much more work still to be done on the social patterns of Roman litigation.  

8 J. M. Kelly, *Studies* (cited n. 5) 97–98, on this attitude in the late Republic.  

9 On the frequency of resort to self-help, see above all G. Wesener, in *Fs. Steinwenter* 100–120; T. Mayer-Maly, RE s.v.  
1060–607; add J. M. Kelly, *Litigation* (cited n. 2) 132–152; P. Garnsey (cited n. 2) 195–197. The consequences of such arbitration  
are not always socially beneficial; cf. R. MacMullen, *Roman Social Relations* (1974) 39-40 (observing the need for further study).  

10 I intend this calculation in a large sense; it should not be forgotten that the factors mentioned above often had a larger  
psychological weight in Rome than in the modern world. But there are countervailing factors: a plaintiff may pursue an  
unrewarding claim to “set an example,” or because of a high sense of “justice,” or from personal animus against the defendant, or  
the like.  

11 On the defendant’s personal power to prevent execution, see J. M. Kelly, *Litigation* (cited n. 2) 12-14 (exaggerated).  
Personal execution against the insolvent debtor obviously became very rare in the Empire; cf. 131. Kaser, *RZ* 300, against F.  
Schulz, *CRL* 26 27.  

12 Cf. D. Black, *The Behavior of Law* (1976) 21-30. That is the most which can be deduced from the factors cited above; the  
weeping conclusions about differences between Roman and modern law in J. M. Kelly, *Litigation* (cited n. 2) 173-174, are not
was not only exaggeratedly pyramidal in its distribution of wealth and influence, but also bound by stark social conventions that sometimes had overt legal support. Simultaneously, however, their poverty effectively protected these same lower classes against private lawsuits by others. Much of Roman private law may therefore have remained confined for all practical purposes to the upper social tiers—an inference that seems confirmed in certain areas of substantive law. In any event, beyond all doubt the incidence of litigation tended to increase dramatically as one moved higher in the social order.

This “relative imbalance” in litigiousness is likely to have been still further accentuated in the area of urban lease by, the Roman rental market itself. Here the poor, the vast majority of all tenants, were mostly housed in squalid tenement houses (deversoria) where they paid rent on an essentially short-term basis, perhaps most commonly daily. Such a system of rental is, as Pernice may already have seen, not productive of many suits on leases; when landlords were dissatisfied with their lower-class lodgers, or when these lodgers were dissatisfied with their quarters and could find an affordable alternative, they simply moved on. The sums involved were rarely large enough to warrant litigation. This is not to say that suits were never generated among lower-class tenants, only that suits were probably very uncommon. Thus, the “relative imbalance” produced by factors inhibiting litigation was probably converted, in the area of urban lease, into a virtually “absolute imbalance.”

The resulting imbalance is clearly reflected in the jurisprudence of urban leasehold. Wherever we can assess the content of the real or hypothetical cases discussed by the jurists, these cases reflect the upper classes—either upperclass tenants or the entrepreneurial middlemen who rented and then subleased insulae. The inquilini of slum tenements find no place in juristic discussions on leasehold, despite their numerical preponderance among urban tenants.

This imbalance and the consequences that it had for Roman jurisprudence lie at the core of the thesis of this book. In the next three chapters, the Roman law of urban leasehold will be discussed on the assumption that the jurists limited themselves de facto to “legalizing” that portion of the rental market which private law could reach and influence; thereby the jurists created what can be described as a “law of upper-class leasehold,” albeit with allowance (through generalized statement of rules) for occasional cases concerning lower-class tenants. Because the type of analysis here proposed is different from that usually accorded Roman legal sources, a few words of explanation are called for.

Rome’s problems in housing a tenantry that numbered probably at least half a million persons (including dependents) were undoubtedly as great as or greater than those of any city before modern
times. Here it is necessary no longer to speak merely of the imbalance in private law, but rather of the pure and simple inadequacy of any system of private law constructively to approach problems of such magnitude, particularly as they touch on the lower classes. Modern experience has clearly and repeatedly shown that the problems of urban housing not only are predominantly problems of public law but also are exceptionally difficult to handle even for a State armed with a mass of economic and sociological theory, an adequate tax structure, and a policing force able to carry out its legislation. By contrast, Rome not only lacked a comparable conceptual, financial, and bureaucratic capacity, it also lacked the will to master these problems; legislation on urban housing was indeed not negligible in quantity, but hardly sufficient to the task.19

Without a strong legislative tradition behind it, Roman private law necessarily lacked the breadth of vision even to contemplate urban housing in its entirety. No matter how much or how little concerned we suppose the jurists to have been with social and economic problems (and frankly I find it difficult to accept the icy conservatism occasionally thrust upon them by modern scholars),20 in a trouble area like urban housing the extent of their difficulties should not be underestimated. The social range of the impulses that flowed into the law in the form of claims by plaintiffs and defendants was relatively small, could not adequately represent the entire spectrum of interests, and clearly did not constitute an adequate basis for generalized social planning.

It is, I think, entirely fair to observe that Roman jurists did not in general aim to “change society”21—but this needs qualifying. Obviously, they did not consciously aim at altering the social structure of Rome, or at “social engineering,” in Roscoe Pound’s phrase; on the contrary, they displayed a considerable loyalty to existing social structures.22 However, “legalization” itself—by which is meant the relentless propagation of law, the patient exposure of hitherto nonlegal or quasi-legal relationships to public scrutiny and legal analysis, with the consequent transformation of such relationships into rule-guided activities—includes a “change” in society that should not be labeled obvious or trivial because the step seems to have been so easy in retrospect. Nor, as I hope to show, can a line be clearly drawn between such legalization on the one hand and the use of law as an instrument of social control on the other.23 The transition from one to the other can be virtually indetectable.

Rome’s housing problems involved not only an immense throng of lower-class tenants, but also (apparently for the first time in history) a relatively large number of well-off ones. No matter the size of the latter group, they obviously cannot be compared with the poor in any framework defined by social conscience; nor do I see any sign of the jurists having made such a comparison. That is not the question. Rather, the question is and was: what can a system of private law realistically be expected to accomplish?


20 See e.g. on locatio conductio, F. Schulz, CRL 544–546; B. Nicholas, An Introduction to Roman Law (1962) 184. The jurists are all “upper-class,” but of diverse origins within this category, in general it is not easy (they do not make it easy) to evaluate their opinions on nonlegal matters. See also n. 22 below.

21 See e.g. N. Luhmann (cited n. 12) 182 (of “premodern” law in general): no intention “auf planmässige Veränderung der sozialen Wirklichkeit mit Hilfe des Rechts.” On p. 183 it is clear that he means not only change in swift response to stimuli, but also what B. A. Ackerman, Private Property and the Constitution (1977) 10–20 calls Scientific Policymaking.


23 I mean here something similar to N. Luhmann’s contrast between jurisprudence at the “input boundary” (the standardization and classification of cases or case elements subjected to decision making; law as regulation of conflict) and jurisprudence at the “output boundary” (law directed toward the attainment of desired social consequences): Rechtssystem und Rechtsdogmatik (1974) 25–30. A similar cybernetic analysis (input/output/feedback) is adopted in L. M. Friedman, The Legal System (1975), and underlies Chapter VI below.
Recognition of Interests in Roman Lease Law

In the preceding chapter I set out the system of law by which, so I implied, urban leasehold was governed during the High Roman Empire. In three important respects, however, this implication is incorrect.

First of all, we do not read our juristic sources in anything like their original form and fullness; rather, we read them mostly in a Byzantine version: highly excerpted, often compressed, and at least to some extent reworded. Admittedly, scholars have not yet arrived at a consensus in evaluating the significance of this Byzantine redaction, nor, in the nature of things, is a consensus likely to emerge. However, even if the substance of our sources were virtually intact (and that is improbable), the loss of the great bulk of juristic writings would still leave us with only a fragmentary idea of the content of classical law.

Second, my attempt to restore a classical law of leasehold was to some extent misleading. In recent years, many scholars have turned away from the notion that classical law constituted a unified body of law; instead, they have recognized how often the jurists disagreed, and they have accepted the possibility of a “classical law” that was formed slowly, in tentative and uneven stages, and with considerable disagreement at every stage. This change in scholarly attitude raises the question of whether we may validly speak of a single Roman law of urban lease; in reality, the “system” assembled above is a composite drawn from sources varying widely in date and nature, and it would be ingenuous to suggest that the whole of this “system” was ever simultaneously in force.

Third; even if these difficulties could be overcome, juristic sources still cannot be dealt with as if they described a body of positive law similar to a modern code. Roman jurisprudence operated differently. At least in the early Empire, and probably (as I think) throughout the classical period, Roman trials were “agonistic” in character. The iudex was not normally a law-trained judge in our sense, but rather a layman attempting to resolve as best he could arguments pro and con. The ambience of a iudicium was rhetorical: the direct confrontation of conflicting interests, the clash of advocacy and persuasion. Within this setting, juristic writings constituted one source of law among many, albeit a powerful source and probably an increasingly powerful one over time; still, the iudex retained a considerable reserve of discretion. These considerations suggest that we should not try to equate juristic law with the actual law administered in Roman courts.

These three points combine to make me a “rule-skeptic”; the known juristic rules on urban leasehold were doubtless influential in the Roman judicial system, but are not likely to describe precisely the law applied by that system at any given time.

From one point of view, however, it need not matter to a legal historian that the known rules on urban leasehold were not in fact invariably applied within the Roman judicial system; from this viewpoint,
which I shall pursue below, it is sufficient that the jurists at least intended them to be applied and had some confidence in their influence on the legal system.

When a conflict about substantive law arises within a judicial system, a legal rule disposing of that conflict implies at least a de facto discrimination between the competing sets of interests advanced by two parties who, in a typical suit, are arguing about that point of law; as a result of a dispositive rule, one party wins and the other party loses. Because of this, rules of substantive law by their nature cannot be interest-neutral. But the juristic rules of Roman lease law, although they normally did not arise (unlike judge-made law) in the context of actual adjudication, did enjoy some considerable measure of official backing and authority; and as such these rules constituted, at least de facto, the Roman government’s major response to and evaluation of the various interests regularly asserted by the parties to urban leases. It is worth the effort, I think, to attempt to set out schematically the principal interests protected within Roman lease law, and to describe briefly how and to what extent they were protected.

We may approach the matter of interests from two points of view. First of all, we may assume that the two litigants are each concerned only with their own private or individual welfare, and that they are advancing a conflict of purely individual interests for adjudication by the State as a theoretically impartial arbiter. In this situation, each party is seeking legal protection for his own advantage. In the following pages, I have attempted to discover the major personal or individual interests protected by Roman lease law.

An analysis of personal interests may begin with a generalized description of the institution of urban lease:

(1) a property owner (dominus/locator), who seeks to exploit his urban property for personal gain, unites with

(2) a tenant (conductor or inquilinus), who seeks shelter for his household, in

(3) a contract whereby their respective desires can be simultaneously satisfied.

This basic pattern provides an initial structure for analyzing the personal interests in urban lease law.

(1) The owner’s fundamental interest (and indeed his reason for concluding the contract) was his desire to exploit the property for profit. There were several sides to this interest, however.

(1a) For the Romans latent in the owner’s right to dispose of his property to others through contract was the (at first sight contradictory) idea that in general he did not thereby lose control of his property. Gaius 4.153:

6 On the significance of legal typification (“the recurrent problem-situation”), see K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960) 43–44. There seems no reason to suppose that the hypothetical cases in the jurists arose from thin air.

7 In reality, the relation of interests to law is of course considerably more complicated than I suggest; cf. J. Stone, Social Dimensions of Law and Justice (1966) 168. Interests are defined more exactly in Chapter VI below (at n. 18). For the moment it suffices to isolate them in the rhetorical context of trial debate (cf. D. Nörr’s article cited n. 3). At least this amount of social information was beyond all question available to the jurists; it would be instructive, for instance were Cicero’s private orations analyzed in terms of interests.

8 In the following pages I have normally relied on the interpretation given the cited passages in Chapter IV, and thus have avoided extensive footnotes. Ideally, an interest analysis of Roman lease law should be historically differentiated; but in the present state of our knowledge this is hardly possible.

9 This “Interessenlage” is described by e.g. K. Larenz, Methodenlehre der Rechtswissenschaft (1975) 187. One must observe that: (1) the similarity between the ancient and modern legal institutions has no special significance in assessing the former; (2) an Interessenlage is only a description of an abstract legal institution, and does not purport to give an accurate description of social reality (though the similarity in this case may be reasonably close).

10 On the support given this interest by Roman law, see F. Schulz, Principles 151–153. The owner’s right to exploit his property by contract is affirmed and justified by Cicero, Off. 2.83–85, as part of his property rights (73, 78); Cicero’s essay, a classically Roman (though Stoic-influenced ) defense of private property, is discussed by M. Frederiksen, JRS 56 (1966) 138–140, with literature. On the individual’s interest in control of property in modern law, see J. Stone (cited n. 7) 244–254.
We are considered to possess not only when we possess ourselves, but also if another is in possession in our name even though he is not subject to our power, such as a farm tenant or urban tenant.

The tenant was *in possessione* for the landlord, even though he was not subject to the landlord’s control. In this sense the owner continued to enjoy an active interest in the physical dwelling; his absolute power to expel the tenant at any time and thereby to resume direct control of the premises (at most he subjected himself to a suit for damages) was a clear expression of his interest. Equally germane to his interest was the right of preclusion since this right assumed (especially after the implication of a tacit pledge: D.20.2.4pr et al.) that the owner’s sphere of control might extend, in some circumstances, also to the tenant’s furnishings within the physical perimeter of the dwelling; Ulpian’s apparent extension of the owner’s right of preclusion past the middleman directly to subtenants (D.13.7.11.5) forcibly brings home the power of this interest. Some similar view of the owner’s interest in having “what is his” may have underlain his right to expel the tenant if he required the dwelling for his own purposes (C. 4.65.3).

(b) Exploitation of the premises obviously implied, in the case of leasehold, the reception of rent from tenants. The tenant’s failure to pay rent was a justification for his expulsion (C. 4.65.3); and the tenant was responsible for seeing to it that the rent reached his actual landlord (D.12.6.65). The landlord’s strong interest in the collection of rent helps to explain why a tenant who abandoned his dwelling unjustifiably was liable for the entire outstanding rent and not just for damages (D.19.2.24.2 28.2); and the tenant’s furnishings were a pledge for the entire outstanding amount (D.43.32.1.4). The juristic construction of the tenant’s tacit pledge of furnishings (D.2.14.4; 20.2.4pr–1, 6) and the jurists’ approval of the stark right of preclusion (D.20.2.9) were equally motivated by protection of this interest; the possessions could be held until the landlord was satisfied as to the rent. Finally, various tenant rights were modified in favor of the owner’s interest in receiving rent; good examples are the restrictions on justified abandonment (D.19.2.13.7; 39.2.13.6, 28, 33) and on deduction from rent (D.19.2.27pr, 28pr–1) and the construction of the owner’s limited opportunity to mitigate damages after a breach (D.19.2.9pr, cf. 60pr).

(1c) From the owner’s interest in exploiting his property also sprang his interest in maintaining it so that its earning capacity was not diminished. The owner could justifiably expel a tenant not only if the building had to be demolished (D.19.2.30pr, 35pr) but also if it required serious repair (C. 4.65.3). For purposes of repair he could enter the premises with the power of an interdict *uti possidetis* behind him (D.43.17.3.3); and small repairs could not be made the excuse for a tenant’s deduction from the rent (D.19.2.27pr).

(1d) Allied to the owner’s interest in maintaining his property was his interest in preventing harm to it. The owner could justifiably expel the tenant for gross misconduct with regard to the premises (C.4.65.3). Further, the growth of the tenant’s *culpa* liability, and especially of his liability for the *culpa* of others (D.9.2.27.11; 19.2.11pr), vividly illustrates the persuasiveness of this interest, which also acted to impose limits on the tenant’s right to abandon (D.19.2.13.7); not only was the tenant to be deterred through this liability from unthinking negligence, but the landlord was also to receive compensation for resultant damage whenever possible. Similar logic extended the tenant’s pledge of furnishings so as to cover his negligent damage (D.20.2.2).

(1e) These interests were contractual, and so adhered not only to the owner but also in part to a middleman. This introduced some problems; for instance, the middleman did not have possession (D.43.16.20), though there is no evidence that this lack hindered him in expelling or precluding an *inquilinus* (cf. D.13.7.11.5). Further, it seems clear that he also acted as a “stand-in” for the owner when the *inquilinus* negligently damaged the dwelling (cf. D.19.1.13.30); in classical law the middleman seems

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11 Again, it needs emphasis that this is a general rule, not the result of the unfavorable social position of the urban tenant in particular; though the general rule no doubt worked hard consequences. Cf. M. Kaser, *RPPr* 1389–390, 567; below, n. 22.

12 Cicero particularly stresses this interest at *Off.* 2.88. On Cicero’s management of his urban properties, see my article, *CJ* 74 (1978) 1–6: he insisted on punctual payment of rent: *Att.* 12.32.2. Compare Ulpian, *Frag. Vindob.* 1.2.

13 The late classical extension of the *actio Serviana* to cover these pledges was discussed at Chapter IV n. 138.
to have been expected to cede the resultant action to the owner (cf. D.19.2.11pr), though he probably became liable himself for his tenant’s *culpa* if he had been negligent in choosing the tenant (decisive evidence is lacking). We will return below to the problem of the middleman.

(2) On the side of the tenant were ranged a group of interests derived from or related to the tenant’s basic interest in obtaining a dwelling. Shelter is obviously a fundamental human need. However, the upper-class Roman tenant, like his modern counterpart in all classes, understood far more by this than merely a roof over his head.

(2a) The tenant’s interest in his dwelling obviously implied his interest in enjoying unabatedly its physical security and comfort.14 He could not enjoy this if he had reason to fear staying there (D.19.2.27.1, cf. 13.7; 39.2.33), particularly if he feared the collapse of his own structure (D.39.2.13.6); in that event he could justifiably abandon the structure, without regard to the landlord’s ability to prevent the cause of fear (D.19.2.27.1). So, too, if the physical condition or the amenities of the building declined to the extent that the tenant’s enjoyment appreciably diminished; depending on how bad it was, the tenant could in some cases justifiably abandon (D.19.2.25.2) or deduct from the rent (D.19.2.27pr). Further, the tenant was also protected against unjustified expulsion from the dwelling during the term of lease; in that event, he could demand the payment of damages (esp. D.19.2.28.2), and so also if he was expelled by a third party because his landlord lacked the right to lease (esp. D.19.2.9pr, 15.8). When the owner-landlord disposed of the property through sale (D.19.2.25.1) or otherwise (e.g. through legacy; cf. D.30.120.2, = Frag. Vat. 44, on farm lease), he was obliged to provide for the tenant’s continued occupancy. Finally, that the tenant’s interest was conceived generally and not just in relation to a specific dwelling is shown by the juristic construction of the landlord’s limited right to mitigate damages through the offer of alternative housing (D.19.2 9pr, cf. 60pr).

(2b) But the tenant’s interest in the dwelling was not limited to the physical habitation of it; the dwelling was also his and he had an interest in finding within it a place of privacy where he could lead the domestic life that pleased him.15 The last clause of D.43.17 3.3, though its authenticity is contested, apparently required a landlord, if he wished to enter and repair a dwelling, to state his purposes publicly before obtaining an interdict *uti possidetis*; and indeed no source ascribes to the landlord any arbitrary right to enter the dwelling in circumstances short of expulsion. The one source which suggests the landlord retained a key (D.19.2.56) also allows him to use it only with permission from the Praefectus Vigilum.16 No sources imply that the landlord had an interest, by virtue of his position, in his tenant’s private life; reasons of this sort are not given as grounds for expulsion in C.4.65.3. The list of exceptions to the category of pledged furnishings is also relevant;17 these exceptions reflect, at least in part, the tenant’s interest in leading a social life distinct from his landlord’s claim. The property of guests is not included (D.20.2.5pr.; 43.32.1.3), nor are things detained by the tenant under a contract (D.43.32.1.5, 2). To be sure, the interests of third parties are also bound up in these exceptions; especially the exception made for slaves manumitted by the tenant before preclusion (D.20.2.6, 9), where *favor libertatis* is involved. Nonetheless, in some cases even the tenant’s own property did not constitute part of the pledge, as when it was only casually within the dwelling (D.20.2.7.1). Finally, the tenant’s general contractual right to remove his property at the end of the lease (D.19.2.19.4–5), and the particular applications of this right in the option between the interdict *de migrando* and a suit *ex conducto* (D.19.2.25.2; 19.2.33–34), is but a slight extension of this interest; just as the tenant could dwell in his home without disturbance, so

14 The classic exposition of a tenant’s desires is Juv. 3.190–211. The corresponding social interest in guaranteeing minimum conditions of welfare is mentioned by Cicero, *Off.* 2.74; such minimums are in the main culturally determined, cf. F. Heichelheim, *Wirtschaftliche Schwankungen* (1930) 100. Compare J. Stone (cited n. 7) 353–357.


16 Cf. G. Rickman, *Roman Granaries* (1971) 208–209. This may be the meaning of D.39.2.34, that the precluding landlord retains furnishings “as if” (*quasi*) they were *pignora*.

too he could depart from it in orderly fashion, provided his contractual obligations had been met. An aspect of this interest is the imposition on the landlord of a duty to protect for a time even legitimately precluded pledges (D.39.2.34). (But the jurists do not go further, by providing a “period of notice” before expulsion.) The jurist’s tendency, to treat each tenant’s apartment as a little world governed by him is complemented by their refusal to allow his justified abandonment if (e.g.) a tenant’s neighbors are a source of annoyance to him; all have equal rights in this respect.

(2c) The concession to the tenant of the right to sublease, in the absence of a contractual provision to the contrary (C.4.65.6), somewhat complicates the picture. This concession created for the tenant, if he exercised his right, an economic interest in the exploitation of the leasehold. (Roman law did not clearly distinguish between middlemen who sublease for profit only, and tenants who both dwell and sublease.) Where the intention to sublease was clear, the tenant was justified in abandoning if sublease was impossible, even though he might be able to live in the structure himself (D.19.2.60pr). Further, if his subtenant was evicted due to his landlord’s lack of right to lease, the tenant could recover at least an amount equal to what he had to refund to the subtenant (D.19.2.7–8). The complexity of this area of law is clearly illustrated by the difficult relationship between sublease and pledge of furnishings (D.13.7.11.5).

(3) An interest on the part of either party in contractual security was also protected; the parties could reasonably expect to receive what they had contracted for.18 Thus, in addition to the various enforcements of the contract discussed above, it is to be observed that Roman jurists generally advocated enforcing all agreed-upon clauses of a lease, even where these seriously weakened the position of one party (D.19.2.11.1; cf. 19.2.9.2, 30.4, farm lease). So also the tenant was held to have received the dwelling he had bargained for (D.39.2.13.6), with the result that only impairment of use arising thereafter was a ground for deduction from rent (D.19.2.27pr): the problem of latent defects is not faced in our texts. The tenant was held automatically liable for damage resulting from his violation of a clause in the lease (D.19.2.11.1, 4; 12). Deviations from the principle of contractual security are always easily explained in terms of a conflicting interest of one party or the other; variations that are more difficult to justify, such as the remission of rent introduced to preserve economic balance in farm lease, are not found in urban lease. Equally, the jurists refused to recognize an automatic renewal of the term of lease after expiration of the contractual term (D.2.13.11).

While an analysis of Roman lease law in terms of personal or individual interests is entirely adequate if we assume that a State (in the person of its representative or appointee) is primarily an impartial arbiter or umpire, such an analysis is inadequate if the State is taken to be not impartial, but rather an active party concerned with obtaining a socially “acceptable” outcome to private litigation. This second viewpoint is involved when (as often occurs)19 litigants cease to base their claims for legal protection on their individual interests, and instead argue about what social interests the State should protect. A litigant who appeals to social interests is not I merely arguing about the relative priority of individual interests; rather, he is advancing differently conceived interests, ones that are “involved in or looked at from the standpoint of social life in civilized society and asserted in title of social life.”20 The very ambiguity of the State’s role in private litigation—an ambiguity probably latent in all developed systems of private law—in and of itself encourages both litigants and us to reexpress the individual interests described above in terms of social interests which Roman lease law seems designed to further or protect.21 Obviously, such a

18 This is “freedom of contract”; compare J. Stone (cited n. 7) 251–254 with F. Schulz, Principles 225–227.
19 Thus, in the pro Caecina, Cicero defends his interpretation of the interdict de vi armata by emphasizing the State’s interest in upholding property rights (73–77).
20 R. Pound, Outlines of Jurisprudence (1943) 97.
21 In any event, for purposes of legal discussion personal interests must be sharply divided from social interests: J. Stone (cited n. 7) 181–182. A distinction of interest levels is clearly recognized in Ulpian D.1.1.11 (ius civile is “what is useful to all or to a majority in the State”).
reexpression does not involve a one-for-one correlation; social interests involve a different kind of argumentation, they overlap with individual interests and are not determined solely by the conflicts of private parties. The following sketch serves to bring out the principal points:

(i) Roman juristic decisions strongly favor exploitation of urban properties through lease; indeed, Roman law was “landlord-friendly,” decidedly too much so by modern standards. This is so even if we leave to one side the tenant’s absence of possession, which was an inherited element. Otherwise, the owner was allowed to retain a very strong interest in his property (above, Categories 1a, 1c), an interest which is clearly manifested in his powers of expulsion and preclusion; nothing definitely indicates that the jurists ever sought to limit these powers, and preclusion was in fact legitimized generally through the implication of a tacit pledge of furnishings. Ulpian’s further extension of the owner’s power of preclusion past the middleman and directly to subtenants (D.13.7.11.5) is a particularly arresting, though not unproblematic, example of the favor accorded the owner’s position. Furthermore, the owner’s interest in the rent (Category 1b) is also firmly protected in principle, and the right to remission of rent was apparently never accorded the urban tenant. However, elimination of the tenant’s duty to pay rent is also the jurists’ commonest method of securing the tenant’s interests against the landlord (see Category iv below)—though Ulpian’s attempt to limit damages (D.19.2.7–8) should also be remembered. Further, the landlord’s dwelling was protected against the damages arising from rental by a gradually increasing culpa-liability for tenants (Category 1d). There is every reason to understand the high degree of legal protection accorded landlords in terms of the strong social position occupied by Roman property owners; at the same time, however, encouragement of this particular form of property exploitation can doubtless also be related to the imperative need to house Rome’s burgeoning population. In this regard, we should note the implication of the tenant’s right to sublease and the general protection accorded that right (Category 2c); and, in another area of law, the allowance of renewal of a lease after breach of contract and the development of amelioration of damages through the offer of equivalent housing (D.19.2.9pr, 60pr).

(ii) Roman jurisprudence displays, in urban leasehold as elsewhere, an emphasis on enforcement of the agreed-upon terms of contracts (Category 3). Such emphasis can be defended as support for the security of the marketplace, and in most cases this is a strong and reasonable defense. Modern law tends to focus on problems resulting from unequal bargaining power; not so in Roman law. While there was probably no great economic or social “gap” between landlord and tenant in upper-class lease cases (cf. Chapter III), Roman jurisprudence shows no inclination to extend protection to those less fortunate. On the other hand, it should not be forgotten that the Roman economic system was relatively simple, and that the Roman world knew neither “landlording” as an occupation nor the professional drafting of “ironclad” leases. Landlords of that period do not seem to have enjoyed an advantage of professional expertise over their tenants.

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22 The system of possessory interdicts sprung up in response to quite different problems, cf. M. Kaser, RPR2 1 396–397. L. Labruna, Vm Fieri Veto (1971), tried to isolate the historical factors involved; the result was perhaps overly monocausal.

23 Though there is some search for legal alternatives to expulsion by self-help; cf. Chapter IV at n. 88.

24 Also through the cautio damni infecti: D.39.2.28–29; and cf. D.39.2.37.

25 On the general legal importance of maintaining the social order, see D. Nörr, SZ 88 (1971) 413–417, rev. P. Garnsey, Social Status and Legal Privilege (1970); on the importance of regular rents to the ancient “economic” system, see M. I. Finley, The Ancient Economy (1973) 116–118. No profound point is involved here; the matter is obvious.

26 Compare J. Stone (cited n. 7) 336–339.


28 This was considered above (Chapter II), but it is worth stressing again, that modern references to capitalism in the Roman rental market are very misleading.
(iii) The social interest in the preservation and upgrading of housing was promoted only indirectly.\(^{29}\) The law in this area depended, for its success on the existence of an economic impulse to maintain housing for the sake of profitability; however, the extent to which that impulse operated is difficult to measure. If the landlord wished to make light repairs during the term of lease, he was allowed to do so without prejudice as to the rent; and the need of extensive repair or demolition was grounds for justified expulsion (Category 1c). The tenant’s legal interest in adequate housing was not defined with regard to a list of minimum conditions (e.g. minimum light), but only in terms of conditions existing when the lease was entered upon (Category 2a). Within the term of lease, the individual tenant was relatively well protected through the legal devices of justified abandonment and deduction from the rent, both of which were not dependent on absence of the landlord’s “good will.” However, the effectiveness of these devices in encouraging repairs must have largely depended on whether keeping a building in good repair was necessary for its profitability; thus, if after a justified abandonment the landlord could readily find substitute tenants at the same or nearly the same rent, he had no economic motive to correct a defect. In addition, the tenant was not encouraged to make repairs himself; the tenant’s right to deduct for necessary repairs is not attested except in the area of public law (D.43.10.1.3), and his \textit{ius tollendi} (D.19.2.19.4) was so narrow as not to be a completely adequate substitute. Finally, the tenant’s \textit{culpa}-liability (Category 1d) resulted in direct financial compensation to the landlord, who could use the money for repairing the damaged dwelling but did not have to do so. Much therefore depends upon unknowns about the operation of the rental market, and we must also probably reckon with differences over time.\(^{30}\)

(iv) The jurists tried hard to make leasehold attractive to upper-class tenants. Perhaps precisely because the tenant lacked any property right in his leasehold, the jurists were especially ingenious in devising alternative means to secure the tenant’s tranquil enjoyment of the premises and to prevent the illegitimate use of expulsion (Category 2a); it is characteristic of these doctrines that they recognized the tenant’s interests without regard to the landlord’s fault, and in the case of expulsion allowed the landlord to escape payment of damages only if he was in no way responsible for it or could find a justification. So long as the tenant was not actually expelled, his privacy (Category 2b) was accorded a measure of the protection which Roman law normally bestowed on the home.\(^{31}\) Against intruders he had, like any other householder, the \textit{actio inuriarum} (D.47.10.5.2); against his landlord, he had contractual rights that seem to have prevailed until the landlord could bring compelling counter-interests to bear against them. (The \textit{testatio} in D.43.17.3.3 is probably a good example of juristic ingenuity.) While the jurists therefore seem to have recognized that the tenant’s interest in his dwelling was not trivial, there were definite limits to their support of this interest. We may single out two problem areas: the tenant was given almost no rights as a “neighbor” (not even against fellow tenants), save \textit{ex conducto} against his landlord, and even that on a limited basis;\(^{32}\) and the position of a middleman who subleased for profit remained unsatisfactory. As to the latter, only the contractual ladder seems at first to have been recognized, so that the owner stood to the middleman as the middleman to the tenant (Category 1e); but there are signs in later law that the tenant was gaining, through \textit{bona fides}, a direct relationship with the owner. Particularly relevant, of course, is the legitimation of the owner’s preclusion and thereby the probable granting to the tenant of the interdict \textit{de migrando} against the owner (D.13.7.11.5). The probable limitation of the owner’s liability for damages when he expelled subtenants, which may also be a late development (D.19.2.7–8), is inconsistent. The

\(^{29}\) In this regard, one may recall the “building codes,” though their scope is largely limited to appearance, stability, and fire prevention; cf. Chapter III n. 19. On laws to discourage destruction of existing housing, see E. J. Philipps, \textit{Latomus} 32 (1973) 86–95; P. Garnsey, in \textit{Studies in Roman Property} (ed. M. I. Finley, 1976) 133–136. Note also measures to encourage construction of upper-class housing: e.g. Gaius 1.33.

\(^{30}\) It is worth comparing the form of disaster relief preferred by the Caesars for urban property owners: normally direct compensation, though Tac. \textit{Ann}. 15.43.2 is an exception; cf. R. F. Newbold, \textit{Latomus} 33 (1974) 861–863.

\(^{31}\) Cf. n. 15 above.

\(^{32}\) The major exception is the concession to tenants of the \textit{cautio damni infecti} against neighboring landowners: D.39.2.13.5, 21, cf. 18.3—a good indication of how strong the tenant’s interest had to be before he gained a neighbor’s rights. The urban tenant could not make an \textit{operis novi nuntiatio}: Ulp. D.39.1.3.3.
The Jurists’ Treatment of Urban Lease Law

jurists seem disinclined to regard the middleman as the owner’s manager (or negotiorum gestor)\(^{33}\) so as to strengthen the tenant’s position as against the owner. On the whole, therefore, it, seems fair to say that the jurists strove to make tenancy legally attractive, but that there were definite limits to this effort. Undoubtedly, however, the law was partially supplemented in this area by social pressures and sanctions.\(^{34}\)

(v) While the tenant’s liability for culpa was subject to a steady growth during the classical period, nonetheless the jurists’ caution in regard to liabilities requires emphasis.\(^{35}\) The tenant’s personal culpa-liability (in the absence of a lease provision) was rarely more extensive than his Aquilian liability (an example: D.19.2.57, lease of a lot); his vicarious liability, while it is difficult to define precisely, was in any event undoubtedly not so high as the generalized and quasi-ethical doctrine of the postclassical period.\(^{36}\) As for the liability of the landlord, one source excludes any form of vicarious liability under normal circumstances (D.19.2.45pr). Otherwise, the landlord had no liability for break-ins if he was not implicated (C.4.65.12) and was liable only under an actio pigneraticia for negligent safekeeping of seized furnishings (O. 39.2.34). In general, the landlord’s personal liability seems also to resemble his Aquilian liability. This matter of liabilities, it should be observed, was not an insignificant one in an era before insurance; imposition of liability because of any degree of “blameworthiness” whatsoever could result in making certain enterprises simply uneconomical. We find in this area, therefore, much the same considerations at work as we observed elsewhere (Categories i, iv). As a parallel, note the jurists’ clear, if somewhat conservative, estimate of the technological realities underlying a landlord’s liabilities: structural failures are mentioned (D.19.2.27pr, 28pr–1; 39.2.13.6, 33) also access to light and the security of doors and windows (D.19.2 25.2), but not the condition of wall plaster or the plumbing.

(vi) Finally, a variety of common public interests are observable in the formation of urban lease law. The late classical intervention of the Praefectus Vigilum in the handling of preclusion stresses the maintenance of public order,\(^{37}\) the Praefectus may also have had a special competence in investigating break-ins into apartments (cf. D.1.15.3.2) and he certainly played a role in preventing fires in insulae (esp. D.1.15.3.1, 4). The law of expulsion, which featured the use of self-help, remained a somewhat archaic feature in classical leasehold; here, however, we can perhaps discern the encouragement of nonviolent alternatives to self-help.\(^{38}\) Other public interests appear in special circumstances; the favor libertatis that allows a tenant to manumit a slave before preclusion (D.20.2.6., 9) is a good example. At varying points in the law a public interest in efficiency of administration is clearly expressed: as, for instance, in the requirement that the tenant’s grounds for abandonment through fear (cf. D.19.2.27.1) be objectively demonstrable; or in the well-articulated action-sequence of the interdict de migrando and the action ex conducto.

It should be clear by this point that, while analyses in terms of individual and social interests are complementary rather than mutually exclusive, an analysis in terms of social interests has both advantages and disadvantages. The main disadvantage of reexpressing Roman lease law in terms of social interests is that we thereby move one step further from the terms in which particular decisions are framed. The main advantage is that we are thereby enabled to think of Roman lease law in legislative terms, as part and parcel of public policy with regard to the Roman rental market. Were we to formulate Roman

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33 The stark limits on such theory in Roman law are observed by the scholarship; cf. M. Kaser, RPR\(^{2}\) i 586–588. If we knew more about the legal handling of the tenant’s negligence (cf. Category 1e above), or about the handling of problems arising from tenant’s abandonment or deduction from rent, the problem with the middleman might seem less acute.

34 This point is rightly emphasized by A. Pernice, SZ 19 (1898) 92 n. 3 (on Martial 12.32).

35 I might observe that some modern works have inclined to ignore the reasons for this caution. By contrast, see J. M. Kelly, Studies in the Civil Judicature (1976) 72–73.


38 See Chapter IV at n. 88.
lease law in terms of public policy, its priorities would seem clear: first and foremost, to encourage Roman property owners to exploit their property through rental to the upper classes; second, to encourage the upper classes to avail themselves of the opportunity to rent. These priorities seem to remain remarkably stable over time.

The process of striking balances between competing interests was a dynamic one, occurring in both the short and the long run. Each new rule struck a new balance of its own, but simultaneously altered slightly the balance of the whole body of urban lease law. For example, Servius’ decision to justify abandonment due to fear (in D.19.2.27.1) was a clear victory for the tenant’s interest in unabated enjoyment of his rented dwelling; this interest was secured at law and hence established a “right.” Later jurists, while apparently accepting Servius’ ruling, moved to interpret it so that the landlord’s interests in the rent and in the protection of his property were also protected: the tenant’s fear had to be objectively provable, it had to be the fear of a reasonable man confronted with a threat which he could not physically resist (cf. esp. Labeo in D.19.2.13.7). Gradually a legal doctrine developed out of such repeated balance-striking; this doctrine was then extended, beyond cases of abandonment justified through fear, to cases where the tenant’s basic comfort and security were adversely affected (Gaius D.19.2.25.2).

On the level of social interests, the ceaseless back and forth of these rules tilted State policy now a little in favor of the tenant, now a little toward the landlord. The social debate underlying these patterns of continually restruck balances must always be at the back of a legal historian’s mind. The consequences of the debate are found again and again in every area of lease law: the intricate rules governing tenant’s pledges, the forms of and justifications for expulsion, or the remarkable complexity of rent deduction already in Alfenus (D.19.2.27pr). Through this interplay the law lived on, and as a consequence its work could never be completed.

The broader context of the jurists’ balancing reflected their acceptance of the Roman rental market as the starting point in the discussion of lease law. Landlords and tenants were assumed to have struck a bargain as equals within the market, and it was not the purpose of Roman law to undo or undermine their bargain; in principle, demands were not imposed in excess of what the parties had expressly or tacitly agreed to do for one another. The jurists were concerned not with the bargain but with its fulfillment. The making of a lease represented the commitment of landlord and tenant to a lengthy future relationship, upon which, however, unforeseen happenings might impinge. Roman lease law operated to ensure that, during the run of the lease, the complex interests of both parties continued to receive, in the face of unforeseen happenings, a full and fair protection within the Roman understanding of those words. Therefore Roman lease law was characterized, so it appears to me, by a belief that the interests of landlord and tenant could not be analytically isolated from one another and then given separate consideration or even enforcement; in this respect, Common Law, both in its ancient and more modern forms, differs sharply from Roman law. The jurists preferred to see the sets of interests as strictly interrelated throughout the length of the contract.

The impact of Roman lease law on the Roman rental market cannot, of course, be precisely determined. The effects, in any event, could only have occurred in the long run. Clearly, ownership of leasable urban property remained a not unattractive form of investment throughout the classical period; and rental among the upper classes appears to have become more rather than less popular. It is well worth pointing to the extensive Trajanic and Hadrianic building projects for the housing of the “commercial class” at Ostia, and to the provision for a cenaculum on the first floor of the Casa di Via Giulio Romano in Rome (Chapter I). In Rome of the High Empire, investment in housing rested on a delicate balance between high profits and high risks (Gell. 15.1.3). The law of urban leasehold could have made the difference. In any event, even though its influence on the rental market was limited to the small sphere of upper-class housing, nonetheless the Roman law of urban leasehold does not seem in any way an

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39 See N. Luhmann (cited n. 17) 50–51, on the “absorption of smaller pushes.”
unreasonable or irresponsible law, especially in a world where public housing and other modern impulses to socialization of the rental market were entirely unknown.

In summary, then, the suggestion in the pages above is that the rules of Roman lease law reflect discernible patterns in the balancing of interests. For the purposes of the present chapter it is immaterial whether this balancing occurred unconsciously or consciously. The jurists’ balancing would occur unconsciously if their “discovery” of new legal rules nevertheless followed patterns of which they were unaware; it would occur consciously either if they deliberately set out to weigh interests in the modern fashion, or if they deliberately set out to do something else which amounted to a weighing of interests—as, for instance, if they set out to obtain the lease law that was of the highest possible social utility.

Which of these alternatives should we choose? What should we infer about the formation of Roman lease law from the apparent pattern of its interests? The honest answer to this question is that different people will probably infer different things, some people, perhaps, nothing at all. For at this juncture we must take into consideration the motives of the jurists in proposing their rules, and this is a subject on which, it is generally accepted, we have almost no other evidence than the rules themselves, so that modern interpretations are bound to vary. In the next chapter, however, I want to explore the possibility that the “adjustment of interests” discernible in Roman lease law was not due to chance, or to the jurists’ following patterns of which they were unaware, but rather that this pattern was consciously developed. My argument will be exceedingly indirect, suggestive rather than demonstrative, and I advance it in full anticipation of the inevitable objections.

VI

Roman Jurisprudence as an Instrument of Social Control

The Construction of this book is obviously intended to suggest an answer to the question: how did the jurists go about creating Roman lease law? The first three chapters are designed to show that it was based on the upper-class rental market of the capital city of Rome. There are good reasons for limiting analysis of lease law more or less exclusively to upper-class leaseholds (Chapter III); but, within this socially defined area, Roman lease law takes into account every known feature of the market including architectural as well as social and economic features (Chapters I–II). Further, the resultant law (Chapter IV) clearly reflects an “adjustment of interests” that by no means appears to be out of tune with the realities of the Roman rental market (Chapter V). Indeed, Roman lease law, although it would scarcely be “acceptable” in any modern context, does not seem at all implausible or unreasonable within its Roman context, whether the law is treated from the viewpoint of the individuals involved or from that of social policy.

My concluding chapter is intended to tie together the argument in earlier chapters and to give some suggestion of what I think this argument implies concerning the genesis operation and purposes of Roman lease law.

The texture of Roman juristic writings differs from most modern jurisprudence. One primary difference is the absence of surface urgency in the Roman sources: the absence of any clearly expressed sense that “law-jobs” cannot be put off until tomorrow and that society stands in pressing need of new rules and new legal institutions. Instead page after page of juristic writings is filled with a dry rather unrhetorical prose that for the most part simply declares the law offering no intellectually sufficient explanation or justification arguments are not common and when they do appear they seem to conceal more than they disclose about the foundation of juristic decisions. Under the circumstances it is hardly

1 On this controversial matter, I agree completely with F. Wieacker, in Fs. Kaser (1976) 3–27, who cites much recent bibliography. Wieacker observes (p. 4) that the postclassical tendency to strike out legal reasoning probably should not affect our judgment of the overall character of their argument. On the general failure of the jurists to seek and obtain ethical grounding for their decisions, cf. T. Parsons, Societies (1966) 27, 89. This failure is (or ought to be) evident to any scholar of comparative law.
surprising that some scholars have attributed to the jurists a highly intellectualized “mathematics of concepts”\(^2\) divorced from the daily life of law. We may name this characteristic of Roman jurisprudence the “illusion of timelessness.”\(^3\)

One consequence of the extreme almost stylized flatness affected by the jurists is that we often do not find it easy to state with authority the factors impelling a jurist to any particular decision.\(^4\) Within the limits of an historical discussion, it is possible to describe with certainty only the (partially self-imposed) parameters delimiting the jurists’ freedom of decision. In Roman lease law the major parameters are two:

First, there can be little doubt (although we lack absolute proof) that the structure and preexisting social institutions or practices of the rental market were in the main adopted by the jurists as the basis and framework for the legal institutions of urban leasehold; the fundamental conceptions of justified expulsion and abandonment with the accompanying rules on rent abatement or damages are especially relevant in this connection, but so also are preclusion and the tenant’s pledge of furnishings,\(^5\) perhaps also such subsidiary elements as deduction from rent and amelioration of damages through the offer of alternative housing. Furthermore, the basic characteristics of Roman leases, such as the long terms of lease, long payment periods, and the practice of payment at the end of the payment period, also obviously influenced the pattern of juristic thought about lease law: for instance, the absence of stress on the significance of the term of lease, or the tendency to emphasize deduction from rent rather than its refunding. Finally, the normal, socially determined expectations of tenants and landlords in Rome surely influenced, at least to some extent, the general juristic expectations as to the conduct of the two parties. From these viewpoints, the broad lines of Roman lease law might fairly be understood as based on preexisting social institutions, even though, to be sure, a legal system necessarily involves much higher degrees of abstraction and internal organization than do social institutions.

Second, it is also plain that the development of particular rules in lease law was influenced by the development of legal doctrines or of analogous rules in areas outside of urban leasehold; good examples are the rules on justified expulsion and those on the tenant’s \textit{culpa}-liability, both of which stood in obvious relation to farm lease.\(^6\) A specific example of such influence is found in \textit{Coll.} 12.7.9 and D.9.2.27.11: Sabinus and Urseius denied that the urban tenant had contractual liability for damage done

\(^2\) This famous idea is ascribed to Savigny; on the problems it entails for its (few) modern defenders, see F. Horak, in \textit{Fs. Kaser} (1976) 29–55. The impression of timelessness is also promoted by the jurists’ free mixing of “real” and “hypothetical” cases, and by their easy movement from one theme or case-group to another.

\(^3\) By which is also meant, that when certain clearly temporal elements in Roman law have been ignored (e.g. the existence of slavery, and the absence of capitalism), what remains can be held to constitute the jurists’ contribution to a “timeless” fund of legal ideas. Some such notion lies at the basis of an approach to Roman law through Natural Law, an approach which even today has its persuasive advocates e.g. W. Waldstein, in \textit{ANRW} 11.15 (1976) 3–100, esp. 98–100, on whom see F. Wieacker, \textit{SZ} 94 (1977) 320–324. By contrast N. Luhmann, \textit{Rechtssystem und Rechtsdogmatik} (1974) 49–54, rightly changes the focus to “gesellschaftsadäquate Rechtsbegriffe.”

\(^4\) The modern resort to “intuition” is, in my opinion, a symptom of despair; for bibliography on “intuition,” see F. Wieacker (cited n. 1) 12 n. 37. Intuition appears to be a modern psychological substitute for \textit{auctoritas}.

\(^5\) Four examples can be given of the relation of contract clauses to the developing law: clauses providing for pledge of furnishings (cf. Chapter IV, n. 18) and the implication of a tacit pledge of furnishings (Neratius D.20.2.4pr; \textit{et al.}); clauses providing for the tenant’s vicarious liability (cf. Ulp. D.19.2.11pr) and the implication of his vicarious liability (D.19.2.11pr; D.9.2.27.9, 11); clauses restricting the tenant’s right to sublease, and the implication of his right to sublease in the absence of specific provision (on both points, cf. Alex., C.4.65.6); and clauses eliminating the right to remove fixtures (cf. Chapter IV, n. 19) and the implication of a right to remove fixtures in some circumstances (Labeo D.19.2.19.4). In none of these cases do the ensuing juristic implications allow us to draw any conclusion about the frequency of a clause’s occurrence in actual leases; all these implications are better explained through reference to public policy. However, the idea for the rules may have originated in social practice.

\(^6\) I have discussed tenant’s liability in the broader perspective in \textit{SZ} 95 (1978) 232–269. I intentionally leave to one side the tenant’s absence of possession, which was in effect determined by the Roman procedural system before the development of lease law; cf. Chapter V, n. 22. We must also reckon with influences from the structure of the procedural system and from the development of broad underlying concepts (like \textit{bona fides}).
by his slaves; against Sabinus, Proculus established for *coloni* a “pro-noxal” liability on the contract, which he then applied to *inquilini*; his position was approved by Ulpian. The legal problems occasioned by urban and farm lease were obviously to some extent similar, and the two situations were often discussed together; much less frequently, the *inquilinus* was discussed in relation to other legal “types” such as the *conductor* of a storeroom (cf. D.19.2.56).

These two sources, namely the organized rental market and the generalized rules on *locatio conductio*, clearly exercised considerable influence on the development of lease law; but usually they can scarcely be described as determining factors. In fact only a small portion of Roman lease law can be “explained” through reference to these sources alone. Therefore, if we are to understand Roman lease law more completely, we must seek another source; and it is the theory of this chapter that a consideration of “interests” provides the missing source.

In Chapter IV above, I discussed juristic lease law as an analytical subsystem within the larger system of Roman private law. Because all historians of Roman law are familiar with this kind of discussion, I did not inquire into the purpose and utility of an analytical treatment, save to indicate (at the outset of Chapter V) certain ways in which such a treatment would not be enough if its aim were to describe a law actually in force. But what, then, is the purpose of analytical jurisprudence? It is “concerned with problems such as clarification of the nature of law, the meaning of terms used in its propositions, the classification of these terms and of the propositions containing them, and the study of the degree of logically consistent arrangements of which they are capable.”\(^8\) In short, it looks upon law as a coherent system of rules, theoretically complete in itself and susceptible to logical testing. The law of the jurists has long been studied, at times almost exclusively, from this viewpoint.\(^9\) When modern scholars treat Roman private law in this fashion, they are thinking of the jurists as practitioners of a highly specialized “science” largely inaccessible to most Romans,\(^10\) practiced rather in the quiet of the study or in exclusive and professional “schools.”\(^11\)

For a legal historian, the utility of analytical jurisprudence lies in its ability to elucidate the logical web tying together diverse propositions of law within a single historical “system.” Within a living system of law, analytical jurisprudence is also an important element in the decision-making process that leads to new rules of law. Analysis assists in isolating and stating a problem, in obtaining solutions logically consistent with the inherited legal system, and in framing and justifying a legal decision. If indeed we should suspect that all this is of ultimately limited usefulness to actual law finders,\(^12\) the reason is probably that, as Oliver Wendell Holmes often observed: “The life of the law has not been logic: it has been experience.”\(^13\) For this reason, no doubt, a living system of law almost inevitably either fails to

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\(^7\) The following examples can be noted: Gaius 4.153; *Coll.* 12.7.9; D.9.2.27.11; 11.7.14.1; 19.1.13.11, 30; 19.2.9pr–l, 13.11, 24.2, 25.1–2, 33, 35; 20.2.4pr, 6; 24.3.7 11; 30.39.1; 34.3.18; 41.2.25.1, 37; 41.3.31.3; 43.16.20; 43.26.6.2; 43.32.1.1; 50.15.4.8; 50.16.166pr; C. 4.65.5; 7.30–1. This list (28 loci) is surely incomplete.


\(^9\) On the “unity” of the Roman legal system, see F. Wieacker (cited n. 1) 8–10. I have a higher opinion of the jurists on this score than do most modern scholars.

\(^10\) Ordinary Romans received at best a training in “red letter” rules: cf. Petron. *Sat.* 46.7; Persius 5.90; Quint. 12.3.11; Juven. 14.92.


\(^12\) J Stone, *Legal System* (cited n. 8) 55–61. We must learn not to think of *Digest* decisions as having been reached by some inevitable process. Compare the neo-realism of W. Twining and D. Miers, *How to Do Things with Rules* (1976).

obtain complete logical coherence or attains it only at such a high level of analytical abstraction and complexity that a complete and accurate description is virtually impossible.

“The life of the law,” on the other hand, directs our attention to quite a different forum for the systematic discussion of Roman law, namely (in the typical case) the proceedings adud iudicem. During these trial proceedings, seasoned advocates advanced sharply opposing cases for determination by a lay judge; the advocates debated law’s application from the viewpoints of the affected parties. To judge from Cicero’s private orations, which alone survive to represent this type of legal discussion, advocates tended to speak of law much less in terms of its overall logical coherence and much more in teens of its concrete effects. When the occasion demanded, advocates readily employed a broad range of instruments for persuasion; they summoned up every convenient weapon of social sensibility, and in the process sometimes even called into question fundamental legal propositions when these worked to the disadvantage of their clients and the social categories their clients could be held to represent.

No doubt the jurists observed these discussions at the courtroom or forensic level with decidedly mixed feelings. On the one hand, many sources attest to the inevitable professional rivalry, even the hostility, between jurists and advocates; and recent studies of the way jurists reached decisions suggest that they tried to, keep almost self-consciously aloof from their forensic colleagues in their methods of legal reasoning. On the other hand, the hurly-burly of the courts, however it may at times have annoyed the jurists, nevertheless provided them with an indispensable laboratory for the creation and testing of law. Within the courts, jurists could witness new legal problems constantly arising and new legal ideas struck off in the heat of controversy; simultaneously they were allowed to see something of their rules at work. It seems reasonable to try to discover, within the intensely competitive arena of forensic discussion, many of the impulses toward breadth and equity which gave to Roman private law its vitality as a living system and its vast influence as a dead one.

The difficulty, however, is that for Roman law it is not easy for us to deal with such impulses on a systematic basis; for one thing, we know very little of the dockets of courts in the Principate. Therefore the impulses to law provided by forensic discussion cannot be studied empirically, but must rather be hypothesized on the basis of the law which they helped to generate. In order to circumvent this difficulty I have resorted to the “theory of interests” developed as part of their “sociological jurisprudence” by Roscoe Pound and Julius Stone. The theory of interests was designed in part to explain how a body of

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14 Several of these are newly analyzed by W. Stroh, Taxis und Taktik (1975), with bibliography; Stroh, however, following the lead of some legal historians, is far too aggressive in criticizing Cicero for “misrepresenting” juristic law (e.g. pp. 82ff., on the pro Caecina)—as if the jurists had legislative power! See also F. Wieacker, Cicero als Advokat (1965). On advocates in imperial iudicia, see Chapter III n. 6; on their education, S. F. Bonner, Education in Ancient Rome (1977) 288ff., only adequate.

15 In this context a large role must be reserved for the employ of various theories of justice, both in motivating and in justifying new rules of law; cf. J. Stone, Human Law and Human Justice (1965) 345–355. Many theories of justice also set standards of consistency and coherence for analytical jurisprudence; cf. e.g. Stone, pp. 241–245 (“formal justice”), on Gerhard Radbruch; and in general N. MacCormick (cited n. 8).


17 Specifically, the reasoning used to explain and justify decisions; for the distinction, see G. Schubert, Human Jurisprudence (1975) 333–335. For bibliography on the distinction between juristic and rhetorical inter pretatio, see M. Kas er, RPR 8 i 214 and n 8; add G. Kennedy, The Art of Rhetoric in the Roman World (1972) 88–90. This is a controversial matters of course; the researches of (especially) Dieter Nörr have uncovered many links between rhetoric and “juristic reasoning.” In general, see F. Wieacker, SZ 94 (1977) 27–29 (and 13–38, “on offence Wertungen”).

law develops, in relation to society, within an essentially stable and relatively slowly evolving case-law system, where the principal law finders (whether jurists or judges) have and are conscious of having nearly exclusive control of the nonstatutory law, but lack access to detailed and authoritative information on their social system. As such, the theory of interests is well suited to explaining the social basis of case law within modern systems of Common Law; and \( (\textit{mutatis mutandis}) \) it seems to me also well suited for explaining much of Roman juristic law. As applied to modern law finders, sociological jurisprudence has received much justified criticism because of its inadequacy for a planned economy and a welfare state; \(^{19}\) but its deficiencies and dangers would be much less significant in the simpler Roman world, where centralized planning was unknown and in any event all but impossible. \(^{20}\) When law is interpreted through interest theory, interests are taken as having for law finders the epistemological status of facts. \(^{21}\) For them interests are neither legal concepts nor legal institutions; they are not like “rights,” they are not created by law nor can they be removed by law. Rather, interests are the typified embodiment of demands actually advanced upon the law by men living in a historical society; it is the claimants themselves, and not the law finders, who define the content of these interests. Within the historical context of a given society, interests mainly serve to organize undifferentiated wants and desires, \(^{22}\) to give them power and make them persuasive to others. Individuals, either singly or in groups, put forward “their interests” in order to defend or enhance some aspect of their own position within their society; through “their interests,” individuals call upon the law to provide to them, by means of legal rules and procedures, specific sorts of protection.

In relation to the upper-class Roman rental market and the body of law that came to govern it, the exact nature of the interests advanced by landlords and tenants must remain, given the state of our evidence, largely hypothetical—a suppositional stratum beneath the law as we have it. Yet there can be little doubt that such a stratum is legitimately inferred; trials involving urban lease law obviously did occur with some frequency, and in these trials interests will have come to be enunciated relatively clearly under the pressure of competing advocacy. Further, by way of a check, since Rome’s upper-class rental market shares many points of similarity with modern rental markets, it is not difficult for us to imagine what these interests must have been. Literary and archaeological sources provide a further check. All we need do beyond this is to believe that the jurists listened when laymen spoke of what they wished the law to do. And what possible reason is there for us to deny this proposition?

Precisely how did these interests influence the emerging urban lease law? I have already suggested \(^{23}\) that the rules of this law represented at the very least a \textit{de facto} choice by the jurists among the interests advanced by typical litigants. Even if we assume that the jurists took only this relatively passive attitude, a description of Roman lease law in terms of the interests it protected is of considerable value. In the first place, interest theory allows us to consider an area of law as a complete entity, encompassing the whole pattern of interests contained in it; thus, we can avoid a possibly biased judgment, made on the basis of

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\(^{20}\) This emerges clearly enough from F. Millar, \textit{The Emperor in the Roman World} (1977), who emphasizes the \textit{ad hoc} character of imperial decision making.


\(^{23}\) In Chapter V, at nn. 6–7.
isolated rules, as to, the social intent of lease law as a whole.\textsuperscript{24} Interest theory brings out a complex pattern of many competing interests; it shows how these interests were accorded varying weight in different situations and at different times; and it thereby demonstrates what aspects of lease law were a source of difficulty or concern for the jurists. Finally, interest theory provides a way of considering legal rules without detracting from any of their formal claim to coherence within the larger structure of their legal system; and where (as is usually the case) these rules are not logically entailed by that system, then interest analysis provides a way of assessing both the flexibility of the legal system in adapting itself to specific social needs and the concomitant degree of free maneuverability retained by the jurists.

In this chapter, however, I want to argue for a much greater degree of influence on Roman lease law by the interests expressed in forensic discussion. I want to advocate our complete penetration of the “illusion of timelessness,”\textsuperscript{25} or so at least in this one specific area of Roman private law. My thesis is the following:

(1) That, in the course of arriving at each of their decisions, the jurists undertook, as a constituent and fundamental part of their decision-making process, something which can be called (or can be reduced to) a “weighing” of the interests expressed in litigation on either side of a particular legal problem, with the object of obtaining the most socially practicable solution of the problem;\textsuperscript{26}

(2) Further, that the result of these weighings was their creation of a lease law which, in terms of the relevant interests, would have had certain clearly foreseeable effects on the existing social structure of the Roman rental market, which was presumably intended to have such effects, and which apparently did have such effects;

(3) Finally, that to this extent (at least) the jurists may be said to have used Roman lease law as an instrument of social control.\textsuperscript{27}

It should be noted that, while my thesis supposes for Roman lease law a considerably higher degree of “social consciousness” than most modern Romanists have asserted for Roman private law as a whole, nonetheless this degree is much lower than that in any modern system of law. I am not arguing that the jurists undertook any specific kind of social engineering, that they (for instance) aimed either at the

\textsuperscript{24} Particularly to be avoided are analyses that speak of the bias or “one-sidedness” of urban lease law, on the basis of single juristic decisions or isolated themes (such as the landlord’s right to expel or preclude at any time, or his retention of possession). Illustrative of such evaluations is M. Kaser, \textit{RPR} \textsuperscript{1} 186, 563, 567. Contrast K. Llewellyn, \textit{The Bramble Bush} (2d ed. 1951) 49 “no case can have a meaning by itself!” There is, I think, no evidence that in general social bias influenced the jurists’ decisions on lease law; however, their rules may have had some class-related effects in diverting scarce resources away from lower-class housing.

\textsuperscript{25} On the relationship, within maturing legal systems, of legal rules to time, and above all to a planned future, see N. Luhmann, \textit{Rechtsoziologie} (cited n. 19) 34ff., an important discussion. In general, the issues at stake were well brought out by B. Ruthers, \textit{Die Unbegrenzte Auslegung} (1968); Ruther’s concept of \textit{Richterrecht} (esp. pp. 457–476) is analogous to a familiar Anglo-American view of judges, which finds classic expression in K. Llewellyn, \textit{The Common Law Tradition: Deciding Appeals} (1960). Compare W. F. Murphy, \textit{Elements of Judicial Strategy} (1964).

\textsuperscript{26} Such balancing emerges as the explicit purpose of private law in Ulpian, D.1.1.1.2 (\textit{Inst}. 1.1.4), a passage today often considered genuine, cf. M. Kaser, \textit{RPR} \textsuperscript{1} 197 n. 34; \textit{idem}, \textit{Meth.} 56 n. 103; on G. Longo, in \textit{Atti Perug.} (1971) 155–227, see R. Wittmann, \textit{SZ} 93 (1976) 485–487. An instrumental conception of law, whereby law is a goal-oriented activity intended to alleviate problems of social life, is familiar in ancient philosophy (e.g. Diog. Laert. 10.150–153, from Epicurus), commonplace in ancient rhetoric (e.g. Arist. \textit{Rhet.} 1.6.1ff.; Cic. \textit{Inv.} 2.156, 168–169), and presumed by (e.g.) the juristic doctrines of \textit{utilitas}, cf. M. Kaser, \textit{RPR} \textsuperscript{1} 185, 212, and compare T. Honsell, \textit{SZ} 95 (1978) 93–137, with bibliography. On balancing of interests, see T. M. Benditt, \textit{Social Theory and Practice 3} (1975) 341–342.

\textsuperscript{27} As I hope is already clear, this hypothesis provides no explanation for the entire juristic decision-making process. Problem-solving behavior in law is described with extraordinary clarity by W. Twining and D. Miers (cited n. 12) 75–81; my formulation evades the intricate problem of compliance, which is almost impossible to deal with for Roman law. On social control, see M. Janowitz, \textit{The Last Half-Century} (1978) 3: “Social control is … the obverse of coercive control. Social control refers to the capacity of a social group, including a whole society, to regulate itself. Self-regulation must imply a set of higher moral principles beyond those of self-interest.” On social control and the law, cf. \textit{ibid}. 364–365; compare K. Llewellyn, \textit{Jurisprudence} (1960) 399–411.
systematic alteration of the rental market and its major social institutions, or at the deliberate support of
one group within the market against another. All that I am arguing is that, through the mechanism of their
decision making and to the extent that the social character of actual litigation made this possible (Chapter
III), the jurists sought in a general way to guide the rental market toward ends which they considered
socially desirable, and that in this way they sought to change the market by slow stages with due
allowance at every stage for the subsequent reassertion of competing, interests. Finally, I should also
stress that juristic rules, unlike the rules of modern legal systems, were not generally created in a
courtroom context where rule-finding was required by the exigencies of a case; my thesis should rather be
understood as explaining how, within the context of on-going litigation, the jurists received the stimulus
for legal change and then went about achieving it.

If my thesis is correct, then it ought to be possible to confirm it through two kinds of empirical
observation. First, it should be possible to reconstruct the interests which over the long run the jurists
tried to protect, and to arrange them in a way that suggests the general social ends which the jurists
promoted. This subject was treated at length in Chapter V above, where it was argued that “the rules of
Roman lease law reflect discernible patterns in the balancing of interests.” The priorities of Roman lease
law “would seem clear: first and foremost, to encourage Roman property owners to exploit their property
through rental to the upper classes; second, to encourage the upper classes to avail themselves of the
opportunity to rent. These priorities seem to remain remarkably stable over time.”

Second, it should also be possible to discover within the jurists’ decisions, despite their brevity,
evidence that in the process of decision making the jurists had been sensitive in the short run to
discussions of urban lease at the working level. And there is in truth an abundance of such evidence.

The juristic decisions on urban lease law by and large confine themselves to significant questions of
law which can easily be imagined as having arisen in actual disputes. Many traces remain of original
responsa, by contrast, there are no logical puzzles or “limiting cases” merely designed to explore the
extremes of a rule’s interpretation. Decisions do not turn on rigid or excessively technical points of
analysis, nor do they seem to rely on concepts and categories which are obscure or misleading from a
social viewpoint; on the contrary, they are usually readily understandable on the forensic level even if one
disagrees with the result. The choice between analytical alternatives seems sometimes to have been
resolved through reference to patterns of interests. Often the jurists showed considerable subtlety at
“building-in” some accommodation for interests which had ostensibly lost under their decisions. To this
extent, the jurists preferred to tolerate a higher degree of analytical complexity, rather than to sacrifice
valid interests so as to preserve simplicity. Important reinterpretations of existing law may seek to
increase the power of one party so as to provide a context for securing the interests of the other.

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28 Above, Chapter V, after n. 39.
29 Above, Chapter V, after n. 38; the success of this policy is discussed just after n. 39.
30 Cf. Coll. I 2.7.9 (controversy on tenant’s vicarious liability for slaves; the response is suppressed in D.9.2.27.11); D.6.1.59 (accession of fixtures to dwelling); D.19.2.15.8 (liability of pseudo-procurator for lease concluded by him); D.19.2.27.1 (abandonment due to fear); D.19.2.30pr (expulsion due to the building’s demolition). Rescripts: esp., D.19.2.9.1; C.4.65.3.5.
31 E.g. Ulpian’s effort to limit middleman’s damages when the principal lessor lacked the right to lease (cf. D.19.2.7–8, with Chapter IV at nn. 60–63). Compare the argument (largely suppressed in the Digest) as to the most effective means of securing a tenant’s interest in removing his furnishings (Chapter IV at nn. 224–226).
32 E.g. the possible requirement of a denuntiatio when the landlord seeks to repair a dwelling (Ulp. D.43.17.3.3, with Chapter IV at nn. 77–79); the allowance of alternative housing where the tenant is expelled without the landlord’s fault (Ulp. D.19.2.9pr; cf. Labeo D.19.2.60pr); the requirement that the landlord safeguard the tenant’s furnishings for a period after preclusion (D.39.2.34, cf. D.19.2.56).
33 Contra G. Longo, Ric. 523–570, who sought to strip Roman lease law of most of its “corresponsive obligations.”
34 Thus, the late classical increase in legal mechanisms for expulsion probably shows that they were trying to bring expulsion under State control (Chapter IV at n. 88); Ulpian’s reinterpretation of the pledge relationship between an owner and his subtenant probably shows a willingness to grant the subtenant an interdict de migrando against the owner (D.13.7.11.5, with Chapter IV at n. 170).
times, this preference even led the jurists to construct rules which may have been difficult to defend on an analytical level, but which were entirely natural within their social setting.\textsuperscript{35} In at least one case, juristic recognition of an interest resulted in a trial-and-error experiment until a satisfactory means of securing it was discovered.\textsuperscript{36} Many texts indicate that the jurists were willing to reconsider their decisions, and often such reconsideration is readily comprehensible as the consequence of social dissatisfaction with the original rule. Reconsideration seems to have underlain instances where the jurists disagreed among themselves,\textsuperscript{37} or allowed an awkward rule to slip into obsolescence through disuse,\textsuperscript{38} or progressively modified a general rule by making provision for exceptions.\textsuperscript{39} Where such reconsideration is attributable to social dissatisfaction, it implies the existence of at least rudimentary attempts by the jurists to evaluate the social consequences of their rules.

Evidence for the jurists’ sensitivity to the forensic expression of competing interests is extremely important; for, within the Roman judicial system, juristic sensitivity on this point may fairly be considered the essential prerequisite for the establishment of law as an instrument of social control. As Julius Stone has written: “On such a view one irreducible minimum requirement of justice is in a broad sense procedural. It is that society shall be so organised that men’s felt wants can be freely expressed; and that the law shall protect that expression, and provide it with channels through which it can compete effectively for (though not necessarily attain) the support of politically organised society. … Free expression is basic to the self-improvement, as well as to the stability in change, of a mature society.”\textsuperscript{40}

So much, then, for my thesis as to the genesis of Roman lease law. I have tried to provide, through this discussion, an idealized model, an explanatory mechanism by which certain important features of lease law’s origin can be elucidated. In using this model, I have hoped to broaden the landscape of Roman legal history, but in certain relatively well-fixed directions; for while the “stratum” of interests in lease law remains hypothetical, it is no more improbable, I think, than some of the elaborate conceptual schemata imposed on Roman law in modern times. In brief, my general view of Roman lease law is that analytical and forensic discussion are complementary aspects of a complete historical consideration; analytical discussion aimed and aims to achieve for law a binding logical order, while forensic discussion aimed and aims to demonstrate or to advance law’s social acceptability and utility.\textsuperscript{41} In legal history, the tension between these two levels of discussion should be considered as essentially creative. In the case of Roman law, we can date this from the moment when Ser. Sulpicius Rufus recognized that urban lease was not

\textsuperscript{35} E.g. the legal implication that the tenant had tacitly agreed to a pledge of his furnishings (Nerat. D.20.2.4; \textit{et al.}). This fiction is so extreme that Pomponius drops it when extending the pledge to cover damage through \textit{culpa} (D.20.2.2.2).

\textsuperscript{36} Cf. the process that led to the establishment of a tenant’s vicarious liability \textit{ex conducto} (Chapter IV at nn. 205–209).

\textsuperscript{37} E.g. Proculus’ disagreement with Sabinus about a tenant’s contractual liability for his slaves (\textit{Coll.} 12.7.9 and D.9.2.27.11, with Chapter IV at nn. 205–206); Nerva’s argument that slaves could be manumitted even after preclusion (D.20.2.9); the disagreement about the tenant’s ability to get a \textit{cautio damni infecti} from his building’s owner (Chapter IV n. 106).

\textsuperscript{38} That is probably the significance of the silence which overtook Proculus’. position on the tenant’s pro-nosal contractual liability (Chapter IV at n. 206).

\textsuperscript{39} E.g. the limitations imposed on the rule in D.9.2.27.1 concerning tenant’s abandonment due to fear (Chapter IV at nn. 99–109); Ulpian’s limitation on the rule that the tenant inform his landlord before abandoning (D.19.2.13.7); the modification of the pledge of furnishings to exempt the property of guests (D.20.2.5pr; 43.32.1.3) and contractual partners (D.43.32.1.5, 2), tenant’s furnishings essential to his life (cf. Chapter IV at n. 137), and the value of his burial expenses (Ulp.D.11.7.14.1).

\textsuperscript{40} J. Stone, \textit{Social Dimensions} (cited n. 18) 794 (Stone’s footnotes omitted); compare \textit{Human Law} (cited n. 15) 382, 341. In Parsonian terms, analytical discussion is concerned mainly with integration and pattern maintenance, much less with adaptation and goal gratification; in forensic discussion the emphasis is reversed and free expression of interests therefore becomes paramount. For this terminology, cf. e.g. T. Parsons, in \textit{Theories of Society} vol. 1 (ed. Parsons \textit{et al.}, 1961) 36–41.

\textsuperscript{41} The dichotomy here presented is often found in “realistic” writings, and is still overly simplistic in that it presupposes an essentially organic society; cf. G. Schubert (cited n. 17) 335–338. In any event, let me be clear: I have no faith in any schema that rigidly distinguishes “fachinterne” and “ausserjuristische Argumente,” especially if the only evidence is the summary justification a jurist chances to offer for a particular decision; nor is such a justification an X-ray of his mind at the moment of decision. In my opinion, all legal decisions tend to involve both levels of discourse, and it is the work of legal history to recreate the ambiance of decision. For a discussion, cf. F. Wieacker (cited n. 17) 1–10.
merely an indistinguishable form of *locatio conductio*, but rather a special kind of contract requiring rules of its own; and similar creativity continued throughout the long history of Roman jurisprudence, until that system finally withered and died away.

Three final points remain to be made concerning the feasibility of this general view of Roman private law. First, urban leasehold was in one sense a “good” area for Roman jurisprudence. The average parties to an upper-class Roman lease were, if not always social equals, then at least not far apart. Each side therefore had a reasonable opportunity to defend itself in a court of law; each side had ready access to the Roman courts and to judicial authority at Rome, each side was likely to possess the financial means and social influence required to elicit help from jurists and orators, each side was capable of presenting a “good face” before an *ídēx*. Furthermore, the problems of upper-class urban leasehold were also problems with which the jurists themselves, were likely to be familiar from both sides, at least at second hand if not personally. Since there was nothing remote about urban leasehold, the jurists could visualize its problems as a whole, secure that no side of them remained unknown. They could predict with some accuracy the social implications of their decisions within this specific context. Compared with urban leasehold, there were many “bad” (difficult or awkward) areas in Roman jurisprudence, as for example labor law, or for that matter the law directed toward lower-class tenants in their lodging houses. The law of urban leasehold is easily distinguishable from such areas, above all by the richness of its thought.

Second, there is need to emphasize once again the considerable flexibility of analytical doctrine in many areas of Roman law. As was observed above, urban leasehold is in Roman law one of the three principal forms of lease of an immoveable. The other two are strikingly dissimilar. Lease of a storeroom in a *horreum* had the main consequence of imposing on the * locator* a custodia-liability with regard to things left by the lessee in the storeroom; this duty arises from the plain sense of the transaction between the parties, and it is symptomatic only of a modern dogmatic rigidity that such a liability should ever have been considered a basis for denying the appurtenance of this contractual form to *locatio conductio rei*. Farm lease is even more dissimilar. Examples are the tenant farmer’s duty to cultivate (failure to cultivate constituted not only grounds for expulsion but also *culpa*), his duty to keep the premises in repair, his tacit pledge of the fruits (and the absence of a tacit pledge of furnishings), the differences in *reconductio tacita* after the lease’s term expired, the tenant farmer’s ability to obtain recompense for “useful” improvements, the landlord’s warranty against latent defects affecting cultivatability, the tenant farmer’s right to obtain rent remission in the event of catastrophic damage to the crops, and so on. In the case of urban lease, it is to my mind questionable whether the jurists began by recognizing any legal consequence, save for the tenant’s nonpossession of the leasehold, as being inevitably entailed by the mere fact of the lease’s existence.

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42 The researches of F. M. de Robertis have made Roman law’s poverty in this area notorious. However, it is dangerous to draw social and economic conclusions from this fact, cf. D. Nör, *SZ* 82 (1965) 67–105 esp. 86ff. T. Mayer-Maly, *Recht der Arbe it* 20 (1967) 281–290, attempted to isolate the principles of Roman labor law; but his later article, in *La Formazione Storica del Diritto Moderno* vol. III (1977) 1321–1345, clearly demonstrated the far greater subtlety and complexity of medieval canon law.

43 The close relationship of Roman law to its economic base is increasingly recognized by Romanists: e.g. M. Horvat, in *Antologia Giuridica* (1968) 213–222 contra A. Steinwenter, *Fundus cum Instrumento* (1942) 99–101, on the law relating to *fundii*; J. Hammerstein, *Die Herde* (1975) 63–64, on the economic nature of a *grex*. A bibliography of recent (mainly Italian) scholarship is in M. Kaser, *RPR* II 569 (to nn. 13, 14); on “ideology,” cf. F. Wieacker (cited n. 17) 8–10, and compare *idem* (cited n. 3) 356–358. Modern scholars have often proceeded from unrealistic understandings of Roman society.


45 These differences are all observed in Chapter IV above; cf. also this chapter, n. 7. A detailed consideration of the legal position of the *colonus* in the early Empire is still lacking. The article on tenant farming by M. Finley, in *Studies in Roman Property* (ed. Finley, 1976) 103–118, shows how helpful such a study could be for historians.

46 To some extent, indeed, urban leasehold might better be thought of as the exchange of money for certain services from the landlord, and not just for a place (*res*); this view is consistent with the landlord’s warranty that conditions prevailing at the lease’s
Third, Roman juristic law is (from a sociological perspective) strikingly different from any modern type of law finding. During the classical period, which was in other political domains a time of gradually increasing absolutism, the aristocratic jurists were nonetheless for all practical purposes the sole depositaries, furtherers, and transmitters of a living legal tradition; and their tradition was (at least to the mid-second century A.D., and probably later) also formally independent of the Roman court system. Within the court system, juristic decisions took on normative force by virtue of their source, and not because of the reasoning offered in their support; for the most part, these decisions were not intended to persuade and hence not even supplied with a token of adequate supporting argumentation. Inside the narrow circle of jurists, free discussion and disagreement were not uncommon, but we have no evidence that disagreement ever resulted in lengthy exchanges of written argument. To a large extent, therefore, the jurists exercised the privilege and the discretion of concealing the precise reasons for their decisions behind a veil of personal authority (the “illusion of timelessness”). Thus a certain ambiguity of motivation always attended the position taken by a particular jurist, his disagreement with a colleague, and the ultimate prevalence among jurists of one view over another. From the modern viewpoint of a law whose means and ends are mainly defined by public policy, such ambiguity in the formation of law has both its advantages and its disadvantages. It is important, however, that the advantages not be entirely overlooked; for they are not likely to have remained unknown to the jurists. Was such a weapon ever forged to lie rusting in its sheath?

It is my hope that the general view in this chapter will help legal historians to find their way out of a dilemma that has plagued modern scholarship, and stems from the modern feeling that Roman private law must be discussed in much closer connection to its social context. But it is not yet clear how such discussion should be conducted. For instance, some scholars have supposed that the jurists in effect only acted in simple reflex to economic or social pressures when they formed their rules. By contrast, Alan Watson recently expressed the view that private law normally “does not progress in a rational way, and that the divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked.”

It is not easy to steer a course between these extreme views until a way can be found to identify even hypothetically “the needs or wishes of the people involved,” and to show how these “needs or wishes” were communicated to the jurists and how the jurists responded to them.

In order to resolve this dilemma, I have resorted to an approach which is frankly modernistic, and specifically “realistic” as that word is understood in American jurisprudence. Its utility lies in its ability outset will continue, and also with his right to offer equivalent housing in some circumstances. Compare “Javins v. First National Realty Corp.,” in Federal Reporter 428 (1970) 1071–1083, esp. 1074–1075 (U.S. Court of Appeals, D.C. Circuit; Wright, J.): “The city dweller who seeks to lease an apartment … has little interest … even in the bare right to possession within the four walls of his apartment. When city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well-known package of goods and services. …” The court then implied a “warranty of habitability,” though on somewhat different grounds.

The ensuing paragraph follows in the main A. Schiller, An American Experience in Roman Law (1971) 148–160 (who owes much to Max Weber); for additional bibliography, see F. Wieacker (cited n. 1) 11 n. 33. I am claiming, of course, that the “style” of Roman jurists itself took on functional significance; compare L. M. Friedman (cited n. 22) 216 on late nineteenth-century American judicial opinions: “Conceptual jurisprudence was another defence against the threat to legal independence. … These cases are boring to read, but this vice is a virtue. The cases made no dangerous claims to innovation. They treated law as a realm unto itself; the judges merely discovered and announced pre-existing principles of law.”

The main disadvantage is that the social purpose of the resulting rule is indefinite, even in relation to the specific case under discussion; therefore it does not teach effectively. But in truth the gulf that divides us from the Romans in this matter is very great; the extended written decision serves a wide variety of social and legal functions within modern legal systems. The Roman “failure” in this regard is rightly emphasized by J. P. Dawson, Oracles of the Law (1968) 113–119. The “failure” was somewhat mitigated when law was created in the rhetorical ambiance of litigation.


A. Watson, Society and Legal Change (1976) 6; Watson discusses Roman law in his Chapters 1–4.

On “America’s dominant philosophy of law,” see e.g. R. S. Summers, Harvard Law Review 92 (1978) 433–449, a eulogy for Lon Fuller. I have adapted this position to match my material. My own views closely resemble those of R.B.M. Cotterell,
to explain the evidence without forcing or distorting it; the jurists are seen as responsive to the forensic expression of interests which arise naturally out of the social institutions underlying the law. This approach requires testing in relation to other areas of law, where it may prove to be helpful only in special circumstances when (as was evidently the case in urban lease law) the station and wealth of average litigants allowed the jurists a fuller control of law’s social content. But even if my approach proves to be exaggerated or wrong, there is still a need within legal history to pay a more sustained attention to interests; for surely it is improbable that the jurists ignored altogether the expression of contemporary demands upon the law.

On the other hand, if it should prove to have a degree of general application, the discussion of interests would help considerably in clarifying both how and why the jurists operated in the High Roman Empire. I do not underestimate the barriers, both practical and theoretical, to such further research; but the potential gain is also great. The gain would come from a new way of looking at Roman private law. The jurists did not live exclusively in their tiny enclave of law and legal thinking; they were also functioning participants in the complex flow of their social system, at times bending to the flow and at other times channeling it. Within its society Roman juristic law had both possibilities and limitations as a means for social control; in doing what they were capable of doing, the jurists sometimes succeeded and sometimes failed. No doubt the jurists were involved, as individuals, in the political and cultural events of their time, as well as in the underlying social struggles and “ideologies,” and we can expect their involvement to have left its mark on their work; but on another level there is a portion of their work that is not in this sense derivative, but instead comprises their contribution, not as individuals hut as jurists, to the directing of their society. Discussion of interests can assist us in illuminating these aspects of Roman legal science. And I suspect that, in the end, a surprise may yet await us: we may discover that the jurists’ invention and employment of juristic methods, rather than leading them most often into a sterile formalism, instead repaid them handsomely by generating a substantial increase in law’s instrumental power.52

The potential service of a discussion of interests, at least in “good” areas of law like urban lease law, lies in its capacity to fill out the shadowy space between social institutions on the one side and the naked legal rules on the other—to demonstrate the reciprocal lines of calculation which can bind law to society and society to law. If such realism means that we come to see Roman jurisprudence more firmly anchored in its time and place, then, or so I think, this result is in one respect eminently desirable: we shall at last claim for Roman jurisprudence no more than the jurists themselves sought to achieve for their law.

Anglo-America Law Review 4 (1975) 386–411, e.g. 406: “A truly realistic view of law in its social setting requires the analysis of both [its] conceptual and behavioural aspects and the examination of their interrelationship.” Therefore the two “aspects” are thought of and considered first separately (above, Chapters IV, V) and then together (Chapter VI). This view is hard to apply only because we must be so vague about the uses to which juristic rules were put after their creation.