CHAPTER 4

# *Property*

Ownership and the means by which it is protected are the topic of the first section of this chapter. The second and third sections are devoted to land, and in particular to legal institutions providing for its exploitation and to legal remedies against the unwelcome activities of neighbours.

## I OWNERSHIP

Ownership (*dominium*) in Roman law is difficult to define, and the Romans themselves did not trouble to do this. The best approach seems to be to deal with the main ingredients of ownership and from that allow the meaning of the term to emerge. The discussion in this section does need to go into some detail, in particular about the remedies available to owners to protect their property. This is not (intended to be) pure self-indulgence: it is only from the details that a reasonably accurate picture of the security of property rights and commercial transactions such as sales can be obtained.

In particular, it is important to see how Roman law dealt with the perennial problem of stolen goods: movable property gets stolen. Often it is sold to an innocent buyer. Someone has to lose. All legal systems have to decide whether the loser should be the original owner or the innocent buyer. The choice has serious implications: on the one hand, it is important to protect existing property rights; but on the other, if buyers in good faith are liable to lose their purchases, commerce may be adversely affected.

### *1. Acquisition of ownership*

The ways in which a person became owner of a thing can be dealt with here briefly. Exotic but without great practical importance were various

ways in which ownership could be acquired *ab initio*, without a conveyance: these methods included capture of an unowned thing (such as a wild animal or an island which had arisen in the sea); the finding of treasure; and the creation of a new thing by the combination or transformation of existing things. There is an interesting discussion of these various possibilities in the Digest, mainly taken from Gaius (*D.* 41.1.1 to 9.2). By far the most important way of acquiring ownership other than from the existing owner was *usucapio*, acquisition of ownership by possessing the thing for a certain period. There will be more to say about this below.

But the usual way of acquiring ownership, then as now, was by acquisition from another person, namely the owner of the thing. A proper conveyance of the thing would transfer it from the ownership of one person to that of another. For certain more valuable items known as *res mancipi* (in particular land, slaves and cattle) formal conveyance by *mancipatio* or *in iure cessio* was necessary in order to make the acquirer owner. The details are not important here: the point was simply that greater formality and publicity were appropriate for conveyance of the most valuable items of property. Other objects were simply conveyed by delivery (*traditio*).

It is fundamental that a person could not transfer a better title than he had himself: somebody who was not the owner could not therefore make a person who acquired a thing from him its owner. Money, however, was to some extent subject to special rules, just as it is today.

Ownership in money was transferred by delivery. The normal case would be, for example, that if the owner handed over money as a loan (*mutuum*), ownership transferred to the borrower. (This had to be so in the case of lending money, since the idea of the loan was not that precisely the same coins should be returned but that they should be used, and the same value in other coins returned.)

Suppose, however, that the lender handed over somebody else's coins. This would not transfer ownership, and the owner of the coins could therefore claim the very same coins back (using the *vindicatio*, which is discussed below). So far this is the ordinary rule for property. The speciality was that, if the recipient of the money spent it in good faith, the acquirer became owner of it. Similarly, if coins belonging to different people were mixed together, so that each could not now identify his own and vindicate them, they became the property of the possessor (Ulpian, *D.* 12.1.11.2 and 13 pr.–1; Iavolenus, *D.* 46.3.78). The consequence was that the person who lost the ownership of the money would have to rely

on another remedy, such as a contractual action or action for theft. These rules are peculiar to money.

The critical point is that commerce demands that money should be freely transferable and that there should be no need to make inquiries into whether the person handing over the money is actually its owner. In the cases just discussed only if the precise coins are still identifiable is the owner's title unaffected; otherwise it is safe to assume that the possessor is owner.

### *2. Use of property*

The owner in Roman law was fairly uninhibited in the use of his property, although he might be subject to statutory restrictions (such as building regulations or rules on humane treatment of slaves) as well as to restrictions imposed on the use of his land in the interests of his neighbours, whether by agreement or by the operation of law. These are discussed in sections II and III below.

### *3. Protection of ownership*

Ownership was protected by various different remedies. Before turning to the principal remedy by which it was protected, the *vindicatio*, we should note the relevance of two other actions. The first is the action for theft, by which the owner could recover damages from a person who stole his property. The second is the action under the *lex Aquilia* (of about 286 BC), by means of which the owner could recover damages from a person who wrongfully injured or killed his property. These were important weapons in the owner's armoury.

Nevertheless, the main action with which we are now concerned is the action by which the owner could recover his property from any person who had it, the *vindicatio*. To succeed in this he required to prove that he was the owner. This sounds straightforward and might indeed be so, if he could show that he had manufactured the thing or captured it; but otherwise it would in principle require him to prove that the person from whom he had acquired the thing was then its owner. That of course would turn on whether that person had acquired from the person who was then the owner; and so on *ad infinitum*. All most inconvenient.

### *4. Possession and* usucapio

This difficulty was avoided by relying on the concept of 'possession'. There are two important points to make about possession, both quite lengthy.

(1) Possession was different from ownership because, while ownership was based on entitlement, 'possession' was based on fact. A person who had a thing and intended to possess it was its possessor. He need not also be its owner. There is room for argument about exactly why the law chose to protect the possessor. But there is one very good reason: the best way of encouraging people to keep the peace and not to take the law into their own hands is to protect the existing possessor, whether or not he claims to be owner, until the facts have emerged properly in legal process.

The way in which possession was protected was by means of orders called possessory interdicts. This was a 'fast track' procedure under which the praetor would adjudicate on the question of possession. The rules were simple: in cases involving land, the praetor would grant possession to the person who already had it, unless he had obtained it by force or by stealth from, or with the permission of, the other party. If any of those exceptions applied, that other party would obtain possession. The rules for cases involving movable property differed in only one respect: possession was granted to the party who had had the thing for the longer period during the immediately preceding year. Again, this was subject to the exceptions of force, stealth and permission.

The procedure was simple and swift in the sense that it did not involve looking at the rights and wrongs of title and how it had been acquired. All it needed was an examination of the position between the two litigating parties: had one of them, for example, taken the thing from the other by force? If so, he must restore it to him. The result of this inquiry was correspondingly limited: the praetor could conclude only that one party had a better right than the other, but that said nothing about their absolute rights. There might be a lot of people who had even better rights than either of them. But this procedure rapidly resolved the question which of the two had a better claim to possess and so kept the peace between them.

Interdict proceedings therefore provided one way of avoiding the inconvenience of proving ownership in the *vindicatio*. If you could prove that the person who had a thing had acquired it from you, for example, only with your permission (and so had no right to set himself up as

having any right competing with yours), interdict proceedings would be adequate to recover possession from that person. Gaius emphasizes that it is always worth considering whether there is any interdict under which you can recover possession: if you succeed, you transfer to the other party the much heavier burden of bringing a *vindicatio* and the need to prove ownership (*D.* 6.1.24).

(2) *Usucapio* was a means (as mentioned already) by which a non-owner could become owner of a thing, by possessing it for a certain period. For movables the period was one year, for land it was two.

To become owner by *usucapio*, a possessor had to meet certain conditions: first, he must possess; second, he must begin (though he need not complete) his possession in good faith; third, he must have a good cause for being in possession; and finally, he must remain in possession for the relevant period. So a buyer who, under a contract of sale (which was a good cause), in good faith acquired a thing from a seller who did not own it could become its owner, by possessing it for the requisite period. This was subject to the over-riding rule that there could be no *usucapio* of a stolen object, a point to which we return almost at once.

The existence of *usucapio* simplified the owner's task in *vindicatio*. Instead of needing to prove a series of owners and conveyances from time immemorial, he could rely on proving only that he had possessed for the necessary period under a possession which had begun in good faith for a good cause.

*Usucapio* meant that the acquirer of the property was enriched at the expense of the original owner: just as the passing of the one or two years vested ownership in the new owner, so it divested the old one. This seems unfair. But to this the jurists had their answers: *usucapio* was in the public interest, so that ownership of property should not be uncertain for too long or virtually always open to challenge, and so that there should be some end to litigation (Gaius, *D.* 41.3.1; Neratius, *D.* 41.10.5). These seem good points.

In fact, it is not quite clear that *usucapio*, at least of movable property, can have had this beneficial effect of clarifying titles and rendering them unchallengeable. The reason for this is that Roman law insisted on one restriction: there could be no *usucapio* of a stolen object, not just by the thief (of course) but by anyone at all. This restriction goes back to the Twelve Tables (*c.* 450 BC). But this means that it is likely that *usucapio* of movable property was rather uncommon: mostly when movable property ends up being sold or acquired by a non-owner it will at some point in its history have been stolen.

In Rome, if *usucapio* was completed, the title of the possessor became unassailable. But ultimately the Roman preference was for protection of the existing title: before *usucapio* was completed, the possessor in good faith had no defence against the owner. Even after it had been thought to be completed, if the owner detected a stolen thing in the hands of a purchaser in good faith, he could still claim it back as his property. The fact that it had at some point been stolen would prevent the purchaser relying on *usucapio*. That would leave the purchaser with only a contractual claim for damages against the seller; and if the seller was himself the thief, such a claim would not be worth much in practice. Thieves are hard to find; when they are found, they find it hard to find any money.

### *5. Other titles to property*

The topic of *usucapio* leads naturally into the question of other titles to property. The Romans were strict in saying that there was only one form of ownership, *dominium*. But in fact they created other statuses which were well protected, although they lacked the formal title of ownership.

(1) A person who acquired a thing in good faith from somebody who was not the owner was not himself the owner either, since a non-owner could not transfer ownership to him. But such a person, a bona fide possessor, was worthy of protection by the law, since he had no reason to doubt the validity of his own title to the thing. Put delphically, the good faith of the possessor in good faith consists in thinking that he is not a possessor in good faith but the owner.

By *usucapio* a bona fide possessor would become full owner in either one or two years. But, until the period for *usucapio* had run, he faced a difficulty in recovering the property if he lost possession of it. It is true that, since he was a possessor, he was protected by possessory interdicts. But he might not find any interdict of use in his case: for instance, if he had not lost possession by force, stealth or permission or (in the case of movables) if he had been out of possession for a significant period. Nor could he use the normal action for recovery of property (*vindicatio*), since this required proof of ownership, something which the bona fide possessor could not satisfy.

The solution was to provide the bona fide possessor with a modified version of the *vindicatio*, known as the *actio Publiciana*. This appears to have been introduced in the last century of the republic, possibly in 67 BC. Why precisely then is a question which cannot be answered, just as it remains uncertain whether the primary purpose of this innovation was

to meet the difficulties of the bona fide possessor or the rather different ones faced by the bonitary owner (see below; Jolowicz and Nicholas 1972: 164–6). The special feature of the *actio Publiciana* consisted in asking the judge to decide not whether the plaintiff was owner now (which he was not) but whether after the period of *usucapio* he would be. That meant that the judge must hear evidence on the requirements of *usucapio* other than the period of possession: did the plaintiff acquire possession in good faith? Did he have a good cause for possession? He would also, if this issue was raised by the defendant, have to consider whether the thing had been stolen. A person who had purchased the object in good faith from a non-owner would be able to satisfy those requirements, so the judge would be entitled to conclude that he should succeed in the claim; always provided, of course, that the object had not been stolen.

It is appropriate here to point out one more concession made to the bona fide possessor: this was that, if the object he possessed bore fruit (whether literally, or in the form of the young of animals), the bona fide possessor became its owner by the very fact of its separation from the parent. Even if the bona fide possessor was successfully sued for return of the parent object, in classical law there was no obligation to hand over its fruits. The precise reason for this rule is not very clear. In some cases, such as that of crops, it is plausible to say that the rule protects the bona fide possessor's labour or investment. But in others (animals) it can only be said to be protecting his reasonable expectations. Paul puts it very broadly: the bona fide possessor is protected because he is more or less in the position of the owner (*D.* 41.1.48). In any event, this rule is a further pointer to the fact that bona fide possession was a status with significant rights and significant legal protection.

(2) For completeness, it should be noted that the *actio Publiciana* was also available to another person whose standing fell short of complete ownership or *dominium*, namely a person who acquired a thing which required formal conveyance (a *res mancipi*) from the owner but received it only by an informal conveyance: the bonitary owner. Since ownership passed in such things only by formal conveyance, the recipient was not owner. But, equally clearly, as an acquirer directly from the owner, he deserved legal protection. So much so, that if it came to *actio Publiciana* proceedings between the bonitary owner and the owner, the bonitary owner would succeed.

The *actio Publiciana* required slightly less to be proved, so it is at least conceivable that even full owners might have chosen to use it. But the main difficulty – that, owing to the exclusion of stolen goods from

*usucapio*, a plaintiff may always have harboured a slight doubt about whether something was really his own – was a difficulty regardless whether proceedings were raised by *vindicatio* or by the *actio Publiciana*.

### *6. Some conclusions*

All this may seem very technical: what does it all add up to for the purposes of the historian? There are two main points.

(1) A good deal of importance was attached to possession rather than ownership. The remedies by which any possession, and in particular that of the possessor in good faith and bonitary owner, was protected were potent. This indicates that Roman law was seriously concerned with preservation of the status quo and keeping the peace, and less so with questions of formal entitlement. It is true, of course, that the Romans insisted on formal conveyance for certain objects, and that ownership in these things could otherwise not pass. But at the same time they were prepared to innovate so as to make the difference between those types of conveyance nugatory. Gaius himself spoke of a double system of ownership at Rome (*Inst.*, 1.54); the amalgamation of the two nearly four centuries later was long overdue. The emphasis in developed Roman property law was often therefore not really on who was the owner, but on who was entitled to the protection of possessory remedies and the *actio Publiciana*.

In other respects too the position of the bonitary owner and bona fide possessor was satisfactorily protected: section III deals with remedies by which an owner could protect himself in relation to his neighbours; it is likely that all or most of these were also open to bonitary owners, although the position in relation to possessors is not always so clear (Bonfante 1926: 345–6, 380, 409, 448–9). Certainly, the actions for theft of the property and for wrongful damage to it were open to both of these people.

(2) None the less, when faced with a choice between protecting an innocent owner and an innocent possessor in good faith, Roman law opted to protect the owner. And, although *usucapio* meant that ownership of property theoretically did not remain uncertain for long, this was less than the whole truth given the exclusion from *usucapio* of stolen goods. This seems to suggest that – with the exception of money, for which special rules were necessarily developed in the interests of commerce – the Romans were relatively unconcerned about the effect of their prop-

erty rules on commercial transactions. The position is likely to have been mitigated, however, by the difficulty of proving a theft many years after it had taken place.

## II THE USE OF LAND

This section looks at the various legal devices which were used to exploit land, notably leases and usufruct. For the purposes of this section, 'land' means land together with the buildings built on it: that reflects a rule of Roman law that ownership of land carried with it whatever was built on the land (Gaius, *Inst.* 2.73). The Digest contains a good deal of incidental information about the exploitation of land. For Roman society the essential point is that land was always the primary investment (Pliny, *epistulae* 3.19.8). It is no accident that the word wealthy (*locuples*) means 'rich in land'; and it is equally clear that landed wealth might go hand in hand with low liquidity (Cic., *Att.* 16.2.2). Clearly, there are various possible ways in which land may be managed: it may be occupied by the owner, by a tenant, or in some other way, such as under a usufruct (Garnsey and Saller 1987: 71–7).

There is evidence of leasing of urban property as an investment, although probably compared with rural property this was on a small scale. The risks were evidently higher – collapse of buildings and especially fire – but the returns were commensurately greater than in letting rural property (Aulus Gellius, *Noctes atticae* 15.1.1–3). None the less, the Digest contains a good deal of evidence about urban letting (for example, see Ulpian, *D.* 5.3.27.1).

The main rental market appears, however, to have been in rural property. Although this got off to a slow start, by the time of our principal legal sources tenancy appears to have become the chief method for exploiting land throughout the Roman empire (Finley 1976; de Neeve 1984: 164–74; Kehoe 1997: 5, 156–66). For that reason, most of this section is concerned with tenancy.

### *1. Occupation by the owner*

This does not raise any significant legal issues beyond the question of remedies, which has already been discussed. Slaves would of course be likely to bear most of the burden of work; a (free or slave) manager or *vilicus* would regularly be appointed.

### *2. Leases*

The owner might let out his property for occupation by tenants. A lease in Roman law is a contract. It therefore generated rights *in personam*: that is, personal rights of the landlord against the tenant and vice versa. The principal obligation on the part of the landlord was to give the tenant vacant possession of the premises leased, and on the part of the tenant to pay the rent.

Until recently it was widely held that the law of lease was a paradigm of law forged in the interests of the landowning classes. One of the main reasons for this was that, to put the matter in modern terms, the tenant had no security of tenure. (There will be more to say about this later.) The truth, however, appears to be more complicated. It is too simplistic to assume that all tenants were underdogs and that the law was written in the interests of the landlords. It has recently been shown that there was a substantial urban rental sector, and that the tenants were regularly members of relatively high social classes. So much is suggested too by certain rules of the contract which do not fit at all well with the notion of the poor, exploited tenant: for example, leases were regularly for periods of several years; the rent was typically paid in lump sums at yearly or half-yearly intervals. In general, the jurists' treatment of the contract indicates that they were alive to the interests of both landlord and tenant (Frier 1980: 39–47, 174–95). And the fact that the jurists assume as a matter of course that tenants might sue their landlords does not suggest that there was a great gulf between the social or economic standing of the two parties to the contract. This is not to say that there were no poor or oppressed tenants and no slums. Of course there were: the point is rather that the jurists were mainly concerned with the workings of leases entered into by the well-to-do. The Digest therefore presents only a partial picture of Roman society.

Similarly, so far as leases of rural property are concerned, the strength of the landlord's position can be exaggerated. Columella speaks of the importance of continuity in tenancies (*de re rustica* 1.7.3), and Pliny of a shortage of tenants (*ep.* 3.19.7). Since there was certainly a lack of other possible investments, and, since there was a limit to the area the landlord could himself cultivate, the landlord had every reason to attempt to keep good tenants in place. The Digest provides instances where the question is raised of compelling a tenant to remain in occupation, and even a case where the seller deceives the buyer into thinking that the property sold is occupied by a tenant. In these cases clearly the presence of the tenant

is regarded as being a good thing (Julian, *D.* 19.2.32; Hermogenian, *D.* 19.1.49 pr.; Kehoe 1997: 163–6).

The law of leases is therefore more even-handed than previously assumed. This will be confirmed by closer inspection of some of the key topics.

*The landlord and the tenant*

Landlords might lease premises directly to the tenants who were to occupy them. But this was not the only possibility: particularly in the case of leases of flats, we find leases of the premises as a whole to a tenant who would then enter into sub-leases of the individual flats with the actual occupiers. There are examples of this in the Digest (Alfenus, *D.* 19.2.30 pr.; Labeo, *D.* 19.2.58 pr.). The advantage from the landlord's point of view was that he had in place a manager, who had undertaken to pay a fixed rent. He therefore shielded the landlord not just from the tiresome business of dealing with individual tenants but also from fluctuations in the rent, owing, for example, to inability to let the premises fully or the insolvency of one of the occupiers. The disadvantage was of course that this security came at a price: the head landlord would receive only a proportion of the full market rent, since the sub-landlord had to have his cut. For example, in Alfenus' text, the landlord let a building for thirty, and the tenant sublet the apartments in it for a total of forty.

The same enthusiasm for making use of tenancies for management purposes is found in relation to land: there is some evidence of dividing up landholdings in order to make it easier to attract tenants to them (Paul, *D.* 31.86.1). Furthermore, rather than leave an estate to be managed by an administrator or *vilicus* who had no financial interest in it, there was much to be said for letting it to someone who did. This extended even to a landlord's letting land to his own slave (a so-called *servus quasi colonus*), who would pay the rent for it out of his *peculium* (Kehoe 1997: 156–73). The slave managed the property not under master's orders, as it were, but as his tenant, for a rent (Scaevola, *D.* 33.7.20.1).

*Vacant possession*

The landlord's obligation was only to provide the tenant with vacant possession of the property in a state such that he could enjoy it. Failure to do this was a breach of contract on the part of the landlord and would make him liable in damages. So, for example, the landlord was liable if

the leased building had to be demolished, as well as for less drastic breaches of contract such as the blocking of daylight from a flat (Alfenus, *D.* 19.2.30 pr.; Gaius, *D.* 19.2.25.2). Similarly, if leased land was untenantable, or the farm buildings or stables in disrepair, the landlord would be liable (Ulpian, *D.* 19.2.15.1). But, provided the landlord met this obligation, the tenant was under an obligation to pay the rent.

The tenant's obligation was qualified somewhat by the development of rules for abatement of rent (*remissio mercedis*), particularly in the case of rural property in the event that the crop failed. Although the rationale underlying this doctrine is not entirely clear and controversy continues (Frier 1989–90), it seems to have become settled that where overwhelming force, *force majeure*, caused the failure of the crop, that risk lay on the landlord. The consequence was that the tenant was not obliged to pay the full rent, but the rent due by him was abated pro rata. The tenant might still be liable to make up the rent to the full amount, if future years were particularly fruitful. The sorts of events which this doctrine of abatement covered were flooding, enemy attack, and earthquake but also, much less obviously, extreme frosts and heatwaves. By contrast, where the tenant's complaint was simply that he managed to harvest only a poor crop, or that the vines leased were old and not very fruitful, he obtained no redress. He ought after all to have been aware of that when he entered the contract (Ulpian, *D.* 19.2.15.2–5, 7). The rules are summed up in a text of Gaius, which is also important for the discussion of rent in the next section:

> Force majeure ought not to cause loss to the tenant, if the crops have been damaged beyond what is sustainable. But the tenant ought to bear loss which is moderate with equanimity, just as he does not have to give up profits which are immoderate. It will be obvious that we are speaking here of the tenant who pays rent in money; for a share-cropper (*partiarius colonus*) shares loss and profit with the landlord, as it were by the law of partnership. (Gaius, *D.* 19.2.25.6)

At the end of the text, Gaius refers to share-cropping, the possibility of paying rent as a proportion of crops harvested. One consequence of doing so, as he points out, is that the tenant does not carry the whole risk of the failure of the crop as he would in an ordinary lease, since what he has to pay is scaled down automatically.

Much the same approach to abatement of rent seems to have been adopted in urban leases: a difficult (because corrupt) passage of the republican jurist Alfenus Varus indicates that the tenant cannot rely on minor inconvenience (such as repair work) as a ground for withholding rent: there must be a substantial impact on his occupation of the prem-

ises to allow him to do so (*D.* 19.2.27 pr.). This text as it stands does not say how much rent could be withheld, but it is perhaps not unreasonable to assume that it would be in proportion to the part of the premises which was unusable.

To cut a long story short: freedom of contract allowed the parties to make their own bargain. They might opt to share the risk of crop failure, as in Gaius's example, or they might contract to place the whole risk on the tenant (Ulpian, *D.* 19.2.9.2). But, if they made no other agreement, the risk of *force majeure* was on the landlord. The very existence of this doctrine shows that landlords did not have the law all their own way: in certain circumstances it was appropriate for them and in practice they would probably have had little alternative but to make concessions in order to retain their tenants. That is exactly what Pliny appears to have done (*ep.* 9.37.2; 10.8).

*Rent*

The contract of lease of property (*locatio conductio*) involved the letting of a thing against payment in money. The text of Gaius just cited shows that at least one jurist (writing here – perhaps significantly – in his commentary on the provincial edict) was aware of a practice of paying rent in kind: the landlord took a share of the crops as the rent. The practice is also mentioned by Pliny (*ep.* 9.37.2). It seems not unlikely that this type of rental agreement was an import from the Greek East; and in Egypt it was apparently a typical form of lease. None the less, although the jurists were not wholly inflexible, on the whole they avoided discussion of the peculiarities of this type of rental agreement and confined themselves to cases of money rent (Africanus, *D.* 19.2.35.1; Gaius, *Inst.* 3.144).

There is some reason to believe that this sort of tenancy agreement was characteristic of the lower end of the spectrum: the tenants might be supplied with some of the necessary equipment, and might be supervised, sometimes by slaves, for the obvious reason that their efforts directly influenced the landlord's own income from the land (de Neeve 1984: 16–18).

*Other terms*

These basic contractual terms could be supplemented. Since the parties were free to fix the terms of their own contract, and clearly did so, there is little to be said for rehearsing the great variety of terms here, and much to be said for simply referring to *D.* 19.2. But a few examples may be given.

In urban leases we find such things as terms prohibiting the lighting of a fire and also (more conveniently, if less clearly) the lighting of a harmful fire (Ulpian, *D.* 19.2.11.1). In rural tenancies, the tenant would anyway be under a general duty to occupy and to keep the land in good heart, but he might also come under more specific obligations, for example to cultivate in a particular way or to build something (Iavolenus, *D.* 19.2.51 pr.; Paul, *D.* 19.2.24.2–3; Gaius, *D.* 19.2.25.3); conversely, the landlord might come under an obligation to supply certain equipment (Ulpian, *D.* 19.2.19.2).

In any kind of tenancy it was open to the parties to reinforce the contractual obligations by setting penalties for failure to comply with them (Paul, *D.* 19.2.54.1).

*Termination*

Since the Roman lease generated only personal rights, the tenant obtained no right to the property (right *in rem*). It follows that the tenant's position was relatively insecure. In the event of sale of the property by the landlord, the tenant had no claim on the property, and no rights against the new owner, and could therefore simply be ejected. It is true that this might involve the landlord in payment of compensation for breach of contract; but that would be little consolation to a tenant whose primary desire was to be allowed to remain in occupation. Nowadays, by contrast, under the typical lease tenants have certain statutory rights to security of tenure.

This lack of security of tenure in Roman law does appear to favour the landlord. But two qualifications should be borne in mind. First, as mentioned already, a landlord had every interest in trying to retain a satisfactory tenant. Second, the way the jurist Gaius describes sale of tenanted property does not suggest that the buyer's first act would have been to proceed with summary eviction: he says that the seller should take care that the tenant is entitled to enjoyment on the same terms under the new owner; otherwise the seller is liable to his tenant for breach of contract (*D.* 19.2.25.1). Clearly, this does not prove anything, but it counsels caution in assuming that the tenant was in practice in a fragile position.

The lease might also end by abandonment by the tenant before its full term was up. Although we do not know much about the details of this, it seems likely that the tenant would remain liable to pay damages based on the rent for the full term of the lease, unless he had a reason which justified abandonment. The only reasons the jurists discuss are related

to physical deterioration of the property (Paul, *D.* 19.2.55.2; Frier 1980: 92–105).

### *3. Long leases*

In later classical law a new form of lease is found in which the tenant does have a right to the leased property, often indefinitely, as well as to protection by interdict and a proprietary action. He therefore has security of tenure. This form of lease seems to have been developed first for leases by the Roman state or municipalities. Later law seems also to have allowed private arrangements along the same lines, normally of land on which the tenant was to build (*D.* 43.18).

### *4. Usufruct*

Usufruct gave a person certain rights in a thing for a period, which might be either a term of years or a lifetime. The rights involved were, as the name suggests, to the use (*usus*) and enjoyment of the fruits (*fructus*) of the thing. These rights were exclusive, so the owner had no right to use or enjoyment until the usufruct came to an end. A usufruct might be over movable property or land; the present concern, however, is solely with land.

Just as leases split the exploitation of land between two people, the landlord and the tenant, each of whom enjoyed part of its fruits, so too usufruct divided it between owner and usufructuary. But the social context of usufruct was very different: the typical usufruct was left by a testator to his widow and gave her a right for life to the use of, and income from, his estate, while leaving the ownership of that property to the testator's children.

Notwithstanding this cosy family background to the institution of usufruct, the jurists developed a good deal of law regulating the respective rights of owner and usufructuary. It seems unlikely that this was simply for their own amusement, and more probable that there were disputes about precisely what the usufructuary was entitled to do. It is clear that there is a built-in conflict of interest between a person with a life interest in property and the person who will become unrestricted owner of the property when the life interest comes to an end: the person with the life interest is interested only in the short term, in maximizing income, and has no personal interest in (for example) the good heart of the land in the long term. The owner, on the other hand, will be interested in

seeing that the capital value of the land is maintained and that it is not threatened by policies designed only to boost short-term income.

The usufructuary was kept in order in two ways: first, he could be held liable to the owner under the *lex Aquilia* for wrongful damage to property; second, he was required in advance to give a promise to return the property at the end of the period of the usufruct and to treat the property as a reasonable man would do. This second part of the promise enabled the jurists to enter in extraordinary detail into the question what the usufructuary was entitled to do with the property, as a glance at title *D.* 7.1 will confirm. Here it is enough to give two examples.

> If trees are uprooted or blown down by the wind, Labeo says the usufructuary can use them for his own purposes and that of the villa, but he is not to use the wood as firewood if he has another source for that. I think this view is correct: otherwise if the whole estate suffered this fate the usufructuary would make off with all the trees. Labeo thinks the usufructuary can cut wood for the purpose of repairing the villa; in the same way, he says, he can burn lime or dig sand or take what is necessary for the building. (Ulpian, *D.* 7.1.12 pr.)

> The usufructuary ought not to make the state of the property worse, although he may make it better. If the usufruct of a farm is left by legacy, he ought not to cut down fruit-bearing trees or demolish the villa or do anything to the detriment of the property. If it was a pleasure garden, having greenery or pleasant drives or walks shaded by ornamental trees, he must not destroy this in order, for example, to create market gardens or anything else for the purpose of profit. (Ulpian, *D.* 7.1.13.4)

From these texts it is clear that observing the standard of the reasonable man meant that the usufructuary could not go all out for profit. The cases discussed in the Digest are many and various, but in the end they come back to one point: the usufructuary must not damage the substance of the property. In a given case views might differ on whether the usufructuary's use of trees or minerals was or was not damaging the substance of the property (e.g. Ulpian, *D.* 7.1.12 pr. and *D.* 7.1.13.5). Modern views might also differ on whether the approach adopted here by Roman law demonstrated a lack of economic thinking or a welcome rejection of short-termism.

## III RELATIONS WITH NEIGHBOURS

### *1. Boundaries*

A fertile area for dispute between neighbours was the question where the boundary between their respective properties lay. The Twelve Tables

had already provided an action for this, the action for regulating boundaries (*actio finium regundorum*; table 7.2; Gaius, *D.* 10.1.13). Where the boundary was simply unclear or there was a dispute about the ownership of land at the boundary, either neighbour could raise this action, and the judge would adjudicate on where the boundary lay. The consequence of his judgment might be to vest ownership in one neighbour and divest the other.

### *2. Servitudes*

Roman law recognized a limited class of servitudes (*servitus*), rights in the property of another. The most typical example is a right of way across a neighbour's land. Of course, it was always open to the landowners to enter into an agreement that one could cross the land of the other and, if made in the proper form, it would be enforceable in contract. But such an agreement would bind only those who were party to it; and it would therefore immediately cease to be of any value if one of the landowners sold his or her land to someone else.

To overcome this insecurity it was essential that the right of way be a right not exercised against a specific person (who might change) but against a specific piece of land. This, broadly speaking, is what a servitude is: a right inseparably and permanently attached to one piece of land (the 'dominant' land) and exercisable against another (the 'servient' land). The consequence is that changes in the ownership of the land make no difference to the existence of the servitude.

The original servitudes recognized at an early stage in Roman legal development were mainly rights of way of varying extent (on foot, with cattle or a vehicle, or both of those; *iter*, *actus*, *via*) as well as the right to lead water across another's land (*aquaeductus*). It is clear that the class of recognized servitude rights gradually expanded, to include such things as the right to draw water, extract clay or lime, pasture cattle, and so forth.

The servitudes mentioned so far were known as 'rural' servitudes, probably (although this is uncertain) because as a rule they served agricultural purposes. There was another class of servitudes, 'urban' servitudes, which again were probably of use mainly in urban areas. Urban servitudes included such things as the right to light, to prevent a neighbour's building beyond a particular height, or to let water run off into the neighbour's property. Curiously enough, each of these urban servitudes appears to have had a counter-servitude: the right to obstruct light;

to build up beyond a particular height; not to have water run onto one's property. It is difficult to be sure what the right explanation for this is, but the best seems to be this. The starting point was that any neighbour was entitled to a reasonable amount of light, or to build up to a reasonable height. If a proprietor wanted to have more (more light, a higher building), or wanted his neighbour to make do with less (less light, a lower building), he would have to negotiate a servitude with him. So these servitudes and counter-servitudes represent deviations from a norm (Rodger 1972).

There is an economic dimension to servitudes. Three points are worth making. First, the existence of servitude rights leads to efficient use of property. In the case of rural servitudes, land which would otherwise be unusable because it was landlocked by a neighbour's land or because it had no water source of its own could become usable by means of a servitude right of access or of water. In the case of urban servitudes, property for which extraordinary levels of light were required or a building of exceptional height was needed could become usable by means of a servitude right to light or to build.

Second, there was no entitlement to acquire such a right from a neighbour, so it would be necessary for a person who wanted his land to benefit from a servitude right to negotiate for it. This means that everything turned on the relative bargaining positions of the parties. This is a clear illustration of the individualistic stance which Roman law often adopts: you get what you pay for.

Third, because the servitude right affected the property itself in perpetuity it was necessary to develop rules about what could be the legitimate subjects of servitude rights. Clearly, if this was not done, there was a risk that the beneficial economic effects of servitudes would be lost, for instance, if a piece of land became burdened in perpetuity with so many rights in favour of other landowners that the basic content of ownership was reduced virtually to nothing. This is a good reason why there could be no servitude to stroll, pick apples or consume picnics (Paul, *D.* 8.1.8 pr.). Although an economic argument for delimiting the acceptable content of servitudes is not advanced explicitly, it does appear to lie behind some of the criteria which servitudes had to satisfy: they must be for the benefit of the dominant land; and they must be exercised with the least possible inconvenience to the servient land.

### *3. Protection against nuisance, damage and encroachment*

In one of his letters, Seneca writes 'I live over a bath-house. Imagine the assortment of voices, the sound of which is enough to nauseate you.' He goes on to elaborate: the groans and sighs of people exercising; others playing with balls and loudly keeping count of the score; thieves being arrested; great splashes as people jump into the pool; and the cries of sausage sellers and peddlers (*epistulae morales* 56.1–2). So urban life in Rome could be exceptionally unpleasant, and the neighbours exceptionally tiresome. But the protection given against them in Rome was rather limited. This is the more significant given that a large number of people lived in a relatively confined space.

Nowadays many antisocial and tiresome activities of neighbours can be restrained on the ground of nuisance. This is a broad general doctrine, and it is the more effective because it is accepted that the proper approach to the question whether there is a nuisance is from the standpoint of the victim and not the offender; regardless how normal the use the defendant is making of his property, if it exposes the plaintiff to intolerable inconvenience, it can be enjoined (and in some cases damages can be sought).

There is no such general doctrine in Roman law. Instead there was a range of remedies, each of which was specific to a particular situation. For instance, particular interdicts covered infringement of particular servitudes (titles *D.* 43.19, 20 and 22 are examples). There were some more general remedies too. But gaps gaped between these remedies. It is worth looking at the main remedies more closely.

(1) Where a neighbour wrongfully caused physical harm to property, it might be possible to make use of the ordinary action for damages for negligently causing harm (which of course applied in many contexts other than this), the *actio legis Aquiliae*. But this was not altogether straightforward. It was necessary, in the first place, to prove that the defendant had caused the harm, and some jurists took a strict line on this. So, for example, Labeo took the view that if someone piled up earth against his neighbour's wall, the earth was soaked by constant rain, and this caused dampness in and the eventual collapse of the wall, the neighbour was not liable under the *lex Aquilia*, because it was not the neighbour's act (the piling of the earth) but the dampness percolating from the pile which caused the loss (Iavolenus citing Labeo, *D.* 19.2.57).

An even more serious restriction on this remedy was that it was apparently a good defence to the action that the loss resulted from the normal

use of property. This seems to be the reason why the jurist Proculus said there was no liability when the heat from a neighbour's oven, which was placed against a common wall, had damaged the wall (Ulpian citing Proculus, *D.* 9.2.27.10).

In short, this remedy depended on showing that the neighbour was at fault, but fault required that he was doing something which was not a normal use of his property. That might not be at all easy; and the problems this might raise seem all the more serious on reflection that Roman housing was not zoned or neatly divided into residential and commercial areas, but baths, bakeries and commercial enterprises (perhaps even cheese factories: see below) might form part of the same building (Wallace-Hadrill 1994: 131–4). There is no reason to doubt that the problem addressed to Proculus was a real problem.

There were however certain remedies which made it possible to prevent a neighbour making even an ordinary or normal use of his property. These were available in highly specific circumstances. Some of the remedies were peculiar to rural use and others to urban.

(2) The 'action for warding off rainwater' (*actio aquae pluviae arcendae*) imposed liability for damage caused by rainwater in very specific circumstances: the defendant had to have built a construction which caused rainwater to harm the plaintiff's land. The rationale of this action was the protection of agricultural land. It was therefore available only for harm done to land, not to buildings; and for the same reason some types of construction did not give rise to liability, notably works built for agricultural purposes. If the defendant lost the action, judgment was given for a sum of money, but the formula in the action was devised so as to encourage the defendant to remove the offending construction rather than pay the money. (More detail on this point is given in chapter 6.)

This action already existed at the time of the Twelve Tables, in the middle of the fifth century BC (Pomponius, *D.* 40.7.21 pr.). Since Roman society at that time was overwhelmingly agricultural, the fact that this action appeared so early is unsurprising. The exception made for constructions built for agricultural purposes also makes good sense, although from when it dates is unclear.

It is remarkable that, although some early jurists such as Trebatius took a broader view, the classical notion of the scope of this action was rather narrow: it was rigidly confined to 'rainwater', so if the complaint was about polluted or hot water, the action was not available (Ulpian citing Trebatius, *D.* 39.3.3 pr.–1). Equally, the action was directed only at 'warding off' water. No action was given to a person whose complaint

was that his neighbour had intercepted his water supply, although it might be thought that this was a potentially serious cause of action (Ulpian, *D.* 39.3.1.11–12, 21; Paul, *D.* 39.3.2.9). Only if a servitude right to the water existed would an interdict be available for this sort of infringement (Ulpian, *D.* 43.20.1.7 and 1.19).

It is true that some of the texts just referred to suggest that there might have been a remedy had the neighbour's motive been malicious. But it is doubtful whether this represents classical law. It would anyway be difficult to prove that a neighbour's activities on his own land were so lacking in any possible utility to him that they must have been motivated purely by malice.

(3) An important remedy, probably of greater importance in an urban environment, was known as *damnum infectum*. Gaius defines this as 'loss which has not yet occurred (*nondum factum*) but which we fear will occur' (*D.* 39.2.2). The importance of this remedy was – as the name suggests – that it allowed protection to be sought against the threat of future loss. Again, this protection was available in very specific situations, that is, where a person anticipated suffering loss in the future from a neighbour's building, site or work of construction which was in danger of collapse. The threatened neighbour could seek a promise (*cautio*) from his neighbour that he would indemnify him in the event of loss; and the praetor exercised measures to attempt to compel the giving of the promise.

Although it is not altogether straightforward to reconcile the texts in the Digest, it appears that the provisions for *damnum infectum* were aimed at restricting what would otherwise have been legitimate activities on an owner's own land. For example, a person was wholly at liberty to dig a large hole on his land, even if this intercepted his neighbour's water supply. But he could be compelled under this procedure to give the promise, if it threatened the collapse of his neighbour's wall (Ulpian, *D.* 39.2.24.12 and 26; Paul, *D.* 39.2.25).

The importance of this remedy lay in the fact that there was otherwise no clear entitlement to claim if a building collapsed owing to its owner's failure to maintain it: to make a case under the *lex Aquilia* would be difficult, since there was not normally liability for the consequences of omissions. In short, everything turned on obtaining the promise in advance of the damage (Gaius, *D.* 39.2.6). Even so, liability under the promise would be triggered only if the loss was caused by a fault in the building or construction and not, for instance, by violent storms or by someone's negligence (Ulpian, *D.* 39.2.24.7 and 10).

Although the circumstances in which liability could be brought home

to the owner of the moribund property were therefore limited, none the less this device, of inducing its owner to undertake contractual liability for the loss, filled what would otherwise have been a serious gap in the law. For example, the case mentioned above of the wall collapsing owing to the penetration of dampness could have been solved in this way (Alfenus, *D.* 8.5.17.2).

(4) Related to, and sometimes overlapping with, *damnum infectum* was *operis novi nuntiatio*, a term which may be inelegantly translated as the 'denunciation of new work'. This was the remedy where the complainant's concern was that he would suffer harm from new construction which his neighbour was undertaking on his own land. The sort of harm relevant for the purposes of the remedy were such things as encroachment onto or emissions into the complainant's own land, infringement of a servitude, *damnum infectum*, or incompatibility with building regulations (Ulpian, *D.* 39.1.1.16–17; *D.* 39.1.5.8–9). The complainant could serve a notice on the builder to cease work. The builder had then to desist or else give a promise (*cautio*) to destroy the new works if they turned out to be unwarranted (Ulpian, *D.* 39.1.21). If the builder carried on regardless, the complainant was able to seek an order from the praetor, an interdict, to have the work complained of demolished.

Since there might well be urgency about these proceedings, they were extremely informal: the notice was a private notice which had to be served at the place where the building was taking place and must make it clear exactly what construction where was being complained of (Ulpian, *D.* 39.1.5.3–4, 15). At this stage the complainant did not need to demonstrate any right to prohibit the work. That became material only at the later stage if the respondent sought to have the order set aside. In effect, therefore, the serving of the notice made it clear to the builder that, if he persisted in building, he did so at his own risk and might be required to demolish what he had built.

This remedy too therefore offered a neighbour some protection against unwelcome activity taking place on someone else's land. Its scope was somewhat broader than *damnum infectum*, but it was confined to building work which was still under way.

(5) On the other hand, if the building had already been completed, another remedy might still meet the case. This was the general interdict *quod vi aut clam*, named after its opening words ('what by force or stealth. . .'). In essence this forced people to give notice to their neighbours if they intended to build anything which would either encroach onto the neighbouring land or would obstruct the neighbour's use of a

servitude over their own (i.e. the builder's) land. The interpretation given to the terms 'force' and 'stealth' was rather broad: *vis* did not in fact require any force at all but simply that the work should be done contrary to a prohibition, while for something to be done *clam* it was necessary only that it be done without giving notice. The usual reason for not giving notice would of course be that the person notified would object. It was not enough simply to indicate generally that work would be taking place: it was necessary to indicate when, where, and what was to be constructed. If the work was done by force or stealth in these broad senses of the words, then the complainant could obtain this interdict from the praetor ordering the removal of the work.

These proceedings did not go into the question whether the respondent to the interdict might be entitled to do what he had done: the fact that it had been done by force or stealth was sufficient ground for the thing complained of to be removed.

(6) Unusual servitudes. As we have seen, servitudes could be used to adjust neighbours' respective entitlements to light, or to discharge rainwater, and so forth. What is much less clear is whether servitudes were extended to deal with other potential inconveniences of urban life. A well-known text in the Digest deals with the sufferings of those whose houses were near premises on which a particularly noxious smoked cheese was produced.

> Aristo gave an opinion to Cerellius Vitalis that he did not think that smoke could lawfully be discharged from a cheese factory into the buildings higher up unless they are subject to a servitude to this effect. He also says that it is not permissible to discharge water or any other substance from the upper onto the lower property, as a man is only allowed to carry out operations on his own premises to the extent that he discharges nothing onto the property of another; and the emission of smoke is just like that of water. The upper proprietor can therefore bring an action against the lower one asserting that he has no right to act in this way. He reports that Alfenus writes that an action can be brought alleging that a man does not have the right to hew stone on his own land in such a way that broken pieces fall onto the plaintiff's land. . . . (Ulpian, *D.* 8.5.8.5)

This is one of very few texts in the Digest suggesting that, by analogy with emission of water, emission of other substances such as smoke or steam might be regulated by servitude. Another text, also setting out the views of an early jurist, suggests that there might be a servitude allowing one person to emit dampness into a neighbour's wall (Alfenus, *D.* 8.5.17.2). But there is no more evidence of this for classical law. If, however, such things could be regulated by servitude, that is clearly

significant. Yet there would be no automatic protection against all fumes or any dampness: protection going beyond a normal and reasonable level would have to be be negotiated as a servitude right, and so an unusual sensitivity towards fumes might prove expensive. There is no suggestion in any of the texts that noise could be restrained in any such way.

*Some conclusions*

The most obvious conclusion is that the law relating to neighbours was extremely complicated. Without legal assistance, it would be quite difficult to know what, if any, remedy was available in any given case. It seems clear enough that neighbours were fairly well protected against the effects of building: three different remedies were potentially useful, depending on where the offending building was being built and whether it was in the course of construction or already completed (*damnum infectum*; *operis novi nuntiatio*; interdict *quod vi aut clam*). But apart from this, protection was piecemeal and incomplete. Perhaps most striking of all is that in many cases adequate protection will have depended on reaching agreement with the neighbour in advance, either as to the terms of a servitude or by means of the promise on *damnum infectum*. Fortune therefore favoured the neighbour with deep pockets.