cognatic relations – that is, those whose relationship with the deceased was traced either through the female or the male line – were also given a claim according to their proximity to the deceased. The appalling details of how this question was determined are contained in a text of Paul (*D.* 38.10.10). Last of all came the claim of spouses, so preserving until the bitter end the separation of their property.

What is interesting about this division is the equal treatment given to the deceased's children: no preference is given to males over females, and none to the eldest male over younger children. This system of partible inheritance must have had a strong tendency to fragment the deceased's estate, and one that may seem the more surprising in a society where possession of a particular amount of property (mostly land) was what determined an individual's membership of a given class. Various factors may have mitigated the tendency to fragmentation: for instance, making a will in which preference was shown to one or more of the children; and the likelihood that only a small number of his children would survive the deceased.

What then would be the motive for making a will? A recent study of surviving Roman wills indicates that the Roman testator was most likely to appoint his children – and particularly his sons – as heirs under his will (Champlin 1991: 107–20). But it was precisely to the children, in equal shares, that the law of intestacy directed an estate. A strong reason pointing an individual towards making a will would therefore be the desire to treat the children unequally, whether or not for the purpose of preferring the sons, and whether or not with the intention of avoiding undue fragmentation of the estate. This of course would not be the only possible reason: others would be a sort of superstition (as Maine suggested) or the desire to free slaves or pay off social obligations by leaving legacies. There does not seem to be much merit in speculating about which, if any, of these reasons would have weighed with most Roman testators most of the time.

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 property 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