

THE ROMAN LAW OF OCCUPATIO

by



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INTRODUCTION.

Occupatio is a way in which ownership is acquired in an ownerless thing by taking possession of it with the intention of having it for oneself. Before expanding this, it seems appropriate to remark briefly on the early history and basic nature of occupatio.

Most modern writers¹ describe occupatio not only as the earliest mode of acquisition of ownership but also as the first legal institution or legal concept analysed by jurists in the sphere of acquisition of ownership. For them this was the recognized way in which primitive people acquired the necessities of life: by hunting and fishing. As long as there was effective control as well as the will to be owner, ownership was recognized. For this view strong reliance is put on certain texts in the Digest² and Institutes³ e.g. 'and natural law is clearly the older (that is older than civil law) having been instituted by nature at the first origin of mankind'⁴. All this contains definitely some sociological and perhaps 'natural' truths, but does not necessarily contribute to a scientific analysis of the nature of occupatio. We might all agree that occupatio was most probably the oldest mode but only in the sense that before the legal order was established man started off as a robber, might was right and whatever he grabbed became his. But could one really speak of 'acquisition'

and/2

1. See for instance, Kaser, RE Supplement 7 under 'occupatio'.
2. D 41.1.1 pr., D 41.2.1.1.
3. Justinian: 2.1.11.
4. Justinian 2.1.11 continues ... 'whereas civil law ~~came~~ into existence when states began to be founded magistrates to be created, and laws to be written.'

and 'ownership'⁵ as technical legal phrases applying to this age? And once the legal order had been established, it does not follow that occupatio was the institution that was first recognized - there are indications that also exchange had been recognized from very early onwards. What I mean to say is that it does not necessarily follow that because occupatio is so natural, obvious and straightforward it must have been the first concept to be legally analysed. Is it not more likely that this very informality would disguise its legal importance, that it would be accepted without analysis and that the formal modes of acquisition would first be analysed? The rules of mancipatio for instance called for attention of the legally-minded long before that of the straightforward traditio. As to the texts⁶ which allude to the view that occupatio was the first to receive legal analysis, both are taken from the Res Cottidianae of Gaius, a post-classical work. They show only that philosophical speculations in the Empire assumed that natural acquisition preceded modes of acquisitions under the civil law, and it does not necessarily prove that the position was the same in early law. This was perhaps the

most/3

5. Maybe Kaser, in 1965 T.H.R.H.R. p 1 sqq., was not thinking of acquisition and ownership in a technical way at all for all this is concerned with his 'pre-scientific' stage when ownership was still only a 'relative right'.

6. See above.

most convenient and easiest way in which the didactically-minded Gaius could introduce his topic. The same can be said of a text attributed to Nerva, a jurist of the first century A.D. who states that in the earliest stages of mankind, possession meant ownership and that traces of this naturalis possessio could still be found in those things captured on land, in the air and in the sea.

Finally two significant points may be referred to namely firstly that Gaius in his Institutes⁷ says that traditio is not the only way of acquisition under natural law, but that there is also occupatio, which shows that Gaius does not regard occupatio as self-evidently the earliest mode of acquisition; secondly, the noun occupatio does never occur in the Roman juristic writings - only the verb occupare: if the analysis was very early, the noun would be expected as a technical term. All this does not mean that the content of occupatio that is taking control of a thing with the intention to make it one's own was not from earliest days onwards basic to most of the ways of acquisition of ownership e.g. in traditio but only that the institution of occupatio was not legally analysed in earliest times maybe just because it was all so self-evident and acceptable.

It is by laying stress on this factual content that the relationship with the formal early method of acquisition of property, mancipatio, can be explained.

Mancipatio/4

Mancipatio is derived from the word mancipium which in earliest times applied to a foreign slave captured by hand: manu capere, capere being the verb common to both occupatio and mancipatio. Consequently, the whole formality of mancipatio was an imitation of the original capture taking place before the parties, witnesses and a scale-bearer. In this sense, mancipatio, is only tolerated occupatio which shows the importance of occupatio in a purely derivative mode of acquisition. But not only was mancipatio tolerated occupatio. It also involved a collusive litigation as can be seen from the fact that the formula was the same as for the earliest vindicatio, the legis actio per sacramentum in rem. In this way it is clear how even this most important example of a derivative mode of acquisition has quite a large element of the basic original mode: occupatio. Thus, though essentially an original mode of acquisition not dependent on a title of a predecessor, the factual content of occupatio also plays a large rôle in derivative modes of acquisition of property.

Though it does not therefore seem proved that occupatio was necessarily the earliest way by which ownership was acquired in a legally recognized way, it is easy to accept that it existed from very early onwards. The early history of occupatio is, however, obscure. It depends mainly on what view we take of the early sociological order. If we accept that early Roman society was based on collectivism with only a small amount of private ownership, the scope for occupatio

by the individual was small: they all acted as instruments acquiring for either the gens or the family. As the collective grew weaker, there would, however, be more scope for individual occupatio. If, on the other hand we accept that individualism was the governing principle in early Roman life, the scope for occupatio would be large at the beginning but would grow smaller as the state and smaller corporations became stronger and the categories of res nullia became fewer.

Occupatio is referred to in the sources as a mode of acquisition of property based on a naturalis ratio and the ius gentium⁸⁾ as opposed to modes of acquisition under the ius civile. Most modern Romanists⁹⁾ accept with the Institutes of Gaius that naturalis ratio was the basis for occupatio in classical times. The reference to ius gentium was a later addition. They argue that ius gentium meant the law applicable to commerce between Romans and Peregrines in classical times and concluded that occupatio had nothing to do with commerce. Beseler¹⁰⁾ holds, on the contrary, that ius gentium is the most logical to contrast with ius civile and that the idea of ratio or underlying principle is very often not a classical notion but rather a Byzantine one. Therefore he holds that the ius gentium is classical and all the references to naturalis ratio, post classical.

Both/6.

8. G. 2.66-69, D.41.1.1 pr. Institutes of Justinian 2.1.11; D.41.1.3 pr. D 41.1.5.7, Institutes of Justinian 2.1.17.
9. e.g. Ferrini, Perozzi, Albertario and Arangio-Ruiz-see Kaser RE Suppl. 7 under 'occupatio'.
10. Tijdschrift voor Rechtsgeschiedenis 8 p.319 sqq.

Both these theories, however, have to rely too much on wholesale interpolations which they prove only on a priori grounds. If one accepts a third view,¹¹⁾ which proves that both notions are really the same and therefore classical, no interpolations have to be proved. The concept of ius gentium referred to is the one found in Gaius' Institutes 1.1 and D.41.1.1 pr: 'iure gentium, quod ratione naturali inter omnes homines peraeque servatur' that is a kind of law binding all over the world because it is based on natural reason. In accepting this neat theory one need not deny occasional interpolation in the sources if there are good reasons for suspecting some of the texts as in the case of occupatio of things belonging to the enemy. A text of Gaius¹²⁾ states that these things become the property of the first taker 'naturali ratione' while the Digest text¹³⁾ states that the basis was ius gentium. Now in this case even the classical lawyers felt uneasy about the main part of booty namely prisoners of war, becoming the property of their takers: this kind of enslavement was just as the other types 'contra naturam hominem'. The influence of Stoic philosophy and Christianity increased this feeling and thus affords a good reason why the Byzantines would change a reference to naturalis ratio here to a reference to ius gentium.

This brings us to a statement of the general

requirements/7.

11. See Maschi, 'La Concezione naturalistica' p.248 sqq.
12. Institutes 2.69.
13. D.41.1.5.7.

requirements for occupatio:

FIRSTLY, the object of occupatio must be capable of being occupied - it must be a res nullius, an ownerless object or more technically an object without an owner recognized under the Roman legal system.¹⁴⁾ This objective condition of the thing justifies its taking in that it guarantees the absence of any injury to any other person: precisely because it belongs to no-one, it logically becomes the property of the first taker.¹⁵⁾

SECONDLY, the taker must have the intention to appropriate that is the will to make the 'res nullius' his own. There is much dispute¹⁶⁾ as to what the content of this 'aneignungsabsicht'¹⁷⁾ is, as to whether it is only intention coinciding with the factual taking of control or whether the taker must also be aware that the thing is a res nullius and that he acquires ownership in it by taking possession of it - that is an awareness that he is performing a legal act by taking possession of the ownerless object. The correct view is in my submission that the Romans only required intention to substantiate the facts, only an intention to acquire factual control without specifying that a knowledge of the juridical significance of the act must also be understood. The Romans never considered the
 problem/8.

14. This wide circumscription is mainly so as to account for 'res hostiles' also.

15. Vide D. 41.1.3 pr. 'quod nullius est, id ratio naturali occupanti conceditur'.

16. See Kaser, RE Suppl. 7.

17. Op. cit.

problem of intention but were satisfied with the straightforward practical statement: quod enim nullius est, id ratione naturali occupanti conceditur¹⁸⁾ A text in the Digest¹⁹⁾ states further specifically that a person who intends to steal a thing that belongs to no-one acquires it by occupatio which shows that even the intention of a thief which can be no more than to have the thing for himself is sufficient for occupatio.²⁰⁾ All this means that in order to acquire something by occupatio an intention to possess suffices. An intention to own is not necessarily required.²¹⁾

THIRDLY, factual taking of possession, 'capere'²²⁾ is finally required. Some texts use 'invenire' instead of 'capere' and from this a traditional distinction between proper occupatio and inventio has grown up:²³⁾ occupatio implies acquisition of possession animo et corpore, whereas animus possidendi perhaps oculis et affectu was sufficient for inventio. The texts do not indicate such a clearcut distinction between occupatio and inventio and if there was such a distinction inventio could only have been considered sufficient in the sphere of gems found on the seashore²⁴⁾ and never where wild animals, things belonging to the enemy and abandoned things/9.

18. D.41.1.3 pr.

19. D.47.2..43.5.

20. The reference by Kaser in RE Suppl. 7 to D 22.6.9.4: 'plus est in re quam in existimatione' is in my submission too general to use as a specific argument in this subject.

21. See the chapter on 'Res Derelictae' for a further precision of this problem.

22. Gaius I.1; D.41.1.5.7.

23. Voci, 'Modi di acquisto della proprietà' p.11.

24. See the last chapter on this.

things were concerned.

Having outlined the historical background and the main elements of occupatio, one can now proceed to a more detailed exposition of exactly how the various types of res nullia are acquired by occupatio.

CHAPTER I.

OCCUPATIO OF WILD ANIMALS.

The most important category of res nullia is wild animals. These include animals dwelling on the land, birds and fishes. These animals can only be objects of occupatio if they are of a wild species and if they are still in state of natural liberty.

The first requirement of feritas or wildness which depends on the species rather than the individual animal, excludes all animals belonging to the domestic class. Which species are wild and which are tame depends on the circumstances of the day as well as on how the lines between the different species were drawn. That this might have created some difficulties in practice, is seen by the emphatic statement of Gaius that hens and ducks are tame but that wild hens and wild ducks are fera natura.¹⁾ A clear distinction between wild and tame animals is absolutely necessary because only wild species can be occupied whereas tame species even though they have escaped from their master's control - e.g. if they wander or are chased off - can never be occupied. Capture of such tame animals amounts to theft.²⁾

The second requirement of factual liberty includes not only those animals which have never been captured before, but also those which have escaped the control of their master and have regained their natural liberty. It does not seem to matter whether the animal escaped by its own efforts or by release by a human being. In the latter case, however, the person who freed the animal

is/2.

1. D.41.1.5.6.

2. Ibid. and D.47.2.37.

is liable either to an actio in factum because of the loss caused to the master or even to an actio furti if he appropriates the animal for himself.³⁾ The new taker, if any, would however, become owner of the animal and the former owner cannot bring a vindicatio to recover the particular animal which would have been the case if it was a tame animal which escaped by the act of a third party or even if it escaped by its own efforts and was taken by another.

Before ownership is acquired in the animal by occupatio, the animal must not only be of a wild type enjoying its natural liberty, but an act constituting positive control over this particular animal must also be executed. This means that also the young of wild animals must be efficiently taken possession of. Thus if a pregnant wild sow is stolen, the thief would acquire ownership of the piglet if he takes possession of it. This is in marked contrast with the young of domestic animals which become the property of the owner of the mother by accessio. Some writers argue that the position of the young of wild animals was different in Justinianic times. They base their argument mainly on Inst. 2.1.19⁴ saying that the eorum iure refers back to the dominio tuo. But the eorum iure could also refer back to the ius naturale of the previous passage. This would explain the introductory 'item' better and would mean that also in the case

of/3.

3. This is stated by Proculus. D.41.1.55. He refers to the analogous case of the silver cup thrown overboard. See D.19.5.14.2.
4. Institutes of Justinian 2.1.19 - Item ea, quae ex animalibus dominio tuo subietis natan sunt eorum iure tibi adquiruntur.

of the young of wild animals taking of possession was necessary as in the cases mentioned in Institutes of Justinian 2.1.18⁵⁾. As to what amounts to physical control sufficient for acquisition by occupatio, the late Republican jurist, Trebatius stated that wounding and continued pursuit,⁶⁾ was sufficient but because many things could happen to prevent the hunter from taking possession, the classical jurists, followed by Justinian⁷⁾ laid down that factual possession had to be taken. A text⁸⁾ of the early classical period lays down that mere trapping⁹⁾ would be enough indication of factual possession. The difficulty is that the test seems to allow occupatio even in the case where the person who sets the trap is ignorant that something has been caught. This means that an important element of possession namely the animus possidendi of the possessor is not present. This is however perfectly understandable if one accept the view that the earlier jurists rely more on objective than on subjective criteria.¹⁰⁾

Once ownership has been acquired by occupatio of these animals, ownership continues to exist as long as the animals are kept in effective control e.g. in a cage,
basin,/4.

5. Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inventoris fiunt.
6. D 41.1.5.1.
7. Institutes of Justinian 2.1.13.
8. D 41.1.55.
9. It seems also to depend on the place the trap was set, etc.
10. General arguments: (i) from point of view of evidence, objective criteria is more convenient and more appropriate to be relied on in primitive conditions.
(ii) Mankind as it grows in age, gets more interested in the pshyche of man.

basin, etc. Once control is lost, the former owner loses all the rights he had in the animal and it becomes open to capture by the public again. As to the underlying basis for the tests of effective control, Buckland¹¹⁾ suggests that the answer may be found in the fact that the institution of occupatio antedates the law: that it stems from a date when the strong man armed, and he alone, held his goods in peace. This makes perfect sense if seen from the point of view of the former owner. Seen from the point of view of the general public, however, the fact that the former owner has lost control has more significance in the fact that because of the loss of control the animal has regained its natural liberty and is therefore open to capture by the public again. From the point of view of the public the test of lost of control therefore gives them the green light for recapturing without considering why the former owner lost his control or whether he had means to keep his control. The test of loss of control, seen from the point of view of the general public is therefore a practical one, recognizing their faculty to recapture.

The main result of the rule that ownership of a wild beast is lost on loss of control, and that if the beast escapes and does damage, the former owner is not liable because the beast is no longer his. Unlike the position in modern law, the owner of a wild beast therefore does not have to exercise any care in guarding it however dangerous it was¹²⁾. This strange situation was met in later times by regulations of the aediles:

any/5.

11. A text-book of Roman law, p. 206.

12. Institutes Justinian 4.9.1.

any one who keeps wild beasts of certain kinds near the public way is responsible for the damage they do. In later law this was extended to all wild animals. The actio de pauperie was also allowed in respect of wild animals¹³⁾

Loss of control is a question of fact which is taken to have happened when the animal escaped from control and has regained its natural liberty: i.e. either if the animal is out of sight or if it is still in sight it is difficult to pursue¹⁴⁾ or to put it in another way when it cannot be recovered¹⁵⁾. In ordinary cases the three different elements involved here namely escape of control of a former master, re-acquisition of natural liberty and non-recoverability by the former master would overlap e.g. if a wild crow escapes from its cage, the former owner would lose his control and would not be able to recover the bird again, while the bird would have regained its natural liberty. In certain cases there might however be divergencies as can be illustrated by the case put by Pomponius.¹⁶⁾ Wolves snatched pigs away from a swineherd and a neighbouring herdsman saves them by pursuing the wolves with his dogs. The question is put whether the pigs belongs to the owner of the dogs or the former owner. Pomponius and Ulpian decided in favour of the former owner. Though the pigs have not regained their former state of natural liberty and could still be recovered/6.

13. Institutes Justinian 4.9.1.m.

14. G. 2.67; Institutes Justinian 2.1.12; D. 41.1.3.2; D. 41.1.5 pr.

15. D. 41.1.44 Pomponius and Ulpian.

16. D. 41.1.44.

recovered, they have certainly escaped from the control of their former master. But Pomponius seems to argue that the carrying-off by the wolves, is like the case of force majeure - maybe he thought that because the escape has not been natural i.e. not due to any lack of control (custodia) on the part of the former owner and because the animals have not regained their former liberty, they should still belong to their former owner. Thus Pomponius and Ulpian relied more on the element of re-acquisition of natural liberty than on the element of loss of control. For them the objective state of liberty is more important than that the animal can no longer be seen or pursued - for once the animal has regained its former freedom, it can certainly not be recovered^{16b}). In the end the problem as to when a particular animal would be considered to have regained its natural liberty would depend on the local customs and the kind of animal under discussion¹⁷).

In the sphere of loss of control, the jurists seem to have besides the general rule applying to all true wild animals, a special rule for domesticated or tamed animals: animalia mansuefacta. They are accorded an animus/7.

16b. D.41.1.44 is no authority for the proposition for the pigs were tame (Lewis & Short) but the illustration could still be used to solve the problem. See also on this text Daube, 76 ZSS 1959 p. 153 'Zur Palingenesie einiger klassiker fragmente' and connection with D 10.2.8.2.

17. In this connection the test suggested by Czyhlarz (eigentumserwerbarten 46) namely that the beast ceases to be owned when the chance of recovering it is not materially greater than that of capturing any other wild animal, though viewed more from the point of view of the former owner, might be helpful. De Zulueta's test that recapture must be reasonably probable, though certainly correct is very vague (Gaius II p. 76).

animus revertendi and it is said that as long as they continue their habit of returning (consuetudo revertendi), their former owner has not lost his control over them and they are still considered his. How vague this statement is, was only realized after Prof. Daube had brought to academic knowledge the following precisions¹⁸⁾

FIRSTLY, the rule applied at first only to doves which had the specific animus revertendi.

SECONDLY, stated in this subjective way the rule is not at all suitable to bees which are fera natura and not really tameable to the same extent as doves. However, in swarming, bees qualify for the external fact of going and returning and by concentrating on this objective habit of returning, the same rule was extended to them: they are owned just as doves, as long as they have the habit of returning.

THIRDLY, from this it follows that the rule as to animals mansuetae is not based on advanced theory of possession, recognizing possession even if the animal was not under control, but rather on ownership - I own these animals as long as they have the disposition to return and once they lose their disposition, they become fera natura and thus ownerless again. Only later when the theory of possession had been extended beyond strict physical control, could this rule also be explained in terms of possession as shown by the words of Paul: 'Quidam recte putant ... a nobis possideri'¹⁹⁾

In/8.

18. Daube, 'Doves and Bees' *Mélanges Levy-Bruhl*, 1959, p. 63-75.
19. D.41.2.3.16. - *Quidam recte putant columbas quoque ab aedi ficiis nostris volant, item apes quae ex alveis nostris evolant et secundum consuetudinem redeunt, a nobis possideri.*

In conclusion on this section of loss of ownership of wild animals by loss of control it may be noted that it seems as if the element of re-acquisition of natural liberty was, even if only subconsciously, the most important factor for the jurists. This was certainly an important element not only in the case of wild animals but also in the case of tamed animals, for ~~one~~ these animals lost their habit of returning they were considered fera natura - i.e. in a state of natural liberty again.

Apart from the general rules concerning the type of animals that can be acquired by occupatio, as to what constitutes capture and as to how ownership of the animals is lost again, there is a rule no matter whether an animal is captured on one's own land or on the land of another, it always becomes the property of the first taker²⁰⁾. This rule recognizes a free 'right of hunting'. If exercised on the property of another, it could, however, clash with the property rights of that particular landowner. In earlier times the right of hunting was certainly much stronger than the right an owner has over his property^{20b)}, but gradually the idea of a proprietor being master of his own land (and everything on it) grew much stronger and began to intrude into the sphere in which/9.

20. D. 41.1.3.1.

20b. See Karlowa, Rechtsgeschichte 2, 1, 412: 'Der Eigentumserwerb durch occupation solcher Objekte (omnia animalia quae in terra caelo mari nascuntur) ist schon aus der niedrigen Kulturstufe, auf welcher ein Volk noch lediglich von Jagd und Fischerei lebt, jedenfalls durch die Sitte anerkannt.' Non-juristic Latin authors underline that hunting preceded agriculture: Lucretius: De Rerum Natura 5, 980, Virgilius Aeneas 7.745, 8.316, 9.602, Jurists consider hunting of wild beasts as a 'vestigium' of the origin of ownership through naturalis possessio: D. 41.2.1.1.

which the 'right of hunting' was up to then paramount. Let us consider how Roman law gave effect to the claims of the proprietor of an estate against the hunter coming onto his estate in order to exercise his 'right to hunt'.

Firstly it must be noted negatively that Roman law did not know any rules corresponding to modern game laws. It can be inter alia, either because wild animals were so numerous that the state did not feel an economic or social duty to control capture of these animals²¹⁾ or rather that the right of hunting was considered such a sacred private right of the individual that the state did not dare to curtail it.

There was, however, secondly a definite trend in favour of the proprietor of an estate, aiming to establish an objective relationship between animals captured by hunting and the land itself by endeavouring to regard wild animals on the property as fruits of the estate. Drawn to its logical conclusion, this would mean that the proprietor of the land owned all the wild animals on it - they would become pars fundi in the same way as buildings on the land and trees rooted in it - and any capture of these by a hunter would be a theft committed against the proprietor. Roman legal science must have realized that not only would this position have been too flagrant an infringement of the individual's right to hunt but also that wild animals were different from e.g. trees insofar as it depended on the contingency of their being caught before they could form part of the proprietor's patrimony. It is clear from the texts that such

an/11.

21. A general argument can perhaps also be based on in-effectiveness of the weapons used. For different kinds of weapons used, see Bauchet, *Dictionnaire des Antiquités grecques et romaines* ed. Daremberg and Saglio, under Venatio.

an extreme position was never taken: never was wild animals considered 'fruits' in such an absolute sense and never could an action of theft be brought against a hunter for capturing wild animals on another's land.

Though such an extreme view is unacceptable, some explanation ought still to be given to those texts which seem to allude to the trend to regard if not the wild animals, at least the proceeds from the hunting as fruits (fructus civilis) of the land. These texts seem to refer exclusively to a dispute between a usufructuary and a landowner - a very natural sphere in which fructus would have a definite meaning. In this field, the Italian Romanist, Lombardi²²⁾ has investigated all the relevant texts with great care and has come to the following conclusions:

- (i) In classical law a usufructuary was entitled to income of hunting as against the nude proprietor if systematic hunting had been exercised on the particular farm concerned.
- (ii) In post-classical law, another, more restricted criteria was introduced which allowed the usufructuary the proceeds of hunting only if the income of the farm properly consisted of hunting i.e. only if it was in fact a hunting-estate.

In my submission a few doubts could be advanced against Lombardi's view: Firstly, the only text on which he bases his proposition as to what the classical position was, is D.33.7.12²³⁾. Though I agree with his reconstruction of it, the use made of it to prove so many other texts²⁴⁾/12.

22. 'Libertà di caccia e proprietà privata in Diritto Romano', 1948 *Bulletino dell' Istituto del diritto romano* p. 273 sqq.

23. Ulpian: Si in agro venationes sint, puto venatores quoque et vestigatores et canes et cetera quae ad venationem sunt necessaria instrumento contineri, maxime si ager ex hoc reditum habuit.

texts²⁴⁾ interpolated, does not seem justifiable. Secondly, he does not really tell us what he means exactly by 'systematic hunting' or to give the Ulpianic version si in agro venationes sint²⁵⁾. It seems, however, that he regards it rather as a 'subjective' relationship between the proprietor and the land, the proprietor deciding when and how many systematic hunts should take place. This is surely not in pace with a trend which tends to regard the proceeds of hunting as fruits of the land whereby an objective relationship between the fruits and the land is constituted—hunting contributing to the economic utility of the land. Taken in this sense, there is not much to distinguish this from the situation in post-classical law.

On the ground on the above reservations, I would like to submit the following propositions:

FIRSTLY, the phrase 'si in agro venationes sint' was never used in classical times to qualify as fruits proceeds of hunting after a systematic hunt. It was only used loosely so as to specify when dogs, nets, traps and other hunting instruments would be included as instrumentum fundi under a legacy. Only D 33.7.12 uses this phrase and it is hard to believe that if this was an important qualification, this would be the only mention of it. Thus in classical law, in my submission,

the/13.

24. P.S. 3.6.45; D. 33.7.22 pr.; P.S. 3.6.41; P.S. 3.6.66; D. 7.1.9.5; P.S. 3.6.22; D. 22.1.26; D. 7.1.62.

25. Lombardi, p. 284, explains it as follows: 'se cioè nel fondo si eserciti sistematicamente la venatio'.

the trend (if it existed at all) of regarding proceeds of hunting as fruits never found practical application. SECONDLY, in post-classical times however, this idea did find recognition to a limited extent in the field of estates prevalently destined for hunting or hunting-estates. If a usufruct was given over such an estate, the wild animals did not necessarily become fruits. Hunting was rather considered to be the proper use of such a farm and therefore an interference with it by a proprietor vis-a-vis the usufructuary e.g. capturing of wild animals could be met by a vindicatio usufructus of the usufructuary. The aim of the compilers in introducing this qualification was further not to make acquisition of fruits easier for the usufructuary - as in all cases perceptio was still needed - but rather to allocate the proceeds of hunting in a dispute between proprietor and usufructuary. Maybe the underlying idea was that the proprietor in giving a usufruct over such an estate had ceded his right of hunting in favour of the usufructuary or if constituted by will, this would most probably have been the intention of the testator in giving a usufruct over such an estate. This would also explain why this would apply only between nude proprietor and usufructuary and could not be invoked to the detriment of a third-party-hunter.

The third and most successful trend in favour of the proprietor as against the hunter was the power given to the owner of land to prevent a hunter from entering his land. Clear reference is made to it in the texts -and our main task would be to decide whether it was introduced already in classical times and once introduced

what/14.

what the nature and effect of such a prohibition was.

Lombardi²⁶⁾ made out a very good case for holding that a proprietor had no right to prohibit the entrance of a hunter in classical times. His arguments can be arranged in the following manner:

FIRSTLY, a general argument can be based on the unique right of hunting which was recognized from the earliest days. This was an unimpeded freedom to capture animals wherever the hunter found them and was much earlier recognized than the recognition of the right which an owner has over his property. Texts²⁷⁾ in the Digest show that it was of economic importance in classical law which means that it could not have been too easily infringed²⁸⁾.

SECONDLY, three texts can be produced in which one might have expected an allusion to the right of prohibition on the part of the proprietor if it did exist in classical times. Since all these are not strictly in the field of dissolving a dispute between a hunter and an owner of land, they are not conclusive, but persuasive value can at least be attached to them.

G 2.66 treats hunting as a mode of acquisition but does not mention the dispute which might arise between hunter and proprietor. This is all the more significant if one considers that the post-classical version of this text²⁹⁾ does mention a dispute and solves it by giving

the/15.

26. Op. cit. p. 290 sqq.

27. e.g. 19.1.11.18.

28. Voci, 'Modi di acquisic della propriet ' has argued that the free right to hunt was not in accordance with the property regime of classical times. He had however not produced any proof of what he thought this was in classical law.

29. D. 41.1.3.1.

the proprietor a right of prohibition.

In D 47.2.26 an actio furti is refused in the case where bees and honeycomb are taken from the land of another, without mention that the proprietor could have prevented the entrance of the third party.

In cases where the interdictum quod vi aut clam is applicable a previous prohibition as well as a so-called 'opus in solo' are necessary before this interdict can be asked for. If there existed a remedy for the owner on the ground of a mere prohibition some mention of it might have been expected, but there is none in D 43.24.22.3³⁰⁾. Voci³¹⁾ has protested that these arguments from silence do not prove the supposed original rule, and that Lombardi needs some positive allusion to such a rule before he can prove his case. What Voci seems to want is a rule stating that a hunter acquires ownership over a captured wild animal whether he catches it on his own land or the land of another plus a further negative qualification that the owner could not prevent the hunter from entering. This latter qualification is in my submission already implied in the wider rule - its addition would be a mere platitude for which classical jurists are not renowned. One might argue that this non-possibility of prohibition on the

part/16.

30. These three texts are taken from three different parts of the Digest viz G.2.66 from 'modes of acquisition', D.47.2..26 from 'de furtis', and D.43.24.22.3 from 'de interdictis'.

31. Op. cit. p. 4.

part of a landowner might have been mentioned as one of the limitations in the ownership of land i.e. the hunter's right to hunt prevent the landowner from having full dominium over his estate. This would however only bring us back to the central point of dispute namely whether the proprietary rights of an owner were so strong in classical times that it could infringe the long-established right to hunt.

THIRDLY, all the phrases mentioning a right of prohibition to a propretor look like later additions.

D.41.1.3.1 is derived from Gaius' *Res Cottidianae*, and though the specific phrase might have derived from the classical Institutes of Gaius, the fact that many Romanists³²⁾ consider the *Res Cottidianae* to be a post-classical work may be considered an argument in favour of holding this phrase a post-classical addition. The same argument can be used in connection with the passage from Justinian's Institutes which is almost certainly taken from Gaius' *Res Cottidianae*³³⁾. The clearest case of a phrase added later, is however the one in D.47.10.13.7: 'sed nec aucupari, nisi quod ingredi quis actum alienum prohiberi potest'. This is considered an addition by many writers³⁴⁾ mainly because of the bad parenthesis at the beginning of the phrase and the fact that it breaks the logical development of an argument mainly

concerned/17

32. See for instance, Schulz *Roman Legal Science*, p. 167, Di Marzo 'I Libri rerum cottidianarum sive aureorum', B.I.D.R. 1947, p. 32.
33. See, Ferrini, *Sulle fonte delle 'Istituzioni di Giustiniano'* 13 B.I.D.R. p. 146.
34. Pernice, *Die Sogenannten 'res communes omnium' in Festgabe Dernburg*, Berlino 1900, p. 13 n 155, Bonfante, *Corso*, 2, 2, 62, Perozzi, *Istit. I*, p. 396, Branca-Le Cose 'extra patrimonium humani iuris' p. 119 sqq.

concerned with the problem of fishing and the effect of a prohibition to fish³⁵⁾.

FOURTHLY, and to my mind conclusively, nothing precise has been worked out in the sources as to what the position was if the hunter acted against the prohibition of the landowner³⁶⁾. If such a right really existed in classical times, it is incredible that the active legal science of those days did not pay more attention to this acute problem and did not allude to any specific action that was available to a landowner whose express prohibition had been ignored by the hunter. The undeveloped nature of the right of prohibition therefore is strongly against its classicality.

All these arguments taken together are in my submission conclusive against the existence of a right of prohibition of entry on the part of the owner of land. This does not however mean that landowners did not in fact prohibit hunters and other strangers from coming onto their land or that traps for catching animals could be set on another's land without the landowner's permission³⁷⁾. All that is argued is that the right of prohibition was not legally recognized and protected and that non-observance of a prohibition on its own did not give rise to a remedy in classical law. Combined with something else it might however, well have given rise to

a/18.

35. See on this text, Lombardi, *op. cit.* p. 399-321. Voci says that the fact that the right of prohibition appears only in the *Res Cottidianae* is only proof for post-classical law and that this does not necessarily mean that the text contains a new norm: the change must be proved by specific arguments. Against this my arguments (*supra*) should suffice?

36. This is also a strong argument of Lombardi, *op. cit.*

37. D 41.1.55.

a specific remedy e.g. non-observance of a prohibition plus an opus in solo did give rise to an interdictum quod vi clam³⁸⁾.

From the above it is not only clear that a right of prohibition did not exist in classical times, but also that it did definitely exist in post-classical times. As to its development, the view of Lombardi³⁹⁾ seems acceptable: A rescript⁴⁰⁾ of the emperor Antoninus Pius solved an isolated dispute in an oriental province between a proprietor of a farm and some bird-catchers by stating that it was not the 'done thing' for bird-catchers (aucupes) to catch birds with bird-lime against the wishes of the owner of the land. The fact that this rescript settled this dispute authoritatively by extra-ordinary proceedings shows that the emperor was not dealing with pre-existing principles but was enunciating a new principle. We do not have examples of any other rescripts but the fact that Callistratus included this rescript 50 years later in this libri de cognitionibus and addressed it to bird-catchers in general shows that it has been accepted as a general principle applying to all bird-catchers. Note, however, that the penalty was not very clearly defined: it was only not the 'done thing' to catch birds against the wishes/19.

38. This might well have been the action Proculus had in mind when asked about the case at a wild animal trapped on the land of another and he replied that it depended inter alia upon whether it was done with or without the permission of the landowner. Libri epistularum seems to be made up at special cases all depending on its own circumstances. See Lenels Palingenesia p. 161 sq.

39. Op. cit. p. 307 sqq.

40. D. 8.3.16. The text reported by Callistratus is in Greek. The Mommsen-Krüger edition of the Digest gives the following Latin translation: 'non habet rationem vos in alienis locis invitis dominis aucupari'.

wishes of the proprietor of the estate. Only in post-classical times was it stated that a landowner could iure prohibere⁴¹⁾ the entrance of a person si is providerit⁴²⁾ - only then his prohibition would make all contrary behaviour of a hunter illegal with the consequent possibility of recourse to ulterior juristic measures of protection. In the time of Justinian a further precision was introduced in the sphere of the vague si is providerit of post-classical times. The compilers prefer the phrases 're integra' or 'si provideris ingredientum'⁴³⁾ which shows that the prohibition had to be known at the moment of entering and also that the prohibition was not directed against the hunting as such, but against entering. Thus the compilers wanted the prohibition to appear as a prohibition directed against strangers in general and not against a hunter as such because this would have been too manifest an infringement of the hunter's right to hunt. In practise this would mean that the proprietor would have had to warn every hunter beforehand that he did not want any strangers on his land which could presumably be done by putting up notices to that effect. Never, however, could he prohibit a particular hunter to hunt after he had entered or issue a prohibition applying only to hunters for

this/20.

41. Prohibere on its own also this sense and it is also the sense in which it is used in connection with the interdictum quod vi aut clam. See also D 47.10.13.7 and the same trend in Theophilus and the Basilica.

42. D 41.1.3.1., Justinian's Institutes 4.1.12.

43. D 41.1.5.3. for instance.

this would mean that he reserves an absolute right of hunting on his own property for himself, a position never envisaged by the post-classical jurists or the compilers.

What remedies would be available to the landowner whose prohibition had been overlooked? Any discussion of these must be subject to understanding that the older system of actions based on specific formulae had by this time made way to the extra-ordinary proceedings: a procedure under which however, the legal science still harked back to the old actions to find out whether the plaintiff would be allowed a remedy in his own particular case. In these circumstances the most obvious remedy would be recourse to force if the proprietor had previously indicated that he would prevent strangers from entering. In the case of no previous prohibition, an obstruction of the hunter's right to hunt would give rise to an actio iniuriarum against the proprietor. If there was a prohibition but if the proprietor was not present or if his recourse to force was ineffective, the only remedy open to the proprietor would be an actio iniuriarum which developed in later times more and more towards protecting injuries to the personality. In this case the measure of damages depended on the degree of offence caused to the proprietor, which can amount to an obligation to surrender the captured animal or its price, but the kind and number of animals captured could constitute an important factor in the calculation of damages by the judge.

Having dealt extensively with all the aspects of
hunting/21.

hunting, a few remarks on fishing seems appropriate to conclude this chapter. Fishing in the sea or public waters was open to everyone and any prohibition or hindrance could be met by an actio iniuriarum⁴⁴⁾. A rescript of Antoninus Pius goes even further in recognizing an access for fishermen to the seashore across farms adjoining the beach⁴⁵⁾. When portions of the sea or of public waters had been given in concession by the state to private persons, the concessionaire has a monopoly over it and can exclude any fishing by interdict⁴⁶⁾. As to fishing in private waters, one text states clearly: 'in lacu, qui mei dominii est, utique piscari aliquem prohibere possum'⁴⁷⁾. There are only slight grounds for holding this phrase interpolated, but if one has to accept it as genuine it would pose the 'difficulty' that the rules concerning hunting and fishing did not coincide in classical Roman law: whereas one could prohibit fishing in your lake one could not prohibit hunting on your land. In my submission this is not a difficulty at all and I would like to adduce the following arguments to reconcile this text with the accepted law as to hunting.

FIRSTLY, it might be argued that 'lacus' in this phrase means something much smaller than a lake: a basin, tank or tub⁴⁸⁾. In such a container, the owner would still

have/22.

44. D.47.10.13.7.

45. D.1.8.4 pr., Inst. 9.2.1.1.

46. D.47.10.13.7., D.43.14.1.7.

47. D.47.10.13.7 in fine.

48. A Latin dictionary, Lewis & Short.

have the fish under his effective control and the position would therefore be exactly the same as in the case of wild animals kept under effective control by the landowner.

SECONDLY, if this meaning is not accepted, it could still be argued that the texts seem to treat piscatio and venatio as two separate groups which would justify different rules in the same situation. In both the Digest⁴⁹⁾ and the Institutes of Justinian⁵⁰⁾ the rule as to the right of prohibition is expressly stated in connection with hunting and bird-catching. Nothing is said about fishing in this respect and because of this silence one can argue that the rule as to fishing was different and that the lake-owner could prohibit fishing in his private lake in classical times. This is not so arbitrary as it may seem since private lakes would have been under much stricter control than land. Further no-one would go so far as to say that the 'right to fish' was just as strong as the 'right to hunt'. Anyway, fishing would be done mostly in the sea and in public rivers and a recognition of a lake-owner's right of prohibition would not be such an obvious infringement of a 'fundamental right' as in the case where a right to prohibit a hunter is recognized for a landowner.

49. D.41.1.3.1.

50. 2.1.12.

CHAPTER II.OCCUPATIO OF RES HOSTILES.

Yet another example of things which can be acquired by occupatio is the case of res hostiles or res hostium - things belonging to the enemy. Enemy was defined in ancient times as all Peregrini¹⁾, but in classical Roman law it was those people against whom Rome has declared war publicly or who themselves had declared war publicly against the Romans.²⁾ The property of all people falling into this category would be considered res nullia i.e. belonging to no-one or rather things the ownership of which is not protected under the Roman legal system. Being of such a character, it was only logical to apply the rules of occupatio to it and to hold that ownership in res hostium is acquired by the physical appropriation of it.

Owing to the peculiar nature of res hostiles, the rules as to its occupatio could not be as simple as the rules for occupying wild animals or fish. These rules had to take into account that this category only comes into existence after a war had been declared publicly and following on this that because of its involvement in the matter, the State, as organisation to whom it was left to declare the war might have some interest in the things that had been taken from the enemy./24

1. Fesbus: 'hostis apud antiquos peregrinus dicebatur et qui nunc hostis.'
2. D.49.15.24 Ulpian: 'hostes sunt quibus bellum publice populus Romanus decrevit vel ipsi populo Romano'.
D.50.16.118 Pomponius: 'hostes' ni sunt, qui nobis aut quibus nos publice bellum decrevimus: ceteri latrones aut praedones sunt.'

enemy. The crucial question is thus whether the property of the enemy is always open to private occupation or whether it had automatically turned into public property no longer res nullia and therefore not open to occupatio. If the latter is the case, any meddling with the property would be considered a crime against the State: peculatus. Shortly, the broad question to decide here is as to how and where to draw the boundaries between 'public' and 'private' Roman law.

Now, most Romanists seem to agree that in earliest times the principle of private occupatio of things belonging to the enemy held sway. This can be justified by saying that in the earliest times the accepted rules were not far removed from rules valid in a primitive society where might was right and ownership only recognized over those things which could be defended de facto. When however in later times the legal system became more sophisticated and specially when the Lex Julia peculatus was passed which could be interpreted in such a way as to give the organisation of the state some claims to booty captured in war, the principle of private occupatio logically had to suffer some infringement from this new principle. As to how these two opposing principles were reconciled Romanists have made numerous and diverse conjectures.

Apart from the untenable older doctrines³⁾ which tried to distinguish between things occupied by the
army/25.

3. Some of the authors mentioned by Bona, *Preda di guerra e occupazione privata di 'res hostium'* 25 SDHI (1959) p 310 fn 4 are the following: Walter, *Geschichte des Röm. Rechts*, Bonn (1861), 2, 184 n 43; Karlowa, *Röm. Rechtsgeschichte*, Leipzig (1901), 2, 5 s.; Scialoja, *Teoria della proprietà nel diritto romano*, Roma (1931), 2, 42 s.; Ferrini, *Manuale di Pandette*, Milano (1953) 280.

army as such, and those occupied by individual soldiers or non-military persons, modern theories have all settled for a reconciliation based on different categories of things which could form part of res hostiles. A systematic scrutiny of these categories is called for before one can attempt any conclusion.

The most uncontroversial type of enemy property is land. Everyone seems to accept that the maxim 'publicatur ille ager qui ab hostilus captus sit'⁴⁾ was valid for all times. Closely connected with this proposition would also be the rule of 'superficies solo cedit' with the result that land belonging to the enemy with everything built on it or planted or sowed in it would become the property of the Roman State after a conquest.

Conversely, there seem to be general agreement that spolia i.e. weapons and armoury captured from the enemy if not sacrificed by the commander to the goddess Iua Mater, becomes the private property of those who take hold of it. The soldier would usually display these weapons in his hall (atrium) or lodge it in the temple. Such weapons could be used in emergencies i.e. in the case of troops who could not get hold of weapons.⁵⁾ The same also applied to agricultural produce - like harvest and animals obtained during the onward march.^{5b)}

The/26.

4. From D 49.15.20.1 Pomponius: verum est expulsis hostibus ex agris quos ceperint dominia eorum ad priores dominos redire nec aut publicari aut praedae loco cedere: publicatur enim ille ager qui ex hostibus captus sit.

5. Vide Livius 22.57.10; 23.14.4.

5b. Tourtoalon 5 Tijdschrift voor Rechtsgeschiedenis (1923'4) p 208: Examen de quelques textes de droit hébraïque sur le pillage, le butin et l'attribution du butin fait par, l'ennem; et qui lui est repris' p 269.

The third category, concerns things which belong to a non-allied state. It is widely accepted⁶⁾ that these things fall to the first taker. Girard seems to be the basic authority for this. He argues that this type of occupatio would usually happen in the case of a private raid by an organised band of partisans and cites D.41.1.5.7 as his main authority. This text however only states very widely: 'item quae ex hostibus capiuntur iure gentium statim capientium fiunt' and the precision which Girard intends is hardly justifiable on the face of it. Realising the weakness of authority some writers⁷⁾ have dragged a text of Pomponius on postliminium⁸⁾ in by the hair in order to fortify Girard's theory. Strong reliance was put on one particular phrase 'idemque est si ab illis ad nos aliquid perveniat.' My submission is that this text deals mainly with postliminium and here with postliminium of a person who was captured on enemy/27.

6. Girard, Manuel élémentaire de Droit Romain (Paris) 1929, p 340.
Buckland, A text-book of Roman Law, Cambridge (1932) 208.
Zulueta, The Institutes of Gaius, Oxford, (1953), 2,75.
Kaser, RE, Supl. 7, 686.
Perozzi, Istituzioni, Roma (1928) I 682.
Monier, Manuel élémentaire de droit romain Paris, 1935 I 474.
Bonfante, Corso 2.2.63 s.
Voci, Modi di acquisto della proprietà, Milano, (1952) 18 s. (and others cited by Bona, 1959 SDHI p.312 fn 6).
7. See Bona, 1959 SDHI p.338 sqq.
8. D 49.15.5.2 Pomponius: In pace quoque postliminium datum est: nam si cum gento aliqua neque amicitiam neque hospitium neque foedus amicitiae causa factus habemus, hi hostes quidem non sunt, quod autem ex nostro ad eos pervenit, illorum fit, et liber homo noster ab eis captus servus fit et eorum: idemque est, si ab illis ad nos aliquid perveniat. Hoc quoque igitur casu postliminium datum est.

enemy soil and given the rights of postliminium on his return. Bona⁹⁾ have also argued that this text might be interpolated e.g. the illorum for eorum which at least makes its authority for classical times doubtful. Another general argument against Girard's hypothesis is that such a right of freebootery was never recognized or protected in Roman times.¹⁰⁾ All these arguments taken together should at least throw doubt on a conclusive proposition that a certain type of res hostiles viz things belonging to non-allied states became the property of the first taker by occupatio. Though certainly not the case in classical law, the conditions of the Empire when enemies were no longer those on whom war was declared publicly, might well have given rise to such a situation. This does not mean that as in modern times, there might have existed some system of privateering by which the State secretly commissioned private people to go out to acquire things on behalf of the State treasury from non-allied states.

Another controversial type of enemy property is things belonging to the enemy found on Roman soil at the outbreak of a war. The sole authority for the existence of such a category is a text of Celsus,¹¹⁾ which states clearly that res hostiles which are apud

nos/ 28.

9. Bona, 21 SDHI (1955) 258 sq.
SDHI (1959) p.338 sq.
10. See the final phrase in the text of Pomponius referred to in Fn 2.
11. D.41.1.51. Lelius liber 2 digestorum: Transfugum iure belli recipimus. Et quae res hostiles apud nos sunt, non publicae, sed occupantium fiunt.'

nos do not become publicae but fall to the first taker. Since the time of Grotius^{11b} this was taken to refer to enemy property on Roman soil at the outbreak of a war. The temporal qualification is based on the connection of this bold statement in paragraph 1 of the text with the state of war depicted in the paragraph and a scrutiny of the word hostiles: enemy can only be people on whom war had been declared publicly and therefore res hostiles would be property belonging to those people from the moment of public declaration onwards. A minor objection to this interpretation^{11c)} is that the paragraph refers to a deserter which indicates a much later stage of the warfare but it can be argued that there is no necessary connection between paragraph 1 and the paragraph and that even if there is the more general application to things taken during the course of the warfare (with the exception of the very beginning) would still be valid. The qualification as to place is based on the phrase 'apud nos' the natural meaning¹²⁾ of which must be something like 'amongst our things', 'at our house', 'amongst the Romans' or even 'on Roman soil'. Here, again, since pontification by Grotius¹³⁾ the meaning 'on Roman soil' had been attributed to the phrase 'apud nos' but even in the face of so much of authority some doubts could

be/29.

11b. 'De Iure Belli ac Pacis' III.6.12

11c. See Vogel 16 ZSS p.397.

12. See Lewis and Short, A Latin Dictionary.

13. Hugo Grotius, De iure belli ac pacis III.6.12. 'quae apud nos sunt id est bello orto apud nos deprehenduntur'.

be raised against such a precision: no other practical case has been found either in lay or legal literature to support this interpretation; the natural meaning is certainly something like 'amongst the Romans' which could equally well be applied to things brought home by Romans after a campaign: those things of the enemy which they had amongst their property. Therefore one may conclude that the statement that res hostiles found on Roman soil at the outbreak of the war do not become public but the property of the first taker, is not conclusively proved. This does not mean that these type of things would never be open to occupatio, but rather that it may perhaps be brought under a different category of res nullia viz res derelicta i.e. property abandoned by the enemy in flight. Even if the particular enemy had no intention of abandoning it, it is doubtful whether the Roman legal system would recognize this fact rather than employing a presumption of abandonment.¹⁴⁾

The final and most obvious category of things belonging to the enemy is those things taken from the enemy during the course of a war: mainly booty. This type has been considered either as the prime type of res nullia always open to private occupation or conversely as property belonging to the State and thus never open to individual appropriation which would in fact be considered a public crime: peculatus.

Bona¹⁵⁾/30.

14. This is only a suggestion for which I can quote no authority at all.

Bona¹⁵⁾ is the most recent exponent of the latter theory. He argues that the numerous texts talking about private occupatio of res hostiles only states a general abstract principle based on historical notions. Bona's starting-point seems to be a text of Gaius¹⁶⁾ which states that in historical times only the sword was the sign of lawful ownership: i.e. only those things which were taken by weapons from the enemy and could be defended by weapons could be said to be in the ownership of a particular individual. This was the 'naturalis ratio'¹⁷⁾ on which the acquisition of res hostiles by occupatio was based and the references to the acquisition of enemy property as a mode under the ius gentium¹⁸⁾ are only an ill-disguised cross-reference to this 'naturalis ratio'. Taken in this way, all the texts recognizing private occupatio of res hostiles only state a general abstract principle perfectly valid for

historical/31.

15. See especially, 25 SDHI 1959: p.309-370, Preda di guerra e occupazione privata di 'res hostium'. And also 24 SDHI 1958, p.237-268, Osservazioni sull'acquisto delle 'res hostium' a seguito di 'direptio', 21 SDHI 1955, p.249-275 'Postliminium in pace', 26 SDHI 1960 p.105-173 'Sul concetto di 'manubiae' e sulla responsabilita del magistrato in ordine alla preda'.
16. G.4.16 (in fine) -- festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quod maxime sua esse credebant quae ex hostibus cepissent: unde in centumviralibus iudiciis hasta praeponitur.
17. G.2.69 Ea quoque, quae ex hostibus capiuntur, naturali ratione nostra fiunt. Add also D.41.2.1.1 for which see infra
18. D.41.1.5, 7 pr. Gaius (Res bott:) - item quae ex hostibus capiuntur, iure gentium statim capientium fiunt. 7 pr. adeo quidem, ut et liberi homines in servitutem deducantur: qui tamen, si evaserint hostium potestatem, recipiunt pristinam libertatem. And D.1.5.5.1 Marcianus: Servi autem in dominium nostrum rediguntur aut iure civili aut gentium: iure civili si quis se maior viginti annis ad pretium participandum venire passus est: iure gentium servi nostri sunt, qui ab hostibus capiuntur aut qui ex ancillis nostris nascuntur.

historical times but with only minor application in classical Roman law. For Bona, only Celsus realized the limited field of concrete application of this principle with this precision: quae res hostiles apud nos sunt. Only Celsus saw that only things belonging to the enemy on Roman soil at the outbreak of a war, do not become public and therefore fall to the first taker; all other things taken from the enemy become public property and any handling of it would give rise to the crime of peculatus. This theory, however logical and accepted to the theoretical lawyer, is in my submission open to grave doubts.

FIRSTLY, there is the general objection that it is very peculiar that only Celsus of all the classical jurists did think about the acquisition of res hostiles in a practical way. Paul might perhaps have felt in the mood of theorizing on absolute principles (naturalis ratio?) but it is improbable that Gaius, writing an institutional work for young lawyers would not have felt obliged to state the concrete facts of his day.¹⁹⁾

SECONDLY, while I can agree that the naturalis ratio as explained by Bona was most definitely the governing principle in earliest times, it seems a bit far-fetched to twist all the general texts on the occupatio of res hostiles/32.

19. An argument based on Gaius' conservatism would not, in my submission, weaken this statement. Gaius seems to have been only conservative in extending the rights of private individuals, whereas here he is limiting them. Compare e.g. G. 3.172 with Pomponius D.46.4.10 and G. 2.95 with D. 41.1.53.

hostiles to fit this strict a priori pattern. It is, e.g., hard to believe that Paul is expounding only an abstract principle in D 41.2.1.1²⁰⁾. According to Bona²¹⁾ Paul only completed a list by adding some abstract examples (e.g. res bello capta) after he caught on to the notion of naturalis possessio (naturalis ratio?) explained by Nerva filius; as the basis for acquisition by hunting and fishing. Any objective reader of the text would have to agree that Paul was depicting if not such a frequent at least a concrete fact-situation of his day²²⁾.

THIRDLY, the tentative argument put forward by Bona²³⁾ that the occupatio of res hostiles forms together with the island arising in the middle of the sea and gems found on the seashore a neat little group of abstract cases, is not very convincing. Apart from the fact that only one text groups the different situations in this way, at least one other explanation can be advanced for grouping these cases in contraposition to cases of hunting and fishing namely that hunting and fishing were always open to the individual occupans, whereas res bello capta, insula in mari nata, and gems found on the seashore/33.

20. *Dominiumque rerum ex naturali possessione coepisse Nerva filius ait eiusque rei vestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderit item bello capta et insula in mari enata et gemmae lapilli margaritae in litoribus inventae eius fiunt, qui primus eorum possessionem nactus est.*

21. *Op. cit.* p. 334 sqq.

22. Further examples of forced interpretation by Bona are D. 41.2.3.21 (Paulus), D. 41.1.5.7 (Gaius) and especially the two texts of Marcianus D. 1.5.5.1 and D. 49.14.31.

23. This seems to me the logical conclusion of Bona's argument in, 1959 SHDI p. 346 (esp. fn 113).

seashore, did depend on specific conditions in accordance with their contingent nature. It can also be noted that at least one of the cases enumerated viz that of gems found on the seashore, must have happened fairly frequently - Paul would have been on very shaky ground, if he intended this case only as an abstract example without concrete application. A final argument against Bona's view is that his interpretation of the phrase apud nos in the Celsus-text needs not necessarily be accepted²⁴⁾.

Vogel,²⁵⁾ on the other hand, supports the theory that all res hostiles taken in warfare, is open to private occupation by individuals. He does however, limit the capacity of occupatio in this case to military persons and makes a division between 'grossbeute²⁶⁾' which falls to the general and 'plunderingsbeute' which could be occupied by a private soldier. On examination of extra-legal sources he arrives at a further precision: plundering by soldiers always depends upon a concession of the general and only after he has given the sign for direptio could they start acquiring smaller things for themselves. Property acquired in this way, although theirs was subject to the obligation to be handed over to the field quaestor²⁷⁾ for division amongst all the soldiers (igentumsbindung

obligatorischen/34.

24. Vide supra P.

25. 66 ZSS 1948 p. 394-422: 'Zur rechtlichen Behandlung der römischen Kriegsgewinne'; 43 RE, (1953) p. 1206.

26. 'darunter wohl immer der feindliche Staatsschatz, überhaupt die öffentlichen Gelder, Kriegspotential und Schiffe - 66 ZSS p. 395.

27. D. 41.1.13 pr. on the analogous case of a procurator.

28. See comparatively I Samuel 30-22-25.

obligatorischen Art.). For Vogel, therefore, all booty of war was open to occupatio either by the general or by the individual soldiers. Never would this appropriation of booty be considered peculatus for 'quæ res hostiles apud nos sunt, non publicae sed occupantium fiunt'²⁹⁾ - i.e. according to Vogel things belonging to the enemy amongst our property are never considered public property and must therefore fall to the first taker. Only when booty was stolen from the field quaestor or from the general could it be considered theft of public property or peculatus. Though a neat and logical picture, the following objections can be raised against Vogel's view:

FIRSTLY, apart from the fact that there is no necessary connection between the pr. and paragraph 1 of the Celsus-text on which his whole argument that occupatio of booty was open only to soldiers was based, and also apart from the fact that none of a number of passages from Livius supports the thesis that plundering could only take place after an order given by the general,³⁰⁾ the general legal statements about occupatio of res hostiles are against such a narrow field of application as put forward by Vogel. If it was really true that only soldiers could 'occupy' booty only after an authorisation by the general, some hint as to such a precise application would have been absolutely necessary in a passage settling out the modes of acquisition of property.

On/35.

29. Celsus D.41.1.51.1.

30. For the passages, vide Bona, op. cit. Fn. 63.

On the contrary, the only characteristic that is mentioned is the fact that such things must be res hostiles and as such res nullius, open to be taken by anyone whether military or not, with or without authorisation from a general.

SECONDLY, Bona³¹⁾ has argued very strongly that Vogel has not produced adequate proof that things captured from the enemy did not become public property automatically on the moment of capture. Bona cites some texts of Cicero³²⁾ in support of the view that enemy property do become res publica at that very moment and interprets the Celsus-text as only stating that those specific res hostiles which were apud nos did not become public, but that this implies that all other types of res hostiles did become public. Thus for Bona all praeda was always public property especially as this was the only way in which praeda was considered in either legal or extra-legal sources. The cumulative effect of all these arguments must at least throw some doubt on the authoritative pronouncements by Vogel.

THIRDLY, a text of Modestinus^{32b)} talks about theft of 'praeda ab hostilibus capta' which most naturally indicates a moment immediately after the victory. It is only a forced interpretation which makes this apply to property only after it had been handed over to the general or
the/36.

31. Op. cit. Fn. 52.

32. e.g. in Verrem 1, 21, 57 - *multo diligentius habere dico servitium praedam populi Romani quam te tua furta notata atque perscripta*'.

32b. D. 48.13.15

the field quaestor.

In conclusion one may sum up that apart from the clear cases of land and sporlia which goes to the State and the private individual respectively and the controversial case of enemy property found on Roman soil at the outbreak of a war which need not necessarily affect the issue, the problem is most acute in the case of booty captured from the enemy. It is in this field that the claims of the private individual had its fiercest struggle with the up-coming claims of the State to booty. In my submission this whole problem should be seen as an historical development of the claims of the State which in the course of time infringe widely on the claims of the private individual. Thus in earliest times the principle of private occupation held vast sway. In the late Republic it, however, became the custom and perhaps even a moral obligation to give some if not all of the booty captured in war to the treasury³³⁾ (Cicero). But never was it a legal duty especially not since the passing of the Lex Julia peculatus et de sacrilegis³⁴⁾ which applied originally primarily to offences committed in the public mint³⁵⁾ without envisaging that theft of booty of war could easily come under its ambit. This is proved by the wide statements of Gaius and Paul concerning private occupation of res hostiles. This does not mean that the individual soldiers could necessarily keep the booty they/37.

33. Cicero-texts - see Fn 32.

34. Probably of Augustus, at earliest from time of Caesar - Rotondi, Ieges Publicae 453 ff.

35. This was accepted by Mommsen as the prime and most important instance of peculatus: Römisches Strafrecht p. 764 sqq.

they obtained. In practice they were most generally bound by an oath to hand the booty over to the quoesirr for division between all the soldiers. All these matters however, under the imperium of the commandor (general) which is strictly a matter of executive discretion which falls for the greatest part in Rome outside the sphere of judicial control. But undoubtedly the trend to regard booty as State property was subconsciously at work and resulted in a clear statement by one of the last classical jurists, Modestinus³⁶⁾ that theft of booty would be publicly punished based almost certainly on the underlying principle if not that booty is res publicae then at least that booty is destined for the State and any infringement of this right of the State should be punished³⁷⁾. That this victory of the claims of the State over the claims of private individuals continued can be seen from the post-Theodosian constitutions³⁸⁾ which made a special concession that any private person could take all the booty they could plunder as a reward if only they took up arms to defend the Roman State. Justinianic law again reverted to the pre-Modestinian position - wholly understandable if one consider that the compilers of the Institutes used the Institutes (+ Res Cottidianae) of Gaius when laying down rules in Inst. 11.1.17³⁹⁾.

36. D 48.13.15 Modestinus: Is, qui praedam ab hostibus captum subripuit, lege peculatus tenetur et in quadruplum damnatur.

37. An argument by analogy might be based on the conclusions of Buckland in an article in *Studi in onore di Riccobono I*, p. 275: 'Marcian'. He argues against heavy interpolation in the passages of Marcian taken up in the Digest and explains that Marcian could well have given a late-classical view, (different from the classical view) which was more favourable to the compilers and therefore inserted. This is not only against heavy interpolation of Marcian but also for a view that there were certainly late classical developments which were different from the classical view. In this background Modestinus (or his teacher Ulpian) could well have been responsible for a late-classical extension of the scope of the/38.

the crime of peculatus so as to cover booty taken in war from the enemy.

38. Nov. 9 (Imp. Theodosius et Valentinianus AA populo Romano): ... singulos universosque hoc admonemus edicto, ut Romani roberis confidentia et animo, quo debent propria detensari, cum suis adversus hostes, si usus exegerit, salva disciplina publica servataque ingenuitatis modestia, quibus potuerint utantar armis nostrasque provincias ac fortunas proprias fideli conspiratione et iuncto umbone tueantur: hae videlicet spe laboris proposita, ut suum fore non ambigat quidquid hosti victor abstulerit. Ea manu divina: proponatur amantissimo nostro populo Romano. Et ad latus: dat. VIII Kal. Iul. Ravennae Valentiniano A. et Anatolio VC. cons. (Leges Novellae ad Theod. pertinentes, ed Meyer, B̄arolini 1905 p. 90).

Nov. 13, 14 (Imp. Theodosius et Valentinianus AA. Albino II p.p.): Erit etiam sollicitudinis ducis provinciae, ne cuiquam ad occasionem vexandarum reliquiarum armatus habere liceat) nisi forte his qui sub periculo proprio laudabili animositate contra hostes manus suas viresque proiserint pro utilitate communi: quorum animositatem ita erigendam esse censemus, ut quidquid de praeda hostium conquisierint sibi habeant exceptis hominibus, quos se provinciales docuerint perdidisse Emissa XI Kal. Iul. Romae Valentiniano A VI et Nomo NC. cons. (Leges p. 97).

39. Inst. of Justinian 2.1.17 - Item ea, quae ex hostibus capimus, iure gentium statim nostra fiunt: adeo quidem, ut et liberi homines in servitatem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi fuerint pristinum statum recipiunt.

CHAPTER III.OCCUPATIO OF RES DERELICTA.

On basic principles res derelicta or things which have been abandoned by their former owner, are res nullia and thus open to be taken by anyone.

For dereliction a deliberate giving up of possession by the owner with the intention that the thing shall no longer be part of his property, suffices¹ - for instance if an owner discards a movable or if he leaves his land with the intention not to return. An owner not in actual possession can only make a declaration that he no longer wants the thing. It stands to reason that this subjective intention of the owner is very difficult to prove but it is submitted that even in Roman law outward conduct gives a strong indication as to what the intention of the derelinquens is.

In classical Roman law there was a dispute as to ~~when~~^{when} a former owner lost ownership in the thing he had abandoned.² The Proculian view was that derelictio was not completed until another person had actually taken possession of the abandoned thing. The Sabinians, followed by Justinian, held that the former owner lost his ownership immediately on abandonment. To illustrate the difference in practice between these two views, the following example would suffice: A abandons his cow on

the/40

1. Institutes of Justinian, 2.1.47.

2. Compare D 41.7.2.1, D 47.2.43.5 and Institutes of Justinian 2.1.47.

the public road. She calves the next day. B comes along and takes the calf, while C 'occupies' the cow. On the Sabinian view, the cow became a res nullius at the moment of abandonment and because of this, the calf, when born is also res nullius. Thus B and C would have acquired ownership by their taking. On the Proculian view, however, A would remain owner until C had taken possession. Meanwhile the calf would have acceded to A as owner of the mother and B can thus be proceeded against because of theft of the calf. As to what the rationale for the Proculian view is the following explanations are offered:

FIRSTLY, Buckland³, argues that the Proculians preferred derelictio to be considered complete only after it was too late for the former owner to change his mind. As much time as possible must be given to the derelinquens to reconsider this act.

SECONDLY, Daube⁴ has argued that the Proculians saw that the method adopted by the Sabinians might have been abused as a device to dodge taxation or other burdens. Both these explanations are plausible and in my submission sufficient to form a basis for the Proculian view.

A THIRD explanation for the Proculian view is that the Romans considered acquisition not as a form of occupatio but rather as a case of traditio incertae personae i.e. an offer to anyone to take possession of the abandoned thing. This would fit the Proculian view perfectly for

only/41.

3. A Textbook of Roman Law, p 207.

4. Derelictio, Occupatio and Traditio: Romans and Rabbis, 77 L.Q.R. p 389.

only when a third person takes possession would ownership pass.⁵ The argument is that neither Justinian nor Gaius mentions occupatio of a res derelicta and that no text in the Digest does so clearly, whereas other texts put acquisition of res derelicta under traditio.⁶ It is also argued that the word 'occupare' is never used in a technical sense in this sphere. This view is in my submission wholly untenable for the following reasons: FIRSTLY, it is hard to believe that the verb occupare as well as the noun occupantis⁷ has no technical meaning in this sphere. Occupare means 'to seize' and if a res nullius is seized, ownership is acquired immediately. SECONDLY, the maxim quod enim nullius est, id ratione naturali occupanti conceditur⁸ applies certainly also to res derelicta if derelinquere is explained as an abandonment with the intention to relinquish ownership.⁹ THIRDLY, the Sabinian view according to which derelictio was completed by mere abandonment prevailed: The thing became res nullius and there could be no traditio of such a res. For Justinian, even to hint at the construction of traditio would be illogical because he accepted the Sabinian view.

My conclusion is therefore that the Sabinian-Proculeian dispute as to when ownership of a res derelicta was lost was independent of the controversy as to whether the acquisition of res derelicta was a form of occupatio

or/42.

5. This is of course only in the case of res nec mancipi, because mancipatio is needed for res mancipi.
6. Institutes of Justinian 2.1.46-47.
7. D 47.7.1.1.
8. D 41.1.3 pr.
9. Institutes of Justinian 2.1.47.

or traditio. Either or both of the explanations given above affords a good rationale for the Proculian view.

This brings us to the controversy as to the basic nature of acquisition of a res derelicta. It can be taken as a kind of derelictio cum occupatio: A abandons his lame horse on the public highway and B takes possession of it thereby acquiring ownership in it by occupatio¹⁰. Acquisition of a res derelicta can, however, also be taken as a traditio incertae personae: A, by abandoning the lame horse, offers it to whoever would like to have it and B accepts. This constitutes a traditio from A to B. It is widely accepted¹¹ that both these approaches were employed in Justinianic law. Proof for this is the connecting phrase qua ratione between Justinian's Institutes 2.1.47 and 2.1.46. It is most probable that the construction derelictio cum occupatio was earlier, which reflects the tendency to turn natural modes of acquisition into derivative ones.¹² This does not mean that one has to accept that the traditio - construction was employed only in post-classical times. Daube¹³ came out very strongly for its classicality/43.

10. Some Romanists would say that because a horse is a res mancipi and because occupatio is a mode of acquisition under the ius gentium, B would only have acquired bonitary ownership in the horse: civil law ownership could only be acquired after usucapio. This however, involves a misconception of the effect of occupatio. Surely the fact that occupatio is referred to as a mode of acquisition under the ius gentium only refers to its origin and not to its effects. In my view occupatio, accessio and other ius gentium modes of acquisition all give full civil law ownership of the particular thing.
11. For instance, H. Krüger, *Mnemosyna Pappulius*, 1934, p 168 sqq.; Kaser, 'Das Römische Privatrecht' I, 1955, p 350.
12. See Daube, *op. cit.*, p 282.
13. *Op. cit.*, p 282 sqq.

classicality. He refuses to accept the vast interpolations which are necessary to accept Krüger's or Kaser's view,¹⁴ and argues that a construction as traditio intertae personae would have a practical use insofar as it would enable an offeror either to confine his 'offer' to a definite circle or to exclude certain persons from accepting. This use becomes very probable if one consider that this construction is connected with the case of iactus missilium which was not a case of ordinary abandonment but rather an abandoning of coins intended to benefit up to a certain extent only his political supporters or at least to exclude members of a rival group. Daube further refers to Talmudic law¹⁵ in which this technique (traditio incertae personae) was also employed. From the fact that the independent controversy between Sabinians and Proculians as to when ownership was lost¹⁶ is also found in Talmudic law, he concludes that if both controversies existed in one system there is no reason why one would not expect both also in the other.

Against this background we may now tackle the problem as to what sort of intention is required for the acquisition/44.

14. Op. cit., p 282, p 283.

15. Prof. Daube considers the development of Roman and Talmudic law as independent of each other. He does however, add, loc. cit. p 388: 'But we must not forget that from say, 150 B.C. the teaching of the rhetorical schools pervaded the entire Mediterranean world; so that in most branches of learning, up to a point at least, the same spirit, and, above all, the same technique might be found everywhere.'

16. See Supra.

acquisition of a res derelicta. In ordinary cases of acquisition by occupatio, e.g. in the case of occupation of a wild animal, the problem of the animus of the occupans does not become acute, merely because the classes of wild animals were more or less clearly defined. It seems as if everyone accepts that the correct animus necessarily accompanies the acquisition of the wild animal. In the case of a res derelicta, however, the problem is more complicated: Here one has to deal with a res which is ordinarily in the ownership of someone (res intra nostrum matrimonium) but which has been abandoned by its former owner. No indication as to its state, e.g. like a certain species of animal, is apparent to the person who wants to acquire it and it is very difficult to prove what the belief of the acquirer was when he took possession of it.

Very few Roman law scholars seem to have realised this difficulty.¹⁷ Buckland,¹⁸ however, considered it, stating the case as follows: "If I picked up what had been abandoned but I supposed to have been accidentally dropped, and decided to keep it, had I acquired it? The difficulty is that I could hardly be said to intend to
acquire/45.

17. Kaser, *Das Römische Privatrecht I*, 1955, p. 122, 359, *Römische Privatrecht*, 1962, p. 101; Voci, *Modi di acquisto della proprietà*, 1952, p. 233 et sq. Arangio-Ruiz, *'Istituzioni di Diritto Romano'*, 1960, p. 190.

Some authors (e.g. Voci) treat occupatio as automatic, and thus consider that the intention of the acquirer is irrelevant. For others (e.g. Kaser) the intention is so inextricably bound up with bona fides in the usucapio they consider necessary for the occupatio of a res derelicta that they did not consider it necessary to treat it as a separate point.

18. *A Text-book of Roman Law*, third edition, revised by Stein, 1963, p. 206.

acquire what I did not think to be susceptible of acquisition. The only text requires knowledge on the part of the occupans." The text which he cites in support is D 41.7.2. pr.¹⁹ and he adds that texts on usuca-
pio are not in point in this context. It seems that Buckland overlooked some of the difficulties involved, and that his tentative view was only held by a minority of jurists.

The generally accepted requisites for occupatio are the following:²⁰ (i) the thing occupied must be a res nullius; (ii) possession must be taken of this res nullius. It is, however, disputed what the exact state of mind of the occupans has to be, i.e. whether he must have the intention to hold for himself²¹ (animus possidendi) or whether he must have the intention to own the object. In the case of res derelicta this latter view means that the acquirer must know in fact that the res had been abandoned, or at least believe that it had been abandoned, or else he can never have the intention to acquire ownership in the thing. This is the view which Buckland seems to support in the passage quoted above.

My submission is that Buckland's statement is only correct if one adopts the view of those jurists who constructed acquisition of a res derelicta as a form of traditio incertae personae; but that he is not correct

as/46.

19. Loc. cit. fn. 13. For Discussion see below.

20. See for example: Voci, op. cit., p 11.

21. See Voci, loc. cit.

as far as the other jurists, who construed acquisition as dere-
lictio cum occupatio, are concerned. If acquisition of
a res derelicta is constructed as a traditio incertae
personae, a iusta causa is needed in every case before
the acquirer would get ownership by this method. This
means that both in the case of a res nec mancipi and in
the case of res mancipi, the acquirer must believe that
what he is acquiring is a res nullius or else he would
not have a 'good reason' for acquiring it. In the case
of res mancipi traditio was, however, not sufficient
for the transfer of ownership. Because mancipatio was
required in this case, usucapio as well as traditio was
necessary for the acquisition of ownership.

To provide textual authority for my view the best
starting point would be the text of Paul already referred
to. D 41.7.2. pr. Paulus libro IV ad edictum.
Pro derelicto rem a domino habitam, si sciamus possumus
adquirere.

In the light of what has been said above, Paul
could have meant by 'sciamus possumus adquirere' that
the acquirer can only acquire the res derelicta if he
believes it to be such because this belief would give
him a iusta causa for the traditio made to him. It
need not necessarily mean that one can acquire by occu-
patio only if one knows that the thing is a 'res dere-
lictata', the way in which Buckland seems to understand
this text. Notice further that Paul is presumably only
dealing with the requirement of a iusta causa for the
traditio in this text without saying further that if

the/47.

the thing was a res mancipi, usucapio as well might be required. That is in my submission the way in which the next text of Paul should be dealt with:

D. 41.7.4. Paulus libro quinto decimo ad sabinum. Id, quod pro derelicto habitum est et haberi putamus, usacapere possumus, etiam si ignoramus, a quo derelictum sit'.

Here, again, stress is laid on the fact that one must have a iusta causa for acquisition. Paul is, however, here qualifying his previous statement of what a iusta causa is, considerably. However, he seems to say that the minimum content of a iusta causa is still present even though we merely believe that the res is a res derelicta and we do not know who the owner who abandoned it was. It is my submission that Paul is only saying here that one can still have a iusta causa without having to prove that a particular person had abandoned the res²²⁾. Another text of Paul²³⁾ discusses the following case:²⁴⁾ Sempronius when taxed by a nurse (Procula) to pay for provision given to a child (Theris) who had been born to one of his slave-girls testified before witnesses that he had no money to pay for the provisions and said that the child should be given back to her natural father (Lucius Titius). The latter, having paid Procula, manumitted the slave girl by vindicta.

When/48.

22. The 'res' must, however, be a res nullius or else usucapio was impossible except in the instance given by Pomponius (see below).

23. D 41.7.8.

24. I prefer not to quote the Latin mainly because no interpolation was ever suggested in connection with the principles relevant to this discussion.

When the question whether the liberty of the child could be rescinded was put to him, Paul replied: "quoniam dominus ancillae ex qua Thetis nata est, Thetidem pro derelicto habuisse videtur, potuisse eam a Lucio Titio ad libertatem perducere". Voci²⁵⁾ following Romano²⁶⁾ has argued from this text that a res derelicta whether a res mancipi or a res nec mancipi comes into the ownership of the occupans immediately and that usucapio is never needed - not even in the case of a res mancipi because this case deals with a slave girl. Their argument is that since only a civil law owner can free by vindicta, Titius must have acquired ownership in the child by taking possession of it. In my submission, Romano and Voci do not have sufficient support in the text to say that the mode of acquisition Paul thought of here was occupatio. The whole tenour of the text suggests that it is rather a case of straightforward traditio and Paul's reasoning that the child had become a res derelicta might be interpreted as him showing that Titius had a perfect 'iusta causa' for the traditio. The context of this text in the Digest, namely under pro derelicto as one of the iustae causae for usucapio, shows that at least the compilers thought that this text dealt with 'iusta causa'. It can be suggested that Paul did not go on to mention that usucapio was/49.

25. Op. cit., p. 235.

26. Studi su la derelizione Padova, 1933 - see Voci.

27. See Buckland, op. cit. p. 73.

was also necessary in this case of traditio of a res mancipi because he was preoccupied with the question as to iusta causa and did not consider the further point as to usucapio probably because the time period (only a year) had already run before the child was manumitted.²⁸⁾ Therefore the three texts of Paul lend themselves to a reasonable interpretation if we presume that he always construed the acquisition of a res derelicta as a traditio and not as a derelictio cum occupatio²⁹⁾

Before proceeding to expound the opposite construction it is necessary to distinguish certain texts of Javolenus and Julian which deal with genuine usucapio. Here are the texts of Javolenus:

D 41.1.58. Libro KI ex Cassio.

Quaecumque res ex mari extracta est, non ante eius incipit esse qui detraxit quam dominus eam pro delicto habere coepit.

D 42.2.21. 1, 2. Libro VII ex Cassio.

Quod ex naufragio expulsus est, usucapi non potest quoniam non est in derelicto, sed in deperdito. Idem iuris esse existimo in rebus quae iactae sunt quoniam non potest videri id pro derelicto habitum quod salutis causa interim dimissum est.

Both texts deal with losses which occurred in the sea, and both are cases in which the previous owner did not have the intention of abandoning the thing, it seems, until after the next person had taken possession of it.

This/50.

28. A more daring suggestion is that there has in fact been a mancipatio of the slave girl to Lucius Titius or at least that all the outward signs of mancipatio (the witnesses) had been present to a transaction by which Sempronius got rid of the child.

29. There is only one other text of Paul on the same subject:
P.S. 2.31.27 - Qui pro derelicto rem iacentem occupavit, furtum non committit, tametsi a domino (non) derelinquendi animo relicta (sit). This text deals mainly with the acquirer's liability for theft and is thus not relevant for the present discussion.

This means that at the moment of taking possession the thing was not a res derelicta and thus could not be taken on either view - not by derelictio cum occupatio because there was no res derelicta; nor by traditio because there was not a real iusta causa (non est in derelicto, sed in deperdito) and therefore it cannot be usucapud. On the whole it seems as if Javolenus is rather dealing with usucapio as such, showing that there cannot be usucapio of a thing which was only lost.

The Julian texts seem to express the same rule:

41.7.6. Julianus Libro III ad Urseium Ferozem.

Nemo potest pro derelicto usucapere, qui, falso, existimaverit rem pro derelicto habitam esse.

7, Idem Libro II ex Minicio.

Si quis merces ex nave iactatus invenisset num ideo usucapere non possit, quia non viderentur derelictae, quaeritur sed verius est cum pro derelicto usucapere non posse.

This again is a question of mere usucapio - these things cannot be taken by usucapio because they are not in fact res derelictae. The best argument for saying that this is a different case from that which Paul and indeed Buckland is discussing, is the fact that both Javolenus' and Julian's answers are in the negative - viz. things which are not res derelictae can never be usucapud or rather if they are not in fact res derelictae there could never be a iusta causa for usucapio³⁰⁾. Paul's argument in the only case where

usucapio/51.

30. It does not help to believe falsely that it is a res derelicta. The explanation of these texts corresponds on the whole with Voci's explanation.

usucapio is concerned, viz. in case of res mancipi, is in the positive; we can usucapere but then only if we believe that the thing is a res nullius granted the fact that it is a res nullius.

A slight variation on this theme is discussed in a text of Pomponius³¹). He poses the following problem: A has a thing in his possession as a res derelicta. He sells it to B who knows that he had it as res derelicta. In these circumstances Pomponius says that nothing is against him acquiring it by usucapio - he is bona fides, and he has a iusta causa (the sale) for it. To illustrate this Pomponius gives the case of the husband who sold a gift given to him by his wife. This can also be usucapied by the buyer''quasi' volente et concedente domino id faces'. Thus by this fiction Pomponius is moving one step further - if a thing is lost and a person picks it up he himself cannot become owner of it by usucapio because the thing still belongs to someone else, i.e. because the thing was only lost it was not in fact a res derelicta but if he believes it to be abandoned and then sells it to another the other going on this belief that it is a res derelicta and having a definite iusta causa (i.e. the contract of sale)'can acquire the res by usucapio. Pomponius, then, however, goes on to the next case³²) which was a case of true res derelicta, i.e. when a person abandons something, viz.

e.g. either/52.

31. D 41.7.5 pr., 1. For a different interpretation of D 41.7.5 pr., see Voci, op. cit., p. 235.

32. D 41.7.5.1.



e.g. either throwing out coins or letting loose birds³³⁾. Even if we accept that the example given by Pomponius might be largely interpolated, the vital statement at the beginning of the text must still be accepted as genuine. Id quod quis pro derelicto habuerit, continuo meum fit - thus a res derelicta possessed by some person immediately becomes that person's no matter whether he had the correct animus with regard to it or not. If we do accept that Pomponius' example is classical as to the general argument one might further suggest that the example he gives about the res being distributed and the definite construction as the state of mind of the person who abandons it as 'quamvis incertae personae voluerit eas esse' suggests that he might have had the constructions of traditio incertae personae in mind, but that he definitely rejected it in favour of the view of derelicto cum occupatio. His reason for preferring this view to the other might precisely be that because one required knowledge that the thing is a res nullius before one can get it by traditio and moreover possession of a year if it is a res mancipi, this might take the thing out of circulation for too long a period. This was not practical. If the res is in fact a res nullius its economic utility should be restored as soon as possible. That Pomponius would make exceptions on grounds of utility can be seen from the 'quasi' phrase in the preceding part of the text.

But Pomponius was not the only person who held

this/53.

33. Amiserit or emiserit would not matter here if one takes them for wild birds. In both cases they would regain their former freedom, become res nullius and thus belong to the first taker.

this view. Also Ulpian states it clearly in:

D 14.7.1. Libro duodecimo ad edictum, Si res pro derelicta habita sit, statim nostra esse desinit et occupantis statim fit, quia isdem modis res desinant esse nostrae quibus adquiruntur'.

The second statim can only be argued away on a priori grounds³⁴⁾ and it can surely be argued that Ulpian would have used a less definite word than statim if he required knowledge that the thing was res derelicta on the part of the acquirer³⁵⁾.

Finally this is definitely the view taken by Justinian:

I 2.1.47 Qua ratione verius esse videtur et si rem pro derelicta a domino habitam occupaverit quis, statim eum dominum effici.....

Qua ratione connects this extract with the example of the larsesse being thrown out and also in that case is the construction of it as a derelictio cum occupatio preferred.³⁶⁾ The reasons why the compilers preferred this construction might be because they felt the same as Pomponius about it.³⁷⁾ Why did they not change the texts of Paul on this subject could be because there were only two texts of his which mentioned this directly and the context being iusta causa for usucapio his mentioning of knowledge on the part of the acquirer might have seemed to them to be perfectly in line with the topic they/54.

34. See Voci, op. cit., p for criticism of Kaser's views.
35. It might perhaps be argued that Iavolenus also supported this view. In 41.7.6 he says that it is not before an owner considers a thing abandoned that a person who draws it out of the sea can begin to own it ('eius incipit esse'). No further usucapio is needed and a traditio here would indeed be too far-fetched.
36. Justinian, I 2.1.43.
37. See above.

they were discussing.

My conclusions are therefore the following:

FIRSTLY, that the object was a res derelicta before the necessary animus for acquisition of it was present was only required by those jurists who construed the acquisition of a res derelicta as a traditio incertae personae for which at least a iusta causa is needed. Derelictio cum occupatio was, however, preferred by the majority of jurists thus making them consistent in their general requirement for the acquisition of all res nullia. For them the maxim 'quod enim nullius est, id ratione naturali occupanti conceditur'³⁸⁾ applied also to res derelicta with full force.

SECONDLY, this is advocating yet another view³⁹⁾ as to the acquisition of res derelicta - viz., in classical law acquisition was immediate on occupatio no matter whether a res mancipi or a res nec mancipi was concerned; for those (mainly Paul) who construed it as a traditio incertae personae ownership of a res nec mancipi would be immediately required if the acquiror had a iusta causa whereas if it was a res mancipi, usucapio as well was needed.

FINALLY, the fact that all the texts, as they stand, can be interpreted in this reasonable way without having to hold certain of them interpolated on a priori grounds affords in my submission not only another argument

that/55.

38. D 41.1.3.

39. For different views, see Kaser 'Das Römische Privatrecht', p. 539 fn. 9.

that the view taken of the 'animus' is correct but also another argument for saying that the difference in opinion as to the construction of the acquisition of ownership (whether traditio incertae personae or derelictio cum occupatio) of a res derelecta existed already in classical times, at least at the time of Paul but possibly even earlier in view of Pomponius' allusion to it.

CHAPTER IV.MISCELLANEOUS OBJECTS OF OCCUPATIO.

In this final chapter we would consider some less important objects which could be acquired by occupatio like an island arising in the middle of the sea and pearls, gems and other precious stones found on the seashore. We will also consider whether building on the seashore or on the river-bank constitute occupatio of the soil underneath and whether specificatio or thesaurus inventio could ever have been considered a form of occupatio.

Islands¹⁾ arising in the middle of the sea were naturally considered res nullia and thus open to be occupied by the first taker²⁾. The sources tell us expressly that this did not happen very often. The appearance of islands in the middle of a river was more frequent and a classical text³⁾ tells us that if they arose in the middle of a public river and the estates on both sides of the river were agri limitati⁴⁾ (i.e. measured out by landsurveyors) they are acquired by occupatio. There are however two other classical texts⁵⁾ which states clearly that islands arising in the middle of a river accedes to the riparian owners

proportionate⁵⁾.

1. On this paragraph see especially Voci, p. 11-12.
2. D. 41.1.7.3.
3. D. 43.12.1.6 (Ulpian 68 ad ed). Insula in publice fiume nata ... occupantis est, si limitati agri tuerant.
4. i.e. measured out by landsurveyors (agrimensores). See Lewis & Short under limita.
5. D. 41.1.7.3 in fine; Gaius Institutes 2.72.

proportionate to their ownership of the river-bank. This is not necessarily a post-classical position because it speaks of islands in general: the case of agri limitati must have found only limited application since the river itself would most frequently constitute the particular boundary which is relevant in these cases^{6a)}.

Precious stones, gems and pearls found on the seashore^{6b)} are acquired by the first taker.⁷⁾ From the context it is clear that this rule applies only to valuable things: the lapilli being opaque precious stones as opposed to the translucent gemmae such as emeralds, chrysolites and amethysts⁸⁾ and the ceteraque in D 1.8.3 should be translated as 'and other valuable stones'. It must further be noted that stress seems to be placed on the finding of these stones. This does not necessarily mean that this is not a case of occupatio—its context shows again that this case is put on an equal footing with occupatio which means that the mere finding would not constitute acquisition of ownership but that physical appropriation was also necessary. Finally, all the sources talk about precious stones found on the seashore which not only implies that there must/58.

6a. I am not very happy with Voci's op. cit. (p. 11) distinction between agri limitati and agri arcifinalis because Lewis & Short gives as the meaning of the latter: 'lands received in possession and built upon by victors after expelling the previous owners' unless it could further be explained that this happened after land had been captured from the enemy, measured up by landsurveyors and allotted to private individuals. This would boil down to a distinction between agri limitati and agri limitati which is wholly acceptable.

6b. See Voci, op. cit., p. 12, Bonfante, Corso II p. 65.
7. D-1.8.3, D.41.2.1.1. D-1.8.3. (Florentinus 6 Inst.5) Lapilli, gemmae ceteraque, quae in litore invenimus, iure naturali nostra statim fiunt. D.41.2.1.1. (Paul 54 ad. ed.) ... gemmae, lapilli, margaritae quae in litoribus inventae eius fiunt, qui primus eorum possessionem nactus est.

8. See D. 34.2.19.17. Bonfante.

must be res nullia (not in ownership of private person) being washed out on the shores, but also that precious stones found on private land do not fall under this rule. Bonfante⁹⁾ has argued that these stones accrue to the owner of the private land by accessio, but the rules of accessio seem only to apply to things firmly rooted to the ground or built into the ground unless it could be treated as something analogous to alluvio. If this is not accepted, one has to suggest that because those are res nullia they can be acquired by occupatio. In practice however, this problem would not arise very often: almost all of the precious stones found on private land would in fact have been occupied previously on the seashore by another person who would still have his claims to it, if he had not abandoned it.

Neratius¹¹⁾ considered the seashore as something analogous to wild animals: just as these can be captured by anyone, so anyone could build on the seashore thereby acquiring ownership over that particular piece of soil. Once the building has been ^{raised} ~~raised~~, however, the seashore becomes public again provided it recovers its previous character of seashore. This wide view of seashores by the earlier jurists¹²⁾ seems to be curtailed by a text of the later jurist Pomponius¹³⁾ which states that before erecting¹³⁾

9. Bonfante, Corso, II p. 65.
10. Not thesaurus inventio because a res nullia and not a treasure the owner of which is unknown.
11. D.41.1.14. (Bonfante holds this text interpolated).
12. Neratius is from the first half of the second century (Berger, 'An Encyclopedic Dictionary of Roman Law' p. 595.)
13. D.41.1.50. Pomponius was prominent around the middle of the second century (Berger, op. cit. p. 635.)

erecting anything on the seashore a decree had to be obtained from the praetor, and that the praetor could refuse it if it was against the public interest. Pomponius says expressly that a person who builds on the seashore has no civil action to protect him which might either mean that the builder would not be allowed an actio iniuriarum if he is prevented from building or that once the discretionary authorisation had been given by the praetor he would be protected (i.e. by a discretionary actio in factum). As to the type of the buildings that can be erected on the seashore, Buckland¹⁴⁾ is most probably correct when he states that it must have some connection with the public use of the sea or seashore, e.g. shelters and places for drying fishing-nets. The same principle applies to river-banks, which though it belongs to the riparian owners were still open to public use connected with the use of the river like tying-up boats or placing burdens on the banks. Any impediment of such a public use could be met by either an interdict or an actio iniuriarum against the riparian owner. If anything, activities on the seashore or the river-bank is therefore only a limited form of occupatio curtailed by the content and regulations of public use because as opposed to res nullia these are res publica which speaks against an exclusive right accruing to one particular individual.

Could/ 60.

14. Text-book of Roman Law p. 183.

Could specificatio ever be considered a form of occupatio? It might be argued that the maker by forming a nova species has created something which has no owner: a res nullius which would be acquired by the first taker which would naturally be the maker himself. This would never have been accepted by the Sabinians who did not recognize the acquisitive effect of specificatio and hold that the new product still belongs to the owner of the materials. On the Proculian view as well as according to the media sententia which was that new products only became the property of maker if they could not be reduced to their former materials¹⁵⁾, this analysis is more likely¹⁶⁾. The following objections can however be raised against such a construction: FIRSTLY, never do the sources mention a nova species made by a specificator as an example of a res nullius. SECONDLY, it would be very difficult to tell in practice exactly when a particular new creation would become a res nullius so as to be open to occupatio. Following from this, no deliberate act of taking possession with the knowledge that he is acquiring possession can be proved on the part of the specificator. FOURTHLY the Romans were not so much concerned with theoretical questions as to how they arrive at practical decisions in particular cases: all they were concerned with was whether the maker did acquire ownership or not, no matter whether it happened because of

occupatio/61.

15. 'Ea species ad materiam reduci non possit'.

16. Vide Moyle Imperatoris Justiniani Institutiones' p. 202 on par. 25.

or because of specificatio. Finally, if they did consider specificatio as a form of occupatio, the Institutional writers would have grouped these two modes of acquisition together, but in both the Institutes of Gaius and that of Justinian the treatment of occupatio is separated from that of specificatio by a discussion of accessio¹⁷⁾.

Some writers¹⁸⁾ have also stated that finding of a treasure was a form of occupatio, a view which is totally unacceptable for a number of reasons. It is, firstly, clear from the definition of a treasure¹⁹⁾ that it was not a res nullius in the true sense of the word: a treasure is not an object without a master, but an object with an unknown master. Secondly, the fact that the finder acquires only half of what he finds does not tally with the animus necessary for his taking possession. The half acquired by the landowner also seems to go to him automatically without an actual taking of possession being necessary. Finally, in every case of treasure trove, the treasure seems to have been actively concealed (depositio) by some former owner which is not at all the peculiar characteristic of other objects of occupatio. Our conclusion is therefore that while treasure trove might have been considered a form of accessio in the Republic, it was regulated by

special/62.

17. This argument can be met by saying that the jurists recognized the difference between Sabinians and Proculians on the subject of specificatio and that especially a Sabinian like Gaius would never consider occupatio as a form of specificatio.
18. See e.g. Van Oven, Leerboek van Romeinsch Privaatreg p. 92.
19. D.41.1.31.1 Var 8.8: 'depositivae pecuniae, quae long a vetustate competentes dominos amiserant'.

special statutes in the time of the Empire. Never, however, was it considered to be a form of occupatio²⁰).

20. The passages from the Satires of Horace and the Ecloques of Celpunius Sipulus (early Empire) only show that the finder of a treasure trove was rewarded, not that he acquired the entire treasure.

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