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Law of Property

GLOBAL LAW AND TRANSATIONAL LEGAL STUDIES

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How to use the Concepts of Ownership, Property, Possession and Detention in Roman Law

As a rule, the concepts of Ownership, Property, Possession and Detention are different one from the other

$$\boldsymbol{Ownership \neq Property \neq Possession \neq Detention}$$

but with some slight exception.

Ownership

- (Civil) Ownership = *Dominium ex iure Quiritium* = «absolute» right *in rem*, including (almost) every way to use, enjoy or even abuse the thing object of such right

Notice:

- That we also use the phrase 'praetorian ownership' as a synonym of *in bonis habere* (which could lead to *dominium ex iure Quiritium* by way of *usucapio*), but *in bonis habere* was qualified as a kind of ownership only by Gaius)
- That, when we use the word 'ownership' with no qualifications, we always refer to *dominium ex iure Quiritium*;
- That some textbooks, instead of using the phrase 'rights *in rem*', prefer to use 'real rights'.

Property

- Property = the thing object of ownership

Notice:

- That, properly speaking, 'ownership' is the subjective right having a thing as its object and 'property' is the thing that is the object of the right.
- That, as 'property' derives from '*proprietas*' (which is the Latin word for 'ownership' in late classical age), many romanists have the habit to use 'property' as a synonym of 'ownership' or instead of it.

Possession

- Possession = a de facto situation, which consists in having a thing under one's control, fulfills the two requirements of *corpus possessionis* and *animus possessionis*, and to which juridical consequences are connected

Notice that, in current English, 'possession' is also frequently used as a synonym of 'property', namely in the sense of 'a thing object of ownership', but such usage is very discouraged in Roman law, as it leads to confusion

Detention

- Detention = a de facto situation, usually the consequence of a legal transaction (as hire, deposit, etc.), which consists in having a thing under one's control, but in which the detentor recognises somebody else as the legitimate possessor or owner of the thing.

Modes of Acquisition of Dominium

According to Gaius and Justinian modes could be distinguished in:

- ***Iure civili*** modes of acquisition
- ***Iure naturali*** modes of acquisition

According to the traditional distinction made by romanists, modes could be distinguished in:

- **Original modes of acquisition** – you acquire *dominium* independently from any juridical relationship with the former owner
- **Derivative modes of acquisition** - you acquire *dominium* because of your juridical relationship with the former owner

Original modes

- *Occupatio*
- *Accessio*
- *Specificatio*
- *Treasure trove*

  + Usucapio

Notice that all these are *iure naturali* modes except usucapio, which is *iure civili*.

Derivative modes

- *Mancipatio*
- *Cessio in iure*
- *Traditio*

*Notice that *mancipatio* and *in iure cessio* can transfer the ownership of *res mancipi* and *traditio* only the ownership of *res nec mancipi*.

A Brief Guide to Superficies

We can modernly define *superficies* as one's right in rem to erect and/or enjoy a building on the land of another person. Conceiving such right was originally impossible in Roman law, as it was opposed to the principle of accession (see modes of original acquisition of ownership); according to such principle, every building belonged always to the owner of the land on which the building stood. The economic growth of Rome lead to an increase in business activities. New locations were then needed for such activities, and empty plots of land were very much required. As the principle of accession made it impossible to conceive on the building a right in rem distinct from the right in rem on the land, the relationship between the owner of the land and the person enjoying the building was legally qualified as an obligation arising either from the contract of *emptio-venditio* or of *locatio-conductio*. This happened firstly with plots of public land belonging to the Roman state, and then with private ones. Unfortunately, this also implied that the buyer/hirer had only a right in *personam* against the owner of the land, thus he had no right to sue a (possible) third party who in any way disturbed or impeded his enjoying the building. A first defence for such case was given by the praetor, who introduced a new interdict (called *interdictum* de *superficiebus*, whose model was the *interdictum uti possidetis*). A second and definitive defence, given by the same praetor, consisted in the *actio de superficiebus*, which, being in rem, could be brought forth against whoever disturbed or impeded the *superficiarius* in his enjoying the building. The introduction of such new remedy let us understand that finally the superficies was conceived as a proper right in rem.