Charles Donahue, Jr., '*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney', in Domenico Maffei, Italo Birocchi, Mario Caravale, Emanuele Conte, and Ugo Petronio, ed., *A Ennio Cortese* (Rome: Il Cigno Edizioni, 2001), 1:506–35.

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Ius in the subjective sense in Roman law. Reflections on Villey and Tierney*

In a recent book, Brian Tierney effectively demolishes Michel Villey's ideas about medieval conceptions of legal rights[1]. In this paper I want to suggest that Villey was also wrong about the Roman conception of rights[2]. Because Villey was wrong about the Roman conception of rights, the canonists of the twelfth and thirteenth centuries were not quite so original as Tierney sometimes seems to suggest[3]. To be more precise, I am going to argue that the notion of subjective right, which Villey believed did not exist (or barely existed) in Roman law[4], was, in fact, quite fundamental to Roman law. Because the idea of subjective right was quite fundamental to Roman law, there was nothing particularly original about the canonists' and civilians' use of the idea in the twelfth and thirteenth centuries. What was original was the development of the idea of subjective natural right. How important this idea was before the debates about Franciscan poverty, I will not venture to say, but it clearly was there in a way in which it was not there in Roman law.

Before we get to the argument, we need to do some defining. Although the word «right» is not so ambiguous in English as is the word *ius* in Latin (or *diritto* in Italian, *Recht* in German, etc.), it is ambiguous. Early in the last century, Wesley Newcomb Hohfeld proposed that English-speakers resolve the ambiguity, at least in precise legal language, by using the word «right» only where there was a correlative duty or obligation in another or others[5]. If, on the other hand, there

* Thanks are owing to Christian J. Ward for assistance in checking the references and to Bruce Frier for helpful suggestions and corrections.

[1] B. TIERNEY, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625*, Emory University Studies in Law and Religion (Scholars Press: Atlanta, 1997).

[2] This idea is not new. See M. KASER, *Zum 'Ius'-Begriff der Römer*, in *Essays in Honor of Ben Beinart*, 2 (= *Acta Juridica* [1977]), 63-81; G. PUGLIESE, *Res corporales, res incorporales e il problema del diritto soggettivo*, in *Studi in onore di Vicenzo Arangio-Ruiz* (1953) 3:223; E. BETTI, *Falsa impostazione della questione storica, dipendente da erronea diognosi giuridica*, in ID., 4:81. I seek here to put Kaser's paper on a more elaborate footing and to connect it to the debate about medieval conceptions of rights.

[3] Tierney does not fully accept Villey's reading of the Roman law. Ultimately, however, he seems to concede it for purposes of argument. TIERNEY, 15-19. It is this seeming concession that makes the medieval canonists seem more original than, I will argue, they actually were.

[4] Villey wrote much on the topic over some period of time, and the statements of his thesis are not completely consistent. I rely here principally on M. VILLEY, *L'Idée du droit subjectif et les systèmes juridiques romains*, RHD 4e sér. 24-25 (1946-7) 201-28; *Du sens de l'expression* jus in re *en droit romain classique*, in *Mélanges Fernand de Visscher*, 2 (=RIDA, 1er sér. 3) (1949) 417-36; *Le 'jus in re' du droit romain classique au droit moderne*, in *Conférences faites à l'Institut de droit romain en 1947* (Paris: Sirey, 1950), 187-225. The last contains the strongest claim (at 188): «Le droit romain classique ignore, à mon avis, totalement l'idée de droit subjectif».

[5] W. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *Yale Law Journal*, 23 (1913) 16-59, repr. in ID., *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919). Hohfeld also proposed four other «fundamental legal categories» in addition to «rights», «privileges»,

was no correlative duty or obligation, but simply an absence of right in someone else (a «no-right»), Hohfeld preferred to say that the subject had a «privilege». Hohfeld's proposed vocabulary has not been universally accepted, but his distinction between «rights» and «privileges» is well recognized. Other authors distinguish between «claim rights» and «liberty rights» or «passive rights» and «active rights»[6]. Whether the Romans saw this distinction is a question that cannot be answered here (though we will make some suggestions about it)[7]. The important thing about Hohfeld's analysis for our purposes is that it firmly connected both rights and privileges with a given legal subject and defined them in terms of that subject's relationship to others. Our contention here is that the Romans used the word *ius* in just the way that Hohfeld used the words «right» and «privilege», to refer to a «jural relationship», in Hohfeld's language, in which another or others have a duty or obligation to the subject or no right to prevent the subject from acting.

The problem, of course, is that *ius* in Latin is even more ambiguous than is «right» in English. *Ius* in Latin (like *diritto* and *Recht*, etc.) can mean a whole body of normative rules, a legal order, as well as «right», in either sense of the English word. (The absence of this ambiguity in English is more than compensated for by the notorious ambiguity of the word «law», which can mean either *lex* in the sense of statute, or rule, or *ius* in the sense of the body of normative rules).

Michel Villey's contribution to the understanding of the language of the classical Roman lawyers was to emphasize in a way that had not been emphasized for several centuries that the word *ius* meant not only a body of normative rules, a legal order, and also (albeit in the strongest statement of his view only in late or interpolated texts)[8] a right of an individual (a right or privilege in the Hohfeldian senses) but also an objective situation that was right, in the adjectival sense of the English word. When Ulpian tells us that *iustitia est constans et perpetua uoluntas ius suum cuique tribuendi*, we should not translate «justice is the steady and enduring will to render unto everyone his right», but «justice is the set and constant purpose which allots to every man his due»[9]. In

«duties» and «no-rights»: «powers», «immunities», «liabilities» and «disabilities», categories that referred to the subject's ability or lack thereof to change the first set of categories. Perhaps the easiest illustration of all the categories may be seen in the context of tangible property, where the owner normally has the the exclusive «right» to possession (others have the «duty» to stay off), the «privilege» of use (others have «no-right» to prevent it), and the «power» to convey this right and privilege (others being liable to or immune from the exercise of the power).

[6] Discussed in TIERNEY, *passim*; see, e.g., pp. 3-4, 48-9, 217-20.

[7] See, e.g., below, text at notes 71, 190.

[8] See above, note 4; below, note 16.

[9] D.1.1.10pr (Ulp., Reg. 1); cf. JI.1.1pr. In what follows, quotations from the *Digest* follow Mommsen's *editio magna*, first printed in Berlin in 1868 and reprinted with an English translation under the general editorship of Alan WATSON (Philadelphia: University of Pennsylvania Press, 1985), except that I have included Mommsen's suggested emendations only where they are relevant to the point at stake, and I have closed quotations with a period (full stop) even if Mommsen has a colon and have opened them with upper-case letters in some cases where he did not. The first translation given above is that of the Pennsylvania group, the second, with slight modifications, that of the corresponding passage in the *Institutes* by J. B. MOYLE, 5th ed. (Oxford: Clarendon, 1913), long before Villey. See M. VILLEY, *Suum jus cuique tribuens*, in *Studi in onore di Pietro de Francisci* (Milano: Giuffrè, 1956), 361-71.

the case of a criminal, we might imagine that the *ius* that we would allot would be severe punishment. We can hardly translate *ius* in this context as «the right of the criminal», although we certainly can translate it, «the right (or lawful) thing to do with the criminal»[10].

Villey's emphasis on the objective sense of the word *ius* in situations where it did not refer to a whole body of law is one that had not been made for some time. Consider, however, the following definitions: *Potest ius significare aequitatem, quae unicuique ex iustitia debetur ... . Unde divus Thomas (II II, quaest. 57, art. 1) hanc dixit esse primam rationem et significationem iuris, et inde optime concludit, in solutione ad secundum, ius non esse legem, sed potius esse id quod lege praescribitur seu mensuratur*[11]. And again: *[S]olet proprie ius vocari facultas quaedam moralis, quam unusquisque habet vel circa rem suam vel ad rem sibi debitam; sic enim dominus rei dicitur habere ius in re et operarius dicitur habere ius ad stipendium ratione cuius dicitur dignus mercede sua*[12]. And once again: *Iuxta aliam vero etymologiam qua ius a iubendo dicitur, proprie videtur ius legem significare, nam lex in iusssione seu imperio posita est. Et hoc modo sumunt frequenter hanc vocem iureconsulti, ut quando dicunt, hoc vel illo iure utimur vel hoc est certi et explorati iuris, et similia*[13]. We have here, of course, three different definitions: first, objective right, the meaning that Villey emphasized; second, subjective right, and, third, the general meaning of a body of law.

The author of these three definitions was Francisco Suárez, in a work first published 1612. As Tierney shows, a similar multiplicity of definitions may be found from the twelfth century onward[14]. Some authors, like Thomas Aquinas, omit the middle term, but it is to be found in Thomas's predecessors and contemporaries, particularly among the lawyers, and Villey to the contrary notwithstanding, it is not clear whether we can attribute much significance to Thomas's failure to mention it[15].

We will not, however, find these definitions in the works of the classical Roman jurists. Indeed, we will not find any general definition of *ius*[16]. The

[10] The *ius parricidae* was to be shut up in a sack of vipers and thrown into the Tiber. TIERNEY, 14. The phrase *ius parricidae* does not occur in Roman law and the cited article by Villey does not say that it does, but the example is too good to leave out. Actual examples, however, of instances where *ius* is ascribed to a person and which cannot bear the translation «right» are quite few. For possible instances, see below, text and note 92 (*uniuersum ius*); text and note 121 (*ius liberti*). Cf. below, note 38 (*ius fluminis*). The puzzling *ius non altius tollendi* (a duty rather than a right, as we understand it) is probably best understood, depending on the context, either as the right of the holder of the dominant land (that his neighbor not build higher) or, perhaps very occasionally, as a shorthand for the formula *ius ei altius tollendi non esse*. See below, note 72 and Appendix I (under «aedif»).

[11] FRANCISCO SUÁREZ, *De legibus*, 1.2.4, ed. L. PEREÑA, Corpus Hispanorum de Pace, 11 (Madrid: Consejo Superior de Investagaciones Cientificas, 1971), 24. See TIERNEY, 303.

[12] SUÁREZ, 1.2.5, pp. 24-5.

[13] ID., 1.2.6, p. 26.

[14] TIERNEY, 58-77.

[15] ID., 22-7.

[16] The closest we come is D.1.1.11 (Paul. Sab. 14); cf. D.1.3.41 (Ulp., Inst. 2). Hence, we agree with the weak form of VILLEY's argument (*Droit subjectif*, 226): «La notion de droit subjectif ... n'est pas l'objet à Rome d'une véritable élaboration scientifique». There is, however, a substantial gap between this claim and the claim (above, note 4) that it did not exist.

classical Roman jurists are, however, notoriously chary of definitions[17] (*obligatio* is another key term that does not seem to have been defined by the classical jurists.)[18]. Hence, it is not clear that we can attach much significance to the fact that the classical jurists do not define the term *ius*.

What is clear is that the classical jurists frequently used the word *ius* in a subjective sense[19]. No less than 191 times in the *Digest* is someone said to have *ius* (*ius habere*)[20]. The range of *iura* so described is broad indeed. They include *iura* of both public and private law. They include *iura* in the law of persons, of things, and of actions. It is true that in the second category we find *iura* in the area that we would call property more frequently to than in the area of obligations, but the latter are not wanting[21].

Equally common is the expression that *ius* belongs to someone, expressed either by the verb «to be» with the dative (*ius esse alicui*) or with the possessive adjective or pronoun (*ius meum, tuum, suum, nostrum, alienum, eius, eorum, alterius*, etc.)[22]. Here, too, the range of *iura* so described is broad. A more technical variant of this usage is the phrase in the law of persons that someone is *sui iuris* «of his own right» or *alieno iure subiectus* «subject to another's right», meaning that the person in question either has legal capacity on his own, or is in the power, *manus*, or *mancipium* of another[23].

Let us examine a subset of these usages more carefully. There are, as we have said, at least 191 places in the *Digest*, where someone is said to have *ius* (*ius habere*). There are also at least 103 places in which a given *ius* is said to belong to someone (*ius esse alicui*)[24]. Analysis of these instances should give us a good idea of both the range and the possible limits of the Roman jurists' conception of

[17] *Omnis definitio in iure ciuili periculosa est: parum est enim, ut non subuerti posset.* D.50.17.202 (Iau., Ep. 11). Whatever the original context and meaning of this famous aphorism (see, e.g., P. STEIN, *Regulae iuris* [Edinburgh: University Press, 1966], 70-1), the absence of classical definitions of many key terms indicates the jurists' wariness of definitions.

[18] See SCHULZ, *Classical Roman Law* (Oxford: Clarendon, 1951) [=CRL], 455-6, and sources cited. But see D.44.7.3pr (Paul., Inst. 2), which modern criticism might accept as substantially classical. See M. KASER, *Das römische Privatrecht*, Handbuch der Altertumswissenschaft X.3.3.1 (München: Beck, 1971) [=RPR], 479 and n. 4.

[19] Since my concern here is with the *Digest* as it was known in the Middle Ages, I have paid relatively little attention to the problem of interpolation. (The number of instances of *ius* in the subjective sense is so great, however, that it seems highly unlikely that all were interpolated).

[20] See KASER, *'Ius'-Begriff*, 67 and nn. 64-65. My count differs from Kaser's because I have excluded duplicates. I say «no less than» because the count is based on the *Vocabularium Iurisprudentiae Romanae*, 5 vols. in 7 (Berlin: Reimer; De Gruyter, 1903-1987) [=VIR], 3.22.8 to 3.24.34, 4.133.24-34, and the cross-references therein, which I then checked against the original. This checking produced a number of other instances, and the possibility exists that there are other examples which both the VIR and I missed.

[21] See below, text at notes 171-192.

[22] KASER, *'Ius'-Begriff*, nn. 66-72.

[23] ID., nn. 74-75.

[24] ID., p. 67 and n. 66 (VIR, 3.1040.49 to 3.1041.19, 5.834.46 to 5.835.53, 5.843.27-32). (This excludes the citation to «*ius tibi esse*, Pomp., 1.521.34» which is not at the cited place, nor in any extract from Pomponius from pp. 510-30 of vol. 1 of the Mommsen *Digest*, nor at 2.521, nor in any extract from Pomponius at line 34 from pp. 500-99. See above note 20, for the method used in selecting the passages under *ius habere*.) We call this collection a «sample». It is not, of course, a random sample but one deliberately biased to find subjective uses of the word *ius*. It is, however, a sample of all uses of the word *ius* in the *Digest*, and, we believe, that it is a relatively unbiased sample of the subjective uses.

subjective right[25]. While analysis of a broader group, including, for example, the uses of *ius* in connection with the possessive noun, adjective, or pronoun might change the proportion of different kinds of uses, an unsystematic examination of these uses indicates that it would not change them in broad outline[26].

Iura in re aliena. By far the most common context (115 out of 294, or 39%) for these statements of subjective right is that of the law of servitudes and the penumbra of the law of servitudes that Anglo-American lawyers call «nuisance»[27]. The rights involved concern building or preventing building (30) (*ius aedificandi* or *aedificare*, *aedificatum* or *protectum habere*, *altius tollendi* or *tollere*, *opus nouum faciendi*, and their negatives); rights of way and their expansion and negation (21) (*ius ire* or *eundi*, *agere* or *agendi*, *uiam habere*, *iter actumque reficere* or *reficiendi*); rights of *usus*, with or without *fructus* (18) (*ius utendi* or *uti* and/or *fruendi* or *frui*); getting, or getting to, water (16) (*ius aquam quaerere*, *hauriendi et adeundi*, *ducere* or *ducendi*, *retinere*, *ius aquae* or *aquae cottidianae*, *ius riuum reficiendi*); various rights of *immittere*, letting or putting out something, or letting or putting in something (10) (*ius luminis immittendi*, *immittendi stillicidium*, *stillicidii immitendi*, *tigni immittendi*, *tigna immissa habere*, *aquam immittere*, *fumum immittere*)[28]; burial of the dead (7) (*ius mortuum inferendi* or *inferre*, *facere sepulchrum uel monumentum*, *iura sepulchrorum habere*); and a miscellaneous collection (13), including some traditional servitudes (*ius compascendi*, *oneris ferendi*, *parietem reficere*, *pecoris ad aquam appellendi*), and some untraditional (*ius aliquid positum in eo loco non habere*; *crustam* [sc. *in terra aliena*] *habere*; *terram, rudus, saxa iacere* [*et*] *posita habere*).

Most of these rights are subjective liberty rights («privileges» in Hohfeld's terminology). They involve a state of legal affairs in which someone may choose to act, or not, and someone (normally the owner of the burdened property) has no right to compel or prevent the behavior. A few of these rights are claim rights («rights» in Hohfeld's terminology), in which the holder of the right can require the performance of a duty (in all but one case a duty not to do something)[29] by the holder of the burdened land. All of these rights involve human activity (sometimes in conjunction with beasts), or, in a few cases, stopping human activity. All of these rights are ascribed in these passages to a particular individual (or, occasionally, a group). All of these passages will bear the translation into modern English of «A has a right to X» or «the right to X belongs to A». Most of them will not bear the translation «This is the objectively right thing in this situation», or «This is the law of this situation». Anyone who is seeking to argue that the Romans did not have a conception of subjective rights must come to grips with these passages.

Villey, of course, was aware of these passages, and he, and his followers, made a number of arguments about them, some of which can be easily dismissed and

[25] See above, note 19, for the problem of interpolations.

[26] See the examples cited in KASER, *'Ius'-Begriff*, 67-71, and accompanying notes.

[27] These are listed in Appendix I.

[28] We include here one instance where the water is said to *fluere* rather than *immittere*. D.8.5.13 (Proc., Ep. 5).

[29] The exception is the servitude *oneris ferendi*. D.8.5.6.2 (Ulp., Ed. 17): D.8.5.8pr (*id.*).

others of which require more careful consideration. The first argument is that *ius* may have been used subjectively in popular speech, but not in the technical vocabulary of the law[30]. Occasionally a jurist would adopt the popular usage, but not when he was speaking carefully. The very number of these passages would suggest either that the jurists frequently spoke carelessly, or that the argument is wrong. We can rely, however, on more than statistics. The surviving fragments of the urban praetor's edict, the most technically worded of all Roman legal documents, contain no less than six instances of the phrase *ius alicui esse* in contexts where subjective right must be meant[31]. The late Max Kaser argued that this phrase was derived from the ancient formula of the *legis actio sacramento in rem*[32]. It suffices to say here that the notion of subjective right was in the praetor's edict as it was consolidated by Julian.

More serious are a series of arguments that Villey and his followers made about the Romans' conception of *iura* in general and *iura in re aliena* in particular. They argued (1) that *iura in re aliena* adhered to the land, not to a given person; (2) that they were a narrow subclass of what we would call rights, never being applied, for example, to what we would call the right of ownership (*dominium*); (3) that *iura* in general were classified as a «thing» (*res*); and (4) that they were the product of an official decision of what was right in a particular situation (*ius dicere*) and hence could be used to speak of what we would call rights or of what we would call duties or even penalties[33]. We deal with the first and portions of the fourth argument here. Consideration of the rest requires analysis of more of our passages.

The concept of *iura in re aliena* is certainly Roman, even if the phrase is not[34]. A servitude cannot exist without there being burdened property (normally land), the ownership of which is in another[35]. One cannot have a servitude in one's own property[36]. Praedial servitudes belong to a person in his or her capacity as owner of other land. Transfer of the burdened or benefited land carries the burden or the benefit of the servitude with it. Granted these facts, it is not surprising that

[30] Hints of this argument may be found in VILLEY, *Droit subjectif*, 223-4. Elsewhere he argues that the usage is post-classical. E.g., *Sens de* jus in re, 435-6.

[31] See below, text and notes 60, 173; cf. below, note 62 (*ius habere*). The translation proposed by VILLEY (*Droit subjectif*, 219: *le* jus *(objectif)* existe *au benéfice de quelqu'un*) strikes me as tortured. It is true that the phrase *esse alicui* can be used of things (like one's fortune or one's nose) over which one has no control, but that fact does not make one's fortune or one's nose any less subjective, and the phrase is as often used of things that are the property of someone. See *Oxford Latin Dictionary* (Oxford: Clarendon, 1982), *s.v.* sum (A.10). *Ius esse alicui* is «the right belongs to someone» in English and, more literally, *le droit est à quelqu'un* in French.

[32] KASER, *'Ius'-Begriff*, 69-70.

[33] See VILLEY, *Droit subjectif*, 224-6; *Sens de* jus in re, *passim*; *Le 'Jus in re'*, 192-5.

[34] See SCHULZ, CRL, 334-5. For what follows, see *id.*, 381-99. For qualifications, see below, note 42.

[35] I use the term «servitude» here in the broad sense, to include the so-called «personal servitudes». See SCHULZ, CRL, 382-3.

[36] E.g., D.7.6.5pr (Ulp., Ed. 17): *Uti frui ius sibi esse solus potest intendere, qui habet usum fructum, dominus autem fundi non potest, quia qui habet proprietatem, utendi fruendi ius separatum non habet: nec enim potest ei suus fundus seruire: de suo enim, non de alieno iure quemque agere oportet.*

we occasionally find it said that land owes or is burdened with or is owed a servitude[37]. Once it is said that a given stream has a servitude-like *ius*[38].

These usages might lead one to think that when the Romans spoke of *iura in re aliena*, they were speaking of the objective legal situation with regard to the land and not of anyone's subjective rights. Such is not the case, however. If occasionally the land is said to have the benefit or the burden of a servitude[39], there are many more instances in which the person who holds the right is said to have it or the person who holds the burdened land is said to owe it. The right is a real one, in the sense that it is established by an *actio in rem*. This fact, however, does not make it any less of a subjective right for the one who holds it. If it is appurtenant to a given piece of land, the holder of the right will lose it if he parts with the land, but while he holds the benefited land, it is his subjective right, just as much as the rights that he has that are associated with his personal status.

Where the fact that the servitude is a real right does make a difference is not in the nature of the right but in the nature of the corresponding duties. The owner of the burdened land cannot be sued *in personam* for breach of these duties (though he may be subject to an interdict and/or be required to give a *cautio*, which would make him personally liable), and in the few instances in which affirmative obligations are imposed on him, he may avoid them by abandoning the land[40].

Before proceeding to consider Villey's arguments more fully, let us consider once again the contents of our sample. If almost 40% of the usages of *ius habere* and *ius esse alicui* are in the context of *iura in re aliena*, more than 60% of them are not. Here categorization is more difficult, and there is some overlap, so that single categories may be somewhat arbitrary. Broadly speaking, however, the 180 remaining usages may be categorized as follows: 69 (23% of the total) deal with property rights in a broader context than that of a specific *ius in re aliena* (sometimes, though not always, including the rights of owners); 55 (19%) deal

[37] E.g., D.8.3.23.3 (Paul., Sab. 15): *Quaecumque seruitus fundo debetur, omnibus eius partibus debetur ... . si tamen fundus, cui seruitus debetur, certis regionibus inter plures dominos diuisus est, quamuis ominibus partibus seruitus debeatur.* D.8.2.24 (Paul., Sab. 15): *Cuius aedificium iure superius est, ei ius est in infinito supra suum aedificium imponere, dum inferiora aedificia non grauiore seruitute oneret quam pati debent.* D.8.5.4.7 (Ulp., Ed. 17) (a nice mixture of the personal and the real): *habeo aedes, quibus sunt uicinae Seianae et Sempronianae, Sempronianis seruitutem debeo, aduersus dominum Seianarum uolo experiri altius me tollere prohibentem: in rem actione experiar: licet enim seruiant aedes meae, ei tamen cum quo agitur non seruiunt: hoc igitur intendo habere me ius altius tollendi inuito eo cum quo ago: quantum enim ad eum pertinet, liberas aedes habeo.*

[38] D.41.1.56pr (Proc., Ep. 8): *flumen istud, in quo insulam contra frontem agri tui enatam esse scripsisti ita, ut non excederet longitudinem agri tui, si alluuionis ius habet ... .* Mommsen would insert *is* after *alluuionis*, which would make the *ager* have the *ius alluuionis*. Whichever is the case, we have either an extraordinary instance of personification, or an objective use of the word *ius*. The text is not included in our sample, but it is the only one with the phrase *ius habere* or *ius esse alicui* that had to be so excluded.

[39] See above, note 38, for the only example in the sample of phrases built around *ius habere*. See above, note 37, where it is said *rei debere seruitutem*, and below, note 40, where it is said *rem debere seruitutem*.

[40] D.8.5.6.2 (Ulp., Ed. 17): [*P*]*ossit quis defendere ius sibi esse cogere aduersarium reficere parietem ad onera sua sustinenda. Labeo autem hanc seruitutem non hominem debere, sed rem, denique licere domino rem derelinquere scribit.*

with rights of what modern, and perhaps ancient[41], authors call the law of persons; 28 (10%) deal with public rights, normally of public officials; 14 (5%) deal with rights associated with the law of actions and no substantive body of law, and 13 (4%), with rights associated with the law of obligations. Each of these categories deserves further analysis:

Property rights in broader contexts. As intimated above, standard Roman legal terminology gives priority to ownership (*dominium*) and describes lesser rights in a thing as, to use the modern term, *iura in re aliena*. This means that frequently the owner is said to have the thing (*rem/corpus habere*), while the holder of a lesser right is said to have a right (*ius habere*). Villey argued from this undeniable fact that the Roman lawyers did not conceive of *dominium* as a right or, to use modern Anglo-American terminology, «a bundle of rights». *Ius*, at least in the context of property, was, so Villey seems to say, properly confined to *iura in re aliena*, or, at least, to a *ius* less than ownership[42].

There are texts in our sample that support Villey's view. There are a number of texts in which property rights are spoken of broadly or outside the context of traditional *iura in re aliena*, but the context makes clear that we are dealing with rights less than ownership: *quicquam iuris in pignore habere*[43], *ius pignoris in redempto habere*[44], *ius expellendi heredem non habere* [sc. *eum cui legatorum fideiue commissorum nomine non cauetur missum in possessionem*][45], *plus iuris in percipiendis fructibus habent* [sc. *bonae fidei possessores quam fructuarii*][46]. The most notable support for the Villey thesis is provided by those texts that contrast a *ius* in the thing with the thing itself, or with property in the thing: *Siue corporis dominus siue is qui ius habet (ut puta seruitutem) de damno infecto caueat, puto eum repromittere debere, non satisdare*[47]. *[S]i ... alii fundum uectigalem legauerit, non uideri proprietatem rei legatam, sed id ius quod in uectigalibus fundis habemus*[48]. *[E]t generaliter siue in corpore siue in iure loci, ubi aqua oritur, uel in ipsa aqua habeat quis ius, uoluntatem eius esse*

[41] At a minimum GI.1.9 and GI.2.1 mean that *ius personarum* was a phrase that was thinkable in post-classical law. See F. DE ZULUETA, ed., *The Institutes of Gaius* (Oxford: Clarendon, 1946), 1:4 and n. 2, 66 and n. 1.

[42] The argument is most fully developed in VILLEY, *Sens de* jus in re. To the extent that he is arguing that the modern notion of *iura in re aliena* is misleading, and that classical jurists conceived, at least at times, of servitudes as incorporeal things independent of the *res aliena*, I will not quarrel with him here, nor will I quarrel with his interpretation of the passages that speak of a *ius domini* or *ius dominii*, because most of these passages are not found it our sample. What I will quarrel with is his implication that *iura*, in the sense of subjective rights, were not contained within *dominium* and that *iura*, in the sense of subjective rights, could not include *dominium*. Hence, in the following paragraphs, we seek to undercut the arguments in the massive note 26 in *id.*, 426-7.

[43] D.20.1.28 (Paul., Qu. 3).

[44] D.49.15.19.9 (Paul., Sab. 16).

[45] D.36.4.5 (Ulp., Ed. 52).

[46] D.22.1.25.1 (Iul., Dig. 7).

[47] D.39.2.13.1 (Ulp., Ed. 53).

[48] D.30.71.6 (Ulp. Ed. 50) Cf. D.30.71.5: *Si fundus municipum uectigalis ipsis municipibus sit legatus ... quamuis fundus uectigalis municipum sit, attamen quia aliquod ius in eo is qui legauit habet, ualere legatum* [sc. *Iulianus scribit*].

spectandam placet[49]. *[Q]ui bona fide absunt ius non corrumpitur, sed reuersis defendendi ex bono et aequo potestas datur, siue domini sint siue aliquid in ea re ius habeant, qualis est creditor et fructuarius*[50]. There is at least one other example in our sample[51].

In some cases, however, where this contrast seems to be being made, the passage turns out on closer examination to be more ambiguous: *Si quid alicui licite fuerit relictum uel ius aliud, quod ipse ... habere non potuit ...*[52]. If we read this text as it is in the *Florentinus*, the contrast is clear: «If something is properly left to someone [i.e., ownership], or another right [i.e., less than ownership], that he cannot have...». If, however, we read the text *secundum Graecos*, it is *ius aliquod* (τι δίκαιον), and we translate «or any right», i.e., including ownership. Again, *si ius* ἐμφυτευτικὸν *uel* ἐμβατευτικὸν *habeat pupillus, uideamus, an distrahi hoc tutoribus possit*[53]. This seems clear enough; the *ius* ἐμφυτευτικὸν *uel* ἐμβατευτικὸν is being contrasted with the thing itself. But what then are we to make of the following sentence: *et magis est non posse, quamuis ius praedii potius sit*[54]. Clearly here *ius praedii* means ownership, or, at least, any right greater than ἐμφυτευτικὸν *uel* ἐμβατευτικὸν, including ownership.

Even some of the passages given in the next previous paragraph have their ambiguities. If *is qui ius habet* is being contrasted with a *dominus* in the passage about the *potestas cauendi*[55], the *potestas cauendi* is itself described as a *ius* (*ius non corrumpitur*), which belongs to the *dominus* and to *is qui ius habet* alike. And if the passage about water rights[56] clearly contrasts an interest *in corpore* with one *in iure*, it seems to describe both as *ius*, and it also deals with someone who *in ipsa aqua habeat ius*. This last may not be ownership[57], but it is not a *ius in re aliena* either.

But we need not rely on these possibly ambiguous passages. No less then 21 of our 72 instances of «property rights in the broad» include the rights of owners within the term *ius*. This includes most notably instances in which someone is said to have no right in a thing or to do something. It would make no sense in these passages if the negation were only of *iura in re aliena*; the negation must be of all rights, including those of owners[58]. *Ius*, including rights of ownership, is also used quite frequently in a positive sense: *plus iuris habere* (including rights

[49] D.39.3.8 (Ulp., Ed., 53). Whether Ulpian said this has been questioned. See E. LEVY and E. RABEL, ed., *Index interpolationum quae in Iustiniani Digestis inesse dicuntur* (Weimar: H. Böhlau, 1929-1935) [=Index Itp.], *loc. cit.* But that does not concern us here. See above note 19.

[50] D.9.4.30 (Gai., Ed. urb., *de damno infecto*); cf. D.39.2.19pr (*id.*) (almost the same).

[51] D.47.8.2.22 (Ulp., Ed. 56). Here *res in bonis* is contrasted with *res ex bonis* (e.g., *commodata, locata, pignerata, deposita, bona fide possessa, «siue usum fructum in ea habeam uel quod aliud ius»*), and then it is said that the distinction makes no difference for purposes of the *actio ui bonorum raptorum*.

[52] D.30.114.5 (Marcian., Inst. 8). The passage continues: *alius tamen hoc habere potuit: quanti solet comparari tantam aestimationem accipiet.*

[53] D.27.9.3.4 (Ulp., Ed. 35).

[54] ID.

[55] D.9.4.30, above, at note 50.

[56] Above, at note 49.

[57] See JI.2.1.1.

[58] D.10.1.8pr (Ulp., Op. 6) (*loca in quibus ius non habent*); D.32.20 (Ulp., Fid. 6) (*nullum quidem ius in ipsam rem habere*); D.9.2.29pr (Ulp., Ed. 18) (*ius ponendi* [sc. *laqueos*] *non habere*); D.48.20.8.4 (Macer, Pub. iud. ?) (*fisco in dotem ius non esse* [restored from Greek]).

of ownership)[59], *utrum ius habuerit faciendi, an non* (owners must be included; see above on negation)[60], *ius donandi, uendendi, concedendi* (preeminently rights of ownership)[61]. Perhaps the most obvious instance is: *Ius habet opus nouum nuntiandi, qui aut dominium aut seruitutem habet*[62].

Twelve instances, not included in the above, involve the *ius prohibendi*. This right is frequently associated with ownership: *quamquam enim actio negatiua domino competat aduersus fructuarium, magis tamen de suo iure agere uidetur quam alieno, cum inuito se negat ius esse utendi fructuario uel sibi ius esse prohibendi*[63]. *Nec solum domino haec actio* [the *actio in factum* mentioned in the previous fragment, to compel someone to dig up a corpse wrongfully buried] *competit, uerum ei quoque, qui eiusdem loci habet usum fructum uel aliquam seruitutem, quia ius prohibendi etiam hi habent*[64]. We must say that the holder of a servitude has the *ius prohibendi*; in the case of the *dominus*, it goes without saying. In other instances, involving the *nuntiatio operis noui*, it seems to be assumed that owners are included[65].

Particularly interesting are usages involving the rights of co-owners: *Si plurium dominorum rei opus noceat, utrum sufficiet unius ex sociis nuntiatio* [sc. *operis noui*] ... *? et est uerius ... esse singulis nuntiare necesse, quia et fieri potest, ut nuntiatorum alter habeat, alter non habeat ius prohibendi*[66]. *Si in area communi aedificare uelis, socius prohibendi ius habet, quamuis tu aedificandi ius habeas a uicino concessum, quia inuito socio in iure communi non habeas ius aedificandi*[67]. *An unus ex sociis in communi loco inuitis ceteris iure aedificare possit, id est an, si prohibeatur a sociis, possit cum his ita experiri ius sibi esse aedificare, et an socii cum eo ita agere possint ius sibi prohibendi esse uel illi ius aedificandi non esse: et si aedificatum iam sit, non possit cum eo ita experiri ius tibi non esse ita aedificatum habere, quaeritur. et magis dici potest prohibendi potius quam faciendi esse ius socio, quia magis ille, qui facere conatur ut dixi, quodammodo sibi alienum quoque ius praeripit, si quasi solus dominus ad suum arbitrium uti iure communi*[68] *uelit*[69].

The last passage shows, as does one other quoted above[70], that establishing the *ius prohibendi* could be the functional equivalent of the conceptually troublesome *actio negatiua* or *contraria* on a servitude. Establishment of either

[59] D.41.3.15 (Paul., Plaut. 15) (ownership strongly indicated because we are speaking in the context of usucapion); D.50.17.160.2 (Ulp., Ed. 76).

[60] D.43.24.1.2 (Ulp. [quoting Ed. pr. urb.], Ed. 71) (2 instances).

[61] D.50.17.163 (Ulp., Ed. 55) (2 instances).

[62] D.43.25.1.3 (Ulp., Ed. 70). Less obvious are: *ius publicandi habere* and *Quo ex castello illi aquam ducere ab eo, cui eius rei ius fuit, permissum est.* D.43.8.2.21 (Ulp., Ed. 68); D.43.20.1.38 (Ulp. [quoting Ed. pr. urb.], Ed. 70). Each of these phrases could refer to the owner, but in both the context suggests that it is more likely it is a public official who has the right.

[63] D.7.6.5pr (Ulp., Ed. 17).

[64] D.11.7.8.4 (Ulp., Ed. 25).

[65] D.39.1.1pr (Ulp., Ed. 52); D.39.1.1.17 (Ulp., Ed. 52); D.39.1.21pr (Ulp., Ed. 52); D.43.25.1pr (Ulp., Ed. 71); D.43.25.1.2 (Ulp., Ed. 71).

[66] D.39.1.5.6 (Ulp., Ed. 52) (2 instances).

[67] D.8.2.27.1 (Pomp., Sab. 33).

[68] *Mo. ins.* re?

[69] D.8.5.11 (Marcell., Dig. 6) (2 instances).

[70] D.7.6.5pr (Ulp., Ed. 17); see above note 63; cf. note 36.

of them made clear that another was invading the owner's rights[71]. At a minimum this means that the jurists, like Hohfeld, could conceive of these situations as «jural relationships». The liberty right of the holder of a *ius in re aliena* entails a correlative absence of *ius prohibendi* in the owner, while the absence of a liberty right entails a correlative *ius prohibendi*[72].

The presence of this functional equivalent also raises the question whether we should assume that whenever a negation of a servitude is mentioned, we should not assume that its positive version is also assumed. Consider: *Si arbor ex uicini fundo uento inclinata in tuum fundum sit, ex lege duodecim tabularum de adimenda ea recte agere potes ius ei non esse ita arborem habere*[73]. And: *Si arbor in uicini fundum radices porrexit, recidere eas uicino non licebit, agere autem licebit non esse ei ius (sicuti tignum aut protectum) inmissum habere*[74]. Can we assume that, here too, an alternative was to establish a *ius sibi esse prohibendi eum arborem ita positam* or *radices sic inmissas habere*? The use of such phrases in other contexts suggests that such an idea was not far from the minds of at least some jurists[75]. In one notable instance, the owner's right is stated negatively as an exception, when the positive version of it would encompass a far larger class: *Domum suam reficere unicuique licet, dum non officiat inuito alteri, in quo ius non habet*[76]. If *officere* is taken to mean *officere luminibus*, then the class of persons *in quibus ius habet* is much broader than those *in quibus ius non habet*, particularly since, by statute, servitudes could not be acquired by usucapion[77].

Other instances of the use of the word *ius* in the context of co-ownership show that the jurists were quite willing to conceive of the *ius* or *iura* of owners when the occasion demanded: *Parietem, qui naturali ratione communis est, alterutri uicinorum demoliendi eum*[78] *et reficiendi ius non est, quia non solus dominus est*[79]. Lest one think that *solus dominus* in this passage is meant to exclude only the *ius in re aliena* of the other, consider this passage: *Si is qui duas aedes habebat unas mihi, alteras tibi legauit et medius paries, qui utrasque aedes distinguat, interuenit, eo iure eum communem nobis esse existimo, quo, si paries tantum duobus nobis communiter esset legatus, ideoque neque me neque te agere posse ius non esse alteri ita immissas* [sc. *trabes*] *habere: nam quod communiter socius habet, et in iure eum habere consistit*[80]: *itaue de ea re arbiter communi diuidundo sumendus est*[81]. The *actio coummuni diuidundo* also produces this remarkable passage from Julian: *Iudicium communi diuidundo,*

[71] The same may be said of most, if not all, of the examples of the *actio negatiua* listed in Appendix 1.

[72] In this regard it might be noted that the paucity of Latin legal vocabulary is more notable on the negative side than on the positive. We would say that where the owner has a *ius prohibendi*, others have a duty not to engage in the prohibitable conduct. But legal Latin has no word for duty in this context (*obligatio* being confined to actions *in personam*). Hence, the awkward *ius non altius tollendi*, etc.

[73] D.43.27.2 (Pomp., Sab. 34).

[74] D.47.7.6.2 (Pomp., Sab. 9).

[75] See the examples of the *actio negatiua* in Appendix 1.

[76] D.50.17.61 (Ulp., Op. 3).

[77] See KASER, RPR, 444-5, and sources cited.

[78] *Mo. del.*

[79] D.8.2.8 (Gai., Ed. prou. 7).

[80] *Mo.* item iure me habere?

[81] D.33.3.4 (Iau., Ep. 9).

familiae erciscundae, finium regundorum tale est, ut in eo singulae personae duplex ius habeant agentis et eius quocum agitur[82]. Although the Pennsylvania group translates this passage objectively: «the individual participants have the double legal status of plaintiff and defendant», it can equally well bear a subjective translation: «each person has the double right of bringing the action and defending it».

The same conjunction of *ius* with ownership can be found in a number of passages that deal with rights in inheritances. Again, the easiest to associate with ownership is the negative one: *quid si* [*possessor hereditatis*] *nihil iuris* [*in hereditate*] *se sciat*[83]. This clearly is intended to exclude, among others, rights of ownership. The positive rights in question may be those of the heir: *an heres partem reuocandi a legatariis ius* [sc. *lege Falcidia*] *habeat*[84], *emancipatus praeteritus plus iuris scriptis heredibus tribuat, quam habituri essent*[85], *ius antiquum, quod* [*pater*] *et sine manumissione habebat*[86], *quibus adcrescendi ius est* or *ius adcrescendi non habere*[87]. Or they may be those of the testator: *est igitur rationi congruens, ne plus iuris circa personam substituti testator habeat, quam habuerat in eo, cui eum substituebat*[88]. Or they may be those of creditors (the least easy to associate with ownership, although, in context, they may lead to a *missio in possessionem*): *creditores nihil iuris in bonis pupilli habuerint*[89].

Closely associated with rights in an inheritance are subjective rights that are normally associated with the law of persons, but which affect inheritance profoundly. Principal among these is the *ius testamenti faciendi* (or *ius testandi*) and the closely related *ius fidei committendi*. These phrases occur nine times in our sample, and in all instances they are so closely associated with ownership that they may be said to be an attribute of ownership[90]. These instances are particularly striking, because there is an objective way of stating the same right: *is qui testamenti factionem habet*[91].

It might be suggested that rights with regard to an inheritance are different from those associated with other kinds of ownership, because an inheritance could include all kinds of *iura*, including property rights less than *dominium* and obligations. Hence, the jurists were less reluctant to speak of a *ius* with regard to

[82] D.10.1.10 (Iul., Dig. 51).

[83] D.5.3.49 (Pap., Qu. 3).

[84] D.35.2.61 (Iau., Ep. 4).

[85] D.37.4.8.14 (Ulp., Ed. 40).

[86] D.37.12.1.6 (Ulp. (Iul.), Ed. 45).

[87] D.37.1.6pr (Paul., Ed. 41): A difficult passage, but it is clear that the right includes, perhaps is limited to, the *scripti heredes*, who, in these circumstances, own part of the inheritance. D.7.2.1.4 (=Frag. Vat. 78) (Ulp. (Iul.), Ad Sab. 17): Another difficult passage. The lapse that might lead to the *ius adcrescendi* is probably that under the *ll. Iuliae*. In any event, we are clearly asking about the rights of owners, because the passage concerns *duo heredes instituti quibus deducto usu fructu proprietas legetur*.

[88] D.35.2.87.7 (Iul., Dig. 61.).

[89] D.42.5.28 (Iau., Ep. 1).

[90] D.30.2 (Ulp., Fid. 1); D.29.7.7pr (Marcian., Reg. 2); D.37.11.1.8 (Ulp., Ed. 39); D.32.1.2 (Ulp., Fid. 1); D.32.1.4 (*id.*) (*ius testamenti faciendi et fidei committendi*); D.28.1.6 (Gai., Ed. prou. 17); D.36.1.13 (Ulp., Fid. 4); D.37.1.3.5 (Ulp., Ed. 39).

[91] E.g., D.5.2.17.1 (Paul., Qu. 2); D.28.1.18pr (Ulp., Sab. 1). See H. HEUMANN and E. SECKEL, *Handlexikon zu den Quellen des römischen Rechts*, 9th ed. (Jena: Fischer, 1907) [=Heumann-Seckel], *s.v.* factio.

an inheritance than they were in the case of simple ownership of a single corporeal thing. This lack of reluctance is most apparent in the broadest uses of the word *ius* in conjunction with inheritances: *Hereditas nihil aliud est, quam successio in uniuersum ius quod defunctus habuerit*[92]. This passage provides some support for Villey's view of the meaning of *ius*, because the *uniuersum ius* referred to probably includes not only the credit side of the obligations but also the debit side[93]. A similar inclusiveness is probably also implied in three passages that deal with the sale of rights in inheritances[94].

The possibility that we are dealing with rights broader than ownership of corporeal things is also present in some of the instances that speak of a *ius uindicandi* or *uindicationis* or *uidicandorum bonorum*. In two instances, for example, a mother is denied the *ius uindicandorum bonorum intestatorum filiorum* under the *sc. Tertullianum*[95]. *Bona* in this context probably includes *iura in re aliena* and obligations. In other instances, however, the phrase refers to a specific corporeal thing: *Si is, cui legatus sit Stichus aut Pamphilus, cum Stichum sibi legatum putaret, uindicauerit, amplius mutandae uindicationis ius non habet*[96]. And corporeal things are probably also referred to in the following phrase: *Meum est, quod ex re mea superest, cuius uindicandi ius habeo*[97].

There are other instances of the word *ius* being applied to the owners of specific corporeal things without the mention of *uindicatio*: *Marcellus respondit Septiciam ius, quod in his praediis habuisset, heredi suo reliquisse*[98]. Septicia had been left the *praedia* in question subject to a *fideicommissum* to transfer them to the testatrix's son. We are not told the form of the legacy; it is clearly irrelevant. Even if it was a legacy *per uindicationem* giving Septicia *dominium ex iure Quiritium*, all she had was a *ius*, granted the *fideicommissum*. Where we are told, *neque omnimodo rescindere non debemus uenditionem, quasi libertus ius uendendi non habuerit*, we know from the context that the *libertus* was *dominus rei*[99]. Where one owner succeeds to another but allows the former owner to pursue an action, we are told that the new owner will be bound by what happens in the action, *quia ex uoluntate eius de iure, quod ex persona agentis habuit, iudicatum est*[100]. We even find the *ius domini praediorum* generalized in the following passage: *bonae fidei possessor in percipiendis fructibus id iuris habet, quod dominis praediorum tributum est*[101].

The cases concerning rights of possessors follow a similar pattern to those concerning more substantive rights. When possessors are said to prevail *licet nullum ius habeant*, rights of owners are clearly being included in what is being

[92] D.50.17.62 (Iul., Dig. 6); cf. D.50.16.24 (Gai., Ed. prou. 6), where Gaius seems to be quoting Julian.

[93] See also above, note 9.

[94] See below, note 188.

[95] D.26.6.2.2 (Mod. [Seu.], Excus. 1); D. 38.17.2.23 (Ulp., Sab. 13).

[96] D.31.19 (Cels., Dig. 18).

[97] D.6.1.49 (Cels., Dig. 18). The context suggests that what *superest* is the contents of an *aedes*, the ownership of which I have lost to the owner of the soil.

[98] D.35.1.36.1 (Marcel., Resp. sing.).

[99] D.38.5.1.12 (Ulp., Ed. 44.).

[100] D.42.1.63 (Macer, App. 2). Here *ius* could be taken objectively, but it clearly applies to an owner.

[101] D.22.1.25.1 (Iul., Dig. 7).

denied[102]. In some cases, possessory rights are clearly intended to exclude ownership: [*S*]*i res aliena … ei cui ius possidendi non est per fideicommissum relinquatur puto aestimationem deberi*[103]. In some cases it seems highly likely that the holder of possessory rights does not have ownership: *Si quis metu ruinae decesserit possessione, si quidem, cum adiuuare rem non posset, id fecit, Labeo scribit integrum ius eum habere, perinde ac si in possessione perseuerassset*[104]. [*P*]*lus iuris in possessione habeat qui precario rogauerit quam qui omnino non possidet*[105]. In some cases, the relationship between possession and ownership is irrelevant: *Iusta enim an iniusta aduersus ceteros possessio sit, in hoc interdicto* [*uti possidetis*] *nihil refert: qualiscumque enim possessor hoc ipso, quod possessor est, plus iuris habet quam ille qui non possidet*[106].

We save for last the most fascinating but most troublesome in our category of broad property rights:

> Qui usum fructum traditum sibi ex causa fideicommissi desiit in usu habere tanto tempore, quanto, si legitime eius factus esset, amissurus eum fuerit, actionem ad restituendum eum habere non debet: est enim absurdum plus iuris habere *eos*, qui possessionem dumtaxat usus fructus, non etiam dominium adepti sint[107].

The question, of course, is what does the last phrase mean? The most obvious translation is the one offered by the Pennsylvania group: «[I]t is inappropriate that parties who have acquired the possession only and not the ownership of a usufruct should be in the better legal position [sc. than those who have acquired ownership]». The problem, of course, is that this makes Julian say that someone could be the *dominus* of a usufruct. If we find that impossible (Julian is, after all, the jurist who is alleged to have said that it is not false to say *fundum totum meum esse*, even if it was subject to a usufruct)[108], then we must try a more tortured translation: «[I]t is ridiculous that those who have acquired only possession of a usufruct and not also ownership [sc. of the thing] should have a greater right [sc. than those who have acquired ownership of the thing]». This, of course, raises another question: How could a *dominus* lose his ownership by non-use (*desiit in usu habere tanto tempore*)? Either way, Villey's thesis is undercut. In the first translation the supposed rigid separation between *dominium* and *iura in re aliena* is broken; in the second a *dominus* is said to have a *ius*[109].

[102] D.7.6.5pr (Ulp., Ed. 17: *quod si forte qui agit dominus proprietatis non sit, quamuis fructuarius ius utendi non habet, uincet tamen iure, quo possessores sunt potiores, licet nullum ius habeant* — an interesting combination of subjective and objective meanings of *ius*.

[103] D.30.40 (Ulp., Fid. 2). Mo. omits *non* on the basis of D.31.49.3, but that does not affect the point made here.

[104] D.39.2.15.35 (Ulp. (Lab.), Ed. 53. The context is the *missio in possessionem* of the ruin to try to make repairs, an interdict that would not be necessary if the applicant were the owner.

[105] D.41.2.36 (Iul., Dig. 13).

[106] D.43.17.2 (Paul., Ed. 65).

[107] D.7.6.3 (Iul., Dig. 7).

[108] D.50.16.25pr (Paul. (Iul.), Ed. 21). See Schulz, CRL, 386.

[109] The passage has attracted the attention of interpolationist criticism: Both Beseler and Albertario argued that the entire troublesome phrase is a post-classical addition. Index Itp., *loc. cit.* VILLEY cites D.7.6.3 (*Droit subjectif*, 223 n. 3; cf. *id.*, 225.) as an instance of *dominium* being used of a usufruct. He argues here that *dominium* came to be applied exclusively to the plenitude of legal interests in a *corpus*

Rights in the Law of Persons. The fifty-five cases (19%) of subjective rights in the law of persons are easier to classify. We have already dealt with the nine examples of *ius testamenti faciendi* and its equivalents[110]. Most of the others are also connected with inheritance. Eighteen examples deal with the rights of patrons, normally in the *hereditas* of their freedmen or emancipated sons. These range from the quite general: *ius patroni non habere*[111], *nihil iuris* [sc. *patroni*] *habere*[112], *iura patronatus habere*[113], *ius aduersus libertos habere*[114], *plenum, solidum, solum, ius patroni habere*[115]; to the more specific: *nullum ius in bonis libertorum habere*[116], *ius in bonis eius/illius* [sc. *liberti*] *habere*[117], to the quite specific: *ius accusandi ut ingratum* [*non*] *habere*[118], *ius petendae bonorum possessionis habere*[119]. These rights are highly subjective, liberty rights. The only thing that even hints at objectivity is the fact that the word *ius* is used far more often than *iura*, though the latter is not wanting[120]. One phrase in this group that could be taken as objective, *ius liberti*, from the context should not be so taken[121]. This is not the *ius* of the *libertus* (which, of course, is not a right in the modern sense but a duty or a liability), but rather the *ius* in the *libertus* (objective genitive).

The next largest group (9) concerns the rights that accrue to kinship, normally in the context of inheritance, but sometimes more generally. Here we find such phrases as *mihi ius cognationis et adfinitatis esse*[122], *iura cognationis habere*[123], *ius* or *iura consanguinitatis habere*[124], *iura filii habere*[125], *iura sui heredis habere*[126], *ius legitimum* [*non*] *habere* (in the sense of *iure ciuili* as opposed to *iure honorario*)[127]. One phrase in this group is worth particular note: *si naturales* [sc. *liberi*] *emancipati et adoptati iterum emancipati sint, habent ius*

only quite late. This concession, however, seems inconsistent with the claim made in *'Ius in re'*, 193: «Il n'existe, à ma connaissance, aucun texte classique ou attribué par Justienien à des auteurs classiques qui qualifie *dominium* de *jus in re*». That may be literally true, but if one can have *dominium* of a usufruct as late as Julian and a usufruct is concededly a *ius in re*, the fact that the full phrase is not found seems beside the point.

[110] Above, note 90.

[111] D.23.2.45.1 (Ulp., l. Iul. 3); cf. D.26.4.1 (Ulp. (Pius), Sab. 14): *Qui autem iurauit se patronum, hoc idem* [sc. *ius patroni*] *non habebit.*

[112] D.37.14.15 (Paul., l. Iul. 8); D.23.2.48.2 (Clem., l. Iul. 8); D.40.4.15 (Iul., Dig. 32).

[113] D.37.12.1.6 (Ulp., Ed. 45).

[114] D.38.2.11 (Iul., Dig. 26).

[115] D.38.2.29 (Marcian., Inst. 9); D.38.4.12 (Pomp., Ep. 12); D.38.4.10.1 (Clem., l. Iul. 12).

[116] D.25.3.9 (Paul., I. patr. sing.).

[117] D.38.2.28 (Flor., Inst. 10); D.48.20.7.1 (Paul., Portiones sing.) (so close in wording that one may be a quotation of the other, in which case read *ius* for *id* in the latter [F. *is*]).

[118] D.40.9.30pr-2 (Ulp., l. Ael. 4) (3 instances).

[119] D.38.2.36 i.f. (Iau., Ep. 8).

[120] See above, at note 113.

[121] D.26.5.13.1 (Pap., Qu. 11): *et ius quidem liberti, quod habet* [sc. *manumissor*], *quia ex causa fideicommissi manumittit, non est ei ablatum.*

[122] D.1.1.12 (Marcian., Inst. 1).

[123] D.22.6.1.2 (Paul., Ed. 44).

[124] D.38.7.6 (Hermo., Epitomae 3); D.38.16.1.11 (Ulp., Sab. 12).

[125] D.49.15.9 (Ulp., l. Iul. 4).

[126] D.28.3.13 (Gai., Inst. 2).

[127] D.37.1.6.1 (Paul., Ed. 41) (2 instances).

naturale liberorum[128]. This is the only instance in the *Digest* where the phrase *ius naturale* is used in an unambiguously subjective sense (though there are a few other possibly subjective uses)[129]. Notice that the text as we have it does not say *ius naturalium liberorum*, which would have been quite possible in the context[130]. In all cases the subjective nature of these rights is strengthened by the fact that when these texts were written *sui* and *extranei heredes* did not have to take up an inheritance and praetorian grants of *bonorum possessio* had substantially increased the options available to the kin of the deceased.

Six instances in our group concern the rights that fathers and masters have over their children and slaves: *ius imperandi* [*non*] *habere*[131], *ius manumittendi habere*[132], *ius ductionis habere*[133]. These are all clear examples of subjective liberty rights. To these should be added the bald statement of the converse proposition: *seruile caput nullum ius habet*[134].

Eleven of our instances deal with rights under other aspects of the law of persons. One is closely related to inheritance: *ius eis* [sc. *heredum obsidum qui accepto usu togae ut ciues Romani semper egerint*] *seruandum, quod habent*[135], *si a legitimis ciuibus Romanis heredes instituti fuissent*[136]. Two concern the right to kill (*ius occidendi*) an adulterer under the *l. Iulia de adulteriis*[137]. One concerns the rights of a slave or son in his *peculium* (*donandi ius eum non habere*)[138]. Three concern the *ius postliminii*[139]. One concerns the right of *collegia* to meet (*ius coeuendi*)[140]; one, the *ius anulorum*[141], and two, the absence of rights of mothers who are managing the affairs of their orphaned children (*ius actoris constituendi non habere, ius administrationis non habere*)[142]. Again, all the rights described here, with one possible exception[143], are subjective liberty rights.

Rights in public law. The twenty-eight instances in our sample (10%) of rights in public law are relatively easy to classify. Most of them concern public

[128] D.38.6.4 (Paul., Sab. 2).

[129] Below, text and notes 193-199.

[130] The phrase does not seem to have attracted the attention of interpolationist criticism. See Index Itp., *loc. cit.*

[131] D.9.2.37pr (Iau., Cass. 14) (2 instances): This *ius* may be broader than that under the private law of persons and may include public rights. D.28.5.38.2 (Iul., Dig. 30): This *ius* is confined to private law.

[132] D.49.15.12.9 (Tryph., Disp. 4).

[133] D.43.30.3.1 (Ulp., Ed. 71).

[134] D.4.5.3 (Paul., Ed. 11). The context (*ideoque minui non potest*) tends, though not quite decisively, to exclude the possibility of an objective meaning here. The problem is made more difficult by the fact that *caput*, like *ius*, can also be understood in both a subjective and an objective sense.

[135] *Mo.* haberent *?*.

[136] D.49.14.32 (Marcian., Inst. 1).

[137] D.48.5.25.3 (Macer, Pub. 1) (2 instances).

[138] D.2.14.28.2 (Gai [Iul.], Ed. prou. 1).

[139] D.49.15.12pr (Tryph., Disp. 4) (2 instances); D.49.15.19.6 (Paul., Sab. 16).

[140] D.40.3.1 (Ulp., Sab. 5). This could be taken in an objective sense if we are convinced that the jurists did not ascribe legal personality to *collegia*; the converse, however, seems to have been the case. See P. DUFF, *Personality in Roman Private Law* (Cambridge: University Press, 1938), 129-61, esp. 151-2 (discussing our text).

[141] D.27.1.44.1 (Tryph., Disp. 2).

[142] D.3.5.30.6 (Pap., Resp. 2); D.46.3.88 i.f. (Claud., Notae ad digesta Scaeu.).

[143] Above, note 140.

officials. Particularly notable are those which give to a public official the right to punish in a particular kind of way, or generally (13): *ius animaduertendi*[144], *coercendi*[145], *atrociter uerberandi*[146], *huius poenae consituendi*[147], *deportandi*[148], *damnandi rei capitalis*[149], *in prouinciam relegandi habere*[150], or, more simply (and with a remarkable future), *ius gladii habere*[151]. Included among these is one concerning the right of delegation (*ius concedendi liberam mortis facultatem*)[152] and one etymological general description: *'Territorium' est uniuersitas agrorum intra fines cuiusque ciuitatis: quod ab eo dictum quidam aiunt, quod magistratus ius eius loci intra eos fines terrendi, id est summouendi ius habent*[153]. Another group concerns the right of a public official to appoint a tutor or curator *ius tutoris* [*uel*] *curatoris dandi* or *ius dandi tutores* [*uel*] *curatores*, and, once, *ius iubendi tutelam gerere*[154]. To this should be added the one *ius excusationis* (of *mensores frumentarios*), which is probably to be thought of in the context of the obligation to serve as a tutor, though it may be broader[155]. Six instances concern other rights of public officials, some quite specific, *ius permittendi* [sc. *corpus in itinere defuncti transuehendi*][156], *ius concedendi* [sc. *domum absentis debitoris signari*][157]; some more general, *ius iudicum dandorum*[158], *ius iudicandi*[159], *cognoscendi*[160], *ius decernere, imperare, facere*[161]. Two concern the rights of inhabitants of specific cities (*ius Italicum habere*) or of an *ordo* within a given city (*ius ordini ciuitatis pretium grani statuere non habere*)[162]. One concerns the rights of individual members of the public in public places: *tantum iuris in iis*[163] *habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet*[164].

With the exception of this last (which is a normal subjective liberty right), the classification of these as subjective rights requires some explanation. When the jurists speak of the right of a public official to do something (or the absence of such a right), they are normally focusing, as do modern lawyers when they use the same phrase, on the question of competence. If a public official has the *ius*

[144] D.1.16.11 (Uen., Off. procon. 2.); D.48.3.9 (Uen., Off. procon. 1.).
[145] D.1.16.11 (Uen., Off. procon. 2).
[146] *Ibid.*
[147] D.1.19.3pr (Call., Cog. 6.).
[148] *Ibid.*; D.48.19.2.1 (Ulp., Ed. 48); D.49.7.1.3 (Ulp., App. 4).
[149] D.48.19.2.2 (Ulp., Ed. 48).
[150] D.48.22.7.6 (Ulp., Off. procon. 10).
[151] D.1.18.6.8 (Ulp., Op. 1).
[152] D.48.19.8.1 (Ulp., Off. procon. 9).
[153] D.50.16.239.8 (Pomp., Enchir. sing.)
[154] D.26.5 (rubr.); D.26.5.13pr (Pap., Qu. 11); D.27.8.1.1 (Ulp., Ed. 36); D.49.4.1.1. (Ulp., App. 1); D.26.7.17 (Pomp., Sab. 17) (*ius iubendi*).
[155] D.27.1.26 (Paul. [Marc.], Excus. sing.).
[156] D.47.12.3.4 (Ulp. [Marc.], Ed. 25).
[157] D.47.10.20 (Mod., Resp. 12).
[158] D.5.1.81 (Ulp., Op. 5).
[159] D.38.17.1.12 (Ulp., Sab. 12). This may not be a public official if we are to think of the *iudex* in the formulary system.
[160] D.50.16.46 (Ulp., Ed. 59).
[161] D.48.6.10pr (Ulp., Ed. 68).
[162] D.48.12.3.1 (Papir. [Diu. fr.], Const. 1).
[163] *Mo. add.* in iis.
[164] D.43.8.2.2 (Ulp., Ed. 68).

uerberandi, no one can say to him: «You should not have whipped that man; that's not within your power». «Right» here means «legitimate power», not quite in the Hohfeldian sense, but in the sense of capacity[165]. (We might say «jurisdiction», were it not for the fact that that word, in both Latin and English, tends to be confined to the question of competence in the judicial process.) The right in question is subjective; it inheres in the person of the official, so long as he has his office. The exercise of rights by public officials is, however, different from the usual exercise of rights by private persons. In the case of private persons, normally once we have determined that the person has a right to do something, that is the end of the matter. Law (as opposed to morality) normally has nothing more to say. In the case of the public official, however, there are normally two further legal questions that one must ask once one has determined that he has the capacity to act: First, is this factual situation one in which the law contemplates that he should exercise his undoubted power. «You should not whip that man; he has done nothing that deserves whipping». Second, in some, but not all cases, the official may have the discretion as to whether to act in a particular way. «You should not whip that man; for while he has done something for which you could whip him, in his case a lesser penalty is appropriate». If the official has no discretion, then his right is also a duty. It is interesting, and perhaps instructive, that most of the rights of public officials mentioned above were, at the time the texts were written, rights which not only gave them the power to act but also some discretion as to whether they should act, or how they should act, or both. It would seem that the word *ius* in the context of public officials came most easily to the Roman jurists in contexts in which it was most like a private, liberty right.

Procedural rights. There are fourteen instances in our sample (5%) of purely procedural subjective rights. On the civil side we have four examples of the *ius reuocandi domum* or *ius reuocandi forum*[166]; on the criminal side we have two examples of *ius accusandi*[167] and the following pair concerning the *ius accusandi* in the case of *lex Iulia de adulteriis*: *ius* [sc. *mariti*] *quod cum eo* [sc. *patre*] *aequale est, in accusationem uiduae filiae non habet pater ius praecipuum*[168]. There are two examples of the *ius postulandi* being used as a criterion for whether someone can engage in another legal act (*detegere collusionem* and *legationem fungi*)[169]. The other four examples are isolated: *non uideri ui eximi eum, cui sit ius ibi non conueniri*; *mulieres testimonii in iudicio dicendi ius habere*; *satis est ab eo cui ius agendi fuit causam esse actam*; *ius deferendi* [sc. *fisco*] *habere eum cui fideicommissum erat relictum*[170]. While the number of these

[165] A point that is made or implied in a number of texts, e.g., D.1.18.6.8 (Ulp., Op. 1); D.5.1.81 (Ulp., Op. 5); D.48.6.10pr (Ulp., Ed. 68); D.48.19.2.1 (Ulp., Ed. 48).

[166] D.4.6.28.4 (Ulp., Ed. 12); D.5.1.2.4 (Ulp., Ed. 3); D.5.1.5 (Ulp., Ed. 5); D.5.1.7 (Ulp., Ed. 7) (*reuocandi forum*).

[167] D.48.2.4 (Ulp., Adult. 2) (the original context here may be the *lex Iulia de adulteriis*, but the compilers have generalized it); D.48.4.7pr (Mod., Pand. 12).

[168] D.48.5.16(15)pr (Ulp. [Pomp.], Adult. 2); D.48.5.23(22).1 (Pap., Adult. 1).

[169] D.40.16.2.4 (Ulp., Off. cons. 2); D.50.7.5(4).1 (Marcian., Inst. 12).

[170] D.2.7.2 (Paul., Ed. 4); D.22.5.18 (Paul., Adult. 2); D.21.2.55pr (Ulp., Ed. cur. aed. 2); D.49.14.42 (Ualens, Fid. 5).

cases of procedural rights is not large, there are enough of them to indicate that the jurists had no difficulty conceiving of a subjective liberty right in an area of law that we call procedure and for which they had no term.

Obligation. There are only thirteen (4%) examples in our sample of subjective rights in the area of obligations. The word *ius* seems to have come most easily to the jurists' minds in the context of the *ius nouandi* of which there are four examples[171]. One example, *ius uendendi*, could be classified with the broad property rights, though the verb *uendere* is more frequently found in the context of contracts that in that of the law of single things or inheritances[172]. Another instance of what Anglo-American law would classify as a capacity to alienate (*ius locandi*) must be classified as a right in the area of obligations, because of the well known fact that Roman law did not give either possession or a *ius in re aliena* to the *conductor*. This example is particularly important because it comes from the praetor's edict[173]. In a third example, priority among different creditors in a pledge is being discussed, but it is clear that that the right in question (*secundus creditor nihil aliud iuris habet, nisi ut soluat priori et loco eius succedat*) is a right in the law of obligations, not in the property itself[174]. In a fourth example, also involving *pignus* or *hypotheca*, one who *ex pacto conuento* is permitted (*licuit*) to sell an *insula* (presumably if the debt is not paid) is said *idem in noua insula iuris habere* if the *insula* burns down and the debtor rebuilds it with his own funds[175]. Again, this is clearly a right in the law of obligations, not in the property itself.

The remaining examples require more discussion. The phrase *ius crediti habere* occurs three times, in *leges gemmatae*[176]. A decree of Marcus (almost certainly Aurelius [161-80]) deprived a creditor of the *ius crediti* where he had engaged in self-help. The decree closes: «[*Q*]*uisquis igitur probatus mihi fuerit rem ullam debitoris uel pecuniam non ab ipso sibi traditam sine ullo iudice temere possidere uel accepisse, eumque sibi ius in eam rem dixisse: ius crediti non habebit*»[177]. The phrase *ius crediti* appears in only one other place in the *Digest*: *Iulianus ait eum, qui uim adhibuit debitori suo ut ei solueret, hoc edicto* [sc. *quod metus causa*] *non teneri propter naturam metus causa actionis quae damnum exigit: quamuis negari non possit in Iuliam eum de ui incidisse et ius crediti amisisse*[178]. Here, there can be little doubt that the phrase is being used in a subjective sense: «he has lost his right to what has been lent». Whether the same can be said of the decree of Marcus is open to some doubt. On the one hand, the grammatically possible translation «He shall not have a right to the money lent»

[171] D.12.2.21 (Gai., Ed. prou. 5); D.46.2.31.1 (Uen., Stip. 3); D.46.2.34.pr (Gai., Uerb. obl. 3), D.46.2.34.1 (*id.*).

[172] See VIR, 5.1271.4 to 5.1279.12.

[173] D.43.9.1pr (Ulp., Ed. 68): «Quo minus loco publico, quem is, cui locandi ius fuerit, fruendum alicui locauit, ei qui conduxit socioue eius e lege locationis frui liceat, uim fieri ueto».

[174] D.20.4.12.9 (Marcian., Formula hyp. sing.).

[175] D.20.1.35 (Lab., Pith. 1).

[176] D.48.7.7 (Call. [Marc.], Cog. 5); D.4.2.13 (*id.*). The third instance, provided only in D.48.7.7, does not further the analysis: *diuus Marcus decreuit ius crediti eos non habere*.

[177] Both texts cited in note 176.

[178] D.4.2.12.2 (Ulp., Ed 11).

is supported by the only other use of the phrase in the *Digest*. On the other hand, the phrase *eumque sibi ius in eam rem dixisse* (which is something that only one who has *iurisdictio* can do) and the commonness of the *actio certae creditae pecuniae*[179] suggest that a more objective meaning may be intended here: «He shall not have an action for the money lent» or «The law of money lent shall not apply to him». We will return to this problem in our conclusion.

The last examples are the most troublesome[180]. In the first Ulpian begins by reciting from Julian the standard doctrine that the unsuccessful defendant in a *uindicatio* must turn over not only the thing vindicated but also the profits that he has acquired through the thing. This includes: *si per eum seruum* [sc. *uindicatum*] *possessor adquisierit actionem legis Aquiliae restituere cogendu*[*s est*] ... . Just how he is to *restituere* an *actio* is not stated. Ulpian then closes with the following puzzling remark: *sed fructus eius temporis, quo tempore possessus est ab eo qui euicerit, restituere non debet: sed quod dicit* [sc. *Iulianus*] *de actione legis Aquiliae, procedit, si post litem contestatam usucepit possessor, quia plenum ius incipit habere.* The Pennsylvania group's translation assumes that the *is qui euicerit* is some third party, who has obtained possession of the slave in some possessory action. This seems unlikely. The only action that we have been discussing is that between the *dominus* and the possessor; *euincere* is rarely, if ever, used to describe a recovery of possession only[181], and it is hard to see why the *dominus* would be suing the possessor in a *uindicatio* if the possessor did not in fact have possession. Without great confidence, we suggest that the putative *dominus* has obtained possession of the slave (whom he ultimately *euicerit*). After the *litis contestatio*, the period of usucapion runs out (though this does not affect the ultimate outcome of the *uindicatio*). What it does mean, however, is that the defendant in the *uindicatio* (the possessor) now has *plenum ius* to bring an action under the *lex Aquilia* against someone who has injured the slave, and it is this right that he must restore to the owner after he loses the action.

The difficulty with the last passage lies in the fact that it is shorn from its context: *Nemo damnum facit, nisi qui id fecit, quod facere ius non habet*[182]. The original context, Paulus, *Ad edictum* 64, may be the interdict *ne quid in loco publico* (and hence the original context is not the law of obligations)[183]. That interdict lies *ne quid in loco publico facias ... qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretoue principum tibi concessum est*[184]. Hence, in context, the phrase probably means that if the act is sepecifcially authorized *lege senatus consulto*, etc., it cannot *quid damni dare* within the meaning of the interdict[185]. Taking the phrase shorn of its context, Paul seems to be saying that what modern jurists sometimes call *damnum absque iniuria* does not exist, at least not in law[186]. However startling that

[179] Although there are only four examples of the phrase *actio creditae pecuniae* in VIR 1.1064.17-19.
[180] D.6.1.17.1 (Ulp., Ed. 16); D.50.17.151 (Paul., Ed. 64).
[181] See HEUMANN-SECKEL, *s.v.*
[182] D.50.17.151 (Paul., Ed. 64).
[183] See O. LENEL, *Das Edictum Perpetuum*, 3d ed. (Liepzig: Tauchnitz, 1927), 458 and n. 6.
[184] *Id.*; cf. D.43.8.2pr (Ulp., Ed. 68).
[185] Cf. D.43.8.2.16.
[186] Cf. D.9.1.1.3 (Ulp., Ed. 18): *Pauperies est damnum sine iniuria facientis datum.*

proposition might be as a substantive matter[187], it does suggest that a subjective liberty right (for that is what *ius facere habere* must mean) precludes liability. We are not far from the Hohfeldian privilege, which has as its necessary correlative an absence of right in another.

Whatever the meaning of these troublesome passages, there are two things to note about the employment of the terminology of subjective right in the context of the law of obligations: First, it was possible. Second, it was quite rare. In our sample of 293 cases, there are only three[188] between *Digest* 12.2.21 to 20.1.28, a gap of 220 pages in the Mommsen edition, and by far the largest gap in our sample. These pages contain many of the major titles on the law of obligations: *condictio*, *commodatum*, *depositum*, *mandatum*, *societas*, *emptio uenditio*, *locatio conductio*. In none of these titles, with three exceptions involving the sale of rights in an inheritance[189], is anyone said to have a subjective right, or is it said that a subjective right belongs to someone. We may argue, if we will, that the phrase *habere actionem*, which is found many times on these pages[190], was the functional equivalent of *ius habere* or *ius esse alicui*[191]. That possibility is one to which we shall return. For now, we simply note that *ius habere* and *ius esse alicui* were thinkable in the context of the law of obligations, but that the jurists did not use the phrases very often. Their focus in the law of obligations is on the obligation, the duty, and on the action. This means that they did not think, as modern jurists tend to think, of analyzing all legal situations, at least in private law, in terms of rights and duties. That much we must concede to Villey. We are reminded, however, of Hohfeld's fundamental insight that precision in analysis of rights frequently comes by looking to the correlative duty[192].

Ius naturale. The phrase *ius naturale* occurs twenty-five times in the *Digest*. In one instance, noted above, it is clearly to be taken in a subjective sense: *naturales* [sc. *liberi*] *emancipati et adoptati iterum emancipati habent ius naturale liberorum*[193]. In twenty instances, it is clearly to be taken in an objective sense[194]. We deal here with the four ambiguous cases, none of which is in our sample.

> Eas obligationes, quae naturalem praestationem habere intelleguntur, palam est capitis deminutione non perire, quia ciuilis ratio naturalia iura corrumpere non

[187] Note the puzzlement of the author of the ordinary gloss, D.50.17.143, v° *damnum* (ed. Lyons, 1604), col. 1920.

[188] The exceptions prove the rule. They are all from D.18.4, *De hereditate uel actione uendita*, and involve rights in an inheritance. D.18.4.2pr (Ulp., Sab. 49) (2 instances): *...inter ementem et uendentem agatur ut neque amplius neque minus iuris emptor habeat quam apud heredem futurum esse.* D.18.4.13 (Paul., Plaut. 14): *Quod si sit hereditas* [sc. *uendita*] *et si non ita conuenit, ut quidquid iuris haberet uenditor emptor haberet, tunc heredem se esse praestare debet.*

[189] See above note 188.

[190] See VIR, 1.110.23 to 1.111.31.

[191] For a complicated argument that it is not, but that the idea of subjective right precedes that of action, see G. PUGLIESE, *Actio e diritto subiettivo*, Pubb. dell'Ist. di diritto Romano, 8 (Milano: Giuffrè, 1939).

[192] See above, note 72

[193] Above, text and note 128.

[194] See Appendix 2.

potest. itaque de dote actio, quia in bonum et aequum concepta est, nihilo minus durat etiam post capitis deminutionem[195].

Prescinding from the question whether Gaius could possibly have written this and from the fact that its ringing middle statement (*ciuilis ratio naturalia iura corrumpere non potest*) is belied by much else in Roman law, what the passage seems to say is that the *actio de dote* survives *capitis deminutio*. (The easiest context in which to think of this would be where the woman was emancipated by her father). The reason offered is that the obligations of the *actio de dote* have a natural guarantee (*naturalis praestatio*). These obligations survive because «civil reason cannot destroy natural rights». The phrase is certainly obscure, but the underlying rights being referred to are subjective ones (the obligations enforced by the *actio de dote*). The passage does not say that natural law prevails over civil law. Rather, it seems to contemplate that in certain actions, the *actio de dote* being one of them, a *naturalis obligatio* may be enforced, despite the fact that an *obligatio mere ciuilis* would have been destroyed by *capitis deminutio*. The more that we try to make sense of this passage in the context of a legal system that frequently did allow the civil law to prevail over the natural, the more it seems that we must understand *naturalia iura* here as subjective natural rights.

Qui domum alienam inuito domino demolit et eo loco balneas exstruxit, praeter naturale ius, quod superficies ad dominum soli pertinet, etiam damni dati nomine actioni subicitur[196].

The Pennsylvania group's translation takes this objectively («quite apart from the rule of natural law that whatever is built on land belongs to the owner of the land»), and that certainly seems to be easiest way to render this somewhat awkward phrase. If, however, we compare this statement with the statement of the same rule in Gaius's *Institutes* (*id quod in solo nostro ab aliquo aedificatum est ... iure naturali nostrum fit, quia superficies solo cedit*)[197], we see that Ulpian's statement of the rule is more subjective. The *superficies* does not cede to the soil but pertains to the owner of the soil. When we add this together with the fact that the owner of the soil has a right of action under the *lex Aquilia* (here stated in the passive because the subject of the sentence is the wrongdoer), we may suggest that the subjective natural right of the owner was not far from the author's mind. He does not say *praeter naturale ius domini soli quod superficies ad eum pertinet*, but he does not say *praeter naturale ius quod superficies solo cedit* either.

Si quis emancipatum filium exheredauerit eumque postea adrogauerit, Papinianus libro duodecimo quaestionum ait iura naturalia in eo praeualere: idcirco exheredationem nocere[198].

[195] D.4.5.8 (Gai., Ed. prou. 4).
[196] D.9.2.50 (Ulp., Op. 60).
[197] GI.2.73.
[198] D.37.4.8.7 (Ulp., Ed. 40).

The son is the natural child of his father whom the latter has disinherited. In civil law, he is the adrogated child of his father, adrogated after the making of the testament, and not mentioned as such in it. If the civil status were allowed to be treated separately, the son might not only be entitled to *bonorum possessio* as one who had not been disinherited, but he might also break the testament as a *praetermissus*. One can see how Papinian might have wanted to avoid that result, and the way he achieves it is by saying that the natural status takes precedence over the civil: *iura naturalia in eo praeualere*. The *iura* in question are highly subjective; the problem is that they are not, in this case, rights as we conceive of them, but liabilities, in particular the liability to being disinherited by the father's testament. The *ciuilia iura*, however, over which the *naturalia iura* impliedly prevail are, in this case, subjective rights as we understand them.

> Casum aduersamque fortunam spectari hominis liberi neque ciuile neque naturale est: nam de his rebus negotium recte geremus, quae subici usibus dominioque nostro statim possunt[199].

It is not entirely clear that *ius* is to be supplied after *naturale*, though the editors of the *Vocabularium iurisprudentiae Romanae* do so. If *ius* is to be supplied, we may take the phrase either in an objective or a subjective sense: «It is neither civil nor natural law to anticipate the chance of ill fortune [falling on] a free man». «It is neither a natural nor a civil right to anticipate the chance of ill fortune [falling on] a free man». The fact that the passage immediately proceeds the matters about which *negotium recte geremus* suggests that a subjective understanding of *naturale* [*ius*] here is at least possible.

Conclusion. The use of the word *ius* in a subjective sense is so common in the texts of classical Roman law that one wonders how it is that Villey, who was quite knowledgeable about Roman law, could possibly have been misled. He may have been misled by his insight. He had discovered, or, rather, rediscovered, that the word *ius* is frequently used in classical Roman legal texts in a way that cannot mean subjective legal right. This insight is quite correct. Consider the following extract from Papinian[200]:

> Contra tabulas filii possessionem iure manumissionis pater accepit et bonorum possessionem adeptus est: postea filia defuncti, quam ipse exheredauerat, quaestionem inofficiosi testamenti recte pertulit: possessio, quam pater accepit, ad irritum reccidit: nam priore iudicio de iure patris, non de iure testamenti quaesitum est: et ideo uniuersam hereditatem filiae cum fructibus restitui necesse est.

The underlying law is reasonably clear[201]. A father who had emancipated his son was entitled to a half of the son's estate if the son left no children or disinherited them. But a child who had been disinherited could petition the praetor for his or her intestate share (the entire estate in this case), if he or she could show that the testament was *inofficiosum* («undutiful»). Here the father obtained possession of half the estate on the ground that the daughter had been

[199] D.45.1.83.5 (Paul., Ed. 72).
[200] D.5.2.16.1 (Pap., Resp. 2).
[201] For this and what follows, see KASER, RPR, 708-13.

disinherited, but was later made to turn it over to her when she succeeded in upsetting the testament on the ground that it was undutiful.

The word *ius* appears three times in the passage and in the third instance it cannot bear the translation «right», either subjective or objective. We cannot say in English that the first case did not deal with the «right of the testament». We must say that it did not deal with the legality of the testament or with the law of the testament or with what in an objective sense was the right thing to do about the testament. Similarly, the first use of the word *ius* in the passage, *iure manumissionis*, could be translated «by the law of manumission» or «according to what is right to do in a case of manumission». That is to say, we can understand this usage in an objective sense. Having done that, it is all too tempting to try to see if we cannot also understand the second usage (*de iure patris*) in an objective sense. This, I submit, we cannot do. The first case dealt with the subjective right of the father according to the law of manumission. It did not deal with the right thing to do about the father, because in fact what it did was wrong. Nor did it deal with the objective rights of fathers in some generic sense; rather, it dealt with the subjective right of this particular father, without — and this is the important fact — considering the subjective right of his granddaughter to have the testament invalidated. That right, the case tells us, ultimately trumps the father's right, because his right is dependent on her being disinherited by a valid testament, which this one was not. From a procedural point of view, the father may obtain *bonorum possessio* of half the estate by showing a *prima facie* case: he emancipated the son and the son disinherited his daughter. But the daughter can ultimately prevail by showing that the disinheritance was invalid.

As we have said, examples in the classical Roman legal texts in which the word *ius* must be translated as subjective legal right run into the hundreds, perhaps the thousands. Villey certainly tried to push his insight further than it would go. He may have been laboring under a linguistic fallacy, that people who use the same word in two different senses are not aware of the two senses because they are using the same word[202]. That proposition is not true as a general matter, and is, I think, belied in this case by the rather careful way in which the Roman lawyers structured the words around the word *ius* when they were using the word in a subjective sense or when it was open to a subjective meaning. It is true, of course, that in many cases it does not make any difference whether a subjective or objective meaning of the word is intended, and it is also true that in almost all instances the subjective right in Roman law is dependent on an objective one.

This last observation should be scanned. We should not forget Holmes's aphorism: «[F]or legal purposes a right is only the hypostasis of a prophecy — the imagination of a substance supporting the fact that public force will be brought to bear on those who do things said to contravene it ...»[203]. Modern lawyers, particularly those trained in European civil law, tend to deal in legal categories shorn of their procedural context and hence of the enforcement mechanisms in which they are embedded. Classical Roman lawyers were not like

[202] There are hints of this in *Droit subjectif*, 225.

[203] O. HOLMES, *Natural Law*, in *Harvard Law Review*, 32 (1918) 42, and many times reprinted.

that, particularly when they were not writing text-books for first-year law students[204].

Let us go back to our text from Papinian. The first proceeding before the praetor declared the *ius patris*, the right of the father. He was entitled to a decree of possession of half the estate because he had shown what he had to show in such a proceeding, that he had manumitted his son, and that the son had disinherited the daughter. The second proceeding, the complaint of an undutiful will, was a separate proceeding. Unless the daughter brings it, the decree of possession stands. She cannot raise the issue of undutiful will in the proceeding about possession, but once she raises it in the separate proceeding, it establishes her subjective right to the entire estate, because it establishes the *ius testamenti*, what the law is about this testament, to wit, that it is invalid. Our text admittedly does not say that this proceeding establishes the *ius filiae*, the subjective right of the daughter, but that phrase does exist in the classical sources, including one concerning an undutiful will[205], and it may well be that the only reason why Papinian did not use it here is that it would have been otiose. A legal system like the Roman that conceives of rights and duties in terms of what one can bring an action for, must have the concept of subjective right, even if it never uses the term. But we need not rest on that proposition; the Romans used the word *ius* in a subjective sense many times.

Much more still needs to be done. I had hoped in this paper to explore what the medieval commentators on these texts did with them. In particular, I suspect that some of the developments that Tierney sees in the canonists may also be seen in the civilians. This has, however, gone on far too long, and the medieval story must await another day.

[204] Like Gaius's *Institutes*, on which VILLEY relied heavily in *Droit subjectif*. We can fully agree, however, with Villey when he argues that the concept of *ius* changed with the abandonment of the formulary system. *Le 'Ius in re'*, 188-9. The change, however, was not from objective right to subjective, but from subjective right bounded by the the formula to subjective right with a potentially less well defined import. In Hohfeldian terms, the discipline of the formula requires that one consider the correlative duties or no-rights of any subjective right, while the more open procedure of the *extraordinaria cognitio* may allow one to consider a subjective right without its defining correlatives.

[205] D 5.2.22pr (Tryph., Disp. 17) (*ius filii*); see KASER, *'Ius'-Begriff*, n. 77.

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APPENDIX I

Iura in re aliena[1]

PHRASE	*CITE*	*JUR*	*SRC*	*TYPE*
sibi ius non esse altius tollere	D.7.1.16	Paul.	Sab. 3	aedif
uicino ius esse altius aedificare	D.8.2.4	Paul.	Inst. 2	aedif
ei ius [eius F.] imponere esse	D.8.2.24	Paul.	Sab. 15	aedif
aedificandi ius habere concessum	D.8.2.27.1	Pomp.	Sab. 33	aedif
ius aedificandi habere	D.8.2.27.1	Pomp.	Sab. 33	aedif
tibi aedificare ius non esse	D.8.3.20pr	Pomp.	Sab. 33	aedif
ius sibi esse aedificatum habere	D.8.4.17	Pap.	Qu. 7	aedif
habere me ius altius tollendi	D.8.5.4.7	Ulp.	Ed. 17	aedif
ius ei non esse tollere [sc. altius]	D.8.5.4.8	Ulp.	Ed. 17	aedif
ius mihi non esse ita aedificatum habere	D.8.5.6pr	Ulp.	Ed. 17	aedif
ius tibi aedificare non esse	D.8.5.9pr	Paul.	Ed. 21	aedif
ius sibi aedificare esse	D.8.5.11	Marcell.	Dig. 6	aedif
illi ius aedificandi non esse	D.8.5.11	Marcell.	Dig. 6	aedif
ius tibi non esse ita aedificatum habere	D.8.5.11	Marcell.	Dig. 6	aedif
ius mihi protectum habere non esse	D.9.2.29.1	Ulp.	Ed. 18	aedif
ius sibi esse ita aedificatum habere	D.39.1.1.7	Ulp.	Ed. 52	aedif
ius ei non esse inuito se altius aedificare	D.39.1.2	Iul.	Dig. 49	aedif
ius aedificandi habere	D.39.1.8.2	Paul.	Ed. 48	aedif
ius aedificandi habere	D.39.1.8.4	Paul.	Ed. 48	aedif
ius uicino non esse aedes altius tollere	D.39.1.15	Afr.	Qu. 9	aedif
ius sibi esse altius tollere	D.39.1.15	Afr.	Qu. 9	aedif
ius sibi [sc. esse] altius tollere	D.39.1.15	Afr.	Qu. 9	aedif
ius faciendi [sc. opus nouum] habere	D.39.1.20.1	Ulp.	Ed. 70	aedif
ius altius tollere aduersario non esse	D.39.2.13.10	Ulp.	Ed. 53	aedif
tibi ius non esse [sc. aedificatum] habere	D.39.2.45	Scaeu.	Qu. 12	aedif
ius tibi esse aedificatum habere	D.39.2.45	Scaeu.	Qu. 12	aedif
ius altius aedificare ei esse	D.43.25.1.4	Ulp.	Ed. 71	aedif
ius mihi esse usque ad [etc.] altius tollere	D.44.2.26pr	Afr.	Qu. 9	aedif
ius mihi esse usque ad [etc.] altius tollere	D.44.2.26pr	Afr.	Qu. 9	aedif
ius mihi esse altius ad [etc.] tollere	D.44.2.26pr	Afr.	Qu. 9	aedif
ius tibi aquam quaerere non esse	D.8.1.15	Pomp.	Sab. 33	aqua

[1] For an explanation, see above text at note 27.

[sc. ius] utrumque [sc. hauriendi et adeundi] habere	D.8.3.3.3	Ulp.	Ed. 17	aqua
quod ius habere tunc	D.8.3.35	Paul.[2]	Plaut. 15	aqua
ius esse mihi aquam riuo ducere	D.8.4.11.1	Pomp.	Sab. 33	aqua
ius utendi habere	D.8.5.9.1	Paul.	Ed. 21	aqua
ius aquam retinere omnibus esse	D.39.3.1.11	Ulp.	Ed. 53	aqua
ius habere [?sc. denegandi ut aliter aqua flueret]	D.43.13.1.9	Ulp.	Ed. 68	aqua
nullum ius [sc. aquae] habere	D.43.20.1.19	Ulp.[3]	Ed. 70	aqua
ius aquae ducendae habere	D.43.20.1.21	Ulp.	Ed. 70	aqua
ius [sc. aquae cottidianae] adsignatum sibi habere	D.43.20.1.44	Ulp.	Ed. 70	aqua
[sc. ius aquae cottidianae adsignatum sibi] non habere	D.43.20.1.44	Ulp.	Ed. 70	aqua
ius ducendi [sc. aquam] habere	D.43.20.2	Pomp.	Sab. 32	aqua
ius cottidianae aquae habere	D.43.20.3.5	Pomp.	Sab. 34	aqua
ius cottidianae [aquae] habere	D.43.20.5	Iul.	Ex Min. 4	aqua
ius aduersario agendi aquae ducendae esse	D.43.20.7	Paul.	Sent. 5	aqua
ius aquae ducendae habere	D.43.21.1.9	Ulp.	Ed. 70	aqua
ius ei non esse	D.43.21.3.8	Ulp.[4]	Ed. 70	aqua
ius luminis immitendi habere	D.8.2.40	Paul.	Resp. 3	immit
ius ei fumum immittere non esse	D.8.5.8.5if	Ulp.	Ed. 17	immit
ius esse [sc. mihi] immittendi stillicidium	D.8.5.9pr	Paul.	Ed. 21	immit
ius illi tigna immissa habere non esse	D.8.5.12	Iau.	Ep. 2	immit
ius mihi flumina fluere non esse	D.8.5.13	Proc.	Ep. 5	immit
ius stillicidii immittendi habere	D.8.6.8	Paul.	Plaut. 15	immit
ius [?sc. tigni] immittendi habere	D.8.6.18.2	Paul.	Sab. 15	immit
ius ei esse aquam immittere	D.39.3.2.10	Paul.[5]	Ed. 49	immit
non esse ei ius inmissum [sc. arboris radices] habere	D.47.7.6.2	Pomp.	Sab. 20	immit
ius ei esse terram rudus saxa iacere posita habere et ut in tuum lapides prouolantur ibique positi habeantur indeque exportentur	D.8.3.3.2	Ulp.[6]	Ed. 17	misc

[2] Quoting rescript of Atilicinus.
[3] Quoting Aristo.
[4] Quoting formula.
[5] Quoting Labeo.
[6] Quoting Nerva.

Ed. 17	aqua
Plaut. 15	aqua
Sab. 33	aqua
Ed. 21	aqua
Ed. 53	aqua
Ed. 68	aqua
Ed. 70	aqua
Ed. 70	aqua
Ed. 70	aqua
Ed. 70	aqua
Sab. 32	aqua
Sab. 34	aqua
Ex Min. 4	aqua
Sent. 5	aqua
Ed. 70	aqua
Ed. 70	aqua
Resp. 3	immit
Ed. 17	immit
Ed. 21	immit
Ep. 2	immit
Ep. 5	immit
Plaut. 15	immit
Sab. 15	immit
Ed. 49	immit
Sab. 20	immit
Ed. 17	misc

cui id faciendi [sc. lapidem caedendi] ius non esse	D.8.4.13.1	Ulp.	Op. 6	misc
ius sibi cogere aduersarium reficere esse	D.8.5.6.2	Ulp.	Ed. 17	misc
tibi me cogere ius non esse	D.8.5.8pr	Ulp.	Ed. 17	misc
ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant	D.8.5.8.5im	Ulp.	Ed. 17	misc
tibi non esse ius parietem illum ita habere	D.8.5.14.1	Pomp.	Sab. 33	misc
positum habere ius Seio non esse	D.8.5.17.1	Alf.	Dig. 2	misc
ius ei non esse in eo loco ea posita habere	D.8.5.17.1	Alf.	Dig. 2	misc
ius compascendi habere	D.8.5.20.1	Scaeu.	Dig. 4	misc
hoc ius [sc. compascendi] habere	D.8.5.20.1	Scaeu.	Dig. 4	misc
ius tibi non esse ita crustam habere	D.39.2.9.2	Ulp.	Ed. 53	misc
ius pecoris ad aquam appellendi habere	D.43.20.1.18	Ulp.[7]	Ed. 70	misc
ius ei non esse ita arborem habere	D.43.27.2	Pomp.	Sab. 34	misc
ei ius inferendi [sc. mortuum] esse	D.11.7.8.5	Ulp.	Ed. 25	mort
illi mortuum inferre ius esse	D.11.8.1pr	Ulp.[8]	Ed. 68	mort
ius inferendi mortuum habere	D.11.8.1.1	Ulp.	Ed. 68	mort
illi ius mortuum inferre esse	D.11.8.1.5	Ulp.[9]	Ed. 68	mort
facere sepulchrum uel monumentum in loco in quo ei ius esse	D.11.8.1.7	Ulp.	Ed. 68	mort
iura sepulchrorum habere	D.38.16.1.3	Ulp.	Sab. 12	mort
iura sepulchrorum habere	D.40.5.4.21	Ulp.	Ed. 60	mort
trahendi lapidem aut tignum neutri eorum ius esse	D.8.3.7pr	Paul.	Ed. 21	uia+
eundi agendique ius habere	D.8.3.7pr.	Paul.	Ed. 21	uia+
ius mihi esse eundi agendi	D.8.3.11	Cels.	Dig. 27	uia+
ire agere per tuum locum et uti frui eo ius esse	D.8.3.20pr	Pomp.	Sab. 33	uia+
ius sibi esse eundi	D.8.3.23.3	Paul.	Sab. 15	uia+
ius eundi habere	D.8.5.4pr	Ulp.	Ed. 17	uia+
ius mihi esse ire agere	D.8.5.9pr	Paul.	Ed. 21	uia+
ius sibi esse ire agere	D.8.5.9pr	Paul.	Ed. 21	uia+
sibi ius esse [?sc. aedificatum non habere]	D.8.5.9pr	Paul.	Ed. 21	uia+
ius mihi ire agere esse	D.39.3.17.3	Paul.	Plaut. 15	uia+
ius uiae habere	D.43.18.1.2	Ulp.	Ed. 70	uia+
ius uiae habere	D.43.18.1.2	Ulp.	Ed. 70	uia+

[7] Quoting Marcellus.
[8] Quoting the Edict.
[9] Quoting the Edict.

tibi ius [sc. reficiendi] esse	D.43.19.3.11	Ulp.[10]	Ed. 70	uia+
ius sibi reficiendi esse	D.43.19.3.13	Ulp.	Ed. 70	uia+
ius [sc. reficiendi] esse ei	D.43.19.3.13	Ulp.	Ed. 70	uia+
ius agendi habere	D.43.19.3.14	Ulp.	Ed. 70	uia+
ius eundi habere	D.43.19.3.14	Ulp.	Ed. 70	uia+
ius reficiendi habere	D.43.19.3.14	Ulp.	Ed. 70	uia+
ei reficiendi ius esse	D.43.19.3.14	Ulp.	Ed. 70	uia+
tibi ius [sc. Reficiendi] esse	D.43.19.3.14	Ulp.[11]	Ed. 70.	uia+
ius eundi habere	D.45.1.56.4	Iul.	Dig. 52	uia+
ius fruendi legatario esse	D.7.4.2.pr	Pap.	Qu. 17	uti+
ius fruendi habere	D.7.4.2.1	Pap.	Qu. 17	uti+
uti frui ius sibi esse	D.7.6.5pr.	Ulp.	Ed. 17	uti+
utendi fruendi ius separatum non habere	D.7.6.5pr.	Ulp.	Ed. 17	uti+
ius utendi fructuario esse	D.7.6.5pr.	Ulp.	Ed. 17	uti+
utendi ius non habere	D.7.6.5pr.	Ulp.	Ed. 17	uti+
ius habere [sc. Qui usum sed non usum fructum habet]	D.7.8.11	Gai.	Aurea 2	uti+
ius deambulandi habere	D.7.8.12.1	Ulp.	Sab. 17	uti+
ius gestandi habere	D.7.8.12.1	Ulp.	Sab. 17	uti+
uti frui eo ius esse	D.8.3.20pr	Pomp.	Sab. 33	uti+
mihi ius uti frui non esse	D.8.3.20pr	Pomp.	Sab. 33	uti+
ius sibi esse frui	D.8.5.9pr	Paul.	Ed. 21	uti+
ius uti frui non esse ei	D.20.1.11.2	Marcian. (Pap.)	F. hypo.[12]	uti+
ius sibi utendi fruendi esse	D.21.2.62.2	Cels.	Dig. 27	uti+
Titio ius utendi fruendi esse	D.21.2.62.2	Cels.	Dig. 27	uti+
sibi ius esse uti frui	D.39.3.22pr	Pomp.[13]	Varia[14] 10	uti+
ius utendi (et) fruendi habere	D.41.1.10.5	Gai.	Inst. 2	uti+
fructurario uindicandarum seruitutium ius esse	D.43.25.1.4	Ulp.[15]	Ed. 71	uti+

[10] Quoting the Edict.
[11] Quoting the Edict.
[12] I.e., *Ad formulam hypothecariam*, lib. sing.
[13] Tribonian? See VIR, 5.835.51.
[14] I.e., *Ex variis lectionibus*.
[15] Quoting Julian.

Ed. 70	uia+
Ed. 70	uia+
Ed. 70	uia+
Ed. 70	uia+
Ed. 70	uia+
Ed. 70	uia+
Ed. 70	uia+
Ed. 70.	uia+
Dig. 52	uia+
Qu. 17	uti+
Qu. 17	uti+
Ed. 17	uti+
Ed. 17	uti+
Ed. 17	uti+
Ed. 17	uti+
Aurea 2	uti+
Sab. 17	uti+
Sab. 17	uti+
Sab. 33	uti+
Sab. 33	uti+
Ed. 21	uti+
F. hypo.[12]	uti+
Dig. 27	uti+
Dig. 27	uti+
Varia[14] 10	uti+
Inst. 2	uti+
Ed. 71	uti+

APPENDIX II

Ius naturale in the Digest[16]

PHRASE	*CITE*	*JUR*	*SRC*
Ius naturale est, quod natura omnia animalia docuit	D.1.1.1.3	Ulp.	Inst. 1
Ius gentium ... a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.	D.1.1.1.4	Ulp.	Inst. 1
Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale.	D.1.1.11	Paul.	Sab. 14
iure naturali omnes liberi nascerentur	D.1.1.4	Ulp.	Inst. 1
Ius ciuile est, quod neque in totum a naturali uel gentium recedit nec per omnia ei [eis?] seruit.	D.1.1.6pr	Ulp.	Inst. 1
Quaedam naturali iure communia sunt omnium	D.1.8.2pr	Marcian.	Inst. 3
Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.	D.1.8.2.1	Marcian.	Inst. 3
Item lapilli, gemmae ceteraque, quae in litore inuenimus, iure naturali nostra statim fiunt.	D.1.8.3	Flor.	Inst. 6
Indebiti soluti condictio naturalis [sc. iuris?] est	D.12.6.15pr	Paul.	Sab. 10
libertas naturali iure continetur et dominatio ex gentium iure introducta est	D.12.6.64	Tryph.	Disp. 7
si tantum naturale et gentium ius intuemur, ei qui dedit restituenda sunt	D.16.3.31pr	Tryph.	Disp. 9
in contrahendis matrimoniis naturale ius et pudor inspiciendus est	D.23.2.14.2	Paul.	Ed. 35
quaedam cognationes iure ciuili, quaedam naturali conecttuntur	D.38.10.4.2	Mod.	Enc. 12
nonumquam utroque iure concurrente et naturali et ciuili copulatur cognatio	D.38.10.4.2	Mod.	Enc. 12
sine iure naturali cognatio consistit per adoptionem	D.38.10.4.2	Mod.	Enc. 12
quarum [sc. superficiarum aedium] proprietas et ciuili et naturali iure eius est, cuius et [*Mo. del.*] solum.	D.43.18.2	Gai.	Ed. pro. 25
Pupillus mutuam pecuniam accipiendo ne quidem iure naturali obligatur.	D.44.7.58	Licinn.	Reg. 8
Quod attinet ad ius ciuile, serui pro nullis habentur: non tamen et iure naturali	D.50.17.32	Ulp.	Sab. 43
quod ad ius naturale attinet, omnes homines aequales sunt	D.50.17.32	Ulp.	Sab. 43
Nihil tam naturale[17] est quam eo genere quidque dissoluere, quo colligatum est.	D.50.17.35	Ulp.	Sab. 48

[16] For an explanation, see above text at note 194.

[17] It is not at all clear that *ius* is to be supplied here, but the VIR does.