

On Stolen Swine, Fished Fisherman, and Drowned Dogs

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Abstract — In Digest 41.1.44, Ulpian relates a case discussed by Pomponius. Wolves steal pigs supervised by the pig owner's swineherd. A farmer on a neighboring estate pursues the wolves with dogs, which snatch the pigs from the wolves alive. The question is, to whom do these pigs now belong? Pomponius' dilemma is not immediately obvious: domestic pigs should remain the property of their owner until dereliction, in the manner of any object. Yet Pomponius seems willing to assimilate the stolen swine to wild animals, in circumstances in which they would have been doomed to perish without a third party's intervention. Indeed Pomponius ultimately resolves the question in favor of the pig owner by reference to the notion of "retrievability": it matters whether the pigs are able to escape the ordeal alive. We may presume that Pomponius' difficulty with this case arose from his reluctance to leave the rescuer empty-handed. The fragment was discussed in the law school of Orléans in aid of a comparable case, and again one can detect a desire to reward the rescuer. In 1902 the fragment was cited by Rudolf Stammler for the proposition that an owner's right to exclude others from an object will cease at the precise moment the object is no longer retrievable. In sum, the fragment reveals Pomponius' qualities as a jurist who avoids rigid thinking and seeks a solution from several points of view.

THE late-classical Roman jurist Domitius Ulpianus reports the

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following remarkable and instructive case in his commentary on the Praetorian Edict:¹

D.41.1.44 (Ulpian 19 *ad edictum*). Pomponius tractat:

[1] cum pastori meo lupi porcos eriperent, hos vicinae villae colonus cum robustis canibus et fortibus, quos pecoris sui gratia pascebat, consecutus lupis eripuit aut canes extors-erunt: et cum pastor meus peteret porcos, quaerebatur, utrum eius facti sint porci, qui eripuit, an nostri maneant:

[2] nam genere quodam venandi id erant nanci.

[3] Cogitabat tamen, quemadmodum terra marique capta, cum in suam naturalem laxitatem pervenerant, desinerent eorum esse qui ceperunt, ita ex bonis quoque nostris capta a bestiis marinis et terrestribus desinant nostra esse, cum effugerunt bestiae nostram persecutionem.

[4] Quis denique manere nostrum dicit, quod avis transvolans ex area aut ex agro nostro transtulit aut quod nobis eripuit?

[5] Si igitur desinit, si fuerit ore bestiae liberatum, occupantis erit, quemadmodum piscis vel aper vel avis, qui potestatem nostram evasit, si ab alio capiatur, ipsius fit.

[6] Sed putat potius nostrum manere tamdiu, quamdiu reciperi possit: licet in avibus et piscibus et feris verum sit quod scribit.

[7] Idem ait, etsi naufragio quid amissum sit, non statim nostrum esse desinere: denique quadruplo teneri eum qui rapuit.

[8] Et sane melius est dicere et quod a lupo eripitur, nostrum manere, quamdiu recipi possit id quod ereptum est.

...

The following case is discussed by Pomponius:

[1] When wolves were carrying off pigs from my swineherd, a farmer on a neighboring estate, with some strong and powerful dogs which he kept to protect his own herd, pursued the

¹ For the purpose of an easier orientation, I have divided the text into eight subdivisions. The translation is that of J. A. C. Thomas, in A. Watson, ed., *The Digest of Justinian*, 4 (Philadelphia 1985) (with amendments).

wolves and snatched the pigs away from them; that or the dogs tore them away; but when my swineherd claimed the pigs, the question arose whether the pigs had become the property of their rescuer or remained mine;

[2] for, in a way, the dogs got them by hunting.

[3] He, however, used to ponder whether, since animals caught on land or sea cease to belong to their captors on regaining their natural freedom, so also things captured from a man's property by wild animals of land or sea cease to be his, when the animals elude his pursuit.

[4] Who indeed can say that what a bird, flying by, takes from my threshing-floor or land or snatches from me myself remains mine?

[5] If, then, ownership is so lost, the thing will belong to the first taker on being freed from the wild animal's mouth, just as a fish, wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it.

[6] But he thinks that rather is it the case that the thing remains ours so long as it can be recovered; what he writes about birds, fish, and wild animals, however, is true.

[7] He [Pomponius] also says that what is lost in a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value.

[8] And it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved.

...

Ulpian discusses the problem of appropriation, thus the oldest and most natural way of acquisition of ownership. Wolves steal pigs of the owner that his swineherd supervised. A farmer on a neighboring estate pursues the wolves with dogs and snatches the pigs that are still alive away from the wolves. To whom do these pigs belong?

I. Stolen swine

Originally, our fragment was a part of the 19th book of Ulpian's commentary on the Praetorian Edict. This book was dedicated to the action for dividing an inheritance, not to the acquisition of ownership. The fragment originally appeared after the second

paragraph of Ulpian D.10.2.8.1–2, which dealt with a rather similar question:²

D.10.2.8.1–2 (Ulpian 19 *ad edictum*).³ 1. Idem Pomponius ait columbas, quae emitti solent de columbario, venire in familiae erciscundae iudicium, cum nostrae sint tamdiu, quamdiu consuetudinem habeant ad nos revertendi: quare si quis eas adprehendisset, furti nobis competit actio. Idem et in apibus dicitur, quia in patrimonio nostro computantur. 2. Sed et si quid de pecoribus nostris a bestia ereptum sit, venire in familiae erciscundae iudicium putat, si feram evaserit: nam magis esse, ut non desinat nostrum esse, inquit, quod a lupo eripitur vel alia bestia, tamdiu, quamdiu ab eo non fuerit consumptum.

1. Pomponius also says that pigeons which are used to being let out of their cote are included in the action for dividing an inheritance, since they are property so long as they are in the habit of returning to us. So if someone appropriates them, the action for theft is available to us. The same is said of bees, because they are reckoned to be part of property.
2. Pomponius also thinks that if any of our livestock is carried off by a wild animal, it is included in the action for dividing an inheritance if it escapes from the animal; for, he says, there is more reason to believe that anything carried off by a wolf or other wild animal does not cease to be our property so long as it has not been eaten by the animal.

Both texts have a treatise of Pomponius as the starting point. Unfortunately, we do not know the exact work from which the treatise was extracted. While Lenel assigns it to Pomponius' commentary on the Edict,⁴ Mommsen believes it to be a fragment taken from the 39 books of Pomponius' lectures on the civil law of Quintus Mucius Scaevola.⁵ If Mommsen were right, the story of the stolen swine would have been discussed by three generations of Roman jurists, ultimately to become a part of Justinian's *Corpus Iuris*. I will come back to this question later.

According to D.10.2.8.1, doves having flown away from their

² For the palingenesis see Accursius, *Digestum Novum seu Pandectarum iuris civilis* (Lyon 1581), gl. *recuperari possit* ad h. l.; O. Lenel, *Palingenesis iuris civilis*, 2 (Leipzig 1889), Ulpian nos. 631–637.

³ The translation is that of H. Hine, in A. Watson, ed., *The Digest of Justinian*, 1 (Philadelphia 1985).

⁴ Lenel (note 2), Pomponius no. 95.

⁵ P. Krüger and T. Mommsen, *Institutiones. Digesta [Corpus Iuris Civilis]*, 1], 8th ed. (reprinted Berlin 1963), at D.41.1.44, n.8.

cote do not become ownerless as long as they do not abandon their custom of returning to the cote, their *consuetudo revertendi*. Since the deceased person's property continues to exist, the doves will be included in the action for dividing his inheritance. The same holds for bees. In D.10.2.8.2, Pomponius then considers a case rather similar to D.41.1.44: a wild animal, a wolf for instance, abducts some of the cattle belonging to a deceased person. According to Pomponius his property continues to exist as long as that portion of the cattle has not been eaten. Pomponius' principles can be summed up in the following way: property in a domestic animal lasts until it physically perishes, regardless of its exact location. The mere abduction by a wild animal does not change ownership. Pomponius, however, introduces this point of view in D.10.2.8.2 with *magis esse*, which means: "there is more reason to believe"; uncertainty can be noticed here. In contrast to domestic animals, doves and bees become ownerless when abandoning their willingness to return. As long as they keep this intention, their location does not matter, which is why possession and control on the owner's part are not necessary. Pomponius does not mention wild animals in D.10.2.8.1 but the reverse is obvious: they *a priori* have no will to return and thus become ownerless when attaining their natural freedom and with the owner having lost any control over them. In his *Institutes* Pomponius' contemporary Gaius confirms the same rules. In G.2.67 he tells us that wild animals are ownerless and can be the object of unrestricted appropriation. Special fishing or hunting rights that we know nowadays did not exist in Rome. According to Gaius, property exists as long as the owner has control over the wild animal. If it escapes his guard, his *custodia*, ownership lasts only as long as the owner pursues the animal *in conspectu*, which means with his own eyes. However, Gaius makes a certain restriction, saying that it is not useful to the owner only to observe the animal if the pursuit meets insurmountable obstacles, as is the case with a bird having landed on a tree close to the owner. That bird is free and thus ownerless.

Pomponius and Gaius were therefore agreed on the question of the ownerlessness of a wild animal. In order to keep his right the owner has to pursue the fleeing animal, while maintaining visual contact, in fact. Tamed animals such as bees and doves assume an intermediate position: according to G.2.68 they can move in full freedom and become ownerless only if they abandon their custom of returning, which of course can only be determined if they do not come back any more. Domestic animals, on the contrary, do not become ownerless if the owner loses control over

them. They share the same fate as any chattel: they become ownerless only if the owner abandons his property by giving up possession.

Starting out from these principles and keeping the Roman jurists' usual brevity in mind, one may be rather astonished by the fullness and detail of D.41.1.44. The difference between D.10.2.8.2 and D.41.1.44 consists solely in the fact that in the latter the domestic pigs were saved from the claws of the wolves merely by the courageous intervention of the pursuing neighbor. If Pomponius had applied his previously outlined principles, he would have had to approve of the continuation of *ego's* property in the pigs, in one sentence in fact. It is rather obvious that the pigs were domestic pigs, which is why for lack of dereliction of title they continue to belong to the owner until they perish. For that reason the pursuing neighbor could not acquire property through appropriation. If Ulpian cites Pomponius at such length, both jurists must have had doubts about such a schematic solution. The swine case seems to be a borderline case. Might we instead consider the neighbor to be the owner?

At first glance, in D.41.1.44 an appropriation by the neighbor seems to be possible. The whole course of events — the hunting, the use of the dogs as well as the snatching away of the pigs from the wolves — really suggests an acquisition of ownership by hunt. The only prerequisite of an appropriation by means of hunting is, however, that the pigs are ownerless. Since the swine are domestic pigs (*porci*), not wild pigs (*apri*), ownerlessness should actually be denied. Instead, Pomponius presents a new thought, beginning with *cogitabat* in [3], namely a comparison with wild animals: in the same way wild animals become ownerless by attaining their natural freedom without being followed by the owner, even their prey could have become ownerless. The prey of a wild animal could thus share this sphere of the wild, as it were, and could become wild, too. Odofredus, professor of law at Bologna until 1265, only calls the wolves *domini* and thus draws attention to a possible loss of property.⁶

It is difficult to understand to what subject the introductory *cogitabat* refers. Who uttered this opinion? The medieval Gloss for instance adds the neighboring *colonus* as a subject.⁷ Consequently, it would be the defendant's argument to state that he is not willing to surrender possession of the pigs to the plaintiff.

⁶ Odofredus, *Lectura super Digesto novo* (Lyon 1552; reprinted Bologna 1968), at D.41.1.44, n.1.

⁷ Accursius (note 2), gl. *cogitabat* ad h. l.

This is not convincing for several reasons. Firstly, *colonus* in the first sentence of [1] is too far away from *cogitabat* in [3], whereas the *pastor meus* in the second sentence of [1] is much closer so that only the opponent of the *colonus* could be taken into consideration as the subject. Secondly, the point of view of the Gloss presupposes that Pomponius discusses a practical case. But this is not at all probable, as the whole text is a treatise. Pomponius did not hold a public office and did not give expert opinions, so called *responsa*, on real legal cases. Thirdly, the names of the parties are not mentioned, and in [1] two different statements of fact are developed (*consecutus lupis eripuit aut canes extorserunt*). Finally, what decisively speaks against an expert opinion in a real case is that a wolf, as is known, does not carry off a pig without killing it, so that a pig cannot survive the attack, as provided in our case. That is why the swine case was a theoretical one, a case invented for didactic purposes so as to discuss reasons for and reasons against. We owe this case to the jurist's imagination.

Mommsen adds, as mentioned above, Quintus Mucius Scaevola as the subject of *cogitabat* and thus suspects a citation in Pomponius' work from this early jurist's civil law. For this opinion the change of tenses could be cited: first it reads in [1] *Pomponius tractat* in the present tense, then *quaerebatur* and *cogitabat* in [1] and [3] in the past tense, then again *sed putat* in [6] and finally *idem ait* in [7] in the present tense. *Tractat*, *putat*, and *ait* can only refer to Pomponius. Only in [8] Ulpian's final commentary follows, introduced by *et sane melius est dicere*. Thus, on account of the past tense one could be tempted to refer *quaerebatur* and, above all, *cogitabat*, to an earlier jurist, namely Quintus Mucius Scaevola, while Ulpian reports Pomponius' commentary on Quintus Mucius in the present tense. But there is no great evidentiary value in the tenses, as the Roman jurists were not especially consistent in the use of these tenses. Therefore Mommsen's interpretation did not find much following in the literature.

Above all there are reasons of substance that speak against Mommsen's thesis. In D.10.2.8.2 Pomponius himself is not sure if ownership of domestic animals ceases only with their physical perishing or already before with the abduction by the wild animal. He only says *magis esse*: he remains guarded. On that account, in the high-classical period of Roman jurisprudence, the argument drawn from the wild and tamed animals and applied to the domestic animals was not as assured as one might believe. Schematic thinking was not the Roman jurists' cup of tea. Since D.41.1.44 includes a further aspect beyond D.10.2.8.2 — namely

the neighbor's courageous intervention — it is highly probable that with *cogitabat* Pomponius himself doubts his own solution only hesitatingly given in D.10.2.8.2. The case offers enough cause for doubt. Should the stolen swine not be equally treated with wild animals in a case in which they would have been doomed to perish without a third person's intervention? At any rate, domestic pigs belong to the same species as wild pigs. For a jurist like Pomponius arguing by association, the strict limits between domestic and wild animals become indistinct. This is revealed by the fact that in [5] Pomponius expressly mentions the possibility of the appropriation of escaped wild animals such as fish, boars, and birds.

Moreover, the following argument shall prove the correlation of losing control and ownerlessness. When Pomponius compares the wolf with a bird carrying off an object on the wing, we have to think of the proverbial thieving magpie stealing a precious ring. In [4] the rhetorical question suggests that in such a case the owner loses his right. The ring that the magpie drops over a river is just as irretrievably lost as a domestic animal snatched by a wolf. The argument, however, falls short: the legal situation of the stolen ring will only become questionable if it appears again, if, for instance, a wanderer finds the dropped ring. In this case his interest in recompense collides with the owner's interest in continuity. It is by no means obvious whether Pomponius would have considered the ownership as extinct and would thus have conceded the right of appropriation to the wanderer. With the help of the decisive *topos* of the retrievability of the lost thing that Pomponius finally develops in [6], he would probably have decided in favor of the former owner. It is remarkable, though, that the parallel text in the Basilica approves of the unrestricted right of appropriation even for things stolen by magpies.⁸

Pomponius, as we have just seen, finds another criterion in [6] in order to resolve the case: the retrievability of the thing, the *recuperatio*. Similar to his decision in D.10.2.8.2, it matters to the jurist if it is certain that the animal cannot escape its robber any more. Only if it is eaten does ownership cease. As long as the thing can be retrieved, property continues: *Nostrum manere tamdiu, quamdiu recipari possit*, as Pomponius puts it. At first it is not quite clear why Pomponius uses the passive voice *recipari*. Does he mean that property continues to exist only if the owner regains the thing or even if a third person returns the thing to human control? With his subsequent argument Pomponius, how-

⁸ See Bas. 50.1.43.

ever, clarifies that for keeping property it is sufficient that any person regains the thing: what gets lost in a shipwreck continues to belong to the former owner, as it reads in [7]. After a shipwreck normally people other than the owner himself return the lost thing to legal and economic status. Nevertheless property does not cease. Therefore Pomponius chose the passive voice on purpose.

In the end the jurist decides the case with reference to the loss of things in distress, being supported by Ulpian. The legal situation of those things was already clear in Pomponius' time. If a ship fell into distress and chattels were thrown off the ship in order to lighten it, the intention of dereliction of title was denied, and the finder hence had to surrender possession to the owner.⁹ In addition, Callistratus, a jurist writing in the time of Septimius Severus, mentions an edict by the emperor Hadrian according to which the owners of estates on the coast must not keep stranded possessions.¹⁰ In the case of shipwreck the Roman jurists thus preferred the owner's interest in continuity to the finder's interest — which, by the way, is in contrast to many legal systems in the medieval and early modern times that knew the so-called "blessing of the shore": even monks in monasteries close to the sea prayed for this blessing, and thus for a considerable number of shipwrecked persons.¹¹

The analogy to shipwreck bases itself on the involuntary loss of possession. The distress caused by the sea is compared to the theft of the pigs. Like stranded possessions, the pigs can be regained even if the chances are minimal. Property continues to exist.

Why is it so difficult for Pomponius to make a decision? We may presume that he doubted whether it was just that the rescuer should be left empty-handed. It was only thanks to him that the pigs were saved and for that he risked the lives of his dogs or even his own life. Without this deed the pigs would have been lost to the owner for ever. Even if one considered him as a *negotiorum gestor*, he could only claim compensation for expenses or damages, for example if one of his dogs had been injured by a wolf. Over and above this the law of *negotiorum gestio* is of no use to him. Does his action not merit a reward? Roman law does not know a finder's reward. Claiming it is inadmissible and even considered

⁹ D.14.2.8 (Julian 2 *ex Minic.*).

¹⁰ D.47.9.7 (Call. 2 *quaest.*).

¹¹ Finkenauer (note *), 54.

morally indecent.¹² There is merely the alternative of granting property to the finder or of treating him as a thief. The finder's reward is only established in older Germanic laws, and later for instance in the Prussian General Code, I 9 § 62, or the German Civil Code § 971.¹³ The finder's reward, however, is of no use to our neighbor even if he claimed it under the actual German Civil Code since this institute is a special case of *negotiorum gestio* and hence the so-called *animus negotia aliena gerendi* is presupposed which our neighbor did not have. Obviously Pomponius felt the gap of justice, but in the end swept aside his objections with the argument that the pigs could have been regained. In this context it is remarkable that according to § 403 of the Austrian Civil Code a person salvaging a thing from its inevitable demise can demand 10% of its value. The corresponding provision of the first draft of the Austrian Civil Code of 1797 still referred to the slightly modified example of a sheep stolen by a wolf.¹⁴ Our case was obviously the force behind this legal provision.

II. First epilogue: the fished fisherman

Pomponius' indecisiveness in D.41.1.44 resulted in the fact that medieval professors cited his treatise in order to justify opposing solutions to the same case, which is not really rare in the medieval jurisprudence. I speak of the following case discussed in the law school of Orléans in the middle of the 13th century and handed down to us by Jacobus de Ravanis (1210/15–1296):¹⁵

Per legem istam fuit semel determinata questio et in veritate lex ista parum vel nichil facit ad hoc. Quidam rustici tendebant retia sua in mari ut caperent pisces. In retia unius fuit ingressus quidam magnus piscis. Ille rusticus traxit retia sua et traxit illum piscem in naviculam suam. Piscis ille erat fortis et robustus, ille piscis voluit exire de navicula. Rusticus retinebat eum quantum poterat. Tandem piscis et rusticus ceciderunt in aquam et ceciderunt in rethia alterius rustici; et tamen rusticus ille primus retineret piscem per aurem. Querebatur cuius esset piscis ille. Terminata fuit questio per legem istam quod erat primi rustici Dico quod lex ista

¹² D.47.2.43.9 (Ulpian 41 *ad Sab.*); D.6.1.67 (Scaev. 1 *resp.*).

¹³ See Finkenauer (note *), 55–56.

¹⁴ § 132; see Julius Ofner, *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen bürgerlichen Gesetzbuches*, 1 (Vienna 1889; reprinted Glashütten im Taunus 1976), XLI.

¹⁵ C. H. Bezemer, "Les quaestiones disputatae Orléanaises dans les commentaires de Jacques de Révigny," *TRG*, 58 (1990), 32.

nichil facit ad hoc . . . Unde si lex ista faceret ad questionem istam, potius faceret ad oppositum.

By virtue of this law [D.41.1.44] once the (following) legal question was decided, but in reality this law contributes little or nothing to the solution. Some folk kept their nets in the sea so as to catch fish. One big fish was caught in a fisherman's net. This man pulled his net and the fish into his boat. The fish however was brave and powerful and wanted to escape from the boat. The fisherman kept him as tight as he could. [Finally] both of them, fish and fisherman, fell into the sea and into the net of another fisherman. Nevertheless the first fisherman continued to keep the fish by the gill. It was asked to whom the fish belonged. By virtue of this law the question was decided in favor of the first fisherman . . . I say that this law is of no importance for the solution . . . Hence if this law had any significance for the question then it would have rather the opposite one.

In this rather odd case legally the question is decisive if the first fisherman already concluded the act of appropriation of the ownerless fish. For this it was necessary that he got possession as owner which requires a certain control. If he had already appropriated the fish, then the wild fish was not ownerless as long as his pursuit lasted. In this case the second fisherman could not appropriate the fish. If, on the contrary, the first fisherman had not gained control over the fish (at least for a certain period of time), then the second fisherman could appropriate the still ownerless fish.

The incomparably less famous Fulco de Luduno, professor in Orléans until approximately 1270, does not hesitate to concede ownership of the fish to the first fisherman by citing our law.¹⁶ Jacobus refers to this decision at the beginning of his decision (*fuit semel determinata questio*). He considers the second fisherman as the owner, likewise quoting our law — though reluctantly.

Should it really matter for the recompense of the second fisherman if the first one already appropriated the fish by pulling it into his boat or if for lack of a certain control the fish remained ownerless and — back again in its natural element — could represent an object of appropriation? Should the second fisherman really remain empty-handed if the first one had had the fish in his boat for a certain time and had therefore established possession before it jumped back into the sea? Jacobus de Ravanis

¹⁶ See his decision in Finkenauer (note *), 57–58.

at first denies the relevance of D.41.1.44. Indeed, a difference can be seen in the fact that the first fisherman possibly had not established ownership of the fish in contrast to *ego* in the case of the stolen swine. However, this difference can be neglected as is done by Jacobus if one takes into account the contribution of the second fisherman or the pursuing neighbor respectively. In any case Jacobus thinks that Pomponius' case suggests the opposite solution, which is why he cites the text in favor of the second fisherman. Just as Pomponius before him, he obviously feels the need to grant property in the wild animal to the person without whose aid it would have never been put at human disposal again. For him the second fisherman gains ownership, independently from the act of appropriation by the first fisherman. In the end he thus decides exactly opposite to Pomponius.

III. Second epilogue: the drowned dog

In his *Lehre von dem richtigen Rechte* from 1902 Rudolf Stammler (1856–1938), a Neo-Kantian and professor of Roman law, takes Pomponius' case as a basis for his doctrine of the "denial of rights to exclusion."¹⁷ In the ancient sources of law that problem was, as he puts it, only treated once, namely by Pomponius in our text. The upholding of a right that cannot any longer be realized is not in accordance with the social order; such a right has to cease. If the owner opposes the termination of his right, it will be merely the result of his own subjective discretion; of his arbitrary whim that is incompatible with the idea of an objectively right law; with the "idea of absolute harmony of human desire." In the question of ownership the practical borderline is human ability: the control over an object. As soon as control is no longer possible for the owner, his affirmation that he can freely act with the object and exclude third persons from any influence on it becomes a "mere pun." In that case the formerly existing right to exclusion has lost its reason for existence. Stammler uses the example of a puppy that got into a drain and could not even be rescued by the fire brigade. In order to shorten its suffering, the brigade drowned the dog. According to Stammler, that act of killing is not an unlawful infringement of property even if the former owner opposes the filling of the drain with water, since the dog no longer belongs to anybody. Stammler expressly shares the criterion of retrievability, *recuperatio*, developed by Pomponius: If "at the best

¹⁷ For the discussion in this section, see R. Stammler, *Die Lehre von dem richtigen Rechte*, 2nd ed. (Halle 1926), 337, 339.

possible judgment” the chance for the owner to regain his object has totally vanished, his right to exclusion ceases. In Pomponius’ case Stammeler evidently shares the opinion of Jacobus de Ravanis that the pursuing neighbor could establish ownership over the pigs saved by himself. The former ownership became extinct in the very moment when the pigs were carried off by the wolves. From that time a practical limit was put to human ability and control, at least in a view *ex ante*. Due to being ownerless, the pigs could be hence acquired by the neighbor.

IV. Résumé and outlook

Firstly, for a long time in modern literature Pomponius was defamed as a mere schoolmaster who only rarely argued in a dogmatically independent manner. However, D.41.1.44 is a good example of a juridically superior argumentation. Pomponius shows considerable capacity for understanding the interests at stake and comes to terms with the result, namely the continuity of property, only reluctantly and after conscientious examination. The remarkably long quotation in Ulpian’s work reveals the esteem Pomponius enjoyed with this late-classical jurist.

D.41.1.44 is an excellent example of the Roman jurists’ legal thinking which is concrete and associative at the same time. Schematic and rigid thinking was to a high degree unknown to them. Pomponius does not simply apply well-known principles — wild animals becoming ownerless when gaining their natural freedom, domestic animals continuing to be owned until their death — but he tries to approach the problem of his case — namely the collision of the owner’s interest in continuity and the rescuer’s interest in recompense — from several points of view. Decisive for him is the legal situation of stranded possessions. Both cases are comparable because of the criterion of retrievability. On account of this *topos* shipwreck and robbery of swine become comparable: the owner is the victim of involuntary loss of possession, which is why his property remains unaffected. This way the rescuer’s contribution remains neglected, a result which one may not approve of and which Jacobus de Ravanis, the Austrian Civil Code, and Stammeler did not agree with. In any case Pomponius’ decision fits in well with the known owner-friendly tendency of the classical Roman law.

Secondly, the German Civil Code adopted the Roman principles of the law of animals and of appropriation.¹⁸ However, with

¹⁸ §§ 958–960 BGB.

codification the intellectual richness of our ancient sources got lost. We are nowadays accustomed to our codification and the technique of subsumption, but we should learn from the Roman way of thinking, it being of a completely different nature. At least we should always call the results of our more or less schematic subsumption into question. Obviously Pomponius had considerable doubt as to whether or not to deny any recompense to the brave neighbor. However, for a modern lawyer educated under the German Civil Code any doubt disappears due to the lack of a corresponding legal basis for a claim. That is why the German legal order is, so to speak, more Roman in this respect than even the Roman jurists were.

In the third place, the question arises whether the saving deed should not merit recompense, in accordance with § 403 of the Austrian Civil Code.¹⁹ A case recently decided by the provincial court of Bonn reveals the relevance of our question to the present.²⁰ A jogger had discovered in a garbage dump a watercolor painted by the expressionist August Macke, worth one million euros at least. When the owner had put the painting into the garbage dump she was mistaken about the artist's identity which is why she could avoid her declaration of intention in abandoning her property. Therefore the painting was no longer ownerless and an appropriation by the jogger was impossible. A finder's reward was not possible either for lack of a corresponding *animus* and notification. In addition, the period of prescription lasting ten years had not expired. The jogger, however, had saved the painting from destruction, since the press of the garbage truck would have certainly destroyed it only a few minutes later.

Shall, in such a case, the owner's interest in continuity actually be preferred to the rescuer's interest in recompense? It is thanks to the rescuer's attention, initiative, and intervention that the object returns to human control, contrary to expectations. Legal conscience does not accept the rescuer not getting a reward. Furthermore, as to legal policy, it would be very questionable to suffocate every incentive for such a saving deed by denying any claim. For those reasons at least the German lawyer should analogously apply a new regulation in the German Commercial Code about the salvager's money.²¹ This provision has its origin

¹⁹ See T. Finkenauer, "Lohn für die Rettungstat?," in M. Wallerath, ed., *Fiat iustitia — Recht als Aufgabe der Vernunft. Festschrift für Peter Krause* (Berlin 2006), 589–609.

²⁰ Landgericht Bonn, *Neue Juristische Wochenschrift*, 57 (2003), 673.

²¹ §§ 742–751 HGB.

in the International Law of the Sea and provides salvage money in case of sea damage, regardless of the establishment of possession as owner or as a bailee or by notification. Only the success of the deed is the basis of the money, the upper limit is the value of the ship with its load. Assessing the salvager's money one should take into consideration the particular circumstances of the case, such as the owner's negligence — recall the case of the painting of Macke — or the riskiness of the deed as it was obvious in the case of the stolen swine.
