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COMMENTS ON THE HISTORIOGRAPHY OF CONDOMINIUM: THE MYTH OF ROMAN ORIGIN

ROBERT G. NATELSON*

I. INTRODUCTION

The faded grandeur of the Roman Empire still exerts a wondrous fascination over the mind of man. This is evident in modern legal literature, as elsewhere. It may help to explain what has become a persistent myth: That condominiums, those most modern of creatures, evolved directly from prototypes that once crowded the seven hills of Rome.

The myth is not only persistent; it is very widespread. It has been repeated uncritically numerous times in the legal literature — and only somewhat critically, many times more. The writers responsible for perpetuating it include practicing

* B.A., 1970 Lafayette College, J.D., 1973, Cornell University, Assistant Professor of Law, Oklahoma City University.

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lawyers,¹ laypersons,² law students,³ judges,⁴ and even law professors.⁵ The publications in which their works have appeared include law reviews,⁶ a hornbook,⁷ case decisions,⁸ case books used for law school instruction,⁹ professional speeches

1. See, e.g., Skaggs & Erwin, *The Horizontal Property Law of Kentucky*, 51 Ky. L.J. 46,47 (1962) [hereinafter Skaggs & Erwin]; Kerr, *Will Condominium Come to Connecticut?* 36 CONN. B.J. 481, 485 (1962) [hereinafter Kerr]; Borgwardt, *The Condominium*, 36 CAL. ST. B.J. 603 (1961) [hereinafter Borgwardt]; Ross, *Condominium In California — The Verge of an Era*, 36 S. CAL. L. REV. 351 (1963) [hereinafter Ross]; Fokes, *Legal and Practical Aspects of Condominium*, 19 BUS. LAW. 233 (1963) [hereinafter Fokes]; Kreider, *The Ohio Condominium Act*, 33 U. CIN. L. REV. 463, 464 (1964) [hereinafter Kreider]; H. ROTHENBERG, *WHAT YOU SHOULD KNOW ABOUT CONDOMINIUMS* 9 (1974).

2. See, e.g., Thurma, *The Condominium — A New Form for the Cooperative*, 41 TITLE NEWS 126 (1962) [hereinafter Thurma]; T. BURKE, et al., *CONDOMINIUM: HOUSING FOR TOMORROW* 5-6 (1964) [hereinafter BURKE].

3. See, e.g., Comment, *Condominium: An Introduction to the Horizontal Property System*, 11 DE PAUL L. REV. 319 (1962) (“originating in Roman law centuries ago”) [hereinafter Comment, *Condominium*]; Note, *Property: Condominium: A New Concept in Real Property Estates*, 16 OKLA. L. REV. 440, 441 (1963) [hereinafter Note, *Property: Condominium*]; Note, *The Unit Ownership Law — Condominium Comes to Oregon*, 2 WILLAMETTE L.J. 434 (1963) [hereinafter Note, *Unit Ownership Law*]; Comment, *Condominiums In the District of Columbia*, 15 AM. U.L. REV. 255 (1966) [hereinafter Comment, *District of Columbia*]; Comment, *The Mississippi Condominium Act: An Analysis of Potential Problems*, 44 MISS. L.J. 261, 263 (1973) [hereinafter Comment, *Mississippi Condominium Act*]; Note, *Real Property — Georgia’s Apartment Ownership Act — Its Scope Analyzed in View of Emerging Condominium Litigation in Other Jurisdictions*, 23 MERCER L. REV. 405 (1972) [hereinafter Note, *Georgia Apartment Ownership*]; Note, *The Alabama Condominium Ownership Act: How to Stand a House Divided*, 27 ALA. L. REV. 177 (1975) [hereinafter Note, *A House Divided*]; Note, *Building on the Horizontal Property Act: Condominiums in Iowa*, 59 IOWA L. REV. 291, 292 (1973) [hereinafter Note, *Condominiums in Iowa*]; Note, *Condominium: A Reconciliation of Competing Interests?*, 18 VAND. L. REV. 1773-1774 n.6 (1965) [hereinafter Note, *Condominium Reconciliation*].

4. See e.g., *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. Dist. Ct. App. 1971). For a somewhat less gullible comment, see *Siller v. Hartz Mountain Associates*, 93 N.J. 370, 461 A.2d 568, 570 n.4 (1983).

5. See, e.g., N. PENNEY, R. BROUDE & R. CUNNINGHAM, *CASES AND MATERIALS ON LAND FINANCING* 578 (1985) [hereinafter PENNEY]; J. BRUCE, J. ELY & C. BOSTICK, *CASES AND MATERIALS ON MODERN PROPERTY LAWS* 3 (1984) [hereinafter BRUCE]; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* 37 n.19 (1984) [hereinafter CUNNINGHAM] (“quite common in ancient Rome”); P. KEHOE, *COOPERATIVES AND CONDOMINIUMS* 6 (1974) [hereinafter KEHOE] (“is thought by some experts to have existed in ancient Rome”).

6. See *supra* notes 1 & 3.

7. CUNNINGHAM *supra* note 5.

8. *Supra* note 4.

9. PENNEY, *supra* note 5; BRUCE, *supra* note 5.

and papers,¹⁰ treatises,¹¹ college undergraduate texts,¹² and condominium handbooks.¹³

The result of this repetition has been, this author believes, a common perception that the condominium is an institution peculiarly Roman, when in fact classical Roman law was entirely hostile to the concept — so much so, that when the civil law was rediscovered by the Medievals and was re-introduced into Western Europe, the horizontal ownership schemes which had arisen under indigeneous practice were severely threatened.¹⁴

The truth of the matter has never been a secret to serious legal historians, and the works of those historians have been freely available in America for many years.¹⁵ What is astonishing is the extent to which American legal writers have overlooked the conclusions of those historians, neglected the original source materials, and cited each other back and forth in a curious roundelay of error. Those conscientious few who have been skeptical of the fable of Roman condominiums, and have cautioned against undue credulity, have in turn been misquoted and misunderstood themselves.

This article is designed to serve two purposes. First, it represents one more effort to set the record straight, and to do so more explicitly than has been done heretofore in the

10. See, e.g., Thurma, *The Condominium — The New Look in Cooperative Building*, 1962 A.B.A. SEC. REAL PROP. PROB. & TR. L., Part II, at 4; Fokes, *supra* note 1, at 233.

11. For example, highly questionable reports of Roman law antecedents are reported in 1 A. FERRER & K. STECHER, *LAW OF CONDOMINIUM*, § 31, at 16-27 (1967) [hereinafter FERRER & STECHER]. (These reports are investigated in Part VI, *infra*). See also 4B R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY*, Par. 633.1[2] (1985) [hereinafter POWELL] (“The term itself originated in Roman law and simply meant joint dominion or co-ownership”). This is misleading, for the term is unattested in classical Roman law. See M. KASER, *ROMAN PRIVATE LAW* 100, *cf.* xv (1968).

12. See, e.g., B. HARWOOD, *REAL ESTATE PRINCIPLES* 485 (1986) [hereinafter HARWOOD].

13. See, e.g., KEHOE, *supra* note 5. See also H. ROTHENBERG, *WHAT YOU SHOULD KNOW ABOUT CONDOMINIUMS* 9 (1974); C. Dowden, *Creating a Community Association: The Developer's Role in Condominium and Homeowner Associations* 2 (1977); Institute of Real Estate Management, *The Owner's and Manager's Guide to Condominium Management* 10 (1984); R. WINDHAMSMITH, *CONDOMINIUM RESEARCH STUDY GUIDELINES*, inside cover (1984) [hereinafter WINDHAMSMITH].

14. See *infra* note 57 and accompanying text.

15. See *infra* notes 64-72 and accompanying text.

mainstream legal literature. Second, it traces a course of events that is symptomatic of underlying problems in American legal scholarship. The reader may find the story of how "Roman condominium" became lodged in our textbooks and law reviews at least as amusing as it is disheartening; hopefully, the story will prove instructive as well.

The reader will find this article to be divided into several different parts. This introduction constitutes Part I; Part II of this article outlines the considerations which render it improbable that anything like modern condominium existed in Roman civil law.¹⁶ Part III is a short sketch of the actual history of condominium. Part IV traces the process by which the fable of Roman origin crept throughout American legal literature. Part V explains, in reverse chronological order, how a now-discredited European historical theory was transmitted *via* Spanish-language literature to the western hemisphere; how it was introduced to the American mainland (in greatly embellished form) by Puerto Rican witnesses testifying at Congressional hearings; how a midwestern title examiner — entranced with the condominium concept — embellished the story still further and introduced it into mainstream legal publications, where the credulity and negligence of legal writers have nurtured it ever since.

Part VI provides citations to, translations of, and commentary on the classical texts cited by those authors who have sought to find evidence of horizontal property ownership in Rome. Although competent classical scholars have long rejected them as evidence of horizontal property, these texts are still regularly referred to (not always with discretion) in Spanish-language literature, and they have occasionally appeared (usually with even less discretion) in American legal journals. It is hoped that once these texts have seen the light of day and of the English language, they will not plague us again.

16. There have been allegations of horizontal property ownership in those parts of the empire subject to Greek, Syrian, or Judaic law. This paper will not pass upon the merits of those allegations. The specific problem being addressed herein is the oft-repeated claim that the condominium is of *Roman* origin, that it existed in *Rome*, and that it was a creature of *Roman* law. The citations in support of alleged horizontal ownership in the Levant are collected in M. FERNÁNDEZ MARTÍN-GRANIZO, *LA LEY DE PROPIEDAD HORIZONTAL EN EL DERECHO ESPAÑOL* 112-16 (Madrid 1983).

Part VII speculates upon the reasons for the sorry state of so much legal scholarship and suggests no other solutions but a slight change in emphasis, a moderate increase in classical training, and a great deal more diligence and intellectual curiosity.

II. CONDOMINIUM OWNERSHIP AND THE CLASSICAL ROMAN LAW¹⁷

The tourist reflecting upon the ruins of residential areas in Ostia and Rome might well conclude that many of the

17. *A Note on Roman law sources, citations, and translations;*

a. *Primary.* The Latin cited here for Justinian's *Corpus Juris Civilis* is from the (now standard) edition of T. Mommsen and P. Krueger, except that consonantal "u" has been regularly changed to "v". The *Corpus Juris* includes, of course, the *Institutes*, *Digest*, *Novellae*, and *Codex*.

The Mommsen-Krueger edition is the basis for the first full translation of the *Digest* into English: T. MOMMSEN, P. KRUEGER & A. WATSON, *et al.*, *THE DIGEST OF JUSTINIAN* (1985), to which reference is occasionally made.

The edition of Gaius used is F. DE ZULUETA, *INSTITUTES OF GAIUS* (1952).

b. *Classical citations.* Classical conventions have been used in citing primary sources. If there is one identifiable author to a *Digest* fragment, his name is abbreviated and placed in front of the citation. Thus:

Ulp.D.7.1.13.8 = Ulpian in the *Digest*, Book 7, Title 1, Fragment 13, Paragraph 8. Other sources are cited: I. = *Institutes of Justinian*; C. = *Code of Justinian*; G. = *Institutes of Gaius*.

c. *Translations.* All translations in the text from Latin, Greek, Spanish, and German are by the present writer.

d. *Secondary Sources.* On issues of Roman law and horizontal property, the following writers are cited more than once. (Other sources also appear throughout the footnotes.) If the work is not available in English translation, the language in which it is published is here noted: M. BATLLE VÁZQUEZ, *LA PROPIEDAD DE CASES POR PISOS* (Valencia 1960) (Spanish) [hereinafter BATLLE VÁZQUEZ]; M. BORJA MARTÍNEZ, *LA PROPIEDAD DE PISOS O DEPARTAMENTOS EN DERECHO MEXICANO* (Mexico City 1957) (Spanish) [hereinafter BORJA MARTÍNEZ]; W. BUCKLAND & A. McNAIR, *ROMAN LAW AND COMMON LAW* (1952) [hereinafter BUCKLAND & McNAIR]; J. CARCOPINO, *DAILY LIFE IN ANCIENT ROME* (1940) [hereinafter CARCOPINO]; M. FERNÁNDEZ MARTÍN-GRANIZO, *LA LEY DE PROPIEDAD HORIZONTAL EN EL DERECHO ESPAÑOL* (Madrid 1983) (Spanish) [hereinafter F.M.-G.]; B. FRIER, *LANDLORDS AND TENANTS IN IMPERIAL ROME* (1980) [hereinafter FRIER]; R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* (1918) [hereinafter HUEBNER]; M. KASER, *ROMAN PRIVATE LAW* (1968) [hereinafter KASER]; H. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (1952) [hereinafter JOLOWICZ]; Leyser, *The Ownership of Flats — A Comparative Study*, 7 *INT'L & COMP. L.Q.* 31 (1958) [hereinafter Leyser]; Meincke, *Superficies Solo Cedit*, 88 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG (RÖMISCHE ABTEILUNG)* 136 (1971) (German) [hereinafter Meincke]; H. RACCIATTI, *PROPIEDAD POR PISOS O POR DEPARTAMENTOS* (Buenos Aires 1975) (Spanish) [hereinafter RACCIATTI]; Riccobono, *Dal Diritto Romano Classico al Diritto Moderno*, 3-4 *ANNALI DEL SEMINARIO GIURIDICO* 165 (1917) (Italian)

buildings he sees would have been ideal subjects of condominium ownership. Besides the sprawling, detached, multi-chambered homes of the very wealthy (*domus* or *aedes*), the tourist can find the remains of attached houses connected by party walls, of once-towering blocks of flats (*insulae*), and of flop-houses (*deversoria*) for the very poor.¹⁸

For those who have speculated about Roman condominiums, the *insulae* have been of particular interest. These apartment buildings were commonly four or five stories in height:¹⁹ an impressive achievement — although a wearying one to ponder, when one recalls the absence of elevators. Otherwise, the better *insulae* were striking in their modernity. Indeed, artists' reconstructions of them remind us of the buildings erected in American cities early in the twentieth century.²⁰

Space occupancy within an *insula* was by apartments and floors. The ground level served as the *domus* of an upper-class

[hereinafter Riccobono]; F. SCHULZ, *CLASSICAL ROMAN LAW* (1951) [hereinafter SCHULZ]; A. VENTURA-TRAVESET Y GONZÁLEZ, *DERECHO DE PROPIEDAD HORIZONTAL* (Barcelona 1976) (Spanish) [hereinafter VENTURA-TRAVESET]; A. WATSON, *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* (1968) [hereinafter WATSON, PROPERTY]; A. WATSON, *ROMAN PRIVATE LAW AROUND 200 B.C.* (1971) [hereinafter WATSON, 200 B.C.]; A. WATSON, *ROME OF THE XII TABLES* (1975) [hereinafter WATSON, TABLES].

e. *Note on European sources.* Trained classicists will note the relative absence of citation to French, Italian, and German-language journals. The generally uncontroversial nature of the Roman law conclusions expressed herein should excuse the omission, which is caused by our inability to obtain much of this material by any method available to us.

18. The classic description of Roman housing is to be found in CARCOPINO, *supra* note 17, at 22-44 (1940). Carcopino must be used with care. Some of his conclusions have been supplemented by more recent scholarship, and a number of his citations are erroneous or misleading. A more up-to-date description, complete with diagrams and plates, is found in FRIER, *supra* note 17, at 3-34. *See also* the recent study of one particular complex: Watts & Watts, *A Roman Apartment Complex*, *Sci. Am.*, Dec., 1986, at 132.

19. FRIER, *supra* note 17, at 3. The height of lightly-built apartment houses became a problem, and a subject of imperial regulation. *See, e.g.*, Anon., *Epitome de Caesaribus* 13.13. There is a famous quotation from the epigrammist, Martial, in which he regrets having to climb three stories to a fourth floor *cenaculum*. *Mart.* 1.117.6-7. CARCOPINO, *supra* note 17, at 26.

20. *See generally* the illustrations in FRIER, *supra* note 17.

family or as quarters for a commercial establishment. The upper floors were divided into residential units of varying sizes — from large, two-story *cenacula* for the more fortunate, to tiny cubicles for the poor.²¹

Yet there can be little doubt that, although space *occupancy* occurred by apartments and floors, condominium-style space *ownership* was unrecognized in ancient Rome. There are compelling reasons for this conclusion.

First, the available sources do not mention the condominium form of ownership or anything like it. The occasional classical citation put forward by those suggesting Roman antecedents for condominium always turns out to stand for something quite different.²² The word “condominium” itself, although commonly attributed to Roman law,²³ is of New Latin coinage²⁴ and is unattested for Roman times.²⁵

Second, there is a massive amount of evidence²⁶ which reveals how apartment houses actually were owned and managed. The evidence suggests that each *insula* and each *deversorium* was held by an upper-class landlord (individually or in partnership) and was rented to the tenants who lived there. Rental was frequently effected through the services of “middleman,”²⁷ a businessman who leased the entire structure from its owners and subleased in turn to its occupants on terms varying from a day (in the humble *deversoria*), to from one to five years (in the *cenacula*).²⁸

21. *Id.* at 3-18. We are indebted to Professor Frier for his identification of the wide range of social classes who lived in rental housing.

22. Some of those citations are examined in Part VI, *infra*.

23. See, e.g., Skaggs & Erwin, *supra* note 1, at 47; Johnson, *Condominium: The Theory and North Dakota Practice*, 44 N.D. L. REV. 345, 346 (1968); Breur, *Condominium — A Study in Recent Developments* 41 TITLE NEWS 2 (1962); see POWELL, *supra* note 10, at Par. 633.1[2]; Pohoryles, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014-15 (1963) [hereinafter Pohoryles].

24. “New Latin” is modern Latin, as opposed to Early (Archaic) Latin, Classical Latin (c. 80 B.C. — 200 A.D.), Late Latin (third to sixth century) and Medieval Latin. WEBSTER’S NEW INTERNATIONAL DICTIONARY 1397 (2d Ed. 1955). On the etymology of “condominium,” see *id.* at 557.

25. *Supra* note 11.

26. At least massive by the standards of classical scholarship. Much of it is collected in FRIER, *supra* note 17, at 291-92.

27. *Id.* at 35-36. The middleman could be called a *procurator*. Ulp. D. 19.2.15.8.

28. FRIER, *supra* note 17, at 37 & 51.

There is evidence, in imperial times, of even longer terms, for it was then that private landholders began to utilize the *superficies*, a lease which, in theory anyway, could be perpetual, although it was always clearly distinguishable from the ownership of the property.²⁹

Third, the known doctrines of Roman law were hostile to the creation of anything like the modern condominium. Condominium ownership, as the institution is understood today, depends for its viability upon four legal requirements:

(1) Undivided co-ownership of a parcel of improved real estate.³⁰ This co-ownership must be of a kind appropriate to the condominium form. For example, the "unities" and rights of "accrual" characteristic of joint tenancy or tenancy by the entirety (except as they might be applied to a single unit) are not consistent with our ideas of condominium.

(2) Extensive reciprocal servitudes upon the property interests of the co-owners. It is these servitudes which make possible rights of access and building administration.

(3) Certain restrictions upon the right of partition. These are necessary to prevent unit owners from severing their

29. *Id.* at 29 n.24. Originally, the *superficies* was a long-term rental of publicly-owned land. 1 T. MOMMSEN, P. KRUEGER & A. WATSON, *et al.*, THE DIGEST OF JUSTINIAN xxvi (1985) [hereinafter 1 WATSON DIGEST]; see also KASER, *supra* note 17, at 126 and 1 J. MOYLE, IMPERATORIS JUSTINIANI INSTITUTIONUM LIBRI QUATTUOR 313 (1883) [hereinafter J. MOYLE].

For the uninitiated, explanation of some chronological terms may be helpful. Generally, Roman history is divided into the Regal period (the rule of kings from the founding of the city in 753 B.C. to the establishment of the Republic in 510 or 509 B.C.), the Republican period, and the Imperial period. The imperial era began at the accession of Augustus, a date given variously (for different events) as 31, 30 or 27 B.C. This era continued through the collapse of the western part of the Empire (traditional date: 476 A.D.). The eastern half survived, and, under Justinian (527-565 A.D.), reconquered much of the West.

Justinian was the last Emperor who was a native Latin speaker, and his reign (or death) is often marked as the beginning of the Greek or Byzantine Empire. This continued in one form or another until the capture of Constantinople, the eastern capital, by the Ottoman Turks in 1453.

The period of "classical" Roman law referred to in this text corresponds roughly to the era which most people think of as the height of the Empire, that is to say, the first two and a quarter centuries A.D.

30. See, e.g., UNIF. CONDOMINIUM ACT § 1-103(7), and comment 5. 7 U.L.A. 434 and 436-37 (1980). This act has been adopted in nine states. For a similar provision in a "first generation" condominium statute, see COLO. REV. STAT. § 38-33-103(1) (1982).

airspace rights from their undivided ownership, or forcing the sale of the entire property.³¹

(4) "Horizontal property," *i.e.*, a separate ownership right (in America this is usually a fee-simple) reserved to each co-owner over a specific block of air space.³²

Roman jurists would have been uncomfortable with all of these requirements. Their law recognized only one kind of co-ownership.³³ Although most aspects of this form were comparable to those found in our tenancy in common, there were important — and, from a condominium point of view, very inconvenient — differences. One of these was a limited right of accrual, whereby the interest of one owner became forfeit to the others.³⁴

Moreover, title holders of co-owned property were not permitted to create servitudes in that property.³⁵ This restriction might of itself have prevented creation of anything like the modern condominium declaration, with its detailed enumeration of unit owners' respective rights and responsibilities.³⁶ (It hardly needs saying that there is absolutely no

31. See, *e.g.*, 1 B P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE, App. C-2, at App. - 192.28 (125) (1965) [hereinafter ROHAN & RESKIN]. See also COLO. REV. STAT. § 38-33-102 (1982) and OKLA. STAT. ANN. tit. 60, § 527 (West Supp. 1986).

32. On the minimal criteria of co-ownership and air space possession, see Leyser, *supra* note 17, at 37-38. A few statutes do not have an absolute requirement of horizontal property, *e.g.*, FLA. STAT. ANN. § 718.103(23) (West Supp. 1986), but it remains the most distinctive element of ownership, and is required in many, if not most, states. See, *e.g.*, OHIO REV. CODE ANN. § 5311.01(I)(1) (Anderson 1970); OKLA. STAT. ANN., tit. 60, § 503(b) (West Supp. 1986).

33. On this form, see W. BUCKLAND, A TEXT BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 534-44 (3rd ed. 1966) [hereinafter BUCKLAND]; BUCKLAND & MCNAIR, *supra* note 17, at 103-10; SCHULZ, *supra* note 17, at 336-37; and KASER, *supra* note 17 at 99-101.

34. BUCKLAND & MCNAIR, *supra* note 17, at 105. For example, accrual occurred if one tenant abandoned his share. Mod. D. 41.7.3. The attempted manumission of a slave by one co-owner without the other's consent resulted in accrual in favor of the second owner. I.2.7.4 An example of a way in which Roman co-ownership was similar to tenancy in common was that the co-owners could hold unequal shares. Ulp. D. 39.2.40.4.

35. Paul. D. 8.2.26 (In re communi nemo dominorum iure servitutis neque facere quicquam invito altero potest neque prohibere, quo minus alter faciat (nulli enim res sua servit) . . . See also Ulp. 8.4.6.1.

36. A possible dodge might have been to use the principle set forth in Paul D. 8.1.8.1 (imposing servitudes while property separately owned, which servitudes survive when tracts come under single ownership), but that would have been a complicated procedure. Also, mutual servitudes in many housing complexes would have been made impossible by the requirement that dominant and servient estates be within each others' line of sight. Paul D. 8.2.38.

evidence that any such document was ever drafted.) Since no reciprocal servitudes could be created in co-owned property, no administrative mechanism could be erected to manage the property; on the contrary, there were legal devices available to *prevent* acts of management by any one co-owner without the unanimous consent of the others to each single act.³⁷ To be sure, there were a few exceptions to the rule, but they were narrow, and limited to such questions as administration of joint legacies,³⁸ emergency repairs,³⁹ and business partnership.⁴⁰ The prevailing legal attitude was that co-owners must work together on a continuing basis and not bind themselves for the future. As might be predicted, the sources report that this system was the cause of countless disputes among those who had the misfortune to co-own property.⁴¹

It is not surprising, therefore, that the right to bring an action for partition (*communi dividundo actio*) was a valued one. Indeed, contractual restrictions upon partition were void in classical law.⁴² Yet, as just noted, such restrictions are crucial to a condominium scheme.

Perhaps the most serious legal bar to condominium in ancient Rome was the juristic attitude toward horizontal property ownership. This attitude is summed up in the much-cited maxim "*superficies solo cedit*," which, translated literally, means "an improvement yields to the soil," and, translated freely, means "title to things connected to the ground is vested in the owner of the ground."⁴³

37. *E.g.*, the *actio negotiorum gestio*, discussed in D.3.5., *passim*. See also Mod.D.3.5.26pr. Another remedy was the *actio communi dividundo*. See, *e.g.*, Ulp.D. 10.3.6.2 and 10.3.6.12.

38. Gai.D. 10.2.5.; Gai.D. 16.3.14 pr. The other reference cited by BUCKLAND & McNAIR, *supra* note 17, at 107 (Paul. D. 10.2.44.2) does not appear relevant.

39. Gai.D. 39.2.32 (defect in jointly owned house threatens injury to adjacent property of one co-tenant).

40. Ulp.D. 17.2.52.10.

41. Paul.D. 8.2.26.

42. C.3.37.5; Paul.D. 10.3.14.2. BUCKLAND & McNAIR, *supra* note 17, at 106, suggest the addition of the clause validating such agreements *intra certum tempus* is a post-classical addition.

43. This maxim is attested in numerous places and in many forms. Some of these are collected in Meincke, *supra* note 17, at 136. A few of these include: *Omne quod inaedificatur solo cedit* ("Everything which is built yields to the soil"); *illius fit aedificium, cuius et solum est* ("A building becomes his whose is also the soil"); *ius soli sequetur aedificium* ("The building will follow the right to the soil").

The term *superficies* as utilized in this maxim should not be confused with the use of the same word to describe a long-term leasehold. One German scholar (Meincke) explains its usage in the maxim as follows: *Superficies* in the meaning of this rule is "what is connected to the ground and projects out over it," or, putting a stronger emphasis on the base-word *facere*, "what has been made on top of the ground."⁴⁴ That same scholar then goes on to point out that *superficies* encompassed more than buildings; plants were also included.⁴⁵

In explaining the meaning of the word *solum* (soil, ground; the form "*solo*" is the dative), the same writer adds that the "soil" to which the improvements "yielded" was not a delimited, staked-out plot of land, but rather the land connected directly to the building, the land "without which the building cannot stand;" for "the soil is part of the house."⁴⁶ This conception, therefore, is really part of the Roman doctrine of accession,⁴⁷ and somewhat different from the "conical" ideal of real estate which our own law captures in the maxim "*cuius est solum, eius est usque ad coelum et ad inferos*."⁴⁸ For the Romans claimed no automatic right to the sky, nor even to much of the airspace above the ground. A property owner's rights in the soil gave him his rights in an affixed building; he held the improvements not by reason of

44. *Id.* at 137 (translated from German).

45. *Id.* at 137-38.

46. *Id.* "Sine quo aedificium stare non potest." Jul.D. 30.81.3. "Solum partem esse aedium." Cel. D. 6.1.49 pr. If an improvement belonging to "A" was affixed to "B"'s land, ownership of the improvement usually passed to B. But once severed from the land, ownership might well revert to A. Jul. D. 6.1.59.

47. For a brief discussion of *superficies solo cedit* and accession of movables to immovables, see KASER, *supra* note 17, at 110-11. See also, A. WATSON, 200 B.C. *supra* note 17, at 66-67; A. WATSON, PROPERTY, *supra* note 17, at 74-75; BUCKLAND, *supra* note 33, at 208-15.

48. That is, "He who owns the soil owns all the way to the sky and to the nether regions." See BUCKLAND & McNAIR, *supra* note 17, at 101, suggesting that this maxim may have been developed based on a gloss to a Roman text, but was not itself Roman.

vertical property boundaries, but by reason of their connection to the ground.⁴⁹

It is true, of course, that many legal maxims are honored in the breach as least as much as in the observance. There have, therefore, been a number of scholarly inquiries into the actual legal force of *superficies solo cedit*. Most have concluded that, with certain narrow exceptions not relevant here, it reigned unchecked in Roman property law,⁵⁰ and that it made horizontal ownership of property impossible.⁵¹

III. ACTUAL HISTORY OF CONDOMINIUM

For some time, scholars have been aware that the antecedents of modern horizontal property ownership are to be

49. Meincke, *supra* note 17, at 137-38. The qualified nature of airspace rights is exemplified by Ulp. D. 43.27.1.7-8 (limiting property owner's right to prune neighbor's tree overhanging property). Cf. Ulp. D. 43.27.1.9 (right to cut down tree when it overhangs a house). Professor Watson proposes an engaging explanation for the first provision. See WATSON, TABLES *supra* note 17, at 159.

50. Meincke, *supra* note 17, at 170-71. Ner. D. 39.2.47 is heavily interpolated, and in its original form was not *contra*. See Riccobono, *supra* note 17, at 520-22. Note even here the accompanying disapproval of horizontal ownership: "Nec tamen consequens est, ut superior pars aedificii, quae nulli coniuncta sit neque aditum aliunde habeat, alterius sit quam cuius est id cui superposita est." *Id.* at 522.

51. BUCKLAND & McNAIR, *supra* note 17, at 101 ("the Roman law totally excluded superimposed freeholds"); Meincke, *supra* note 17, at 141 ("also the establishment of a special property interest in real, horizontally organized parts of a house [Stockwerkseigentum] is . . . prohibited); see also *id.* at n.29; F.M.-G., *supra* note 17, at 125; KASER, *supra* note 17, at 111; HUEBNER, *supra* note 17, at 173.

There has been little dissent from the foregoing. The primary reservation has been among scholars who, although conceding that horizontal ownership was impossible, have suggested that the *superficies*, or long-term lease, could be used to achieve the same result. There is a dispute over the question of how early, or how often, the tenant (*superficiarius*) was entitled to an action *in rem*. Some scholars suggest that *in rem* actions were available to *superficiarii* by the time of Hadrian. See, e.g., KASER, *supra* note 17, at 126: "A protection by *actio in rem* . . . was obviously only granted from case to case (by *actio in factum* . . .)."

Perhaps the more prevalent view is that references to *in rem* rights of *superficiarii* in the *Digest* are largely post-classical interpolations, perhaps by Justinian's compilers, who were subject to Hellenistic influence. See Riccobono, *supra* note 17, at 519, 523; Meincke, *supra* note 17, at 165. SCHULZ, *supra* note 17, at 398. F.M.-G. *supra* note 17, at 128, accepts this theory. A glaring example of post-classical patchwork, apparently designed to give the *superficiarius* an action *in rem*, is found at D. 6.1.73-75. A short bibliography appears in JOLOWICZ, *supra* note 17, at 283 n.1, who believes that praetorian legislation initiated the process of granting *superficiarii* rights *in rem*, and that the process was completed under Justinian. *Id.*

found in the Middle Ages, and particularly in Germany, a nation at that time relatively untouched by Roman legal concepts.⁵² Except for a fleeting moment in the reign of Augustus, the greater part of Germany had never come under Roman sway.⁵³ Although in the years following the collapse of imperial power in the West, certain Germanic kingdoms in territories formerly Roman experimented with legal codes based on the *Ius Civile*,⁵⁴ these codes apparently had little effect in Germany proper.

The moveable nature of tents and of primitive German cabins had encouraged the idea that one could own an improvement on another's land. By the 1100s, this idea had become generalized to include more permanent structures, for by that time ownership of stories within structures was common in German towns.⁵⁵ This was the institution of "story-property:" *Stockwerkseigentum*.⁵⁶ From its German origin the institution spread to other parts of Europe — specifically France, Switzerland, and perhaps Italy, territories which had been part of the Roman Empire, but where the influence of Roman law had faded.

Eventually, however, Justinian's *Corpus Juris* was rediscovered in western Europe, and scholarly and judicial enthusiasm for Roman law principles made them regnant once again. Even the Germans, whose ancestors had successfully resisted Roman arms, now fell in love with Roman law. The new "Reception" of Roman law into Europe presented a challenge to *Stockwerkseigentum*, for that institution was inconsistent

52. HUEBNER, *supra* note 17, at 172-74. The Italians apparently claim similar institutions nearly as old. See F.M.-G., *supra* note 17, at 130, especially n.46.

53. The Roman boundary usually followed the lines of the Rhine and the Danube, although the *Agri Decumates* (Black Forest area) was for a long time under imperial control. Roman arms were carried to the Elbe in 6 A.D., and there were plans for a new German province, but a military disaster three years later caused the scheme to be abandoned. For a connected narrative in English, see the following translation: T. MOMMSEN, *THE PROVINCES OF THE ROMAN EMPIRE: THE EUROPEAN PROVINCES* 35-50 (1968) (T. Broughton, Ed.).

54. A. WATSON, *THE LAW OF THE ANCIENT ROMANS* 94 (1970); J. WALLACE-HADRILL, *THE BARBARIAN WEST* 55-56 (1962).

55. HUEBNER, *supra* note 17, at 166-74.

56. *Id.* at 174. Other terms included *Geschosseigentum*, *Gelasseigentum*, and *Etageneigentum*.

with *superficies solo cedit*; and in several parts of Europe, horizontal property ownership was restricted or abolished.⁵⁷

Some countries, although in the main adopting Roman legal concepts, chose to regulate rather than destroy the institution of *Stockwerkseigentum*. One of these was France, which recognized horizontal property at least as early as 1804.⁵⁸ By the 1920s, flat-ownership was more than a curiosity. It had become quite popular in Paris and in other major European cities. In the succeeding years, the various European national legislatures responded to this popularity with statutes designed to legalize "story-property," and put the institution on a workable modern basis. Belgium enacted legislation in 1924; Sweden followed in 1931. Similar laws were adopted in Italy (1934), France (1938, with amendments in 1939 and 1943), and in Spain (1939). The Germanic nations, however, still under the influence of classical Roman jurisprudence, did not respond to the new trend until late in the 1940s and in the 1950s.⁵⁹

The result of this legislative activity was the perfection, on the continent of Europe, of an institution very much like the modern American condominium. Its initial toehold in the western hemisphere was acquired in Brazil, which adopted a horizontal property statute in 1928. From there, the institution spread throughout Latin America.⁶⁰ The first United States jurisdiction to adopt the concept was Puerto Rico, which enacted a rudimentary statute in 1951,⁶¹ and followed

57. *Id.* Specifically, this occurred in Saxony, Bavaria, and Austria. This is perhaps reflective of the fact that the Reception was a faster, more thorough process in the Teutonic regions than in Italy or France. O. ROBINSON, T. FERGUS & W. GORDON, *AN INTRODUCTION TO EUROPEAN LEGAL HISTORY* 318 (1985).

58. In the Code Napoleon, Article 664, see Leyser, *supra* note 17, at 34. A translation of Article 664 appears in Kerr, *Condominium — Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3 n.7 (1963) [hereinafter Kerr, *Statutory Implementation*]. This writer cannot vouch for it. Extensive municipal regulation of horizontal property was enacted in cities throughout Europe from the fifteenth century on. Ordinances are extant from Brussels, Paris, Grenoble, Milan, Orleans, and many other cities. BORJA MARTÍNEZ, *supra* note 17, at 23; BATLLE VÁZQUEZ, *supra* note 17, at 19-20; RACCIATTI, *supra* note 17, at 8-11; VENTURA-TRAVESET, *supra* note 17, at 14.

59. The laws are surveyed in Leyser, *supra* note 17, at 37-50 and in F.M.-G., *supra* note 17, at 139ff.

60. BATLLE VÁZQUEZ, *supra* note 17, at 27-29; RACCIATTI, *supra* note 17, at 13-14.

61. 1 ROHAN & RESKIN, *supra* note 31, at § 2.03.

up with a more comprehensive law (based on a Cuban model) seven years later.⁶² As of 1960, however, the concept was quite unknown in the continental United States.

The condominium invasion of the American mainland was facilitated, as most real estate experts know, by the United States Congress. At Puerto Rican request, hearings were held in 1960 before the House Subcommittee on Housing of the Committee on Banking and Currency, and before a subcommittee of the corresponding Senate committee. As a result of these hearings, Congress passed (in 1961) an amendment to the National Housing Act to permit FHA insurance of condominium mortgages. One result was an outpouring of state enabling legislation, an outpouring which did not end until condominium laws had been adopted in all fifty states.⁶³

IV. THE EVOLUTION OF THE ROMAN MYTH IN THE MODERN LEGAL LITERATURE

At the time the National Housing Act was amended, there had not been a large volume of materials published in English on horizontal property ownership, but what had been published had been competently researched and was freely available. Writers who sought useful historical information on condominium had to turn no further than to Professor Ball's account in the *Yale Law Journal* (1930),⁶⁴ Professor Leyser's thorough discussion in *International and Comparative Law*

62. On origins of the Puerto Rican law, see *Arce Preston v. Caribbean Home Construction Corp.*, 108 D.P.R. 225, 235 (1978) ("The Horizontal Property Law . . . of June, 1958 . . . is based on Cuban Legal-Decree Number 407 of September 16, 1952.") (opinion in Spanish).

At the Congressional hearings on the bill to extend FHA insurance to mortgage loans secured by condominium units, it was claimed that at least four condominiums already existed in the mainland United States, but without statutory authorization. This writer is unable to vouch for the veracity of that statement. See *Hearings on General Housing Legislation Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 86th Cong., 2d Sess. 273-74 (1960) (statement of Luis E. Julia, President of Condominium Enterprises, Inc.) [hereinafter *House Hearings*] and *Hearings on Various Bills to Amend the Federal Housing Laws Before a Subcomm. of the Senate Comm. on Banking and Currency*, 86th Cong., 2d Sess. 597 (1960) (statement of Luis E. Julia) [hereinafter *Senate Hearings*].

63. 1 ROHAN & RESKIN, *supra* note 31, at Appendix B-1. The statement at *id.* § 2.03 (49 states) is now obsolete.

64. Ball, *Division Into Horizontal Strata of the Landscape Above the Surface*, 39 YALE L.J. 616 (1930).

Quarterly (1958),⁶⁵ or a well-prepared student comment in the *Louisiana Law Review* (1959).⁶⁶ Larger studies were also readily available. Huebner's classic treatment of German law⁶⁷ had been translated into English, and two British scholars (Professors Buckland and McNair) had collaborated to produce a popular book comparing the Roman and the common law systems.⁶⁸ The Roman law studies of Kaser⁶⁹ and Schulz⁷⁰ had also been rendered into English, as had the *Institutes* of Gaius and parts of Justinian's *Corpus Juris*.⁷¹ In addition, there were numerous publications on horizontal property in modern foreign languages, especially in Italian and German.⁷² Any serious examination of the foregoing sources would have been enough to induce a writer to reject the notion that the ancient Romans lived in condominiums.

In 1960, the late Charles E. Ramsey, a title officer for the Chicago Title and Trust Company, wrote a pamphlet entitled *Condominium: The New Look in Co-ops*. This pamphlet was published by his company late that year.⁷³ On its third page is the following sentence:

65. Leyser, *supra* note 17.

66. Comment, *Individual Ownership of Apartments in Louisiana*, 19 LA. L. REV. 668, at 668-75 (1959).

67. HUEBNER, *supra* note 17. One might note also another classic, which had been translated into English, and which clearly points out the incompatibility of horizontal property with Roman legal concepts: C. CALISSE, *A HISTORY OF ITALIAN LAW* 670-71, 718 (1928).

68. BUCKLAND & MCNAIR, *supra* note 17 (1951 edition).

69. KASER, *supra* note 17 (earlier edition).

70. SCHULZ, *supra* note 17.

71. See, e.g., F. DE ZULUETA, *INSTITUTES OF GAIUS* (1952); J. MOYLE, *supra* note 29 (Latin and English with extensive annotations); J. MUIRLAND, *INSTITUTES OF GAIUS AND RULES OF ULPIAN* (1904). Most of the *Digest* had not been published in English until 1985, but there were exceptions even here, e.g., B. WALKER, *SELECTED TITLES FROM THE DIGEST: "DE ADQUIRENDO RERUM DOMINIO" AND DE ADQUIRENDA VEL AMITTENDA POSSESSIONE* (1880).

72. Scholarly discussions on the impossibility of horizontal property in Roman law are to be found at least as far back as 1837, when the great von Savigny published an article on the subject. For citations, see Meincke, *supra* note 17, at 141, n.23.

73. His position is identified in Ramsey, *The Proposed Illinois Condominium Act*, 51 ILL. B.J. 554 (1963) (This is one place where he did not repeat the "hills of Rome" language discussed in the text immediately *infra*). For the date of initial publication, see Ramsey, *Condominium, The New Look in Cooperative Building*, 1962 A.B.A. SEC. REAL PROP. PROB. & TR.L., Part II, at 4 [hereinafter Ramsey A.B.A.]. The publication date borne by the pamphlet is 1961, however.

There has recently appeared in the United States a new word to describe an ancient concept of ownership of real property. The word is "condominium," and while it is new to us in the sense that it is not to be found among the pages of our numerous treatises on the law of real property, the concept of property ownership to which it pertains is literally as old as the hills — the hills of ancient Rome, where it is said to have had its beginning.⁷⁴

Perhaps due to this felicitous turn of phrase, to his company's influence, or to his own abilities as a speaker and a writer, Mr. Ramsey quickly became known as an expert in condominiums, a concept which everybody was interested in, but which nobody but Mr. Ramsey seemed to know much about. Mr. Ramsey's name is referred to constantly in the condominium literature of the 1960s. He spoke and wrote in a number of different fora, nearly always repeating the "hills of ancient Rome" language in one form or another, but never providing any citations to authority.⁷⁵ In 1963 he wrote for both the *Practical Lawyer*⁷⁶ and the *Louisiana Bar Journal*;⁷⁷ and his address the preceding year before the Real Property, Probate, and Trust Law Section of the American Bar Association was published in that organization's *Proceedings*.⁷⁸ William Thurma, another Chicago Title employee (apparently Mr. Ramsey's superior) borrowed the sentence about the "hills of ancient Rome" for an address at a convention of the American Title Association held in October, 1961. This address was subsequently published in an issue of *Title News*.⁷⁹ That same year another writer (Borgwardt) related a similar story to readers of the *California Bar Journal*; one suspects

74. F. RAMSEY, *CONDOMINIUM: THE NEW LOOK IN CO-OPS* 3 (1961).

75. Mr. Donald Wilson of Chicago Title informs this writer that Mr. Ramsey is now deceased. Telephone interview of July 14, 1986. Thus we shall never know what sources Mr. Ramsey relied upon. Ironically, however, at a point shortly after the "hills of Rome" sentences, Ramsey did refer the reader to Leyser, *supra* note 17, which should have caused him to doubt the notion of Roman origin. *Id.* at 3 n.2.

76. Ramsey, *Condominium*, 9 *PRAC. LAW.* 21 (Mar. 1963).

77. Ramsey, *Condominium in Louisiana — Act 494 of 1962*, 10 *LA. B.J.* 219 (1963).

78. Ramsey *A.B.A. supra* note 73.

79. Thurma, *supra* note 2, at 126. Compare the commendable caution of another writer in the same publication, explicitly avoiding a detailed history. Boyce, *Condominium Comes to Town*, 41 *TITLE NEWS* 12 (Dec. 1962).

Mr. Ramsey was his source. We cannot be sure, however, for that writer did not cite to authority, either.⁸⁰

Messrs. Ramsey, Thurma, and Bourwardt can perhaps be excused their errors: Their articles had no scholarly pretensions, and they were not written for mainstream law reviews. But before long many of those law reviews were printing the same story. The following is found in a 1962 article in the *Kentucky Law Journal*:

The concept of condominium is founded on ancient laws, including the civil law and Roman law. The slight information available indicates that under civil law and Roman law, title to property could be held by two or more individuals owning undivided fractional interests in the entirety with the right of exclusive occupancy of a specified portion of the premises⁸¹

The same year a writer for *De Paul Law Review* made a similar mistake:

While new to the United States, the condominium is an ancient form of ownership, originating in Roman law centuries ago.⁸²

Neither the authors of the Kentucky nor the De Paul article found it necessary to identify their sources.

In the following years, many more mainstream law magazines repeated the story, either entirely uncritically or as the view of "some scholars." An article in the *Business Lawyer*⁸³ related the tale of Roman condominiums without providing attribution. The *Oklahoma Law Review* did the same, relying on Thurma as a source.⁸⁴ The *Missouri Law Review* told the identical story, using Ramsey as its authority (and, to

80. Borgwardt, *supra* note 1, at 603. ("The condominium, while not heretofore used in California, apparently dates from the time of the Romans").

81. Skaggs & Erwin, *supra* note 1, at 47.

82. Comment, *Condominium*, *supra* note 3. No citation given, but Thurma, *supra* note 2, is cited for another point at 320 n.7.

83. Fokes, *supra* note 1, at 233. ("Although the concept of condominium as we know it today was in use in Rome some six centuries B.C. . . ."). Of course since we have virtually no reliable information about so early a time it would be impossible to prove Mr. Fokes wrong.

84. Note, *Property: Condominium*, *supra* note 3, at 441.

its credit, displaying some skepticism).⁸⁵ Authors who had questioned the fable actually found themselves being cited *in its favor*. For example, Professor Leyser's careful study in the *International and Comparative Law Quarterly* was given as the source for Roman origins by an article in *Willamette Law Journal*.⁸⁶ An article in the *University of Cincinnati Law Review*⁸⁷ cited Professor Cribbet as supporting the story when he had in fact doubted it,⁸⁸ and the *Southern California Law Review* enlisted Buckland and McNair, despite their statement that superimposed freeholds were impossible in Roman law.⁸⁹

To be sure, there were also writers who questioned the story of Roman condominiums. In 1962 a student writing a note for the *University of Florida Law Review*⁹⁰ had the good sense to find a copy of Buckland and McNair, and to use it correctly. Other authors followed suit, or relied on Huebner, Ball, and/or Leyser.⁹¹ Some disbelieved the story but gave no basis for their skepticism.⁹²

85. Note, *Missouri Condominium Property Act of 1963*, 29 Mo. L. Rev. 238, 239 n.5 (1964).

86. Note, *Unit Ownership Law*, *supra* note 3, at 434. ("Condominium is not new; it originated in ancient Rome and has been popular in Europe for decades."). See also the unfair treatment of Leyser in Comment, *Alabama Apartment Ownership Act — A Condominium Law Introduction*, 17 ALA. L. Rev. 375, 378 & n.21 (1965).

87. Kreider, *supra* note 1, at 464.

88. Cribbet, *Condominium — Home Ownership for Megalopolis*, 61 MICH. L. Rev. 1207 (1963).

89. Ross, *supra* note 1, at 351 (citing BUCKLAND & McNAIR, *supra* note 17, at 102. Either Mr. Ross had not read his source or there was a grievous editorial error here. Possibly both).

90. Note, *Land Without Earth — The Condominium*, 15 U. FLA. L. Rev. 203, 205 (1962).

91. Among the skeptical articles are Cribbet, *supra* note 88, at 1210 (citing Leyser and mentioning *superficies solo cedit*, but without discussion); Schwartz, *Condominium: A Hybrid Castle In the Sky*, 44 B.U.L. Rev. 137, 141 (1964) (citing HUEBNER, BUCKLAND & McNAIR, and Ball); Kerr, *Statutory Implementation*, *supra* note 58, at 3 (following Berger, *infra* note 93, and Leyser, *supra* note 17); Phohoryles, *supra* note 23, at 1014-15 (following BUCKLAND & McNAIR); Note, *Condominiums in South Carolina: Possibilities and Pitfalls*, 17 S.C.L. Rev. 334, 336 (1965) (following BUCKLAND & McNAIR, Leyser, and Cribbet); Kerr, *supra* note 1, at 485 (citing Leyser and the Code Napoleon); Smith, *Hybrid Housing in Ohio: Condominium*, 15 WEST. RES. L. Rev. 597, 599-600 (1964) (citing HUEBNER and Leyser, but not on the point of Roman law).

92. *E.g.*, Comment, *Home Ownership in Space — Pie in the Sky?* 14 HASTINGS L.J. 263 (1963).

Professor Berger was one of the very few who actually examined some of the original source material. In expressing doubts about the Roman origin of condominium, he wrote: "These assertions [i.e., that condominiums predate Caesar] are supported with little or no authority and may be erroneous. [Citing Buckland and McNair] Yet the Digest of Justinian refers to what seems to be separate ownership of the lower and upper portions of a house." [Citing a *Digest* fragment].⁹³ It is to be regretted that Professor Berger's understanding of the *Digest* fragment was in error,⁹⁴ and that other writers apparently seized upon the sentence to support their position that condominiums did indeed exist in ancient Rome.⁹⁵ Nevertheless, he deserves credit for actually examining an original source, which is more than most authors did.

The only other author who cited to the classical texts was Professor Bergin of the University of Virginia. In a footnote to an article written in 1966, he discussed briefly Professor Berger's *Digest* citation, and demonstrated its inapplicability. Unfortunately, he did not pursue the matter further, and later writers generally ignored his footnote.⁹⁶

Since 1966, the myth of Roman condominium origin has been repeated often, sometimes in the company of competing theories, but often alone.⁹⁷ Moreover, as time has passed, the

93. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 n.5 (1963).

94. In addition to Ulp. D. 43.17.3.7, Professor Berger cited Pap. D. 8.2.36 and Ulp. D. 8.4.6.1, for common roof and party wall, respectively. These citations are treated in Part VI, *infra*.

95. Note, *Condominium: Reconciliation*, *supra* note 3, at 1774 n.6; Comment, *District of Columbia*, *supra* note 3, at 255 n.4 (1966).

96. As far as can be determined, Professor Bergin has not been cited on this point. His brief comments are found in Bergin, *Virginia's Horizontal Property Act: An Introductory Analysis*, 52 VA. L. REV. 961, 962 n.7 (1966).

97. Three examples appearing since 1966 are cited in the three succeeding footnotes. Other instances are as follows: Alpern & Hassenfeld, *Condominium: A Functional Freehold in the Metropolis*, 5 AM. BUS. L.J. 127 (1967) [hereinafter Alpern & Hassenfeld]; FERRER & STECHER, *supra* note 11, at 16-17 (1967); Note, *Georgia Apartment Ownership*, *supra* note 3, at 405 [citing FERRER & STECHER, *supra*, and (erroneously) ROHAN & RESKIN, *supra* note 31]; Comment, *Mississippi Condominium Act*, *supra* note 3, at 262 (citing to MERCER L. REV., *supra*); Note, *Condominiums in Iowa*, *supra* note 3 (citing to FERRER & STECHER, *supra*); Note, *A House Divided*, *supra* note 3 (also erroneously citing ROHAN & RESKIN, *supra*); Galton, *Condominiums: The Experience of the Past Decade*, 66 THE BRIEF 91 (1970-71), reprinted in 42 OKLA.

myth has been embellished. Thus for the authors of one hornbook it is not enough that there may have been Roman antecedents to the modern condominium; the reader is also told that horizontal ownership "was quite common in ancient Rome"98 A widely-used textbook for undergraduate real estate students asserts: "The idea of combining community living with community ownership is not new. Two thousand years ago, the Roman Senate passed condominium laws that permitted Roman citizens to own individual dwelling units in multiunit buildings. This form of ownership resulted because land was scarce and expensive in Rome."99 Similarly, a law professor has written in a condominium guidebook:

A system of ownership of parts of buildings by different persons, somewhat similar in basic concept to that of a modern condominium or cooperative, is thought by some experts to have existed in ancient Rome. There it is believed to have been used by wealthy home owners for several of the same purposes for which its modern counterparts are used today, such as providing, through the pooling of the financial resources of all the owners, certain luxuries that otherwise they would not have been able to afford.¹⁰⁰

It is perhaps significant that all three of these passages were composed by people with responsible positions in academia; that all were intended for wide audiences; that not one is supported by a single citation; and that all three represent examples of pure historical fiction.

B.J. q-98 (1971) [hereinafter Galton]; BRUCE, *supra* note 5, at 3 (citing Ramsey); PENNEY, *supra* note 5, at 578 (citing FERRER & STECHER, *supra*). In attempting to legitimate condominium in civil law, another author comes perilously close to making the same error. Armstrong, *Louisiana Condominium Law and the Civilian Tradition* 46 LA. L. REV. 65, 71 (1985) [hereinafter Armstrong] (erroneous use of Ulp. D. 43.17.3.7).

98. CUNNINGHAM, *supra* note 5, at 37 n.19.

99. HARWOOD, *supra* note 12, at 485. Prentice-Hall has informed the present writer that this is one of its better-selling texts. Telephone interview with representatives of the College Book Division (July 8, 1986).

100. KEHOE, *supra* note 5, at 6.

V. THE MYTH'S FOREIGN ANCESTRY

A. *Traces in American Legal Writings*

In Part IV it was demonstrated that the myth that ancient Romans lived in condominiums surfaced in the United States in the early 1960s. However, for some time it was unclear to the present writer whether this was an indigenous myth, or whether it had been imported from abroad. The failure of most of the early authors to buttress their statements with supporting authority rendered the question especially puzzling. One day, while laboring on another project, this writer came upon an article in a 1971 issue of the *Oklahoma Bar Journal*. It included the following passage:

In addition, the condominium can be found in Roman documents. The prominent advocate, [sic] Papiniano, [sic] refers to an instance where each owner occupied an entire floor but shared a common roof. Here the condominium concept must have experienced considerable difficulty since it contravened the basic principle of classical Roman law: *Superficies [sic] solo cedit* — "Whatever is attached to the land forms part of it" ¹⁰¹

A citation thoughtfully provided by the author, together with some additional research by the present writer, resulted in uncovering an entirely new line of tradition. The *Oklahoma Bar Journal* article was a reprint of a prize winning essay that had appeared in *The Brief*.¹⁰² It cited to a study published in 1964 by graduate students at the Harvard Business School (apparently not under the aegis of the University). That study contained a passage very similar to the one in *The Brief*, including both the misspelling of *superficies* and the alteration of the name *Papinianus* to *Papiniano* (which in English is usually rendered "Papinian"). The study correctly identified the latter as a jurisconsult rather than an "advocate."¹⁰³ Unfortunately, the tradition could not be traced back further, for the

101. Galton, *supra* note 97.

102. 66 THE BRIEF 91 (1970-71).

103. BURKE, *supra* note 2 (typed paper published by Management Reports, Boston, MA). Papinianus was probably a relative of the Emperor Septimius Severus (ruled 193-211 A.D.), and served as the latter's praetorian prefect from 203 and into the second year of Caracalla's reign (that is, until 212). His primary fame was as a jurist, and his written collections of his decisions were highly valued by future generations. His name is prominent in Justinian's *Digest*. For a connected, if short, biography in English, see M. GRANT, THE CLIMAX OF ROME 79 (1968).

study provided no citation of authority, and the items in its bibliography proved either inaccessible, irrelevant, or *contra*. The study had been used as authority for a similar assertion in at least one article besides the one which had appeared in the *Oklahoma Bar Journal* and in *The Brief*.¹⁰⁴

From the context, it was evident that none of the authors citing Papinian had actually read his works or had more than the vaguest idea of who he was; no *Digest* reference was given, and the interpretation provided is clearly the product of a mistranslation.¹⁰⁵ Because the jurist's name had been rendered "Papiniano," this writer began to suspect that the condominium myth was not wholly North American; that, like the condominium itself, it might have European and Latin American ancestors.¹⁰⁶

It will be recalled¹⁰⁷ that in 1960 committees of both houses of Congress held hearings on proposed amendments to the National Housing Act. From the viewpoint of condominium developers, the most important of the proposed amendments would permit the Federal Housing Administration (FHA) to insure mortgages secured by condominium units. Testimony in favor of that amendment was presented by a delegation of Puerto Rican businessmen, a delegation led by the Resident Commissioner of Puerto Rico himself. The group's strategy was (in part) to convince Congress that condominium was a venerable institution which had been thoroughly time-tested in Europe and in Latin America. In furtherance of this strategy, Dr. A. Fernos-Isern, the Resident Commissioner, told the subcommittees of both the House and the Senate: "As you may know, this is an ancient form of ownership which was, according to my understanding, recognized

104. See, Alpren & Hassenfeld, *supra* note 97; see also WINDHAMSMITH, *supra* note 13, at inside cover ("Although the Condominium concept was legally described in Roman documents, where separate (*sic*) floors were independently owned but shared a common roof, the concept suffered from its contradiction with Roman law; 'Superficies (*sic*) solo cedit'")

105. The reference is apparently to Pap. D. 8.2.36. Its proper meaning is discussed in Part VI, *infra*.

106. "Papiniano" is the proper form in Spanish and Italian.

107. See *supra* note 62, and text accompanying notes 62 & 63.

in Roman law."¹⁰⁸ Franciso Fullana, legislative director of the Puerto Rican Home Builders Association, added "This form of ownership is not new. It has been in existence and known for centuries. It traces its origin in the Roman law and is known as condominiums (*sic*) — joint ownership."¹⁰⁹ To this writer's knowledge, this is the first time the myth of Roman condominiums had been propagated in the English language.

B. *Antecedents From Abroad*

If Messrs. Fernos-Isern and Fullana imported the myth, it cannot be said that they were responsible for inventing it. They were, rather, responsible for (a) misunderstanding a conclusion which (b) resulted from a misunderstanding, (c) arising from certain discredited interpretations of classical texts.

The textual misinterpretations had occurred first. They had appeared in the writings of several nineteenth and early twentieth century European scholars. Among the errors made by these writers was the doubtful conclusion that classical Roman law had regularly endowed long-term tenants (*superficiarii*) with rights *in rem*.¹¹⁰ This conclusion has since been rejected as resting upon certain post-classical interpolations in Justinian's *Digest*, interpolations made possibly under the influence of concepts from Hellenistic law.¹¹¹

The notion that *superficiarii* regularly enjoyed rights *in rem* led some civilian writers to conclude that *in rem* tenancy

108. *House Hearings, supra* note 62, at 247; *Senate Hearings, supra* note 62, at 585.

109. *House Hearings, supra* note 62 at 260; *Senate Hearings supra* note 62, at 88. This author cannot resist noting that it seems incredible that the source for so many assertions in scholarly legal literature could be the testimony of a band of lobbyists seeking Federal largess. For example, the language of Mr. Fullana is mirrored in several particulars by Comment, *Condominium, supra* note 3, which does not actually cite any source. Similar "centuries" language is found in Note, *Property: Condominium, supra* note 3, at 441.

110. Notable among these were Pineles and Ferrini. See, Riccobono, *supra* note 17, at 515 n.2. For a French writer guilty of the same error, see 2 E. CUQ, *INSTITUTIONS JURIDIQUES DES ROMAINS* 297-301 (Paris 1908).

111. For a discussion of other textual errors, see also text accompanying notes 113-178.

of a floor or apartment was the practical equivalent of horizontal ownership. This is not a mistake that would likely afflict a student of the common law, for the common law has long recognized *in rem* tenancy — usually without confusing it with fee ownership. Yet students of the civil law are easier prey to such an error, for the civil law has traditionally treated tenancies as contractual only.¹¹²

The next misinterpretation was that of Messrs. Fernos-Isern and Fullana. Having read or heard that horizontal property had existed in Roman law, they proceeded to confuse horizontal property (one component of condominium) with condominium itself, failing to recognize that the former is merely a necessary, rather than a sufficient, condition for the latter.¹¹³ Thus their assertions provided a basis upon which Mr. Ramsey could build. Once he had “learned” that the institution had originated in Roman law, he quite naturally assumed that it must have been known in the Eternal City itself. He therefore envisioned for his audiences condominium development upon the “hills of ancient Rome.”¹¹⁴

VI. CLASSICAL TEXTS CITED IN SUPPORT OF THE MYTH

The reality of the matter was, as has been noted, quite different. The reality is fairly discernable, as has also been noted, from the classical sources. Yet some of those sources provided a basis for the myth as well. Perhaps the best approach to demonstrating the flimsy nature of that basis will be

112. BUCKLAND, *supra* note 33, at 502. The fact that the *superficiarius* is not the owner is emphasized in the same part of the *Digest* that appears to give the *superficiarius in rem* rights. Gai. D. 43.18.2. Also, the *superficies* was not necessarily perpetual or long-term. D.43.18.1.3. Not surprisingly, by the time of the Congressional hearings, most Latin American scholars had recognized that horizontal ownership had not existed in Roman law. For example, F.M.-G., *supra* note 17, at 124-25, cites a 1946 study done at the Civil Law institute of Córdoba, Argentina. See also, RACCIATTI, *supra* note 17, at 4-8; BORJA MARTÍNEZ, *supra* note 17, at 18; SOCIEDAD DE ARQUITECTOS DEL URUGUAY, ESTATUTO DE LA PROPIEDAD HORIZONTAL: ANTECEDENTES Y DISCUSIÓN PARLAMENTARIA, 97-100 (Montevideo 1946) (Comisión de Constitución, 7 Legislación de la Cámara de Senadores).

113. The confusion of horizontal property and condominium appears in *House Hearings*, *supra* note 62, at 270 & 271; *Senate Hearings*, *supra* note 62, at 594, 595, 598. Note that under questioning, one of the witnesses, Dr. Pico, admitted that he did not really know the origins of condominium. *Id.* at 595.

114. *Supra* note 74 and accompanying text.

to set forth the actual texts in translation, affixing such commentary as may be necessary.¹¹⁵

At the outset, it should be stated that this writer owes much to Manuel Fernández Martín-Granizo, who has collected these texts and has provided Spanish-language summaries of some of the arguments surrounding each passage.¹¹⁶ Fernández Martín-Granizo is not, apparently, a trained historian, and his own conclusions are often tentative and unconvincing. He dismisses one citation too readily, without seeing how it could mislead a casual reader, and he fails to recognize why several others must be rejected as evidence for horizontal property ownership. Nevertheless, his is the best modern collection available of relevant classical citations and of references to Italian and Spanish-language commentary. The following analysis is organized in part on his presentational scheme.

A. Arguments from "Pure Fact"

Fernández Martín-Granizo has classified the contentions of those who argue for Roman origin as (A) those of "pure fact" (*puro hecho*) and (B) those based on the writings of certain jurists.¹¹⁷ By an argument from "pure fact," he means an argument from purely historical evidence. He notes that the supporters of Roman condominium rely on two pieces of evidence not found in the juristic sources. The first is a citation

115. The story of the abuse of these classical texts would itself make a short article. One example in English-language legal literature is that of FERRER & STECHER, *supra* note 11, a work commonly relied on by other authors (*see* note 97, *passim*). For example, in reporting Niebuhr's opinion on the quotation from Dionysius (discussed *infra*, Part VI), they cite (at 16) Jerónimo González, who cites Niebuhr; and BORJA MARTINÍNEZ, *supra* note 17, who cites Jerónimo González, who in turn cites Niebuhr! FERRER & STECHER also misrepresent the position of BATLLE VÁSQUEZ, *supra* note 17, claiming he relies on three *Digest* citations, when in fact he rejects two and reports scholarly disagreement on the third. *Cf.* BATLLE VÁSQUEZ, *supra*, at 12-15.

116. F.M.-G., *supra* note 17. Fernández Martín-Granizo is Magistrate of the Supreme Court of Spain. His book suffers from a number of defects, including garbled renditions of the Latin texts and of the citations themselves.

Heretofore, there has been no collection of these citations in English. However, as noted *supra* some have crept into mainstream legal publications. *See, e.g.*, Armstrong, *supra* note 97, at 71 (citing Ulp. D. 43.17.3.7) and Berger, *supra* note 93, at 987 n.5 (citing Pap. D. 8.2.36, Ulp. D. 8.4.6.1., and Ulp. D. 43.17.3.7).

117. F.M.-G., *supra* note 17, at 117-18.

from a history of Rome, composed in Greek by Dionysius of Halicarnassus late in the first century B.C.: the *Roman Antiquities*.

1. Citation from Dionysius of Halicarnassus¹¹⁸

In the *Roman Antiquities*, Dionysius sketches, year by year, the events of Roman history. The paragraph in question discusses certain events after the passage of the Icilian Law in 456 B.C.¹¹⁹ At the time, Rome was still a tiny city state, but its population had become too large to fit within the city proper. After encountering significant upper-class opposition, Lucius Icilius, tribune of the people,¹²⁰ managed to secure approval in the Senate and passage in the popular assembly of a law permitting lower-class citizens to build houses on the neighboring Aventine Hill (one of the "Seven Hills" of late romance). A translation into English of the relevant passage is as follows:

When the law had been ratified, the plebians assembled; and after drawing lots for the plots of ground, began to build, each man taking as large an area as he could, and sometimes agreeing together by twos, threes or even more to build one house; and some drew by lots the *katágeia* and others the *hyperôa*. That year, then, was employed in building houses.¹²¹

118. The present writer wishes to thank the following scholars for their assistance with his scanty Greek: A.W. Martin, Professor of Religion, Oklahoma City University; and A.J. Heisserer, Professor of Ancient History, University of Oklahoma. They bear, of course, no responsibility for any errors made here.

119. G. ROTONDI, *LEGES PUBLICAE POPULI ROMANI* 199 (1966) [hereinafter ROTONDI]. This *lex Icilia* must not be confused with the similarly named *leges* of 492 and 449 B.C. Few articles have been written on this law in recent years. *But see* Serrao, *Lotte per la terra e per la casa a Roma dal 485 al 441 a.c.*, 51 *LEGGE E SOCIETÀ REPUBBLICA ROMANA* 180 (1981).

120. On L. Icilius, *see* T. BROUGHTON, *THE MAGISTRATES OF THE ROMAN REPUBLIC* 42 (1951). He may be the same Icilius to whom Verginius intended to marry his daughter before Appius Claudius attempted to seize her. *Zonaras* 7.18. *See also* OXFORD CLASSICAL DICTIONARY 539-40 (2d ed. 1970).

121. This is my translation, although it is based in part on that in the Loeb Edition of Dionysius 277 (E. Carey, translator). The passage is found at *Dionysius* 10.32.5.

κυρωθέντος δὲ τοῦ νόμου συναλθόντες οἱ δημοτικοὶ τὰ τε οἰκόπεδα διελάγγχανον καὶ κατακοδόμουν ὅσων ἕκαστοι τόπου δύνηθετεν ἀπολαμβάνοντες. εἰσὶ δ' οἱ σύνδου καὶ σύντροις καὶ ἔτι κλειούς συνιόντες οἰκίας κατασκευάζοντο μίαν, ἑτέρων μὲν τὰ κατάγεα λαγγχάνοντων, ἑτέρων δὲ τὰ ὑπερῶα. ὁ μὲν οὖν ἐνιαυτὸς ἐκεῖνος εἰς τὰς κατασκευὰς τῶν οἰκήσεων ἔδακνήθη.

In several translations,¹²² the word “*katágeia*” is rendered as “lower stories” while *hyperôa* is translated “upper stories.” This is relevant, because at least some of those arguing for condominium ownership are not resorting directly to the Greek, but to an old (1704) Latin version in which those words are so rendered.¹²³ There is no doubt that *hyperôon* (the singular for *hyperôa*) is the usual Greek word for “upper story,” but this usage of *katágeion* (singular of *katágeia*) may be unique.¹²⁴ The usual meaning for *katágeion* is not “first floor” or “lower story,” but “subterranean area.”¹²⁵ Since these houses were built on the side of a hill, one of the apartments in each may indeed have been subterranean. A “*katágeion*” may have been a basement, while the “*hyperôon*” was at ground level.¹²⁶ But what of the fact that of the “two, three, or even more” building a house, each took a level? Are we to assume that in the mud-hut sort of town which was Rome in 456 B.C., people were constructing three-, four-, and five-story apartment houses? This seems highly improbable.

It is likely, therefore, that the houses of which Dionysius wrote contained individual apartments, but they were apartments side by side, not over each other. Some of these might be built into the hillside — hence, *katágeia*; others would enjoy more sunlight — hence, *hyperôa*. If (which also seems possible) they were not actually built *into* the ground, but along the side of the hill caterpillar-style,¹²⁷ those higher up might

122. For example, the Loeb into English and the 1704 translation into Latin referred to *infra*.

123. F.M.-G., *supra* note 17, at 117-18. “*καταγεα*” is translated “*infimas partes*;” “*υπερωα*” is translated “*superiores [partes]*.”

124. For that precise meaning it may be a *hapax legomenon* (a word so used only once in the texts). See H. LIDDELL & R. SCOTT, A GREEK-ENGLISH LEXICON 751 (1889). The use for “on the ground” may be mirrored in *Herodotus* 4.175 & 192 (*στρουθοι* — *καταγαυοι* “ostrich” or “ground bird”), assuming an ostrich is thought of as a bird that runs *on* the ground as opposed to one that puts its head *under* the ground. The usual word for “ground floor” is *εδαφος*.

125. “*κατα*” meaning “below;” “*γει*” meaning “earth.”

126. Compare the discussion of Ulp.D. 43.17.3.7 in Riccobono, *supra* note 17, at 517-19 (houses on hillside, fronting on street, with cellars within that part of the foundation connected to hill-slope below street).

127. As the texts report occurring elsewhere. See, e.g., Pomp. D. 8.2.25.1. This passage has also been misunderstood. See text accompanying notes 146-47, *infra*.

still be called *hyperôa*, and those lower down could be described (loosely) as *katágeia*.¹²⁸

To those familiar with him, Dionysius is a useful author, but one who is sometimes guilty of obscurity and often guilty of anachronism. Here he may stand convicted of both. This passage is certainly obscure. If he had intended to describe houses of three or more stories, it is also an anachronism. Perhaps when he learned of houses divided into apartments in differing relationships to the ground, he imagined that the Romans of four and a half centuries earlier had built structures comparable to the *insulae* of his own day.¹²⁹

Another problem with reading "horizontal ownership" into this passage is that it says nothing about ownership. The original Greek states only that "some drew by lots the *katágeia*, some the *hyperôa*." Dionysius does inform us,¹³⁰ however, that the land on the Aventine Hill was of two categories: that in the rightful possession of private owners, and that which belonged to the public (some of which private parties had usurped by force or fraud). It was the public land that was divided among the plebians, and Dionysius tells us nothing which would compel a conclusion that there was a change of ownership. Further, it is known that from an early period the Roman state leased public land to private persons so they could erect dwellings thereon and live there in exchange for the payment of rent. This was, in fact, the origin of the long-term lease or *superficies*.¹³¹ Thus it is quite likely that the plebs took their land as mere lessees, not as owners.¹³²

Third, it remains to point out that information from the fifth century B.C. is just not that reliable. It was not reliable

128. This would be consistent with the use of "*κατα*" to mean "along," as in "along the ground."

129. Of course a contrary argument is that there was horizontal ownership in Dionysius' time, and he was merely projecting it backwards. But this argument cannot be entertained without at least *some* credible support in the sources.

130. *Dionysius* 10.32.2-4.

131. KASER, *supra* note 17, at 126; BUCKLAND, *supra* note 33, at 276.

132. This parallels the conclusion of RACCIATTI, *supra* note 17, at 6-7.

in Dionysius' time either, as Livy, his contemporary and fellow historian, remarks.¹³³ Even if Dionysius had expostulated about issues of legal ownership in 456 B.C., a time so remote it antedated even the first codification of Roman law,¹³⁴ his views would be entitled to little or no credibility in the absence of corroborating evidence. It should be added that the conclusion that this passage is not evidence of horizontal property ownership is in accord with scholarly authority.¹³⁵

2. Growth of the City of Rome

On the second argument from factual circumstance, we can afford to spend much less time. The argument is phrased in this way by Fernández Martín-Granizo:

Another situation of pure fact is represented by the enormous growth of the City of Rome, a growth which, in the opinion of Maschi, had already proceeded in the last century of the Republic to the point at which, according to the data treated by that author, there had come to be 1,790 *domus* and 46,602 *insulae*.¹³⁶

It goes almost without saying that the foregoing observation proves nothing. It requires no more rented units to house a population than it does owner-occupied units. What this "argument" boils down to is the suggestion that "there was a lot of housing, so there had to be a condominium in there somewhere."

133. Livy 6.1.2. Of the *lex Icilia* of 456 B.C., Livy says only the following: "De Aventino publicando lata lex est." 3.31.1.

134. That is to say, the Twelve Tables, enacted into law in 451 and 450 B.C. see ROTONDI, *supra* note 119, at 201.

135. Riccobono will concede only that this might have been a practiced, but extra-legal, arrangement; Rudorff (whose work the present writer has been unable to obtain) is said to interpret it merely as a common "use." Riccobono, *supra* note 17, at 520 & n.4.

136. F.M.-G., *supra* note 17, at 118. Very similar statistics appear in CARCOPINO, *supra* note 17, at 18, and those cited by F.M.-G. may in fact be derived from that source.

Inherent in the statement, moreover, is a lack of understanding of the nature of Roman society. Like most pre-industrial civilizations, Roman society was characterized by extreme inequalities of wealth.¹³⁷ Only the very few could afford to purchase even the most humble piece of urban real estate, yet that very few could well afford to buy entire *insulae*.¹³⁸ The overwhelming majority was very poor or just barely getting by, and the livelihood of a good many (probably most) had to be subsidized by the public dole.¹³⁹ Of those who did live in wealthy families, a majority was legally, if not practically, incapable of owning property: slaves, minors, *filiifamilias* (sons under their father's power),¹⁴⁰ and most women.

To a considerable extent, horizontal property ownership depends upon the existence of a substantial urban middle class, a stratum of citizens wealthy enough to purchase portions of multi-unit buildings, but not wealthy enough to purchase single family structures. This might explain why horizontal property first became popular in the mercantile German towns of the Middle Ages, and why it reappeared in western Europe and in America in the twentieth century. In each culture in which it surfaced, there was a middle class large enough to support it. This was most definitely not the case in ancient Rome.

137. For an example of a writer imagining the existence of a large middle class of apartment owners, see the quoted language of Richter, cited in RACCIATTI, *supra* note 17, at 7 n.3. On inequalities of wealth, see CARCOPINO, *supra* note 17, at 65-75; P. BRUNT, *SOCIAL CONFLICTS IN THE ROMAN REPUBLIC 17-19* (1971). Reflective of the enormous disparities was the pay schedule of soldiers, which in the classical period differed according to rank and other factors. An ordinary legionary at the time of Augustus received 225 *denarii* (900 *sesterces*) a year. Centurions received from 3750 to 15,000 *denarii* — between 17 and 68 times as much as the legionary. There were also levels of military pay well below that of a legionary and far above those of a senior centurion. See generally M. GRANT, *ARMY OF THE CAESARS* 73, 77, 93, 95, 218, 259, and 303-04 (1974).

138. A story of the risks of investment in *insulae* is told by Aulus Gellius. See Gell. 15.1.2-3.

139. CARCOPINO, *supra* note 17, at 16-18.

140. Instances are recorded of *filiifamilias* renting houses. e.g., Cicero, *Pro Caelio* 7.17 and Paul. D. 39.2.21.

B. Juristic Texts

The juristic fragments cited by supporters of Roman horizontal property and collected by Fernández Martín-Granizo are all culled from the *Digest* of Justinian. There are ten in all. They will be considered in the following groups: (a) four fragments in which there is a reference to a division of improved property, but the division is vertical rather than horizontal; (b) two fragments in which there is a horizontal division, but it is of rights other than ownership, and (c) four fragments which suffer from multiple difficulties.

The fragments will be set forth in this text in English. Ambiguities and awkward wording in the Latin will be, to the extent practicable, reflected in the English. For those wishing to consult it, the original Latin will be found in accompanying footnotes. Those desiring to view another English version are referred to the recently published (1985) translation of the *Digest* published by a team headed by Professor Watson.¹⁴¹

Regarding several of these fragments, the English translations alone should be sufficient to dissipate any notion that they are credible evidence for Roman horizontal property ownership. However, some annotation is provided so that the reader may understand the context of each fragment, identify critical post-classical interpolations, and be aware of latent ambiguities. Hence a brief comment is appended to each fragment.

1. Fragments in Which Property Division is Vertical

It will be recalled that a number of American legal writers have cited a text by "Papiniano" in which, allegedly, "each owner occupied an entire floor but shared a common roof."¹⁴² The actual passage from Papinian referred to is as follows:

A person had a duplex house covered by a single timber roof; he devised each to a different person. I said, because it was better that the roof should be shared by the two of them in accordance with the area each owner had covered, and

141. See *supra* note 29.

142. See *supra* notes 101-05. This passage is also cited by VENTURA-TRAVESSET, *supra* note 17, at 13.

that each would be the owner of the portion of the roof directly above his house, that it was not legally proper for either of them to have an action to contest the right of the other to insert a beam into his property; nor would it matter whether the property were devised unconditionally to both or whether one took subject to a condition.¹⁴³

It is apparent, of course, that the fragment does not speak of horizontal ownership, but of two apartments in the same house, on the same level, separated by a party wall. It is not even true to say, as does one Spanish writer, that this text "refers to a case of undivided ownership, which resembles somewhat that in horizontal ownership, by the existence of a common roof,"¹⁴⁴ for the text (although not entirely clear) seems to contemplate that each owner will have title to that part of the roof over his half of the building, and not that the roof will be subject to undivided ownership.¹⁴⁵

A text which has also been cited for horizontal ownership, but in fact refers to vertical division, is the following by Pomponius:

If, out of three houses located on sloping ground, the house in the middle is subject to a servitude for the upper, but the lowest is not subject to a servitude to any of them, and a party wall, which is between the lower and the middle house should be raised up higher by the owner of the lowest house, Sabinus says that may be legally done.¹⁴⁶

It appears that the reason this passage has been confused with horizontal division is that in Latin the houses in question are identified as *superiores*, *mediae*, and *inferiores*, thus perhaps suggesting that they are piled on top of each other. But

143. *Pap.D.* 8.2.36

Binas quis aedes habebat una contignatione tectas: utrasque diversis legavit. Dixi, quia magis placeat tignum posse duorum esse ita, ut certae partes cuiusque sint contignationis, ex regione cuiusque domini fore tigna nec ullam invicem habituros actionem ius non esse immissum habere: nec interest, pure utrisque an sub condicione alteri aedes legatae sint.

144. BATLLE VÁZQUEZ, *supra* note 17, at 12.

145. *Accord*: English translation in 1 WATSON DIGEST *supra* note 29, at 257. See also RACCIATTI, *supra* note 17, at 6-7 n.3.

146. *Pomp.D.* 8.2.25.1. Si ex tribus aedibus in loco impari positis aedes mediae superioribus serviant aedibus, inferiores autem nulli serviant, et paries communis, qui sit inter aedes inferiores et medias, altius a dominio inferiorum aedium sublatus sit, iure eum altius habiturum Sabinus ait.

the terms referred to have the meaning, in this context, of buildings on "upper," "middle," and "lower" ground; and if there were any question on this score, the existence of a party wall between two of the houses should resolve it. It is worth adding that the sources reveal party walls to have been extremely common in Rome.¹⁴⁷

Another fragment is one in which Ulpian quotes the Emperor Trajan's jurist, Titius Aristo:

Aristo gave a legal opinion to Cerellius Vitalis to the effect that he did not think smoke could be discharged from a cheese factory into higher buildings unless there is a servitude to this effect.¹⁴⁸

In alluding to this fragment and to two others, Fernández Martín-Granizo refuses to spend time in discussing them because "it is evident that they do not refer to horizontal property."¹⁴⁹ He is right; they do not refer to horizontal property. Yet he does not do this passage justice, for it can be very misleading. The word used for factory (*taberna*) is the same as that used for "shop" — specifically a shop of the type that often occupied the first floor of an *insula*. If one conceives of smoke rising into the apartments above the *taberna*, one might well ask why a servitude should be necessary, unless the higher floors were under separate ownership. Indeed, one might argue, servitudes could only be established if the higher floors were under separate ownership, for one cannot place servitude on his own property.¹⁵⁰ Thus, in accordance with this interpretation, the fragment appears to provide a hint of horizontal property.

The reason the foregoing analysis is not viable is that the word *superiora* is used, once again, to describe buildings located on higher ground, not situated over the *taberna* itself. That this was the intended meaning is shown by two pieces of evidence: First, *superior* and *inferior* are employed in nearby

147. See, e.g., Ulp. D. 39.2.35 and 40.1; Paul D. 39.2.36; Pomp. D. 39.2.41; Alfenus Verus D. 39.2.43.1 and 39.2.43.1; Gai. D. 8.2.8; Proc. 8.2.13 pr.

148. Ulp. D. 8.5.8.5 (erroneously cited by F.M.-G., *supra* note 17, at 118, as "8.8 and 5"): Aristo Cerellio Vitali respondit non putare se ex taberna casiarum fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit.

149. F.M.-G., *supra* note 17, at 118.

150. Paul. D. 8.2.26.

passages of the *Digest* to mean higher and lower ground,¹⁵¹ and, second, this fragment is immediately followed by a juristic comparison between smoke rising to higher ground and water or stones falling upon adjacent lower ground.¹⁵²

Another excerpt in the same category is the following:

If someone should convey a share of a building or a share of an estate, he cannot impose a servitude because servitudes cannot be imposed on shares, nor can one be acquired. Of course, if he has divided the estate into tracts and thereby he conveys a share in accordance with the division, he can impose a servitude on either one because it is not a share of the estate, but a [new] estate. Which can also be said in regard to a house: if the owner shall have divided one house into two by building a party wall in the middle (as many people do), then it can also be treated as two houses.¹⁵³

The translation should be enough to indicate just how clearly this passage refers to vertical, rather than horizontal, partition. Not only is there specific allusion to a party wall, but the subdivision of the house is compared to the (perforce vertical) subdivision of a field.¹⁵⁴ The clarity of the text is such that few, if any, modern scholars now accept it as evidence for horizontal ownership.¹⁵⁵

151. Paul. D. 8.3.29 (effect of servitude on lower neighboring land). *See also* D. 39.3, *passim*, especially Paul D. 39.3.2 pr and Paul. D. 39.3.2.10.

152. Ulp. 8.5.8.5 (see portion following quoted passage). This position is in accord with scholarly authority. *See Riccobono, supra* note 17, at 515.

153. Ulp.D. 8.4.6.1

Si quis partem aedium tradet vel partem fundi, non potest servitutem imponere, quia per partes servitus imponere non potest, sed nec adquiri. Plane si divisit fundum regionibus et sic partem tradidit pro diviso, potest alterutri servitutem imponere, quia non est pars fundi, sed fundus. Quod et in aedibus potest dici, si dominus pariete medio aedificato unam domum in duas dividerit, ut plerique faciunt: nam et hic pro duabus domibus accipi debet.

154. The "field" analogy is found elsewhere, also in party wall situations. *See* Paul. D. 39.2.38.1 and 2.

155. Yet they have felt compelled to mention it, and this can be misleading. *See, e.g.,* F.M.-G., *supra* note 17, at 119; BATLLE VÁZQUEZ, *supra* note 17, at 13; BORJA MARTÍNEZ, *supra* note 17, at 19-20; Berger, *supra* note 93, at 987-88 n.5; and VENTURA-TRAVESET, *supra* note 17, at 13.

2. Horizontal Rights Other Than Ownership

In two fragments, superimposed property rights exist, but they are not rights of ownership. One of those cited by Fernández Martín-Granizo deals with construction on top of a neighbor's wall:

If a neighbor builds on top of your wall, that which he has built becomes his property, say Labeo and Sabinus. But Proculus [says] it is your property howsoever it becomes yours, for another has built on your soil. This is the better view.¹⁵⁶

In this fragment, Pomponius informs us that Proculus' view — i.e., that when "A" puts his structure on "B's" wall it becomes part of "B's" property — is to be preferred to the opinions of Labeo and Sabinus. As Riccobono points out,¹⁵⁷ however, it does not follow that Sabinus or Labeo (the latter of whom was unconventional in other ways)¹⁵⁸ had seriously questioned the doctrine *superficies solo cedit*. Presumably their position had been that the superimposed structure belonged to "A" by reason of connection to "A's" land at another point, and that B's wall was subject to a servitude for support (*oneris ferendi*).¹⁵⁹

In proof of his point, Riccobono quotes the following fragment, in which Labeo himself affirms the doctrine *superficies solo cedit*, but which, ironically, has become the primary consolation to those who insist that there was horizontal property in ancient Rome:¹⁶⁰

But if above my house, which house I possess, there should be an apartment in which another resides as if he were the owner, Labeo says I can obtain the interdict *uti possidetis*, not he who is in the apartment; for the *superficies* always yields to the soil. Of course if the apartment has the entrance to the street, Labeo says it appears that the house is

156. *Pomp.D.* 41.1.28: Si supra tuum parietem vicinus aedificaverit, proprium eius id quod aedificaverit fieri Labeo et Sabinus aiunt: sed Proculus tuum proprium, quemadmodum tuum fieret, quod in solo tuo alius aedificasset: quod verius est.

157. Riccobono, *supra* note 17, at 517.

158. *Pomp.D.* 1.2.2.47.

159. See KASER, *supra* note 17, at 119.

160. See *supra* note 94. See also BATLLE VÁZQUEZ, *supra* note 17, at 14-15; BORJA MARTÍNEZ, *supra* note 17, at 13.

not possessed by him who possesses the cellar, but by him whose house is over the cellar. This is true of him who has entrance from the street: [otherwise use by the praetor the interdict and the actions for a *superficiarius*. (sic)] For the owner of the ground is preferred over the *superficiarius* with respect to the interdict *uti possidetis*, just as over anyone else. But the praetor will protect the *superficiarius* according to the law of lease.¹⁶¹

This passage is one that should give very little comfort to promoters of Roman condominium. First, it is corrupt; that is to say, it was formed by connecting two classical passages with a post-classical interpolation. The interpolation is in ungrammatical Latin, and is marked with brackets in the English version given above and in the original set forth below.¹⁶² Second, the subject matter of the fragment is not ownership, but *possession*, a right which, in classical law, could be held even by a squatter or a thief.¹⁶³ Third, Labeo repeats in the initial sentence the doctrine *superficies solo cedit*, applying it not only to ownership, but to possession — that is, taking the doctrine even further than it need be taken. Fourth, Labeo insists upon treating the house as *one unit*, despite the fact that two floors are occupied;¹⁶⁴ and in most situations he would give the right of *possessio* to the occupant of the lower floor, even though the occupant of the upper floor is living there under a claim of ownership.¹⁶⁵ Fifth, the final sentence of the fragment

161. *Ulp.D. 43.17.3.7-8*. Sed si supra aedes, quas possideo, cenculum sit, in quo alius quasi dominus moretur, interdicto uti possidetis me uti posse Labeo ait, non eum qui in cenaculo moretur: semper enim superficiem solo cedere. Plane si cenaculum ex publico aditum habeat, ait Labeo videri non ab eo aedes possideri, qui κεντρας possideret, sed ab eo, cuius aedes supra κεντρας essent. Verum est hoc in eo, qui aditum ex publico habuit: [ceterum superficiarii proprio interdicto et actionibus a praetore utetur]. Dominus autem soli tam adversus alium quam adversus superficiarium potior erit interdicto uti possidetis: sed praetor superficiarium tuebitur secundum legem locationis.

162. Riccobono, *supra* note 17, at 519. The grammatical error is in treating the deponent verb (*utetur*) as if it were passive. This is explainable if the compiler were not a native Latin speaker, which in turn would suggest a late date.

163. KASER, *supra* note 17, at 85. On *possessio* generally, see *id.* at 83-92. *Possessio* was protected by the interdict (injunction) *uti possidetis*, which forbade interference. See BUCKLAND, *supra* note 33, at 740-41; JOLOWICZ, *supra* note 17, at 273-76.

164. Meincke, *supra* note 17, at 161-63.

165. *Id.* The claim of ownership would appear to be the meaning of "quasi dominus." FRIER, *supra* note 17, at 88 n.78.

reaffirms that a *superficiarius* is only a tenant, and has no more right to possession against the true owner than does anyone else. Sixth, the presence of the interpolated sentences suggests that at the time Labeo spoke (probably during the reign of Augustus) the *superficiarius* did not even have rights *in rem*, but that reference to those rights had to be added by Justinian's compilers.

Finally, the portion of the opinion which would award *possessio* to the upstairs tenant is applicable only in very narrow circumstances — that is to say, when a house on a steep hillside fronts on a street and contains a cellar on the hillside below, which cellar enjoys no public access.¹⁶⁶ Since the inhabitant of the cellar was unlikely to be the owner of the dwelling (as might, for example, the inhabitant of the first floor of an *insula*) it was more reasonable to award possession to the person in control of the main part of the house — which, it must be remembered, also touched the soil along its front side.

3. Texts Suffering From Multiple Difficulties

Another fragment in which the matter at issue is not ownership but possession contains the following legal opinion by Ulpian:

But if a house should be divided into several parts, let us see whether a person should be given a *missio in possessionem* for only part or for the entire house. If the house should be large enough so that space lies between the faulty section and that which is not faulty, it may be said that he should be given only the faulty section. But if they are integrally united in the building, he should be given possession of all of it. [Therefore, it is the better view that in spacious houses he is given possession of that section of the house which is integrally united to the faulty section. Otherwise, if a modest portion of a very large house is faulty, what would it be to say that it should be ordered that the entire house be

166. Riccobono, *supra* note 17, at 518, describes analogous arrangements in twentieth-century Italy.

turned over to the possession of him to whom security for anticipated injury was not posted, given that the house is so large?]¹⁶⁷

The *missio in possessionem* was a legal decree given by the praetor when a defendant refused to give an undertaking (*cautio*) for the protection of neighbors threatened by a ruinous condition on the defendant's land.¹⁶⁸ The *missio* did not actually award the plaintiff exclusive possession, but it allowed him to enter the defendant's property. If the defendant resisted this, there were supplementary proceedings that might result in sole control being awarded to the plaintiff.

Ulpian's opinion is significant, for Sabinus had earlier opined that *missio in possessionem* could be granted only for an entire house.¹⁶⁹ Ulpian's opinion, however, takes into account the fact that houses could be very large and contain many apartments, and that it would be a hardship to transfer control over the entire property when a defective condition affected only one part of the building. In considering whether division of a house in these circumstances could be horizontal as well as vertical, Riccobono¹⁷⁰ points out the interpolation in the text (in brackets herein), and correlates it with another interpolated text,¹⁷¹ the classical portion of which compares splitting a house to splitting a field — the same analogy noted in our earlier discussion of another fragment.¹⁷² Riccobono's opinion that classical law contemplated only vertical partition has more recent scholarly support.¹⁷³ Thus, as evidence for

167. *Ulp.D. 39.2.15.13* (erroneously cited by F.M.-G., *supra* note 17, at 119-20, as "D.31.2.13"). Sed si in plures partes divisa domus sit, utrum in partem an in totam domum possidendam mitti quis debeat, videamus. Si tam ampla domus sit, ut et spatia inter vitiosam partem intercedant et eam quae vitium non facit, dicendum in eam solam partem mitti: si vero unita sit contextu aedificiorum, in totam. [Itaque et in spatiosis domibus melius dicetur in eam partem domus mittendum, quae vitiosae parti unita est. Ceterum si modica portiuncula aedium amplissimarum vitium faceret, quale erat dicere totas aedes iubendum possidere eum, cui damni infecti non caveretur, cum sint amplissimae?].

168. Anticipated injury was called *damnum infectum*. On this subject and the *missio in possessionem*, see BUCKLAND, *supra* note 33, at 727-28; WATSON, PROPERTY, *supra* note 17, at 125-53.

169. *Ulp.D. 39.2.15.12*.

170. Riccobono, *supra* note 17, at 516.

171. *Paul.D. 39.2.38.1*.

172. See *supra* text accompanying note 154.

173. Meincke, *supra* note 17, at 161 n.113.

horizontal ownership, this fragment fails on at least two counts, for it is irrelevant to both ownership and to horizontal division.

Two other fragments with multiple problems will not be set out here verbatim. One of those deals exclusively with the question of what lodgers or family members may reside with a person who lives in a house of which he enjoys the "use."¹⁷⁴ (*Usus* may be compared to a stripped-down life estate.) Fernández Martín-Granizo rightly rejects it as irrelevant.¹⁷⁵ The other fragment is also inapposite.¹⁷⁶ However, one remaining passage is worth setting out here:

Likewise, if there is a legacy of the usufruct of a house, the usufructuary should not divide the house into studio apartments (*meritoria*) nor divide it into larger apartments (*cenacula*). Otherwise he can lease it out, but he must lease it as a single house.¹⁷⁷

Among the problems in finding horizontal ownership in this passage are the following: (1) The person who might seek to divide the house is not the owner, but the holder of the usufruct;¹⁷⁸ (2) even if such a step were permitted, it is clear that what is being referred to is the division of the house into rental apartments (*cenacula* and *meritoria* — the word for rent being *merces*), and what is explicitly permitted is rental (*locare*) of the entire house. Indeed it is difficult to understand why this passage was ever cited as evidence for horizontal ownership.

174. Ulp.D. 7.8.4. On *usus* see BUCKLAND, *supra* note 33, at 273-74, KASER, *supra* note 17, at 124-25; JOLOWICZ, *supra* note 17, at 282, or D. 7.8 *passim*.

175. F.M.-G., *supra* note 17, at 118.

176. F.M.-G. could not identify the fragment due to errors in his source. From his description (at 123), it can be inferred that it is Mar.D. 44.4.10.

177. Ulp.D. 7.1.13.8 (erroneously cited by F.M.-G. as "7.1.13 and 8"): Item si domus usus fructus legatus sit, meritoria illic facere fructuarius non debet nec per cenacula dividere domum: atquin locare potest, sed oportebit quasi domum locare.

178. On which see BUCKLAND, *supra* note 33, at 269; KASER, *supra* note 17, at 121-24; JOLOWICZ, *supra* note 17, at 282; or D.7.1 *passim*.

VII. CONCLUSION

Thus the image of Roman condominiums vanishes upon approach. Insofar as the evidence reveals, there were no condominiums in ancient Rome; there was never even anything approximating horizontal ownership. The facts have long been known to classical scholars; they have now been stated for the mainstream legal literature. However, a more important issue remains: Granted that there were legal writers who doubted that there were condominiums in ancient Rome; why, then, has the myth been accepted and propagated by so many others?

One of the conclusions of the previous pages is worth restating at this point: With the exception of Professor Bergin, every legal writer in the United States who has considered the subject over the past twenty-five years has either accepted the story of Roman condominiums without significant investigation, or expressed skepticism without significant investigation. Why?

Perhaps the majesty of the Roman Empire numbs the critical faculties. As a student of Rome, and one long in awe of the greatness of her civilization, this writer would fain believe it so. Regretfully, that answer seems insufficient.

The Roman condominium myth is not an isolated incident. Recently, this writer had the opportunity to examine an article in a law review of at least moderate prestige. A central theme of the article was the Roman law of sale and barter. Its discussion was supported, almost entirely, by a handful of English-language secondary sources and (in a very few spots) references to a *Digest* translation of known unreliability.¹⁷⁹ Unfortunately, this sort of "scholarship" becomes more common as there is greater neglect of the substance and principles of classical education. This neglect has no doubt been a contributing factor to the prevalence of the Roman condominium myth.

Another reason for the general failure to stalk down the facts may be a belief that information about Roman law is not

179. That is to say the S. Scott version, the unsatisfactory nature of which provoked the 1985 translation by a team headed by Professor Watson. See 1 WATSON DIGEST, *supra* note 29, at xii.

really accessible. Given the deplorable state of foreign language studies in America (especially the study of Latin), perhaps there is something to this belief.

Yet it has already been noted that by 1960 enough English-language material had been published to enable a competent researcher to conclude that the Romans probably did not utilize condominium ownership.¹⁸⁰ Although some writers have consulted this material, many more have disregarded or misinterpreted it. There have, moreover, been entirely too many instances of non-citation, erroneous citation, and third and fourth-hand citation.

This writer cannot judge whether these defects are widespread in all branches of legal literature, but he can state that they are rather common in articles he has read within his fields of specialty. Editors or contributors who believe that their product could be improved may wish to investigate the quality-control procedures employed by publications serving other learned professions. Some of these procedures include rigorous standards of expert review, limitations on the scope of conclusions, and meticulous attention to sources. (The standards employed by the best classical scholarship are particularly impressive.) Since implementation of these devices would require more intensive research and additional editorial time and effort, it might reduce the number of articles published and/or the size and scope of each article. Nevertheless, the resulting improvement in the quality and reliability of the finished product might justify the effort.

180. It is not suggested that a knowledge of English alone would have been sufficient for a full-dress study on Roman attitudes toward horizontal property ownership, any more than English alone is sufficient to support a scholarly article on Roman barter or sale. Classical research requires a working knowledge of at least four (and preferably six or seven) languages.