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The Public and the Private in the Roman law of Sale

In 1986, during excavations of a Roman-era refuse pit on what is today the corner of Throgmorton Avenue and Austin Friars in the city of Westminster, a Roman writing tablet of 145 x 110 mm was discovered.[1] The tablet, made of wood with a rectangular indentation for wax, bore faint signs of writing where the stylus had scratched the surface below. It was conserved by experts at the Museum of London where it now resides as part of the Roman exhibit.[2] 13 lines of text are legible, but it is not complete and the tablet seemingly formed part of a larger document now lost.[3] Tomlin published the reconstructed text in 1996 and provided an English translation:[4]

> Imp(eratore) Traiano [Had]ri[ano] Caesare Aug(usto) (iterum), Gn(aeo)Fusco
> Salinatore co(n)s(ulibus) pr(idie) idus Martias.
> Cum ventum essec in rem praesentem,
> silvam Verlucionium, arepennia de-
> cem quinque, plus minus, quod est in ci-
> vitate Cantiacorum pago DIBVSSV...
> ....RABI....A..Sadfinibus heredi'bus'
> [*interlineated, traces of half a line*- Tomlin]
> et heredibus Caesenni Vitalis et via
> vicinale, quod se emisse diceret L(ucius)
> Iulius Bellicus de T(ito) Valerio Silvino
> (denariis) quadraginta sicut emptione con-
> tinetur.
> L(ucius) Iulius Bellicus testatus est se [Text – Tomlin]
>
> In the consulship of the Emperor Trajan Hadrian Caesar Augustus for the second time, and Gnaeus Fuscus Salinator, on the day before the Ides of March [14 March 118]. Whereas, on arriving at the property in question, the wood Verlucionium, fifteen *arepennia* more or less, which is in the canton of the Cantiaci in Dibussu[ ] parish, [ ], neighboured by the heirs [of... | and the heirs of Caesennius Vitalis and the vicinal road, Lucius Julius Bellicus said that he had bought it from Titus Valerius Silvinus for forty *denarii*, as is contained in the deed of purchase. Lucius Julius Bellicus attested that he [ ]' [Translation – Tomlin]

[1] Tomlin (1996), 209 for a discussion as well as a brief mention of the tablet in Korporowicz (2012), 145 with literature.

[2] http://www.museumoflondon.org.uk/Collections-Research/Research/Your-Research/Londinium/Lite/classifieds/legal.htm (last accessed 3 October 2012) with a picture of the tablet.

[3] Tomlin (1996), 210.

[4] Tomlin (1996), 211.

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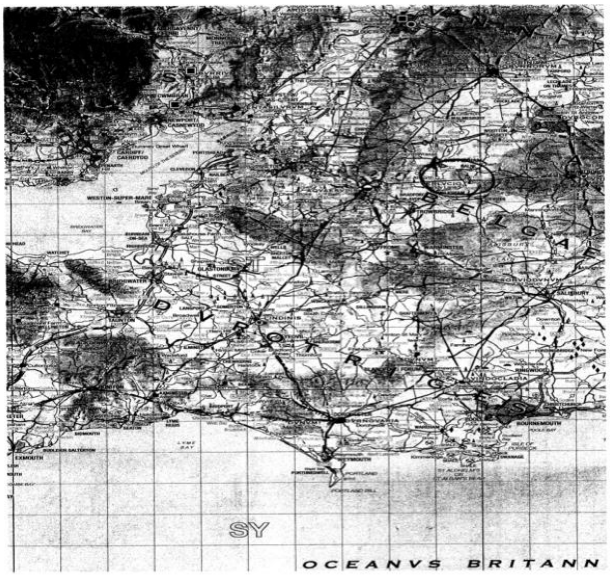
The text, which can be dated to the early second century CE, is notable for at least two reasons. First, according to Tomlin, it is '… the longest stylus tablet of its kind to have survived from Roman Britain'.[5] Furthermore, it the only tablet to identify by name Roman landowners in Roman Britain.[6] But what was the purpose of it and why was it drafted? The aim of this paper is to answer this twofold question while at the same time contributing to the larger debate about the "public" and the "private" in the Roman law of sale. I will argue that for all the focus on private law in modern Roman-law scholarship, more attention should be paid to the different contexts in which these rules arose and operated. Only when this is done, does it become apparent that the separation between "public" and "private" was perhaps somewhat more porous than previously appreciated.[7]

As a starting point, the content of the tablet requires consideration. It contains the following information a) a date identification; b) a description of the size and location of a woodland; c) a mention of the names of the neighbouring owners and certain defining geographical features; d) a statement that one of the parties L. Julius Bellicus (the purchaser) claims to have bought it from T. Valerius Silvinus (the seller); e) the price of the woodland and f) a mention of a deed of purchase. This information suggests that the document was somehow related to the sale of a wood and possibly served to fulfill an official function of some sort. Tomlin's assessment of its function - the dominant one at present - has centered on the location and name of the woodland.[8] The wood, called *Verlucionium*, was most likely located close to the settlement *Verlucio* which existed on the road between the modern-day towns of Bath and Mildenhall, close to the village of Sandy Lane (see attached OS map).



[5] Tomlin (1996), 209.

[6] On Britain during the Roman period, see Hobbs and Jackson (2010); De la Bedoyere (2010); Moorhead and Stuttard (2012); Salway (1993).

[7] See Stein (2007); Lehoux (2012).

[8] Tomlin (1996), 213 – 214.

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The word is Celtic and the measurements of the wood given in the tablet (*arepennia*) are not Roman.[9] In light of these facts, Tomlin has speculated that the wood *Verlucionium* might have been a pre-existing Celtic 'sacred grove'. Although this interpretation appears somewhat tenuous, especially given the paucity of the evidence, it raises interesting legal questions and thus deserves further scrutiny. Why were two Romans buying and selling a Celtic 'sacred grove' in Roman Britain and were they entitled to do so by law? To answer this question, we must look at Roman law, and more specifically, at the distinction between cause and conveyance as well as the Roman 'theory' of the ownership of immovable property.

Let us first take the issue of the cause. The tablet uses the verb (*emere*) and mentions a deed of purchase. It therefore seems safe to infer that the drafter was referring to the consensual contract of sale (*emptio venditio*). Sale was one of the four "consensual" contracts in Roman law that became binding by mere consent of the parties over the object of sale and its price.[10] Its use was not limited to Roman citizens as it was deemed to have originated in the *ius gentium*.[11] The names of both parties mentioned in the tablet suggest that they were Roman.[12] Even though the tablet does not seem to be the actual deed of purchase, it is worth noting that all the legal requirements for an *emptio venditio* have been met and can be extracted from the information contained in it (a description of the object of sale and the price).[13] Why the parties chose to use the consensual contract of sale as opposed to other forms of transaction whereby a sale could be concluded, such as a *stipulatio*, remains unclear and cannot be resolved. In all likelihood, the prevalence of *emptio venditio* during the second century CE and the decline of *stipulatio* may have been a factor, but other possibilities remain.

Related to the issue of the cause is the notion of conveyance and by implication the rights that could be acquired and exercised over the woodland. As all students of Roman law are taught, in the early Empire *dominium* (in the sense of the highest entitlement to immovable property) could be exerted as a rule only over 'Italic land', i.e. mainly land south of the River Po in Italy and sometimes (but rarely) land that had been granted the *ius italicum* situated in the provinces. In large sections of the Roman Empire, therefore, it was not possible to obtain or transfer *dominium* over land and provincial 'owners' had to contend themselves with 'provincial ownership'.[14] Schulz describes this concept as follows:

> 'The rest of provincial land [i.e. land not held under *ius italicum*, not belonging to the *fiscus* or a *civitas libera et foederata*] was in the ownership of communities or individual persons (Romans or peregrines), but this ownership was neither quiritary not praetorian; it was an ownership of a special kind subject to a mixture of Roman and peregrine law. To designate it the classical lawyers used the old republican formula (or parts of it) *habere possidere uti frui licere* … *Dominium* of this land was ascribed to the Roman State, in the senatorial provinces to the *Populus Romanus*, in the imperial provinces to the *Princeps*, but this ownership was neither quiritary nor

[9] Tomin (1996), 214.
[10] De Zulueta (1949), 10.
[11] D.48.22.15pr (Marcian. Lib. …).
[12] Tomlin (1996), 214.
[13] Korporowicz (2012), 145.
[14] On the relationship between the provinces and the Emperor, see generally Millar (1977), chapter 7.

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> praetorian ownership. It was a sort of public ownership which implied nothing else but that the land was subject to a tax and formed part of the territory under the administration of provincial governors.'[15]

Britain was an Imperial province and there is no evidence that the *ius italicum* was ever granted to regions within it.[16] Armed with this knowledge, we may therefore assume that the Romans mentioned in this tablet were using the Roman contract of sale in order to transfer (a form of) 'provincial' ownership of the woodland through the sale.

But Tomlin sees more in this text. Using the Celtic name of the woodland and its possible status as a 'sacred grove', he argues that the woodland may originally have belonged to the native *Cantiaci* in whose territory it lay.[17] When they surrendered to the Romans, these lands were 'captured' and thus became *res publica*. Legal authority for this may be found in Gaius (2.66, 69):

> Nec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione adquiritur, sed etiam quae occupando ideo adepti erimus, quia antea nullius essent, … 69. Ea quoque quae ex hostibus capiuntur, naturali ratione nostra fiunt.
>
> 66. But it is not only by delivery that we acquire things as a matter of natural reason; this applies also to things which we get by first taking … 69. By natural reason we also become owners of things captured from enemies. [Gordon Robinson translation]

Mattingly describes this process with reference to the capitulated tribes in Britain.[18] Each tribe received their own specific settlement with the victorious Romans and much depended on the level of resistance against the Roman occupation. In most instances all land belonging to a vanquished tribe were turned into 'state land' (*res publica*). Some of this was then given to the *colonia*, which were instructed to parcel some out to the repatriated veterans who were settled there to bolster numbers, while the rest was kept as *ager publicus*.[19] In rare cases, vanquished tribes were given the privilege of keeping some of their land, but these were then made subject to Roman taxation. But what effect would this have on the legal status of the Celtic 'sacred grove'? Some evidence may be found in Gaius (2.2,3,4,7):

> 2. Summa itaque rerum division in duos articulos diducitur: nam aliae sunt divini iuris, aliae humani. 3. Divini iuris sunt veluti res sacrae et religiosae. 4. Sacrae sunt, quae diis superis consecratae sunt; religiosae, quae diis Manibus relictae sunt. … 7. Sed in provinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Caesaris, nos autem possessionem tantum et usumfructum habere videmur; utique tamen, item quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

[15] Schulz (1954), 341.
[16] Salway (1993), 69 – 70.
[17] Tomlin (1996), 213.
[18] Mattingly (2007), 353.
[19] For a discussion of the significance of different types of settlement and their legal status, see Mattingly (2007), 260.

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> 2. Now the main division of things [i.e. in private wealth or not] has two limbs; some things are under divine law, others under human law. 3. Sacred and religious things, for instance are under divine law. 4. Sacred things are consecrated to the gods above; religious things to the gods below. … 7.But in the case of land in the provinces most people accept that it is not made religious because ownership of such land is held by the Roman people or by the Emperor; we are regarded as having only possession or a usufruct; all the same, although not in fact religious, it is treated as religious. Again, anything in the provinces not consecrated by the authority of the Roman people is not sacred properly speaking, yet it is treated as sacred. [Gordon Robinson translation]

Gaius seems to be suggesting here that *res sacra* could also include things which were not only sacred to the Romans (i.e. had been consecrated by the authority of the Roman people), but which had been 'sacred' before. Such property would not be subject to human law and by implication could therefore not be 'owned' in any way. Tomlin therefore argues that the woodland may have inadvertently passed into private ownership, most likely when land was parceled out to veterans by the *colonia*.[20] As is well known in the law of sale, according to standard works such as De Zulueta,:

> 'In principle the sale of *loca sacra*, *religiosa*, or *publica* or of a *liber homo* was void, …'[21]

If this is indeed the case, then the tablet in question suddenly acquires a whole new level of complexity. It refers to a complex property-law dispute in which someone challenged the title of 'public' land which has been sold, likely in good faith. But who would bring such a challenge and what was the purpose of this document?

To answer this question we must look at the use of expert evidence in a Roman court case.[22] Given the content of the tablet, it seems plausible that an expert may have drafted it. In disputes concerning land, the most commonly used expert was the surveyor (*agrimensor*). Maganzani expresses the role of these experts in Roman court cases as follows:

> 'The *agrimensor* used to be consulted for legal disputes concerning land, its extension and boundaries, that is in particular for the *reivindicatio*, the claim on ownership of land between two neighbours, and the *actio finium regundorum*, the claim on settling boundaries between neighbouring lands. … A fragment of the jurist Ulpianus (third century A.D.) issued from his commentary *ad edictum* and now included in Justinian's Digest, mentions the technical adviser in two different positions: the *mensor* could be required, chosen and consulted directly by the judge to help him reach a decision, or he could be engaged by the parties. In the first case Ulpian calls him *mensor a iudice adhibitus*, in the second *mensor propter iudicium adhibitus*.'[23]

From the final sentence of this passage one may therefore conclude that either the judge or the parties could employ the *agrimensor* in the context of the lawsuit. It is not my intention to

[20] Tomlin (1996), 213.
[21] De Zulueta (1949), 10.
[22] Bablitz (2007), chapter 7.
[23] Maganzani (2007), 2.

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enter into the vexed question of whether the operae of an *agrimensor* could be 'rented' or not, since the matter has been definitively resolved by Coppola.[24] Suffice it to say, as she has shown, that the parties to a lawsuit could rent the *operae* of an *agrimensor*.[25] But who would be interested in challenging the rights of the purchaser to this land? According to Tomlin, it could be any one of a number of parties with an interest in the land, e.g. the Imperial Procurator wanting to claim it as *res sacra*, a disgruntled member of the local community wanting to lease the property were it to be declared *res publica* or even the local community objecting to it being transferred as private property.[26] Thus, what we seem to have preserved here in this tablet may be a portion of a report by an *agrimensor* in the context of a property dispute who was acting either on behalf of the judge in the lawsuit or on behalf of the parties. This also seems to be borne out by the physical state of the tablet. It contains two holes on the one side, which suggests that it was the outside of a triptych, i.e. where a brief summary of the legal controversy was written without technical details which would be contained inside.[27]

The task of the *agrimensor* differed depending on the nature of the land to be surveyed.[28] In the provinces three types of land existed, namely centuriated land, delimited (surveyed) land (*ager limitatus*) and unsurveyed land (*ager arcifinius*). Given that the woodland was described in the tablet using measurements which were not Roman, there is a suggestion that the land may have been completely unsurveyed.[29] If this were the case, the surveyor could rely on external documents relating to the census [for tax purposes] to accurately survey the land.[30] According to D.50.14.4pr (Ulpian 3 de cens.) the census document contained information about the property such as it size, location, the names of neighbours etc. Given that this information appears in the tablet in question, it seems safe to assume that the woodland was unsurveyed.

One final point to be resolved is where this court case may have taken place. To understand this, we must look at the information about the different types of Roman settlement (*municipia* and *colonia*) which existed in Roman Britain and the law which applied to them and their lands. Information about the status of Roman-era towns in Roman Britain is fragmentary.[31] Of all of the known settlements, only 4 or 5 are known to have had the status of *colonia* (i.e. where Roman civil law would have applied) and one *municipium* (which used partly Roman law and retained part of its own laws) is known. In light of this (and using the map) it would appear that Gloucester was the nearest *colonia* and, given that the matter concerned Roman law, it appears likely that the court case would have been heard there.

So how does this text contribute to the debate about the 'public' and the 'private' in the Roman law of sale? Although modern scholars of Roman law are prone to think of sale as a largely private-law entity which only occasionally interacted with public law (e.g. in regulations of the sale of slaves and the edict of the Aediles), the discussion of this tablet shows that the contract of sale was much more closely connected with the 'public', i.e. the larger public-law context in which this contract operated. Here, in the case of a sale of a

[24] Coppola (1994), generally.
[25] Du Plessis (2012), 99 – 100.
[26] Tomlin (1996), 213.
[27] Meyer (2004), generally.
[28] Maganzani (2007), 3 – 5.
[29] Tomlin (1996), 214.
[30] Maganzani (2004), 4 – 5.
[31] Mattingly (2007), 261.

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'public' thing, the 'public' element features strongly, not only in the classification of property and the resulting rights which parties could hold over such property, but also in the institutional structure which was used to enforce and countermand rights. This remains an unexplored frontier in the Roman law of sale.

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