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Modena 1182, the origins of a new paradigm of ownership The interface between historical contingency and the scholarly invention of legal categories

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Abstract

The legal phrase *dominium utile* is commonly known to express the property rights enjoyed by the person to whom a piece of land has been granted in fief or under other similar concessions. A considerable amount of legal-historical research has been spent on the origins, the reasons and effects of this legal concept, which proved to have played a very significant role in European history. One of the results of this historical research was that the first jurist who introduced the expression *dominium utile* was Pillius de Medicina, a law professor who moved from Bologna to the new born school of Modena in 1180. This article aims at an historical recontextualization of Pillius' doctrinal construct in the frame of the political and social history of the city of Modena. However, this contingency of a doctrinal invention does not prevent a legal theory from transcend its particular circumstances to remain part of the tool-box which can be used by intellectuals in a completely different historical context, perhaps very remote from time and place of their first origins.

Keywords

Medieval property, *Dominium utile*, Pillius de Medicina, Statutory law, Medieval legal doctrines

SUMMARY: 1. *Dominium utile*. 2. Pillius de Medicina and the birth of the *dominium utile*. 3. The historical context of doctrinal innovations. 4. The legal rule within and outside its historical context

1. *Dominium utile*

Is this the case of “chasing a chimera”? In an article published in 1998¹, Robert Feenstra revisited one of the central themes of his scholarly work, on which he had at the time already spent more than thirty years of his research². The theme was that of the *dominium utile*, one of the boldest devices designed by Medieval legal scholarship, and at the same time one of the most important conceptual tools which made it possible to secure a legal grip on the vast network of rights on property. As a legal device governing the control over property, it had a far-reaching effect during the centuries which we look back upon as the *Ancien Régime*. Moreover, one of the deepest fault-lines which the Revolution cut first through French, and subsequently European, history was precisely the

* I wish to thank Alain Wijffels for translating this article from original French into English.

¹ Feenstra, R., “*Dominium utile est chimaera? Nouvelles réflexions sur le concept de propriété dans le droit savant (à propos d'un ouvrage récent)*” 66 TRG 66 (1998), pp. 381-397.

² In the first footnote of his article, Feenstra refers to two earlier studies of his: Feenstra, R., “*Les origines du dominium utile chez les glossateurs (avec une appendice concernant l'opinion des ultramontani)*”, originally published in 1971 in the *Festschrift in honour of H.J. Scheltema*, and later reprinted in Feenstra, R., *Flores iuris romani. Etudes d'histoire du droit*, Leiden, 1974, pp. 215-259; the second article is Feenstra, R., “*Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, first published in *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas*” (P. Birks, ed.), Oxford, 1989, later reprinted in Feenstra, R., *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries*, London (Variorum), 1996, as essay No. III.

suppression of the distinction between the *dominium directum* and the *dominium utile*, and other legal expressions of feudal entitlements on property.

The legal phrase *dominium utile* is commonly known to express the property rights enjoyed by the person to whom a fief has been granted, or as the beneficiary of another form of entitlement on the property which had been conveyed to him. The lord who had made the grant maintained over the property an entirely different kind of ownership, known as the *dominium directum*. The latter only entitled the lord to receive various forms of homage associated with the property he had conveyed, and to retain a power of control over the grantee. It was precisely because these terms referred to a society governed by feudalism that the French Revolution had abolished that system of double ownership, so as to reunite in the hands of a single person the legal powers to enjoy and dispose of the property. Ownership thus became a right which was necessarily one and indivisible. Property rights which could lawfully be established on goods owned by someone else were therefore restricted to a small number by the lawmaker, while the possibility of having two concomitant forms of ownership on the same property was ruled out.

Since the *dominium utile* was now perceived as a defining feature of a legal order which had been demoted by the new legal constructs of the nineteenth century, no wonder it drew the attention of legal historians. A considerable amount of legal-historical research has been spent on the origins, the reasons and effects of a legal concept which proved to have played a very significant part in European history³. It was a concept which had been shaped by academic lawyers, strongly influenced by the new legal language which gained ground in Western Europe when Justinian's compilations of Roman law were discovered. However, neither the phrase nor its legal substance appears in the sources of Roman law. It was certainly an invention by Medieval legal scholars and, making the case look even less plausible, it also contravenes a fundamental principle of classic Roman law, which is clearly stated in the Digest: two individuals cannot exercise a *dominium* over the same thing at the same time (D. 13.6.5.15). When a single thing is owned by several individuals, Roman law considered that each owner was entitled to a notional portion of the whole, to a part of the value of the property. Each one is the sole owner of that notional part, although that perfect ownership will only materialise when the community with the other owners is dissolved. Such is the question of our topic for legal history: how did the glossators succeed in subverting so blatantly their textual authorities?

³ A full bibliography would be too long to include in the present article. A first survey of the issue may be found in a famous article by Meynial, E., "Notes sur la formation de la théorie du domaine divisé (domaine direct et domaine utile) du XIIe au XIVE siècle dans les romanistes. Étude de dogmatique juridique", *Mélanges Fitting*, II, Montpellier, 1908, 411-461; after the Second World War, in addition to the articles by Robert Feenstra, already mentioned, the reader should be referred to Coing, H., "Zur Eigentumslehre des Bartolus", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 70 (1953), pp. 348-371. P. Grossi published two books during the 1960s: *Locatio ad longum tempus. Locazione e rapporti reali di godimento nella problematica del diritto*, Naples, 1963, and *Le situazioni reali nell'esperienza giuridica medievale*, Padova, 1968, as well as several articles, which have been collected in *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano, 1992. Since the beginning of the twenty-first century, relevant studies include: Cortese, E., "Controversie medievali sul dominio utile. Bartolo e il quidam doctor de Aurelianus, in *Amicitiae pignus*" Studies for A. Cavanna], Milano, 2003, I, 613-635; Heirbaut, D., "Feudal Law: the Real *Ius Commune* of Property in Europe, or: Should We Reintroduce Duplex *Dominium*?", *European Private Law* 3 (2003), pp. 301-320, with further bibliographical references at p. 312; Rüfner, Th.], "The Roman Concept of Ownership and the Medieval Doctrine of *Dominium Utile*", *The Creation of the *Ius Commune* : From Casus to Regula* (J. Cairns and P. du Plessis eds.), Edinburgh, 2010 [Edinburgh Studies in Law 7], pp. 127-142.]Even more recently, on the theories developed at the School of Orléans, see Duynstee, M.C.I.M., *L'enseignement du droit civil à l'université d'Orléans du début de la guerre des cent ans (1337) au siège de la ville (1428)*, Frankfurt, 2013 [Studien zur europ. RG, 253], pp. 155 ss.

When he first tackled the issue, back in 1971, Feenstra decided to approach it, metaphorically speaking, through its main gate. He asked the questions of the concept's origins: who and for what reasons had first coined the strange phrase for the first time? Unlike his predecessors, Feenstra did not restrict his investigations to the earliest appearances of the phrase in those Medieval works which happened to have been published when the printing press was invented, or for which philologically minded jurists had provided critical editions in the nineteenth and twentieth century. He also carried on his investigation in manuscripts which document the travails of the glossators on the sources of the civil law. That research allowed him to formulate a strongly reasoned opinion, based on the evidence of the source-material he had found, on the first use of the phrase. At the same time, Feenstra also took a critical look at the scholarly debate on the issue since the beginning of the twentieth century. In the discussions about the birth of the expression *dominium utile*, he recognised two schools of thought which opposed each other. The first was represented by Édouard Meynial, who wrote in 1908 an article in honour of Hermann Fitting which became notorious among legal historians: *Notes sur la formation de la théorie du domaine divisé*. In order to illustrate the opposite thesis, Feenstra drew the attention to a strongly argued essay by a German scholar, much less known at the time: Karl Lautz, who had published in 1916 a booklet (already written in 1886) under the title *Entwicklungsgeschichte des Dominium utile*.

The two authors proposed entirely different theories. For Lautz, the construct of a double ownership had been the result of a discussion between the first glossators of Roman law, who had been debating about the effects of acquisitive prescription. The sources on this debate betray a great deal of uncertainties on the precise nature of the right acquired by someone who had behaved as the true owner during the period set out by the law, and who was therefore protected by the civil law even though he was not the holder of the proper right of ownership. What such an individual who had the possession of the property could do in order to reclaim the property acquired through prescription was to start an *actio utilis*. It seemed therefore plausible that in that context, the phrase *dominium utile* had first originated. In that view, this would have been a mere academic discussion, without any concern for creating legal instruments adjusted to the social reality at the time. A typical procedural term of art ("*utilis*" applied to a form of action) was transposed to substantive law. Medieval legal science would therefore have drawn its inspiration from the internal logics of Roman law in order to formulate the "double dominion", following a characteristic phrase in the Roman law sources.

Meynial, in contrast, suggested a far more "historical" interpretation. In his view, the distinction between the two forms of ownership was not the result of an academic discussion centred around the texts of Roman law. He looked for external influences in a society deeply marked by Germanic institutions which he thought might have convinced the Medieval jurists to tamper with their texts so as to introduce a concept which was foreign to Roman law. Surprising as it may seem, it was the French scholar who took side along the historiographical stream of the history of German law⁴. Meynial's thesis implied that the very strength by which the legal institution of ancestral German law had been able to penetrate Medieval society had led the learned academic lawyers with no other option but to work out a constrained, and ultimately wrong, interpretation of Roman law so as to ensure that Germanic legal concepts could apply. Conversely, the German scholar Lautz continued to follow the concept of law as a complex system of abstract rules which were formulated by jurists working on positive normative *dicta*, in order to make them intelligible in a rational system which was not necessarily determined by external factors.

⁴ In Lautz' book, the idea that the *duplex dominium* reflected the Germanic *Gewere* was mainly attributed to George Phillips, *Gründsätze des gemeinen deutschen Privatrechts mit Einschluss des Lehnrechts*, I, Berlin 1829, 237-239. After Phillips, that idea, which was taken up by Meynial, has been supported by several German authors.

In the first pages of his article, Meynial openly admitted his adhesion to the ideas of Germanistic scholarship, in particular the writings by Otto von Gierke⁵. In order to develop his own investigations, Gierke had borrowed from earlier German scholarship, which, in the very context of property rights, had assumed the introduction by the northern *Völker* of a typically Germanic “legal idea”, that of the *gewere* (usually translated in French as *saisine*). According to this interpretation, the concept of *gewere* had deeply affected the practice, but furthermore the legal doctrines of the first generations of jurists during the twelfth century, who had been compelled to tamper with their reading of Roman law texts, so as to apply them to ancestral legal structures completely foreign to them⁶. Meynial’s research on the origins of the phrase *dominium utile* was as such the latest development of a historiographical tradition deeply rooted in the German tradition⁷.

The opposing theories of Lautz and Meynial provided the preliminary materials for Robert Feenstra’s research. The opposition was reflected and reshaped in the struggle between “naturalism” and “formalism”, which may be considered as two forces which have determined the structure of law in Europe. On the one hand, we have a law which adjusts to the requirements of the real world of social relations, on the other, a system governed by general and abstract rules, which, rather than evolving from society, have to be fitted into *a priori* established categories of the law making authority. The “naturalist” view, supported by a majority current among historians of Medieval law, tends to see a struggle based on the opposition between Roman law texts and institutions which used to be labelled as Germanic, but which nowadays are usually associated with customs based on usage and practice throughout Europe⁸.

The concept of *dominium utile* appears therefore to be trapped between two characteristic, but diverging views on legal historiography, which always tends to focus more strongly on institutional developments, rather than on contingent historical events. In such a tradition, the constructs of legal science are not explained as answers to specific cases or to a historical context which is precisely determined in time and space, but they result from immanent historical forces, and legal doctrines emerge from the confrontation of these forces. It is exactly this cultural attitude that has often prevented legal historians from undertaking researches aiming at understanding the cultural, economic and social context in which legal theories were created. The theory of the double ownership appears to be no exception.

⁵ Feenstra, R., “*Dominium utile est chimaera*”, cit., p. 384, notes that “D’après Meynial, l’élément le plus important dans la formation du *dominium utile* aurait été ‘la conception foncière germanique’. Sur ce point, il s’était inspiré des idées d’Otto von Gierke”.

⁶ One of the oldest examples of that view is to be found in Delbrück, B., *Die dingliche Klage des deutschen Rechts*, Leipzig, 1857, pp. 101-111, where the author discusses the distinction between *possessio civilis* and *possessio naturalis* as a construct elaborated by the glossators, strongly influenced by the Germanic *gewere*. Heusler, A., *Die Gewere*, Weimar, 1872, pp. 297-326, took up and further developed the interpretation of Delbrück.

⁷ Conte, E., “Droit médiéval. Un débat historiographique italien”, *Annales. Histoire, Sciences sociales* 57/6 (2002), pp. 1593-1613, 1601-1607. See also Conte, E., “Gewere, vestitura, spolium: un’ipotesi di interpretazione”, *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Bd. 1: *Zivil- und Zivilprozessrecht* (O. Condorelli, F. Roumy, M. Schmoeckel, eds.), Köln-Weimar-Wien, 2009, pp. 169-191.

⁸ That approach is now largely outdated, see (a.o.) Reynolds, S., “Medieval Law”, *The Medieval World* (P. Linehan and J.L. Nelson, eds.), London – New York, 2001, pp. 484-502, 487: “The Roman Law on which some groups in Italy and elsewhere in southern Europe prided themselves was also to a large extent customary law. The old obsession with defining law as Roman or Germanic has come to look more and more pointless. Roman law in the provinces had always been different from that of the classical jurists, and the collapse of Roman government in the West had changed the conditions in which it worked”.

2. Pillius de Medicina and the birth of the *dominium utile*

Feenstra's detailed study published in 1971 established beyond doubt that the phrase was first coined by the glossator Pillius de Medicina. Twenty-five years later, Feenstra himself wrote a useful summary of his findings, which may here be reproduced verbatim (in English translation):

“Already around the mid-twelfth century, a few glossators had been wondering if the holder of a right of emphytheosis, of superficy and similar rights were *domini*, so that somewhat vague expressions such as *quasi dominus*, *aliquo modo dominus* came to be used. However, the more abstract question, whether those individuals enjoyed a *quoddam dominium*, does not appear to have been asked before Pillius, who was the first commentator of the *Libri Feudorum*, during the last decade of the twelfth century”⁹.

Feenstra also recalls the technical features which make it possible to envisage the right acquired by a vassal who received his fief as a *dominium*. Because the feudal concession was considered in law as a form of conveyance, the right of the vassal was transformed into a property right which, in turn, could be transferred to a third party: “on the issue, whether *in feudum concedere* should qualify as an *alienatio*, — Feenstra writes — Pillius says that the lord *dominium alienat, scilicet utile, retinet tamen directum*, and, in the case the vassal will transfer the fief property to a vassal of his own, Pillius returns to the issue and acknowledges that both the first and the second vassal have the *dominium utile*”¹⁰.

That was the first use of a legal phrase which would last for many centuries. One may ponder why legal historians, whose area of research inevitably must raise their interest for the history of legal formulations, are not wont to extend a similar interest for the relevant historical circumstances surrounding the turning-points in their historical field. In this case, the lack of interest is all the more striking, because Pillius' personal history and the political circumstances of the city where he was active as a professional lawyer are well known and documented.

He was born in Medicina, a village near Bologna where he read law. He became a professor in his *Alma Mater* around 1177¹¹. In an autobiographical aside, he mentions that after having taught for three years at Bologna, the council of the city of Modena invited him to move to their town and to establish a new law school. The offer was so attractive that he decided to leave his chair in Bologna and to transfer his activities to the aspiring competitor, however comparatively small that city was. His name appears in Modena's records from 1181 onwards, and regularly occurs until 1207.

In Modena, Pillius suggested a few major innovations in law teaching. In his *Libellus disputatorius*, he proposed to his students to abandon the useless *apparatus glossarum* and to focus instead on the texts of the *corpus iuris civilis* so as to learn how to draw out from these texts the arguments that would allow them to discuss legal issues dialectically¹². He could never have put forward such a

⁹ Feenstra, “*Dominium utile*”, p. 386.

¹⁰ *Ibidem*. Feenstra here refers to Pillius' gloss on LLFF 2.3 *rebus suis*, published by Rota, A., “L'apparato di Pillio alle *Consuetudines feudorum* e il ms. 1004 dell'Arch. di Stato di Roma”, *St. e mem. per la storia dell'Univ. di Bologna*, 14 (1938), pp. 104-105, num. 127. The same text can be found in the Accursian gloss, at the same place. Thus, the idea that a feudal concession was a form of conveyance was generally adopted once the standard gloss started spreading in the Latin West.

¹¹ On Pillius' life, see now the entries in *Dizionario biografico dei giuristi italiani*, Bologna 2013, by E. Cortese (vol. II, pp. 1587-1590), and in *Dizionario biografico degli italiani*, Rome 2016, by E. Conte (also available online).

¹² See the *prooemium* of the *Libellus*, published by Belloni, A., *Le questioni civilistiche del secolo XII: da Bulgaro a Pillio da Medicina*, Frankfurt-am-Main, 1989, 54: “Surgite, surgite, surgite quasi de sompno scolares tepidi,

radical proposal in Bologna, the home-town of glossators and their *apparatus*. Nor would he have been able to introduce in Bologna another momentous change: the study of a text of customary law in a law school dedicated to Roman law. And yet, that is what he did with the compilation of feudal customs by the Milanese judge Obertus de Orto. The teaching of feudal law was exceedingly innovative. No Bologna educated jurist before him had ever written a sequence of glosses on a text which was not anointed with statutory authority. The glosses on the *Libri Feudorum*, however, dealt with a text which consisted mainly in a treatise on feudal customs written down by a judge who did not even claim to act as a lawmaker. In the margins of that treatise, Pillius' glosses were the first to build a network of references to Roman law, which was the primary concern of law teachers and students¹³. That network of connections between the customs written down by Obertus, imperial constitutions issued by Medieval rulers and Roman laws, opened the path for the *Libri Feudorum* to be quoted by the glossators, and within a few decades to make their triumphal entry in the standard version of the *corpus iuris civilis* including the Accursian gloss¹⁴.

The encounter between feudal customs and Roman law was therefore one of the influential innovations introduced by Pillius after his move from Bologna to Modena. A good example is the gloss which mentions the *dominium utile*. It sets out to explain a passage from the *Libri Feudorum* (2.3) according to which someone who is not entitled to transfer the ownership of his property is not entitled either to transfer the property through a feudal investiture. The gloss therefore raises the practical question, if an heir is given a real property with the qualification that he will not be able to sell it, can he still convey it as a fief? In order to answer that question, Pillius addresses the issue of the legal nature of the conveyance by referring to two texts in Justinian's Code. Firstly, C.4.51.7 states that the prohibition of selling includes all other forms of disposal, such as creating a hypothec or pledging assets as surety. Therefore, under the generic term of disposal of property, different types of legal operations are included, not only a contract of sale. What is the common thread uniting those different operations? Here again, one has to turn to a text of the Code which offers a general definition: "Est autem alienatio omnis actus per quem dominium transfertur" (C. 5.23.1). The investiture is therefore a legal device through which *dominium* is being transferred. The vassal receives a *dominium utile*, while the lord keeps the *dominium directum*¹⁵. That is the reason, Pillius notes, why in the case where a vassal has been lawfully given possession of his fief through an investiture, he will be able to protect his right with a property claim (*rei vindicatio*) in the form of an *actio utilis*, whereas the *direct* property claim will remain the prerogative of his lord, who retains the *dominium directum*. The reasoning is characteristically a learned legal construct relying at the same time on a customary authority and on a Roman law authority, in order to achieve a rationalisation of feudal relations within the established framework of the rules applied by academic jurists.

3. The historical context of doctrinal innovations

multiplici scriptorum fere imbuti, et textum, maxime trium voluminum Institutionum, Digestorum et Codicis, superfluis scilicet apparatus reiectis, lectitate...".

¹³ Rota, A., "L'apparato di Pillio alle *Consuetudines feudorum* e il ms. 1004 dell'Arch. di Stato di Roma", *St. e mem. per la storia dell'Univ. di Bologna*, 14 (1938), pp. 61-103.

¹⁴ For this case, see Cortese, E., *Il rinascimento giuridico medievale*, 2nd revised edition, Rome, 1996, pp. 50-52.

¹⁵ Rota, "L'apparato", p. 105: "... alienatione omnis actus continetur, per quem dominium transfertur, ut C. de fundo do. l. 1 (C. 5.23.1). Respondeo: falsum est, immo dominium alienat, scilicet utile, retinet tamen directum, unde utilis et non directa vindicatio datur...".

The specific political and economic context of the construct of *dominium utile* is that of the city of Modena, the town which succeeded in luring Pillius from nearby Bologna by offering him an attractive salary and, as Pillius himself informs us, by contributing to pay off the debts that the young scholar had accumulated in his home town. Moreover, as Bolognese professors had to promise under oath that they would not teach elsewhere for a period of three years, Modena paid out his salary during two years, even though this meant that Pillius was unable to take on any teaching.

At the time, Modena was a city in full expansion. During the 1170s, it had strengthened its relations with the anti-imperial party in the communal wrangle against Frederic Barbarossa. Peace treaties with other communes provided for mutual military aid. Other treaties, with small neighbouring communities, secured Modena's ascendancy over the city's surrounding territory.

The records of privileges¹⁶ of the municipality contain the most important official documents produced by the city government and provide evidence of the city's diplomatic efforts. However, in those records dealing with the subordination of the rural population, of treaties with large and small cities, one single document deals with the rights of Modena's citizens on their own property. It is a document which the city regarded as a foundational act of the community's economic life. Ludovico Antonio Muratori, who was the first to publish the text in 1740, commented that it was an enactment still in force at Modena in his own days¹⁷.

The document, dated from 1182, testifies to an agreement made between the city's government and the most important local ecclesiastical authorities about the legal status of goods belonging to ecclesiastical institutions which citizens of the city held by virtue of a concession. The agreement followed an arbitration which the parties had assented to in order to put an end to disputes between them. The bishop, the canons of the principal church, the abbot of the monastery of Saint Peter and the abbess of the monastery of Sant'Eufemia had complained against the Commune of Modena because of a new "municipal statute" which, they claimed, was harmful to their interests. The statute not only dealt with the land of their institutions, but also with that of other real estate owners in the city¹⁸.

The text of the new statute under discussion is fully reported in the document. It contains some very precise rules about the rights of those who possessed houses and land within the city's perimeter and its immediate surroundings. They were allowed to convey them freely, as long as the rents due to the owner were secured¹⁹. If the concession had been granted in the form of a fief, which would normally have implied that it was only transferrable to male heirs, the daughters, according to this

¹⁶ *Registrum privilegiorum Comunis Mutinae*, (L. Simeoni and E.P. Vicini, eds.); Reggio Emilia, 1940.

¹⁷ Muratori, L.A., *Antiquitates Italicae Medii Aevi*, vol. III, diss. 36 (*de emphyteusibus, precariis et laicorum decimis*), coll. 149-156. In his introduction to his transcript, the famous clergyman, both historian and jurist, shows that he was perfectly aware of the legal importance of the distinction between *dominium directum* and *dominium utile* as it was applied in that document: "Saepe lites effervebant inter episcopos et clerum mutinensem ac cives, emphyteuseon caussa, contententibus iis hos aut ob pensionem non solutam aut ob mortem alicuius, aut alias ob caussas, excidisse a iure suo ac fundos *directis dominis* esse restituendos. Contra nitebantur cives. Quare post diuturnam certamen ad istam concordiam deventum est, *quae adhuc in civitate nostra viget*" (col. 150).

¹⁸ *Registrum*, cit., 78: "Cum lis et controversia esset inter comune et populum Mutine ex una parte et dominum Ardicionem episcopum et dominum Bonefacium prepositum et canonicos ecclesie maioris pro ecclesia, et dominum Michaelem abbatem sancti Petri, et dominam Mariam abbatissam sancte Euphomie pro ecclesiis suis ex alia de lege municipali et ordinamento civitatis et populi quam constituerant tam in terris predictarum ecclesiarum quam aliorum hominum...".

¹⁹ *Ibidem*: "qui habent vel habebunt domos vel casamenta in civitate Mutine vel extra infra hos fines ... possint ea, salva domini pensione, quomodocumque voluerint dare".

statute, were entitled to inherit those properties if there were no male heirs. Further feudal concessions remained of course possible, as long as the newly created vassals acknowledged the rights of the original owner²⁰. In such a case, if the first vassal died without heirs, the lord could not reclaim his land, which remained granted to the sub-vassal on the same terms for the rent due²¹.

These rules on property held in fief applied to a large number of land and houses within the city, for the diocese had for several decades pursued a policy of granting real property in the form of fiefs so as to reinforce its influence on the city's population²². Moreover, much land and many houses had been granted in the form of *precharia*, which was the Church institutions' favourite form of concession. The son of the author of the *Libri Feudorum*'s main part, Anselmus (or Anselminus) de Orto, briefly mentions that form in an elementary work, which proves nonetheless to follow closely legal practice²³. The author explains that because the churches were not allowed to transfer the ownership of their land to anyone, they often granted their real property "precario", whereby a rent was to be paid. Contracts were made up in writing and did not operate beyond the third generation. On the other hand, they could be renewed by agreement between the parties²⁴. The licensees' rights of inheritance were sometimes restricted to male heirs, but sometimes extended to women²⁵.

The Modenese statute of 1182 regulated these concessions just as favourably on behalf of the grantees as in the case of fiefs. The grantor's freedom of choice was even more limited, for when the concession in the form of *precharia* terminated, it was automatically renewed at a price fixed by law²⁶. If the contract provided that the inheritance was to be restricted to male heirs (as Anselmus noted), the provision was subject to a compulsory amendment by the city. As a result, even against the will of the grantor expressed in the contract establishing the *precharia*, women could also inherit the property in the absence of male heirs²⁷.

The extension of the rights devolved to the grantees can also be observed in the case of property held in the form of *livellus*, another contract widely used for granting goods belonging to the church. Anselminus quite naturally also deals with it in his small treatise, just after the *precharia*. The *livellus*' duration was supposed to be limited to 29 years, but a renewal of the grant could be

²⁰ *Ibidem*: "et ut qui habent vel habebunt domos vel casamenta in civitate vel extra infra predictos fines per feudum, succedat filia femina si masculus desierit in predicto feodo, et possint ea quomodocumque voluerint alii concedere, dum tamen non per proprium".

²¹ *Ibidem*: "Et si ille qui concessit domum vel casamentum quod habebat per feudum sine filiis decesserit, dominus non possit auferre predictum feudum, set recipiat quod vasallus erat solitus recipere".

²² Rölker, R., *Nobiltà e comune a Modena. Potere e amministrazione nei secoli XII e XIII*, Modena, 1997 (updated Italian translation of the original German version of 1994), p. 3 and p. 27.

²³ Anselminus de Orto, *Super contractibus emphyteosis et precarii et libelli atque investiture* (R. Jacobi, ed.), Weimar, 1854. On Anselmus, see now the entry *Anselmo dell'Orto*, by E. Cortese, in *Dizionario biografico dei giuristi italiani* (Birocchi, Cortese, Mattone et Miletta, eds.), Bologna, 2013, pp. 77-78.

²⁴ Anselminus, *op. cit.*, pp. 15-16: "Plerumque enim ecclesiae, quia non possunt dominium suarum rerum in alios transferre, certa pensione constituta solent aliis precario concedere: antiquitus enim precibus tantum dabantur, hodie vero pretio sine damno ecclesiae, in scriptis conceduntur, ita ut non transgrediantur tertiam generationem. Sed tamen ex pacto possunt renovari".

²⁵ *Ibidem*: "Quomodo in hoc contractu succedatur videndum est. Plerumque enim ecclesiae solent hoc precarium concedere ita ut masculi tantum succedant, quandoque ut masculi et feminae. Prius tamen masculi quam feminis defertur, et ideo quandoque masculi tantum succedunt, quandoque masculi et feminae".

²⁶ *Registrum*, *cit.*, p. 78: "Item ordinaverunt cives Mutine ut finita precharia dominus cogatur eam renovare pro decem sol. unumquemque iugerum infra predictos fines; extra vero illos fines cogatur dominus renovare bubulcam pro duobus sol."

²⁷ *Ibidem*, p. 79: "Item ordinaverunt in prechariis quod si precharius decedat sine illis heredibus qui debent succedere per pactum precharie, tunc femine ex eo descendentes succedant sicut masculi deberent succedere predicto modo renovandi eis servato".

agreed in the original contract²⁸. The statute of 1182 applied to *livelli* some of the same provisions already established for fiefs and *prechariae*. For all three forms of grants, the statute added that if the grantee failed to pay the rent, he would not lose his right, but would be bound to pay twice the amount, in addition to the costs incurred by the owner in order to recover the money due to him²⁹. However, if the owner delayed the renewal of a grant, he would be admonished by the city authorities. If he failed to answer after the third admonishment, the grant was to be automatically renewed³⁰.

This summary of the transcript of the statute appears at the beginning of the document which includes the agreement between the ecclesiastical lords and the city following arbitration proceedings. The arbitrators ruled that the new statute would remain in force, but they also allowed for a compensation in favour of the churches. Evidently, under this new system (which, as Muratori testified, was still in force at Modena in his lifetime³¹) the owners' rights, who a few years later would be styled by Pillius as *domini directi*, were diminished. The newly confirmed rules were favourable to the lay citizens of Modena and fostered their material well-being. The real property rights which they had obtained through grants from the great ecclesiastical landlords were now much more secure, while the landlords enjoyed much less leeway than before.

4. The legal rule within and outside its historical context

An analytical reading of the statutory rule of 1182 therefore offers a fairly accurate picture of the social and economic forces active in Modena at a time when the political power of the city was growing. The statute was passed between the victory of the communes over the emperor at Legnano in 1176 and the so-called 'peace of Constance' of 1183, which was an imperial constitution in which the emperor recognised the powers of self-government to the Northern Italian cities. During those years, land in municipal Italy became a much sought-after commodity: it was much better managed and conveyancing of land multiplied³². Precisely during the same period, Pillius left Bologna, his *alma mater studiorum*, in order to found a new and innovative law school at Modena. There, he worked out the doctrine of divided ownership, which, as we have seen, would have a profound influence on the legal construct of ownership until the French Revolution.

The analysis of the text shows that it was a turning point in the history of legal ideas, which occurred in the middle of major changes implemented by statute law, which, in turn, reflected the ascendancy of a new political power. The town's citizenship who held that power exercised pressure so as to secure their rights on land which had been granted to them, but without acquiring an absolute title.

²⁸ Anselmus, *op. cit.*, pp. 16-17.

²⁹ *Registrum*, cit., p. 79: "Et ut in omnibus suprascriptis capitulis non amittat quis ius suum eo quod aliquo tempore steterit quod non solverit pensionem, set teneatur eam duplare; et si dominus in petenda pensionem aliquas expensas fecerit sive in advocato proprio sive comuni vel iudici, ille qui debuit eam solvere omnes illa expensas resarciet quas predictus dominus occasione pensionis sine fraude suo iuramento monstraverit se fecisse".

³⁰ *Ibidem*: "et si predicti domini tam clerici quam laici predictas precharias et libellos renovare distulerint ut suprascriptorum est postquam requisiti fuerint a prechario vel libellario vel eorum nuntio et trina denuntiatione facta per rectorem civitatis vel eius nuntium, perinde habeatur ac si precharia vel libellus renovatus fuisset, nec interim donec renovet teneatur pensionem prestare, ita tamen ut quandocumque voluerit ei renovare cogatur precharius vel libellarius solvere predictam in renovatione cautelam, scilicet octo sol. vel decem pro iugero, ut suprascriptum est".

³¹ *Supra*, note 17.

³² Cammarosano, P., "La situazione economica del Regno d'Italia all'epoca di Federico Barbarossa", *Bullettino dell'Istituto Storico Italiano per il Medio Evo* 96 (1990), pp. 157-173, 160.

Pilius insisted exactly on that issue. According to him, the rights which the grantees had obtained as a fief, a *precharia* or *livellus* could qualify in law as a form of ownership, a *dominium*. His bold move promoting the *Libri Feudorum* as a legal authority on the same footing as Justinian's *sacratissimae leges* becomes much more intelligible in the light of the circumstances which led to the adoption of the statute in the city which employed him. The statute was the result of the city authorities' political and diplomatic display of strength which aimed at changing radically the balance of power between the major ecclesiastical institutions and the large body of "bourgeois" families who formed the commune of Modena.

The theory of double ownership should therefore not be understood as a jurisprudential "awakening" to a typically Medieval balance of interests. Nor did the learned jurists simply draw from the Roman legal vocabulary a terminology which allowed them to "dress up" a reality which legal historians used to view as "Germanic", but would call today "customary", and which was supposedly derived from facts or social mentality. Legal historians have since then highlighted the uncertainties around such "mentality", particularly in feudal relations. Already in 1983, Gérard Giordanengo noted: "It is exceedingly hazardous to argue the existence of a feudal mentality"³³.

A proper historical recontextualization of the law shows that Pilius' doctrinal construct was part of a contingent historical chain of events which included, among the information which is the historical subject-matter of our research, the legal innovation carried out, in this particular case, by a combination of legal science and statutory initiative. In Modena, in an entirely specific economic and political context, a two-fold innovation was carried out in order to meet the demands of those classes of society who held land and were becoming increasingly powerful in the city's political community. In the first place, they sought to protect their rights on land within and outside the city walls. The new statute radically changed the nature of the traditional concessions of land. The "municipal law" (as our text defines it) would be referred to as "custom" the following year in the peace of Constance. However, it was in no way the statutory expression of some ancient customary institution which was endorsed by a state of fact and the lapse of time³⁴. On the contrary, the statute completely reshaped the traditional legal relationship, as it carried through the equivalent of an expropriation of the lordship's rights in favour of the vassals and other grantees. In that sense, the old liberal historiography interpreted the "customs" of the Italian cities in such a way that the experience of the late-Medieval communes was represented as a first bourgeois revolution against the nobility³⁵. In fact, far from expressing an ancient local tradition, the city's statutes were intended to bring major changes in the social balance of interests. The statutes of the Italian cities introduced new rules against customary enserfment, against the privileges enjoyed by the nobility and the clergy, and it favoured an allocation of land property which would heed the individual rights of the citizens.

³³ Giordanengo, G., "La féodalité", *La France médiévale* (J. Favier, ed.), Paris, 1983, now in Giordanengo, G., *Féodalités et droits savants dans le Midi médiéval*, Aldershot (Variorum), 1992, num. XIII, p. 187.

³⁴ The reforming purpose of Medieval customs was already highlighted by Gouron, A., "La coutume en France au Moyen Age", *Recueils de la société Jean Bodin* 52,2, *La coutume*, Bruxelles, 1990, pp. 193–217, now in Gouron A., *Droit et coutume en France aux XIIIe et XIIIe siècles*, Aldershot (Variorum), 1993, XXI: "L'apparent respect... vis-à-vis de l'ancienneté des usages ne doit pas tromper: il s'agit bel et bien d'un nouveau droit, dont on chercherait en vain de lointains précédents" (p. 201).

³⁵ See for example Quinet, E., *Les Révolutions d'Italie*, Paris, 1848, p. 50 and *passim*. A few additional remarks in Conte, E., "Res publica. Il modello antico, la politica e il diritto nel XII secolo", *Iuris Historia. Liber amicorum Gero Dolezalek* (V. Colli and E. Conte, eds.), Berkeley, 2008, pp. 193–212, 194–195.

While the historians of Germanic law focused their energy on demonstrating that what was not Roman had to be the unrestrainable emergence of very ancient legal institutions enrooted in the German hearts of the people, the vision of the French liberal historians was still successful among Italian historians of the *Risorgimento*. The statute of 1182, still in force in the 14th century, was considered by its editor in 1864 as a manifestation of the revenge of the bourgeois class against clergy and nobility³⁶.

The doctrinal interpretation of the double ownership, which has inspired so many studies among legal historians, was therefore much more a rebalancing act than a fresh “awareness” of structures rooted in Medieval mentality. Pillius, who was employed by the city authorities to teach Roman law, worked out the *dominium utile* in order to frame into a bold and successful legal theory what the holders of grants on land had obtained through local statute law.

The case should be a reminder to legal historians that they should never neglect the evidence of legal practice. The document of 1182 is not a recent discovery. It was published more than 250 years ago in the main collection of Medieval Italian sources, Muratori’s *Antiquitates*, and it was also published in 1940, as part of the file of records in which it had been included³⁷. It was mentioned in several historical studies on Modena, the first time by Tiraboschi in 1793³⁸, and recently by Rölker³⁹. It is therefore a well-known document. Yet, research by legal historians never gave that statute of Modena further attention. Since Meynial’s article of 1908 had already shown that the origins of the phrase *dominium utile* could be traced back to Pillius, the lack of interest for the available source-material on the city where Pillius was working betrays a common attitude in legal historiography. Legal historians still often tend to be guided by some bygone intellectual evolutionism, and fail to take a closer look at the historical context in which legal innovations took place. They rather focus their attention on the legal works by jurists, where they look for evidence of doctrinal “progress” which they seek within legal literature. Thus, the old tradition of the “internal legal history”⁴⁰ continues influencing their research.

On the other hand, one needs to emphasise that historical contingency is certainly not the only dimension of legal history. Doctrinal constructs obviously occur as a sequel to a particular situation, in order to meet historically clearly identifiable needs of a society in which lawyers operate. Doctrinal concepts are nevertheless intellectual entities which can be severed from the historical contingency which inspired them, so as to serve the needs of an entirely different kind, in a very different context from that where they were produced. The case of the *dominium utile* is probably one of the best examples, because, as we have seen, it has been adopted on a large scale by *ius commune* doctrine. However, the learned doctrine of feudal law as a whole is no doubt the best illustration of that second attitude of the law confronted with the passing of time. The law is apt to elaborate general rules which make it events which reflect the relationship between men and things. That artificial uniformity, reached through the formulation of general rules, sometimes succeeds in determining the historical narrative. Precisely with regard to feudal relations and property, that influence of the categories of civil law scholarship on historiography has been questioned as a

³⁶ *Statuta civitatis Mutine (anno 1327 reformata)*, (C. Campori, ed.), Parma, 1864 [Mon. di storia patria delle provincie modenesi, serie degli statuti, T. 1]. The statute of 1327 re-affirmed a statute of 1221, itself essentially a repetition of our law of 1182. The document of 1221 is printed on pp. 332-337 (rubr. LX of Book III). For more liberal-minded remarks, see Cesare Campori’s introduction on pp. CXIV-CXV.

³⁷ *Registrum privilegiorum*, *op.cit.*, pp. 78-83.

³⁸ Tiraboschi, G., *Memorie storiche modenesi...*, Modena, 1793, pp. 199-200.

³⁹ *Nobiltà e comune*, *op. cit.*, p. 182.

⁴⁰ Conte, E., “Storia interna e storia esterna. Il diritto medievale da Francesco Calasso alla fine del XX secolo”, *Rivista Internazionale di Diritto Comune* 17 (2006, but 2007), pp. 299-322.

central theme in Susan Reynolds's work⁴¹. When the fief is envisaged as a legal institution, a caveat is required, for the old habit which consists in regarding doctrinal constructs as the expression of a customary (possibly "Germanic") legal tradition, deeply rooted in the history of European nations, has influenced the traditional historical reading. When Reynolds insists on the many variations of feudal relations which appears from the historical evidence, and on the difficulty of encapsulating those variations in the legal designation of a "fief", she calls the unifying effect of legal categories into question. The historian's attention for the proper facts feels as unsatisfactory the broadness of general legal categories. Each document brings its own singular evidence, because any general use of terms of art used in practice would be tantamount to a superstructure imposed from above by some legal constructivism alien to historical research⁴². History, Reynolds reminds us, can only be practised with an eye for contingency.

Moreover, the case of the *dominium utile* proved that the doctrinal innovation which produces general definitions applicable in various contexts, is itself a product of history. Pillius would probably never have introduced his definition of ownership if he had not happened to work in that particular place at that particular time. His ability to meet the particular needs of his time was the key to the success of the new theory. The rapid and efficient spread of the jurisprudential vocabulary in feudal matters became necessary at a time when the ecclesiastical, royal and local institutions introduced rational proceedings, which followed an established order that was based on the legal classification of the case in dispute. Such a classification, from which depends the way that the case before the court will be handled in legal terms, inevitably applies general categories. It is based on the *regulae* established by legal doctrine in order to apply them to contingent situations which may be remote in time and in space from the circumstances prevailing where and when the rule was produced⁴³.

The abstraction of legal definitions from their context is therefore necessary for the way they can operate in rational legal proceedings. In the historical context of each litigation, singular and non-repeatable events proper to the individual case determine the interaction. At the same time, we recognise the ability, which is also fully historical, of reordering those events in general categories, according to which the law will enforce or deny a person's rights, the duties to give or to do something, the right to receive or to enjoy something. This was especially true in the case of feudal law, which circulated throughout Europe through its use in practice.

As Dirk Heirbaut has remarked⁴⁴, the lawyer could leave to specialist researchers the study of that historical contingency evidenced in historical source-material, and concentrate instead his attention to legal scholarship. That may be a somewhat exaggerated viewpoint, because the example of the present contribution has shown that the historical research of the moment when a legal doctrine is being elaborated may help us to understand its significance. The historical character of law nonetheless shares with other "histories pertaining to knowledge" a common feature: intellectual doctrines which are developed in a specific historical context do not always cease to exist when the contingent circumstances which produced them disappear in the course of social changes. On the contrary, what statutes, doctrines, legal practice generated in order to a contingent reality will transcend those particular circumstances and remain part of the tool-box which can be used by

⁴¹ Reynolds, S., *Fiefs and Vassals. The Medieval Evidence Reinterpreted*, Oxford, 1994.

⁴² See, *inter alia*, the review by F. Cheyette in *Speculum* 71 (1996), pp. 998-1006.

⁴³ See Conte, E., "Ordo iudicii et regula iuris: Bulgarus et les origines de la culture juridique (XII^{ème} siècle)", *Frontières des savoirs en Italie à l'époque des premières universités (XII^e-XV^e s.)* (J. Chandelier and A. Robert, eds.), Rome, Ecole Française de Rome, 2015, pp. 155-176.

⁴⁴ *Loc. cit.* (*supra*, note 3).

intellectuals in a completely different historical context, perhaps very remote from time and place of their first origins. That is how the definition of the right of a grantee as *dominus utilis*, which was first worked out at Modena for the reasons which become intelligible through the document of 1182, was the beginning of a remarkable success-story in later centuries.

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