

Book XI.
Title LXII. (LXI)

Concerning patrimonial lands, woodland pasture lands (*saltuensibus*), emphyteutic lands and their head-tenants (*conductoribus*).
(*De fundis patrimonialibus et saltuensibus et emphyteuticis et eorum conductoribus.*)

Headnote.

Public lands.

It is apparent from the succeeding laws that there were several classes of public lands, aside from those that belonged to a municipality. The terminology used in the Code is quite confusing, so that it is at times difficult to tell just what class of land is intended. *Domus divina*, *domus nostra*, *sacrum patrimonium* and other terms, being at times used to designate all the lands, sometimes in a more limited sense. An exhaustive treatise on the subject is contained in His, Domanen. A full discussion is also found in Studien by Ernest Stein, 168-185. See also 1 Karlowa 841-845; Marquardt, Staatsverw., 2, 239-258; Bury, 2 Hist. Later Roman Empire 354; Arnold, Roman Provincial Administration 214.

The public domain of the Roman republic was gradually taken over by the fisc, the imperial treasury, which step by step supplanted the treasury of the republic. Domitian assigned what little public domain was left in Italy to the adjoining owners, which, however, left vast domains in the provinces to be appropriated by the fisc. His, supra 1. The emperors had also private lands, called patrimonial lands (*patrimonium*). But as the emperors were frequently all-powerful, at least in theory, the private property came to be considered as belonging to the crown as such, and not to the individual who held the reigns for the time being - the reason for that leading to confusion also between the various later classes of property. Septimius Severus, however, separated the crown lands from the patrimonial lands, and the former from that time on went under the name of *res privata*, herein translated crown domain, such property, though the name indicates the contrary, being considered as belonging to the public, or rather the crown, transmitted to the successor of the crown. After Constantine both the patrimonial lands as well as the crown lands were managed by the *rationalis*, later the count of the crown domain. Another change was made in the second half of the fourth century, when certain lands both in the East as well as in the West were assigned for the support of the imperial household, which were ultimately placed under a separate management. Another change was made by Anastasius, who placed the patrimonial lands, perhaps those recently acquired, under the count of Patrimony, of illustrious and equal rank with that of the count of the Crown Domain. C. 1.34.1. But see note to that law. The lands belonging to the crown domain are sometimes spoken of as fiscal lands, the term fisc sometimes being used to designate the treasury of the imperial exchequer and sometimes the property or rights of the crown domain. The fisc, as representing the imperial exchequer, did not, according to His, have the control of any public lands after Constantine (His, 24), except mines from which that treasury received the taxes. Humbert, 1 Les Finances 372.

This point is not, however, as clear as it might be, 1 Karlowa 842, holds the contrary. The titles to titles 68, 71-74, speak of fiscal lands, title 74 of both fiscal lands and the crown domain. These titles, says His, in so far as referring to fiscal lands, refer to

the crown domain. The fisc, in any event, might acquire title to lands on tax-sale, and it does not appear that these were transferred to the crown domain.

1. Patrimonial lands.

It will be noticed that titles 62 to 65 inclusive of this book deal with patrimonial lands. These, says His, supra 70, were the private, individual property of the emperor. Closely connected with these lands were, as shown by title 62 of this book, the emphyteutic lands (lands under long perpetual lease), and were lands, as His maintains, belonging to the patrimony, private property, of the emperor which were leased in perpetuity. His, supra 71. *Fundi saltuensis*, too, are mentioned in title 62, and these, according to His, were lands of the imperial patrimony lying within certain large plantations (*saltus*). His, supra 71. Otto, Schilling and Sintenis, however, considered them as woodland pastures, and that has been the meaning adopted in this translation, particularly in view of C. 11.67.1; and see note to it. The *fundi limitotrophi*, mentioned in C. 11.60.1, and in law 8 and 13 of the instant title, too, belonged, according to His, to the imperial patrimonial estates. Patrimonial lands were situated in various parts of the empire: In various portions of Italy, Sardinia, Sicily, Northern Africa, in the diocese of Asia, Pontus and the Orient, in the provinces of Mesopotamia, Arabia and others. The lands were, until the time of Anastasius, managed, as stated before by the count of the crown domain. That emperor created the office of count of patrimony. C. 1.34.1. Such a count appeared also in the West in 488 A.D. The difference between these two was, that the count of Patrimony in the West looked among other things after supplying the imperial household (Cass., Var. 6.13; 6.9; 12.4; His, supra 74), while that was done in the East by the Grand Chamberlain. These counts of patrimony will again be referred to later.

Stein, in his Studien 183, takes a radically different view from His as to the patrimonial estates, and maintains that *fundi patrimoniales* were lands that belonged to the crown domain and were leased by emphyteutic, perpetual lease. According to him, accordingly, there were, up to the time of Justinian, only two classes of public lands (not considering the municipal lands), namely, the lands of the crown domain, and those assigned for the use of the imperial household, mentioned later, although Anastasius placed the recently acquired property under the count of Patrimony; that Justinian, however, abolished the office of Count of Patrimony, considered the lands managed formerly by him, and his individual property, hence again making three classes, namely, (a) crown domain, (b) patrimony or *domus divina* (Bury, 2 Hist. Later Roman Empire 355), and (c) Household lands. After Justinian, and possibly in the latter part of his reign, curators governed also the household lands. Dunlap, Grand Chamberlain 245 (Roman and Byzantine studies).

2. Crown Domain.

The lands of the crown domain (*res privata*) are separately considered by His, in his work supra, from pages 33 to 70. Dunlap, in his work on the Grand Chamberlain, Roman and Byzantine Studies (Michigan), p. 217, designates as crown land the household lands which will be considered later. This cannot be said to be inappropriate, in as much as the latter class of lands were probably an offshoot from the crown domain as here mentioned. But it has been thought best to translate *res privata*, as crown domain

throughout this work, because the Latin words are apt to leave the impression that they relate to private, individual property, which was not true. The property of the *res privata* originated mainly if not entirely, with confiscated property under Septimius Severus. Constant additions were made thereto by confiscations, by adding escheated and heirless lands, and by appropriating many lands that belonged to the municipalities and lands that had formerly belonged to heathen temples, but which by reason of introduction of Christianity as the state religion, fell to, or was forcibly appropriated by, the state. The Government, or the emperor, did not keep all of it. Much of it was given as a present to churches and to private individuals; some of it was sold, some of it leased, ordinarily by *emphyteusis*, the later perpetual lease. Lands of the crown domain were situated in many parts of the empire: In Apulia, Calabria; upper Italy; Gaul, Spain, Britain, Illyria, Africa, in the diocese of the Orient, Pontus and Asia. The manager of these lands was in the third century known as master of the crown domain (*magister rei private*), later as *rationalis rei privatae* (comptroller of the crown domain), later still, and about 400 A.D., as count of the crown domain, with the rank of illustrious, just as the count of the imperial exchequer, with jurisdiction over the whole empire, and not confined to any prefectures (Stein, supra 179), and having several bureaus and officials under him the capital as well as in the province. The regional agents under them generally of dioceses, were known as *rationales* (comptrollers), who in turn had procurators, agents, under them who either managed the lands of the crown domain in a province or an individual plantation. See headnote C. 3.26, and C. 1.33, the officials of the two ministers of Finance, as the count of the crown domain and the count of the imperial exchequers may well be called, being known under the special name of *palatini* (palace officials). The actual collection of the amounts due the crown domain were made under the supervision of the governor of the province. C. 11.65.5; C. 11.74.2; His, supra 56-58; See also C. 11.66.4. He had a receiver-general, and an accountant-general under him, who, in turn had other employees under them. C. 10.72.13; His, supra 58. Local collecting stations were probably located in various parts of the provinces. His, supra 58.

3. Household or kitchen lands.

The third class of public lands were the household lands mentioned in title 69 of this book, called at times *praedia tamiacia*, and at times *domus divina*. According to His, these lands were situated at various places in the empire. Some of them were in Africa. The main body of lands, however, the income of which went to the support of the imperial household in the East were situated in Cappadocia, and were specially known as *pradia tamiacia*. These came to be under the supervision of the Grand Chamberlain, with illustrious rank, under whom, in turn, was the count of the household lands (*comes domorum*), with the title of worshipful. The domains, in Cappadocia were divided into 13 districts, each of which had a manager, who looked after the collections from the serfs, for no head-tenants (*conductores*) seem to have existed on these domains. (His, supra 77), Novel 30, gives considerable information as to these lands and the management thereof. See also Dunlap, Grand Chamberlain (Roman and Byzantine Studies) 217, 218, 245, which contains a good statement of these lands, and see C. 3.26. By Novel 30, the lands were put under the control of the newly-created proconsul of Cappadocia.

Stein, supra, maintains that the count of Patrimony did not exist under Justinian, except the count of Patrimony in the West, who is mentioned in Novel 75, and whose

rank was not that of the count of Patrimony created by Anastasius. Stein further maintains that the property managed by the count of Patrimony was thereafter managed by illustrious curators, mentioned in C. 7.37.3. In summing up his conclusions he says in substance as follows: "Since the time of Septimius Severus the imperial patrimony and the crown domain were managed separately, but both classes of lands came, under Constantine the Great, or soon thereafter, under the supervision of the comptroller, later count, of the crown domain. Toward the end of the fourth century, the household lands were separated, and the *res privata* was used as state property. Anastasius also assigned patrimonial lands, which were managed by the count of Patrimony, to the uses of the State. Justinian abolished the office of the latter, placing the lands managed by him, under curators as imperial private property. C. 7.38.

This position is approved by Bury, 2 Hist. Later Roman Empire 354, and it may be well to quote part of what he says: "The treatment of private estates had varied, as we have seen from the time of Septimius Severus. The last innovation had been that of Anastasius who, instead of incorporating recently confiscated lands in the *res privata*, had instituted a new minister, the count of the Patrimony. This had simply meant a division of administration, for the patrimony as the private Estate was appropriated to public needs, not to the emperor's private use. Justinian made yet another change. The Patrimony disappears, and the domains which composed it are placed under the management of Curators. We do not know exactly what was involved in this change; more, perhaps, than a mere change of name."

These conclusions are based largely on the fact that C. 7.37.3, and the epilogue to Novel 22, did not refer to the count of Patrimony, when, had that officer then existed, he would naturally have been mentioned; further, on the reference to curators in the former of these laws, and also on the fact that '*sacrum patrimonium*' was used by Justinian to designate the property of the imperial exchequer, which would have been confusing if the imperial patrimony existed at this time. His, 20 says that *sacrum patrimonium*, or *patrimonium nostrum*, were sometimes used for all the domains, sometimes for the crown domain.

11.62.1. Emperor Constantine to Cupitus.

If anyone has made a gift of emphyteutic lands subject to the right of the fisc, but without authority of a judge, the gift shall be valid, provided that the donees shall be compelled to pay the amount payable to the fisc at the times they are due.

Promulgated at Treves June 15 (315).

Note.

The question here was whether emphyteutic lands, that is to say, lands leased from the fisc under perpetual lease, could be given away without obtaining a judicial decree. It was held that it could be. It could not, however, be sold, according to Cujacius, without consent, the same rule obtaining in connection with private lands leased under such a lease. C. 4.66. His, supra 104, thinks that if a sale was made without consent of the state, the vendor remained liable for the rent or tribute. C. 11.66.3 probably states the correct rule, leaving the vendor liable if the vendee or lessee was poor.

11.62.2. The same Emperor to Dracontius.

We direct that the failure to make payment of rent of patrimonial lands in gold or in grain within the legal time, shall not injure the ownership of minors or be the cause to defraud them of their rights, if the amount customarily due is paid in somewhat later, but, while the property shall be saved for the minors, the judge shall exact penalties from the guardian or curator delaying the payment for his negligence and neglect of duty, and cause him to deplore his loss.

Note.

The interest of minors were protected in various ways, as shows by many laws in the Code. See C. 5.28, and subsequent titles.

11.62.3. Emperors Valentinian and Valens to Germanianus, Count of the Imperial Exchequer.

Persons who have received land under emphyteutic lease, cannot turn it back [refundendum] on the pretext that it had commenced to be waste, (and they cannot do so) even though they have fraudulently obtained a rescript (permitting them to do so). Neither can it be taken away from them even if a higher bid is made by another, but it shall perpetually remain the property of those who have taken it, even if a rescript against them has been granted.

Given at Milan September 24 (365).

Note.

This law manifests the spirit that lands should be cultivated. There was no such thing as "throwing up a contract," whenever a man took it upon himself to farm land belonging to the state. The fact that it could not be granted to another, even if the latter made a higher bid therefor, indicates the fact that persons who wanted such lands were not very numerous. See C. 11.70.4 and note. "Refundendum" interpreted by Sintenis as referring to refusal to pay rent, which is wrong.

11.62.4. The same Emperors to Florianus, Count of the Crown Domain.

The patrimonial estates and the emphyteutic lands, which have, in various ways fallen (turned back) to our house, becomes the property of those who ask for them without needing to be in fear of default (of another). For we do not so much lend out property as we deliver it in right of ownership; provided that they (the later possessors) shall pay the amounts which were paid by those in possession (formerly).

Given at Treves March 15 (368).

Note.

This law doubtless deals with public lands that had once been leased but came back into the hands of the state because of the default of the possessor. It could be leased again to another, by emphyteutic lease, without requirement from the new lessee to make good the default of the former possessor, but he was required to pay the same tribute as the former possessor did.

11.62.5. Emperors Valens, Gratian and Valentinian to Modestus, Praetorian Prefect.

If any persons received from the equalizer or assessor (censitore) patrimonial land deserted by former serfs or emphyteutic lessees, they shall hold it in perpetuity and by undisturbed right, and no second petitioner need apply therefor.

Given November 2 (377).

Note.

This law, too, relates to land deserted by former lessees. If it thereafter was assigned to anyone, such person could hold it notwithstanding some one else wanted it. The same idea is expressed in law 3. The equalizers who assigned such lands are mentioned in C. 11.58.7 and note. The present law also mentions the censitor (assessor), so that he, too, seems to have had authority to assign such lands, as well as the equalizer.

11.62.6. Emperors Gratian, Valentinian and Theodosius to Nebridius, Count of the Private Estate.

Persons to whom we or our divine parents granted patrimonial lands in the dioceses of Asia and Pontus by gift, may hold it peaceably and may transmit it to their posterity. This shall apply not only as to heirs but also as to persons who in any way contracted with them (for the transfer of the land to them).

Given at Constantinople March 30 (384).

11.62.7. The same Emperors and Arcadius to Cynegius, Praetorian Prefect.

Whoever receives an emphyteutic lease for patrimonial land or land of a city by the order of our majesty, shall, if he has abundance of means give his property as security that he will pay the amount necessary to be paid if he deserts the land; if he is proven to have little means, he may have an emphyteutic lease on giving suitable sureties. Persons who have charge of these things must know that if they fail to take such guaranty the damage resulting from their neglect will fall on them.¹

Given at Constantinople February 24 (386).

11.62.8. The same Emperors to Clearchus, Praetorian Prefect.

All patrimonial land throughout the provinces of Mesopotamia and Osrhoena, which it is clear, were by the ordinances of previous emperors assigned to (the benefit) of the border, shall be recalled to their former status without reference to any claim, and all shall serve the necessities of the borders as they have been accustomed to do. No person shall be heard to object who through any favor or bounty in any manner by rescript or notation received such property as owner, emphyteutic or other lease.

Given at Constantinople April 30 (386).

Note.

This law deals with the *fundi limitotrophi* mentioned also in C. 11.60.1 and in law 13 of this title. These lands must be distinguished from the *agri limitanei*, mentioned C. 11.60.2 and 3, which were lands assigned to soldiers. The *fundi limitotrophi* were lands doubtless near the borders of the empire, the rent of which, probably in kind, were used for the benefit of the defenders thereof. His, supra 71. The instant law clearly indicates that the holders of these lands were to furnish certain things for the border; i.e. the defenders thereof, though it does not state what that was. That duty had been neglected, or the rent or taxes which the holders paid, had been diverted to other purposes. See also headnote C. 11.60, and C. 11.60.1.

¹ [Blume] As to requirement of sureties in other cases, see C. 11.59.3; and see His, supra 85; C. 11.62.11; C. 11.71.1.

11.62.9. Emperors Arcadius and Honorius to Eutychianus, Praetorian Prefect.

All must know that property bought to become private property, subject to tribute has nothing to do with patrimonial estates, so that the equalizer of patrimonial estates shall not interfere with it; whoever violates the provisions of Our Clemency will be punished by a heavy fine.

Given at Nicomedia July 6 (398).

Note.

This law doubtless had reference to the epibole, forcible addition of waste land to fertile land, for the purpose of taxation. This addition was made by equalizers, as fully shown by note to C. 11.58.7; and see His, supra 85-86. These equalizers were forbidden to have anything to do with lands thus bought, for such purpose; that is to say, whenever anyone bought patrimonial land, then it was permanently severed from the patrimonial estate, and such land and the patrimonial land of which it had been a part, could not be considered together for the purpose of such epibole. The law deals with lands transferred into private ownership, for which see Note C. 11.62.13.

The instant law is closely connected with the next law, which deals with patrimonial land which had been received as a gift, and which had not been bought. Where it had been received as a gift, it could be equalized with the patrimonial land of which it had been a part, for the purpose of such epibole. See note to C. 11.59.12.

11.62.10. The same Emperors to Eutychianus, Praetorian Prefect.

Your illustrious authority will direct that only those patrimonial estates, of which we made a gift, subject to tribute, shall be equalized with those patrimonial estates, which retain their own status as such, so that the estates which are hard pressed may be relieved, part of the burden transferred to those that are in flourishing condition, and the assessment of the tax divided equitably.²

Given April 10 (399).

11.62.11. Emperors Honorius and Theodosius to Probus, Count of the Imperial Exchequer.

We direct that an emphyteutic right held without a lien thereon (taken by the Government) shall remain permanently undisturbed³; moreover, the possession, which without such lien was defective, shall become valid by lapse of time.

Given at Ravenna April 13 (412).

Note.

It was not legal to give an emphyteutic lease without taking security, as stated in law 7 of this title. That security consisted either of a lien or taking a surety. The instant law declares all such leases valid notwithstanding the fact that no security had been taken. Cujacius on this law.

² [Blume] See note to preceding law.

³ [Blume] German translation different.

11.62.12. Emperors Theodosius and Valentinian to Taurus, Praetorian Prefect and Patrician.

Possessors or emphyteuticaries of patrimonial land, who have not heretofore purchased it, shall through our liberality, not at all be compelled to purchase it, but may hold it by favor of our majesty as though they had paid the purchase price, so that the right which another acquired by payment of the price, the aforesaid emphyteuticary shall have through our liberality. 1. The right, too, in the land which he has cultivated, which he has by right of possession by private purchase, by favor of our majesty, or in any other manner, shall be preserved undiminished and undisturbed. He shall also have permission to emancipate slaves on the patrimonial and emphyteutic land, since he is the proprietor of the land.

Given at Constantinople June 18 (434).

Note.

Emphyteutic lands. See C. 4.66.

The duties of emphyteuticaries were: 1. To cultivate and improve the lands embraced in the lease. For some time this form of lease seems to have been confined to lands that were deserted and lay waste and were infertile, the duty to cultivate and improve it being one of the special duties connected with this form of lease. For that reason exemption from rent or tribute was granted for a certain number of years. See C. 11.59.1 and 7. In later times, however, the emphyteutic lease was not confined to waste and infertile land. But if fertile lands were taken over, the lessee was also required, at the same time, to take over some infertile land along with it. C. 11.59.7. His, supra 103. 2. Again it was the duty of the emphyteuticary, that is to say, the lessee of such lease, to pay a yearly rental, called pensio, canon or vectigal. The rental is generally called canon, a name also used to designate the yearly taxes. In fact it would seem that the rental and taxes were considered as the same thing, or rather they were amalgamated, the total sum apparently being fixed somewhat higher than the ordinary amount of the taxes. This point has already been referred to in note C. 10.48.10 and note C. 11.59.17, and see His, supra 105.

The rights of the emphyteuticary were: 1. The perpetual use of the land, subject to the payment of the rent and other grounds of default, such as making the condition of the land worse. See C. 4.66.2, and His, supra 104. 2. The holder of the lease could transmit the land to his heirs and could sell it, although, as His, supra 104, thinks, the vendor was still liable for the rent unless the consent of the governmental authorities were had to the sale. He was not exactly owner, but was considered as virtual owner, as shown by the instant law, and as such he had the right to bring the regular action for recovery of the property (vindicatio) the same as an owner of property. As such owner, or virtual owner, he also had the right to emancipate slaves, as shown by the instant law. C. 11.63.2 states that non-owners could not emancipate slaves. His, supra, 104, thinks that that law forbade emphyteuticaries from emancipating slaves. Cujacius thinks that the law refers to head-tenants and other non-owners and not to emphyteuticaries. If it refers, however, to the latter it would seem to have been modified by the instant law. The emphyteutic lease was in later times used not only for public lands, but also for private lands, as clearly appears from C. 4.6.6. The headnote to C. 4.66, gives further information on this subject.

11.62.13. The same Emperors to Florentius, Praetorian Prefect.

We direct that no one shall any longer hereafter be permitted to transfer patrimonial, or border lands (limitotrophis) or lands within plantations (saltuenses fundis) in the Orient to private ownership, whether the change of ownership is asked free from or subject to rent. The violators of this law, both the petitioner as well as the official staff which grants the petition, shall be fine 50 pounds of gold, even though our imperial annotation or a pragmatic sanction is produced contrary hereto.

Given at Constantinople June 8 (439).

Note.

This law refers to public lands transferred into private ownership - in jus privatum - as distinguished from lands leased by the emphyteutic lease. The transfer of such lands into private ownership was not favored, prohibited, but despite thereof continued. His, supra 96. The difference between the rights of the transferees of these respective lands is not clear. The person receiving it into private ownership generally paid a purchase price, but notwithstanding that was compelled to pay a yearly rental just as the emphyteuticary, except that it was smaller. As the designation of the right indicates, it was greater than that of the emphyteuticary, but it is not clear in what respects. His, supra 94-97. See also C. 11.62.9. As to fundi limitotrophi, see headnote C. 11.60 and note C. 11.62.8. As to fundi saltuenses, see headnote C. 11.62. (1); His, considered them as patrimonial lands of large plantations; but they may refer to woodland pastures.

11.62.14. Emperor Anastasius to Matromarius, Praetorian Prefect.

We order that all who in any diocese, province or woodland pasture district (saltu) hold any patrimonial land or land formerly belonging to temples, or land assigned for the benefit of games (agonothetici) or those which were tax-free (relevatorum) or any other lands for the continuous period of 40 years, by any title whatever, or even with no title; or whoever shall hereafter hold them for the above mentioned period of 40 years need fear no suit by the State, or disturbance in reference to the ownership of any of the aforesaid lands, places or houses, and the possession shall be computed not only by the time during which it was held by the present holders but also by the time during which it was held by those who occupied them before. 1. But if they pay the regular tribute each year according to the lawful amount fixed by law for such lands, or places, they may feel assured that the property which they now or hereafter hold, is their own, and the defense of continuous actual possession for 40 years, based on any title or no title at all, will suffice to bar any action by the public. 2. This, too, is to be added in the case of those who claim that such lands were originally granted them free from rent (dempto canone) by imperial order, that if they were in possession, with the benefit of this exemption for 40 continuous years, the rent, the exemption from which is confirmed by 40 years of possession, as stated, may in no manner be demanded, and in either case - that is to say in cases where there is or is not exemption of rent - the rights of our possession, which they enjoyed for 40 years, shall remain unimpaired by any innovation.

Given at Constantinople July 30 (491).

Note.

A prescriptive period of forty years ordinarily barred all claims to property. C. 7.39.8 and 9. Whether the dempto canone (free from rent) referred also to freedom from tax, whether in other words the term canone here refers to rent or to taxes or to both,

is not clear. The emperors in early times at least were wont to make grants of lands free from taxes (see note C. 10.46.1), but that was apparently forbidden by C. 11.64.7, though it is also doubtful whether that law refers to rent or taxes or both. In any event, it is hardly credible that, though lands relieved from taxes (relevatorum) are mentioned in the first part of this law, that the law meant to state that a man who held land free from tax (canone) for forty years, should hold it forever. The word canone here probably referred to rent, forty years possession free from rent, making the exemption therefrom permanent, leaving the holder, nevertheless under duty to pay the regular taxes. The unfortunate use of the word canone for both rent and taxes leaves some doubt.