Roman Law
Property law

A *res* was an element in wealth, a *thing*. The subject of *res* (or *ius rerum* = law of things) is treated under two main heads, i.e., what are called *iura in rem* = rights available against all, and *iura in personam*, *obligationes*, = available only against specific persons, the names being derived from the Roman *actio in rem*, *in personam*, which express the same distinction.

*Res* were either *in patrimonio* i.e. belonging to someone, or *extra patrimonium* (non-belonging). These were of various kinds.

*Res omnium communes*. The common property of every one: the air, running water, the sea, and, in later law, the seashore to the highest winter floods. Access to the shore was open to all, but no one might erect buildings on it, since it was not *ius gentium* like the sea itself.

*Res publicae*. Public property. Such were roads, rivers and harbors, so that all might navigate and fish at the ports, etc., the use of the banks being public for this purpose.

*Res universitatis*. Property of a corporation, of which Justinian takes the *civitas* as the type, mentioning theaters, stadiums and the like but the property of the corporate *collegia* (corporations, eg. tax collectors) would come under the same class.

*Other classifications:*

*Res in commercio* = *suitable for commerce*
*Res extra commercio* = *excluded from commerce*

*Res nullius*. Property belonging to no one. Such things might be either *divini* (divine) or *humani* (human) *iuris* (law). *Divini iuris* were *res sacrae*, *religiosae and sanctae*.

*Res sacrae* were those which had been formally accepted and consecrated, with statutory authorization as well as dedication. Such were temples, and their contents and sites. *Res sacrae* could not be commercially dealt with, and could always be re-claimed, except that Justinian allowed them to be sold for redemption of captives, and similar purposes.
Res religiosae were tombs and burial grounds. Like res sacrae they could not be commercially dealt with.

Res sanctae were the gates and walls of a city. It was a capital offence to commit any outrage on them, e.g. scaling them.

Res nullius, humani iuris (nobody’s things of human law), were those which belonged to no one. Wild animals and abandoned property were the most important examples.

We have from Justinian another classification of things from a different point of view. Res were either corporales or incorporales. The former were quae tangi possunt (you can touch), the latter, quae tangi non possunt (you cannot touch). So stated the distinction is simple. Physical objects were res corporales. Res incorporales were abstract conceptions, notional things, and, as res meant assets, res incorporales were rights.

Rights are res incorporales. Physical objects are res corporales. All rights are necessarily incorporeal as they cannot be made perceptible to the senses.

Dominium (‘ownership’) was not a res incorporalis. It was in fact treated as a res corporalis!

Res incorporales were however res and thus did not include matters belonging to the law of persons: liberty, patria potestas, etc., = they were intangible, but were not res.

The distinction between land and movables, fundamentally important in modern law, was of only subordinate interest in Roman Law.

However: The distinction is important in various institutions of Roman private law and procedure.

Res immobiles = Immovables: land and buildings. As early as the Twelve Tables, a differentiation was introduced with regard to the acquisition through usucapio (see below!) and the interdictal (possessor interdicts, below) protection was built upon the distinction between res immobiles and res mobiles.

Res mobiles = Movables.
An important rule:

Superficies solo cedit = what stands on/over the ground, legally belongs to it.

Exception: a building built with permission of the owner.

Fruits/benefits:

- Fructus naturales = natural fruits  
- Fructus civiles = profits from legal actions/commercial relations, for example: rent.

Fructus naturales:

a. Fructus fundi = fruits/benefits from the soil/agricultural products  
b. Fructus pecolum = e.g. eggs, milk, young animals  
c. Fructus hominis = e.g. work/labour

Usus fructus = usufruct = a right to use someone else’s thing and getting fruits/benefits from it.

Subjective rights to a thing:

Ius posidendi = possession  
Ius utendi = using  
Ius disponendi = disposing of  
Ius ab utendi = destroying

Dominium (‘ownership’) is commonly defined as "ius utendi, fruendi, disponendi, abutendi", the right of using, enjoying fruits, disposing of, and destroying.

But whether the right concerned is dominium or one of the inferior modes it is practically never so unrestricted as this description would make it. All civilisations have found it necessary to lay down restrictions on what a man may do with his own. An owner might not cruelly treat his slaves. He might not so use his house as to make it a nuisance to his neighbours. The law might forbid him to build above a certain height, or within a certain distance of his boundary. He might not pull down his house. Thus the general principle is subject to such restrictions as the State may impose. And the owner may have restricted his right by conferring rights on others, such as servitudes, e.g. a right of way, without ceasing to be owner.

Dominium was the ultimate right to the thing, the right that had no right behind it. It might be a mere nudum ius (formal right without any effects) with no practical content, but it was still
dominium ex iure Quiritium (ownership based on the law of Roman citizens).

If, in the time of Gaius, a dominus of land sold it and made traditio of it, i.e. transferred it informally, he lost all practical interest (right) in the land, but as he had not formally transferred the dominium he remained dominus, till, by lapse of time, the dominium had passed to the purchaser. (=nudum ius).

Conversely, the buyer had all practical rights in the land but was not dominus: he had not the ius Quiritium (rights of Roman citizens).

In the classical law, a man who had received a res mancipi (cattle, land) by traditio from the dominus had all the rights enumerated in the definition, but he was not dominus: he held the thing in bonis, but he had not dominium. In the same case the old owner had none of these rights, but he still had dominium.

It was impossible in classical law to convey property with a restriction against alienation (= e.g. sale of property), operative in rem: alienation, though a breach of contract, would be valid. This rule may have disappeared under Justinian.

Res mancipi: Things the ownership of which is transferable only by the solemn act of MANCIPATIO (hence the name) or by IN IURE CESSIO. Res mancipi included buildings and land on Italian soil, rustic (not urban) servitudes connected with such land, slaves and farm animals of draft and burden, such as "oxen, horses, mules" (Gaius, Inst.. 1.120).

Cessio in iure (in iure cessio): a fictitious trial before the magistrate (=in iure – see below!) the purpose of which was the transfer of Quiritian (citizen’s) ownership of a thing.

Rei vindicatio. An action which served for the protection of quiritary ownership. Under this action the owner of a thing sued the possessor of his thing for its recovery. The victorious plaintiff regained possession of the object claimed. If the defendant denied the plaintiff's ownership, the plaintiff had to prove the acquisition of it under the rules of the ius civile (Roman citizen’s law) from its previous quiritary owner. Such proof might be difficult in certain circumstances and, if so, the plaintiff could avoid it by using another action, ACTIO PUBLICIANA IN REM, in which he had only to prove that, before having been deprived of the possession of the thing in dispute, he possessed it under conditions which normally led to usucaption (usucapio). The defendant, when defeated, had to return the thing cum sua causa,
i.e., with all that the plaintiff would have had if the thing were delivered at the time of the litis contestatio (proceeds, fructus – fruits, benefits) and was liable for damages done to the thing after the litis contestatio. The liability, of the defendant for fructus (fruits, benefits) and damages in the period before litis contestatio depended upon whether he held the thing in good faith (in the belief to be its owner) or in bad faith. If the defendant refused to deliver the thing claimed, the plaintiff could estimate under oath the value that the actual restitution represented to him. The defendant was adjudicated to pay the sum but he retained the thing. Only Justinian admitted an execution on the thing itself, which was performed with the assistance of public officials.

**Possession as such** was different from ownership because, while ownership was based on entitlement, ‘possession’ was based on fact. A person who had a thing and intended to possess it was its possessor. He need not also be its owner.

**Two elements of possession:**

- **Animus** = intention/the will to control a thing
- **Corpus** = actual control of that thing

**Corpus** = body of a thing/person

a + b = **possessio civilis** = legal possession/ possession according to law

**Detentio** = holding, ‘detention’ of a thing =

Two elements:

- a. There was NO **Animus** = no permanent intention to control a thing
- b. There was **Corpus** = actual control of that thing

**Classification of possession:**

- **Possessio vitiosa** = possession resulting from an illegal act
- **Possessio invitiosa** = e.g. pledge

**The way in which possession was protected** was by means of orders called **possessory interdicts**. This was a ‘fast track’ procedure under which the praetor would adjudicate on the question of possession. The rules were simple: in cases involving land, the praetor would grant possession to the person who already had it, unless he had obtained it by force or by stealth from, or with the permission of, the other party. If any of those exceptions applied, that other party would obtain possession. The rules for cases involving movable property differed in only one
respect: possession was granted to the party who had had the thing for the longer period during the immediately preceding year. Again, this was subject to the exceptions of force, stealth and permission.

The procedure was simple and swift in the sense that it did not involve looking at the rights and wrongs of title and how it had been acquired. All it needed was an examination of the position between the two litigating parties: had one of them, for example, taken the thing from the other by force? If so, he must restore it to him. The result of this inquiry was correspondingly limited: the praetor could conclude only that one party had a better right than the other, but that said nothing about their absolute rights. There might be a lot of people who had even better rights than either of them. But this procedure rapidly resolved the question which of the two had a better claim to possess and so kept the peace between them.

Interdict proceedings therefore provided one way of avoiding the inconvenience of proving ownership in the *vindicatio*. If you could prove that the person who had a thing had acquired it from you, for example, only with your permission (and so had no right to set himself up as having any right competing with yours), interdict proceedings would be adequate to recover possession from that person. Gaius emphasizes that it is always worth considering whether there is any interdict under which you can recover possession: if you succeed, you transfer to the other party the much heavier burden of bringing a *vindicatio* and the need to prove ownership.

**Usucapio (a general explanation).**

*Usucapio* was a means by which a non-owner could become owner of a thing, by possessing it for a certain period. For moveables the period was one year, for land it was two.

To become owner by *usucapio*, a possessor had to meet certain conditions: first, he must possess; second, he must begin (though he need not complete) his possession in good faith; third, he must have a good cause for being in possession; and finally, he must remain in possession for the relevant period. So a buyer who, under a contract of sale (which was a good cause), in good faith acquired a thing from a seller who did not own it could become its owner, by possessing it for the requisite period. This was subject to the over-riding rule that there could be no usucapio of a stolen object, a point to which we return almost at once.

The existence of *usucapio* simplified the owner’s task in *vindicatio*. Instead of needing to prove a series of owners and conveyances from time immemorial, he could rely on proving only that he had possessed for the necessary period under a possession which had begun in good faith for a good cause.

*Usucapio* meant that the acquirer of the property was enriched at the expense of the original
owner: just as the passing of the one or two years vested ownership in the new owner, so it
divested the old one. This seems unfair. But to this the jurists had their answers: usucapio was in
the public interest, so that ownership of property should not be uncertain for too long or virtually
always open to challenge, and so that there should be some end to litigation. These seem good
points.
In Rome, if usucapio was completed, the title of the possessor became unassailable.

USUCAPIO in details:
Acquisition of ownership of a thing belonging to another through possession of it (possessio) for
a period fixed by law. Further requirements of usucapio under ius civile were (a) bona fides
(good faith), i.e., the possessor's honest belief that he acquired the thing from the owner (while, in
fact, he acquired it from a non-owner, a non domino), and through a transaction which legally
was suitable for the transfer of ownership (while, in fact, it was not, if, e.g., the thing which was a
res mancipi was conveyed by traditio). Good faith was required on the part of the possessor
only at the beginning of his possession. If he lost later his good faith by getting knowledge of
the true situation, the completion of the usucapio was not impaired; (b) a just cause (iusta causa,
also called iustus titulus); Such a just cause was either an act of liberality (donatio) of the owner
or an agreement with him (a purchase) which would justify the acquisition of ownership if there
were not a defect in the transaction itself (e.g., traditio [“delivery”] of a res mancipi instead of
mancipatio) or in the person of the transferor (a non-owner). An erroneous belief of the
usucaptor that there was a just cause (e.g., a valid sale or donation) did not suffice for usucapio.
Possession of the usucaptor (a person performing usucapio) had to be continuous and
uninterrupted. If he lost possession during the period required for usucapio (according to the
Twelve Tables two years for immovables, one year for other things) the previous time during
which he possessed under conditions sufficient for usucapio did not count any longer. Usucapio
was accessible only to Roman citizens and on things on which Quiritary ownership (Quiritary
dominium – see below!) was admissible. Things belonging to the fiscus (State treasury) and res
publicae were excluded from usucaption.
Excluded from usucapio were stolen things (res furtivae) and things taken by violence (res vi
possessae) even when possessed by a person who acquired them bona fide from the wrongdoers.

Bonitary ownership. This is for our purposes much the most important of the inferior modes of
ownership. It arose where a person received a res mancipi from the dominus (owner) by mere
traditio (delivery), without the formal mancipatio (or cessio in iure) which was needed for the
transfer of dominium in such things. The Romans had no substantive descriptive of the holder: the res was said to be in bonis (= a part of his property), from which early commentators formed the name dominium bonitarium.

So long as the holder was in actual possession, it is plain that he could not be effectively attacked by anyone but the dominus.

It might, however, happen that from some cause the holder lost actual possession. It might happen, for example, that during his absence some other person entered on the property, in good or bad faith, and refuses to give up possession. How is the bonitary owner to get it back? The bonitary owner is not dominus, and thus he cannot bring a vindicatio (vindication): he cannot allege, as a plaintiff in this action must, that the property is his ex iure Quiritium (formally given to him according to Roman law). Here too the Praetor comes to his relief by providing in his Edict an action called the Actio Publiciana, which serves his purpose equally well. This action is based on the fact that the bonitary owner whom we are considering will, in the ordinary course of things, become dominus, by lapse of time, by Usucapio, of which he satisfies all the requirements, since he holds the property bona fide ex iusta causa (in good faith by the right reason).

EXPLANATION:
A person who acquired a thing in good faith from somebody who was not the owner was not himself the owner either, since a non-owner could not transfer ownership to him. But such a person, a bona fide (in good faith) possessor, was worthy of protection by the law, since he had no reason to doubt the validity of his own title to the thing.

By usucapio a bona fide possessor would become full owner in either one or two years. But, until the period for usucapio had run, he faced a difficulty in recovering the property if he lost possession of it. It is true that, since he was a possessor, he was protected by possessory interdicts. But he might not find any interdict of use in his case: for instance, if he had not lost possession by force, stealth or permission or (in the case of moveables) if he had been out of possession for a significant period. Nor could he use the normal action for recovery of property (vindicatio = vindication), since this required proof of ownership, something which the bona fide possessor could not satisfy.

The solution was to provide the bona fide possessor with a modified version of the vindicatio, known as the actio Publiciana. This appears to have been introduced in the last century of the republic, possibly in 67 BC.

The special feature of the actio Publiciana consisted in asking the judge to decide not whether
the plaintiff was owner now (which he was not) but whether after the period of usucapio he would be. That meant that the judge must hear evidence on the requirements of usucapio other than the period of possession: did the plaintiff acquire possession in good faith? Did he have a good cause for possession? He would also, if this issue was raised by the defendant, have to consider whether the thing had been stolen. A person who had purchased the object in good faith from a non-owner would be able to satisfy those requirements, so the judge would be entitled to conclude that he should succeed in the claim; always provided, of course, that the object had not been stolen.

It is appropriate here to point out one more concession made to the bona fide possessor: his was that, if the object he possessed bore fruit (whether literally, or in the form of the young of animals), the bona fide possessor became its owner by the very fact of its separation from the parent. Even if the bona fide possessor was successfully sued for return of the parent object, in classical law there was no obligation to hand over its fruits. The precise reason for this rule is not very clear. In some cases, such as that of crops, it is plausible to say that the rule protects the bona fide possessor’s labour or investment. But in others (animals) it can only be said to be protecting his reasonable expectations. Paul puts it very broadly: the bona fide possessor is protected because he is more or less in the position of the owner. In any event, this rule is a further pointer to the fact that bona fide possession was a status with significant rights and significant legal protection.

For completeness, it should be noted that the actio Publiciana was also available to another person whose standing fell short of complete ownership or dominium, namely a person who acquired a thing which required formal conveyance (a res mancipi) from the owner but received it only by an informal conveyance: the bonitary owner. Since ownership passed in such things only by formal conveyance, the recipient was not owner. But, equally clearly, as an acquirer directly from the owner, he deserved legal protection. So much so, that if it came to actio Publiciana proceedings between the bonitary owner and the owner, the bonitary owner would succeed. The actio Publiciana required slightly less to be proved, so it is at least conceivable that even full owners might have chosen to use it.

Additional explanations:

Litis contestatio. The final act in the proceedings in iure, by which, after the appointment of the judge (iudex), the controversial issues are established and submitted to the latter for the examination of the facts and for judgment. Among the manifold effects of the litis contestatio the
most important is that the plaintiff's right to sue the defendant is "consumed" which excluded a second trial for the same claim.

*In iure* = before the judicial magistrate. The first stage of a civil trial in the proceedings of *legis actiones* and *per formulas* (formulary) took place before the magistrate (the praetor), while the second, final stage, normally ended with a judgment took place before the judge (*iudex*), *apud iudicem*.

*Traditio.* The transfer of ‘ownership’ over a res *res mancipi* through the handing over of it to the transferee by the owner. A simple delivery of *res mancipi* did not transfer ownership, the transferee acquired only the so called bonitary ownership which could be converted in *quiritary* ownership (under *ius civile*) through *usucapio*. The classical *traditio* required a just cause (*iusta causa*) since, being only a transfer of possession of a thing from one person to another, it had, in order to transfer ownership, to be based on a special legal relationship of an obligatory or another nature between transferor and transferee. A simple delivery of a thing never transfers ownership, unless a sale or another just cause preceded the delivery.

*Dominium ex iure Quiritium.* Ownership which a Roman citizen has acquired according to the principles of *ius civile* (*ius Quiritium – old formalistic law of Roman citizens*) of things which under that law could be in private ownership. The pertinent action for the *recovery* of such things was the *rei vindicatio*.

*Bonitary ownership: In bonis esse* (or *rem habere*). When a *res mancipi* was conveyed by a mere delivery (handing over, *traditio*), and not by one of the solemn acts required for the transfer of property of such things (*mancipatio, in iure cessio*), the transferee did not acquire ownership under *Quiritarian law* but he had the thing only *in bonis* (= among his goods, so-called *bonitary ownership*) which was protected by *praetorian* law. He might acquire *Quiritarian* ownership through *usucapio*. 