

defendant's wrong. The basic difference seems to have been that in an *in rem* action the defendant could default whereas in an *in personam* action, the defendant had to say something.

All corporeal things were subject to actions *in rem*. Some incorporeal things were, and those that were tended to be those which gave *in rem* rights, in the second sense of the term, in a corporeal thing: servitudes (roughly the equivalent of our easements), usufructs (roughly the equivalent of our life estates), an entire hereditas (roughly the equivalent of our decedent's estate). The most striking example from our point of view of a right with regard to a corporeal thing that was not *in rem* (in either sense) was the tenant's in a lease.

3. Now all of this borders on the totally circular. Why do you have an *in rem* action? because you have an *in rem* right. Why do you have an *in rem* right? because you have an *in rem* action.

G. does not talk about it here at all. Rather he makes another distinction, corporeal vs. incorporeal, which provides the first clue to the organization of the two books and which is probably founded historically on the *in rem/in personam* distinction (GI.2.12-14).

corporales vs. *incorporales*

The problem with the distinction is that all physical things are corporeal and all rights, whether involving physical things or not, are incorporeal. G.'s understanding of ownership seems to be that it can only be had of a corporeal thing, but the reason for that can't be the distinction between corporeal and incorporeal if we concede that all rights are incorporeal. Our notion of a 'bundle of rights' in property, however, seems far from his mind. There are some jurists who may have had their doubts. The texts that suggest that one can own a right less than full ownership in property are much debated. Part of the problem that is that word *dominus* in Latin, which certainly does mean 'owner', can also mean 'lord' or 'master', as we noted when we discussed the constitutional history of the Dominate. Incorporeal things clearly include obligations. The structure of 2 books on the law of 'things' makes no sense were that not the case.

Gaius takes one more crack at explaining the distinction between property and obligation, the closest he comes to explaining the structure of the two books (GI.2.12-17). He distinguishes between *res Mancipi* and *res nec Mancipi*, things that are Mancipated and things that are not.

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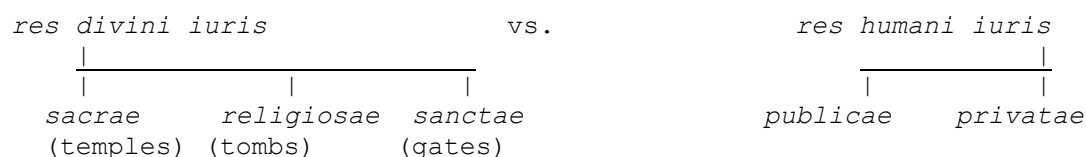
<i>res Mancipi</i>	vs.	<i>res nec Mancipi</i>
Italic land, beasts of burden, slaves, rustic praedial servitudes		all else
<i>Mancipatio</i> or <i>in iure cessio</i>		<i>traditio</i> or (for incorporeal) <i>in iure cessio</i>

Note that the distinction between corporeal and incorporeal is not a product of the distinction between *res Mancipi* and *res nec Mancipi*. Rustic praedial servitudes are incorporeal, but they are *res Mancipi*. Rather, the distinction between corporeal and incorporeal is reflected in, if it is not the product of, the distinction between *traditio* and *in iure cessio* for things that are not *res Mancipi*. The incorporeals cannot physically be handed over and so must be conveyed by *in iure cessio*.

4. BUT §§ 38–39 tell us that obligations cannot be conveyed. That is not quite true because an entire hereditas includes obligations and can be conveyed, but this conveyancing distinction forms the basis of the 2 books: things that can be conveyed singly, things that are conveyed *per universitatem*, and things that cannot be conveyed singly. This conveyancing distinction may antedate speculative jurisprudence, because it certainly makes very little sense if we think about it jurisprudentially.
5. To repeat: what is the relationship between corporeal and incorporeal and conveyancing? Just this: All physical things are corporeal, and physical things that are subject to individual ownership may be conveyed. Certain incorporeal rights with regard to physical things can be conveyed, even though they are not conceived of as corporeal; servitudes are a notable example. All obligations are incorporeal and cannot be conveyed. Things in mass (a whole inheritance, for example) may be conveyed but only if the obligations are conveyed with the physical things. This conveyancing distinction would seem to be the basis of Gaius' tripartite division, and if it is, then it almost certainly, as I just said, antedates speculative jurisprudence.

Now I want to pause with that. We'll see the operation of the property/obligation distinction later in the course, but I want to make sure that everyone understands it at the conceptual level, for what we just suggested is that this fundamental distinction in western law may be the product of chance. It is a product of the way the Romans did conveyances before they thought seriously about their legal system. Not only is it hard to imagine that this would have arisen if there were a group of thinkers who were puzzling about the incorporeal nature of all rights (and there is evidence that the jurists did so), but it's also hard to imagine that it would have happened had it not been for the prohibition on transfer of obligations. The prohibition against the transfer of obligations is now long gone. We could not have a modern banking system if there were such a prohibition. A check is a transfer of an obligation. The bank owes me money, and I transfer a piece of that obligation to the payee. But all western legal systems, both the civil-law ones and the Anglo-American ones have the distinction between property and obligation.

6. Before Gaius gets to the corporeal/incorporeal distinction, he makes two distinctions, principally, it would seem, to exclude topics from the book. The first one is a distinction between things that are in someone's patrimony and things that are not. This distinction may not have been in G's original text. If it was, he does nothing with it. We'll say a bit about it when we get to Justinian. The second distinction is obviously important:



Res divini iuris, 'things of divine right' or 'of divine law', vs. *res humani iuris*, 'things of human right' or 'of human law'. In the former category are *res sacrae*, 'sacred things', for example, temples; *res religiosae*, 'religious things', for example, tombs; and *res sanctae*, 'holy things' for example, city gates.

What do both sides of this dichotomy mean? Things that are of divine law seem to reflect a survival of a notion that there is a separate religious law. So far as those that are of human law are concerned, the distinction between public and private seems to reflect, as we suggested

The general category is the acquisition and alienation of single things. The link to what has come before is provided in §18 where Gaius repeats the distinction between corporeal and incorporeal things, and then goes on immediately, as he had before, to the distinction between *res Mancipi* and *res nec Mancipi*. That everything between §18 and §64 is about acquisition and alienation by civil law we do not learn until §65, where Gaius admits that *traditio* is actually an institution of the natural law that has been incorporated into the civil law along with rest of the institutions in the previous sections, all of which are decidedly of the civil law. Following §65, G. then gives a brief of treatment of acquisition of things by methods that are more distinctively those the natural law (occupancy, alluvion, specification, etc.) before returning the top-level to treat of alienation by those in tutelage and acquisition through others.

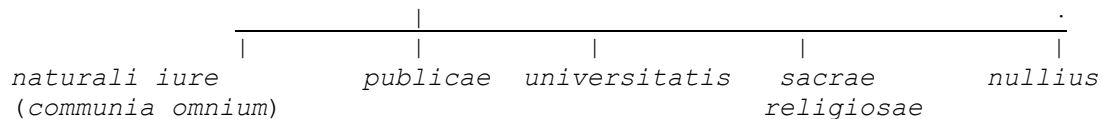
8. In considering incorporeal things for the second time, G. says something about incorporeal rights in land. They are awkward in Roman law.

Servitudes, as we have said, are roughly equivalent to our easements: Of the rustic servitudes there are five mentioned, all of which were *res Mancipi*: *iter* (walk), *actus* (drive), *via* (build a road), *pecoris ad aquam adpulsus* (driving cattle to water), *aquaeductus* (aqueduct) — they are all from our point of view appurtenant affirmative easements. There are also some rights roughly equivalent to our profits, the right to take something from the land, which were not *res Mancipi*. Only four urban servitudes are regularly mentioned: light (*ne luminibus officiatur*), support (*oneris ferendi*), flowage (*stillicidium*, the right to receive drip), and building height (*altius non tollendi*). They are all from our point a view appurtenant negative easements. Since they were not *res Mancipi*, urban servitudes could only be created and transferred by *in iure cessio*.

In the later law, usufruct and like rights were classified as personal servitudes, but G. does not do so, though he recognizes the usufruct and the fact that it could be defended by an *in rem* action. We certainly would not regard a usufruct as an easement, because it gave the holder the right to possession. The closest equivalent in our law is the life estate. A usufruct, however, need not last for life, but it could last no longer than a life.

9. Justinian keeps G’s trichotomy – things that can be acquired singly, things acquired *per universitatem*, and obligations – for the 2 books (actually delicts spills over into the beginning of book 4), but the logic of G’s organization is obscured by the fact that J. treats quite different topics at the beginning.³

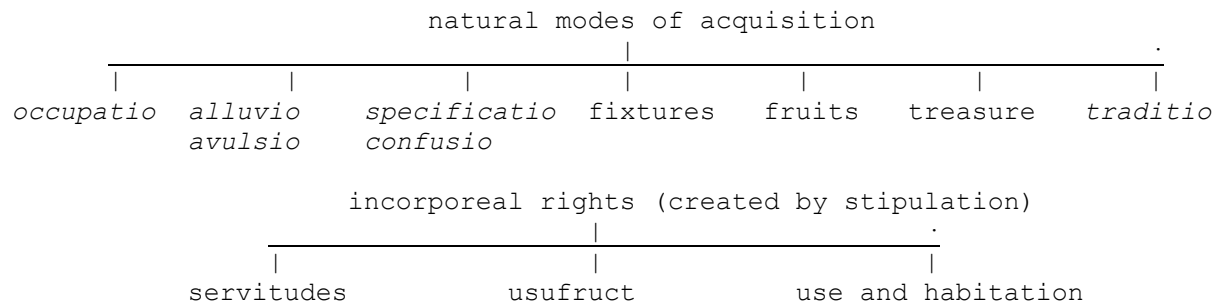
res in patrimonio vs. res extra patrimonium



Justinian offers a distinction between *res in patrimonio* and *res extra patrimonium*, ‘things in patrimony’ and ‘things outside of patrimony’. Moyle’s translation of *res extra patrimonium* ‘things that cannot belong to individuals’ is misleading. Some of the things in this list, those

³ In the process J. leaves out GI.2.38–39, the key passage about obligations not being conveyable, thus obscuring the whole structure of the 2+ books. It is generally thought that this was still the rule in J’s time on the basis of texts in the Corpus.

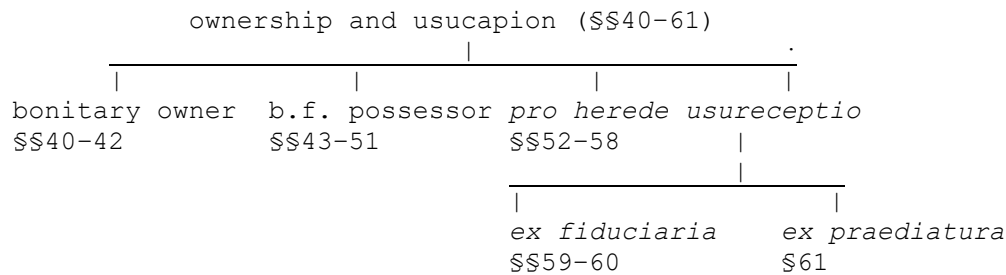
‘by natural law common to all’ (*communia omnium naturali iure*), such as the air and the sea, and ‘sacred’, ‘religious’, and ‘holy things’ (*res sacrae, religiosae, and sanctae*), such as temples (which Justinian changes to churches), tombs, and city-gates, cannot belong to individuals, but ‘public things’, ‘things belonging to a corporation’, and ‘things that belong to no one’ (*res publicae, res universitatis, and res nullius*) are all things that could belong to an individual but do not now do so.



Justinian then goes on to the ‘natural modes of acquisition’. We’ll say something about the individual items in this category when we get to the parallel passage in Gaius.

Particularly noticeable in Justinian’s list of the ‘natural modes of acquisition’ is the inclusion of *traditio* among them. G. also regards *traditio* as a method of conveyance derived from the natural law, but he treats of it with the specifically civil-law methods of conveyance, *mancipatio* and *in iure cessio*. The latter are gone by J’s time and with them the distinction between *res mancipi* and *res nec mancipi*. Since one cannot hand over an incorporeal thing, J. substitutes stipulation (a form of contract) for *in iure cessio*. He then proceeds to consider incorporeal interests in land, a treatment that parallels Gaius’ with some modifications.

10. Let us go back to G. — Of our first-year property topics he treats not at all of public law. There may be some, perhaps even quite a bit, of land use control hidden there. G. also has little on what we call private control of land use. There is nothing about what we would call nuisance. He does not treat here in any detail of the possession/ownership distinction. That is mostly in book 4, the law of actions, to the extent that it is there at all. Creation of estates is there but not the rights and duties of estate-holders. Actually Roman law had no estates in land in our sense, but it did recognize the usufruct, which, as we just said, is roughly equivalent to our life estate. It need not last for a life, but it could last no longer than a life. The same was true of a cut-down version of the usufruct, *usus*, which gave the holder the right to use the land but not to take the fruits from it. *Usus* is classical though G. does not mention it; J.’s description of it reflects some post-classical changes.
11. After laying out the basics of incorporeal things, Gaius treats of delivery of a *res mancipi* without the *mancipatio* ceremony. This does not transfer Quiritary ownership, but it does transfer bonitary ownership. The topics that he treats are outlined in the graphic.



12. The stages by which the Romans arrived at bonitary ownership are interesting. (Actually bonitary owners are never so described as such by the classical jurists; they said that such people had the property ‘in their goods’ [*in bonis*].) It would seem that the first step gave the bona fide possessor who had bought from the Quiritary owner with a defective mancipation an *exceptio rei venditae et traditae* (‘exception of a thing sold and handed over’) if he were sued by the Quiritary owner. The law of obligations was working its way into the law of property. The next step was to give not only him but all *bona fide* possessors an interdict against someone who took possession away from them. The possessory interdicts would protect our putative bona fide possessor who acquired from the Quiritary owner against most third parties and even against the Quiritary owner if the latter were the dispossessor, but what if the person now on the land was not the dispossessor (the interdict was available only against the person who actually did the dispossessing) or what if the person dispossessed was not the original acquirer from the Quiritary owner (that is, the original acquirer had conveyed the property to the now-claimant)?

Another action was needed and it was the fictitious *actio Publiciana* of c. 100 BC, of which Gaius treats in book 4 (G.4.36).

Here’s how it worked. The b.f.p. who has acquired a *res Mancipi* from the Quiritary owner or traces his title from one who did brings an action claiming ownership with the following formula: (a) if A.A. [the claimant] had run out the usucapion period [a fictitious allegation], and (b) unless N.N. [the defendant] is the owner, and (c) even then if N.N. sold and delivered the thing, (d) the judge was to award the property to the claimant. We have ended up giving the bonitary owner an *in rem* right. The bonitary owner now is the owner for most practical purposes.

He wasn’t quite the Quiritary owner, however, because the jurists still regarded the Quiritary owner as Quiritary owner, even if he had lost the action, which was, after all, fictional. The bonitary owner could not (1) (a) manumit slaves and make them citizens (the best he could do was to make them Junian Latins) nor could he (b) make all forms of legacy (some forms of legacy were available only to the Quiritary owner). (2) Also, the bonitary owner must convey by *traditio* (he could not use the *mancipatio*) and in most instances (we’ll deal with an exception shortly)⁴ must receive by *traditio*.

13. Gaius’ §§ 40–51 deal with the requirements for usucapion and with bona fide possessors. To usucapere the bona fide possessor must have held the property for 2 years if it was land and 1 year if it was a moveable. From our point of view these periods are very short, particularly

⁴ The exception is land not taken by violence.

with regard to land. But the requirements of *bona fides* and *iustus titulus*, that the thing have been acquired in good faith and in some way that looked legitimate (roughly equivalent to our ‘color of title’), limited the scope of usucapion. Also, by statute stolen goods and things taken by violence could not be usucaped. This applied not only to the thief and the violent dispossessor but also to the people who took from the thief or violent dispossessor even in good faith. Granted the expansive notion of theft in Roman law, very few things could be usucaped except as a result of defective conveyances.

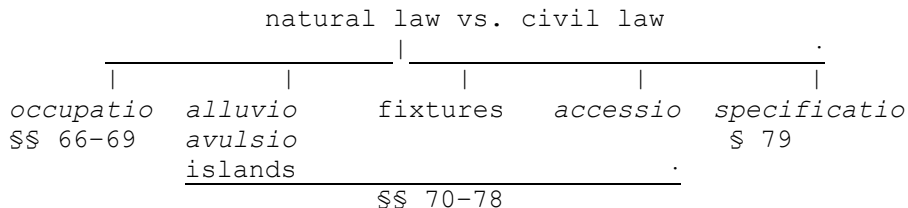
G. offers two examples where usucapion would arise not as the result of a defective conveyance. The first may be generalized: if I have rightful possession of a thing and sell it without knowing that I have no title, usucapion may arise. The example Gaius gives is an heir’s good faith sale of something that he thinks is in the inheritance. Usucapion was also possible of land not originally taken by violence, since theft of land was impossible.

14. The materials on *usucapio pro herede* and *usureceptio* (§§52–61) are odd. The first probably derives from a time in which only the people who were freed of paternal power by the death of the decedent (called *sui heredes*) were truly heirs. Its continuation into G.’s time is hard to explain. He seems to think that Hadrian had done away with any practical effect it might have. In the case of the *usureceptio*, it covers many situations where it seems to make sense. For example, I get back mortgaged property in bad faith, but I pay back the debt. Or I have conveyed property to my friend *cum fiducia* for safekeeping and take it back in bad faith. Where it doesn’t make sense to us (for example, taking mortgaged property back from a creditor without paying), it shows the Roman bias for ownership.

Usureceptio ex praedictura has to do with getting back your property which has been seized by the state for back taxes and sold. We may not fully understand the institution. It seems to be roughly equivalent to the redemption period for tax sales in our law.

15. G’s organization gets a little fuzzy at this point. §§ 62–64 go with §§ 80–85. We’ll take them up with §§ 80–85. The long section on natural vs. civil law methods of acquisition intervenes.

The natural law methods of acquiring title are mostly involuntary. *Occupatio* and *tradio* (which Justinian treats as a mode of acquisition at the very beginning of the material on property) are the major exceptions. Here are the ones that are also known as original (as opposed to derivative) modes of acquisition. It leaves out *tradio*.



Those who did a full-scale number on *Pierson v. Post* in the first year property course will recognize Gaius’ text on *occupatio*, the seizure of a thing that belongs to no one with particular reference to the capture of wild animals. It appears virtually word-for-word in JI, which was quoted in *Pierson v. Post*. Alluvion and avulsion are different ways in which flowing water can add to or take away from surrounding land. Islands can appear suddenly in the midst of rivers. After any of these things happens, who owns what? Fixtures, as in our law, are things permanently attached to land. Accession is the combining of things belonging to

two different people in a common thing. Specification is the changing of the nature of something, such turning grapes into wine.

None of these things is likely to have been of great practical importance. Commercial arrangements would handle the title question by contract. The jurists' discussion of them reeks of the classroom. Gaius' treatment is particularly interesting in the way that he uses the actions to solve the problems presented; Gaius and to a greater extent Justinian also seem to be influenced here by Greek philosophy. These sections make for great paper topics.

16. Property law and the law of persons:

a. §§ 62–64: Owners who cannot alienate:

i. the holders of dotal Italic land. The dowry is owned by the husband, but he may have to return it, notably in the situation of what we would call a 'no-fault' divorce. In order to protect the wife's potential interest, the law forbade the husband to alienate dotal Italic land.

ii. *curatores* vs. those in *cura* (e.g., a *furiosus*). The curator may alienate the property of a *furiosus* who is in *cura*. The *furiosus*, who remains the owner, may not.

b. §§ 80–85 — Deal with alienation by those *in tutela*. Here we get an explanation of what little difference perpetual tutelage of women makes. Only the alienation of *res Mancipi* required the *auctoritas* of the tutor. And Gaius tells us elsewhere that the women can go to the praetor to force the tutor to give his consent.

c. §§ 86–96 — Deal with acquisition for us by others. The connection here with the law of persons is strong. Slaves and sons-in-power can acquire for their owners or fathers. Slaves, in particular, were frequently used as business agents for their owners, and the fact that they could be so used may account for the fact that Roman law does not have a particularly well developed law of agency.

17. Other than what is different at the beginning of book 2 of JI, there are two differences from GI on the acquisition of single things that stand out in JI:

a. JI.2.6 — The principles of usucapion are basically the same as in GI, but J. extends the periods to 3 years for movables, 10 years for land where the original owner is in the same district, 20 years where he is in a different district, and allows a usucapion of 30 years even for stolen goods.

b. JI.2.7 — J. includes a title on gifts, a topic that G. does not treat separately. J. includes in this title the *donatio propter nuptias* ('gift on account of marriage'), which parallels the dowry, but comes from the husband's side.

18. There are four broad themes in this material:

a. Natural vs. civil law. There definitely does seem to be a move away from the things that are specifically Roman to a more general law, whether that is thought of as natural law or *ius gentium*. The movement can also be seen in topics that are not referred specifically to natural law or the *ius gentium*. The periods for usucapion in Gaius were laid down by the XII Tables. They had been molded by the jurists, so that they only applied quite narrowly to situations where their shortness seems appropriate. Justinian got rid of them and came up with periods that from a modern point of view seem more appropriate, if a bit long.

- b. The movement away from formality. *Mancipatio* is gone by Justinian's time, as is *in iure cessio*. The jurists had seen to it that *mancipatio* was for most practical purposes not required. It took Justinian to get rid of it entirely.
- c. Property is closely tied into the law of persons. It remained so so long as slavery and *patria potestas* existed. That, of course, deeply affected power relationships within the society, but it was also something around which commerce could be, and was, organized.
- d. I have left what many people regard as the distinctive feature of Roman property law for last. In comparison with what the Anglo-American law was, and is, the concept of *dominium*, ownership, in Roman law, seems quite absolutistic. The number of ways in which the bundle of rights, as we think of them, in property ownership could be broken up seems from our point of view to be quite limited. This univocal conception of property ownership remains to this day a distinguishing feature of Continental civil law as opposed to the legal systems that derive from Anglo-American common law. In private law the Continental civil law is reluctant to allow the splitting up of the right to possession, the privilege of use, and the power to convey of the property-owner, a feature that paradoxically limits the last, because it makes it difficult for the property owner to convey anything less than the full bundle of what s/he has. It also means that land use control on the Continent is more often done by public law rather than by private initiative.

How much this was true of Roman law either in the classical or in the post-classical period is something of an open question. It certainly seems to be the case that the way in which the jurists and even Justinian thought about property makes ownership seem to be more absolute than it may actually have been. The first and most obvious way is that the jurists and most of what is in Justinian's compilations and certainly most of *JI* is about private law. Public law just is not there, and in most cases we are left speculate how much land-use control there was in public law. Within the private law the categorization process makes ownership seem more absolute. Rights in land that are not ownership are, as a general matter, not thought of as being owned. Later law calls them *iura in re aliena*, 'rights in the thing of another'. A tenant's rights in a lease are not thought of as property. They are contractual rights against the owner of the land who made the lease. Possession is thought of as entirely separate from ownership, and the ways in which possession by another can limit the rights of an owner are not considered when ownership is being considered.

I think we have enough here to discuss this issue now. It is certainly something to which we can return when we can consider the classical law more fully in the last weeks of the course.