a time with the classical *formula petitoria*. It is puzzling how this intricate manifoldedness, which can also be observed in other realms of Roman law, functioned in practice.

III. *ACTIO PUBLICIANA*

1. The *actio Publiciana* is apparently one of the everlasting problems of romanistic researches. Older literature has already given a lot of thought to this question. According to the list made by Gimmerthal, thirty-two works were devoted to the *actio Publiciana* between 1553 and 1866.\(^{23}\) The last hundred years brought no change, and a considerable mass of more recent writings was published on the subject. For a time, romanists were chiefly interested in textual questions, and endeavoured to reconstruct the original drafting of the edict and the formula as faithfully as possible.\(^{24}\) The last years, however, showed a change in the attitude of scholars. The most recent literature is no longer very interested in the reconstruction of the original text, but discusses passionately the causes of the introduction and the original function of the *actio Publiciana*, together with the question of the so-called *probatio diabolica*.

A survey of the whole of the literature, one can state without exaggeration, would practically require a special monograph and this would be a rather hopeless or even fruitless undertaking. Apart from that, the older literature was not available to me. Since, however, the discovery of the Institutes of Gaius has considerably altered and enriched our knowledge about the *actio Publiciana*, I do not think that the old literature could be of much use. A treatise on it would be a collection of scholarly curiosities. More recent literature until 1926 has been carefully gathered and analysed by Bonfante in his article.\(^{25}\) This discharges me from having to give a survey of the tiresome disputes about supposed interpolations. The most important views will be considered in the proper place. It is, however, indispensable to give a short account of the recent dispute about the *actio Publiciana*.

2. The debate was opened by the interesting and original article of Wubbe.\(^{26}\) The author rejected the traditional view, supposing that the original function of the *actio Publiciana* was not the protection of those who had acquired without the prescribed formalities, but the protection of the *bonae fidei possessor*. In such a way, the action was also available from the beginning to those who had acquired a thing from a non-owner.\(^{27}\) According to Wubbe, the *actio Publiciana* was introduced because of the difficulties of bringing evidence with the *rei vindicatio*.\(^{28}\) He ascribes the supposed difficulties to the creation of the notion of absolute

\(^{23}\) Cf. Gimmerthal pp. 1 ff.
\(^{25}\) See the previous note.
\(^{26}\) Cf. Wubbe, *Publiciana*.
\(^{27}\) *Ibidem* p. 430.
\(^{28}\) *Ibidem* p. 422.
ownership, by which the burden of the probatio diabolica would have been imposed on the plaintiff. On this point he adheres to the view of Kaser, who, the actio Publiciana had taken over the role of the la.s.i.r., which had meant, according to his well-known conception, a protection of relative character.

The treatise of Wubbe was followed by the equally original reply of Sturm. Sturm returns to the traditional view, and supposes that the action was created for the protection of informal acquisition, so originally it was available only to those who had acquired the thing from the owner. He denies the supposed difficulties of evidence with the rei vindicatio, and points out that the medieval theory of the probatio diabolica is not supported by Roman sources. He suggests that with respect to the difficulties of evidence there was no difference between the two actions.

The debate of the two scholars has not yet been wound up, because Wubbe, in an article bearing upon a different subject, returned again to the question of actio Publiciana, and others also joined in the dispute. It seems that the theory of the probatio diabolica is quite deeply rooted in the minds of romanists because both Feenstra and Kiefner attack the view of Sturm. Feenstra takes his arguments mainly from medieval sources, and though he does not deny the medieval origin of this theory, he still rejects the opinion of Sturm. Kiefner, as he himself puts it, takes an intermediate position between Wubbe and Sturm concerning the probatio diabolica, but basically he defends the traditional view.

Anyone dealing today with the questions of the actio Publiciana, must necessarily take sides in this discussion, but first of all it seems expedient to examine some preliminary questions.

3. The date of the introduction of the actio Publiciana cannot be exactly ascertained. The prevailing view puts it—I suppose rightly—at the second and first

31 Sturm, Publiciana.
32 Ibidem pp. 397 f. and 415.
33 Ibidem pp. 363 ff.
34 Ibidem p. 385.
35 Wubbe, "Der gutgläubige Besitzer, Mensch oder Begriff?", SZ 80 (1963) p. 203 and passim.
36 Cf. Feenstra, Publiciana.
37 Cf. Kiefner, Probatio diabolica.
38 Feenstra, Publiciana p. 98 and elsewhere.
40 "Die Antwort wird wohl etwas differenzierter ausfallen müssen als sie von Sturm aber bis zu einem gewissen Grade auch von Wubbe je einseitig gegeben wird"—writes Kiefner in (Probatio diabolica p. 213.) However, elsewhere, he declares: "Dass die Problematik des Verhältnisses von rei vindicatio zu actio Publiciana weithin in der Beweissituation des Klägers liegt, kann m. E. ernstlich nicht mehr bestritten werden" (p. 229 n. 78).
centuries B.C. This is also advocated by the economic and social conditions, because the development of commodity-turnover and of commerce made the forms of conveyance prescribed by the *ius civile* obsolete, and so the protection of those who had acquired a thing without these formalities or from a non-owner became a necessity.

However I suppose that the action was introduced only in the first century B.C. Surely, this means a certain lagging behind as compared with the development of the economic conditions, but a similar lagging behind can be observed in preclassical law. One has also to take into account the fact that as has been pointed out by Kaser, the *actio Publiciana* was modelled according to the *formula petitoria*, and the latter had been probably created after 150 B.C. It is unlikely that the praetor would have immediately introduced the other action, too.

This dating is also corroborated by the fact that a praetor called *Publicius* is recorded in Cicero’s age, and it is possible that the invention of the new proprietary remedy must be attributed to him. Although Cicero does not mention the *Publiciana*, this is no strong argument against the prevailing view. A statesman busy with different matters and exercising a rich literary activity must not be supposed to register faithfully every innovation in the realm of private law. The development of economic life at any rate obviously excludes putting the date of the *actio Publiciana* at a later point of time.

4. The text of the original edict, by which the action was promulgated, and the precise text of the formula, are strongly disputed. The sources are contradictory to some extent, so several attempts have been made to reconstruct the original version, among which, as so often happens, there are some rather daring and arbitrary suggestions.

The following sources give support for a reconstruction of the edict.

(a) Ulp. D. 6, 2, 1, pr: *Ait praetor*: “Si quis id quod traditur ex iusta causa non a domino et nondum usuceptum petet iudicium dabo”

(b) Ulp. D. 6, 2, 7, 11: *Praetor ait*: “qui bona fide emit”

(c) Gai. 4, 36: . . . datur autem haec actio ei, qui ex iusta causa traditam sibi rem nondum usu cepit eamque amissa possessione petit. Nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usu cepisse, et ita, quasi ex iure Quiritium dominus factus esset, intendit, velut hoc modo: *IUDEX ESTO. SI QUEM HOMINEM A.A. EMIT ET IS EI TRADITUS EST, ANNO POSSEDIS-

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42 A delay has been also observed with respect to the creation of the notion *dominium* and the recognition of *traditio* as an independent legal act.
43 Kaser, *EB* p. 298.
44 Cicero, *Pro Cluentio* 45, 126.
47 The reconstruction suggested by Karlowa, deserves a special mention as it is completely independent from the sources: “Ei, qui bona fide emit, si eo nomine sibi traditam et nondum usuceptam amiserit, proinde atque si res usucepta esset, iudicium dabo.” *(RG* p. 1211.)
SET, TUM SI EUM HOMINEM, DE QUO AGITUR, EIUS EX IURE QUIRITIUM ESSE OPERTERET...

In the first text, the expression "non a domino" is generally and justly held to be interpolated, but the part "id quod traditum" is also suspect. The chief difficulty lies in the fact, that while here and in the Institutes of Gaius the expression "traditio ex iusta causa" can be found, the second Ulpianic text contains a reference to purchase in good faith, but even the formula quoted by Gaius mentions emptio. Therefore the debate is concentrated upon the question whether the original edict viz. the formula contained the expression bona fides, and whether the praeitor spoke generally about traditio ex iusta causa or about emptio and traditio.

I think that one should start from Gaius, for his work is for the most part an original classical text. This, however, leads us to the conclusion that the edict spoke about a traditio ex iusta causa, while in the corresponding formula the causa was more closely specified. The very words of Gaius: velut hoc modo reveal that the formula is only cited as an example. Like every good teacher, Gaius, out of didactic considerations, chose the most frequent and the simplest case the sale.

The first Ulpianic text basically corresponds to the one of Gaius, but it is hard to see how the fragmentary and obscure qui bona fide emit (D. 6, 2, 7, 11) was related to the text of the edict or perhaps the formula of the actio Publiciana. It is true that the preserved casuistic material bearing upon the action deals primarily with problems connected with sale, but this can easily be explained by the outstanding practical importance of acquisition causa emptionis, and thus does not necessarily lead to the conclusion that the action was originally confined to this case alone. However, it is not impossible, though unlikely, that the original preclassical edict mentioned merely emptio.

In my opinion the original wording of the edict cannot be reconstructed with absolute certainty. The suggestions made up to now are all more or less of a hypo-

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49 For bona fides e.g. see Karlowa (see n. 47); Kaser, RPR p. 369; Perozzi, "L'editto publiciano", BIDR 7 (1894) pp. 45 ff. Contra: Beseler, Beiträge III. pp. 197 f. and IV. pp. 87 f; Bonfante, Publiciana p. 402; H. H. Pfüger, "Zwei Rätsel", SZ 42 (1921) pp. 469 f.
50 Perozzi suggested that the edict had contained only the purchase in good faith (Cf. loc. cit. in n. 49). His assumption has been soundly refuted by Pacchioni, "Una nuova ricostruzione dell'editto publiciano", BIDR 9 (1896) pp. 118 ff.
51 Surprisingly enough Feenstra praises Wubbe for belonging to those "qui ne se laissent plus aveugler par le texte de Gaius" (Feenstra, Publiciana p. 104). I am not ashamed to confess that I am ready to be "duped" by a classical source.
52 The possibility that the fragment originally did not refer to the actio Publiciana but to the contract of sale is excluded, because it was taken from the same book of Ulpian's commentary upon the edict, as the first fragment.
53 In the sedes materiae (D. 6, 2), of seventeen fragments seven refer almost exclusively to sale, and so does the longest one, (7) too. The formula in the Institutes of Gaius concerns sale equally (4, 36).
thetical character." Fortunately, the substance of the edict is clear: the action was based upon traditio and the fiction of usucapio. It is a question of minor importance whether the text expressly mentioned iusta causa or bona fides as well, since these requirements—being indispensable for usucapio—were already inherent in the fiction of usucapio.55

5. From the aforesaid we may conclude that the actio Publiciana could be brought by a person, to whom the thing had been delivered ex iusta causa, and who, though the requirements of usucapio were present, had not yet usucapted, so he was not yet the owner according to the ius civile (rem nondum usu cepit . . . non potest eam ex iure Quiritium suam esse intendere . . .)

Some relevant questions are still open to debate:

(a) First of all, it is questionable whether only those who had acquired the thing from the owner were entitled to sue by actio Publiciana, or whether it also applied to possessors to whom the thing had been delivered by a non-owner. The majority of writers side with the first solution,56 but Wubbe has rightly protested against the prevailing view.57

The communis opinio is based more than anything upon the indisputed interpolation of the expression non a domino in the Ulpianic text quoted.58 The compilers, however, did not complement the original text with this expression in order to extend the action to those who had acquired the thing from a non-owner.59 The interpolation was motivated by the fact that since traditio had become the only act for the transfer of ownership in Justinianic law, a justification was needed to explain why ownership in the given case was acquired in spite of the delivery, by usucapio alone. So we are faced not with an extension, but on the contrary, with a restriction of the field of application of actio Publiciana.

This interpretation is corroborated by several genuine texts to be found both in the sedes materiae and elsewhere where cases of an acquisition from a non-owner are discussed.60 In such a way one may safely draw the conclusion that

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54 Pacchioni rightly concludes: "Veniamo cosi alla melanconica conclusione, che in materia di publiciana, per ciò che si attiene alla ricostruzione dell'editto poggiamo sempre in un terreno di ipotesi." (Op. cit. in n. 50. p. 130.)

55 This was the main argument of Beseler (see n. 49), but—as has been pointed out by Erman—"superflua non nocent". Cf. H. Erman, "Beiträge zur Publiciana", SZ 11 (1890) p. 248. The unfounded assumption of Lombardi, who thinks that the actio Publiciana applied originally to peregrines with the fiction of usucapio having been inserted into the formula later on, is unacceptable. See Lombardi, Dalla “fides” alla “bona fides” (Milano, 1961) pp. 243 f.

56 Thus recently De Vischer, Auctoritas II. pp. 105 ff. This view is also sustained by Sturm, Publiciana p. 415.

57 Wubbe, Publiciana p. 438.

58 Cf. n. 48.

59 See also Kaser, RPR II. (1959) pp. 214 f.

60 Cf. Ulp. D. 6, 2, 9, 4: "et Julianus libro septimo digestorum scripsit, ut si quidem ab eodem non domino emerint, potior sit cui priori res tradita est, quod si a diversis non dominis, melior causa sit possidentis quam petentis."
the action was not extended by Justinianic law to those who had acquired the thing from a non-owner.

Sturm argued for the prevailing view by pointing out that in classical law, as a consequence of the broad concept of furtum, a usucapio must have been rather rare, if the thing had been acquired from a non-owner. In the case of movables somewhat more favourable. In addition Sturm leaves out of account the case when the thing which had been bought from the owner, was sold shortly afterwards by the acquirer to a third person. There can be hardly any doubt that the latter was entitled to sue by actio Publiciana.

So from the arguments of Sturm it follows only that in preclassical and classical law, the cases when the plaintiff of the actio Publiciana had acquired from a non-owner, must have been comparatively rare. If the causes of the introduction of the actio Publiciana are in question, this is rather important, but from the point of view of the legitimation to the action ("Aktivlegitimation") it is absolutely irrelevant. The fiction of usucapio automatically excluded the examination of the right of the former possessor, so the plaintiff to the actio Publiciana was not obliged to bring evidence for the ownership of his predecessor, apart from the case when the judicial decision depended upon the particular circumstance, namely which of the litigants derived his title from the owner.

I suppose that those who had acquired the thing from a non-owner were entitled to bring actio Publiciana from the beginning, providing the requirements of usucapio were not lacking.

(b) The second question is even more delicate. Could someone who had acquired the thing by means of a mancipatio or in iure cessio bring an actio Publiciana?

There is no doubt that, according to the edict, traditio was required for the actio Publiciana. Wubbe, however, suggests that the possessor could sue by this action, even if the delivery had been followed by an act of conveyance of ius civile. Unfortunately, no evidence exists for settling this question. Gaius fails to consider this point, and in the Digest all references to the formal acts of conveyance have been carefully eliminated. In such a way all that can be said does not amount to more than a mere hypothesis.

I should begin with the indisputable fact that the action was based upon the fiction of usucapio and upon the fact that the plaintiff had not yet acquired owner-

\[\text{Pomp. D. 6, 2, 15: Si servus meus, cum in fuga sit, rem a non domino emat, Publiciana mihi competere debet...}
\]

\[\text{Ner. D. 19, 1, 31, 2: Uterque nostrum eandem rem emit a non domino... is ex nobis tuendus est, qui prior ius eius adprehendit...}
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\[\text{\textsuperscript{61} Cf. Sturm, Publiciana pp. 397 ff.}
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\[\text{\textsuperscript{62} On this supra pp. 146.}
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\[\text{\textsuperscript{63} As in the case which was dealt with by Neratius (D. 19, 1, 31, 2).}
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\[\text{\textsuperscript{64} Wubbe, SZ 80 (1963) p. 189.}
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ship. So, in the case an in iure cessio had taken place the praetor presumably refused to deliver this formula. A person, who had acquired by mancipatio, however, was likely to have brought a rei vindicatio, because in practice it turns out for the most part only in the course of the lawsuit that the transferor had not been the owner. It is not inconceivable, though the case must have been rather infrequent, that somebody got acquainted with the fact that the transferor had not been the owner after having acquired by mancipatio and before the time prefixed for usucapio had elapsed. This seems to have been the only case when someone reasonably would have asked for the actio Publiciana, which possibly was not denied to him, because he had not yet acquired ownership.

(c) Having been based upon the fiction of usucapio, the actio Publiciana was in my opinion not available to those who had already usucapted. Otherwise the formula would have contained a falsehood.\textsuperscript{66}

As a consequence, though the contrary is frequently believed,\textsuperscript{67} the quiritarian owner, after the time of usucapio had elapsed, could surely not sue by actio Publiciana. Besides, this would have been utterly unreasonable, for the completed usucapio discharged him in the same way from proving the title of his predecessors, as the fiction of usucapio did.

On the other hand the bonae fidei possessor could not sue by actio Publiciana either, if the period of his possession had exceeded the time prefixed for usucapio. In such cases, he had either usucapted, and so the vindicatio was available to him, or some requirements for usucapio had been lacking, and as a consequence the actio Publiciana could not be expedient. Thus, the actio Publiciana was not simply the action of the bonae fidei possessor, as has been suggested by Wubbe,\textsuperscript{68} but only that of such bonae fidei possessores, who were at the same time "Ersitzungsbesitzer", before the period of one and two years respectively had elapsed.

(d) I am convinced that the actio Publiciana was available only to those who were not entitled to bring a rei vindicatio. In such a way the field of application of the two actions was clearly delimited, and, in order to motivate this duality we need not suppose difficulties of evidence with the rei vindicatio. Actually, as has been already mentioned, the thesis of the probatio diabolica became the issue of passionate debates. So we have to take sides in the recent discussion.

6. The question can be posed in the following way: was the plaintiff of the actio Publiciana in a more advantageous position, than that of a rei vindicatio regarding the burden of proof? Did the latter action involve considerable difficulties in this respect?

\textsuperscript{66} See the sources cited infra in the text p. 165.

\textsuperscript{67} This was already emphasized by W. Seeler, "Das publicianische Edict", SZ 21 (1900) pp. 58 ff. Seeler, however, failed to draw the conclusions from his idea, and contradicted himself by quoting the maxim: in eo, quod plus sit, semper inest et minus (Gal. D. 50, 17, 110, pr.). This rule, however, does not apply to such cases. Romans never applied the fictio legis Corneliae on behalf of those who had not suffered captivity, and in general fictions were not applied to persons who had no need of them.

\textsuperscript{68} Wubbe, SZ 80 (1963) p. 203.
According to the still-prevailing view, the task of a plaintiff vis-à-vis the rei vindicatio was rather difficult. He had to prove the right of his predecessors up to the point where he arrived at an original acquisition. Therefore, the civilian law, where he was entitled to, by a rei vindicatio.

Attacks on the theory of the probatio diabolica have already been launched in the past century by Pflüger, but his sober arguments, if sometimes as conservative as their Roman predecessors. Recently Sturm clearly pointed out the untenability of this view. After having read his article, I was sure that his arguments have given the coup de grace to this misbelief of convincing — though in some details questionable — arguing of Sturm provoked only embarrassment and a violent reaction. Without any delay Feenstra and Kiefer hurried to reinforce the positions of the traditional view.

I should like to start from the unanimously acknowledged fact that the theory of the probatio diabolica was created by medieval lawyers. Our sources not only ignore this expression, but they do not even hint at the fact that the plaintiff to a rei vindicatio would have been obliged to prove the right of his predecessors up to an original acquisition.

An unprejudiced outsider would thus naively ask what the prevailing view can be based on. If our sources fail to lend any support to it, it is entirely superfluous to discuss the point. A deeply rooted misbelief, however, thoughtlessly repeated throughout centuries, does not shrink from such obstacles.

(a) In essence, Feenstra confines himself to a single argument. He argues that the medieval lawyers knew Roman law very well, and their statements have proved to be correct in many a case, so we must not assume that they did not hit the point in this case too. It would, be, obviously, wrong to underrate the achievements of the glossators, but the way in itself, in which they interpreted a given question, can by no means be accepted as evidence for Roman law. In addition, they were not yet acquainted with the Institutes of Gaius, so they could hardly have seen clearly in the question of the actio Publiciana. It has been already pointed out by Pflüger that the theory of the probatio diabolica was a consequence of the impossibility of delimiting the field of application of the two actions with the help of the Digest. Medieval lawyers, indeed, knew nothing about the consequences of an informal transfer — the interpolated Justinianic sources fail to give any information.

For the arguments of Sturm see nn. 86 ff.
about it—so the *actio Publiciana* was inevitably obscure for them. Feenstra, any-
way, does not care much for ancient Roman sources. The protection of those
who had acquired a thing without the prescribed formalities, is not even considered
by him as a possible motive for the introduction of the *actio Publiciana*. He sticks
to the explanation that the action was introduced because of the difficulties of
evidence with the *rei vindicatio*.

(b) Kiefer, to be sure, argues more thoroughly. He admits that the burden
of proof with the *rei vindicatio* was in practice perhaps not as heavy as it seems
to have been from the point of view of the *probatio diabolica*, but he still firmly
believes that the plaintiff was compelled to prove the right of his predecessors
until there was an original acquisition. This rule is, in his opinion, a necessity
of legal logics (“rechtlogische Notwendigkeit”); textual evidence is not needed.

This argument, however, is hardly apt to convince those who are sceptical.
It may at most reassure the believers. It is of course quite possible that for a theo-
retically-trained mind it seems indispensable that the ownership of the predecessors
should be proved in a proprietary lawsuit one by one, until original acquisition
is reached, but in practice such a rule is utterly superfluous. Rather the contrary
is obvious. When the plaintiff has succeeded in proving the legitimate acquisition
of his predecessor, he fulfils his duty with respect to evidence. If the defendant
denies the ownership of the predecessor, the burden of proof becomes automatic-
ally incumbent upon him. The scholarly idea of the plaintiff anxiously struggling
with bringing evidence, and the defendant sitting by with a contemptuous smile,
is devoid of any reality. But be this as it may concerning the abstract “rechtlogische
Notwendigkeit”, legal history cannot be fully based upon logical speculations.
Sources are needed, too.

Kiefer indeed quotes a text from the *Codex Theodosianus*. But the enactment
only points out that in a lawsuit on ownership the burden of proof was hitherto
incumbent upon the plaintiff. The emperor, however, instructs the judges to
examine also the legal title of the defendant. The text contains not the slightest
hint at the necessity of bringing evidence regarding the right of the predecessors.

(c) As could be seen, the arguing of Feenstra and Kiefer is not capable of
rescuing the theory of the *probatio diabolica*.

7. Since, according to the prevailing view, classical law had no rigid rules re-

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88 He fails to cite Gaius, and confines his attention to C. 4, 19, 12 (Feenstra, *Publiciana* p.
98).

87 Kiefer, *Probatio diabolica* pp. 213 f.
88 Ibidem p. 214.
89 C. Th. 11, 39, 1: *Etsi veteris iuris definitio et retro principum rescripta in iudicia petitori
eius rei quam peter, necessitatem probationis dederunt, tamen nos aequitatem et iustitia moti
probare, unde res ad ipsum pertinent: sed si deficiat pars eius in probationibus, tunc denuo
possessori necessitas inponatur probandi, unde possideat, vel quo iure teneat, ut sic veritas
garding the law of evidence, the theory of the probatio diabolica is at any rate deprived of its basis. However it would not be superfluous to mention some classical and postclassical sources that have a bearing upon the question of evidence in a proprietary lawsuit. These sources do not enable one, of course, to draw any definite conclusions about preclassical law, but one is by no means entitled to assume that there was a quite different system of evidence for this age.

Two fragments of the Digest declare that in a proprietary lawsuit the plaintiff has to bring evidence, and in one of them the rei vindicatio and the actio Publiciana are expressly juxtaposed from this point of view. From these sources one cannot come to conclusions about a probatio diabolica or a difference concerning the law of evidence between the two actions. Contained in an imperial enactment is even what the plaintiff precisely had to prove in a lawsuit on ownership:

C. 4, 19, 12: ...factam emptionem et in vacuum possessionem inductum patrem tuum pretiumque numeratum quibus potes iure proditii probationibus docere debes.

Feenstra himself admits that the source fails to mention the necessity of proving the right of the predecessors, the enactment having been complemented in this sense only by the glossators. Concerning another enactment Kiefner also has to admit that the text seems to contradict the theory of the probatio diabolica.

Obviously, instead of lending support to the theory of the probatio diabolica, the sources expressly contradict this assumption.

8. So it would be in vain to repeat the numerous arguments which have been adduced by Sturm. As has been already mentioned, some of them, certainly


81 So Kiefner supposes — without any textual basis — that the law of evidence with the early formula petitoria and the procedure per sponsionem was rigid (Kiefner, Probatio diabolica pp. 227 f).

82 Gai. D. 6, 1, 24: Is qui destinavit rem petere animadvertere debet, an aliquo interdicto possiti nancisci possessionem, quia longe commodus est ipsum possidere et adversarium ad oneram petitoris compellere quam ali possidente petere.

Ulp. D. 6, 1, 73: In speciali actione non cogitur possessor dicere, pro qua parte eius sit: hoc enim petitoris munus est, non possessoris: quod et in Publiciana observatur ...

83 On this see Kiefner, Probatio diabolica pp. 215 f. It is scarcely credible that the text does not bear upon the rei vindicatio, as is assumed by him.

84 Feenstra, Publiciana p. 98. According to him, the original text was first complemented with the rule of the probatio diabolica by Johannes Bassianus (p. 98 n. 40).

85 C. 4, 19, 4. On this see Kiefner, Probatio diabolica pp. 216 ff. His interpretation is artificial and unconvincing. Even if the text deals with a lawsuit between a usufructuary and an owner, it still contradicts the theory of the probatio diabolica.

86 His main arguments are the following: (a) The expression is not Roman, and it is not even based upon Roman sources. (b) There is no trace of difficulties which are supposed to have arisen as a consequence of the introduction of the formula petitoria. (c) Classical law lacked rigid rules as far as the law of evidence was concerned. (d) Why should the buyers have endeavoured to secure themselves by a warranty against eviction, if the position of a plaintiff to a lawsuit on ownership had been as awkward. (e) Ownership was the basis of several actions (e.g. the actio legis Aquiliae or the condicio furiva) and no difficulties of evidence are recorded in this respect. Cf. Sturm, Publiciana pp. 364 ff.
those of minor importance, are more or less inconclusive, but these are not needed to reject the theory of the probatio diabolica. Not only the sources, but the failure of the counter-arguments, which have been suggested by Feenstra and Kiefner, show clearly that this assumption is incongruous with the sources. There are instances when the arguments of the other party supply even better evidence than the positive ones.

What can be gathered from all this regarding the position of the plaintiffs of the two actions with respect to the burden of proof? It seems that the answer given by Sturm corresponds to the historical truth, i.e. in this respect there was no difference between them.88

(a) The plaintiff to the actio Publiciana had to prove the traditio and the title (causa). The requirements of a res habilitis and of the good faith were probably presumed,89 so in the given case, the defendant had to prove that the object of the lawsuit was a stolen thing, or the bad faith of the plaintiff. If, however, the matter in question was which of the litigants had acquired the thing from the owner, the right of the predecessor also had to be proved.

(b) The plaintiff to a rei vindicatio had, if usucapio was completed, only to prove the possession, the title, and the time. If the two other requirements were presumed with the actio Publiciana, then the situation must have been the same in the case of a rei vindicatio. It has been rightly pointed out by Sturm that in the face of the silence of our sources, we are not entitled to suppose different rules.90 If, however, the thing was not yet usucapted by the plaintiff, then as can be seen from the quoted enactment of Diocletian,91 he had only to prove the right of his immediate predecessor, as with the other action. The Roman law of evidence, as far as can be inferred from the sources, never required the proving of the title of the more distant predecessors.

9. Having dealt with the question of evidence, we are in the position of trying to ascertain the motives for the introduction of the actio Publiciana and its original function.

(a) Praetorian law was induced by the development of commodity-turnover to create the actio Publiciana. As the omission of the prescribed formalities in the commerce with res mancipi had become rather frequent,92 a protection had to be given to those who had not formally acquired ownership, and were thus only in a position leading to usucapio.

87 Thus his suggestion that the judge was entitled to search for the truth independently of the intentions of the parties. His opinion is based upon a text of Suetonius (Suet. Galba 7. Cf. Sturm, Publiciana pp. 379 ff.). One must not attach too much weight to this story. The argument that the parties were frequently represented by orators, is equally irrelevant (pp. 374 ff.). Against these arguments with justification see Kiefner, Probatio diabolica pp. 219 ff.
88 Sturm, Publiciana p. 385.
89 Thus Wubbe, Publiciana p. 421 n. 13; Kaser, EB p. 297.
90 Sturm, Publiciana p. 385.
91 C. 4, 19, 12.
92 See the two previous chapters.
Since the actio Publiciana was based upon the fiction of usucapio, this remedy was necessarily also available to those who had acquired from a non-owner. It is an inherent feature of usucapio that the title of the predecessors is left out of consideration, so the actio Publiciana must surely have also protected from the beginning those who were only bonae fidei possessor. So far I agree with Wubbe. On the other hand, Sturm is also right when he emphasizes that the decisive motive of the introduction of the actio Publiciana was the informal conveyance, and not the difficulties of bringing evidence with the rei vindicatio.

(b) In my opinion the actio Publiciana was by no means a facilitated variant of the rei vindicatio. As could be seen regarding the law of evidence, there was no essential difference between the two actions, and there is hardly any need for such an explanation.

It can be clearly seen from the text of Gaius that the action was available to those who were not owners (nam quia non potest eam ex iure Quiritium suam esse intendere), and who can only sue with the help of the fiction of usucapio. This is corroborated by a fragment of Paulus:

D. 20, 1, 18: Si ab eo, qui Publiciana uti potuit, quia dominium non habuit, pignori accepi . . .

The supposed alternative application of the two actions is not attested by a single source. It is also worth mentioning that this alternativity, which has become an accepted statement without thinking, was in actual fact still a matter of dispute with the glossators. In addition, it may be inferred from a text of Gaius that the idea did not even exist in classical law: Ceterum, cum in rem actio duplex sit, aut enim per formulam petitoriam agitur, aut per sponsionem.

Apparently Gaius does not even consider the possibility that the owner might bring an actio Publiciana instead of a vindicatio. Of course there was no need of their alternative employment, because—as has been pointed out—the position of the plaintiff to a rei vindicatio was not at all at a disadvantage from the point of view of the law of evidence.

(c) Thus, in preclassical law, the protection of those who were in a position to usucapt, became a necessity, so that is why the actio Publiciana was introduced. In practice it was primarily available to those who had acquired without formalities, but sometimes it could also efficiently be brought by those who could not claim to have acquired from the owner. The action was applicable to both cases, for the interests of commerce required the protection of both groups. By the protection of informal transfer the praetor fostered the speed of commodity-turnover, while the protection in case of an acquisition from a non-owner, amounted to a cautious and limited recognition of the purchase in good faith as a valid title.

Wubbe, Publiciana p. 437.
Sturm, Publiciana p. 415.
Gai. 4, 36.
Cf. Feenstra, Publiciana p. 103. The older view of Azo and Accursius denied the alternativity.
Gai. 4, 91. Quoted supra in the text p. 152.
I. THE PROBLEM OF BONITARIAN OWNERSHIP

It has already been pointed out in the previous chapter that the question of *in bonis esse* (habere)\(^1\) has to be dealt with separately. This solution is dependent upon two considerations. First, it seems that the literature constantly exaggerates the relationship between the so-called bonitarian ownership and the *actio Publiciana*. Secondly, the prevailing view is, in my opinion, not entirely congruous with the sources, so the question of *in bonis esse* has to be examined thoroughly.

The dominant view could be summarized in a concise and to some extent simplified way thus: by the introduction of the *actio Publiciana* praetorian law protected those who had acquired a *res mancipi* without the formal acts of conveyance. Possessors to whom this action was available were considered bonitarian or praetorian owners until the completion of *usucapio*.\(^2\) As a consequence, the *actio Publiciana* is frequently defined by the literature as the action of the bonitarian owner.\(^3\)

2. This view can be met with in nearly all textbooks and manuals. One gets the impression that perhaps nobody takes very much heed of the sources, but transmits unhesitatingly to the following generations what he has been taught. This impression becomes a conviction after a close reading of the treatise of the great Italian scholar Bonfante on the notion of *in bonis esse*, where the pertinent sources are carefully examined.\(^4\) His analysis reveals that the expression *in bonis esse* was

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\(^1\) This chapter is a slightly modified version of my article "In bonis esse" und "nudum ius Quiritium", *Studi Volterra* II. (Milano, 1969) pp. 125 ff. The expressions *in bonis esse* and *in bonis habere* are alternatively used by the sources as synonyms. In the text, for brevity's sake, I use only the former expression.


\(^3\) Thus e.g. Arango-Ruiz, *Istituzioni* p. 220; Andreev p. 186; Girard-Senn pp. 375 ff; Marton p. 159; Osuchowski p. 303; Schwind, op. cit. in the previous note pp. 225 f; Stojčević, *loc. cit.* in the preceding note. The *actio Publiciana* is defined by several writers as the action of the bonitarian owner and the *bonae fidei possessor*. Cf. Kaser, *RPR* p. 368; Monier, *Manuel* pp. 490 ff; Nowitzky-Perettersky pp. 217 f. Kunkel and Schulz, however, define it as the action of the *usucapiens*. Cf. Kunkel, *RPR* pp. 142 f; Schulz, *Classical* pp. 375 ff. In a similar way also Weiss, *RPR* pp. 213 ff.


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not one of the technical terms of Roman legal language, having been used by
our sources in different meanings.\textsuperscript{5} It has been also shown by Bonfante that
\textit{in bonis esse} and the \textit{actio Publiciana} do not always correspond to each other.\textsuperscript{6}
Unfortunately he failed to weaken the prevailing view. His failure was possibly
due to his reluctance to be consistent when drawing the final conclusions from
his observations. In fact, in spite of everything, he concluded that the terminology
"praetorian ownership" can be applied to \textit{in bonis esse}.\textsuperscript{7} So the prevailing view
continued to flourish, and nobody paid any attention to the terminological in-
vestigations of Bonfante.

Some eight years ago Kaser also devoted an article to the question.\textsuperscript{8} As a prin-
ciple, he follows Bonfante — this is expressly told in his treatise\textsuperscript{9}— but he is appa-
rently less sceptical toward the prevailing view than his Italian predecessor was.
He concludes that \textit{in bonis esse} is justly called a bonitarian ownership.\textsuperscript{10}

Bonfante and Kaser have paved the way for a general revision of the theory
on bonitarian ownership. Their works call attention to the extreme inconsist-
ency of the Roman terminology, and to the need for an unprejudiced examination of
every pertinent text.\textsuperscript{11} Their results are not definitive, possibly because they were
to some extent still influenced by the dominant view. So both of them draw con-
cclusions from a mention of the \textit{actio Publiciana} in the sources about \textit{in bonis esse},\textsuperscript{12}
and by this involuntary concession made to the traditional theory their
conclusions are bound to suffer. In addition, Kaser is also inclined to leave texts
out of account which would contradict the theory of bonitarian ownership.\textsuperscript{13}

3. I have already referred to my doubts concerning the reliability of the pre-
vailing view. These can be resumed as follows:

(a) Those who support the dominant theory, which include to some extent
even Bonfante and Kaser, presume there is a close connection between the \textit{actio

\textsuperscript{5} "Da tutto ciò risulta, che \textit{in bonis} non era termine tecnico per designare l'istituto pretorio,
beni una frase, tanto dell'uso editale, quanto del linguaggio comune dei giuristi, espresse
in ordine alle cose l'esser proprietario. Questa frase veniva adoperata a significar l'\textit{in bonis}
pretorio, ma in guisa, che ciò riuscisse chiaro dalle relazioni del discorso." (Bonfante, \textit{Bonitario} p. 386.)

\textsuperscript{6} Bonfante, \textit{Bonitario} pp. 376 f.

\textsuperscript{7} Ibidem p. 387.

\textsuperscript{8} Kaser, \textit{In bonis esse}. The treatise is at the same time a review of the work of Wubbe pub-

\textsuperscript{9} Kaser, \textit{In bonis esse} p. 177.

\textsuperscript{10} "Es ist hiernach gerechtfertigt das \textit{in bonis esse} ein prätorisches, oder wenn man der von
Theophilus angeregten Terminologie folgen will, ein bonitarisches Eigentum zu nennen."
(Kaser, \textit{In bonis esse} p. 184).

\textsuperscript{11} Kaser, modestly, concludes his treatise with the following remark: "... wagen doch
auch wir nicht zu hoffen das letzte Wort gefunden zu haben" (\textit{In bonis esse} p. 220). This sounds
almost like a call to progress further in the direction indicated by him.

\textsuperscript{12} Thus e.g. Bonfante (\textit{Bonitario} p. 374) interprets Ulp. \textit{D. 6}, 2, 7, 7 as a case of \textit{in bonis esse},
though the fragment mentions only the \textit{actio Publiciana}. In the same way Kaser, \textit{In bonis esse} p. 181.

\textsuperscript{13} Thus e.g. Ulp. \textit{D. 50}, 16, 49—according to Kaser, \textit{In bonis esse} p. 184.—does not refer
to the subject. On this see \textit{infra} p. 169.

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Publiciana and in bonis esse, although our sources fail to justify this assumption.\(^{14}\)

It is unimaginable that literature, as far as I know, has not yet considered the important point that the sources, apart from a single fragment,\(^{15}\) never mention in bonis esse together with the actio Publiciana. Surprisingly enough, the expression in bonis esse does not appear in the title of the Digest on actio Publiciana,\(^{16}\) and Gaius, though he deals with both questions, carefully avoids linking them.\(^{17}\)

As a consequence, neither classical nor Justinianic law\(^{18}\) related in bonis esse and actio Publiciana as closely as contemporary romanists are wont to do. Obviously, if we want to get acquainted with Roman conceptions, we have to examine the use and the meaning of in bonis esse in itself, we must abandon the prejudices of modern research and not link it to the actio Publiciana.

(b) It is equally astonishing that literature has paid comparatively little attention to those sources which deal with the legal consequences of the separation of nudum ius Quiritium and in bonis esse.\(^{19}\) It is to be hoped that new results can be obtained from these neglected texts.

(c) Being convinced that the literature has overestimated the connection between in bonis esse and actio Publiciana, I suppose that the causes of the splitting up of quiritarian ownership and in bonis esse have not been sufficiently clarified. According to a widespread view, the term in bonis esse was limited to designating the position of those who were protected by the actio Publiciana. This view, however, seems to be unfounded.

4. These considerations demand a thorough examination of the problem. First of all, I shall try to ascertain the meaning of the expression in bonis esse in the different sources, and thus find an answer to the question whether the term “bonitarian ownership” is a suitable one for rendering the conceptions of

\(^{14}\) Cf. n. 53. The erroneously supposed connection between in bonis esse and actio Publiciana has been grossly exaggerated by Feenstra in his recently published article: “Duplex dominium”, Symbolae Martino David dedicatae I. (Leiden, 1968) pp. 55 ff. He comes to the peculiar conclusion that the enactment of Justinian (C. 7, 25, 1) did not abolish bonitarian ownership, because otherwise the actio Publiciana could not have subsisted in the Digest (p. 69). I hope that the previous and the present chapter will properly show the untenability of his view.

\(^{15}\) Ulp. D. 44, 4, 4, 32. Cited in n. 28.

\(^{16}\) Cf. D. 6, 2.

\(^{17}\) Gaius pays much attention in particular to the separation of dominium ex iure Quiritium and in bonis esse. Nonetheless, when dealing with the actio Publiciana, he fails to mention the in bonis esse. Moreover he emphasizes that the plaintiff to it is no owner. See Gai. 4, 36. This can be also seen from the title on Publiciana in the Digest. Justinian, anyway, was maintained.

\(^{18}\) Bonfante does not deal with the question, and Kaser devotes only a few lines to the point. (In bonis esse p. 183). Buckland mentions the peculiar provisions concerning the rights finds them inconceivable. Cf. W. W. Buckland, The Main Institutions of Roman Private Law (Cambridge, 1931) p. 97.
classical Roman law. As a second step, the texts in which the legal consequences of the splitting up of *modum ius Quiritium* and *in bonis esse* are treated have to be looked at, in order to be able to establish the causes of this division.

As with the *actio Publiciana*, the sources relating to *in bonis esse* have come down to us from classical and partly from post-classical age, but unfortunately we lack immediate texts of preclassical law. The available sources naturally contain the classical ideas. However, they also enable us to draw conclusions about preclassical law. Obviously, some degree of uncertainty has to be reckoned with but, as will be seen, the dangers of distorting preclassical law are rather small. In fact, if the result is a negative one, then this also holds good *a fortiori* concerning the less developed earlier period of Roman law.

II. "IN BONIS ESSE" IN THE SOURCES

1. First of all, the sources where the expression *in bonis esse* viz. *in bonis habere* can be found, have to be examined. Thus it will be possible to establish what meaning Romans attributed to the expression, and whether there ever existed a homogeneous notion of *in bonis esse*, as a term for a precisely defined legal position.

2. The pertinent texts in the Digest contain a rich variety of different meanings. The positions for which the expression *in bonis esse* is employed can be roughly divided into three groups:

   (a) In twenty instances *in bonis esse* (habere) is employed in a completely broad meaning, designating generally belonging to someone's property, also the claims included.

   This use of the expression is characteristically displayed by an Ulpianic text:

   Ulp. D. 50, 16, 49: ... *in bonis autem nostris computari sciemund est non solum, quae domini nostri sunt, sed et si bona fide a nobis possideantur vel superficiaria sint. Aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus; nam haec omnia in bonis esse videntur.*

   It is quite possible that the text quoted also contains interpolations. Nevertheless it lies beyond any doubt that, in spite of possible alterations of the text, the

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20 The terminology "bonitarian owner" is based upon a passage of the commentary upon the Institutions of Justinian attributed to Theophilus. See *Theoph. Paraphr.* 1, 5, 4: δ ὅπως ἐν τοῖς βουλτάκοις. The source, however, does not bear witness to the conceptions of preclassical and classical law. Justinian himself, fails to adopt this terminology. The dogmatic disposition of the eastern law-schools strove also in other respects to theoretical generalization, and thus deviated considerably from the views of classical lawyers.

21 Gai. D. 36, 1, 65 (63), pr; *Maec.* 35, 2, 30, 5; *Pap.* 35, 2, 11, 3; *Paul.* 21, 2, 41, 2; 31, 12, pr; 33, 2, 1; 31, 49, 3; 42, 5, 6, 2; *Scaev.* 20, 1, 34, 2; 35, 2, 95, 2; 36, 1, 80, 16; Ulp. 5, 4, 6, pr; 35, 2, 62, 1; 35, 2, 82; 37, 1, 1; 37, 6, 1, 11; 42, 8, 10, 9; 50, 12, 2, 2; 50, 16, 49; *Ven.* 42, 8, 8.

22 For supposed interpolations see *Ind. Itp.* volume III. pp. 583 f. According to Kaser, *In bonis esse* p. 184 the text does not bear upon the praetorian *in bonis esse*. Cf. n. 13. One
classical lawyer himself employed the expression in this wide meaning. This is confirmed by other fragments too, where a similar use of in bonis esse can be observed.

(b) In twenty-four fragments in bonis esse designates a right to a thing—including quiritarian ownership—without specifying it more closely.23 A good example for this is offered by Modestinus:

D. 41, 1, 52: Rem in bonis nostris habere intellegimus, quotiens possidentes exceptionem aut amittentes ad reciperrandam eam actionem habemus.

This definition embraces equally ownership, the right of pledge, but also usufruct or emphyteusis.24

The same meaning has to be attributed to the expression in two other fragments, where the quality of being withdrawn from the exercise of ownership of a thing is expressed by the words “nullius in bonis est.”25

(c) I have succeeded in finding only three texts in the Digest where the expression in bonis esse designates a legal situation protected or created by the praetor.26 Two fragments refer to the case of a ducito ex noxali causa iussu praetoris,27 the third one, however, points to the duality of formal right of ownership and actual ownerlike position.28

The clear confrontation of nudum ius Quiritium and in bonis esse is obviously lacking from the Digest, because—as is well-known—this duality was abolished must not, however, start from an a priori notion of in bonis esse, but one has to obtain the notion from the sources. It lies of course beyond any doubt that the quoted text is hardly reconcilable with the theory of bonitarian ownership.

23 Afr. D. 37, 6, 4; Cels. 50, 17, 190; Gai. 20, 1, 15, 1; 20, 4, 11, 3; Lab. 36, 4, 14; Marc. 20, 6, 8, 12; 34, 5, 18 (19), 1; Mod. 41, 1, 52; Paul. 5, 3, 32; 39, 2, 18, pr; 40, 12, 38, 2; 50, 1, 21, 4; Pap. 20, 1, 3, pr; Pomp. 21, 2, 16, 2; Tryph. 23, 3, 75; Ulp. 4, 2, 9, 1; 23, 3, 7, 3; 37, 7, 1, 9; 38, 2, 3, 20; 43, 32, 1, 5; 47, 2, 12, 2; 47, 4, 1, 10; 47, 8, 2, 22; Ven. 42, 8, 25, 4.

24 On this see Kaser, In bonis esse pp. 183 f. I do not think that the source would point to the actio Publiciana and the exceptio rei venditae et traditae, as its wording is quite general.

25 Gai. 1, 8, 1; Marc. D. 1, 8, 6, 2.

26 Cf. Bonfante, Bonitario p. 386. He, however, also considers Ulp. D. 4, 2, 9, 6 (Cf. n. 23) as belonging to this group. But the text shows that the expression in bonis esse embraces here every position entitling one to bring an in rem actio: Licet tamen in rem actionem dandum existimemus, quia res in bonis est eius, qui vim passus est, verum non sine ratione dictetur, si in quadruplum quis egerit, finiri in rem actionem vel contra. There is no hint at a situation specially protected by the praetor.

27 Paul. D. 2, 9, 2, 1 and 9, 4, 26, 6.

28 Ulp. D. 44, 4, 4, 32: Si a Tito fundum emeris qui Sempronii erat isque tibi traditus fuerit pretio soluto, deinde Titius Sempronius heres exitterit et eundem fundum Maevio vendiderit et tradiderit: Iulius ait aequi esse praetorem te tueri, quia et, si ipse Titius fundum a te pateret, exceptione in factum comparata vel doli mali summoveretur et, si ipse eum possideret et Publiciana pateres, adversus excipientem “si suis non esset” replicacione utereris, ac per hoc intellegatur eum fundum rursum vendidisse, quem in bonis non haberet.

Characteristically the expression in bonis esse is adopted in a negative fashion, i.e. we are not told that the land belonged to the property of the buyer, but, on the contrary, we learn of bonitarian ownership. Cf. also n. 15.
by an enactment of the emperor Justinian. Characteristically enough the title and the text of the enactment speaks of the abolishment of *nuďum ius Quiritium* instead of that of *in bonis esse*.

So the fragments of the Digest confirm the view of Bonfante. It can be seen that the expression *in bonis esse* could not be counted among the technical terms of classical legal language. This can already be safely stated on the basis of the Digest, for, as far as I know, nobody has yet suggested that all the fragments examined are interpolated from this point of view. As a consequence, we may conclude that classical lawyers adopted the term in various meanings.

3. But we also have to consider the texts, particularly the Institutes of Gaius, which have not been revised by the commission of Justinian.

(a) Gaius himself uses the word in a wide sense, because in the Institutes too the expression “*nullius in bonis est*” is used for designating things which are withdrawn from the exercise of ownership.

(b) The situation of the *bonorum possessor* and the *bonorum empor* is also included in the notion of *in bonis esse* with Gaius.

(c) Finally, Gaius also applies the expression to the quiritarian owner, if the latter is really in the position to exercise the rights of an owner. So, e.g.: ... *semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse*.

As can be seen, the expression lacks a precise meaning in the Institutes of Gaius too, and it fails to designate a “praetorian ownership” as distinct from civilian ownership. When he wants to designate the position of a quiritarian owner, Gaius unhesitatingly uses the words *in bonis esse*, and the expression *nullius in bonis est* also includes civilian ownership, of course in a negative fashion. As in some fragments of the Digest, *in bonis esse* also denotes a position which was protected by the praetor, but without further explanation it does not mean any more than the belonging of something to someone’s property.

4. Gaius and other pre-Justinianic sources, however, are also acquainted with instances where *dominium ex iure Quiritium* and *in bonis esse* are separated.

It is worth while quoting the much discussed text of Gaius, because it was frequently used as an argument on behalf of the theory of the supposed bonitarian ownership:

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29 C. 7, 25, 1: *De nudo iure Quiritium tollendo.*
31 Cf. Gai. 1, 35; 1, 54; 1, 167; 2, 9–11; 2, 40–41; 2, 88; 2, 222; 3, 80; Ulp. 1, 16; 19, 20; 22, 8; *Fr. Doss.* 9.
32 Gai. 2, 9 and 2, 11.
33 Gai. 3, 80: *Neque autem bonorum possessorum neque bonorum emptorum res pleno iure sunt, sed in bonis efficiuntur.*
34 Gai. 2, 41. In the same way also: 1, 54. The important circumstance that the *in bonis esse* did not cease after the thing had been usucapted, has been already observed by Wubbe.
35 Cf. n. 31.
Gai. 2, 40–41: Sequitur ut admoeneamus apud peregrinos quidem unum esse dominium; nam aut dominus quisque est aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebat: aut enim ex iure Quiritium unusquisque dominus erat aut non intellegebatur dominus. Sed postea divisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. Nam si tibi rem mancipi neque mancipavero neque in iure cesserro, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium vero mea permanebit, donec tu eam possidendo usucapias: semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse, ac si ea mancipata vel in iure cessa esset.

Unfortunately the expressions divisionem accepit dominium and duplex dominium are likely to arouse misunderstandings. Misinterpretations can be found e.g. in the works of Ciapessoni and Feenstra who think that Gaius is writing about two types of ownership. A close reading of the text quoted, however, leads us to reject such interpretations, and to adhere to the view of Bonfante and La Rosa. According to them, duplex dominium does not mean two kinds of ownership, but the splitting (divisio) of ownership into two. This view is also corroborated by the fact that in bonis esse is never termed dominium by Gaius. It must be mentioned as a decisive argument that after usucapio had been terminated, in bonis esse did not cease. It was not transformed into quiritarian ownership, but the usucapiens became a quiritarian owner who had the thing at the same time in bonis.

The splitting into two of quiritarian ownership and the actual patrimonial situation (in bonis esse) took place not only if a res mancipi had been transferred by delivery, though this must have been the most important case. Apart from the already mentioned instances this situation could also arise as a consequence of a definite assignment of possession by the praetor.

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36 Gai. 1, 54.
37 Ciapessoni, "Duplex dominium", Studi su Gaio (Pavia, 1934) pp. 91 ff. Contra: F. La Rosa, "In tema di 'duplex dominium'", Annali Catania 3 (1949). The view of Ciapessoni is also sustained by Feenstra, op. cit. in n. 14. pp. 62 ff. Quite inconceivably he also extends the notion of duplex dominium to those who had acquired from a non-owner. The text of Gaius unambiguously speaks only of the acquisition of a res mancipi from the owner by delivery.
38 Bonfante, Bonitario p. 378; La Rosa, op. cit. in n. 37 pp. 3 ff.
39 It is true that in Gai. 1, 54 we find the expression in potestate domini, but the word dominus does not mean "owner" in this case. It denotes "master" with respect to the slave. Cf. La Rosa, op. cit. in n. 37. p. 2.
40 On this see n. 34 and infra in the text.
41 Bonfante and Kaser (Bonitario p. 374 and In bonis esse p. 182.) underrate the importance of this case. Though I admit that the transfer by delivery was not the only case, it is likely to have been the most typical one.
42 Cf. nn. 27–28.
43 Bonfante, Bonitario p. 374 has made a list of these cases, although objections can be raised about it: (a) After paying the litis aestimatio quiritarian ownership and the actual situation became probably separated, in so far I adhere to the view of Bonfante. (b) However it is doubtful whether the same situation arose, with an adiudicatio in a lawsuit imperio continens. The pertinent source (Ulp. D. 6, 2, 7, pr) fails to mention in bonis esse. (c) Although
If the given thing does not actually belong to the property of the quiritarian owner, if the rights of the owner are exercised by another person, then his ownership is termed *nudum ius Quiritium* by classical sources.\(^44\)

5. The sources show clearly that the expression *in bonis esse* was not one of the technical terms of Roman legal language. It was used both in a narrower and wider meaning, without denoting a precisely defined legal position. The expression simply meant belonging to somebody's property, and nothing more.

This conclusion obviously calls for the abandonment of the prejudice about the existence of a technical and a non-technical *in bonis esse*. Such a monster would not be in accordance with the strict classical legal language, and in addition, no expression can be regarded as a technical term if it is applied in the most various meanings. In the case where quiritarian ownership and the actual patrimonial situation were separated, *in bonis esse* also means this and not praetorian ownership. If it had meant praetorian ownership, at least in this instance, our sources would confront it with the *dominium ex iure Quiritium*. The texts, however, fail to do so, and apply the expression *in bonis esse* unhesitatingly to the quiritarian owner as well. Thus there did not exist an alternative between quiritarian and bonitarian ownership, but between quiritarian owners who could exercise the rights of an owner, and between quiritarian owners who were not entitled to do so. Instead of *in bonis esse*, it is rather the expression *nudum ius Quiritium* that seems to have been a technical term, because the latter clearly and unambiguously denoted a formal right of ownership, where the object of it actually already belonged to the property of another person.\(^45\)

This is why I think that the designation "bonitarian ownership" is wrong, for Roman law, at least until the age of Justinian, was not acquainted with this notion. In addition, I am inclined to deny even the existence of a corresponding legal institution. Its absence is shown by the lack of a uniform legal remedy, which could have been applied to all cases of the supposed praetorian ownership.\(^46\)

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\(^{44}\) a missio in possessionem could lead to usucapio (Cf. Paul. D. 39, 2, 5, pr.), the expression *in bonis esse* cannot be found in the text. (d) In my opinion, it is not correct to interpret the cutting of wood on alien land with the permission of the praetor as a case of the praetorian *in bonis esse*. There is no reference to it in the relevant source. Cf. Ulp. D. 43, 27, 1, pr. (e) It can likewise be objected that Bonfante considers the restitutio fideicommissaria based upon the *SC. Trebellianum* as a case of the praetorian *in bonis esse*. Gaius uses the expression in fact quite vaguely, without indicating a special situation protected by the praetor: D. 36, 1, 65 (63), pr: Facta in fideicommissiariurn restitutione omnes res in bonis fiunt eius, cui restituta est hereditas, est nondo nactus fuerit possessionem. Characteristically enough, it was not even necessary to acquire possession. (f) Finally the additio bonorum libertatum servandum causa was only a case of the bonorum possessio CF. Ulp. D. 40, 5, 4, 21.

\(^{45}\) Thus Gai. 1, 54; 3, 166; C. 7, 25, 1. In Fr. Dos, 9 the words tantum ex iure Quiritium are used. The expression *nudum ius Quiritium* is not attested for the republican age. However, I am inclined to suppose that it had come into existence by the first century B.C. At any rate, even if these words were of later origin, the rules concerning it are surely creations of pre-classical law.

\(^{46}\) See nn. 29. and 44.

\(^{46}\) Cf. nn. 14 and 53.
This conclusion is also corroborated by the fact that so far nobody has succeeded in giving an adequate definition of “bonitarian ownership”. The cautious definition of Kaser can also be found fault with “it embraces those cases which were ... protected by the praetor against anybody”. It is sufficient to mention that the bonorum possessor sine re was not protected against anybody, while the quiritarian owner—i.e., the thing belonged actually to his property (in bonis esse)—had no praetorian, but an action iuris civilis.

The theory of bonitarian ownership can be accepted only to the extent that, without any doubt, there used to be cases when the praetor denied protection to the quiritarian owner, and gave it to another person. These cases, however, have not been united under a general conception. The vague notion in bonis esse, was also used here but occasionally other denominations were employed, too. 48

6. It seems that Roman lawyers consistently used the expression in bonis esse in cases when they wanted to express the belonging of a thing or a claim to a given patrimony, without specifying more closely the legal title.

As is well-known, classical lawyers always strove to use terms like dominium, usus fructus, bonae fidei possessor etc. in their precise legal meaning. 49 It happened, however, that a collective noun, embracing several titles, was required. In such cases the expression in bonis esse was used. So, in order to safeguard the precise terminology, classical lawyers occasionally employed this vague and unprecise expression. This is very characteristically illustrated by a fragment of Gaius:

D. 20, 1, 15, 1: Quod dicitur creditoris probare debere cum conveniabat, rem in bonis debitoris fuisse ... 

In the case of a real security, the debtor, who had bestowed a pignus, was not necessarily the owner. He could have been himself creditor to a real security, or possibly a bonae fidei possessor. For this reason Gaius does not use the words rem debitoris fuisse, because this expression would have excluded every other possibility apart from ownership. Instead, he used the expression in bonis esse, which embraced all possible legal titles. 50

A similar situation arose if quiritarian ownership and the actual patrimonial position were split into two, since the actual holder could not have been called owner. His position could best be expressed by the vague in bonis esse, a term

47 "... es schliesst alle Fälle ein, die der Prätor mit dinglichem Schutz gegen jedermann ... schützt." (Kaser, In bonis esse p. 184).
48 Thus e.g. bonorum possessor, bonorum emptor.
49 On this especially see Levy, Vulgar Law pp. 19 ff; 61. etc.
50 From another point of view, Wubbe basically came to the same conclusion (Cf. Kaser, In bonis esse p. 198). Kaser, however, considers, in conformity with the traditional view, that in bonis esse has to be understood as praetorian ownership (Ibidem pp. 200 f.). This view is unacceptable, because — as Kaser himself admits — the expression embraces quiritarian ownership here as well. So Gaius is likely to have used the expression because he did not want or could not define the legal title of the debtor to the pignus more closely.
51 Cf. n. 39. The terminology of Theophilus, as has been already pointed out, does not bear witness to the conceptions of classical law. H. Erman, “Beiträge zur Publiciana”, SZ 11 (1890) pp. 212 ff. wanted to show by some fragments of the Digest that the in bonis esse
which embraced equally those who had acquired a *res mancipi* by *traditio*, the *bonorum possessor*, or those who in a lawsuit on property had paid the *litis aesti-

III. THE SPLITTING OF “IN BONIS ESSE” AND “NUDUM IUS QUIRITIUM”

1. We have already dealt with the cases where quiritarian ownership and the actual patrimonial situation (*in bonis esse*) were separated, and the owner had only a legal title, without being entitled to actual enjoyment.

To the question what this peculiar duality of ownership and actual patrimonial situation in Roman law has to be ascribed to, the following answer is usually given. By means of the *actio Publiciana* and the *exceptio rei venditae et traditae* the praetor protected those who had acquired a *res mancipi* by simple delivery against the owner, too, and thus made them bonitarian owners.\(^52\) So, according to the prevailing view, the splitting of ownership into *nudum ius* and *in bonis esse* took place only because the situation of those protected by *actio Publiciana* had to be termed somehow.

2. This explanation is a hardly satisfactory one in my opinion.

(a) *In bonis esse* was not the technical term for a special situation protected by the praetor, so the demand for a term was not satisfied by it.

(b) Legal situations which were called *in bonis esse*, were protected by different legal means, not only by the *actio Publiciana*.\(^53\)

(c) As has been shown in the previous chapter,\(^54\) the *actio Publiciana* was available also to those who had acquired the thing from a non-owner, though their position was not identical with the supposed “bonitarian ownership”.

(d) I have already pointed out\(^55\) that the sources fail to establish any connection between *actio Publiciana* and *in bonis esse*.

\(^{52}\) See the literature referred to in nn. 2—3. This idea, as an obvious one, is frequently implied in a tacit way, without being expressly told.

\(^{53}\) If the plaintiff was at the same time quiritarian owner, the *rei vindicatio* was available to him. The *bonorum possessor* was protected by the *interdictum quorum bonorum* (Gai. 4, 144), the *bonorum empor* by the *actio Rutiliana* (Gai. 4, 35). If there were any claims, the corresponding in *personam actio* could be brought. As has been shown, *in bonis esse* was a broad notion, embracing various legal titles. The field of application of the *actio Publiciana*, however, was considerably narrower.

\(^{54}\) See supra p. 159.

\(^{55}\) See supra p. 168. Cf. also nn. 15—17.
In bonis esse, of course, was such a vague and broad notion that it would have been foolish to declare that the actio Publiciana served its protection. Roman lawyers, anyway, never stated anything of the kind.

It can be seen that the duality of nudum ius Quiritium and in bonis esse cannot simply be explained by the introduction of the actio Publiciana. I think that the causes of this phenomenon lie deeper.

3. If one casts but a cursory glance at the texts where the division of ownership is dealt with, it becomes at once apparent that practically all of them concern ownership on slaves. Otherwise kinds of things are never mentioned, and even the word res is only used when the notion of the division is expounded and not the legal consequences of it. There only exists a single text where Gaius, with regard to legacies, speaks about res in general instead of slaves. Astonishingly enough, the literature, as far as I know, has not yet paid any attention to this peculiar fact.

The legal consequences of a splitting of dominium ex iure Quiritium and in bonis esse were—according to the sources—the following:

(a) The potestas on the slave is always conferred on those who have him in bonis. The nudum ius Quiritium does not entitle one to potestas:

Gai. 1, 54: \ldots ita demum servum in potestate domini esse dicemus, si in bonis eius sit, etiam si simul ex iure Quiritium eiusdem non sit: nam qui nudum ius Quiritium in servo habet, is potestatem habere non intellegitur.

(b) As a consequence, the slave’s acquisitions are always due to the person to whose property he actually belongs:

Gai. 2, 88: Dum tamen sciamus: si alterius in bonis sit servus, alterius ex iure Quiritium, ex omnibus causis ei soli per eum adquiritur, culius in bonis est.

It is also emphasized by other sources that the slave does not acquire anything for the person who has merely a nudum ius Quiritium.

Gai. 3, 166: Sed, qui nudum ius Quiritium in servo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur, quam usufructuarios et bona fidei possessor. Nam placet ex nulla causa ei acquiri posse \ldots .

(c) The rules concerning the manumission of the slaves were not as simple. As a principle, the slave could be manumitted by the person to whose property he actually belonged:

56 Gai. 1, 35; 1, 54; 1, 167; 2, 88; Ulp. 1, 16; 19, 20; 22, 8; Fr. Dos. 9. Also in C. 7, 25, I the slave is specially mentioned: sed sit plenissimus et legitimus quique dominus servit sui sive alienarum rerum ad se pertinentium.

57 So: Gai. 2, 40–41 and 3, 80.

58 Gai. 2, 222: Secundum hanc igitur opinionem, si ea res ex iure Quiritium defuncti fuerit, potest a legatario vindicari \ldots quod si in bonis tantum testatoris fuerit, extraneo quidem ex senatus consulta utile erit legatum, heredi vero familiae hercisciunae iudicis officio praestabatur\ldots . It is worth mentioning that in bonis esse also fails here to involve actio Publiciana.

59 In the same way: Ulp. 19, 20: Si servus alterius in bonis, alterius ex iure Quiritium sit, ex omnibus causis adquirit ei, culius in bonis est.

Fr. Dos. 9: Sed et illud observandum, ut is qui manumittitur, in bonis manumittentis sit...  

If the manumittens was at the same time also the quiritanian owner, the former slave acquired the status of a Roman citizen. Otherwise he became only a Latinus: Gai. 1, 35: Ergo si servus in bonis tuis, ex iure Quiritium meus erit, Latinus quidem a te solo fieri potest... Quod si cutus et in bonis et ex iure Quiritium sit, manumissus ab eodem scilicet et Latinus fieri potest et ius Quiritium consequi...

(d) The bonorum possessio on the inheritance of the manumitted slave was likewise the right of the person who formerly owned the slave in bonis.  
(e) To those who had but a nudum ius Quiritium, only two rather insignificant and formal rights were left: to bestow Roman citizenship upon the already manumitted slave by iteratio, and the right to exercise the tutela over the manumitted female slave.

4. It can be seen that the rights of the slaveholder were bestowed upon the person who had the slave in bonis, whether he was the quiritanian owner or not. He had potestas; the slave’s acquisitions belonged to him; he was entitled to manumit the slave; and he could also claim the bonorum possessio if the manumitted slave died.

If he lacked the title of a quiritanian owner, this meant only that the slave manumitted by him did not become a Roman citizen, and as a consequence, the slave manumitted in this way could not be appointed an heir.

Nudum ius Quiritium, on the other hand, contained only two rights of a moderate economic importance.

5. The analysed texts, though they are of classical and even of postclassical origin, give an unambiguous answer to the question why in the course of the last centuries of the Roman Republic, the division of ownership into nudum ius Quiritium and in bonis esse was introduced. The solution lies in the fact that nearly all pertinent texts concern ownership on slaves.

The progress of commodity-turnover and of slave-holding in the last two centuries B.C. resulted—as has been pointed out—in the spread of informal conveyance, among other things. The praetor reacted to this—probably in the first century B.C. by the introduction of the actio Publiciana. As a consequence,

61 Gai. 1, 167: unde si ancilla ex iure Quiritium tua sit, in bonis mea, a me quidem solo non etiam a te manumissa Latina fieri potest...
62 Cf. Ulp. 1, 16: Qui tantum in bonis, non etiam ex iure Quiritium servum habet, manumittendo Latinum facit. Cf. n. 66.
63 Gai. 1, 135: Ergo si servus in bonis tuis, ex iure Quiritium meus erit... bonorum autem quae cum is morietur, reliquert, tibi possessio datur, quocumque ius Quiritium fuerit consecutus. Cf. also Gai. 1, 167 and n. 61.
64 Gai. 1, 35.
65 Gai. 1, 167.
66 Ulp. 22, 8.
68 See supra pp. 138 f.
69 See supra p. 156.
if a *res mancipi* was acquired from the owner by simple delivery, the buyer enjoyed a paramount procedural protection. He could also recover the thing from the owner by means of the *actio Publiciana* and a *replication*, and if sued by the owner, he could paralyse the *vindicatio* by the *exceptio rei venditae et traditae*. Being protected also against third persons, his legal position was seemingly firm.

The procedural remedies indeed proved to be efficient if the different *res mancipi* were in question. If, however, the object of transfer was a slave, grave problems are likely to have arisen. Though the acquirer of the slave had all the necessary procedural means at his disposal if the delivery had been carried out by the owner, it soon turned out that these remedies failed to furnish sufficient security. As a consequence of the peculiarities of slave-property, in fact, the transferor, having retained quiritarian ownership, was in the position to deprive the buyer of the slave, despite the fact that the buyer enjoyed procedural protection. He could not be prevented from manusmitting the slave, and he could raise a claim to the property which had been acquired by the slave.

Thus, the *actio Publiciana* and the *exceptio rei venditae et traditae* failed to give adequate security to the acquirer of a slave. As soon as this was realized by pre-classical law, the quiritarian owner was deprived of the rights of a slave-holder. According to the new principle, the rights of a slave-holder were granted only to those who actually had the slave *in bonis*. The quiritarian owner, who had alienated the slave by *traditio*, or who had been definitely deprived of the slave by the praetor, had only a *nudum ius*, but no *potestas*. The protection of informal conveyance in the case of slaves, required beyond the procedural remedies, further measures too, namely special provisions concerning the rights of a slave-holder, and this was realized by the creation of the notion *nudum ius Quiritium*.

The separation of quiritarian ownership and *in bonis esse* did not remain confined to slaves. As can be seen from our sources, it was also extended later on to other things, although the slave continued to be the most important case.

IV. CONCLUSIONS

1. The result is that the expression *in bonis esse* was not a technical term, and did not denote “bonitarian ownership”. *In bonis esse* meant simply the belonging of a thing or a claim to a given property. The expression *nudum ius Quiritium*, however, had a precise meaning. It denoted a void title of ownership, deprived of the right to actual enjoyment.

So the prevailing view that pre-classical law created two different types of ownership, quiritarian and bonitarian ownership, is not confirmed by the sources. Both

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71 So e.g. Gai. 2, 222 and C. 7, 25, 1.
in preclassical and classical law there was only one right of ownership, apart from the *dominium ex iure gentium*. A bonitarian ownership did not exist.

Nevertheless there were instances when the praetor lent protection not to the *dominus ex iure Quiritium* but to the person who had the thing *in bonis*. This, however, was no more than a recognition of the actual patrimonial situation, and did not amount to praetorian ownership. These cases were so diverse that there was not even a uniform procedural protection.

Instead of the distinction between quiritarian and bonitarian ownership, Romans distinguished rather—within the quiritarian ownership—between *plenum ius* and *nudum ius*.

Finally, we came to the conclusion that the distinction between *nudum ius Quiritium* and *in bonis esse* had been introduced in order to protect the acquirer of a slave against the intrusions of the quiritarian owner.

2. The splitting into two of ownership, into a formal title and actual ownerlike position, was the inevitable consequence of the fact that the preclassical lawyers—and in this respect they were followed by their classical successors—failed to create new forms of conveyance which would have met the demands of the changed conditions. Instead they stuck obstinately to the already obsolete *mancipatio* and *in iure cessio*.\(^{72}\)

This solution cannot be counted among the splendid creations of preclassical Roman law. It was rather an emergency measure, a compromise between the demands of commodity-turnover and the sometimes inconceivably obstinate conservatism of Roman law. Classical lawyers possibly accepted this not altogether fortunate solution because the division of ownership meant only a transitory stage. As a consequence of the comparatively short period of *usucapio*, the *nudum ius* automatically ceased within one or two years and the title of ownership and the actual situation were united again.

This practical but theoretically imperfect solution misled later lawyers, who were inclined to theorize, and thus the contrast between a void legal title and an actual patrimonial situation was interpreted as quiritarian and bonitarian ownership.

\(^{72}\) On this *supra* pp. 138 ff.