RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
June 8-9, 2023

DOI:10.5281/zenodo.8132811

Civil Modes of Acquiring Property in Roman Private Law

Ionuţ Ciutacu

Lecturer PhD, "Dimitrie Cantemir", Christian University of Bucharest, Faculty of Juridical and Administrative Sciences, Bucharest, Romania, ionutciutacu@yahoo.com

ABSTRACT: *Ius civile* regulates legal relations between Roman citizens. The dominium mentality of the Romans led them to pay more attention to the legal relations specific to the possession of goods. During ancient times, when the Romans were a people of shepherds and farmers, the norms of the old Civil Law established the legal institution of *mancipatio*, which applied only to *res mancipi*. The development of society determined the appearance of other categories of goods, the possession of which could no longer be obtained with the help of *mancipatio*. In order to update the legal regime of acquiring property and relate it to reality, the Roman developed additional civil law procedures that contributed to the improvement of private property and to the crystallization of the concept of patrimony.

KEYWORDS: *mancipatio, in iure cessio, usucapio, adiudicatio, lex*

Introduction

Since ancient times, the Romans had the representation of the idea of dominion over goods, which they put into practice in the form of property rights. But for a long time, they did not see property as a subjective right, as their contemporaries do, but as a power. This fact was due to the warrior mentality of the Romans, who considered themselves descendants of the god Mars, as well as the way the family was organized and the duties exercised by the *pater familias*.

The legal institution of *pater familias* was created during the period of patriarchy, when the man was involved in carrying out the most important activities in the family and in society. For these reasons, the head of the Roman family symbolized the god of war and exercised power over persons and goods. The power exercised over goods was designated by the term *dominium*, which has its origin in the Latin *dominus*, which translates as master.

The evolution of legal ideas has made jurists understand that the control exercised over assets is permanent and that it can be exercised by successive persons. From this moment, the question of creating ways to acquire the right of ownership arose. But the concept of acquiring property contradicted the mentality of the ancient Romans and raised serious practical problems, because power was not transmitted, but created.

The mentioned problems were solved by consecrating some legal procedures that had the effect of acquiring the property right in the old Civil Law. Since legal relationships within Rome could only take place between Roman citizens, the first forms of acquiring the right to property were established by the rules of *ius civile*. Even the jurisconsults from the classical era mention them in their works. This is how Gaius proceeds, who, through his Institutes, conveys to us that *"nam mancipationis et in iure cessionis et usucapionis ius proprium est ciuium Romanorum"* (Girard 1890, 199). To these ways of acquiring property, other Roman jurists add *adiudicatio* and *lex*. Initially, the ways of acquiring property rights were qualified as ways of transmitting things. This concept was used until the end of the Classical Era, when the Romans began to use the concept of acquiring property (Axente 2022, 219).

Mancipatio

It was an act of Civil Law that initially had the effect of acquiring property-power. In very ancient times, *mancipatio* was used to acquire property over *res mancipi.* The ancient Romans, who were shepherds and farmers, included in this category only slaves and working cattle,

because they could hold them by hand. Gaius confirms this and tells us that *adeo quidem, ut eum, qui mancipio accipit, adprehendere id ipsum, quod ei mancipio datur, necesse sit; unde etiam mancipatio dicitur, quia manu res capitur* (Poste 1904, 75). Initially, *res soli* did not fall within the scope of the right of quiritary property, because the land was the object of collective property and could not be held by hand. Against the backdrop of the transition from gentile to state organization, the effects of the first social division of labor became permanent, and the land became an object of quiritary property and entered the scope of *mancipatio*. This was also noted by the jurisconsult Gaius, who tells us that *"eo modo et seruiles et liberae personae mancipantur; animalia quoque, quae mancipi sunt, quo in numero habentur boues, equi, muli, asini; item praedia tam urbana quam rustica, quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari"* (Girard 1890, 182).

The old Roman Civil Law had an exclusive character. For this reason, *mancipatio* was accessible only to citizens. The *veteres* Latins also had access to it, because they too enjoyed *ius commercii* (the right to conclude legal acts in accordance with the norms of Roman Civil Law) (Hamangiu and Nicolau 2002, 351).

In ancient times, *mancipatio* was the formalistic legal act through which the legal operation of sale was carried out (Garrido 1996, 199-200). It was performed by performing a ritual, which also involved the recitation of solemn formulas (Correa 2008, 165). Gaius describes to us, in a few words, the way mancipatio was carried out. In the opinion of the great jurisconsult, *"est autem mancipatio, ut supra quoque diximus, imaginaria quaedam uenditio: quod et ipsum ius proprium ciuium Romanorum est; eaque res ita agitur: adhibitis non minus quam quinque testibus ciuibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is, qui mancipio accipit, rem tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO ISQVE MIHI EMPTVS ESTO HOC AERE AENEAQVE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco"* (Poste 1904, 74-75).

Gaius completes the information in this text with another statement, according to which *"ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur; eorumque nummorum uis et potestas non in numero erat, sed in pondere"* (Girard 1890, 182). This was due to the fact that in the very ancient era, the price was not weighed, but counted, proof that the ancient ace represented the equivalent of 327 grams of copper. The development of legal ideas and the evolution of legal ideas determined the replacement of weighing the precious metal with touching the balance with a copper bar (Tuori 2008, 503). The final gesture symbolizes the payment of the price and the transfer of ownership.

The transition to the market economy led the Romans to create currency in the modern sense of the word. From this moment, weighing the precious metal was no longer necessary; however, the Romans, who were deeply conservative, did not modify the ancient ritual of mancipatio, proof that they kept the gesture of striking the balance with a coin. The new realities produced certain difficulties, because it happened that the *libripens* did not pay the price, but fulfilled the formality of reaching the balance with the currency. To eliminate this inconvenience, the Romans made reaching the balance with the brass bar conditional on paying the price. *Mancipatio* was used until the post-classical era.

Usucapio

It is another way of acquiring property established by the rules of Civil Law (Axente 2020, 241). According to the jurisconsult Modestin, *usucapio est adiectio dominii per continuationem possessionis temporis lege definiti* (Cătuneanu 1927, 230).

She operated under two assumptions. The first hypothesis is mentioned by the Institutes of Emperor Justinian, which state that *"iure civili constitutum fuerat, ut, qui bona fide ab eo qui dominus non erat, cum crediderit eum dominum esse, rem emerit vel ex donatione aliave qua iusta causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum*

in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur" (Hanga 2002, 85-86). The second hypothesis has its origin in a practice born towards the end of the Republic, when the buyer acquired *res mancipi* by *traditio*. This situation was presented to us through a text from the Institutes of Gaius, according to which *"nam si tibi rem mancipi neque mancipauero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium uero mea permanebit, donec tu eam possidendo usucapias"* (Girard 1890, 197).

Simple *possessio* was not enough for *usucapio* to produce its effects. The Roman legal texts also emphasized the need to fulfill four more cumulative conditions: the existence of something susceptible to *usucapio*, good faith, *iusta causa* and the term.

Possessio was dominion that had to be exercised for oneself. This dominion of the work had to be effective, uninterrupted and had to last for the entire period of time necessary for the birth of the *usucapio*. *Possessio* could be interrupted *naturaliter* by *usurpatio*, that is, by the loss of material possession, or *civiliter*, by filing a claim action by the non-possessor owner against the non-proprietary possessor.

The *usucapio* requires the fulfillment of certain conditions by the *res habilis.* First of all, it had to be a Roman thing (Hamangiu and Nicolau 2002, 372), because *usucapio* was an act of Civil Law. Among others, *res furtivae* and *res extrapatrimonium* were not considered *res habilis.* These things result expressly from the Institutes of Emperor Justinian, according to which *"sed aliquando etiamsi maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit, veluti si quis liberum hominem vel rem sacram vel religiosam vel servum fugitivum possideat. Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt: nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem, vi possessarum lex Iulia et Plautia"* (Hanga 2002, 86-87).

Good faith consists in the usucapant's conviction that the person who handed over the property was *verus dominus.* This condition was fulfilled if good faith existed at the time of taking possession of the property. This follows expressly from a text in the Institutes of Gaius, according to which *"ceterum etiam earum rerum usucapio nobis conpetit, quae non a domino nobis traditae fuerint, siue mancipi sint eae res siue nec mancipi, si modo eas bona fide acceperimus, cum crederemus eum, qui traderet, dominum esse"* (Poste 1904, 147).

Iusta causa was the legal act or fact that was the basis for taking possession of the asset.

Usucapio also implied the passage of a term, which represented the time interval in which the possession had to be exercised without interruption. The Romans were aware of the effects generated by the passage of time. They transposed them into the legal field for two reasons: to ensure the security of the legal circuit, but also to extend the application of a fundamental legal principle in this hypothesis: *proprietas ad tempus constitui non potest*. In this way, since the time of the Law of the Twelve Tables (Cuciureanu, 2021, 38), it has been highlighted that possession represents the manifestation of the right of ownership. This explains the fact that it also consolidates with the passage of time and can turn into a real property. Certainly, this argument led the jurisconsult Gaius to state that *usucapio autem mobilium quidem rerum anno completur, fundi uero et aedium biennio; et ita lege XII tabularum cautum est* (Girard 1890, 197).

In iure cessio

It consists in the renunciation made before the magistrate (Robaye 2005, 148). This legal procedure was created to fill the gaps in the legal institution of *mancipatio*, which had the effect of acquiring the right of ownership only over *res mancipi. Quirites* could not acquire by *mancipatio res nec mancipi* and *res incorporales.* The problem had to be solved by a formalistic legal procedure, specific to *ius civile,* which could be successfully used in order to acquire these

assets. The most suitable solution was to resort to the graceful jurisdiction. It was the attribute of certain magistrates, who could organize fictitious trials (Garrido 1996, 203-204) in order to acquire one of the powers that the *pater familias* exercised over the assets and persons of his family. Since *dominium* was the power that the *pater* exercised over property other than slaves, citizens could successfully use this legal procedure to acquire property. Moreover, in *iure cessio* it was easy to acquire *res nec mancipi* and *res incorporales,* since the gracious jurisdiction did not involve conflicting interests, which would attract the pronouncement of a sentence of conviction or acquittal and remove the legal act from its finality*; in iure cessio* assumed converging interests and the competition of the magistrate for their realization.

For the organization of the fictitious trial, the parties had to appear every day before the praetor or the province governor. The jurisconsult Gaius describes how this legal act is carried out through the Institutes: *"in iure cessio autem hoc modo fit: apud magistratum populi Romani ueluti praetorem, is cui res in iure ceditur, rem tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO; deinde postquam hic uindicauerit, praetor interrogat eum, qui cedit, an contra uindicet; quo negante aut tacente tunc ei, qui uindicauerit, eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum"* (Poste 1904, 134).

Adiudicatio

It is a legal procedure accessible to citizens, which complements the acquisition of property through court. It is used in the case of the division of one or more assets between the co-owners.

For this purpose, the judicial magistrate drew up a formula by which he empowered the judge to pronounce a sentence in order to terminate the co-ownership. Gaius tells us that *"adjudicatio est ea pars formulae qua permittitur iudici rem alicui ex litigatoribus adjudicare: velut si inter coheredes familiae erciscundae agatur, aut inter socios communi dividundo, aut inter vicinos finium regundorum"* (Girard 1890, 267). It follows from this that the *adiudicatio* was inserted into the formula, which was used in three types of processes: the division of a succession between heirs, the division of an asset between co-owners and delimitation. In the first two hypotheses, the division was absolutely necessary; when it was not the good that could not be divided, the judge assigned it to one of the co-owners, who was obliged to pay the other a *sulta*. In the case of a judgment process, Justinian conveys to us, through the Institutes, that *"dispicere debet iudex, an necessaria sit adiudicatio. Quae sane uno casu necessaria est, si evidentioribus finibus distingui agros commodius sit quam olim fuissent distincti; nam tunc necesse est ex alterius agro partem aliquam alterius agri domino adiudicari: quo casu conveniens est ut is alteri certa pecunia debeat condemnari. Eo quoque nomine damnandus est quisque hoc iudicio, quod forte circa fines malitiose aliquid commisit, verbi gratia quia lapides finales furatus est aut arbores finales cecidit"* (Hanga 2002, 321-322).

Lex

Roman legal texts mention the law among the civil ways of acquiring property rights. *Lex* was a source of law in the formal sense that governed legal relations between citizens. Its role was to provide solutions for situations that did not fall within the scope of the other civil ways of acquiring property rights.

Conclusions

The civil ways of acquiring property were created in order to protect the interests of Roman citizens. They were formed after a long process and managed to capture the dominium mentality of the Romans, to emphasize the superiority of Civil Law over the other branches of Roman Private Law and to contribute to the crystallization of the concept of patrimony.

These legal institutions help us understand the emergence and evolution of property rights and are a source of inspiration for those who want to contribute to the improvement of the legal regime of private property.

References

Axente, Alina Monica. 2020. *Instituţii de drept privat roman. Vol. I. Izvoare. Procedura civilă. Persoane. Bunuri. Succesiuni (Institutions of Roman Private Law. Vol. I. Sources. Civil Procedure. People. Goods. Successions).* Bucharest: Hamangiu Publishing House.

Axente, Alina Monica. 2022. *Curs de drept privat roman (Roman Private Law Course)*. Bucharest: Hamangiu Publishing House.

Cătuneanu, I. C. 1927. *Curs elementar de drept roman (Elementary Course of Roman Law)*. Cluj-Bucharest: "Cartea Românească" S.A. Publishing House.

Correa, Luiz Fabiano. 2008. "La suppléance des contrats d'acquisition de biens dans le droit romain et dans l'ancien droit germanique", *Revue internationale des droits de l'antiquité,* 3e série, tome LV.

Cuciureanu, Ionela. 2021. *Drept roman (Roman Law).* Bucharest: ASE Publishing House.

Gai Institutiones or Institutes of Roman Law by Gaius, with translation and commentary by the late Edward Poste, M. A., Oxford at the Clarendon Press, 1904.

Garrido, Manuel Jesús García. 1996. *Diritto privato romano*, ed. italiana a cura di M. Balzarini, seconda edizione, Padova: CEDAM.

Girard, Paul Frederic. 1890. *Textes de droit romain*. Paris: Librairie Nouvelle de Droit et de Jurisprudence Arthur Rousseau Èditeur.

Hamangiu, Constantin and Nicolau, Matei G. 2002. *Dreptul roman,* ediţie îngrijită de Alin-Gabriel Oprea (*Roman Law*, edition edited by Alin-Gabriel Oprea). Bucharest: Hamangiu Publishing House.

Iustiniani Institutiones. Instituţiile lui Iustinian, text latin şi traducere în limba română, cu note şi studiu introductiv de prof. dr. doc. Vladimir Hanga (*Justiniani Institutiones. Justinian's institutions,* Latin text and Romanian translation, with notes and introductory study by Professor doc. Vladimir Hanga, PhD). 2002. Bucharest: Lumina Lex Publishing House.

Robaye, René. 2005. *Le droit romain.* 3e edition. Bruxelles: Bruylant.

Tuori, Kaius. 2008. "The Magic of Mancipatio." In *Revue internationale des droits de l'antiquité*. 3e série, tome LV.