JUST TITLE AS JUSTIFICATION FOR ACQUISITIVE PRESCRIPTION: GLOBAL DISCUSSION AND ROMAN LEGAL ROOTS

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There are statements in contemporary legal discussion that undermine the legitimacy of maintaining the institution of usucaption in specific legal orders. It is uncertain if there is any justification for acquisitive prescription at all. European law experience is also familiar with this discussion. The institution of usucaption is not a uniform concept – there are many variants in different countries. Are we really talking about one institution or different ones, depending on the existence of one prerequisite or another? One of the prerequisites for acquisitive prescription, not present in every legal system, is interesting - the prerequisite of 'just cause of usucapion'. Polish law does not require such a prerequisite, for instance. The basic and unquestionable requirement of usucaption in the classical legal development of this institution, in Roman Law, is unquestionable. The first statements of such jurists as Trebatius, Sabinus and Cassius show us the first conceptualization of acquisitive prescription, in which the just cause of usucaption prerequisite is immediately present and affects the nature of this legal institution – without it, these jurists did not see the possibility of acquiring things by usucapio.

Keywords: usucapio; property law; Roman law; just cause of usucaption; iustus titulus*; title*

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1. INTRODUCTION**

Usucaption is one of the fundamental legal concepts. "Fundamental" not only because it has spread throughout mainland Europe, but also because it is one of the most important legal institutions and at the same time – a significant aspect of property law.[1] A study devoted to "usucaption" undoubtedly carries the same fundamental characteristics, as it is also one of the most problematic legal institutions in the property law discourse.

In the legal discourse there are three, inherently similar, institutions: usucaption, acquisitive prescription and adverse possession. They are very similar, especially when compared on the meta level. Of course, when it comes to the analysis of particular legal systems, plurality of different variations of this institution can be seen. Recently, such variances are depicted as a whole in Yun-Chien Chang's work[2], which served as an inspiration for the present analysis. Nevertheless, there is a level in the legal discourse, where differences between them do not seem so crucial. Therefore, the word usucaption is generally used in the article, while acquisitive prescription as an alternative. Only adverse possession will be used in a more technical way – the one used in the context of common law solutions. On a side note, usucapion as a term is rarely used in global discussion in English, despite its Latin and Roman law roots.

The aim of the paper is to provide a reader with the analysis of the term 'just cause of usucaption' (*iusta causa usucapionis*) also known as the title (*titulus*) of usucaption. However, any complex analyses of this prerequisite for the acquisitive prescription are not within the scope of this work. This text will primarily focus on the legal conceptualization of just cause of usucaption, especially in the context of contemporary problems related to acquisitive prescription. This is strictly related to the question: Is there still a place in modern legal orders for *usucapio* as a legal institution?

To answer this question properly, it is necessary to conduct a legal, historical and comparative inquiry into the field of property law that is mainly focused

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1 Gretton, G. L.; Steven, A. J. M., *Property, Trusts and Succession*, ed. 3, Haywards Heath – London, 2017, p. 78.

2 Chang, Y-C., *Adverse Possession Laws in 203 Jurisdictions: Proposals for Reform*, University of Pennsylvania Journal of International Law, *vol.* 43, 2022, pp. 373-433. Preceded by: Chang, Y-C., *The Many Faces of Adverse Possession: Economic and Empirical Analyses of Laws in 156 Jurisdictions*, March, 2020, https://dx.doi.org/10.2139/ssrn.3558800 (30.08.2023).

on acquisitive prescription. Also, for the current common law analysis, Roman law can be important as a comparative link. In Roman law, the concept of usucaption was changing together with the social and economic shifts – happening mainly in the later classical, postclassical and Justinianic period.[3] All of the different concepts of this legal institution have developed in various moments of Roman legal history and their analysis would be an important step for Roman law studies and for the modern, contemporary law discourse. However, this paper will focus only on the sources that relate to the first dogmatic conceptualization of *usucapio* as a legal institution. *Usucapio* will be investigated strictly through the lens of the just cause of usucaption as a prerequisite for acquisitive prescription, using the texts of the following jurists: Trebatius, Sabinus and Cassius. For the purpose of this text, it is considered sufficient to "catch" *usucapio* as a legal concept as when it was first described, without going into more details of later Roman jurists' discussions.

2. CURRENT DISCUSSION IN GLOBAL CONTEXT

Taking into account the major differences between the civil law and the common law systems, the most well-developed discussion regarding the purpose of usucaption takes place on the ground of the latter. In countries with a civil law tradition, it is generally accepted that acquisitive prescription is an important part of a legal system. However, in the common law legal systems, jurists are asking whether it should play such a major role. Since the end of the nineteenth century, the academic debate regarding the adverse possession law (the name used for usucaption in common law systems) persists to this day.[4] This debate considers economic, psychological, social and moral aspects of acquisitive prescription.[5] Today in the USA, as J. G. Sprankling and R. R. Coletta wrote in their work, "adverse possession is easily the most controversial doctrine in property law".[6] John Lovett has summarized all of the main arguments of this discussion formed since the end of the 19th century up until 1986.[7] As he pointed out, this debate has not yet been completed. The last three decades have

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3 Hamza, G., *Zum Verhältnis zwischen usucapio und longi temporis praescriptio im klassischen römischen Recht*, in: *Mélanges Fritz Sturm*, *vol*. I, Liège, 1999, p. 189.

4 Lovett, J., *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881-1986)*, Texas A&M Law Review, *vol.* 5, no. 1, 2018, *passim*.

5 *Ibid.*

6 Sprankling, J. G.; Coletta, R. R., *Property. A Contemporary Approach*, St. Paul, 2009, p. 98.

7 Lovett, J., *op. cit.* (fn. 4), *passim*.

contributed a lot to the topic of acquisitive prescription. In addition to the strictly legal and dogmatic arguments, jurists pay attention also to the economic, social and psychological contexts. Those arguments use the historical perspective stemming from the history of common law. Jessica A. Clarke thus asked: "What normative rationales have been put forth by courts and commentators for transforming *de facto* performance into *de jure* protections?"[8]

What is important today is not only the question concerning the justification of a legal institution, but also its practical application. Increasingly, jurists stand up against acquisitive prescription. There are opinions that, in contemporary legal systems, this institution is not necessary and is often harmful. Such statements mainly pinpoint the regulations, where just cause and even good faith are not an appropriate prerequisite for the acquisition of ownership by acquisitive prescription. Jeffrey Evans Stake, when quoting the following statement of William Stoebuck and Dale Whitman: "If we had no doctrine of adverse possession, we should have to invent something very like it", commented: "That was true in the past and may still be true today, but it is not at all clear that it will remain true in the future."[9] However, it is not only scholars who undermine the necessity of adverse possession in common law systems. It is also US judges who, in their judgments, speak out against this institution. For example, judge Joseph Grodin said: "I cannot accept the majority's attempted justification for the current law of prescriptive easements. How, in today's urban society, litigation is reduced or the peace is preserved by allowing persons situated as are these plaintiffs to acquire rights in what is concededly the land of another without a cent of payment is beyond my comprehension."[10]

Doubts concerning acquisitive prescription are present not only in the USA[11], but also in other parts of the world. Hong Yin Teo, an Australian scholar, said that "there is no longer a necessity for the doctrine of adverse possession to remain part of Australian law".[12] An interesting situation took place also in Hong Kong, where the Law Reform Commission of Hong Kong conducted a large survey on the subject of adverse possession and afterwards published two

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8 Clarke, J. A., *Adverse Possession of Identity: Radical Theory, Conventional Practice*, Oregon Law Review, *vol.* 84, 2005, p. 563.

9 Stake, J. E., *The Uneasy Case of Adverse Possession*, The Georgetown Law Journal, *vol.* 89, 2001, p. 2419.

10 Warsaw v. Chicago Metallic Ceilings, L.A. No 31740, Supreme Court of California, March 5, 1984.

11 See also: Shoked, N., *Who Needs Adverse Possession?*, Fordham Law Review, *vol.* 89, 2021, pp. 2639-2692.

12 Teo, H. Y., *A Critique of the Doctrine of Adverse Possession,* Australian National University. Cross sections, *vol.* 4, 2008, p. 133.

important documents: the Consultation Paper from December 2012 and the Report from October 2014. Authors conclude the Report with the following statement: "We recommend that when a registered title regime is in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected."[13] The Chinese legislature decided, after a long discussion, not to include *usucapio* in the new Chinese Civil Code.[14] An interesting view on the problem is presented in the Report written on behalf of the Law Commission of India (part of the Government of India) from May 2023.[15] The Report presents the most important Indian Supreme Court cases about acquisitive prescription and a survey of solutions adopted in such countries as Italy, France, Spain, the Netherlands, Sweden, Germany, New Zealand, Poland, Thailand, United Kingdom, Australia, Ireland and Canada. Interestingly, the Indian and Hong Kong reports are not the only examples of this type of studies. We shall also consider the Report of the British Institute of International and Comparative Law for Her Majesty's Court Service from 2006.[16]

Yun-Chien Chang, who connects the American and the Asian perspective, in conclusion of the above mentioned analysis, said that in the context of immovables the "acquisitive prescription doctrine should be adjusted to the reality of registries as they currently exist".[17] But, as he also mentioned, it will be a development miracle if all legal systems "could become like Finland, with well-functioning registries and efficient laws".[18] So, on the ground of real estate law, *usucapio* remains an important institution. Moreover, we should remember that its application is not limited to immovables[19], but with a possible extension to incorporeal things. The question is in what shape?

An interesting point of view was presented by A. J. van Walt – a well-known South African property law scholar. Firstly, he called upon ownership as the

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13 *Law Reform Commission of Hong Kong, Report. Adverse Possession*, 2014, p. 147.

14 Chang, Y-C., *Adverse Possession…*, *op. cit.* (fn. 2), pp. 376-377.

15 *Government of India. Law Commission of India, The Law on Adverse Possession. Dissent Note. Report No. 280*, May 2023, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/06/2023060190.pdf (30 August 2023).

16 *Adverse possession. Report by the British Institute of International and Comparative Law for Her Majesty's Court Servic*e, September 2006, https://www.biicl.org/files/2350_advposs_sep_ftnsv3.pdf (30 August 2023).

17 Chang, Y-C., *Adverse Possession…*, *op. cit.* (fn. 2), p. 430.

18 *Ibid*.

19 See *e.g.* Puder, M. G.; Rudokvas, A. D., *Acquisitive Prescription of Artwork and Other High-Value Movables: A Comparative Case Study of Litigation and Legislation in Louisiana, Germany, and Russia*, The American Journal of Comparative Law, *vol.* 71, no. 1, 2023, pp. 142-188.

paradigm for rights, arguing that "where and in so far as it features in any legal system, it privileges absolute or strong property rights and interests and allows them to dominate the doctrine structure, the rhetoric and the logic of the law".[20] Then he said, when somebody has acquired a defective title to a land in good faith, "promoting legal certainty by bringing the legal situation into line with a long-standing factual situation could arguably support rather than undermine" such a paradigm.[21] But, as he mentioned, when bad faith possessors can acquire ownership through the effluxion of time, the sanctity and supremacy of ownership as an absolute and an indefeasible legal title is perhaps not quite secure.[22] This interesting observation brings us to the thesis that acquisitive prescription can be a legal institution securing a central position of ownership in the property law system, but only with title and good faith as prerequisites. When a legal order allows one to acquire ownership by a long-term possession, without just title and good faith, the security of ownership is reduced and undermined. A. J. van Walt stressed that legal certainty and economic efficiency "are essentially out of control of and even unrelated to the owner and her rights".[23]

3. THE EUROPEAN PROBLEM

In 2005 the Fourth Chamber of the European Court of Human Rights issued a judgement that is of great importance in the context of adverse possession. In said judgment, it claimed that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1 of Protocol No. 1" of the Convention for the Protection of Human Rights and Fundamental Freedoms. This judgment was issued in *JA Pye (Oxford) Ltd v United Kingdom* and it was concerning adverse possession under English law. This decision "evoked an outcry from property-law scholars in the European Union who feared that the fourth chamber's decision also invalidated acquisitive prescription in their countries".[24] This discussion was soon cut short by the Grand Chamber of the

[20] Van der Walt, A. J., *Property in the margins*, Oxford-Portland, 2009, p. 41.

[21] *Ibid.*, p. 175.

[22] *Ibid.*, p. 175.

[23] *Ibid.*, p. 187.

[24] Van der Walt, A. J.; Marais E. J., *The Constitutionality of Acquisitive Prescription: A Section 25 Analysis*, Tydskrif vir die Suid-Afrikaanse Reg, *vol.* 4, 2012, pp. 715-716. See also: Sagaert, V., *Prescription in French and Belgian Property Law after the Pye Judgment*, European Review of Private Law, *vol.* 15, no. 2, 2007, pp. 265-272.

European Court of Human Rights on August 30, 2007. By a majority of ten votes to seven, the Grand Chamber held that the acquisition of land by adverse possession under English law did not violate Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, today one cannot say that adverse possession and acquisitive prescription are an unquestioned part of common law and civil law systems. Nevertheless, we should mention that some scholars claimed that principles affirmed by the European Court of Human Rights "have less to do with the doctrine of adverse possession in itself than with the specific manner in which it was regulated in English law before 2002".[25] One should remember, that there is no single, universal doctrine of acquisitive prescription and it should be analyzed only in connection to a specific legal order.

It is true that the case was considered in an English law context. Meanwhile, both sentences (the Fourth Chamber's and Grand Chamber's) with dissenting opinions to the second are important to all European legal systems due to the important similarities between them. As J. Lovett noted, "although the doctrines' historical sources are different, the conditions for acquisition of ownership through long-term occupancy are strikingly similar".[26] Of course there are many differences in solutions adopted in continental legal tradition countries. Especially among two main legal families: the Romance legal family and the Germanic legal family. The former refers to the legal systems based on the Napoleonic Code and codes derived from it, such as the Spanish Civil Code, Italian Civil Code, Portuguese Civil Code.[27] The latter relates to the legal systems of German-speaking countries with such civil codes as ABGB, BGB and ZGB[28] – although the Germanic legal family is less uniform than the Romance legal family, mainly if we consider important differences between the German pandectistic approach and ABGB's natural law roots.[29] It is beyond the scope of this paper to present all these differences. A satisfying compilation of legal solutions and regulations concerning acquisitive prescription in particular legal orders is contained in the above-mentioned Indian and British reports and in literature,

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25 Caterina, R., *Some Comparative Remarks on JA Pye (Oxford) Ltd v. The United Kingdom*, European Review of Private Law, *vol.* 15, no. 2, 2007, p. 273.

26 Lovett, J. A.; Hoops, B., *Adverse Possession by the State: Toward Remedial Equivalency*, Loyola Law Review, *vol.* 69, 2022, pp. 21-22.

27 See: Lydorf, C., *Roman Legal Family*, European History Online, http://www.ieg-ego.eu/lydorfc-2011-en (16 July 2023).

28 Berger, E., *Deutscher Rechtskreis*, European History Online, http://www.ieg-ego.eu/bergere-2010-de (16 July 2023).

29 Dziadzio, A., *Powstanie austriackiego kodeksu cywilnego ABGB i jego twórca,* Prawo i więź, *vol.* 42, no. 4, 2022, p. 459.

especially the Yun-Chien Chang paper[30], the study from the Principles of European Law series (concerning moveables)[31] and Dieter Krimphove's analysis[32].

4. JUSTIFIED ACQUISITIVE PRESCRIPTION AND MNEMONIC HEXAMETER

As could have been seen above, the discussion regarding the necessity of acquisitive prescription in contemporary legal systems is only growing bigger over time. But when one looks at the above-mentioned analysis by A. J. van Walt, we can see an important distinction between acquisitive prescription being made – firstly, as an institution used to acquire ownership by a possessor without any title to it and secondly, as an institution used strictly to complete a legal title to a thing in situations where it is truly justified. Both existed in certain legal systems around the world, frequently at the same time, but not in all.

Both variants of acquisitive prescription are part of legal orders which represent the Romance legal family. When it comes to statutes, this solution has its roots mainly in *Le Grand Coutumier de France* from the 14th century AD[33] and *Siete Partidas*. The *Coutumier* required good faith and title to obtain ownership after a 10- or 20-year possession (depending on whether the owner was present in the region of the immovable) but not if the term of possession was longer than 30 years.[34] This solution was generally adopted in the Napoleonic Code.[35] Similarly, the Spanish Civil Code alludes to the *Siete Partidas* regulations[36] and strictly corresponds with French law. The solution was also present in other re-

30 Chang, Y.-C., *Adverse Possession…*, *op. cit.* (fn. 2), *passim*.

31 Faber, W. (eds.), *Principles of European Law. Study Group on a European Civil Code. Acquisition and Loss of Ownership of Goods (PEL Acq. Own.)*, Oxford, 2011, pp. 973–981; see also: Jansen, J. E., *Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law*, European Property Law Journal, *vol.* 1, no. 1, 2012, pp. 153-165.

32 Krimphove, D., *Das europäische Sachenrecht. Eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik*, Lohmar, 2006, pp. 425-448.

33 Delisle, L., *L'auteur du Grand coutumier de France*, Paris, 1880, p. 325; Polain, M. L, *Les éditions du Grand Coutumier de France, 1514–1539–1598–1868*, in: Loviot, L. (ed.), *Revue des livres anciens. Documents d'histoire littéraire*, Paris, 1914, p. 411.

34 Laboulaye, É. ; Dareste, R. (eds.), *Le Grand Coutumier de France*, Aalen, 1969, p. 199.

35 Napoleon's Code civil articles 2262 and 2265 – numbering from the first version, see: Aubry, C.; Rau, C., *Droit Civil Français*, *vol.* 2, Paris, 1962 (Saint Paul (Minnesota), 1966), pp. 359-363; Planiol, M., *Treatise on the Civil Law*, *t.* 1, part 2: Nos. 1610 to 3097, Saint Paul (Minnesota), 1939, p. 574.

36 Part III, book 29, rules XVIII and XIX, see: *Las Siete Partidas*, t. 3: *Medieval. Lawyers and Their Work*, trans. Scott S.P., Philadelphia, 2001, pp. 444-445.

gulations of civil codes from the Romance legal family in Europe and abroad.[37] Interestingly, it is also a part of legal orders rooted in French law which belong to mixed-jurisdiction legal culture. For example, in the Louisiana Civil Code, the prerequisites for acquisitive prescription of a land after ten years are as follows: 10 years of possession, good faith, just title and a thing susceptible to acquisition by prescription.[38] Thirty years of possession are necessary when the possessor cannot demonstrate both good faith and title.[39] What is important is that this just title is defined as a juridical act, sufficient to transfer ownership or another real right. Said act must be in writing, valid in form, and filed for registration in the conveyance records of the parish in which the immovable is situated.[40]

Until recently, this diversity of two forms of acquisitive prescription was present in the Canadian province of Quebec.[41] It changed when the new Quebec Civil Code was passed in 1994. The regulation removed from the Quebec legal system the requirements of good faith and title in the context of acquisitive prescription.[42]

The Austrian Civil Code (ABGB) also provides for the requirements of a legal title (§ 1461) and acting in good faith (§ 1463). While adhering to these requirements, Austrian law stipulates a 3-year period for the acquisition by prescription of movable property (§ 1466). In the case of immovable property, a 3-year period is also possible, provided the specific requirement of registration in public records is met (§ 1467). In the absence of establishing a public record, this period is extended to 30 or 40 years and does not require the existence of a legal title, but still necessitates good faith (§ 1477). In Austria, there has been an ongoing legal debate regarding changes to the prescription laws, initiated by an invitation to discussion from the Austrian Ministry of Justice.[43]

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37 *E.g.* the Italian Civile code articles 1158 and 1159, see: Mezzanotte, F., *All You Need is Control. Italian Perspectives on Acquisitive Prescription of Immovables*, The Italian Law Journal, *vol.* 4, no. 2, 2018, pp. 337-366.

38 Art. 3475 of Louisiana Civil code, see: Kilgore, L., *The Ten-Year Acquisitive Prescription of Immovables*, Louisiana Law Review, *vol.* 36, no. 4, 1975, pp. 1000–1017; Lovett, J. A., *Tacking in a Mixed Jurisdiction*, in: Steven, A. *et al.* (ed.), *Nothing so Practical as a Good Theory. Festschrift for George L. Gretton*, Edinburgh, 2017, p. 162.

39 Art. 3486 of Louisiana Civil code; see: Kilgore, L., *op. cit.* (fn. 38), pp. 1000-1017.

40 Art. 3483 of Louisiana Civil code.

41 De Montmollin Marler, W., *The Law of Real Property*, Toronto, 1932, p. 170.

42 Quebec Civil code article 2918.

43 *Bericht über die Ergebnisse der Arbeitsgruppe I (Trennung der Institute Verjährung/Ersitzung; Grundsätze; Regelungsfrager der Ersitzung*; §§ 1451 bis 1477 ABGB; §§ 1498 bis 1501 ABGB), https://www.bmj.gv.at/themen/Zivilrecht/Reform-des-Verj%C3%A4hrungsrechts.html (1 August 2023). See also: Potschka, S.; Meissel, F.-S., *Zur vorgeschla-*

Swiss law allows for the acquisition of real estate through adverse possession within a period of 10 years in the case of acquiring it in good faith and registering ownership in the land register, and 30 years in the case of mere possession without meeting the criteria for good faith and legal title. In the provisions of the Austrian Civil Code (ABGB) and Swiss law, there is already a reference to a specific legal title in the form of registration in a public register. This is adverse possession based on an entry in a public record, and it is increasingly recognized to the extent that it has been separately discussed in legal systems. This approach is prominently visible in the German Civil Code (BGB), where according to Article 900, it is possible to acquire ownership of real estate after 30 years if the acquirer is registered in the land register (known as "Buchersitzung"). This is closely related to the institution of acquiring things in good faith from an unauthorized possessor (§ 932 BGB).[44]

It seems that Polish civil law holds a rather unique position among legal systems. In Polish civil law, the concept of adverse possession is generally absent, and the requirement of good faith only allows for a reduction in the adverse possession period for real estate from 30 years to 20 years. Therefore, Polish law allows for the acquisition of ownership of real estate without a legal title, without good faith, and without registration in land registers after 30 years of possession.

Prof. Schrage wrote in his article that: „Generations of law students in any part of the world learned at the very beginning of their studies that an old hexameter formulates the requisites of adverse possession thus: *res habilis, titulus, fides, possessio, tempus*".[45] When one looks e.g. at the Louisiana Civil Code, one can see that this mnemonic hexameter is still alive in some legal traditions. But as we see, there are many countries in which some of the elements of this hexameter are not present, as it is in the Polish Civil Code. In the global discussion regarding the justification of acquisitive prescription remains the question whether some of those prerequisites are not as important as a part of a legal system, so that their lack would change this justified legal institution

genen Neufassung des Ersitzungsrechts, Wien, 2022, on-line: https://roemr.univie.ac.at/fileadmin/user_upload/i_roemisches_recht/Publikationen/Meissel_Zur_vorgeschlagenen_Neufassung_des_Ersitzungsrechts.pdf (1 August 2023).

44 See: Bergmann, A., *Der Verfall des Eigentums: Ersitzung und Verjährung der Vindikation am Beispiel von Raubkunst und entarteter Kunst (Der Fall Gurlitt)*, Tübingen, 2015, pp. 20-22; Klunzinger, E., *BGB-Sachenrecht Verfahrensrecht, Rechtsformen der Unternehmen*, Wiesbaden, 1985, p. 9.

45 Schrage, E. J. H., *Res habilis, titulus, fides, possessio, tempus. A medieval mnemonic hexameter?*, in: Sturm, F.; Thomas, P.; Otto, J. (eds.), *Liber Amicorum Guido Tsuno*, Frankfurt am Main, 2013, p. 325.

into an institution that should be criticized from the standpoint of general legal principles.

Talking about such prerequisites as *possessio* and *tempus*, it is clear that they are fundamental prerequisites for usucaption in all legal systems. Without them, even conceptualizing such an institution would be impossible. There is probably no legal order in which possession or effluxion of time is not an essential part of usucaption. We can say that this would be an impossible concept in terms of legal ontology.

As it is natural that *possessio* and *tempus* are prerequisites for the usucaption, it is not the case for *res habilis*. It depends fully upon lawmakers whether in a certain legal order there would be categories of things that would be excluded as possible objects of usucaption.

However, good faith is even more problematic as a requirement for *usucapio*. There are legal systems, for example Polish law, where it is possible to acquire ownership of unmovable things by usucaption regardless of whether they are possessed in good faith or without it. It would be an overstatement to say that in the Polish Civil Code there are two institutions – usucaption in good faith and usucaption in bad faith. In the Polish Civil Code, there is only one institution of usucaption, with or without good faith. Nevertheless, good faith as a requirement for usucaption is an important factor which can decide the shape of acquisitive prescription as a legal institution. However, for this analysis, a far more important concept is just cause, which – as we have seen in the comment made above on the Louisiana legal system – strictly limits the possibility of acquiring ownership by acquisitive prescription. So, let us look at the first conceptualization of this legal institution within the context of that prerequisite.

5. ROMAN TITLE

There is a great probability that the history of usucaption began at the time of the Twelve Tables. Nonetheless, it is true what Professor Schrage wrote about the roots of *usucapio* and of the above-mentioned hexameter in the Twelve Tables: "it is from an historical point of view impossible to describe this regulation in terms that occur in the hexameter. *Possessio* as opposite to *dominium* is certainly a creation of later times".[46] However, there is proof that just title understood as a prerequisite for usucapion was known before the classical period. *Veteres* used the rule *neminem sibi ipsum causam possessionis mutare posse,* as Paul noted[47],

[46] *Ibid.*, p. 326.

[47] D. 41.2.3.18 (Paulus 54 ad ed.). See: Schloßmann, S., *Nemo sibi ipse causam pos-*

which could have been connected to the *iusta causa usucapionis*. There are two sources containing Servius Sulpicius Rufus' views on the topic of this prerequisite that have been preserved to this day in the *Fragmenta Vaticana* 294 and by Julian.[48] Nevertheless, statements regarding Roman law before the classical age are usually risky. However, it is interesting that there are many fragments from the period dated only a few decades later.

We have only a few sources that can be connected to just cause of usucaption coming from the times before the Principate. The first sources where one can undoubtably find title as a prerequisite for usucaption are those coming from Trebatius, Sabinus and Cassius. Of course, for a complex view on this subject, we also need to analyze later jurists' statements. However, this is not possible in one article; the author did it in a larger text[49], where he observed that the opinions of Trebatius, Sabinus, and Cassius give us the first clear perspective on just cause as an important prerequisite for usucapion.

5.1. Trebatius

Let us begin with Trebatius and the purchase contract as a title for usucapion. Trebatius is chronologically the first classical lawyer whose views regarding the just cause of usucaption have been preserved until modern times.

> D. 41.4.2.7 (*Paulus libro 54 ad edictum*): *Eius bona emisti, apud quem mancipia deposita erant: Trebatium ait usu te non cepturum, quia empta non sint.*
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> You bought the estate of someone with whom slaves had been deposited;

sessionis mutare potest, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol*. 24, 1903, *passim*; Böhr, R., *Das Verbot der Eigenmächtigen Besitzumwandlung im Römischen Privatrecht. Ein Beitrag zur Rechtshistorischen Spruchregelforschung*, München-Leipzig 2002, p. 70, *passim*; Hausmaninger, H., *Nemo sibi ipse causam possessionis mutare potest – eine Regel der veteres in der Diskussion der Klassiker*, in: Seidl, E. (ed.), *Aktuelle Fragen aus modern Recht und Rechtsgeschichte. Gedächtnisschrift für Rudolf Schmidt*, Berlin, 1966, pp. 399-412; MacCormack, G., *Nemo sibi ipse causam possessionis mutare potest*, Bulletino dell'Istituto de diritto romano, *vol*. 75, 1972, *passim*.

48 D. 41.5.2.2 (*Iulianus 44 dig.*).

49 Stolarski, K., *Prawna przyczyna zasiedzenia w jurysprudencji rzymskiej* [*Roman Jurisprudence about the Requirement of Iusta Causa for the Usacaption*], PhD Thesis, Kraków, 2021; see also: Stolarski, K., *Iusta causa usucapionis w poglądach Trebacjusza i Fragmentach Watykańskich [Iusta causa usucapionis according to Trebatius and the Vatican Fragments]*, Krakowskie Studia z Historii Państwa i Prawa, *vol.* 12, 2019, pp. 121-144.

> Trebatius says that you do not usucapt them because they were not part of the purchase.[50]

What is important in this context, is the fact that the above cited fragment is one of the rare texts from the Digest that have not been suspected of any interpolations.[51] This text is a continuation of other Paul's writings concerning situations in which the object of *possessio* is different than the object of the *emptio-venditio* contract.[52] Thanks to this, we know that there was a contract for a purchase and a sale whose object has been determined as a vendor's *bona* – translated by Alan Watson as the vendor's estate.[53] The vendor had slaves not in ownership but rather as a result of a deposit contract. Trebatius said that such slaves have not been usucapted. Crucial for this analysis is the justification of his opinion – slaves could not have been usucapted since they had not been a part of the purchase. It follows that the object of a purchase, a sale contract and of the usucaption has to be the same.

Let us go to another text where Trebatius' view on the usucaption is preserved.

> D. 41.6.3 (*Pomponius libro 24 ad Quintum Mucium*): *Si vir uxori vel uxor viro donaverit, si aliena res donata fuerit, verum est, quod Trebatius putabat, si pauperior is qui donasset non fieret, usucapionem possidenti procedere.*
>
> In case that husband makes a gift to his wife or a wife to her husband; if the thing given belongs to someone else, the view of Trebatius is correct, that is to say, that so long as the donor is not made poorer by the gift, *usucapio* will run for the possessor.

This fragment is also surprisingly beyond any important suspicion of an interpolation.[54] It is clear that in Roman law *donatio inter virum et uxorem* was

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50 All translations from Justinian's Digest are based on The Digest of Justinian, translation edited by Watson A., *vol.* 4, Philadelphia, 1998.

51 Levy, E.; Rabel E., *Index Interpolationum quae in Iustiniani digesits inesse dicuntur*, ad D. 41.4.2.7 (*Paulus 54 ad ed.*).

52 D. 41.4.2.6 (*Paulus 54 ad ed.*).

53 Watson, A., *The Law of Property in the Later Roman Republic*, Oxford, 1968, p. 54. About meaning of *bona* in this context, see: Ankum, H.; Pool, E., *Rem in bonis meis esse and rem in bonis meam esse: Traces of the Development of Roman Double Ownership*, in: Birks P. (ed.), *New Perspective in the Roman Law of Property*, Oxford, 1999, pp. 9-14.

54 Levy, E.; Rabel, E., *op. cit.* (fn. 50), ad D. 41.6.3.

generally prohibited.[55] Nevertheless, in some cases donations among spouses were possible.[56] It could be so due to the fact that the prevention of an enrichment by one spouse at the expense of another was the goal of this limitation.[57] In cases where the donation did not result in such an enrichment, it was permitted. These situations took place when the object of a donation was in the ownership of a third person, as it is mentioned in the text.[58] Our knowledge about the limitation of *donationes inter virum et uxorem* allows us to say that Trebatius (and later Pomponius) noted both – belonging of a thing to someone else and a lack of impoverishment of one spouse – as factors that made a donation valid.[59] And it seems clear that if there were a valid donation, there also existed a possibility for usucaption. We can reverse this statement: if a donation was to be non-existent from the legal standpoint, then usucaption was not possible. The existence of a donation was a requirement for the title of usucaption.

The third important text containing Trebatius's view on the just cause of usucaption was incorporated in the tenth chapter of the Digest's book 41, on the *usucapio pro suo*.

> D. 41.10.4pr. (*Pomponius libro trigensimo secundo ad Sabinum*): *Si ancillam furtivam emisti fide bona, quodque ex ea natum et apud te conceptum est ita possedisti, ut intra constitutum usucapioni tempus cognosceres matrem eius furtivam esse, Trebatius respondit omni modo, quod ita possessum esset, usucaptum esse. Ego sic puto distinguendum, ut, si nescieris intra statutum tempus, cuius id mancipium esset, aut si scieris neque potueris certiorem dominum facere, aut si potueris quoque et feceris ceriorem, usucaperes: sin vero, cum scires et posses, non feceris certiorem, contra esse: tum enim clam possedisse videberis, neque idem et pro suo et clam possidere potest.*

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[55] Guarino, A., *Diritto privato romano*, ed. 9, Napoli, 1992, pp. 590-591; Domingo, R., *Roman Law. An Introduction*, London-New York, 2018, p. 138; Johnston, D., *Roman Law in Context*, Cambridge, 2007, p. 34; D. 24,1,1 (*Ulpianus 32 ad Sab.*); D. 24,1,2 (*Paulus 7 ad Sab.*); D. 24,1,3 (*Ulpianus 32 ad Sab.*).; D. 24,1,25 (*Clementius 5 ad leg. Iul. et Pap.*).

[56] Johnston, D., *op. cit.* (fn. 52), p. 34; Zielonacki, J., *Pandekta, czyli wykład prawa rzymskiego, o ile ono jest podstawą prawodawstw nowszych*, cz. 1: *Ogólne zasady prawne i nauka o stosunkach rzeczowych*, Cracow, 1862, p. 239.

[57] See: Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Traditions*, Cape Town-Wetton-Johannesburg, 1992, pp. 486, 896-897.

[58] See: Casavola, F., *Lex Cincia, Contributo alla storia delle origini della donazione Romana*, Napoli, 1960, p. 162.

[59] See: Andrés Santos, F. J., *En torno al origen y fundamento de la prohibición de donaciones entre cónyuges: una reconsideración critica*, Bulletino dell'Istituto de diritto romano, *vol.* XLII-XLIII, 2000-2001, p. 341.

> Trebatius says generally that if you bought a stolen slave-woman in good faith, you so possessed the child conceived by and born to her while she was with you, that, even though you learned within the period laid down for usucapion that the mother was stolen, what was so possessed would be usucapted. For myself, I think that the following distinction should be taken; if, within the statutory period, you do not know whose slave she was, or if, even though you know, you could not inform the owner, or if you both could and did inform the owner, you usucapt the child; but should you know and be able to but fail to inform the owner, the contrary would hold good; for, then, you would be regarded as possessing by stealth, and the same person cannot be held to possess both for himself and by stealth.

It has to be stressed that we are not certain whether in the original text Pomponius cited Trebatius. Some scholars think that, originally, Pomponius was writing about Neratius.[60] Nevertheless, more convincing arguments have been presented for the authenticity of Pomponius' reference to Trebatius.[61] There are also some suspicions of interpolations present[62], but as P. Voci wrote, it is not important whether the fragment has been interpolated or not, because it is generally understandable.[63]

In the text, one should pay attention to two problems: a prohibition of acquiring the ownership of stolen things by acquisitive prescription and *usucapio partus ancillae*.[64] It is beyond any doubt that, at the time of Trebatius, prohibition of acquiring ownership of stolen things by acquisitive prescription was an important part of Roman law.[65] We know from another text – D. 49.15.27 – that this rule was accepted by Trebatius. In D. 41,10,4pr. we can see Trebatius' view on the situation of a slave who was born from a stolen slave-woman. In his

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60 See: Guarino, A., *Pagine di diritto romano*, *vol.* 2, Napoli, 1993, p. 48; Riccobono, S., *Sul Fr. 4 Pr. D. Pro Suo e la vesione greca riportata da Armenopulo*, in: Riccobono, S., *Scritti di diritto romano*, *vol.* 1, Palermo, 1957, p. 339.

61 Watson, A. *op. cit.* (fn. 52), p. 29; Abramenko, A., *Eine übersehene Stellungnahme des Trebatius zum Eigentumerwerb am partus ancillae furtivae. Zu Pomp. D. 41,10,4 pr. und Ulp. D. 6,2,11,2*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol.* 114, 1997, p. 428.

62 Abramenko, A., *ibid.*, p. 426; Watson, A., *op. cit.* (fn. 52).

63 Voci, P., *Modi di acquisto della proprietà*, Milano, 1952, p. 192.

64 See: Kaser, M., *Partus ancillae*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol.* 88, 1958, pp. 165-176.

65 See: Herrmann-Otto, E., *Ex ancilla natus*, Stuttgart, 1994, pp. 276-277.

opinion, it was possible to usucapt the child. Interestingly, Trebatius was one of the first Roman jurists who took a stand on the issue of acquiring ownership of *partus ancillae* by acquisitive prescription.[66]

Nevertheless, there is no information in the text on Trebatius that would show an understanding of the just cause of usucaption. The first part of D. 41.10.4pr. is mostly dedicated to the notion of good faith. The fragment which adheres to the problem of *iusta causa* is located in the last part of the above-mentioned text. Sadly, it contains only the statement made by Pomponius. That is why compilers decided to move this part of Pomponius' text to the 10th chapter of the 41st book of the Digest, which concerns *usucapio pro suo*.

5.2. Sabinus

After the analysis of texts with Trebatius's opinion, let us focus on Sabinus' view.

> D. 41.4.2.2 (*Paulus libro 54 ad edictum*): *Si sub condicione emptio facta sit, pendente condicione emptor usu non capit. idemque est et si putet condicionem exstitisse, quae nondum exstitit: similis est enim ei, qui putat se emisse. contra si exstitit et ignoret, potest dici secundum Sabinum, qui potius substantiam intuetur quam opinionem, usucapere eum. est tamen nonnulla diversitas, quod ibi, cum rem putat alienam, quae sit venditoris, affectionem emptoris habeat, at cum nondum putat condicionem exstitisse, quasi nondum putat sibi emisse. Quod apertius quaeri potest, si, cum defunctus emisset, heredi eius tradatur, qui nesciat defunctum emisse, sed ex alia causa sibi tradi, an usucapio cesset.*
>
> If a sale is made subject to a condition, the purchaser cannot usucapt while the condition is pending. The same applies if he thinks that it has been realized when it has not; for he is like someone who thinks that he has made a purchase. But if the condition has been realized but he does not know it, we can say, with Sabinus to whom fact is more important than opinion, that he usucapts. There is a difference to note: when he thinks the thing to be someone else's and it is in fact the vendor's, he has the mental attitude of a purchaser, but when he thinks that the condition has not been realized, he thinks that he has not yet bought it. A more obvious question is, when the deceased bought something which is delivered to his heir, who is unaware of the deceased's purchase and thinks it was delivered on some other ground, whether usucaption does not run.

[66] Bělovský, P., *Usucapio of Stolen Things and Slave Children*, Revue internationale des droits de l'antiquité, *vol.* XLVIX, 2002, *passim*.

It has been said by some Romanists, that the fragment cited above has most definitely been changed by Justinian's jurists.[67] But only G. Beseler, H. Appleton and E. Albertario suspected that the text was interpolated.[68] Nevertheless, the part that contains the Sabinus' point of view – was probably not corrected by the compilers.[69]

The text describes a purchase contract that is to be concluded under a condition. Before the condition was fulfilled the emptor remained in the possession of the object of the contract. Paul claimed that the purchaser cannot usucapt while the condition is pending. For Paul, it was not important whether the buyer had the knowledge of the condition being fulfilled – the emptor's consciousness was not significant in this case.[70] Paul also referred to Sabinus who had said that if the condition has been realized, but emptor does not know about it, he usucapts. It is probable that the time necessary to usucapt has elapsed before the condition was fulfilled. We can now see that the just cause of usucaption was present not only in a concluded contract, but also in a contract which was effective. The latter applies also if this happened after the time to usucapt has elapsed.

Let us take a look at another text by Paul, in which the jurist cited Sabinus. The fragment below is a continuation of the previously cited one.

> D. 41.4.2.3 (*Paulus libro 54 ad edictum*): *Sabinus, si sic empta sit, ut, nisi pecunia intra diem certum soluta esset, inempta res fieret, non usucapturum nisi persoluta pecunia. Sed videamus, utrum condicio sit hoc an conventio: si conventio est, magis resolvetur quam implebitur*.
>
> Sabinus says that if a thing is sold with a provision that if the price is not paid by a certain date, the sale will be off, there will be no usucaption if the price has not been paid. Let us, though, consider whether the provision is a condition or rather a pact; if it is the latter, it is a matter of dissolving the contract not of implementing it.

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67 Provera, G., *Note esegetiche in tema di errore*, in: *Studi in onore di Pietro de Francisci*, *vol.* 2, Milano, 1956, p. 169.

68 Levy, E.; Rabel, E., *op. cit.* (fn. 50), ad D. 41.4.2.2; Jakobs, H. H., *Error falsae causae*, in: Jakobs, H. H.; Knobbe-Keuk, B.; Picker, E.; Wilhelm J. (ed.), *Festschrift für Werner Flume zum 70. Geburtstag*, Köln, 1978, p. 61; Albertario, E., *rec.: Cesare Tumedei, Distinzioni postclassiche riguardo all'età: „infanti proximus" e „puberti proximus"*, Archivio Giuridico „Filippo Serafini", *vol.* V, 1923, pp. 253, 256; Appleton, H., *Histoire de la propriété prétorienne et de l'action publicienne*, Paris, 1889, p. 151, fn. 4.

69 Provera, G., *op. cit.* (fn. 67), p. 169.

70 Bonfante, P., *Le singole 'iustae causae usucapionis' e il titolo putativo*, in: Bonfante, P., *Scritti giuridici varii*, *vol.* 2, Torino, 1916, p. 601.

There are some suspicions of interpolations having been made in the text, but mostly regarding its second part.[71] Nevertheless, there is no persuasive evidence that the compilers have changed the fragment.

We are pretty sure that the words *Sabinus, si sic empta sit, ut, nisi pecunia intra diem certum soluta esset, inempta res fieret* were about the *lex commissoria*.[72] The pact added to the *emptio-venditio* contract has such an effect that there is no purchase being made if the emptor does not pay the remuneration within the strict term.[73] It is so e.g. in the clause: *Si ad diem pecunia soluta non sit, ut fundus inemptus sit*[74] – Sabinus wrote that if the price is not paid by a certain date, the sale is invalid and there is no place for usucaption.

After a brief analysis of the text by Sabinus, we can see that Paul had some doubts concerning the purpose of the clause mentioned by Sabinus. Paul asked whether that clause was a condition or rather whether it was a pact (*lex commissoria*). There are two possible ways of understanding Paul's statement, depending on how we recognize interpolation in fragment *si conventio est*, according to C. Longo.[75] The first one is based on the text, as preserved in the Digest. To be specific, Paul decided that if there was a *conventio* then it is a matter of dissolving the contract and not the matter of its implementation. It should be noted that Paul did not say that there was any *conventio.* The second possibility is that Paul only asked a question whether there was *conventio* or *conditio.* It is more plausible that Paul was only hesitant about the purpose of such stipulati-

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71 Siber, H., *Römisches Recht, Grundzügen für die Vorlesung: Bd.* 2: *Römisches Privatrecht*, Berlin, 1928, p. 425; Beseler, G., *Romanistische Studien*, Tijdschrift voor Rechtsgeschiedenis, *vol.* 8, 1928, p. 307; Vassalli, F., *Dies vel condicio*, Bulletino dell'Istituto de diritto romano, *vol.* 27, 1914, p. 217; Longo, C., *Sulla 'in diem addictio' e Sulla 'lex commisoria' nella vendita*, Bulletino dell'Istituto de diritto romano, *vol.* 31, 1921, pp. 48-50; Wieacker, F., *Lex Comissoria. Erfüllungszwang und Widerruf im Römischen Kaufrecht*, Berlin, 1932, p. 51; Seckel, E.; Levy, E., *Die Gefahrtragung beim Kauf im klassischen römischen Recht*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol.* 47, 1927, p. 152.

72 Burdese, A., *Lex commissoria e ius vendendi nella fiducia e nel pignus*, Torino, 1949, p. 15; Peters, F., *Die Rücktrittsvorbehalte der römischen Kaufrechts*, Köln-Wien, 1973, p. 113; Thomas, J. A. C., *Provisions for Calling off a Sale*, Tijdschrift voor Rechtsgeschiedenis, *vol*. 35, 1967, p. 559. See also: Jörs, P.; Kunkel, W.; Wenger, L., *Römisches Recht*, Berlin-Heidelberg-New York-London-Paris-Tokyo, 1987, p. 320; Seckel, E.; Levy, E., *ibid.*, p. 166; Sukačić, M., *Nevaljanost potestativnih uvjeta u korist obvezanika i pactum displicentiae*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 69, no. 1, 2019, p. 137.

73 See: Zimmermann, R., *op. cit.* (fn. 57), p. 737; Thomas, J. A. C., *ibid.*, *passim*; Wieacker, F., *op. cit.* (fn. 71), *passim*.

74 D. 18.3.2 (*Pomponius 35 ad Sab.*).

75 Longo, C., *op. cit.* (fn. 71), pp. 48-50.

on, without providing any solution. There is also a small chance that Paul was informed about factual circumstances of Sabinus' solution. Without those circumstances, a classical jurist could only consider the real meaning of the clause that was commented on by his predecessor.

And so, today we do not know for sure whether the stipulation mentioned by Sabinus resulted in a dissolution or rather in the implementation of a contract. The first of those solutions begs another question: what if such a certain date was determined only after the date when the time for usucapion had elapsed, and then the emptor did not pay? Nevertheless, at the end of the day, without payment, there was no purchase contract and therefore there was definitely no usucaption – as Sabinus said. We should stress that Sabinus used the words *inempta res fieret*. And so, for this jurist, the most important thing was that if *res* was bought, then it could be usucapted. It is a crucial observation for any further analysis.

5.3. Cassius

At the end of this work, I will focus on two texts where Paul and Ulpian referred to Cassius.

> D. 41.6.1.2 (*Paulus libro 54 ad edictum*): *Si inter virum et uxorem donatio facta sit, cessat usucapio. Item si vir uxori rem donaverit et divortium intercesserit, cessare usucapionem Cassius respondit, quoniam non possit causam possessionis sibi ipsa mutare: alias ait post divortium ita usucapturam, si eam maritus concesserit, quasi nunc donasse intellegatur*.
>
> If a gift was made between husband and wife, no usucaption follows. Similarly, Cassius held that if a husband should make a gift to his wife and then divorce follows, there will be no usucaption because she cannot herself change the ground of her possession; but, he says, after the divorce, if the man leaves the thing with his ex-wife, she will usucapt as though the gift was made at that time. Still, Julian thinks that a wife possesses what is given to her by her husband.

Only H. Siber suspected this text of interpolations.[76] Though H. Siber does

[76] Levy, E.; Rabel, E., *op. cit.* (fn. 50), ad D. 41.6.1.2. Other authors mentioned in *Index Interpolationum* only repeat Siber's doubt about originality of the text, see: Kaden E.-H., *rec.: Francois Dumont, Les donations entre époux en droit romain*, Paris, 1928, *passim*; Sirey, R., *IV und 308 S.*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Ro-

not clarify convincingly why he sees the compilers' hand in the following fragments: *Si inter virum et uxorem donatio facta sit, cessat usucapio* and *quoniam non possit causam possessionis sibi ipsa mutare*. We do not have any impactful evidence that Justinian's jurists changed anything in the text.[77]

The meaning of this fragment is very clear: if a gift had been made between husband and wife, a donation was invalid – it goes without saying that the remarks that were made when analyzing Trebatius' views remain valid. For Cassius, the conclusion was simple – when there was no donation, the usucaption was not effective. It is the same conclusion as the one coming from Trebatius' statement. Moreover, Cassius laid out conditions for when usucaption could take place, i.e., if a donation was given after the divorce, then it was valid.

The following text belongs to the title *pro dote* and it has been preserved to our times, probably without any important changes.[78]

> D. 41.9.1 (*Ulpianus libro 31 ad Sabinum*): 3. *Constante autem matrimonio pro dote usucapio inter eos locum habet, inter quos est matrimonium: ceterum si cesset matrimonium, Cassius ait cessare usucapionem, quia et dos nulla sit.* 4. *Idem scribit et si putavit maritus esse sibi matrimonium, cum non esset, usucapere eum non posse, quia nulla dos sit: quae sententia habet rationem.*
>
> 3. While the marriage subsists, there will be usucaption on the ground of dowry between the married parties; if, though, the marriage ends, Cassius says that usucaption will cease because there is now no dowry. 4. The same jurist writes that, equally, if a man thought himself married, when there was in fact no marriage, he could not usucapt because there would be no dowry. There is reason in this view.

Both fragments were concluded in a statement, that for Cassius the existence of marriage was a requirement of usucaption on the ground of a dowry. Also, if someone only thought himself married, usucaption could not exist.[79] The

manistische Abteilung, *vol.* 50, 1930, p. 617, fn. 1; Bremer, F. P. (ed.), *Iurisprudentiae antehadrianae que supersunt, pars altera*, Lipsiae, 1896, p. 24; Niederländer, H., *Die Bereicherungshaftung im Klassischen Römischen Recht*, Weimar, 1953, p. 55.

77 Kaser, M., *Eigentum und Besitz im älteren römischen Recht*, Köln-Graz, 1956, p. 358, n. 66.

78 Jakobs, H. H., *op. cit.* (fn. 69), p. 88. Only Beseler and Ehrhardt had some suspicions about originality of this texts: Ehrhardt, A., *Iusta causa traditionis. Eine Untersuchung über den Erwerb des Eigentums nach Römischem Recht*, Berlin-Leipzig, 1930, p. 87.

79 Barton, J. L., *Solutio and Traditio,* in: Cairns, J. W.; Robinson, O. F. (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History*, Oxford-Portland, 2004, p. 25.

crucial part of the text is the one in which the jurist wrote *usucapere eum non posse, quia nulla dos sit*. It sounds like an explanation of his solution, which was necessary in terms of the rules governing usucaption as a legal institution. It was not enough to say that the absence of marriage makes usucaption impossible – the jurist stressed that the absence of marriage resulted in an invalid dowry. And the lack of a dowry, as can be easily guessed, did result in the impossibility of usucaption.

6. CONCLUSION

Once the institution of acquisitive prescription was probably fully established, jurists such as Trebatius, Sabinus and Cassius wrote about its *iusta causa* as if it were an obvious and unquestionable element of the law. The requirement of title turns out to be an inherent element of the Roman institution of *usucapio*. This is not a premise that could be abandoned due to controversy. Therefore, one can openly ask the question whether a Roman lawyer would call *usucapio* a method of acquiring property through long-term possession without the need for such a *causa*. Finally, Paulus – D. 50, 16, 28, explicitly stated that the phrase *alienatio* also includes acquisitive prescription.

So, for Roman jurists of the early classical period usucaption was only possible when there was a just cause for it. In this case, just cause is understood as a legal act, which can be the title for transfer of ownership. The most accurate words describing this title are most likely those coming from French law: *du titre translatif* (English: translatory title), known from Art. 2251 of Quebec's Civil Code of Lower Canada. Firstly, the conceptualization of acquisitive prescription assumed that somebody could acquire ownership by long-term possession, only because such a possession was a consequence of a legal act – a legal act that can also be a title to transfer the ownership – as in French law and in the Louisiana Civil Code. Such an acquisition title is the only legal justification for acquisitive prescription[80] – and this statement should not raise any controversies. Roman law is an important source for the European legal tradition and therefore for European legal systems. The systems where just title is not a prerequisite for acquisitive prescription vastly differ from the first legal conceptualization of this institution that took place in Roman law, no later than the 1st century AD. To sum up – just title is not as often brought up in the discussion about acquisitive prescription and its justification as it should be.

[80] Baudry-Lacantierie, T., *Prescription. Traité théorique et pratique de droit civil*, *vol.* XXVIII, Nos. 1-815, 4th ed., 1924; an English translation by the Louisiana State Law Institute, Saint Paul (Minnesota), 1972, p. 328.

We should always remember this when we invoke the Roman roots of acquisitive prescription in the global discussion. The Roman legal framework can thus serve to distinguish *usucapio* (with requisites of good faith and just cause) from other similar legal institutions.

BIBLIOGRAPHY

Abramenko, A., *Eine übersehene Stellungnahme des Trebatius zum Eigentumerwerb am partus ancillae furtivae. Zu Pomp. D. 41,10,4 pr. und Ulp. D. 6,2,11,2*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol.* 114, 1997, pp. 423-434.

Andrés Santos, F. J., *En torno al origen y fundamento de la prohibición de donaciones entre cónyuges: una reconsidereción critica*, Bulletino dell'Istituto de diritto romano, *vol*. XLII-XLIII, 2000-2001, pp. 317-396.

Ankum, H.; Pool, E., *Rem in bonis meis esse and rem in bonis meam esse: Traces of the Development of Roman Double Ownership*, in: Birks P. (ed.), *New Perspective in the Roman Law of Property*, Oxford, 1999, pp. 5-41.

Aubry, C.; Rau, C., *Droit Civil Francais*, *vol*. 2, Paris, 1962 (Saint Paul (Minnesota), 1966).

Barton, J. L., *Solutio and Traditio,* in: Cairns, J. W.; Robinson, O. F. (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History*, Oxford-Portland, 2004, pp. 15-30.

Baudry-Lacantierie, T., *Prescription. Traité théorique et pratique de droit civil*, *vol.* XXVIII, Nos. 1-815, 4th ed., 1924; an English translation by the Louisiana State Law Institute, Saint Paul (Minnesota), 1972.

Bělovský, P., *Usucapio of Stolen Things and Slave Children*, Revue internationale des droits de l'antiquité, *vol*. XLVIX, 2002, pp. 57-99.

Berger, E., *Deutscher Rechtskreis*, European History Online, http://www.ieg-ego.eu/bergere-2010-de (16 July 2023).

Bergmann, A., *Der Verfall des Eigentums: Ersitzung und Verjährung der Vindikation am Beispiel von Raubkunst und Entarteter Kunst (Der Fall Gurlitt)*, Tübingen, 2015.

Beseler, G., *Romanistische Studien*, *Tijdschrift voor Rechtsgeschiedenis*, *vol.* 8, 1928, pp. 279-335.

Böhr, R., *Das Verbot der Eigenmächtigen Besitzumwandlung im Römischen Privatrecht. Ein Beitrag zur Rechtshistorischen Spruchregelforschung*, München-Leipzig, 2002.

Bonfante, P., *Le singole 'iustae causae usucapionis' e il titolo putativo*, in: Bonfante, P., *Scritti giuridici varii*, *vol.* 2, Torino, 1916.

Burdese, A., *Lex commissoria e ius vendendi. Nella fiducia e nel pignus*, Torino, 1949.

Casavola, F., *Lex Cincia, Contributo alla storia delle origini della donazione Romana*, Napoli, 1960.

Caterina, R., *Some Comparative Remarks on JA Pye (Oxford) Ltd v. The United Kingdom*, European Review of Private Law, *vol*. 15, no. 2, 2007, pp. 273-279.

Chang, Y-C., *Adverse Possession Laws in 203 Jurisdictions: Proposals for Reform*, University of Pennsylvania Journal of International Law, *vol*. 43, 2022, pp. 373-433.

Clarke, J. A., *Adverse Possession of Identity: Radical Theory, Conventional Practice*, Oregon Law Review, *vol*. 84, 2005, pp. 563-654.

De Montmollin Marler, W., *The Law of Real Property. Quebec*, Toronto, 1932.

Delisle, L., *L'auteur du Grand coutumier de France*, Paris, 1880.

Domingo, R., *Roman Law. An Introduction*, London-New York, 2018.

Dziadzio, A., *Powstanie austriackiego kodeksu cywilnego ABGB i jego twórca*, Prawo i więź, *vol*. 42, no. 4, 2022, pp. 449-474.

Ehrhardt, A., *Iusta causa traditionis. Eine Untersuchung über den Erwerb des Eigentums nach Römischem Recht*, Berlin-Leipzig, 1930.

Faber, W. (eds.), *Principles of European Law. Study Group on a European Civil Code. Acquisition and Loss of Ownership of Goods (PEL Acq. Own.)*, Oxford, 2011.

Government of India. Law Commission of India, The Law on Adverse Possession. Dissent Note. Report No. 280, May 2023.

Gretton, G. L.; Steven, A. J. M., *Property, Trusts and Succession*, ed. 3, Haywards Heath-London, 2017.

Guarino, A., *Diritto privato romano*, ed. 9, Napoli, 1992.

Guarino, A., *Pagine di diritto romano*, *vol*. II, Napoli, 1993.

Hamza, G., *Zum Verhältnis zwischen usucapio und longi temporis praescriptio im Klassischen Römischen Recht*, in: *Mélanges Fritz Sturm*, *vol*. I, Liège, 1999, pp. 189-203.

Hausmaninger, H., *Nemo sibi ipse causam possessionis mutare potest – eine Regel der veteres in der Diskussion der Klassiker*, in: Seidl, E. (ed.), *Aktuelle Fragen aus modern Recht und Rechtsgeschichte. Gedächtnisschrift für Rudolf Schmidt*, Berlin, 1966, pp. 399-412.

Herrmann-Otto, E., *Ex ancilla natus*, Sttuttgart, 1994.

Jakobs, H. H., *Error falsae causae*, in: Jakobs, H. H.; Knobbe-Keuk, B.; Picker, E.; Wilhelm J. (ed.), *Festschrift für Werner Flume zum 70. Geburtstag*, Köln, 1978, pp. 137-195.

Jansen, J. E., *Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law*, European Property Law Journal, *vol*. 1, no. 1, 2012, pp. 153-165.

Johnston, D., *Roman Law in Context*, Cambridge, 2007.

Jörs, P.; Kunkel, W.; Wenger, L., *Römisches Recht*, Berlin-Heidelberg-New York-London-Paris-Tokyo, 1987.

Kaser, M., *Eigentum und Besitz im älteren Roömischen Recht*, Köln-Graz, 1956.

Kaser, M., *Partus ancillae*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol*. 88, 1958, pp. 165-200.

Kilgore, L., *The Ten-Year Acquisitive Prescription of Immovables*, Louisiana Law Review, *vol*. 36, no. 4, 1975, pp. 1000–1017.

Klunzinger, E., *BGB-Sachenrecht Verfahrensrecht, Rechtsformen der Unternehmen*, Wiesbaden, 1985.

Krimphove, D., *Das europäische Sachenrecht eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik*, Lohmar, 2006.

Laboulaye, É.; Dareste, R. (eds.), *Le Grand Coutumier de France*, Aalen, 1969.

Law Reform Commission of Hong Kong, Report. Adverse Possession, 2014.

Levy, E.; Rabel, E., *Index Interpolationum quae in Iustiniani digestis inesse dicuntur*, Weimar, 1929.

Longo, C., *Sulla 'in diem addictio' e Sulla 'lex commisoria' nella vendita*, Bulletino dell'Istituto de diritto romano, *vol*. 31, 1921, pp. 40-50.

Lovett, J. A., *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881-1986)*, Texas A&M Law Review, *vol*. 5, no. 1, 2018, pp. 1-63.

Lovett, J. A., *Tacking in a Mixed Jurisdiction*, in: Steven, A. *et al.* (ed.), *Nothing so Practical as a Good Theory. Festschrift for George L. Gretton*, Edinburgh, 2017, pp. 162-176.

Lovett, J. A.; Hoops, B., *Adverse Possession by the State: Toward Remedial Equivalency*, Loyola Law Review, *vol*. 69, 2022, pp. 1-130.

Loviot, L., *Revue des livres anciens. Documents d'histoire litteaire*, Paris, 1914.

Lydorf, C., *Roman Legal Family*, European History Online, http://www.ieg-ego.eu/lydorfc-2011-en (16 July 2023).

MacCormack, G., *Nemo sibi ipse causam possessionis mutare potest*, Bulletino dell'Istituto de diritto romano, vol. 75, 1972, pp. 71-96.

Mezzanotte, F., *All You Need is Controle. Italian Perspectives on Acquisitive Prescription of Immovables*, The Italian Law Journal, *vol*. 4, no. 2, 2018, pp. 337-366.

Peters, F., *Die Rücktrittsvorbehalte der R*ömischen Kaufrechts, Köln-Wien, 1973.

Planiol, M., *Treatise on the Civil Law*, *t.* 1, part 2: Nos. 1610 to 3097, Saint Paul (Minnesota), 1939.

Polain, M. L, *Les éditions du Grand Coutumier de France, 1514–1539–1598–1868*, in: Loviot, L. (ed.), *Revue des livres anciens. Documents d'histoire littéraire*, Paris, 1914.

Potschka, S.; Meissel, F.-S., *Zur vorgeschlagenen Neufassung des Ersitzungsrechts*, Wien, 2022.

Provera, G., *Note esegetiche in tema di errore*, in: *Studi in onore di Pietro de Francisci*, *vol.* 2, Milano, 1956, pp. 161-181.

Puder, M. G.; Rudokvas, A. D., *Acquisitive Prescription of Artwork and Other High-Value Movables: A Comparative Case Study of Litigation and Legislation in Louisiana, Germany, and Russia*, The American Journal of Comparative Law, *vol*. 71, no. 1, 2023, pp. 142-188.

Riccobono, S., *Sul Fr. 4 Pr. D. Pro Suo e la vesione greca riportata da Armenopulo*, in: Riccobono, S., *Scritti di diritto romano*, *vol.* I, Palermo, 1957.

Sagaert, V., *Prescription in French and Belgian Property Law after the Pye Judgment*, European Review of Private Law, *vol.* 15, no. 2, 2007, pp. 265-272.

Schloßmann, S., *Nemo sibi ipse causam possessionis mutare potest*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol*. 24, 1903, pp. 13-49.

Schrage, E. J. H., *Res habilis, titulus, fides, possessio, tempus. A medieval mnemonic hexameter?*, in: Sturm, F.; Thomas, P.; Otto, J. (eds.), *Liber Amicorum Guido Tsuno*, Frankfurt am Main, 2013, pp. 341-355.

Seckel, E.; Levy, E., *Die Gefahrtragung beim Kauf im klassischen römischen Recht*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, *vol*. 47, 1927, pp. 117-263.

Shoked, N., *Who Needs Adverse Possession?*, Fordham Law Review, *vol*. 89, 2021, pp. 2639-2692.

Siber, H., *Römisches Recht: in Grundzügen für die Vorlesung: Bd. 2: Römisches Privatrecht*, Berlin, 1928.

Sprankling, J. G.; Coletta, R. R., *Property. A Contemporary Approach*, St. Paul, 2009.

Stake, J. E., *The Uneasy Case of Adverse Possessio*, The Georgetown Law Journal, *vol*. 89, 2001, pp. 2419-2474.

Stolarski, K., *Iusta causa usucapionis w poglądach Trebacjusza i Fragmentach Watykańskich [Iusta causa usucapionis according to Trebatius and the Vatican Fragments]*, Krakowskie Studia z Historii Państwa i Prawa, *vol.* 12, 2019, pp. 121-144.

Stolarski, K., *Prawna przyczyna zasiedzenia w jurysprudencji rzymskiej* [*Roman Jurisprudence about the Requirement of Iusta Causa for the Usacaption*], PhD Thesis, Kraków, 2021.

Sukačić, M., *Nevaljanost potestativinih uvjeta u korist obvezanika i pactum dicplicentiae*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 69, no. 1, 2019, pp. 117-146.

Teo, H. Y., *A Critique of the Doctrine of Adverse Possession*, Australian National University, Cross sections, *vol*. 4, 2008.

Thomas, J. A. C., *Provisions for Calling off a Sale*, Tijdschrift voor Rechtsgeschiedenis, *vol*. 35, 1967, pp. 557-592.

Van der Walt, A. J., *Property in the margins*, Oxford-Portland, 2009.

Van der Walt, A. J.; Marais, E. J., *The Constitutionality of Acquisitive Prescription: A Section 25 Analysis*, Tydskrif vir die Suid-Afrikaanse Reg, no. 4, 2012, pp. 714-736.

Vassalli, F., *Dies vel condicio*, Bulletino dell'Istituto de diritto romano, *vol*. 27, 1914, pp. 192-217.

Voci, P., *Modi di acquisto della proprietà*, Milano, 1952.

Watson, A., *The Law of Property in the Later Roman Republic*, Oxford, 1968.

Wieacker, F., *Lex Comissoria. Erfüllungszwang und Widerruf im Römischen Kaufrecht*, Berlin, 1932.

Zielonacki, J., *Pandekta, czyli wykład prawa rzymskiego, o ile ono jest podstawą prawodawstw nowszych, cz. 1: Ogólne zasady prawne i nauka o stosunkach rzeczowych*, Cracow, 1862.

Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Traditions*, Cape Town-Wetton-Johannesburg, 1992.

Sažetak

Kamil Stolarski*

VALJANI PRAVNI TEMELJ KAO PRETPOSTAVKA DOSJELOSTI: GLOBALNA DISKUSIJA I RIMSKI PRAVNI KORIJENI

*U suvremenim raspravama u pojedinim pravnim sustavima pojavljuju se stajališta kojima se stavlja u pitanje legitimitet i održivost ustanove dosjelosti. Pritom se iznose sumnje postoji li i generalno opravdanje za postojanje tog instituta. Riječ je o raspravi koja nije nepoznata ni u užem europskom kontekstu. Općenito, međutim, treba imati na umu da ustanova dosjelosti nije jedinstveni koncept, već postoje mnoge varijante u raznim zemljama. Stoga se postavlja pitanje govorimo li doista u svim slučajevima o istoj ustanovi ili o različitima, ovisno o jednoj ili više zahtijevanih pretpostavki. Jedna od pretpostavki koja se ne pojavljuje u svim pravnim sustavima jest valjani pravni temelj (*iusta causa usucapiendi*). Poljsko pravo tako ne zahtijeva ispunjenje navedene pretpostavke za stjecanje vlasništva dosjelošću. S druge strane, sasvim je jasno kako je ona bila nužna pretpostavka dosjelosti (*usucapio*) u rimskom pravu kao temelju civilističkih pravnih sustava. Prve izjave pravnika poput Trebacija, Sabina i Kasija upućuju na to kako je pri prvom konceptualnom oblikovanju instituta dosjelosti* iusta causa *morala biti prisutna, odnosno ispunjena, te je u bitnome definirala njezinu pravnu narav. Bez nje, prema mišljenju pravnika, nije bilo moguće steći vlasništvo stvari dosjelošću.*

Ključne riječi: dosjelost, stvarno pravo, rimsko pravo, valjani pravni temelji dosjelosti, titulus

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