Actio Publiciana and Mancipatio

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Abstract

Mancipatio was the established way to trade res mancipi (slaves, italic soil and big animals), so if these things were delivered by traditio the transmission was invalid. This distinction disappeared before Justinian's compilation, generalizing the traditio as a mechanism for the transmission of all goods. This work discusses the possibility that the mechanisms for protecting the Praetorian owner (especially the actio publiciana) could have determined the disappearance of mancipatio.

Keywords: *Roman law; mancipatio; res mancipi; tradition; property; trade.*

1. Res mancipi y res nec mancipi

The oldest classification of things in Rome separates res mancipi or nec mancipi [1] in view of their social function. Gaius shows that res mancipi were the *servi*, *animalia quae collo dorsove domantur*, *fundi in soli italico* and the rustic easements (iter, via, actus and aquaeductus)

Gai 2

14th. Res praeterea aut mancipi sunt aut nec mancipi. […. vv. 5. seruitutes praediorum urbanorum nec mancipi sunt. item stipendiaria praedia et tributaria nec mancipi sunt. 15. Sed quod diximus ea animalia, quae domari solent, mancipi esse, n[…. vv. 1 3/4. statim ut nata sunt, mancipi esse putant; Nerua uero et Proculus et ceteri diuersae scholae auctores non aliter ea mancipi esse putant quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc uideri mancipi esse incipere, cum ad eam aetatem peruenerint, in qua domari solent. 16. At ferae bestiae nec mancipi sunt, uelut ursi, lions, item ea animalia, quae ferarum bestiarum numero sunt, uelut elefanti et cameli, et ideo ad rem non pertinet, quod haec animalia etiam collo dorsoue domari solent; nam ne notitia quidem eorum animalium illo tempore fuit, quo constituebatur quasdam res mancipi esse, quasdam nec mancipi. 17. Sed item fere omnia, quae incorporalia sunt, nec mancipi sunt, exceptis seruitutibus praediorum rusticorum; nam eas mancipi esse constat, quamuis sint ex numero rerum incorporalium.

The origin of the distinction is not peaceful between the doctrine [2], but the authors seem to agree that, in the early Roman society, the so-called res mancipi were capital goods whose acquisition required extraordinary formalities containing an effect of formal advertising [3], while the nec mancipi could be assimilated to consumer goods, for which mere traditio was sufficient.

2. Transmission of res mancipi

The res mancipi had to be transmitted solemnly: by mancipatio, in iure cessio, will or *addictio* of the praetor. Mancipatio was a ceremony [4] in which *accipiens*, in the presence of at least

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1 The etymological origin of the name is debatable. D'ORS refers the term mancipi to an archaic gentile of *mancipium* with reference to Seneca. D'ORS, A.: *Derecho Privado Romano*, Eunsa, Pamplona, 1989, pp. 179.

2 TORRENT RUIZ cites the views of BONFANTE and VISSCHER in this regard and suggests that the distinction between res mancipi and nec mancipi could entail a different ownership regime. However, it warns, the distinction that might make sense in the primitive archaic society was declining for the classification between movable and immovable property, as can be seen, for example, in the order to proceed in the embargoes set out in the pignus in causa iudicati captum. TORRENT RUIZ, A.*: Diccionario de Derecho Romano, v. res mancipi*, Edisofer, Madrid, 2005, pp. 1078. BONFANTE, P., "Forme primitive ed evoluzione della proprietŕ romana", *Scritti giuridici vari*, vol. II, Roma, 1916, pp. 1-326; GALLO, F., *Studi sulla distinzione fra res mancipi e res nec mancipi,* Giappichelli, Torino, 1958, DE VISSCHER, F., "Mancipium et res mancipi", *Nouvelles Etudes de Droit romain public et privč*, Giuffrč, Milano, 1949, pp. 193-261. DÍAZ-BAUTISTA CREMADES, A.: *El embargo ejecutivo en el proceso cognitorio romano. Pignus in causa iudicati captum*, Marcial Pons, Madrid, 2013, pp. 106 ss. A detailed analysis of the institution's origin in archaic law can be found in AMUNÁTEGUI PERELLÓ, C.: Problems concerning mancipatio, en *Revue d'Histoire du Droit* 80 (2012) 329-352.

3 VARELA GIL, C.: El origen de la mancipatio: de medio de publicidad dominical a modo de adquirir la propiedad, en *RGDR*, 9(2007) pp. 4.

4 BONFANTE, P., "Forme primitive ed evoluzione della proprietŕ romana", *Scritti giuridici vari*, vol. II, cit., pp. 1-326; BREZZO, C., *La mancipatio*, L'erma, Roma, 1972 (reimpresión de la edición de 1891); SCHLOSSMANN, S., *In iure cessio und mancipatio*, Berlin, 1904; ARANGIO-RUIZ, V., *La compravendita in diritto romano,* 2 vols., Jovene, Napoli, 1954; FUENTESECA, P., "Mancipium, mancipatio, dominium", *Labeo*, n.° 4, 1958, pp. 135-149; WOLF, J. G., "Funktion und struktur der mancipatio", *Mélanges Magdelain*, 1998, pp. 501 y ss, FERNÁNDEZ DE BUJÁN, A., *El precio como elemento comercial en la compraventa romana,* 3.Ş ed., Reus, Madrid, 1993.

five witnesses and a *libripens*, taking on the subject of the acquisition, claimed, by solemn words, that it was his own, according to the right of the Quirites while hitting the scales with a piece of bronze that was delivered, as a symbolic price, to the transmitter[5].

Gai. 1.119

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.

In iure cessio, consisted in the use of the *principium dispositivuum*, typical of the civil process, to formalize a legal business. The acquirer sued the seller by means of the *legis actio per sacramentum in rem*, reciting the ritual of *vindicatio*, before which the seller was silent, being dictated by the Praetor or president of the province an addict in favour of the actor[6].

Gai. 2.24

24. In iure cessio autem hoc modo fit: apud magistratum populi Romani uelut praetorem urbanum [aut praesides prouinciae] 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.

3. Acquisition of res mancipi by traditio

As is said, under civil law, these mancipi things, fundamental to the Roman economy, can only be transmitted by solemn means: mancipatio, in iure cessio, magistrate's addict, inheritance or legacy. However, the reality of legal traffic, as is often the case, was imposed on the rule and at one point, the transmission of *res mancipi* through *traditio* was generalized, with omission of established forms[7].

In purity, the transmission of a *res mancipi* without observing the essential forms caused the ineffectiveness of the business, so that the acquirer did not become owner of the good, which remained in the tradens' heritage. However, despite is it correct in legal technique, it caused in practice a serious injustice, since compliance with legal forms depended on the will of the seller, so that the seller, deliberately or negligently, benefited from his own unlawful action, in breach of the principle *nemo auditor propiam turpitudinem allegans*.

For this reason, the Praetorian law established specific protection mechanisms for those who had acquired a *res mancipi* by *traditio*, which, in our view, led to the disappearance of *mancipatio*, and the distinction between *res mancipi* and *res nec mancipi*.

3.1 Mechanisms for the protection of the acquirer of res mancipi by traditio[8]

As we will see, although according to the *ius civile* the "Praetorian owners"[9] lacked rights in the acquired thing, honorary law created mechanisms of protection that brought them, in many cases, closer to true property, which ended up blurring, in postclassic and Justinian law, the differences between possession and property.

Injunctions

The first remedy available to an "*a non domino* acquirer" or defect of form is possessive injunctions, provided even the actor retains possession or has been forced in the year immediately before. This protection extended to any holder, *natural* or *civil*[10], both in good and bad faith - except of "*detentatores*". For the most part, it was granted to those who had entered into possession under a title of those who generally confer ownership[11].

This effective Praetorian protection, both on the preventive side[12] of the injunction to retain and in the reparation, of recovering[13], protected the possessor from *facta spoliandi*, because it is based, as we said, on the need to preserve social peace. However, it was - and proves - ineffective in the face of the

[5] Remember D'ORS that mancipatio is heir to older business procedures, such as nexum or testament per aes et libram. D'ORS, Op. Cit. pp. 213 and points out that throughout classical times it became an abstract mode of transmission of dominance whatever its cause (pp. 215)

[6] Vid. art. 21.1 LEC (Spanish Procedural Civil Law): *Cuando el demandado se allane a todas las pretensiones del actor, el tribunal dictará sentencia condenatoria de acuerdo con lo solicitado por éste*.

[7] Alongside this, D'ORS warns, in some cases, although the sale was lawful, mancipatio could not be granted, as was the case, for example, in the sale of the creditor pignoratitium. Vid. D'ORS, op. cit, pp. 233

[8] On actions for the protection of property Vid. FERNANDEZ DE BUJÁN, A.: Derecho privado romano, 10Ş edic., Madrid, Ed. Iustel, 2017, pp. 399 y ss.

[9] We call a qualified set of civilian holders "Praetorian owners" who, despite having acquired possession through a translational title of the domain, are not true owners either because the transferor did not own (acquisition to non-domino) or because formalities in the transmission of the res mancipi.

[10] We follow in this work the classification of the different holders in: detentatores, natural holders and civil holders, maintained by DÍAZ BAUTISTA Y DÍAZ-BAUTISTA CREMADES, A.: *El Derecho romano como introducción al Derecho* 3Ş ed., Diego Marín, Murcia, 2019, pp. 140 y ss. In a different sense, vid. D'ORS, Op. cit, pp. 185 ss.

[11] Justinian warns in Inst. 4.15.8 that the injunctions had fallen into disuse at the time, being brought back to jurisdiction, as the Civil Procedure Act does today, in article 250.4. De ordine et veteri exitu interdictorum supervacuum est hodie dicere: nam quotiens extra ordinem ius dicitur, qualia sunt hodie omnia iudicia, non est necesse reddi interdictum, sed perinde iudicatur sine interdictis atque si utilis actio ex causa interdicti reddita fuisset.

[12] D. 43.17.1 Ulpianus libro 69 ad edictum Ait praetor: „Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto.

[13] D. 43.16.1 Ulpianus libro 69 ad edictum: Praetor ait: „Unde tu illum vi deiecisti aut familia tua deiecit, de eo quaeque ille tunc ibi habuit tantummodo intra annum, post annum de eo, quod ad eum qui vi deiecit pervenerit, iudicium dabo".

exercise of procedural actions aimed at stripping the "Praetorian owner" of possession, which must therefore seek other safeguarding mechanisms.

Possessive injunctions are mentioned in Justinian Institutions

Inst. 4.15.4

Retinendae possessionis causa comparata sunt interdicta uti possidetis et utrubi, cum ab utraque parte de proprietate alicuius rei controversia sit et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit ut alius possideat, alius a possidente petat. et quia longe commodius est possidere potius quam petere, ideo plerumque et fere semper ingens existit contentio de ipsa possessione. commodum autem possidendi in eo est, quod, etiamsi eius res non sit qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio: propter quam causam, cum obscura sint utriusque iura, contra petitorem iudicari solet.

Justinian's institutions, in describing the injunction to keep property (uti possidetis) refer only to the holding of the thing, not to mention the disturbance of possession by *inmissiones*. Likewise, Gaius's institutions:

Gai 4.148 ss:

148. Retinendae possessionis causa solet interdictum reddi, cum ab utraque parte de proprietate alicuius rei controuersia est et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. cuius rei gratia comparata sunt VTI POSSIDETIS et VTRVBI. 149. Et quidem VTI POSSIDETIS interdictum de fundi uel aedium possessione redditur, VTRVBI uero de rerum mobilium possessione. 150. Et si quidem de fundo uel aedibus interdicitur, eum potiorem esse

Ulpiano ad Ed., in D.43.17.3, and the following, defines the material scope of the *interdictum uti posidetis*, clarifying in which cases interdictal protection will proceed and they will refuse it:

D. 43.17.3

Ulpianus libro 69 ad edictum

pr. Si duo possideant in solidum, videamus, quid sit dicendum. Quod qualiter procedat, tractemus, si quis proponeret possessionem iustam et iniustam. Ego possideo ex iusta causa, tu vi aut clam: si a me possides, superior sum interdicto, si vero non a me, neuter nostrum vincetur: nam et tu possides et ego.

1. Hoc interdictum duplex est et hi, quibus competit, et actores et rei sunt.

2. Hoc interdictum sufficit ei, qui aedificare in suo prohibetur: etenim videris mihi possessionis controversiam facere, qui prohibes me uti mea possessione.

3. Cum inquilinus dominum aedes reficere volentem prohiberet, aeque competere interdictum uti possidetis placuit testarique dominum non prohibere inquilinum, ne habitaret, sed ne possideret.

4. Item videamus, si auctor vicini tui ex fundo tuo vites in suas arbores transduxit, quid iuris sit. Et ait Pomponius posse te ei denuntiare et vites praecidere, idque et Labeo scribit, aut uti eum debere interdicto uti possidetis de eo loco, quo radices continentur vitium: nam si tibi vim fecerit, quo minus eas vites vel praecidas vel transducas, vim tibi facere videtur, quo minus possideas: etenim qui colere fundum prohibetur, possidere prohibetur, inquit Pomponius.

5. Item videamus, si proiectio supra vicini solum non iure haberi dicatur, an interdictum uti possidetis sit utile alteri adversus alterum. Et est apud Cassium relatum utrique esse inutile, quia alter solum possidet, alter cum aedibus superficiem.

6. Labeo quoque scribit: ex aedibus meis in aedes tuas proiectum habeo: interdicis mecum, si eum locum possideamus, qui proiecto tegetur. An, quo facilius possim retinere possessionem eius proiectionis, interdico tecum sic "uti nunc possidetis eas aedes, ex quibus proiectus est?"

7. Sed si supra aedes, quas possideo, cenaculum sit, in quo alius quasi dominus moretur, interdicto uti possidetis me uti posse Labeo ait, non eum qui in cenaculo moretur: semper enim superficiem solo cedere. Plane si cenaculum ex publico aditum habeat, ait Labeo videri non ab eo aedes possideri, qui kruptas possideret, sed ab eo, cuius aedes supra kruptas essententiarum verum est hoc in eo, qui aditum ex publico habuit: ceterum superficiarii proprio interdicto et actionibus a praetore utetur. Dominus autem soli tam adversus alium quam adversus superficiarium potior erit interdicto uti possidetis: sed praetor superficiarium tuebitur secundum legem locationis: et ita Pomponius quoque probat.

8. Creditores missos in possessionem rei servandae causa interdicto uti possidetis uti non posse, et merito, quia non possident: idemque et in ceteris omnibus, qui custodiae causa missi sunt in possessionem, dicendum est.

9. Si vicinus meus in parte in pariete meo tectoria habeat et in parte sua, "uti possidetis" mihi efficax est ut ea tollere compellatur.

10. Non videor vi possidere, qui ab eo, quem scirem vi in possessionem esse, fundum accipiam.

11. In hoc interdicto condemnationis summa refertur ad rei ipsius aestimationem. "Quanti res est" sic accipimus "quanti uniuscuiusque interest possessionem retinere". Servii autem sententia est existimantis tanti possessionem aestimandam, quanti ipsa res est: sed hoc nequaquam opinandum est: longe enim aliud est rei pretium, aliud possessionis.

The possessive injunctions had in Rome a "vicious possession clause" which can be recognized in the text collected by Ulpiano (see note above) with the expression *nec vi, nec clam, nec precario ab altero*[14] which is interpreted as an exception to interdictal guardianship, which would be refused if the disrup-

[14] Note this 'relative character' of the exception: the injunction was not denied to any illegitimate holder but only when the applicant for protection had acquired possession by violence, deception or precarious in respect of the one who now unsettled his possession. If the usurped was disturbed by a third party, he would have full standing to impetrate the injunction.

tor demonstrated that the plaintiff had acquired possession by violence, fraud or precarious in respect of the defendant. This legitimized the recoverive violence of the peaceful holder who, for a year from the stripping, could go to interdict protection or regain possession on his own without the usurping person being able to apply for injunctions. This legitimate violence ceased when the holder who sought to recover the good that had been stripped of him used excessive violence, concrete in the employment of armed persons (even if it were with sticks). In that case, the usurped stripped with such violence, could regain possession with the *interdictum unde vi armata*, which lacked the vicious possession clause [15].

Prescription [16]

In the case of the "aberrant" situation of a different civil owners extends over time, the law chooses to consolidate the appearance, making owner the person exercising the domain in fact, therefore expropriating the *verus dominus* [17].

D. 41.3.3
Modestinus libro quinto pandectarum
Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti.

Traditionally, there is a double basis for an institution that entails expropriation of the rightful owner and the empowerment of those who possess illegitimately: On the one hand, the need for legal certainty that leads to the consolidation of a peaceful situation that continues over time is emphasized, thus giving confidence to those who rely on the appearance of ownership involved in public possession of a good. On the other hand, following Ihering's theories, it is argued that subjective rights (in this case, property) are conferred on subjects to be exercised and the inaction of *verus dominus* for an extended period of time reflects some "negligence" or a kind of abandonment that would legitimize the dispossession [18].

For this it is necessary, except in cases of *extraordinaria praescriptio*, for the civil holder to hold a valid but ineffective title according to which he has entered, in good faith, in possession of the good as owner, that is, that he is a "Praetorian owner" [19].

D. 41.3.10
Ulpianus libro 16 ad edictum
pr. Si aliena res bona fide empta sit, quaeritur, ut usucapio currat, utrum emptionis initium ut bonam fidem habeat exigimus, an traditionis. Et optinuit Sabini et Cassii sententia traditionis initium spectandum.

The terms of usucapion in classical law were very short (one year for movable property and two for real estate) suggesting that the need to validate defective acquisitions could be very high and that the regulatory system preferred to ensure legal certainty over the right of *verus dominus*. In the provinces a special form of usucapion called *longi temporis praescriptio* was applied, in which *bona fides* and *iustus titulus* were recast into a single requirement called *iustum initium possessionis* and required longer periods (ten years between present and twenty among absentees) [20]. It did not produce the acquisition of the domain (positive effect) such as the *usucapio* (and therefore the prescriber, if he lost possession of the prescribed thing could not claim it), but an *exceptio* of the prescriber against a possible claim of the owner (negative effect). In postclassic law an extraordinary system of acquisition of the property was established, called *longissimi temporis praescriptio*, over time (thirty or forty years, depending on the historical moment) without the need for *iustum initium possessionis* (good faith and just cause) [21].

In Justinian law, the previous three institutions were recast, admitting, for the calculation of time, both *successio possessionis* and *accessio possessionis*. The same requirements were required as classical *usucapio*, although the things of the Fisco and those of the Church were not considered usucapible. For movable goods a period of three years was established; for real estate required a period of ten years between present and twenty years between absentees. Next to them was established an extraordinary form in which the initial good faith was demanded but not the just cause and required that possession last thirty years in general.

A this time, the basis of usucapion is twofold: on the one hand, the need to protect the legal appearance on which legal and commercial trafficking rests. On the other hand, it is held that the law grants rights and powers to be exercised and, in

[15] D. 43. 16. 1 Ulpianus libro 69 ad edictum: Praetor ait: „Unde tu illum vi deiecisti aut familia tua deiecit, de eo quaeque ille tunc ibi habuit tantummodo intra annum, post annum de eo, quod ad eum qui vi deiecit pervenerit, iudicium dabo".

[16] D.41.3

[17] The usucapion is considered by the doctrine as a way to acquire the property through possession with certain requirements. It is an original mode even though the thing had a previous owner because the user's domain does not derive from the ownership of the owner, so that the burdens and limitations of the previous owner are not transferred to the new. VERDA Y BEAMONTE, JR.: La usucapión, en SERRA RODRÍGUEZ, A.: *Derecho Civil III Derechos Reales* 5Ş Edición, Tirant, 2019, Pp. 118

[18] VERDA Y BEAMONTE, op. cit pp. 118, disagrees with this basis and refers exclusively to the need to consolidate the legal appearance for the sake of traffic security. For its part, DIEZ PICAZO maintains that position by stating that, if the basis of the usucapion were a certain "presumption of abandonment", it would suffice to establish that it was not possible to defend the domain for the previous owner to challenge the user's acquisition. DIEZ PICAZO, L.: *Sistema de Derecho Civil* III, Tecnos, Madrid, 2005, pp. 126.

[19] FUENTESECA DEGEFFE considers, however, that the usucapio never validated the acquisition to non-domino, since the acquirer did not exercise usus because he had not received the verus dominus thing. In the author's view, the role of the usucapio was to exempt from proof who had acquired a good beyond the prescribed deadlines, ruling out the opinion of CASINOS MORA, according to which the prohibition on the usucapire of other people was established by the lex Atinia (197 BC). In our view, this Lex Atinia banned the usucapion of res furtivae, not anything else. FUENTESECA DEGENEFFE, M.: la exclusión del comprador a non domino de la usucapio, en *RIDROM*, *Revista Internacional de Derecho Romano,* 15(2015) pp. 10.

[20] Art. 1957 CC (Spanish Civil Code)

[21] Art. 1959 CC

some way, the owner who does not diligently claim his mastery, is abdicating his right and consenting to him being transferred to another.

Once the period of usucapion has elapsed, with the concurrence of the other requirements, the acquisition to non-domino or with defect form, is validated, and the acquirer is, in full, a civil owner. The specific remedies we will see below were effective, therefore, during the term of the usucapion or in cases where it was not possible.

Not all goods were suitable for usucapion. In addition to the res communes and res sacrae, which are inability to trade, the acquisition by usucapion of stolen furniture (res futivae) and properties acquired by violence was prohibited[22].

Exceptio rei vendita et tradita

When the Praetorian owner was sued with the claimant act, he could not oppose the domain because, under civil law, he did not own it until the term of the usucapion elapsed. However, the Praetor awarded the defendant an *exceptio* for which he claimed to have acquired by *traditio* possession of the thing (*exceptio rei vendita et tradita*).

Such an exception would be sufficient to neutralize the intent of anyone who could not prove to have acquired the good or did not have a title invalidating the acquisition of the Praetorian owner. However, if the plaintiff has a title of ownership, he may seek to invalidate the *exceptio* with a *replicatio iusti dominii* that would destroy the arguments of the Praetorian owner, unless the defendant's title of acquisition is precisely a sale by *traditio* of a *res mancipi* in which, since the formalities (*mancipatio, in iure cessio*) the seller-claimant remains a civil owner, have not been respected. In that case, the *replicatio iusti dominii* would be invalidated by a duplicate doli that would leave the actor without arguments.

On the contrary, in the case of non-domino acquisition, the defendant cannot claim his acquisition against the plaintiff's civil property, since the title of acquisition of the Praetorian owner is inoponable when *verus dominus*, who acts here as a plaintiff.

Actio Publiciana[23]

If the default owner lost possession, he could not exercise the *vindicatio* to claim it, as he was not a true civil owner. As we have already pointed out, the precarious owner, as the holder, could use the injunctions to retain and recover. However, if a year had passed since the stripping or if the usurper claimed some kind of possessive title, the acquirer was deprived of a procedural remedy that would allow him to regain possession[24].

For this reason, a fictitious utilis in rem actio was granted that protected the Praetorian owners if he were already the owner[25]. The action is presented as a vindicatio utilis, that is, as a variant of the claim in which it was claimed that the plaintiff already owned it for the course of the term of the usucapion. In this way, the Praetorian owner who was stripped of the thing could recover it from the current holder, provided that the thing was identifiable.

Actio Publiciana was born as a form of protection to so-called Praetorian owners or "bonitarios"[26], that is, those who had not yet acquired the property, but who possessed as if they were authentic owners[27]. They were therefore ad usucapionem holders who, once the deadline had been met, would become civil owners by the effect of the usucapio[28]. It should be recalled here that in Roman law the good faith necessary for usucapion is only taken into account at the time of acquisition, so - unlike modern civil law - the ad usucapionem holder could be perfectly aware of the defect of his acquisition title.

The action triumphed against any holder who did not have a legitimate title of possession, even in front of the true owner if it was a sale by *traditio* of *res mancipi*, since the *exceptio iusti dominii* of the defendant (civil owner, at the end of the day) could be neutralized with a *replicatio rei venditae et traditae*, against which the seller could not oppose anything. On the contrary, if the plaintiff had acquired *a non-domino* and the current holder

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[22] Where civilist doctrine probably takes the interpretation of Article 441(CC) set out above

[23] Publicist action is a classic theme in Roman law, covered by the greatest authors. Vid., among others, BURDESE, A.: "Editto publiciano e funzioni della compravendita romana", *Estudios en homenaje al profesor Francisco Hernández-Tejero*, v.II, Madrid, 1992, pp. 81-89; WUBBE, FJ. "Quelques remarques sur la fonction et l'origine de l'action Publicienne", *RIDA*, 8 (1961), pp. 417-440; GALLO, F.: s.v. Actio Publiciana in rem, NNDI, T. I, Torino, 1957, pp. 267-270; BONFANTE, P.: "L'azione Publiciana nel diritto civile", *Scritti giuridici varii, II. Proprietŕ e servitů*, Torino, 1918, pp. 389-438; BONFANTE, P.: "L'Editto publiciano", *Scritti giuridici varii*, II. *Proprietŕ e servitů*, Torino, 1918, pp. 439-449; FEENSTRA, R.: "Action Publicienne et preuve de la propriété. Principalement d'apres quelques romaines du moyen âge", *Mélanges Philippe Meylan*, v. I, Lausanne, Imprimerie Central, 1963, pp. 91-110; DI LELLA, L.: *Formulae ficticiae. Contributo allo studio di la reforma giudiziaria di Augusto,* Napoli, Ed. Jovene, 1984, pp. 67-127; VACCA, L.: "Osservazioni in tema di actio Publiciana e acquisto a non domino", *Scritti per Alessandro Corbino*, v. 7, a cura di Isabella Piro, 2016, pp. 317-337; SANSÓN RODRÍGUEZ, MV.: "Algunas observaciones sobre la función originaria de la acción publiciana", *Anales de la Facultad de Derecho*. Universidad de La Laguna, 14 (1997), pp. 135-154; FUENTESECA DEGENEFEE, M.: "Proprietas, possessio y Actio Publiciana", *Actas del II Congreso Internacional y V Iberoamericano de Derecho Romano: Los derechos reales,* Coord. Armando Torrent Ruíz, Madrid, Edisofer, 2001, pp. 415-436.

[24] D'ORS, op. cit. Pp. 233

[25] This is the thesis supported mostly by The romanesque. Vid. BONFANTE, P.: «L Editto publiciano», en Scritti giuridici varii, II, U.T.E.T, Torino, 1926, pp. 399. En sentido contrario, vid. WUBBE, FBJ.: «Quelques remarques sur la fonction et l'origine de l'action Publicienne», en *RIDA* 8 (1961), pp. 422 ss, defending a broader definition of the active subject of public action.

[26] The genesis of public action on cases initially protected by it has provoked a strong doctrinal debate, which can be examined in detail in SANSÓN RODRÍGUEZ, op. cit. 142 ss.

[27] They were therefore required to have the same budgets as usucapion (res habilis, iustus titulus, possessio and fides), although, as required PÉREZ ÁLVAREZ, good faith was demanded not only at the time of the contract but also in that of the traditio. PÉREZ ÁLVAREZ, MP.: la acción publiciana y la protección del "mejor derecho a poseer" *Revista General de Derecho Romano* 30 (2018), pp. 10

[28] This is considered by most doctrine. Vid. SANSÓN RODRÍGUEZ, op. cit. pp. 146.

was the civil owner, the intent would be neutralized with an exception iusti dominii from the true owner, against which the actor could not oppose anything, since the defendant had not sold him the good and his acquisition title was inoponable to him.

We know the Actio publiciana, through the Digest[29], by the references of the main classical jurists, particularly Ulpianus:

D. 6.2.1
Ulpianus libro 16 ad edictum
pr. Ait praetor: "Si quis id quod traditur ex iusta causa non a domino et nondum usucaptum petet, iudicium dabo. "[30]
1. Merito praetor ait "nondum usucaptum": nam si usucaptum est, habet civilem actionem nec desiderat honorariam.
2. Sed cur traditionis dumtaxat et usucapionis fecit mentionem, cum satis multae sunt iuris partes, quibus dominium quis nancisceretur? Ut puta legatum.

Actio publiciana in Gai Institutions is also described
Gai. 4.36
36. (Eiusdem generis est Publiciana actio). Datur autem haec actio ei, qui ex iusta causa traditam sibi rem nondum usucepit: eamque amissa possessione petit. nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucepisse, et ita quasi ex iure Quiritium dominus factus esset, intendit hoc modo: IVDEX ESTO. SI QVEM HOMINEM AVLVS AGERIVS EMIT ** EI TRADITVS EST, ANNO POSSEDISSIT TVM SI EVM HOMINEM, DE QVO AGITVR EIVS EX IVRE QVIRITIVM ESSE OPORTERET et reliqua.

We can find the origin of the actio publiciana in the Praetor Quinto Publicius[31], although we do not know references to it before to Neratius[32] (D. 6.2.9.3 and 6.2.17), which has led some authors to place their origin in the first century of our Age[33].

D. 6.2.9
Ulpianus libro 16 ad edictum
1. Item si hereditatem emero et traditam mihi rem hereditariam petere velim, Neratius scribit esse publicianam.
D. 6.2.17
Neratius libro tertio membranarum
Publiciana actio non ideo comparata est, ut res domino auferatur: eiusque rei argumentum est primo aequitas, deinde exceptio "si ea res possessoris non sit": sed ut is, qui bona fide emit possessionemque eius ex ea causa nactus est, potius rem habeat.

It warns, however, Ulpianus, in D.6.2.9.5 that there is no action on things that cannot be alienated, since it shows that in such cases the Praetor does not protect anyone.

D. 6.2.9
Ulpianus libro 16 ad edictum
5. Haec actio in his quae usucapi non possunt, puta furtivis vel in servo fugitivo, locum non habet.

The claimant of the public action must have gained possession by a valid title for transferring the domain:

D. 6.2.3
Ulpianus libro 16 ad edictum
pr. Sunt et aliae pleraeque.
1. Ait praetor: "Ex iusta causa petet." Qui igitur iustam causam traditionis habet, utitur publiciana: et non solum emptori bonae fidei competit publiciana, sed et aliis, ut puta ei cui dotis nomine tradita res est necdum usucapta: est enim iustissima causa, sive aestimata res in dotem data sit sive non. Item si res ex causa iudicati sit tradita.
D. 6.2.4
Paulus libro 19 ad edictum
Vel solvendi causa.

Including, of course, the award of the thing in judgment:

D. 6.2.7
Ulpianus libro 16 ad edictum
pr. Sed et si res adiudicata sit, publiciana actio competit.

With an "advance" of the usucapion, the applicant for the action had to prove - as in that one - his good faith at the time of the acquisition of possession

D. 6.2.7
Ulpianus libro 16 ad edictum
11. Praetor ait: "Qui bona fide emit." Non igitur omnis emptio proderit, sed ea, quae bonam fidem habet: proinde hoc sufficit me bonae fidei emptorem fuisse, quamvis non a domino emerim, licet ille callido consilio vendiderit: neque enim dolus venditoris mihi nocebit.

It was ultimately a fictitious claim in which, the acquirer in good faith who had not yet covered the term of the usucapion, could claim possession as if he had already usucapited against anyone but the verus dominus

D. 6.2.16
Paulus notum ad Papiniani libro decimo quaestionum
Exceptio iusti dominii publicianae obicienda est.

[29] PÉREZ Alvarez warns, *La acción Publiciana*... pp. 8 that, according to most doctrine, the entire 6.2 of the Digest was interpolated by the Justinian commission.

[30] It is surprising that the regulation contained in D.6.2 on public action does not mention the assumption of the acquisition of res mancipi with a defect of form. The traditional explanation is that the Justinian commission erased all traces of the distinction between res mancipi and nec mancipi, and therefore on mancipatio, as this institution was already deprecated in its time. However, in our view, the hypothesis that such a distinction was no longer in force in Ulpiano's time would be defensible, so that the jurist did not deal with that assumption. On the contrary, the reference of Gaius (Gai. 4.36, vine. below) to the actio publiciana, which could contain a case of traditio of a res mancipi, can be cited.

[31] Año 67 aC

[32] Siglo I dC

[33] Vid. CUESTA SAENZ JM. *La acción publiciana*. Montecorvo, Madrid, 1984. Pp. 57. D'ORS adds that Cicero does not talk about this action. D'ORS op. cit. Pp. 233

4. Mancipatio's disappearance

The distinction between *res mancipi* and *nec mancipi*, and its corresponding need for *mancipatio* for the transmission of the former, is not present in the compilation of Justinian, being unanimous the doctrine in considering that, by the 6th century it had fallen into disuse. The discrepancy instead arises in determining when and why this category disappeared. D'Ors claims that this classification had disappeared long before the compilation [34].

We do not know at what point the decline of the distinction between *res mancipi* and *nec mancipi* and its correlative demand for *mancipatio* occurred, although we have as a certain date the compilation of Justinian who, with his manipulative work of texts prevents us from knowing if classical jurists spoke of it in his rewrites. However, we can venture that the establishment of an effective protection mechanism for the acquirer of *res mancipi* by *traditio*, as is the actio publicana, it could act as a catalyst for this process of disappearance of mancipatio, because in the end the accipiens was equally protected in its "domain", whether it acquired by mancipatio or if it did not, going well to the vindicatio well to the actio publiciana that would be configured as a real *vindicatio utilis* [35]. Even if the distinction between *res mancipi* and *nec mancipi* and the need for *mancipatio* occurred sometime between the 1st century BC (probable date of promulgation of the actio publiciana) and the coding of corpus iuris civilis, it was likely to be a slow process [36].

[34] D'ORS, op. cit. Pp. 178. However, he also claims that mancipatio endures throughout the classical era. Pp. 215.

[35] VARELA GIL, despite recognizing the influence that the protection of the acquirer by traditio could have on the decline of mancipatio, points out as main causes the extension of citizenship to all the inhabitants of the empire operated by Caracalla in 212 and the administrative reorganization carried out by Diocletian in the early 4th century, along with the appearance of the written document. VARELA GIL, C.: Reflexiones acerca de la decadencia de la mancipatio, Revista General de Derecho Romano 23(2014) pp. 13.

[36] Mancipatio is mentioned not only in legal sources - despite the clean made by Justinian's compilation of classical sources - but also in literary texts. Vid. CARRASCO GARCÍA, C.: Una compraventa poética, Horacio, Epistola 2.2, en Revue d'Histoire du Droit 85 (2017) 79-114.