Usucapi pro suo and the Classification of the causae usucapionis by the Roman Jurists*

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I

One of the ways of obtaining civil ownership in classical Roman law is usucapi, an institution with roots already in the law of the XII Tables.\(^1\) Usucapi had a complicated development in the history of Roman law and the scholarly studies devoted to it are innumerable.\(^2\) There are, however, a few questions in the field of usucapi that should still be explored. One of those questions concerns the surprising place of Paul's commentary on possessio and usucapi in the 54th book of his commentary on the praetorian edict. It is puzzling to find a full treatment of institutions belonging to the ius civile in commentaries on the edict. The next section of this article will be concerned with this question.

A second question has to do with the strikingly regular order of the different causae usucapiendi mentioned by several Roman jurists. This eventually also influenced the order of the titles in book 41 of Justinian's Digest. It would be interesting to know the origin of this fixed order of treatment of the causae usucapiendi. This question will occupy the third section of this article. Some more observations will follow in the fourth section. We will try to bring all these issues into relation with other peculiarities in the field of usucapi described elsewhere by other scholars.

Before starting we must deal with a problem of terminology in the field of

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possessio pro suo and usucapio pro suo. Only the former expression can be found in the sources. Through D.23.3.67, where Proculus speaks of ‘pro suo possidendo usucapit’ we can see, however, that there is a close connection between pro suo possidere and usucapio.\(^3\)

In view of this we need not feel obliged to avoid the use of the expression usucapio pro suo.

II

It is a strange phenomenon that our main source for possessio and usucapio is to be found in the 54th book of Paul’s commentary on the edict, between his treatment of de praedatoribus and of de vi bonorum raptorum. References are made in the three texts on de praedatoribus to usureceptio\(^4\) and to the legal position of the partus ancillae, but these references do not immediately explain why suddenly possessio and usucapio, important topics from the ius civilis, are treated in full in the next chapter of Paul’s commentary on the edict. Logically we would expect a full treatment of possessio and usucapio in the context of the edict only when the actio Publiciana and, in particular, the clause ‘si anno possidisset’, the most famous example of a formula ficticia, are dealt with. Lenel spends quite a lot of time on this problem in the introductory pages of his Edictum Perpetuum.\(^5\) He criticizes the solution proposed by Rudorff\(^6\) in his reconstruction of the edict and makes the important remark that in Julian’s Digesta and later in Gaius’ commentary on the provincial edict, and also in Celsus’ Digesta, the same order of discussion was observed. In the first edition of his Edictum Perpetuum Lenel thought in terms of a link with the enigmatic usureceptio ex praediatione,\(^7\) but in the second and third editions he criticized this approach. He suggested instead that it was highly improbable that such an expatriation could have been placed in a separate book (book 54). His final judgment was ‘Wir werden auf die Lösung des Rätsels verzichten müssen.’\(^8\)

To solve this question we must first turn from Paul and consider Ulpian’s doctrine on possessio and usucapio. In fact Ulpian does treat possessio and usucapio before he comments on the actio Publiciana.\(^9\) This appears from the following passage:

\(^3\) Mayer-Maly, Putativitätsproblem, 45 ff.
\(^6\) A. Rudorff, De iusquidicione edictum (Leipzig, 1869), para. 183, n. 1.
\(^7\) Wubbe, TRG 28 (1960), 30 f.; O. Karlowa, Römische Rechtsgeschichte, ii (Leipzig, 1901), 58 f.
\(^8\) Lenel, EP 1, c. i.
\(^9\) In the 15th book of his commentary on the edict Ulpian deals with the hereditatis petitio and the condition of the defendant in this action (Fr. 508). Hence he speaks about the possessio pro herede, pro possessor (Fr. 509), and pro suo (Fr. 510). In the 16th book the rei vindicatio and the actio Publiciana are treated. Here questions regarding possessio are still more important, in the actio Publiciana also on the side of the plaintiff as a consequence of the clause ‘si anno possidisset’. The fragments are numbered according to O. Lenel, Palängnesia Iuris Civilis (Leipzig. 1889; Graz, 1960).
Classification of *causae usucapionis*

D. 41.10.1 (Ulpian 15 *ad dictum*, Fr. 510).

Pro suo possessio talis est, cum dominium nobis adquiri putamus, et ex ea causa possidemus, ex qua adquiritur, et praeterea pro suo: ut puta ex causa emptionis et pro emptore et pro suo possideo, item donata vel legata vel pro donato vel pro legato etiam pro suo possideo. Sed si res mihi ex causa iusta puta emptionis tradita sit et usucapiam, incipio quidem et ante usucapionem pro meo possidere. Sed an desinam ex causa emptionis post usucapionem, dubitatur: et Mauricianus dicitur existimasse non desinere.

We see here that for Ulpian a cumulation of *causae usucapionis* is possible; behind the *causa possidendi*, for example *emptio*, *donatio* or *legatum*, there is also the *causa pro suo*. Less clearly we find the same opinion in a passage from Papinian:

*Fragmenta Vaticana* 260 (Papinian 12 *responsorum*).

Filius emancipatus, cui pater pecullium non ademit, res quidem pro donato vel pro suo, quod iustam causam possidendi habet, usucapit . . .

Mayer-Maly\(^{10}\) has already pointed out that Paul has a different opinion, as can be seen in the following text:

D. 41.2.3.4–5 (Paul 54 *ad dictum*).

Ex plurimis causis possidere eandem rem possimus, ut guidam putant et eum, qui usucperit et pro emptore et pro suo possidere: sic enim et si ei, qui pro emptore possidebat heres sim, eandem rem et pro emptore et pro herede possideo: nec enim sicut dominium non potest nisi ex una causa contingere, ita et possidere ex una duntaxat causa possimus. (5) Ex contrario plures eandem rem in solidum possidere non possunt: contra naturam quippe est, ut, cum ego aliquid teneam, tu quoque id tenere videaris. Sabinus tamen scribit eum qui precario dederit et ipsum possidere et eum qui precario acceperit. Idem Trebatius probabant existimans posse alium iustum, alium iustum possidere, duos iustum vel duos iustum non posse. Quem Labeo comprehendit, quoniam in summa possessionis non multum interest, iuste quis an iustum possideat; quod est verius. Non magis enim eadem possessor apud duos esse potest, quam ut tu stare videaris in eo loco, in quo ego sto, vel in quo ego sideo, tu sedere videaris.

This text must have been abbreviated by the compilers,\(^{11}\) because there is a contradiction between the beginning of the text ‘Ex plurimis causis . . . pro herede possideo’ and the phrase ‘ita et possidere ex una duntaxat causa possimus’. The only way to explain this contradiction is to suppose that Paul starts by referring to the opinion of other jurists (hence the plural ‘putant’) and continues by giving his own opinion. Hausmaninger\(^{12}\) does not analyse this text, but he thinks that when Paul and Ulpian both agree in admitting *usucapio pro suo* for a part of the *dos* that has been handed over by *traditio* before marriage, there cannot have been a great difference between them. We would suggest the viability of precisely the opposite conclusion: in a practical problem

\(^{10}\) Mayer-Maly, *Putativtitelproblem*, 131 ff.

\(^{11}\) Mayer-Maly, op. cit. 131.

\(^{12}\) Hausmaninger, op. cit. 52.
two jurists may very well agree as to the conclusion, even though their theoretical positions are widely different.

Paul’s own position on this point can be explained if we take his conception of *usucapiio pro suo* into account. It is apparent from *D. 41.10.2* that Paul considers cases of *occupatio*, *alluvio*, and *specificatio* as the main examples of *usucapiio pro suo*:

*D. 41.10.2* (Paul 54 *ad dictum*).

Est species possessionis, quae vocatur pro suo. Hoc enim modo possidemus omnia, quae mari caelo capimus aut quae alluvione fluminum nostra sunt. Item quae ex rebus alieno nomine possessis nata possidemus, veluti partum hereditariae aut emptae ancillae, pro nostro possidemus: similiter fructus rei emptae aut donatae aut quae in hereditate inventa est.

Paul certainly derives his position from earlier jurists. From *D. 41.2.1.1* we can deduce that Nerva *filius*, a jurist from the second half of the first century AD, already held the same opinion. Moreover, we know that originally *possessio pro suo* was contrasted with *possessio vi, clam or precario*. In the reconstruction of the Sabinian system, the scheme on which a system was imposed on the *ius civile*, the exposition of *possessio* and *usucapiio* is preceded by the treatment of *accessio* and *specificatio*. It is very striking in this regard that Ulpian in his commentary *ad Sabinum* does not comment on these heads. In the nineteenth century Leist already suggested that this was not due to the way in which Justinian’s compilers adapted Ulpian’s writings. He showed that Ulpian in fact did not complete his commentary on Sabinus. We think the absence of these heads might also be explained by Ulpian’s different opinions on *possessio* and *usucapiio*. In his opinion there was no direct link between *accessio* and *specificatio*, on the one hand, and *possessio* and *usucapiio*, on the other. Hence the differences in the understanding of the scope of *usucapiio pro suo*: Ulpian takes this species of *usucapiio* as an overall subsidiary category, a safety net when other named *causae* fail, whereas Paul makes it the starting-point from which all other cases of *usucapiio* were developed.

Returning directly to our question about the strange order of Paul’s comments on *possessio* and *usucapiio*, we have to take into account the fact that in Gaius’ *Institutes* there is also a link between *usureceptio ex praediatuara* and *usucapiio*. We see, however, that Gaius barely explains this link, mainly because he does not know very much about *usureceptio ex praediatuara*. But the fact that there is this undeniable link in Gaius leads to the conclusion that Ulpian, for whom there is no such link, takes an exceptional view in the matter of *usucapiio*. He might have been influenced by Julian, who in his treatment of

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12 B. W. Leist, *Versuch einer Geschichte der römischen Rechtssysteme* (Rostock–Schwerin, 1850), 49; O. Lenel, *Das Sabinussystem* (Strasbourg, 1892), 86 in the same sense; R. Astolfi, *I libri tres iuris civilis di Sabino* (Padua, 1983), seems not to give an opinion on this question.
13 Wubbe, TRG 28 (1960), 30 ff. dealing with Gaius 2.61.
the edict tried to systematize and did not follow the strict order of the edict which he himself had revised. This was already seen by Lenel. Ulpian is in fact the only jurist who gives a treatment of possessio and usucapio before dealing with the actio Publiciana. It is highly probable that for him usucapio pro suo is no longer the point of departure, but rather usucapio pro herede or usucapio pro emporte, the latter being the species of usucapio involved in the actio Publiciana.

This is only a partially positive conclusion, for we still do not know why Paul gives his full treatment on possessio and usucapio after the clauses in the edict on praediation. The only thinkable solutions are either that Lenel’s explanation about the usureceptio ex praediation being the connecting link was right or else that the legal status of the partus ancillae could have served as the connection. We do indeed know that there was a long-lasting dispute about the legal status of partus ancillae.

Some jurists held that partus ancillae were to be considered as fructus, others held that they were not. This could provide an explanation for differences of opinion in relation to the possibility of acquiring ownership by usucapio. In the case of an honest sale of partus ancillae by the usufructuarius there was, as we know, no furtum; so the buyer could acquire ownership by usucapio, and the lex Atinia did not apply.

III

Our second question was about the way in which the order of the causae usucapiendi came to be settled. To answer this question we will have to look first at the genera possessionum which we find in the following text of Paul:

D. 41.2.3.21–23 (Paul 54 ad editum).

Genera possessionum tot sunt, quot et causae adquirendi eius quod nostrum non sit, velut pro emporte, pro donato, pro legato, pro dote, pro herede, pro noxae edito, pro suo, sicut in his, quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus, et in summa magis unum genus est possidendii, species infinitae.

(22) Vel etiam potest dividi possessionis genus in duas species, ut possiadeatur aut bona fide aut non bona fide. (23) Quod autem Quintus Mucius inter genera possessionum posuit, si quando iussu magistratus rei servandae causa possidemus, ineptissimum est.

The same order is observed in the Digest (D. 41.4–10) with only minor differences, for example regarding possessio pro herede (D. 41.4) and the omission of possessio pro noxae edito. The first part of Paul’s text drew the attention of Nören in his book on divisio and partitio. For Nören this text is a good

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17 See D. 7.1.68 (Ulpian 17 ad Sabiniun); Gaius 2.50; M. Kaser, ‘Partus ancillae’, ZSS 75 (1958), 156 ff.
18 The lex Atinia declared impossible the usucapio of res furtive, see M. Kaser, Das römische Privatrecht. 1 (2nd edn. Munich, 1971), 137.
19 D. Nören, Divisio und Partitio (Berlin, 1972), 50 n. 208.
example of a partitio, falsely dressed up as a divisio, as often happens. Paul rightly uses the rule that a partitio of a res infinita might retain some lacunae. Partitio is indeed not much more than a summary of the parts of the thing, concept, or abstraction which is to be defined.

At the end of paragraph 21 there is a very interesting digression on possessio pro suo. Once again Paul considers as its main examples certain modes of original possession and ownership, such as occupatio and accessio. He further says that there is in fact only one genus possidendi, whereas the species of it are infinite. We suggest that for Paul the notion pro suo had a double role. In the first place, he used the phrase to stand for the whole genus possidendi; in the second place, he invoked it when a well-defined causa possessionis was lacking. In this case pro suo was a causa possessionis adduced ad hoc not the genus possidendi as a whole. Evidence for this suggestion can also be found in D. 41.2.3.22, where Paul only makes the distinction between possessio bona fide and non bona fide. What else could bona fide mean beyond possessing rightly and for oneself? In this way we can come to a better understanding of the end of D. 41.2.3.5, quoted above, where with a curious argument pro suo in its wide sense is implied. In the scholarly literature, finally, we find support for this view, albeit neither very outspoken nor brought into relation with the methods of divisio/partitio.

In paragraph 23 there is another interesting observation which tells us something about the order in which Quintus Mucius Scaevola put the 'genera possessionum'. From the word 'inter' in paragraph 23 we can deduce that in paragraph 21 Paul was still using a slightly corrected version of the order of the 'genera possessionum' invented by Quintus Mucius Scaevola. Paul calls them 'species'; he has also apparently corrected this highly respected expert jurist by eliminating from the list forms of mere detentio, for example after a party's refusal of a cautio damni infecti ordered by the praetor. For the classical jurists, that missio in possessionem had to be sharply distinguished from possessio civilis.

In our opinion there are thus good arguments for the assertion that the fixed order of the causae possessionis does indeed have its roots in the writings of Quintus Mucius Scaevola.

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20 Nörn, op. cit. 20 ff.
21 Here again we see how much Paul is influenced by the Sabinian system, see above, text to n. 14.
23 See D. 42.4.12 (Pomponius ad Q. Mucium) and B. Albanese. Le situazioni possessorie nel diritto privato romano (Palermo, 1985), 62 and n. 206.
24 M. Kaser, Das römische Zivilprozessrecht (Munich, 1966), 334: 'Die missio verschaft dem Eingewiesenen nicht die volle possessio.'
IV

The wide sense which *pro suo* could have for Paul may also be of some help if we now reconsider our first question about the strange place of Paul's expositions on *possessio* and *usucapio*. In the case of *usuroceptio* only the factual power over a *res* was important and questions of *bona fides* and *iusta causa* did not play any role, just as was true for *usucapio* before the second century BC. Therefore, in that context it was entirely appropriate to offer a general exposition of *possessio*. It is therefore possible to assert, by way of conclusion, that Lenel was right in his first edition of the *Edictum Perpetuum*. *Usuroceptio ex praediatura* was indeed the starting-point of Paul's full treatment of *possessio* and *usucapio*. Linking that conclusion to the identification of the origin of the regular order in which *usucapio* was expounded, an origin to be found in the work of Quintus Mucius Scaevola, we may hope to have added a new perspective to our knowledge of a central institution of the law of property already examined by countless scholars.