УДК 347.113 (477)

BORROWING OF THE INSTITUTE OF PROPRIETARY RIGHTS IN MODERN CIVIL LAW OF UKRAINE

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The article investigates the institution of property rights in modern civil law in Ukraine and identify moments of borrowing the relevant provisions of the Roman private law. On the basis of analysis of the system of property rights concluded that it closely follows the source – in the existing law provided institute property rights and the institution of property rights to someone else's property, consisting of ownership, servitude rights, the right to use someone else's land for agricultural purposes and for development. Proved that today institution of property rights needs to be some improvements, in particular, to clarify the content of property rights, legislative consolidation conditions of the servitude rights, expanding their systems, expanding the range of objects, by legislative recognition of the possibility of establishing servitude rights over movable property.

Key words borrowing, proprietary-legal rights, ownership, possession, servitude, emphyteusis, superficies, Roman private law.

РЕЦЕПЦИЯ ИНСТИТУТА ВЕЩНЫХ ПРАВ В СОВРЕМЕННОМ ГРАЖДАНСКОМ ПРАВЕ УКРАИНЫ

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Статья посвящена исследованию института вещных прав в современном гражданском праве Украины и выявлению моментов заимствования соответствующих положений римского частного права. На основе анализа системы вещных прав сделан вывод о том, что она практически полностью соответствует первоисточнику – в действующем праве предусмотрен институт права собственности и институт вещных прав на чужое имущество, состоящий из права владения, сервитутных прав, права пользования чужим земельным участком для сельскохозяйственных нужд и для застройки. Доказано, что на сегодняшний день институт вещных прав нуждается в определенном усовершенствовании, в частности, уточнении содержания права собственности, законодательном закреплении условий осуществления сервитутных прав, расширении их системы, расширении круга объектов, путем законодательного закрепления возможности установления сервитутных прав в отношении движимого имущества.

Ключевые слова: рецепция, вещные права, право собственности, право владения, сервитут, эмфитевзис, суперфиций, римское частное право.

РЕЦЕПЦІЯ ІНСТИТУТУ РЕЧОВИХ ПРАВ У СУЧАСНОМУ ЦИВІЛЬНОМУ ПРАВІ УКРАЇНИ

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Стаття присвячена дослідженню інституту речових прав у сучасному цивільному праві України та виявленню моментів запозичення відповідних положень римського приватного права. Метою статті є виявлення моментів рецепції приватного права Стародавнього Риму сучасним цивільним правом України та обґрунтування доцільності застосування позитивного історичного досвіду для вдосконалення сучасної системи речових прав на майно в Україні.

У процесі дослідження встановлено, що період відтворення системи речових прав у цивільному праві України був досить тривалим та відбувався в кілька етапів. Перший був пов'язаний з прийняттям Верховною Радою України 16.01.2004 р. нового Цивільного кодексу України, який запровадив систему відмінних від права власності прав на нерухоме майно; наступним етапом стало створення системи речево-правового законодавства та вдосконалення механізмів цивільно-правового регулювання речових відносин, який триває і дотепер.

На підставі аналізу чинного цивільного законодавства, зроблений висновок про те, що на цей час система речових прав майже повністю відповідає першоджерелу – чинним законодавством

передбачені інститути права власності та речових прав на чуже майно, а останній, у свою чергу, складається з права володіння, сервітутних прав, права користування чужою земельною ділянкою для сільськогосподарських потреб (емфітевзис) та права користування чужою земельною ділянкою для забудови (суперфіцій).

Доведено, що на цей час інститут речових прав вимагає вдосконалення, зокрема, уточнення змісту права власності, законодавчого регулювання умов здійснення сервітутних прав, розширення їх системи, розгалуження кола об'єктів, насамперед, шляхом законодавчого закріплення можливості запровадження сервітутних прав щодо рухомого майна. На цій підставі запропоновано внести зміни до ч.2 ст.401 ЦК України, виклавши її в такій редакції: «2. Сервітут може належати власнику (володільцю) сусідньої земельної ділянки, а також іншій, конкретно визначеній особі і передбачати право користування чужим рухомим майном (особистий сервітут)».

Доречним, на наш погляд, є також закріплення в чинному цивільному законодавстві перевірених історичним досвідом видів сервітутних прав, таких, як право користування чужим рухомим майном з можливістю привласнення доходу від нього (узуфрукт) та права користування чужим рухомим майном без такої можливості (узус). Це не лише збільшить правові можливості суб'єктів та сприятиме динаміці майнових відносин, але й засвідчить правонаступництво норм римського приватного права в цивільному праві України, оскільки правовий досвід нормативного регулювання речево-правових відносин є надійним фундаментом для вдосконалення його положень у сучасному цивільному праві України.

Ключові слова: рецепція, речові права, право власності, право володіння, сервітут, емфітевзис, суперфіцій, римське приватне право.

Analysis of current civil legislation of Ukraine shows that it provides real rights institution requires some improvement. This situation is explained by the prolonged denial of civil law Soviet period other than the ownership, speech and legal institutions – the ownership and limited real rights on someone else's property. Loss of positive experience of legal regulation and enforcement (since the latter have been known since the Roman Empire, widely used on the territory of medieval Europe, and later the Russian Empire), could reflect positively on the present state of the system of real rights in general and in particular of its individual elements. Although the development of the draft Civil Code of Ukraine was attended by leading scientists jurist of the country, the lack of practical developments in the regulation of limited real rights on someone else's property established its negative results. But just playing the system of real rights in civil law Ukraine is an absolute achievement of national civil law.

Prior to the adoption 10.01.2003 Verkhovna Rada of Ukraine of the Civil Code of Ukraine existence other than ownership rights to real estate may be said judging only from the theoretical analysis of legal structures contained in certain legislation. Thus, the Law of Ukraine «On Property»dated 02.07.1991 p. Provided an opportunity to use another's property to some extent – point 6 of Article 4 of the law oblige the owner to allow limited use of his property by others [1]. This law was nothing more than a proprietary right to use another's property, which from the time of Roman private law was called servitude. In the implementing legislation, in addition, there was no regulation of the general provisions of the Institute of Property Rights, his system specification and regulation of the content of each.

The need to play complex concept of real rights was due to the fact that the transformation of economic relations on the principles of decentralization and the private sector created the conditions for the emergence of new organizational and legal forms. Civil and commercial turn things argued that the implementation of individual property needs of the subject does not always require the acquisition of property ownership. Therefore, the implementation of these legal relations was carried out using the appropriate special category of rights – rights to other people's things or limited proprietary-legal rights, known since Roman times and provided for in existing legal orders under the civil law.

At this time, the Civil Code of Ukraine (hereinafter – CC Ukraine) contains the third book «The right of ownership and other proprietary-legal rights», which consists of two sections – the first section is devoted to the regulation of property rights (chapters 23-29), the second part – proprietary-legal rights on another's property (chapters 30-34) [2]. At the same time, the Institute of

Property Rights to someone else's property contains the rules governing general provisions on property rights on someone else's property (Chapter 30), the right of possession of another's property (Chapter 31), the right to use another's property (Chapter 32), the right to use someone else's land for agricultural purposes (Chapter 33), the right to use someone else's land for development (Chapter 34). This structure building Book Three by itself is a significant step forward, as takes into account the needs of modern economic and civil circulation, corresponding to modern economic realities and positive historical and current experience in the application of the institution in the countries of the Romano-Germanic law family.

The next important step in improving speech legal legislation was the adoption of new regulatory legal acts and amendments to existing ones. Thus, the Land Code of Ukraine of 25.10.2001 [3] was amended Chapter 16-1 «right to use someone else's land for agricultural purposes or for development» and thus brought into compliance with Chapter 33 and 34 of the CC of Ukraine; the Law of Ukraine «On State Registration of Rights to Real Estate and Their Encumbrances» from 01.07.2004 [4]. Aims to provide recognition and protection of the rights in the state, creating conditions for the real estate market; Decree of the President of Ukraine «On Approval of the State Registration Service of Ukraine» dated 06.04.2011 created the State Registration Service (UkrDerzhReyestr), which is the main body in the system of central executive bodies on implementation of state policy in the sphere of state registration of rights to real property [5] and others.

Despite significant advances in the creation of legal mechanisms for the implementation of real rights in Ukraine, a detailed study of the relevant provisions of the Civil Code of Ukraine proves the existence of some controversial points in their regulation, which emphasized many influential local jurist, including A.V. Zeri, N.S Kuznetsova, A.A. Pidoprygora, A.A. Pogrebnoy, I.V. Spasibo-Fateeva, E.A. Kharitonov, J.M. Shevchenko and others. Conflicts arose regulation, in our opinion, due to the lack of clarity in the definition of the concept of the Institute of Property Rights, as the main focus in preparation of the Central Committee of Ukraine was devoted to property rights. Questions concerning general provisions of other rights, their systems and the features considered in isolation, which adversely affected the quality of the rules. This situation has arisen, in our view, is that Ukrainian lawmaker did not use appropriate in this case, a comprehensive approach to the regulation of these rights. An outstanding application of such a model integrated approach to regulation Speech legal relations should be a source of modern civil law – private law of ancient Rome classical period.

The purpose of this paper is to identify points in the reception of Roman private law proprietary right modern Ukraine and implementation of positive, historically prudent legal experience to improve the modern civil mechanism of regulation of real relationships.

Property law since the days of ancient Rome is traditionally considered a form related to the subject of a thing (property), and although the primary sources of Roman private law is no corresponding definition dominant in Novels is just a point of view. Yes, V.M. Hvostov noted that the proprietary right in the subjective sense is right, giving the subject a direct dominion over the thing [6]. The common feature of all real power is a legal entity over the thing – claimed G.F. Puhta [7].

The basis of the system of real rights in Roman private law criteria laid degree rule over individual thing. It is the totality of powers that make up the content of a particular property law. The degree of dominance is manifested in the possibilities of the subject in some way influence the thing.

At the heart of building a system rights in Rimsky, partial right foundation of the criterion Powers dominions of emoticons Thing, which manifested in a set powers, components Contents of or inox proprietary rights. Character abilities dominions reduced to a certain subject image to influence thing.

So if it was a direct rule, which eliminates the influence of other people on this thing talking about *ius in re* – of *dominium* and *proprietas* (ownership) and *possessio* (possession) as the broad content of rights. If the person used someone else's thing, then there *iura in re aliena* – right on the wrong

things, namely *servitutes* (D.8.1.1.3) (easements), *emphyteusis* (D.6.3) (perpetual lease), *superficies* (D.44.7.44.1) (superficies) and the right of pledge (D.20.1.4), a common feature of which was limited compared to ownership, the range of powers. Note that in Roman private law of the classical period for real rights was exceptional.

As noted above, property law of Ukraine consists of institutions such as ownership and property rights on someone else's property types are defined st.395 Civil Code of Ukraine. Thus, according to CC Part 2 st.395 Ukraine bottle law may establish other property rights to someone else's property. Thus, in the text of this article is enshrined not only for limited real rights, but also provides an opportunity to further expand their system by acquiring others not known at this time of real rights. At first glance, such a rule is successful, it creates a legal framework for the legalization of real rights that arise in the course of further development of military relations and improving civil law. However, in our opinion, it also creates a problem and because introducing unrestricted installation of new types of real rights. The essence of the problem stems from the absolute nature of this category of rights – they receive legal protection from infringement by any person who infringes them. The position of the legislator in this case is clear – if the person is endowed with certain rights, enforceable in accordance with its protection. At first glance, this approach is successful because it creates a legal framework for the legalization of property rights that arise in the course of further development of market relations and the improvement of the legislation. However, in our opinion, it is at the same time contains a particular problem, as proclaimed unrestricted establishment of new types of rights. The essence of the problem stems from the absolute nature of this category of rights – they are subject to legal protection from infringement by any person, infringes upon them. Position of the legislator in this matter is quite clear – if a person is endowed with a certain right, therefore, legally secured his defense. But in the case of uncontrolled expansion of the system of property rights in the future, this principle does not work. There will be new law does not provide legal protection, which, in turn, should not be. To avoid this, the basis of the relevant rules of the laws of the continental law system based on the principle of an exhaustive list of rights in rem. Thus, it is provided by the civil legislation of Germany, Switzerland, France, the Czech Republic. This principle is based on the fact that any legal system, which borrowing provisions of Roman law, contains a well-defined, limited range of rights in rem. This approach, in our view, it would be appropriate to consolidate and Ukrainian legislation, as it gives the opportunity to prevent the occurrence of the above-mentioned problems.

Traditionally, the analysis of the system of property rights begin with a description of the property right. This is due to the historically earlier registration of the institution of property in ancient Rome. It is well known that the Roman lawyers have not developed a definition of property rights, which, however, did not prevent them to use it widely. To designate the corresponding relations used terms *dominium* and *proprietas*. The scope and limits of private property rights Romans were determined by reference to the powers of the owner. This is due to the fact that the Roman jurists believed the concept of property rights so clear that it does not require any definition, so they are not focused on the creation of an appropriate definition, and characterization capabilities Property in relation to things. As noted by V.K. Dronikov – «in daily life in transactions, the trial Roman concept of property expressed by the formula: «This is my thing (*res mea est*)» [8]. Characterizing ownership emphasize that it provided an opportunity to the owner comprehensive use and disposal of the thing, excluding the possibility of any interference by unauthorized persons within the scope of the rule of the private owner. Thus, the right to property is the complete and exclusive sovereignty over the face thing.

Some Roman lawyers have made, however, attempts to present the content of the right of ownership in the form of separate powers. So, Paul believed that the right to use and extraction of fruits (*usufructus*) represents a significant part of the right of ownership (D.7.1.4). His contemporary Ulpian mind intent to list the components of property rights and insisted on the indivisibility of its content. Both of these positions were reflected in the writings of scholars of Roman law. Following Paul split up ownership of the powers tried to V.V. Efimov, T. Maretsoll, L.B. Dorn, a contemporary of A.A. Podoprigora, E.O. Kharitonov, V.A. Savelyev, the opposite point of view was held by L.K. Zagurskii, K.A. Mitukov, D. Grimm [9], who insisted on not

appropriate fragmentation of ownership, because it was considered indivisible in nature. In our view, both of the positions have certain advantages as well as significant drawbacks. Expanding the ownership of its constituent powers, should not, however, forget that the owner remains the owner and in the temporary absence of any of them, and with the abolition of ownership restrictions will resume in full – to show the so-called principle of elasticity property. Therefore, to determine the right of ownership by reference to the variability of proprietary rights is not taken into account the existence of this principle. But it is also difficult to fully disclose the content belongs to the owner of the rights, if we restrict ourselves to pointing out the possibility of the implementation with respect to its property of any action, not focusing on what it is. Therefore, we consider it necessary for the most complete study of the essence of the question, with his description of the content of property rights through its constituent powers.

In our view, a part of the right of ownership opportunities can be grouped as follows: non-transferable rights belonging exclusively to the owner and the rights that can be transferred to another person, that is separated from ownership. The first category includes: 1) *ius disponendi de substantia* – right to dispose of the essence of things (the conversion of forest to farmland, destroying things), 2) *ius alienandi* – alienation things right (by transmitting to another person, abandon it); 3) *ius vindicandi* – the right to reclaim things refund of any illegal owner; 4) *ius prohibendi* – the right to prohibit another person to use the thing.

The second category consists of: 1) *ius possidendi* – the right of possession, 2) *ius utendi* – the right to use *salva rei substantia* – maintaining the integrity of things, 3) i*us fruendi* – the right to give the fruits and revenues of things possible, and without the consent of its owner. As you can see, even in the classical Roman law the powers that make the content of property rights, had not the same weight to its owner. The first category was more important and valuable, and the other – at least, but that together they constituted a single full ownership of a person to a thing.

Based on the foregoing, we believe that provided for in the Civil Code of Ukraine st.317 for the determination of property rights the traditional triad – the right of possession, use and disposal – is insufficient for full disclosure of its contents. It seems that it would be more correct to speak of the most complete on the property rights of the owner or of the need to supplement the triad indication of the possibility of the owner of any that do not contravene the laws in force in respect of their belongings.

Ownership of the state secures supplies of certain material benefits a particular person, being one of the basic human rights of the economically developed society. However, the use of mineral properties of things can be done, as noted above, and based on other proprietary rights and legal nature – of rights to other people's things, the very title of which refers to a person belonging to a legal dominion over the property, previously assigned to another person. Virtually all of the outstanding scientists novelists of the late XIX early twentieth centuries resulted similar in the sense of the definition of the institution. Of the most complete, in our view, we note the view I.A. Pokrovsky, who defined the limited property rights as legal forms, providing an opportunity lasting, that is self-contained simple personal consent and participation of a person in the ownership of another [10]. From this definition it is clear that the main distinguishing feature of limited real rights is that they provide an opportunity to use its subject a foreign thing in a certain way, so that the ownership of the grantor thing in such use shall be limited to (encumbered).

In Roman law there was, as already mentioned, five kinds of rights to other people's things: possession, servitude, divided into types and subtypes, emphyteusis, superficies. This extensive system of rights was formed quite late – the right of the classical period. Ancient Roman law recognized only servitude servitude, namely land *(servitutes praediorum seu rerum*). Later, in connection with the expansion of freedom of wills, there are private easements (*servitutes personarum seu hominum*), consisting of *usus* (D.7.8.2), *usufructus* (D.7.11), *habitatio* (D.7.8.10) (right to a life of living in a house belonging to another person) and *opere servorum vel animalium* (right to use the work of others animals and slaves). Such a structure could have offered Marcian.

He wrote: – «*Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum*» – «Servitude are either personal, as the right to use or usufruct, or in rem as easements rural and urban estates» (Marc.D.8.1.1.3). In Roman legal science, the term «*iura in re aliena*» applied only to the land servitude. Usufruct and other rights to use the thing came to be considered personal servitudes much later in Justinian compilation. Superficies and emphyteusis acquired property rights in rem only during the formulary process. A lien is also only from the time pretorskim activity was to be protected in rem nature, ie rem claim [11].

In ancient Rome, one of the most common things on other people's rights was an servitude. Its appearance is caused by the uneven spread of natural goods (ponds, grazing, minerals, etc.) on the land. To compensate for the shortcomings of one area at the expense of another Romans established the right of the land owner, deprived of certain benefits (the dominant plot), use them on the next site (serving). On the site, the title to which is limited, said he was «*servit*» – «is so appropriate restrictions called easements (I.2.2.3), as opposed to «*libertas rei*» – «things free from servitude» (D. 8.2.32.1), or «*res optima maxima*» – «things that are not burdened with an easement» (D.5.16.90.16).

The subject land (predialni) servitude, so was the land or other real estate. Roman law for the establishment of servitudes required under the following conditions:

1) serving the site should be useful to the ruling – *utilitas praedii dominantis* (D.8.1.15), since the purpose of the easement consisted precisely in providing the dominant portion of certain useful properties [12];

2) neighboring areas should be – duo praedia vicena esse debent (D.8.3.5.1), that is located in such a way that the ruling could not be removed from service certain benefits;

3) the waiting area should provide ongoing, rather than temporary benefit – *omnes servitutes praediorum perpetuas causas habere debent* (D.8.2.28). Therefore, the easement could not be fixed under the suspensive condition or resolute, and for a certain period (D.8.1.4).

Implementation Activity servitude rights, in turn, also had to meet the requirements of the law. The owner of the dominant plot had to exercise their right *civiliter*, that is the least harmful way for the service area (D.8.3.1.6). We believe that compliance with the above mentioned conditions and requirements generally applicable in our day, but the absence of their attachment to the Civil Code of Ukraine is the legislative omission, which could affect the future on the effectiveness of the implementation of servitude relationships.

Article 401 of the Civil Code of Ukraine regulates two types of the right to use another person's property – land and personal servitude. In accordance with Part 1 of this article, the easement may be established in respect of land, other natural resources (land servitude), and it may also belong to the owner (owner) of an adjacent plot of land, as well as other specifically defined subject (personal servitude) (Part 2 st.401 Civil Code of Ukraine).

Criteria division servitude rights for species were at one time identified by Professor A.A. Podoprigora. The most important of these are the subject and object [13]. In accordance with the Civil Code of Ukraine st.401 object servitudes acts land, other natural resources, real estate, and their subject – any person who has received this right on the basis of the Civil Code of Ukraine st.402. Subject of a personal easements should be considered the owner of the neighboring land, as well as other specifically defined subject, and their object – the right to use someone else's real estate. Formally, both the above criteria used st.401 Civil Code of Ukraine, but in part 1 of article it is only about rights, and in Part 2 – on the subject and object. Thus, based on the text of Part 2 of a personal servitude can be installed only in respect of land (other real estate), and moreover, neither in this nor in any other article of the Civil Code of Ukraine does not provide guidance on the possibility of their existence in relation to movable property. A similar error legislative technique has led to the substitution of concepts – both personal and land easements can be established only with respect to property that completely negates the very essence of personal servitude rights.

On this basis, propose to amend Part 2 st.401 Civil Code of Ukraine, and told her to read as follows: «2. Easement may belong to the owner (owner) of an adjacent plot of land, as well as other specifically defined subject and include the right to use someone else's movable property (personal servitude)».

Appropriate, in our opinion, is also enshrined in the existing law of proven historical experience forms of personal servitude rights such as the right to use someone else's movable property with the ability to assign the resulting income from it (usufruct) and the right of the right to use someone else's movable property without such a possibility (Language Usage). This will not only have a positive impact on the legal empowerment of civil rights and the dynamics of property relations in the economic sphere, but also to confirm the continuity of the norms of Roman private law in the civil law of Ukraine.

In addition, since Chapter 32 of the Civil Code of Ukraine, in contrast to the Roman primary sources, does not contain detailed lists of servitudes (although based on Part 1 of the Civil Code of Ukraine st.404 possible to distinguish several types of rights: the passage or transit through a foreign land, laying and operation of power transmission lines, communication pipelines, provision of water supply and irrigation, which in general corresponds to the content of Roman *iter* (D.8.3.12.1); *via* (D.8.6.1.6); *aquae-ductus* (D.39.3.17.1); *aquae-haustus* (D.8.3.9)), article 404 of the Civil Code of Ukraine also needs to be improved in terms of expansion of the system of land servitude rights.

Summarizing all the above, it should be emphasized that the historical practice has proved the feasibility of the existence of property rights institution, which provides legal guarantees full satisfaction of the interests and needs of all the subjects of law, including in relation to such an objective limited facilities like land. Should welcome the return of Ukrainian legislator to the centuries-old practice-tested legal instruments. Today, an important scientific task is to comprehend the theoretical content and the practical possibilities of the institutions, taking its origins from the Roman private law. General The Institute of proprietary rights of ancient Rome, largely borrowing Civil Code of Ukraine, have become an integral theoretical basis of modern civil law, the basis for his perfect knowledge. History proprietary-legal relations, their experience of legal regulation in the various legal systems, starting in the first place, with ancient Rome, is a stout foundation for the further improvement of their positions in the modern civil law of Ukraine.

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