

# ***Usucapio* of Stolen Things and Slave Children**

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*Ne rerum dominia diutius in incerto essent*, such is the traditional explanation given by Roman jurisprudence to account for the institution of *usucapio* - “so that the ownership of no thing should be left in uncertainty.”<sup>1</sup>

The most ancient written legal source to refer to *usucapio* as a legal institution is the Twelve Tables.<sup>2</sup> Although we can not be sure about the exact shape of *usucapio* in the earliest times of Roman law, there can be no doubt about the fact that *usucapio* was established in order to strengthen the proprietary position of the *bona fide possessor*.

The institution itself is older than the Twelve Tables, however, since the tables simply recorded already existing customary law. Yet even before *usucapio* was incorporated into the code, the custom made clear that not all objects could be usucapted. It was explicitly stated that specifically stolen things were not suitable for *usucapio*.<sup>3</sup> The institution of *usucapio* was incorporated into the Twelve Tables together with this limitation, which tells us that the

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<sup>1</sup> *Gai.* 2,44; *Inst.* 2,6pr.

<sup>2</sup> *Gai.* 2,42.

<sup>3</sup> *Gai.* 2,45. Interestingly, the Twelve Tables did not yet exclude from *usucapio* other things acquired *mala fide* than the stolen things. Gaius indicates that things viciously acquired (other than stolen things) were not excluded from the scope of *usucapio* until later by the *lex Iulia et Plautia*. The fact that they are not mentioned in the Twelve Tables does not however prove that they were not considered at all. In practice they could have been excluded from *usucapio* even before the *lex Iulia et Plautia* by customary law.

ban on the *usucapio* of stolen things could not be much younger than *usucapio* itself.

However, this brief and simple addition to the application of *usucapio* was soon to prove inadequate. In the process of its application an important question soon arose - did the ban which was now perpetuated under the Twelve Tables also include within its scope the person who had acquired a stolen thing from a thief but yet had acted *bona fide*? Gaius's interpretation of the Twelve Tables regarding this question is unequivocal. The prohibition is to be understood as referring expressly and in precise terms to the acquirer of stolen goods who acts *bona fide*. The incapacity of the thief to *usucapit* is obvious, claims Gaius. He cannot *usucapit* since he is acting *mala fide*.<sup>4</sup> This interpretation must indeed be correct and that for two reasons. Firstly, the Twelve Tables were intended to contain all those rules of customary law which were in any sense unclear, ambiguous or doubtful. Thus all other rules were omitted and left to be applied through customary law. Consequently, if the ban on the *usucapio* of stolen things was incorporated into the Twelve Tables, it cannot be understood as being aimed against the thief since he was indisputably restricted from the scope of *usucapio* anyway since he had acted *mala fide*. Therefore, if the rule had not been incorporated into the code in order to provide a remedy against persons acting *mala fide*, it must have been intended for use against all other acquirers (*ullus alius*), i.e. persons acquiring from the thief *bona fide*.<sup>5</sup>

A second reason, which inclines us to trust Gaius on this point, is the presumption we are able to make that the interpretation presented in his Institutes is older than Gaius himself. Interpretations of older legal sources, including of legal rules from the most ancient times of Roman law, were passed from one generation of jurists to the next through the process of legal education. It is by this means also that the Twelve Tables remained in force for so long.

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<sup>4</sup> Gai. 2,49. This only proves the hypothesis that the original concept of *usucapio* was to serve the *bona fide* acquirer.

<sup>5</sup> Gai. 2,49: *nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.*

The Twelve Tables were not the only legislation introduced during the Republic which dealt with the prohibition on *usucapio rei furtivae*. In 149 BC the *lex Atinia de usucapione*<sup>6</sup> to a certain extent amended the ban on *usucapio* stated in the Twelve Tables.<sup>7</sup>

Concerning the object of *usucapio*, the *lex Atinia* quite narrowly restricted it to stolen things. *Usucapio* of things acquired viciously by other means is dealt with by a separate law - the *leges Iulia et Plautia*. The significance of the *lex Atinia* in the development of *usucapio* lies in the additional interpretation of the rule contained in the Twelve Tables. It extends *usucapio* to include stolen things which had returned into the power of the person from whom they had been appropriated.<sup>8</sup> This came to be known as *reversio in potestatem domini*.<sup>9</sup>

### 1. The character of *reversio in potestatem*

The institution of *reversio in potestatem domini* is a condition *sine qua non* necessary for the effective *usucapio* of a stolen thing. The requirement of the return of the *res furtiva* into the hands of the victim of the theft had been provided already by the *lex Atinia* and became the subject of long running discussions among Roman jurists.<sup>10</sup>

**The substantive effects of *furtum*.** The development of *reversio* as a legal concept was the result of the adoption of a specifically Roman approach to the consequences caused by the act of theft. In the eyes of Roman jurists these consequences affected mainly the thing itself, thus, so to speak, incorporating a delictual

<sup>6</sup> Opinions concerning the year of promulgation of the *lex Atinia* vary. For a recent study see M. F. GIANCOLI, *La lex Atinia de rebus subreptis, un'ipotesi sulla datazione*, *Labeo* 43 (1997), p. 259ss. pointing to the year 131 BC or even earlier in 212 BC. The oldest study on this subject published in modern romanistic literature is E. GANDOLFO, *La reversio ad dominum delle cose furtive*, *AG* 35 (1885); see also P. STEIN, *Lex Atinia*, *Ath.* 62 (1984), p. 596ss.

<sup>7</sup> Gaius does not mention this law at all even though he mentions the *lex Iulia et Plautia* with regard to the same subject in *Gai.* 2,45.

<sup>8</sup> Paul. D. 41,3,4,6.

<sup>9</sup> B. ALBANESE, *Contributo alla storia dell'interpretazione della lex Atinia*, *Labeo* 12 (1966), p. 409ss. (reprint *Scritti giuridici*, Palermo 1991, vol. 47); S. SOLAZZI, *Sulla lex Atinia de rebus subreptis*, *AG* 144 (1953), p. 3ss.

<sup>10</sup> Frequently commented by Labeo (D. 41,3,49) as well as by Tryphoninus (D. 47,2,87) and Paul (D. 41,3,4,6).

character into the very substance of the *res*. This approach has its roots in the *lex Atinia*. Aulus Gellius, when commenting on this law in his *Noctes Atticae*, deliberately excerpted a fragment which demonstrated the delictual effects which would apply to a thing as a result of the act of theft: *quod subruptum erit, eius rei aeterna auctoritas esto*.<sup>11</sup> If a thing is stolen, the one from who's power it has been taken retains an eternal *auctoritas*,<sup>12</sup> i.e. a power, which prevents the acquisition of the stolen thing by means of *usucapio*. Equally Gaius implies the same approach when stating that the restriction on *usucapio* affects the thief just as much as it would any others who subsequently acquire stolen goods in good faith.<sup>13</sup>

The notion of the *res furtiva* thus became not just the description of a thing in relation to a delictual event but was also developed into a technical term, just as a *res extra commercium* or *res sacra* implied something legally distinct from an ordinary *res*. In this way Roman jurists expressed the kind of legal quality of the thing, a result of which being that it was not the defective title which restricted the application of *usucapio* by a possessor but rather the thing itself. The technical character of *reversio* can be demonstrated also by reference to D. 47,2,87. Tryphoninus here explicitly describes the factual physical act of reacquiring a stolen thing as “*perveniret*” in contrast to the term “*reversa*” which represents the return of the thing comprising all the required legal elements necessary to relieve the stolen thing of its delictual effects.

The primary source for the study of *usucapio rei furtivae* is Paul's treaty *Ad edictum* which is largely devoted to *usucapio*. D. 41,3,4,6 is the key fragment<sup>14</sup> excerpted from the book and incorporated into the Digest:

<sup>11</sup> Aulus Gellius *N.A.* 17, 7.

<sup>12</sup> On the interpretation of *auctoritas* in this sense see F. DE VISSCHER, *Aeterna auctoritas*, RHD 16 (1937), p. 575ss; A. MAGDELAIN, *Auctoritas rerum*, RIDA 5 (1949), p. 152ss.; F. DE VISSCHER, *De la défense d'usucaper les choses volées*, RIDA 5 (1958), pp. 469-491; U. von LÜBTOW, *Die Ersitzung gestohlener Sachen nach dem Rechte der XII Tafeln und der lex Atinia*, Festschrift Schulz, vol. I, Weimar 1951, pp. 263-269.

<sup>13</sup> *Gai.* 2,49.

<sup>14</sup> O. LENEL, *Palingenesia Iuris Civilis* I., Lipsiae 1889, Paul. *lib. LIV. ad edictum (De possessione et usucapione)*, nr. 673, col. 1070-71.

*Quod autem dicit lex Atinia, ut res furtiva non usucapiatur, nisi in potestatem eius, cui subrepta est, revertatur, sic acceptum est, ut in domini potestatem debeat reverti, non in eius utique, cui subreptum est.*

In the text Paul cites the *lex Atinia* and at the same time interprets it in terms of *reversio in potestatem* mentioned in this law. The thing is to return to the very owner of the stolen thing and not to the person from whom it was taken. In addition Paul stresses that the thing must return into the power of the owner (*domini potestatem*) in terms of *reversio in potestatem* which, as we will see in more detail later on, is an important distinction from a simple “return” of the thing in a non-technical sense.

This fragment however is not the only one in which Paul defines *reversio in potestatem*. In another two he adds:

*Tunc in potestatem domini redisse dicendum est, cum possessionem eius nactus sit iuste, ut avelli non possit, sed et tamquam suae rei: nam si ignorans rem mihi subreptam emam, non videri in potestatem meam reversam.*<sup>15</sup>

*...in lege Atinia in potestatem domini rem furtivam venisse videri, et si eius vindicandae potestatem habuerit, Sabinus et Cassius aiunt.*<sup>16</sup>

Paul explains the above stated rule in detail. In order for the *reversio* to be valid and effective, the *dominus* must not only regain the thing into his *potestas* but he must also be aware of the fact. Therefore if a person unwittingly buys his thing back without having knowledge of the fact that he is purchasing the thing which was previously stolen from him, the *reversio* cannot be deemed complete and as such the bar on *usucapio* will remain.<sup>17</sup> This view has already been expressed by Tryphoninus.<sup>18</sup> He refers to the fact that a sale of a stolen thing, which has returned to its owner but without his knowledge, does not open the possibility of *usucapio* regardless of the character of the buyer's *fides*. Tryphoninus explicitly states that such an event is not considered to be a return

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<sup>15</sup> Paul. D. 41,3,4,12.

<sup>16</sup> Paul. D. 50,16,215.

<sup>17</sup> Paul. D. 41,3,4,12.

<sup>18</sup> Tryph. D. 47,2,87.

of a stolen thing into the power of the owner in the technical sense.<sup>19</sup>

**The three decisive criteria.** To sum up the essential characteristics of *reversio in potestatem* as it is viewed by Roman jurisprudence, three decisive criteria must be followed when considering the effectiveness of the *reversio in potestatem domini*: 1) *dominus* - the thing must return to the owner of the stolen thing, 2) *potestas* - the owner must regain power over the stolen thing, 3) *scientia* of the *reversio* - the owner must know that the thing previously stolen from him has come back into his power.

### 1.1. Dominus

**Pignus and commodatum.** The key point Paul is making in D. 41,3,4,6 is that a stolen thing must return to the power of its owner (*dominus*) and not just to the person from whom it has been taken, in the event of this person being different from the owner. The words of *lex Atinia* «*ut res furtiva non usucapiatur, nisi in potestatem eius, cui subrepta est, revertatur*» must be interpreted in this restrictive way.<sup>20</sup> Paul intends to highlight the different legal effects resulting from *reversio in potestatem domini* and *reversio in potestatem eius, cui subrepta est*.<sup>21</sup> He illustrates this by reference to the pledgee and the borrower. If a thing is stolen from a pledgee (*creditor pigneraticius*) or a borrower in *commodatum*, then the thing must return into the power of its actual owner, *i.e.* the pledgor or creditor in *commodatum*. In the case of a pledge, Paul describes the situation as being *creditori subrepta*, stolen from the creditor.<sup>22</sup> This must be understood as describing a pledgee since no other creditor has another's thing with him than a pledgee. Interestingly, Paul at this point places the pledgee and the borrower on the same level and treats them equally as regards the legal effects of *reversio in potestatem*. This is rather surprising since the two are in a very different legal position as far as the thing they control is

<sup>19</sup> Tryph. D. 47,2,87: *non videatur in potestatem domini reversa*.

<sup>20</sup> Paul. D. 41,3,4,6.

<sup>21</sup> ALBANESE, *op.cit.* p. 19 (reprint p. 410).

<sup>22</sup> J.A.C. THOMAS, *The thefts of pledgor and the lex Atinia*, *St. Scherillo* 1, Milano 1972, pp. 395-404; J.A.C. THOMAS, *Furtum pignoris*, *TR* 38 (1970), pp. 135-162; H. ANKUM, *Furtum pignoris dans le texte d'Ulpian*, *D. 47,2,12,2*, *BIDR* 90 (1987), pp. 169-190.

concerned. First of all, the borrower is deemed to have *possessio naturalis* in the sense of a *detentio*<sup>23</sup> over the thing while the *creditor pignoratitius* is considered to be *possessor ad interdicta*. The borrower's legal position in respect of the borrowed thing is therefore notably weaker. This distinction is however ignored by Paul. In relation to *reversio in potestatem* he considers the positions of both the subjects to be equal and pays no attention to the reason for the pledgee's privileged position. Viewed from the perspective of contract law, however, the pledgee and the borrower have two very important things in common. They are both obliged to return the thing at a particular moment and they both have the same degree of custody over the thing, though each on different grounds, just as both have resort to an *actio furti* available to them on different grounds.<sup>24</sup> Nevertheless this distinction does not improve their position when it comes to assessing the effects of *reversio in potestatem*. In the eyes of Roman jurists the owner had absolute power over the thing and by the time of classical jurisprudence the notion of *dominium* had already matured into what we call today a subjective right. Therefore the owner alone was allowed to discharge the delictual effects from the stolen thing no matter how many possessors had acquired the thing in good faith before he regained his possession.

**A controversial fragment.** In our search for a person capable of carrying out an effective *reversio* we must take into consideration an interesting fragment, which carries the name of Labeo in the heading but in fact is an addition of Paul to the text of Labeo.<sup>25</sup> Paul is therefore using Labeo's opinion to explain his point, yet in a way which creates a certain amount of confusion in relation to Paul's other statements about who is capable of carrying out an effective *reversio*. In the first part of D. 41,3,49 we find an opinion of Labeo which is in accordance with other opinions contained in fragments ascribed to Paul: *si quid est subreptum, id usucapi non potest, antequam in domini potestatem pervenerit*.

<sup>23</sup> On distinction between *detentio*, *possessio*, *possessio civilis* and *possessio naturalis* in Roman law resources see G. MACCORMACK, *Naturalis possessio*, ZSS 84 (1967), pp. 47-99.

<sup>24</sup> Ulp. D. 47,2,14,17; Ulp. D. 47,2,10.

<sup>25</sup> Labeo D. 41,3,49.

However, in the same fragment this statement is supplemented with a direct citation of Paul's reaction: *immo forsitan et contra: nam si id, quod mihi pignori dederis, subriperis, erit ea res furtiva facta: sed simul atque in meam potestatem venerit, usucapi poterit*. The owner takes away a thing he had previously given in pledge thus committing *furtum possessionis* (see hereafter sec. 1.1.1.). According to this opinion of Paul, the negative effects placed on the thing by the delict will be discharged once the pledgee reacquires the thing, not the owner.

This last sentence of the fragment appears to stand up in sharp contradiction with Paul's other statements on the subject,<sup>26</sup> where he allows the pledgee here to substitute the owner in relieving the stolen thing of its delictual effects. This appears to stand in contrast to his general view stated on *furtum rei suae* in which Paul makes the owner-thief (not the pledgee) capable of carrying out a valid and effective *reversio* even though he has acted *mala fide*,<sup>27</sup> particularly in D. 41,3,4,21: *Si rem pignori datam debitor subriperit et vendiderit, usucapi eam posse Cassius scribit, quia in potestatem domini videtur pervenisse, qui pignori dederit, quamvis cum eo furti agi potest: quod puto rectius dici*.

Paul generally insists that the effective *reversio in potestatem* can be made by no other person than the owner (*dominus*): *in potestatem domini videtur pervenisse*<sup>28</sup> and also *in domini potestatem debeat reverti*.<sup>29</sup> Yet, in the contradiction to this, in D. 41,3,49 Paul uses Labeo's opinion not just to oppose him concerning the possibility of *usucapio* but primarily to demonstrate that the *creditor pigneraticius* is the only person capable of reopening *usucapio*, not the *dominus* (pledgor) as in D. 41,3,4,21. The opinion of Paul attached to the text of Labeo likewise contradicts the opinions of other jurists such as Modestinus.<sup>30</sup>

<sup>26</sup> E.g. Paul. D. 41,3,4,21; Paul. D. 41,3,4,6; Paul. D. 47,2,20,1.

<sup>27</sup> Paul. D. 41,3,4,21; Paul. D. 47,2,20,1.

<sup>28</sup> Paul. D. 41,3,4,21.

<sup>29</sup> Paul. D. 41,3,4,6.

<sup>30</sup> Modest. D. 41,4,5.



Various modern Romanists have attempted to solve Paul's puzzle. Among them, Biondi,<sup>31</sup> who maintains that D. 41,3,49 was not in fact originally referring to *pignus* but to *fiducia*. However, this does not seem likely, as confirmed by Albanese, since in *fiducia* the debtor actually transfers ownership to the creditor and thus it would not be a case of *furtum rei suae* but of *rei alienae*.<sup>32</sup>

Albanese examines D. 41,3,49 directly comparing it with Paul's fragments D. 41,3,4,6 and D. 41,3,4,21. Of the three fragments he considers only D. 41,3,4,6 to be genuine. Albanese provides a linguistic exegesis of D. 41,3,49 and takes into account the controversy between the schools of Sabinians and Proculians who were represented by Labeo. Yet in the end he himself fails to provide a clear solution to the problem and concludes by expressing further doubts about the relation between Paul's mysterious text and his other opinions given on the subject.<sup>33</sup>

### 1.1.1. *Furtum rei suae*

The fact that the differing character of a theft gives rise to differing legal effects can be observed in several jurisprudential opinions. It must be remembered that the notion of *furtum* is broader than what we understand by the word "theft" today. Under Justinian, *furtum* was characterized as being *contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve*.<sup>34</sup> Any illegal use of another's thing was considered *furtum* and therefore *furtum* also embraced embezzlement and until the half of the first century BC<sup>35</sup> robbery as well. A question faced by Roman jurists was, whether under these circumstances a person could commit the theft of his own thing - *res sua*? The answer given by Paul is clearly affirmative: *dominus, qui rem subripuit, in qua usus fructus alienus est, furti usufructuario tenetur*.<sup>36</sup> Similarly Ulpian confirms this

<sup>31</sup> B. BIONDI, *Iudicia bonae fidei*, AUPA 7 (1918), p. 133.

<sup>32</sup> ALBANESE, *op.cit.*, p. 24 (reprint p. 415).

<sup>33</sup> ALBANESE, *op.cit.*, pp. 22-40 (reprint pp. 413-431).

<sup>34</sup> *Inst.* 4,1,1; Paul. D. 47,2,1,3.

<sup>35</sup> In 76 BC praetor Marcus Terentius Lucullus published an edict containing a formula of the *actio vi bonorum raptorum* that led to the separate development of *furtum* and *rapina*.

<sup>36</sup> Paul. D. 47,2,15,1.

view: *qui rem pignori dat eamque subripuit, furti actione tenetur*.<sup>37</sup> The statements of the two jurists indicate that if a person takes away a thing upon which someone else holds the usufruct or a pledge it is regarded as theft (*furtum possessionis*). In general, *furtum* can be committed in relation to one's own thing if the thing is burdened with a *ius in re aliena* and the person entitled to that right has the possession of the thing.

Paul however does not regard this situation to be a regular *furtum*. He considers it important to distinguish in the context of the *lex Atinia* the legal effects on the regular *res furtiva* resulting from the act of theft from those imposed on, as he calls it, *res quasi furtiva*<sup>38</sup> or *res furtiva facta*.<sup>39</sup> Paul therefore explicitly distinguishes between a regular *furtum* and a *furtum* which might be described as irregular in respect to the contents of this delict. The irregular character of such a *furtum* arises from the simple fact that it is committed by the owner of the stolen thing, *i.e.* a person endowed with rights that no other person has.

Paul's approach can be supported on a number of grounds. First of all, the fact that the thief owns the object of the theft is significant from the point of view of his proprietary rights. Ownership rights measured by Roman standards give the *dominus* absolute power over his property identical to that enjoyed by a *pater familias* over the members of his family. He is entitled to alienate his thing just as much as he is to destroy it. The ownership rights of the *dominus* were reflected in the law of obligations through the rule already described above that a person is not regarded as being the thief of a *res sua* if the person from whom he takes it does not have an interest in the thing: *sed eum qui tibi commodaverit, si eam rem subripiat, non teneri furti placuisse Pomponius scripsit, quoniam nihil tua interesset, utpote cum nec commodati tenearis*.<sup>40</sup> This rule applies regardless of the presence of any intention of the owner, *i.e.* his possible *animus furandi*. The reason for this is the lack of a *contrectatio*, which is a condition

<sup>37</sup> Ulp. D.47,2,19,5. This view is repeated and extended in the following fragment D. 47,2,19,6 in the sense of a theft committed by an owner who sold a *res pignori obligata*.

<sup>38</sup> Paul. D. 47,2,20,1.

<sup>39</sup> Labeo-Paul. D. 41,3,49.

<sup>40</sup> Paul. D. 47,2,15,2.

*sine qua non* for *furtum* as stated by Justinian.<sup>41</sup> Correspondingly the lender in *commodatum* or the *locator* does not commit *furtum* if he takes what he owns from the borrower or the *conductor*, since the *commodatarius* and the *conductor* do not have the thing in *possessio*, which would be the interest that Pomponius and Paul talk about in D. 47,2,15,1 and 2. Therefore the owner's liability for theft committed on his own thing is a deviation from the contents of ownership rights of the *dominus* and at the same time a reflection of the interest in another's property.

Hence, the reason for the owner's liability in certain cases of theft is the third person's (the creditor's or usufructuary's) *ius in re aliena*. Conversely, if there is no *ius in re aliena*, the owner is not deemed to have committed theft even though his conduct goes against the terms of the contract. Thus a depositor or lender does not commit theft against the depositor or the borrower if he takes away a thing which he had given as a deposit or in *commodatum*. This is clearly stated not only by Paul (as it was just demonstrated),<sup>42</sup> but also by Julian.<sup>43</sup> Both of them explain their opinion by referring to the right of the owner to take back that which belongs to him (Julian) as well as by the lack of any interest in the thing, since the depositor or the borrower in *commodatum* are not in this case liable for the loss of the thing by theft (Julian and Paul).

This interest can, however, be strengthened by reason of any claims of the debtor arising against the creditor, namely of any expenditures arising from or damage caused by the thing.<sup>44</sup> In this case the depositor or the borrower (both of them debtors) will have an action for theft against the owner. It is the general interest of a third person in the thing, which is therefore regarded as being crucial when considering the case of a *furtum rei suae*.

<sup>41</sup> Inst. 4,1,8: *sed et si credat aliquis, invito domino se rem commodatam sibi contrectare, domino autem volente id fiat, dicitur furtum non fieri.*

<sup>42</sup> Paul. D. 47,2,15,2.

<sup>43</sup> Iul. D. 47,2,60: *Si is, qui rem commodasset, eam rem clam abstulisset, furti cum eo agi non potest, quia suum recepisset et ille commodati liberatus esset. Hoc tamen ita accipiendum est, si nullas retinendi causas is cui commodata res erat habuit: nam si impensas necessarias in rem commodatam fecerat, interfuit eius potius per retentionem eas servare quam ultro commodati agere, ideoque furti actionem habebit.*

<sup>44</sup> Paul. D. 47,2,15,2.

Consequently, as stated by Paul, an owner who gives his thing in pledge and later takes it away against the will of the pledgee commits theft. Yet the main question of concern in relation to our study is this: are the rules for the *reversio in potestatem* applicable also in the case of *furtum rei suae*? This raises obvious doubts concerning the logic of Paul's answer, since the person to whom the thing should return in order to open *usucapio* is the thief himself and therefore a person acting *mala fide*. On the other hand, a thing on which such a malicious act has been committed is characterized by Paul as a *res quasi furtiva* not just *res furtiva*. In relation to *reversio in potestatem* the theft of a *res sua* presents a problem analogical to the one described by Pomponius - where a thief buys a stolen thing from the owner thus performing the *reversio* himself.<sup>45</sup> This issue is discussed further in greater detail below (see sec. 1.2.).

Regarding the question posed above, Paul is of the view that *usucapio* remains open if a thing is stolen from the pledgee by the owner and adds his own explanation relying on Cassius: *si rem pignori datam debitor subriperit et vendiderit, usucapi eam posse Cassius scribit, quia in potestatem domini videtur pervenisse, qui pignori dederit, quamvis cum eo furti agi potest: quod puto rectius dici*.<sup>46</sup> Paul's view is clearly derived from his general approach to *reversio in potestatem*. He considers all the criteria for an effective *reversio* to have been fulfilled, despite the possibility to pursue the owner by means of *actio furti* by the pledgee. Paul therefore sees no reason to place obstacles in the way of *usucapio*. Where the question involves *quasi furtum* committed on property controlled by the usufructuary, Paul's approach is similar and based on the same reasoning. The argumentation is repeated: *quoniam et si alius subripiat et in meam potestatem reversa res fuerit, usucapiebatur*.<sup>47</sup> The *usucapio* is not to be restricted analogically to the rules of regular *furtum*, where the thing will be freed from the bar on *usucapio* by being returned to the owner.

Modestinus has also expressed his views on the subject. He briefly states: *si rem, quam tibi pigneravi, subripuero, eamque*

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<sup>45</sup> Pomp. D. 41,3,32pr.

<sup>46</sup> Paul. D. 41,3,4,21.

<sup>47</sup> Paul. D. 47,2,20,1.

*distraxero, de usucapione dubitatum est: et verius est utiliter cedere tempora usucapionis.*<sup>48</sup> Modestinus' own clearly stated conclusion appears in some remarks he appended to a note on disputes among the jurists over the solution of this question: the thing will not be excluded from *usucapio*. This way he expresses his affirmative standpoint toward the effectiveness of *reversio* in the case of *furtum rei suae*.

Modestinus' and Paul's opinions on the character of *reversio* in relation to *furtum* committed by the owner could be interpreted also in the following way. The act of theft itself is considered to be a form of *reversio* since the owner, by committing the theft, has actually performed a *reversio* as well. In other words, the owner-thief reacquires *potestas* while having a *scientia* of the *reversio*, even though acting *mala fide*.<sup>49</sup> Thus, the absence of delictual effects imposed on the stolen thing in the case of *quasi furtum* allows us to draw the conclusion that *furtum rei suae* joins together *furtum* and *reversio*.

In considering the effectiveness of *reversio* in the case of *furtum rei suae* a further two points should be borne in mind. Firstly, the reason why all the jurists express no doubts about allowing an effective *reversio* to the owner-thief is perfectly understandable. The owner-thief of a *res quasi furtiva* must be allowed to make an effective *reversio*, since otherwise there would be no other person to do so. Disabling the thief from relieving the stolen thing of its delictual effects and insisting on his incapacity to reopen *usucapio* would lead to a perpetual impossibility of *usucapio*, which would clearly be undesirable. Secondly, viewed from the opposite angle, it appears surprising to allow the owner-thief to reopen *usucapio* since the objective of *usucapio* is to transform the *possessor* into the *dominus*. Yet in this case, the *possessor* is already an owner and therefore no *usucapio* would be necessary. Hence the intention of the jurists to permit a *reversio* to the owner-thief in the case of *furtum rei suae* is aimed at justifying any subsequent conveyance of the thing to a third person. *Reversio* in the case of a *res quasi furtiva* is therefore constructed for the benefit of a third person, *i.e.*

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<sup>48</sup> Modest. D. 41,4,5.

<sup>49</sup> Paul. D. 41,3,4,21.

any future possessor of the thing and not for that of the person performing the *reversio*.

When examining *reversio* in relation to *quasi furtum* we cannot overlook a Paul's somewhat unusual opinion expressed in the already mentioned fragment D. 41,3,49: if the owner commits the theft of a thing which he had previously given in pledge, the thing will be excluded from *usucapio* due to the delictual effects imposed upon the thing by the *furtum possessionis*; these effects will be discharged once the pledgee regains the thing. This view is however not in agreement with the one presented by the same author in D. 41,3,4,21. Here Paul allows *usucapio* of the thing taken by *furtum possessionis*, even though he provides the pledgee with an *actio furti* against the owner. In another words, he supports the view that the owner can perform a *reversio* by taking his thing away from the *creditor pignoratitius* thus committing *furtum possessionis*. This practically means that Paul allows *furtum* and *reversio* to take place simultaneously. The conflict with D. 41,3,49 has already been discussed in relation to *pignus* (see above sec. 1.1.).

Paul's approach appears even more interesting if we take into account another of his opinions stated in D. 41,3,4,10. In relation to Paul's opinions given elsewhere<sup>50</sup> on this subject, the one mentioned in this fragment appears to contradict his general concept of *reversio*. Paul allows the deposittee (*i.e.* the non-owner of the thing) to perform an effective *reversio*. And what is even more interesting, he takes this view even in the situation where it is the deposittee who has become the thief as a result of selling the deposited thing. Yet Paul insists that if the deposittee manages to reacquire the thing in relation to which he had in this manner committed *furtum*, the delictual effects on the thing would disappear, although an *actio furti* would undoubtedly lie before the deposittee. And Paul ascribes these legal effects to the deposittee's reacquisition regardless of whether the depositor had known about the deposittee's delict or not.

This view of Paul appears to contradict what he had already stated about *reversio* in relation to *pignus*: if the thing was stolen

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<sup>50</sup> Paul. D. 41,3,4,6; Paul. D. 41,3,4,12; Paul D. 41,3,4,21.

from the *creditor pigneraticius* it is the owner alone who is able to perform an effective *reversio*.<sup>51</sup>

The problem can be easily solved if we search for the person who will obtain any benefit arising from an effective *reversio*. In the case of a deposit, it is in the interest of the depositor (the owner) to receive the thing back from the depositee in the same state in which he gave it away, *i.e.* without any defects. On the other hand, in the case of a pledge it is the pledgee who has the primary interest in keeping the thing which he holds in security for his claim without any defects, since these would cause a deterioration in the value of the thing and subsequently would lower the price received by the pledgee in compensation for his loss caused by the debtor. Hence, even though in the case of a deposit the *reversio* would be performed by a person who had acted *mala fide* the benefit would be the owner's and it would therefore be preferable to protect the owner rather than to strictly apply the legal rules. What must be also taken into account is that the legal relationship between the depositor and the depositee is of a different character from the one existing between a pledgee and pledgor. The protection of a relationship created by a deposit is secured only by *actiones in personam*, whereas those created by *pignus* entitle the pledgee to use the *actio in rem* as well.

### 1.2. *Potestas*

*Potestas* in terms of *reversio in potestatem* requires to be examined in parallel with *possessio*. In order for the *reversio* to be effective the owner must have the *corporalis possessio* as well as the *animus possidendi*. In other words, he must regain control over the stolen thing to the extent of *dominium*. This is explained by Paul: *tunc in potestatem domini (rem) redisse dicendum est, cum possessionem eius nactus sit iuste, ut avelli non possit, sed et tamquam suae rei*.<sup>52</sup> The stolen thing is deemed to have returned into the *potestas* of the owner if he had reacquired possession in a lawful way over it and with the consciousness that it is his thing, *i.e.* if the owner is again acting as *dominus*. The words *possessionem eius* together with *tamquam suae rei* point to a *corporalis possessio*

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<sup>51</sup> Paul. D. 41,3,4,6.

<sup>52</sup> Paul. D. 41,3,4,12.

and an *animus possidendi* as essential elements of *possessio* which is capable of being transformed into a *dominium* through *usucapio*. As a result, the reacquisition of *potestas* is dependent on the gaining of a *corporalis possessio* as well as the awareness that the thing belongs to the possessor. Consequently, there will be no *potestas* without a regular *possessio*. The reason for the terminological distinction between *potestas* and *possessio* drawn by the jurist is to make clear that the rules of *usucapio*, as applied to regular *possessio*, must be considered and applied differently in the situation of the *usucapio* of a stolen thing and within its ambit in the sense of *reversio in potestatem*.

The conditions necessary in order for the *potestas domini* to be asserted in relation to a *reversio in potestatem* is commented on by Paul in several ways. In D. 41,3,4,6 he states that the stolen thing *in domini potestatem debeat reverti*, the thing must simply return into the power of the owner. Further in D. 41,3,4,12 he explains the position more precisely: *cum possessionem eius nactus sit iuste, ut avelli non possit, sed tamquam suae rei*. A thing is deemed to have returned into its owner's power when he has taken lawful possession of it as his own thing so it cannot be taken away. Yet in D. 50,16,215 he adopts a different interpretation concerning the reacquisition of the *potestas domini* in which he refers to the *lex Atinia* as well as to Sabinus and Cassius: *in lege Atinia in potestatem domini rem furtivam venisse videri, et si eius vindicandae potestatem habuerit*, the stolen thing is deemed to have returned to its owner if he has reacquired it through *vindicatio*. This last fragment must be considered in relation to the previous two. An important question is whether *ut avelli non possit, sed tamquam suae rei* can be understood as pointing to *vindicatio* in the sense in which it is explicitly referred to in D. 50,16,215. There are reasons for believing this to be the case since *vindicatio* is a primary remedy for the protection of *dominium*. Yet Paul avoids using the term *vindicatio* in D. 41,3,4,12 although he uses it in D. 50,16,215. This tempts us to draw the conclusion that in D. 41,3,4,12 Paul is intentionally defining the terms of a regained *potestas* broadly, having in mind the subject of *reversio*. It appears as if Paul would want to allow persons other than the *dominus* to be able to perform an effective *reversio*. An indication suggesting that this hypothesis might be correct is provided by the above



mentioned fragment of Paul and Labeo.<sup>53</sup> This fragment is somewhat unusual if we take into account certain of Paul's statements contained in his other fragments (see sec. 1.1.). Paul holds the opinion that in the case of a debtor who takes away what he has given in pledge, thus becoming a thief, it will be the creditor (pledgee) who will be allowed to perform an effective *reversio*. Thus Paul's *ut avelli non possit, sed tamquam suae rei* can be understood as also meaning a pledgee, since he has equally an *actio in rem* for the protection of his *possessio* based on a *ius in res aliena* existing over the thing he has in *pignus*.

**Depositee and the *reversio*.** In relation to the reacquisition of *potestas* as it has just been defined, we can also find fragments of Paul's which show a different approach from the one just mentioned. Paul states that if a deposit is made and the deposittee sells the deposited thing with the intention to gain, yet later reacquires it, there will be no reason to obstruct the application of *usucapio*.<sup>54</sup> Paul, who derives his own view from Proculus, argues that the thing is deemed to have returned into the power of the depositor regardless of his knowing of the fact. The physical element of *possessio* has in this case been mediated by the deposittee (*corpore alieno*), although there is no doubt over the fact that the deposittee had committed *furtum*. This opinion of Paul's could be regarded as contradicting the view he expressed on the similar power of the borrower in *commodatum*.<sup>55</sup> The borrower is not allowed by Paul to open *usucapio*, even though he is in the same legal position - *detentio* - as the deposittee. The contrast is rather surprising if we take into account the fact that the deposittee to whom Paul is willing to grant the power to mediate *potestas* for the benefit of the depositor (*dominus*) in the sense of *reversio in potestatem*, is: 1) not liable for the loss of the thing (although in this case he would be since he is liable for *dolus*); 2) acting in bad faith, unlike the borrower, who has lost the thing without *culpa*. It must also be noted, that Paul explicitly emphasises the fact that the

<sup>53</sup> Labeo D. 41,3,49.

<sup>54</sup> Paul. D. 41,3,4,10: *Si rem, quam apud te deposueram, lucri faciendi causa vendideris, deinde ex paenitentia redemeris et eodem statu habeas: sive ignorante me sive sciente ea gesta sint, videri in potestatem meam redisse secundum Proculi sententiam, quae et vera est.*

<sup>55</sup> Paul. D. 41,3,4,6.

*reversio in potestatem* can be effectively undertaken by the deposittee regardless of the *scientia* of the *reversio* on the part of the owner: *sive ignorante me sive sciente ea gesta sint*.<sup>56</sup>

Yet we find still another fragment of the same book of the Digest contradicting what has just been said. It is again the familiar D. 41,3,49 in which Paul states, commenting Labeo, that in the case of a thing being stolen from a creditor in *pignus*, it is sufficient for the thing to return to the pledgee in order for the bar on *usucapio* to be eliminated. This is in opposition to what Paul states elsewhere:<sup>57</sup> *in potestatem domini redire debet* - the owner himself must regain the stolen thing. This fragment, where Paul demonstrates the essential role of the *dominus* in *reversio in potestatem* serves to illustrate that the *potestas domini* within the *reversio* cannot be mediated and it must be performed by the *dominus* personally. Yet this rule, which is widely referred to in books 41 and 47 of the Digest is denied in D. 41,3,49 as well as in D. 41,3,4,10 as has already been described above (see sec. 1.1.).

**Quasi reversio.** A specific and somewhat curious way of returning a stolen thing to its owner, though perfectly in accordance with the rules set for *reversio in potestatem*, is described by Pomponius in D. 41,3,32pr.: *si fur rem furtivam a domino emerit et pro tradita habuerit, desinet eam pro furtiva possidere et incipiet pro suo possidere*. If the thief buys a stolen thing from the owner, his proprietary position toward the thing he has stolen will improve and will no longer bear the legal status and delictual effects of a *res furtiva*. The curiosity of this form of *reversio* lies in the fact that it was commonly accepted by Roman jurisprudence, although strictly the requirements of *reversio* had not been fulfilled. The thing did not actually return to the owner, as in a regular *reversio*, instead the owner abandoned the thing in favour of another.

The results of this kind of *reversio* will nevertheless be the same: the thing and the owner will be rejoined in accordance with the requirements of a regular *reversio*. Yet if under a regular *reversio* the thing follows the owner, then in this case the direction of the process is reversed, the ownership following the thing. The thief will therefore gain *bona fide* possession over the thing he possesses,

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<sup>56</sup> Paul. D. 41,3,4,10.

<sup>57</sup> Paul. D. 41,3,4,6.

until then possessed *mala fide*. The condition for an effective *reversio*, which makes *usucapio* possible for later acquirers, is therefore fulfilled even though it is performed in the opposite manner to that envisaged by the *lex Atinia*. The *scientia* of the *reversio* will be mediated by the owner to the acquirer as well. The legal basis for this form of *reversio* is analogous to that applicable to *furtum rei suae* described by Paul.

One further important fact should be kept in mind. The person with whom the stolen thing is rejoined is the person who himself has committed the theft, *i.e.* brought about the delictual effects on the thing in the first place. Still, it appears that Pomponius concedes the right to eliminate the delictual effects from the thing to this person, who has in fact acted *mala fide*. Nevertheless, this appearance may only be superficial. In fact, it is still the owner who causes the delictual effects to be eliminated. He does so through *tradito brevi manu*, which requires the agreement of both the transferor and the transferee.<sup>58</sup> This specific case of *reversio in potestatem* being caused by a thief, *i.e.* a person who has acted *mala fide*, is not as rare as it might seem. Another case would be the one already discussed - *furtum rei suae*.<sup>59</sup>

The approach of Roman jurisprudence is thus pragmatic. The jurists were well aware of how similar this was to the regular *reversio* and regarded this form to be a sort of *quasi reversio*. The jurists saw no sense in presenting obstacles to the transaction and in denying the effects of the regular *reversio in potestatem*, since the effective transfer of ownership had to be supported by the consensus of both parties including the victim of the theft who by these means in fact controlled the thing, in the sense of *corporalis possessio*. In other words, the choice lay in fact in the hands of the *dominus*.

Ulpian speaks in a similar fashion regarding the proprietary rights of the thief when he says: no person is deemed a thief (or a robber) who has paid the price.<sup>60</sup> One question however remains.

<sup>58</sup> Pomp. D. 4,3,32pr: *emerit et pro tradita habuerit*.

<sup>59</sup> Paul. D. 41,3,4,21.

<sup>60</sup> Ulp. D. 50,17,126pr: *nemo praedo est qui pretium numeravit*. Also Ulp. D. 5,3,13,8: *nemo enim praedo est qui pretium numeravit*. See LENEL, *Palin.* II., nr. 512, col. 498.

What role does the knowledge of the owner play concerning the character of the person with whom he performs the sale? Roman legal sources are not clear about the relevance of the owner's ignorance concerning the fact that he is making a contract with the same person as the one who stole his property, *i.e.* about how his possible knowledge might affect the resulting legal transaction in the sense of *reversio in potestatem*.

### 1.3. *Scientia of the reversio*

Having discussed two of the main conditions for an effective *reversio in potestatem* we move to the third essential element required by Roman jurists - *scientia* of the *reversio*. *Scientia* of the *reversio* could be described as being the appropriate state of mind of the *dominus* in relation to the recovery of the thing into his *potestas* (see above sec. 1.2.). The owner must simply be aware that the thing which was stolen from him has returned into his *potestas*.

Paul refers to this requirement explicitly: *si ignorans rem mihi subreptam emam, non videri in potestatem meam reversam*.<sup>61</sup> This view was already stated by Tryphoninus: *si ad dominum ignorantem perveniret res furtiva vel vi possessa, non videatur in potestatem domini reversa*.<sup>62</sup> Consequently, if a thing is stolen and the *dominus* later reacquires it (Paul is talking here about a purchase), yet without knowing that he is buying the thing which has in fact been stolen from him, the bar on *usucapio* will remain on the thing. *Scientia* or *ignorantia* can therefore be decisive in determining the legal effects of *reversio* as we will see later in the case of the *ancilla furtiva* and the *furtum* committed on a *peculium* (see sec. 2.1.3.).

**The purchase of a *res sua*.** The legal consequences of the purchase of a *res sua*<sup>63</sup> which had previously been stolen from the owner are obvious. The sale is deemed void<sup>64</sup> and the seller (the thief) can be charged with *condictio sine causa* as the result of the defect in the *titulus iustus* and because of the benefit received

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<sup>61</sup> Paul. D. 41,3,4,12.

<sup>62</sup> Tryph. D. 47,2,87.

<sup>63</sup> The theme of the purchase of *res sua* appears also in the narrative sources, *e.g.* Petronius *Satiricon* 1,12.

<sup>64</sup> Papin. D. 13,7,40pr: *rei suae nulla emptio sit*; Pomp. D. 18,1,16pr: *suae rei emptio non valet*.

under a void contract.<sup>65</sup> These legal consequences will follow regardless of whether there is any knowledge on the part of the buyer (the owner) about the thing belonging to him.<sup>66</sup> On the other hand, as Paul explains, in the same circumstances the sale would be valid, if the owner knowingly buys only the possession of the thing, which might occur in an attempt to strengthen his position in any subsequent legal proceedings.<sup>67</sup> By such means the owner would regain *possessio* in the sense of the *potestas* described by Paul in D. 41,3,4,12 (see above sec. 1.2.), having as well the requisite *scientia* of the *reversio*. Nevertheless, the *reversio* would be effective regardless of whether the sale was valid or not. It is the knowledge of receiving the stolen thing back that is decisive in relation to *reversio*, not the validity of the relevant legal act. There can be no doubt about this if we take into account the effectiveness of the *reversio* in the case of *furtum rei suae*. *Potestas*, the second condition for an effective *reversio*, will be present regardless of whether the sale is valid or void exactly in conformity to the requirements stated by Paul: *cum possessionem eius nactus sit iuste, ut avelli non possit sed et tamquam suae rei*.<sup>68</sup> This is because in the case where it is the owner who is standing in the place of the buyer acting under a void contract of sale (just as in the case of a sale of a *res aliena*), the thing cannot be taken from him as it could be if the buyer happened to be any other person. There is nobody who can do so when no third person has a better right to the thing than the buyer who also happens to be the owner.

**The object of *scientia*.** The rule formulated by Tryphoninus and Paul must be interpreted literally. The awareness (*scientia*) of the *dominus* is related not just to the simple knowledge of having a *potestas* over the thing but above all to the reacquiring of *potestas*. In other words, in order to be aware of the reacquisition of a thing in terms of a *reversio* the owner must be aware of the fact that for a certain period of time he had lost his *potestas* over the thing, *i.e.* that his thing was stolen from him. It is not enough therefore for

<sup>65</sup> Pomp. D. 18,1,16pr: *quia nulla obligatio fuit*.

<sup>66</sup> Pomp. D. 18,1,16pr: *sive sciens sive ignorans emi*.

<sup>67</sup> Paul. D. 18,1,34,4: *rei suae emptio tunc valet, cum ab initio id agatur, ut possessionem emat, quam forte venditor habuit, et in iudicio possessionis potior esset*.

<sup>68</sup> Paul. D. 41,3,4,12.

the owner to know he has *potestas* over the thing. He must also know that he was previously deprived of it by a thief and therefore that he is now regaining the thing back into his *potestas*. Put another way, if the *dominus* thinks mistakenly that he had the continuous enjoyment of *potestas* over the thing, the *reversio in potestatem* will not take effect.

The *scientia* of the *reversio* must therefore be regarded as being distinct from the *animus possidendi*, although an *animus possidendi* is a fundamental constituent of a *scientia* of the *reversio*. The significance attributed to the *animus* of the owner by Roman jurisprudence is in agreement with the character of *potestas* as it was viewed by the jurists in terms of *reversio in potestatem* (see above sec. 1.2.). The *potestas* was in fact measured by reference to the *possessio civilis*, which consists of a *corporalis possessio* and an *animus possidendi*.<sup>69</sup> Consequently, *potestas* contains an element of *animus* as an essential component just as *possessio* does.

Finally, it should be noted, that the interpretation of the rules laid down by Tryphoninus and Paul requires to be modified when applied to the various specific cases of *furtum*. Hence, just as the precise requirements of the *potestas domini* may vary in particular cases, so too the form of the *scientia* of the *reversio* can deviate in certain cases. An example of this can be found in the case of *furtum* committed on the property of a *dominus* while in the *peculium* of either his slave or the *filius familias*. Another instance which illustrates an inconsistent approach being taken towards requiring a *scientia* of the *reversio* as an essential element of a *reversio* has already been discussed in relation to *furtum rei suae* (see above sec. 1.1.1.).

### 1.3.1. *Furtum ex peculio*

The significance of the *scientia* of the *reversio* can be demonstrated by reference to the case of the indirect acquisition of property, *i.e.* its acquisition through a person in power of the owner, namely a *filius familias* or a slave. The question of the capacity of a slave to substitute his master's *scientia* of the *reversio* is significant within the context of the possibility of usucapting through the *peculium* of one's slave. Generally, according to

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<sup>69</sup> Paul. D. 41,2,3,12.

Pomponius, there are no reasons to restrict the person entitled to a *potestas* (used here in the sense understood in family law) from gaining possession or even acquiring ownership by *usucapio* through persons (slaves or sons) in his power by way of a *peculium*.<sup>70</sup> On this point Pomponius expressly adds that this view is not dependent on the owner's knowledge of his slave's or son's acquisition of a thing into their *peculium*: *ego per eum ignorans possideam vel etiam usucapiam*.

#### ***Usucapio through a slave.***

Paul's opinion is to the same effect when he agrees with Labeo, Neratius and Julian: *ea, quae servi peculiariter nacti sunt, usucapi posse, quia haec etiam ignorantes domini usucapiunt*.<sup>71</sup> They all agree, that a slave or son can in effect mediate to their master or *pater familias* the grounds of possession required for *usucapio*, regardless of the owner's being aware that the thing might have passed into their *peculium*. Paul nevertheless adds the supplementary remark of Pedius who maintains that this is possible only if he who is to usucapt in this way is personally capable of usucapting himself.<sup>72</sup>

Nevertheless, the view held by all the jurists concerning the capacity of a *pater familias* and a *dominus* of a slave to usucapt through persons in their power needs to be modified in order for it to conform with the general rules set out for the *usucapio* of a *res furtiva* so that the *res furtiva* may be acquired into a *peculium*. Pomponius quoted by Paul holds the view that if the slave's possession of a thing acquired into a *peculium* is defective because of *mala fides*, the character of the thing affects the grounds for possession by the slave's owner as well, thus disabling him from *usucapio*.<sup>73</sup> Consequently, Pomponius explains, in respect of things in the *peculium* we must look into the mind of the slave rather than of the master.<sup>74</sup> This is why Paul, in agreement with Celsus, thinks that if a slave acquires a thing *bona fide* into his *peculium*, then

<sup>70</sup> Pomp. D. 41,3,31,3.

<sup>71</sup> Paul. D. 41,3,8pr.

<sup>72</sup> Paul. D. 41,3,8,1.

<sup>73</sup> Paul. D. 41,4,2,12.

<sup>74</sup> Paul. D. 41,4,2,12.

although his master will know about the thing belonging to a third person, the grounds for *usucapio* will be without defect.<sup>75</sup> It is therefore the knowledge of the slave not of his master that will be relevant. Yet this will only be the case if the owner learns that the thing belongs to another after the acquisition has taken place. Hence, if the master possesses in bad faith at the time of the slave's acquisition, the slave's good faith will not improve the master's grounds for *usucapio*. The slave's mind therefore takes precedence over his master's only after the acquisition has taken place.

**Mediation of *scientia* of the *reversio*.** What has just been said concerning the mediation of *usucapio* through a slave's possession of a thing and the relevance of the master's knowledge of the acquisition, as well as concerning the respective minds of the slave and the owner at the time of the acquisition, is equally significant in the matter of the slave's mediation of a *scientia* of the *reversio* in respect of a *usucapio* exercised by his owner.

The case of a theft from a slave's *peculium* is discussed again by Paul D. 41,3,4,7 where he argues over this matter with Labeo. In comparison with Paul, Labeo's view is more liberal: *si res peculiaris servi mei subrepta sit me ignorante, deinde eam nactus sit, videri in potestatem meam redisse*.<sup>76</sup> Labeo speaks in general terms without any mention of the knowledge of the owner concerning the return of the stolen thing into his *potestas* through the slave's *peculium*. He considers the knowledge of the owner to be relevant only in respect of the act of theft, not the later reacquisition of a stolen thing. Labeo thus considers a *reversio* performed by a slave to be equivalent to a *reversio* performed by the owner himself.

Yet Paul is not satisfied with such a simple statement and adds: *commodius dicitur, etiamsi sciero, redisse eam in meam potestatem*, and he explains, *nec enim sufficit, si eam rem, quam perdidit ignorante me, servus adprehendat*.<sup>77</sup> The owner must be aware of the reacquisition of the thing just as he must know that the thing has been lost. In other words, if the owner does not know that the

<sup>75</sup> Paul. D. 41,4,2,13.

<sup>76</sup> According to NICOSIA the text should read: <non> *videri in potestatem meam redisse*.

<sup>77</sup> Paul. D. 41,3,4,7; G. NICOSIA, *L'acquisto del possesso mediante i potestati subiecti*, 1960, p. 252; ALBANESE, *op.cit.*, p. 46 (reprint p. 437).



thing has been stolen he does not have to be aware of the reacquisition of it. In this case the slave alone can cause a *reversio* possessing full legal effects for his master. Paul makes this point clear in D. 41,3,4,8 in which he allows *usucapio* to be available even though the thing was stolen and later returned into the *peculium* without the knowledge of the owner. He simply states: *nam si scivi, exigimus, ut redisse sciam in meam potestatem*. This view of Paul's can be compared with a similar case on which he had stated his opinion. In D. 41,3,4,10 he ascribes the effects of a *reversio* to a depositor who had sold the deposited thing and later reacquired it (see above sec. 1.1.1.). Regardless of the depositor's (i.e. owner's) knowledge of the depositor's *furtum* Paul is ready to consider the reacquisition as being a *reversio in potestatem*. By analogy, Julian asserts, that a thing returned into the hands of a tutor<sup>78</sup> is deemed to have returned into the hands of the person in favour of whom he performs the *tutela*. He states this without making any mention of the relevance of the *scientia domini*.

In addition, in D. 41,3,4,7 Paul makes clear that the master's knowledge alone is relevant only if he wants the thing to again become part of his slave's *peculium*. If he wishes to keep it for himself he must reacquire the thing personally: *si modo in peculio eam esse volui: nam si nolui, tunc exigendum est, ut ego facultatem eius nactus sim*.

The *scientia* of the *reversio* is therefore regarded more liberally by Labeo. In contrast, Paul does not always recognise the full effects of *reversio* based on the *scientia* of the *reversio* on the part of a slave. This view is in accordance with Paul's general view concerning the division of *animus* and *corpus* within the context of *possessio*. He allows for the *animus* to be separated from the *corpus* in relation to acquisition through slaves: *ceterum animo nostro, corpore etiam alieno possidemus... per servum*.<sup>79</sup> That is why we cannot expect Paul to permit a slave to perform a full *reversio in potestatem* which requires both *corpus* and *animus*. The slave will have *corpus* and the owner *animus*. As a result, the slave's role in

<sup>78</sup> Iul. D. 47,2,57,4: *qui tutelam gerit, transigere cum fure potest et, si in potestatem suam redegerit rem furtivam, desinit furtiva esse, quia tutor domini loco habetur*.

<sup>79</sup> Paul. D. 41,2,3,12.

the legal act through which he allows his master to regain *potestas* will perfectly conform to the sense of the *animo nostro corpore alieno*.

## 2. Application of the ban of *usucapio* to an *ancilla furtiva*

So far we have discussed the *usucapio* of stolen things mainly from the perspective of the general legal principles of Roman law. We have been trying to follow the thinking of Roman jurisprudence and have attempted to draw abstract rules from their practice-based reasoning. Now we shall attempt to examine the practical significance of the above-mentioned rules. We spoke about the *reversio in potestatem* as being an important legal element in relation to *usucapio*. But what are the practical aspects of a reopened *usucapio* for a *bona fide possessor* or even an owner (as in the case of *furtum rei suae*)? Such has been the main concern of nearly all studies of the *usucapio* of stolen things. Accordingly, it is this problem which we shall consider below in the light of selected jurisprudential opinions. Our primary objective is to try to examine the position of the person who has the highest interest in obtaining a positive answer to the question of whether or not a stolen thing can be usucapted - the potential acquirer through *usucapio*.

In several places in the Digest we find reference to the following case, which is very thoroughly discussed by several jurists: a slave steals a slave-woman (*ancilla*) or buys a stolen *ancilla* in order to redeem himself from slavery and gives the *ancilla* to his master in return for the grant of his liberty. When studying this case the jurists were confronted with two questions: 1. can the master of a slave-thief improve the character of his possession and usucapt the stolen *ancilla*?, and 2. can the master usucapt the child of the *ancilla*?<sup>80</sup>

To answer the first question we must turn again to Paul's fragment D. 41,4,2,14 in which he follows Celsus: *et si quod non bona fide servus meus emerit, in pactionem libertatis mihi dederit,*

<sup>80</sup> M. KASER, *Partus ancillae*, ZSS 75 (1958), pp. 156-200; J. LINDERSKY, *Partus ancillae. A vetus quaestio in the light of a new inscription*, *Labeo* 33 (1987). K. BAUER, *Ersitzung und Bereicherung im klassischen römischen Recht*, Berlin 1988, pp. 72-79.

*non ideo me magis usucapturum: durare enim primam causam possessionis idem Celsus ait.* On this point Paul agrees with Celsus concerning the ban of *usucapio* on the grounds that the thing has been acquired *mala fide* and further transferred in return for a grant of liberty. His conclusion obviously relates again to the general principles stated in the *lex Atinia*.<sup>81</sup> The master of the slave is not able to improve the character of his possession which has been rendered defective by the *mala fide* acquisition of his slave. The fact that he might be acting *bona fide* at the moment of the *datio manumissionis causa* would not improve the character of the possession either. The essential background to such legal argumentation lies once more in the legal quality of the object - the *res furtiva* (see above sec. 1.). Following the theft the slave-woman will be marked with the delictual effects embodied in the substance of the object itself. The thing will thus not be suitable for *usucapio*.

### 2.1. *Usucapio* of a child born to an *ancilla furtiva*

The second question posited above is discussed more intensively among Roman jurists. We have at hand the opinions of Julian, Pomponius, Papinian, Paul and Ulpian regarding the problem of the *usucapio* of a child conceived and born to a stolen *ancilla*.<sup>82</sup> Yet we find the opinions of the jurists to be conflicting in their answers as well as in their argumentation. The sharpest disagreement lies between the views of Julian and Paul. Pomponius, Papinian and Ulpian, who endorse the opinion of Julian, also contribute to the solution of the above posed question yet they state their views more briefly than the first two authors.

Paul's view is as follows:

*De illo quaeritur, si servus meus ancillam, quam subripuit, pro libertate sua mihi dederit, an partum apud me conceptum usucapere possim. Sabinus et Cassius non putant, quia possessio, quam servus vitiose nactus sit, domino noceret, et hoc verum est.*<sup>83</sup>

By contrast, Julian states:

<sup>81</sup> Paul. D. 41,3,4,6.

<sup>82</sup> Iul. D. 41,4,9-10; Iul. D. 41,3,33pr; Iul. D. 1,5,26; Pomp. D. 41,10,4pr; Papin. D. 41,3,44,2; Paul. D. 41,3,4,16-18; Ulp. D. 41,3,10,2. These opinions are discussed below.

<sup>83</sup> Paul. D. 41,3,4,16.

*Servus domino ancillam, quam subripuerat, pro capite suo dedit: ea concepit: quaesitum est, an dominus eum partum usucapere possit. Respondit: hic dominus quasi emptor partum usucapere potest, namque res ei abest pro hac muliere et genere quodammodo venditio inter servum et dominum contracta est.*<sup>84</sup>

Paul's standpoint, which supports Sabinus' and Cassius' views, is based on argumentation which has already been presented in relation to the general principles of *usucapio rei furtivae* drawn from the interpretation of the *lex Atinia*. A child cannot become the object of *usucapio* to the benefit of the master since the grounds for the possession of its mother are defective and these grounds, which are subsequently conveyed to the master, cannot be improved by him alone. As such the master's possession, regardless of whether accompanied by good or bad faith, cannot lead to the acquisition of ownership over the child through *usucapio* because of the delictual character of the object.<sup>85</sup> Paul takes several different approaches to this problem when discussing the case of the *ancilla furtiva*, always however coming to the same conclusion - a child cannot be usucapted since the grounds of possession are defective. If the slave does not steal the slave-woman himself but buys her in bad faith, the legal consequences for the subsequent possessor - his master - will be the same.<sup>86</sup> Paul, relying on Celsus, insists that these consequences will bar *usucapio*: *Et si quod non bona fide servus meus emerit, in pactionem libertatis mihi dederit, non ideo me magis usucapturum: durare enim primam causam possessionis idem Celsus ait.*<sup>87</sup>

Paul goes even further and extends the rule expressed in his opinion to analogous situations. If a free man gives a stolen *ancilla* to a person intending that this person should manumit one of his slaves, the case would be the same as in the two previous ones. The possessor of an *ancilla furtiva*, who has received her in form of a *datio ob causam* cannot usucapt her child on the grounds of possession since the character of the possession is defective. Equally, the absence of the effect of a long possession would be the

<sup>84</sup> Iul. D. 41,4,10.

<sup>85</sup> M. KASER, *Partus ancillae*, ZSS 75/1958, pp. 175-176.

<sup>86</sup> Paul. D. 41,3,4,7.

<sup>87</sup> Paul. D. 41,4,2,14.

same if the master had acquired the stolen slave-woman from a free man for any other *causa*, *i.e.* in exchange, in discharge of an obligation or as a gift: *Sed et si, ut servum meum manumitterem, alius mihi furtivam ancillam dederit eaque apud me conceperit et pepererit, usu me non capturum. Idemque fore etiam, si quis eam ancillam mecum permutasset aut in solutum dedisset, item si donasset.*<sup>88</sup>

In contrast to Paul, Julian's view is more liberal. In his opinion, the master is entitled to usucapt the child of a female slave acquired in the same circumstances as those described by Paul.<sup>89</sup> Interestingly, Julian uses similar arguments<sup>90</sup> to Paul; he bases his reasoning on analogy with a sale, nevertheless coming to a different conclusion. While Paul says that *usucapio* is equally forbidden in the case where the master has acquired the *ancilla* in exchange, in discharge of an obligation (*e.g.* as a *datio in solutum*) or as a gift,<sup>91</sup> Julian uses the same argument but in the opposite sense: the child can be usucaptured just as if the master had bought its mother - *quasi emptor usucapere*.<sup>92</sup> And furthermore again he repeats his reasoning: *dominus quasi emptor usucapere potest*,<sup>93</sup> since he had given away his property (a slave) in exchange for some other property (the *ancilla*), which is viewed by Julian as being equivalent to a contract of sale - *quodammodo venditio*, even though the party with whom the master made the contract was a slave, *i.e.* not a subject of the law (for further analysis of the contradicting fragments of Paul and Julian see below sec. 2.1.3.).

### 2.1.1. Children slaves and fruits

Having looked at the general legal reasoning for and against the *usucapio* of the *ancilla furtiva*, as discussed by the various jurists,

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<sup>88</sup> Paul. D. 41,3,4,17.

<sup>89</sup> Iul. D. 41,4,10.

<sup>90</sup> Iul. D. 41,4,9.

<sup>91</sup> Paul. D. 41,3,4,17: *si quis eam ancillam mecum permutasset aut in solutum dedisset, item si donasset.*

<sup>92</sup> Iul. D. 41,4,9.

<sup>93</sup> Iul. D. 41,4,10: *dominus quasi emptor partum usucapere potest, namque res ei abest pro hac muliere et genere quodammodo venditio inter servum et dominum contracta est.*

we must now give our attention to the individual criteria upon which the jurists base their answers in specific cases.

**Children of slaves as fruits.** Above all, it must be made clear why the jurists are concerned with this problem at all. Among the fundamental principles of Roman law is the rule which states that the fruits (*fructus*) become the property of the owner of the thing that produced the fruits.<sup>94</sup> Not only are apples and olives counted as fruits in the legal sense, other things also, such as the young of all living animals, are regarded as fruits<sup>95</sup> since they are legal objects and as such can become the objects of ownership. In practice it is very important to lay down rules for the acquisition of fruits in a legal sense, given that a dispute can arise resulting from a combination of two factors: firstly, a new and independent thing which has never had a previous owner comes into existence; secondly, the actual control over the thing which produced the fruit does not always have to be exercised by the owner himself. In fact, very often it is performed by another subject, such as a possessor or detentor (usufructuary, *conductor* etc.).

An observer possessing a thorough knowledge of Roman history and a basic knowledge of Roman law would have every reason to think that the child of a slave would also be considered to be a fruit, just as with all other living creatures born as a result of natural reproduction, with the exception of free men. The free alone are the subjects of law whereas everything else is an object of law, *i.e.* a thing (*res*) in the technical sense. An enslaved man does not belong to the category of subjects of law and consequently must be regarded as an object of law.

It therefore comes as a surprise to learn that the children of slaves enjoyed a special status which did not, however, make them subjects of law.<sup>96</sup> Still, it provided them with a special legal position regulated by special rules concerning their acquisition, different from those concerning the offspring of animals. Ulpian presents the following explanation: *neque enim in fructu hominis homo esse potest*.<sup>97</sup> And Justinian's Institutes explain still further by adopting

<sup>94</sup> Flor. D. 41,1,2 relating to Gai. D. 41,1,1.

<sup>95</sup> Gai. D. 7,1,3,1; Paul. D. 41,1,48,2.

<sup>96</sup> KASER, *op. cit.*, pp. 158-159.

<sup>97</sup> Ulp. D. 7,1,68pr; Ulp. D. 47,2,48,6.

the same approach: *absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit*.<sup>98</sup> In this respect Ulpian, by stating the opinions of Sabinus and Cassius, denies the usufructuary the right to acquire the children of an *ancilla* whom he holds in *ususfructus* in contrast to the young of cattle.<sup>99</sup>

Ulpian however is not alone in his view. An identical approach towards the application of the rule concerning the acquisition of fruits to the children of slaves had already been implicitly stated by Gaius, when he demonstrates that the usufructuary does not commit *furtum* if he sells the child of a slave, whom he held in *ususfructus*, in the belief that the newborn children of a slave had become his property.<sup>100</sup> This view presented in a negative form would mean that if, on the other hand, the usufructuary knew that the children of slaves did not count as fruits (*i.e.* he had an *animus furandi*) yet still sold the child, he would in such a case commit *furtum* since *contrectatio* as an objective element of *furtum* would be present because of the special status of slave children. Gaius nonetheless does not express the rule that the children of slaves (*partus ancillae*) do not count as fruits explicitly. It is clear however, that he too held the view that the children of slaves cannot be treated as fruits.

**The purchaser of a *res aliena*.** Still one more argument could serve in support of the opinion of those who would defend resort being made to *usucapio* by a *bona fide possessor*. According to Paul, the *bona fide* purchaser of a *res aliena* can enjoy and keep the fruits that are produced by the thing he has bought, even though he is not the owner of the thing.<sup>101</sup> By strictly applying this principle without reference to any further rules we would receive a clear answer to the question of the ownership of a child born to an *ancilla furtiva* and given *manumissionis causa*. The possessor would become the owner of the child right away.

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<sup>98</sup> *Inst.* 2,1,37.

<sup>99</sup> *Ulp. D.* 7,1,68,1.

<sup>100</sup> *Gai.* 2,50 and equally *Inst.* 2,6,5; Similarly *Gai. D.* 41,3,36,1.

<sup>101</sup> *Paul. D.* 41,1,48pr : *bonae fidei emptor non dubie percipiendo fructus etiam ex aliena re suos interim facit non tantum eos, qui diligentia et opera eius pervenerunt, sed omnes, quia quod ad fructus attinet, loco domini paene est.*

However, as we have seen, the children of slaves do not count as fruits and the regular rules governing the acquisition of fruits cannot be applied to them. Yet in practice, it is important to determine who will be the owner of a slave child and what proprietary rights the master of the manumitted slave will have since he has factual control over the child. If the jurists are reluctant to make the master the owner according to the regular rules governing the acquisition of fruits, there is only one other way to do so - through *usucapio*. The master is entitled to become an owner since he has acted *bona fide* and he has a title. Yet, if the child possesses a special status regarding the fruits the question arises in what relation is the child to its mother? In other words, if the mother is considered to be a *res furtiva*, must the child of the mother be affected by this defect as well?

Generally speaking the children of slaves were capable of being usucaptured, thus compensating the acquirer acting *bona fide* for his incapacity to become an owner directly because of the special status of slave children.<sup>102</sup> However, in the case of the *ancilla furtiva* the situation was somewhat different. As stated above, the opinions of the jurists concerning the *usucapio* of her children vary. We will now consider the criteria upon which the jurists based their arguments.

### 2.1.2. Time of conception and birth

The relationship of the time of the conception to the time of other relevant events is considered to be an important determinant by all the jurists who have expressed their opinion on the subject under examination here - Julian, Pomponius, Papinian, Paul and Ulpian. Julian in particular stresses the significance of the relationship of the time of conception to the moment of acquisition when he explicitly refers to the moment of conception in a separate sentence: *ea concepit*.<sup>103</sup> Furthermore the same author speaks about the moment of conception as being a crucial determinant: *si apud eum conceptus et editus eo tempore fuerit, quo furtivam esse matrem eius ignorabat* - if the child was conceived and born in the

<sup>102</sup> Paul. D. 41,3,4,5: *fructus et partus ancillarum et fetus pecorum, si defuncti non fuerunt, usucapi possunt*.

<sup>103</sup> Iul. D. 41,4,10.



household of a subject of *usucapio* before he learnt that its mother was stolen, the child can be usucapted.<sup>104</sup> Julian yields the time of conception to the time of the acquisition of the child's mother by the master. In both fragments he specifies that the *usucapio* of the child is possible only if the child was conceived after its mother had been transferred to the master.

Certain other jurists adopt the same approach when considering the character of *possessio* in relation to the time of conception. Paul, who holds the opposite opinion to Julian (for his reasons see above sec. 2.1.), asserts this in several places. He considers the case of the *ancilla furtiva* only at the stage when the *ancilla* is already among the assets of the master to whom she was transferred by the master's slave: *apud me conceptum*.<sup>105</sup> Furthermore in the following fragment he again repeats and explains: *apud me conceperit et pepererit*<sup>106</sup> - even though the child is conceived as well as born while its mother is with the master, he cannot usucapt the child. It is noteworthy that in this fragment, unlike in his previous fragment, the moment of birth is mentioned along with the conception itself. This approach appears also in D. 41,3,4,15: *conceperit ea et pepererit*. This is interesting to see since not much further on in the text the same author sets the decisive time as being the moment of birth alone: *si antequam pariat*.<sup>107</sup> Thus in some fragments Paul takes the time of conception as being the determining moment while in others he considers the time of birth as being decisive. The explanation for this lies in some further determining criteria which will be examined below and which are tied to the moment of conception on the one hand and to the time of birth on the other. Paul connects the moment of conception of the child to the moment of acquisition of the *ancilla* while he ties the knowledge of the true character of the stolen *ancilla* to the moment of the child's birth.

The relevance of both the time of conception and of the birth in relation to *usucapio* can also be observed in another fragment of Julian's contained in the first book of the Digest in which he

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<sup>104</sup> Iul. D. 41,3,33pr.

<sup>105</sup> Paul. D. 41,3,4,16.

<sup>106</sup> Paul. D. 41,3,4,17.

<sup>107</sup> Paul. D. 41,3,4,18.

depicts the theft of a pregnant slave-woman: *si ancilla praegnas subrepta fuerit, quamvis apud bonae fidei emptorem pepererit, id quod natum erit tamquam furtivum usu non capitur*.<sup>108</sup> That is, if a stolen slave-woman who has conceived before being delivered to the master of a subsequently manumitted slave gives birth to a child, the child will be considered as being stolen property. In other words if a pregnant woman, *i.e.* a woman already carrying a child, subsequently becomes the object of the master's defective possession, then both the mother and the child will be deemed to have been stolen and thus excluded from *usucapio*. The mother because she was the object of the theft and the child because it already existed at the time of the theft, *i.e.* it had become part of a *res furtiva* and thus shared the legal effects of the thing it was part of.<sup>109</sup> Julian at this stage emphasises the substantive approach toward the effects of theft. This means that Julian regards the time of conception as being the main decisive criterion in relation to the time of the theft.

**Issue a stolen part.** The same substantive approach is taken by Ulpian in D. 47,2,48,5: *Ancilla si subripiatur praegnas vel apud furem concepit, partus furtivus est, sive apud furem edatur sive apud bonae fidei possessorem: sed in hoc posteriore casu furti actio cessat. Sed si concepit apud bonae fidei possessorem ibique pepererit, eveniet, ut partus furtivus non sit, verum etiam usucapi possit. Idem et in pecudibus servandum est et in fetu eorum, quod in partu*. If the *ancilla* conceives while with the thief, her child will be also considered stolen and therefore excluded from *usucapio* by the *bona fide possessor*. Therefore Ulpian considers the time of conception to be a determining factor in relation to the legal character of the child.

In another fragment we find a further explanation of the last sentence in which he draws an analogous conclusion in relation to the young of stolen animals although it is this same jurist who denies the parallel between the children of slaves and the young of

<sup>108</sup> Iul. D. 1,5,26.

<sup>109</sup> Julian in D. 1,5,26 explicitly remarks that *ius civile* considers children *in utero* as existent beings.

animals.<sup>110</sup> Ulpian presents his view in relation to the argumentation of Marcellus and Scaevola:

*Scaevola libro undecimo quaestionum scribit Marcellum existimasse, si bos apud furem concepit vel apud furis heredem pariatque apud furis heredem, usucapi ab herede distractum iuvenum non posse: sic, inquit, quemadmodum nec ancillae partus. Scaevola autem scribit se putare usucapere posse et partum: nec enim esse partum rei furtivae partem. Ceterum si esset pars, nec si apud bonae fidei emptorem peperisset, usucapi poterat.*<sup>111</sup>

Scaevola contradicts Marcellus' view that the calf of an ox, just as with a child, cannot be usucaptured. Marcellus is here presenting the situation where an ox and an *ancilla* conceived and gave birth while under the control of a thief. Scaevola objects to this statement basing his argument on the substantive effects of theft: the child can be usucaptured since the child is no part of its mother (*pars ancillae*), i.e. the stolen thing. And he goes on to assert that there could be no *usucapio* in the case where the child or the calf is part of a *res furtiva*. In such a case the ox or the *ancilla* would have been stolen when she was pregnant which would mean that the child would become an object of theft as well although the *animus furandi* was only aimed towards the mother.

Other jurists share this view. When Julian or Paul describe the case of a stolen *ancilla* given to the master by his slave in return for manumission, they present the facts in chronological order. Julian: the woman was stolen and given to the master, then she conceived<sup>112</sup> - the child was not part of its mother at the time of the theft and therefore is capable of being usucaptured. Likewise Paul: a stolen slave-woman has been given to the owner of a slave in order that he would manumit him and subsequently the woman conceives<sup>113</sup> - the child cannot be usucaptured; but, Paul explains further on, if the acquirer learnt that she belonged to another only after she gave birth then he can usucapt the child.<sup>114</sup>

<sup>110</sup> Ulp. D. 47,2,48,6; Ulp. D. 7,1,68pr.

<sup>111</sup> Ulp. D. 41,3,10,2.

<sup>112</sup> Iul. D. 41,4,10.

<sup>113</sup> Paul. D. 41,3,4,17; Paul. D. 41,3,4,16.

<sup>114</sup> Paul. D. 41,3,4,18.

We can thus see that it is only the time of conception that is relevant when trying to establish the particular character of the possession needed in order to establish the grounds for a possible *usucapio*. The time of birth is irrelevant as far as the character of the *possessio* is concerned and has relevance only in connection with the knowledge (*scientia*) of the acquirer about the true status of the *ancilla*. This is because, according to the view of the jurists, the child is deemed to have already come into existence at the moment of its conception. It follows then that if the delictual effects can be incorporated into the child only after it begins to exist, the child cannot be usucaptured if the theft was committed before the time of conception. This is yet further proof that the substantive effects of theft were taken into consideration in the legal argumentation of Roman jurisprudence.

It must be kept in mind however, that the principles described above are to be applied only in the case of the child of a stolen *ancilla*, i.e. an object tainted with delictual effects. As Venuleius describes, if a pregnant woman is usucaptured and subsequently gives birth, her issue will belong to her owner at the time of the birth and not to him who owned her when she conceived.<sup>115</sup>

### 2.1.3. *Ignorantia and scientia*

Another of the criteria by which the ownership of a child born to an *ancilla furtiva* is determined is the acquirer's knowledge of the true character of the slave-woman. As has been already mentioned this knowledge is, according to Paul, tied to the time of birth: *si antequam pariat, alienam esse rescierit emptor, diximus non posse eum usucapere: quod si nescierit, posse*.<sup>116</sup> The knowledge of the acquirer is therefore considered in relation to the time of the child's birth - if he learns during the pregnancy that the *ancilla* had been stolen (*sciens*) he will be forbidden from usucapturing the child, yet if he remains *ignorans* (*nesciens*) until the time of the birth Paul allows the period of *usucapio* to run. The words *antequam pariat* indicate that the decisive time runs until the birth begins. For that reason, if the acquirer learns of the theft during the birth, he can still usucapt the child. And Paul adds: if the

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<sup>115</sup> Venuleius D. 41,1,66.

<sup>116</sup> Paul. D. 41,3,4,18.

acquirer, who has begun to usucapt on the grounds of his ignorance about the character of the *ancilla*, learns in the course of the *usucapio* that she belongs to another, the general rules for *usucapio* should be applied. This means that the decisive moment for the possible *usucapio* is the knowledge of the acquirer at the very beginning of the period required for *usucapio*.<sup>117</sup>

**Conflict in Paul?** Paul's text in D. 41,3,4,18 seems to conflict with other of his opinions given on this subject. One of the hypotheses that suggests itself in order to explain the problematic relationship of D. 41,3,4,18 to other of Paul's opinions refers to the different terminology used to describe the slave-woman. While in most of his opinions given on the subject Paul is referring to the *ancilla furtiva*<sup>118</sup> (or *ancilla quam servus subripuit*<sup>119</sup>) in D. 41,3,4,18 he uses a different term: *ancilla aliena*.<sup>120</sup> This could be understood as providing proof that two different cases are being described by the same author,<sup>121</sup> especially since in support of this argument we could use the texts of Julian who also refers to *ancilla furtiva*<sup>122</sup> or *ancilla quam servus subripuit*<sup>123</sup> and not to *ancilla aliena*. Also Pomponius exclusively uses the term *ancilla furtiva*.<sup>124</sup>

However, the mere fact that Paulus uses different terms in two of his opinions does not constitute a sufficient evidence to draw the conclusion that he is dealing with two different cases. There is a good reason why D. 41,3,4,18 follows D. 41,3,4,16-17. In the last of the three fragments Paul continues his account of the legal status of the *ancilla furtiva* which he had commenced in the previous two fragments. We can see this in the word *diximus* ("we have said") after which he repeats again in the first sentence that the child of an *ancilla aliena* cannot be usucapted: *non posse eum usucapere*.

<sup>117</sup> Paul. D. 41,3,4,18: *quod si, cum iam usucaperet, cognoverit alienam esse, initium usucapionis intueri debemus, sicut in emptis rebus placuit.*

<sup>118</sup> Paul. D. 41,3,4,15; Paul. D. 41,3,4,17.

<sup>119</sup> Paul. D. 41,3,4,16.

<sup>120</sup> Paul. D. 41,3,4,18: *cognoverit alienam esse.*

<sup>121</sup> The authenticity of the fragment D. 41,3,4,18 is considered by KASER in *op.cit.*, p. 167 who likewise shares the view that the words *ancilla aliena* in the first sentence is actually referring to the *ancilla furtiva*.

<sup>122</sup> Iul. D. 41,4,9; Iul. D. 41,3,33pr.

<sup>123</sup> Iul. D. 41,4,10; Iul. D. 1,5,26.

<sup>124</sup> Pomp. D. 41,10,4pr.

Evidence supporting the view that Paul is simply referring to the previous fragment D. 41,3,4,17 can be seen also in the fact that in D. 41,3,4,18 he does not even mention the *partus ancillae*. Therefore, reading only D. 41,3,4,18 without reading D. 41,3,4,17 would create the false impression that Paul, when talking about *usucapio*, has in mind *usucapio* of the *ancilla* herself, which would be absolutely impossible. Consequently we must interpret fragment D. 41,3,4,18 in the light of D. 41,3,4,16-17 which allows us to equate the terms *ancilla furtiva* and *ancilla aliena*.

As to the contents of D. 41,3,4,18, this is to be likewise understood as being supplementary in relation to Paul's other opinions, *i.e.* this text explains how his other opinions are to be interpreted. In D. 41,3,4,16-17 Paul explains: a child which is born to an *ancilla furtiva* and is conceived while with the master of a slave who gave her *manumissionis causa* cannot be usucapted due to a defect in the grounds of the possession of the slave which is subsequently transferred to his master.<sup>125</sup> If Paul says at the end of the first sentence of D. 41,3,4,18 that the *usucapio* would be possible if the purchaser remains *nesciens*, than this is to emphasize that the two previous fragments (D. 41,3,4,16-17) deal with the situation where the purchaser knows about the *ancilla* being stolen, although Paul does not state this explicitly. The second sentence is describing the *usucapio* of the *partus ancillae* in the case where the purchaser reveals the status of the *ancilla* only after the birth of her child. Such a synthesis bringing together all Paul's fragments is allowed by the fact that in all the fragments, except for D. 41,3,4,18, Paul does not mention the awareness of the acquirer at all.

**Contradiction between Julian and Paul.** In relation to the opinions of Julian on the same subject Paul's view seems to contradict Julian who generally allows the *usucapio* of the child (this problem was already discussed above in sec. 2.1.) It would appear that while Julian in D. 41,4,9-10 (as well as in D. 41,3,33pr.) allows for the *usucapio* of the slave-woman's child, Paul in D. 41,3,4,16, influenced by the opinions of Sabinus and Cassius, rejects the possibility of *usucapio*. However, when we look at the opinions of the two jurists more closely, we see that the above

<sup>125</sup> Paul. D. 41,3,4,16; Paul. D. 41,4,2,14.

presented interpretation of Paul's D. 41,3,4,18 directly related to D. 41,3,4,16, permits us to draw the conclusion that the two jurists in fact do not contradict each other. While Paul examines the case of the situation where the acquirer of an *ancilla furtiva* is aware of her delictual character, Julian does the same yet he deals with a different situation - where the acquirer is unaware of the *ancilla* having being stolen.<sup>126</sup> He even gives us explicit proof in another of his fragments: there will exist no obstacle to *usucapio* if the acquirer is unaware of the delictual character of the *ancilla* before she gives birth to a child which subsequently becomes the object of *usucapio*.<sup>127</sup> Julian also indicates elsewhere that he is talking about a possessor *nesciens*, i.e. a *bona fide possessor*.<sup>128</sup>

Hence, Julian approaches the case from the standpoint of the *bona fide possessor* while Paul does so from the position of the *mala fide possessor*. Julian's D. 41,3,33pr. and Paul's D. 41,3,4,18 must therefore be considered in relation to the two jurists' other *responsa* relating to the subject. This therefore explains the apparently different conclusions of the two jurists which in fact are in accord with each other but simply deal with different situations.

The only exception to this, where Paul strictly applies the rule governing the substantive incorporation of delictual consequences, is when he denies the *usucapio* of the child of the *ancilla furtiva* of an heir.<sup>129</sup> Regardless of the fact that the heir is *nesciens* and the child has been conceived and born while in his possession, Paul insists that *usucapio* will not follow.

**Julian.** Let us now examine more closely the significance of the acquirer's awareness as it is understood by jurists other than Paul. Except for Ulpian, all the jurists who have stated their opinions on the case take the knowledge of the acquirer as being the determining factor. Julian, as has just been stated, considers the knowledge of the acquirer in the light of his interpretation of the

<sup>126</sup> Iul. D. 41,4,9; Iul. D. 41,4,10.

<sup>127</sup> Iul. D. 41,3,33pr: *nam ex qua causa quis ancillam usucaperet, nisi lex duodecim tabularum vel Atinia obstaret, ex ea causa necesse est partum usucapi, si apud eum conceptus et editus eo tempore fuerit, quo furtivam esse matrem eius ignorabat.*

<sup>128</sup> Iul. D. 1,5,26: *bonae fidei emptorem pepererit.*

<sup>129</sup> Paul. D. 41,3,4,15.

Twelve Tables and the *lex Atinia*.<sup>130</sup> He maintains that the child can be usucapted, provided that the acquirer is unaware of the true character of its mother. Ulpian, supporting Julian's view, considers this to be a general rule.<sup>131</sup>

An opinion which contradicts the views set out by Paul and Julian is given by Papinian: *veluti circa partum eius mulieris, quam bona fide coepit possidere: non enim ideo minus capietur usu puer, quod alienam matrem, priusquam eniteretur, esse cognovit*.<sup>132</sup> Papinian decided to apply the common rule *mala fides superveniens non nocet*. Consequently he looks only to the beginning of the possession of the *ancilla*. If, at this moment, the person is *bona fide*, i.e. he is *nesciens*, his subsequent knowledge of the character of the *ancilla* will not prevent the *usucapio* of her child. Unlike Julian and Paul, Papinian does not even consider it as being relevant, whether the acquirer became *sciens* before or after the birth.

**Pomponius.** A singular view concerning the circumstances which need to apply for the possible *usucapio* of a child born to an *ancilla furtiva* is presented by Pomponius when commenting on Trebatius' view on the subject.<sup>133</sup> Trebatius, just like Papinian, applies the *mala fides superveniens* rule: if the *ancilla* is acquired *bona fide* then her child will be possessed *bona fide* as well, provided that it is conceived and born within the estate of the acquirer. It makes no difference, adds Trebatius, whether the acquirer learned about the true character of the slave-woman once he began to possess her *bona fide* toward *usucapio* or if he discovers it later on.

Pomponius finds this solution unsatisfactory. He follows Trebatius in applying the *mala fides superveniens* rule. He insists

<sup>130</sup> Iul. D. 41,3,33pr.

<sup>131</sup> Ulp. D. 6,2,11,4.

<sup>132</sup> Papin. D. 41,3,44,2.

<sup>133</sup> Pomp. D. 41,10,4pr: *si ancillam furtivam emisti fide bona ex ea natum et apud te conceptum est ita possedisti, ut intra constitutum usucapioni tempus cognosceres matrem eius furtivam esse, Trebatius 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 certiore dominum facere, aut si potueris quoque et feceris certiore, usucaperes: sin vero, cum scires et posses, non feceris certiore, contra esse: tum enim clam possedissee videberis, neque idem et pro suo et clam possidere potest.*



however that this rule should be applied only in relation to the special duty which he imposes upon the *bona fide* acquirer - the duty to notify the owner.<sup>134</sup> Strictly speaking, the duty to inform the owner would imply yet another - the duty to find out who is the owner and where he can be contacted. Being aware of this, Pomponius requires the notification of the owner only under the following conditions: 1. the acquirer learns within the statutory period prescribed for *usucapio* of the true character of the *ancilla*, 2. the acquirer is able to inform the owner without making excessive effort. This means that if the acquirer does not learn, or if he learns but is not able to notify the owner, he will continue to possess *bona fide*. This applies equally if the acquirer fulfils his duty without receiving any response from the owner. Consequently, Pomponius adds, if the acquirer does learn and fails to notify the owner, the rule *mala fides superveniens* will not apply and the character of the acquirer's possession will deteriorate. Pomponius is very strict regarding the consequences of the acquirer's failure to perform his duty once he becomes *sciens*. The acquirer will be regarded as possessing secretly,<sup>135</sup> which would disable him from the *usucapio* of the child.<sup>136</sup>

Concerning the case of the *ancilla furtiva* one final point requires to be made. It is difficult to imagine that the case should occur often, even though the space devoted to the topic by Justinian's compilers and the volume of opinions given in relation to it by classical jurisprudence might suggest otherwise. A slave, unlike other objects, is a living creature equipped with the skill of language and the ability to communicate. The master who receives or buys a slave is therefore more likely to learn whether he or she was stolen or not, unless the slave is a foreigner or has been placed in fear due to threats from the transferror.

### 3. Conclusion

The Roman approach towards the *usucapio* of stolen things was very strict. A stolen thing could not be usucapted irrespective of the *bona fides* or *mala fides* of the acquirer. The notion of *res furtiva*,

<sup>134</sup> Pomp. D. 41,10,4pr: *certiorem facere*.

<sup>135</sup> Pomp. D. 41,10,4pr: *clam possidesse*.

<sup>136</sup> Pomp. D. 41,10,4pr: *neque idem et pro suo et clam possidere potest*.

as we have seen from Paul's fragments, was used primarily as a technical term, which expressed the presence of delictual effects inflicted on the thing by the act of theft. This conclusion is based on the study of the jurisprudential argumentation in the case of the *usucapio* of children born to an *ancilla furtiva*. The *usucapio* of such children was possible if the child was conceived only after the theft was committed, when the *ancilla* was in possession of a *bona fide* acquirer. If it was conceived before the theft, it could not be usucapted since the child shared the legal consequences affecting the *res furtiva* of which it was part (*pars ancillae*), i.e. its mother. The time of birth is related only to the knowledge (*scientia*) of the acquirer of the true status of the *ancilla*. This view is expressed clearly by Julian and Ulpian. Paul also holds the same opinion but his fragments concerning this subject must be interpreted in the light of D. 41,3,4,18, which relates to *ancilla furtiva*. Equally Aulus Gellius adds to the theory of the substantive effects of *furtum* by his statement: *eius rei aeterna auctoritas esto*.

The substantive incorporation of delictual effects enabled the effective protection of the proprietary rights of the *dominus* and secured his right to claim the thing back from any other person. It was specifically the thing itself which prevented the *usucapio* of a *res furtiva*. As a result, in contrast to many modern legal concepts concerning the *usucapio* of stolen things, the Roman view clearly favoured the protection of the *dominus* over the *bona fide possessor*.

In the same way the Roman jurists approached the concept of the *usucapio* of stolen things they also dealt with the elimination of delictual effects from the stolen thing. A particular instrument introduced by the *lex Atinia* for this purpose was the *reversio in potestatem domini* which was reserved to the owner of the stolen thing. The *reversio* was technically constructed upon the requirement that the reacquisition of *potestas* by the *dominus* of the stolen thing be supported by his knowledge of receiving the thing back. The application of this construction was applied very strictly by Roman jurists who looked above all at who would benefit from the *reversio*, i.e. the person who benefited the most from the reopened *usucapio*. Consequently, they allowed even the *possessor mala fide*, such as a thief, to perform an effective *reversio* if it was the owner who profited from the discharge of the delictual

effects. This is well demonstrated in the case of *furtum rei suae*. Yet in this case, the objective was not in fact to let the owner benefit from the effects of the *reversio*, since he was already an owner and the *usucapio* would be of no use to him, but rather to move the benefit on to any subsequent transferee.